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The Integration of Matters of Justice
and Home Affairs into Title VI of the
Treaty on European Union
A Step Towards more Democracy?

PHILIPPE A. WEBER-PANARIELLO

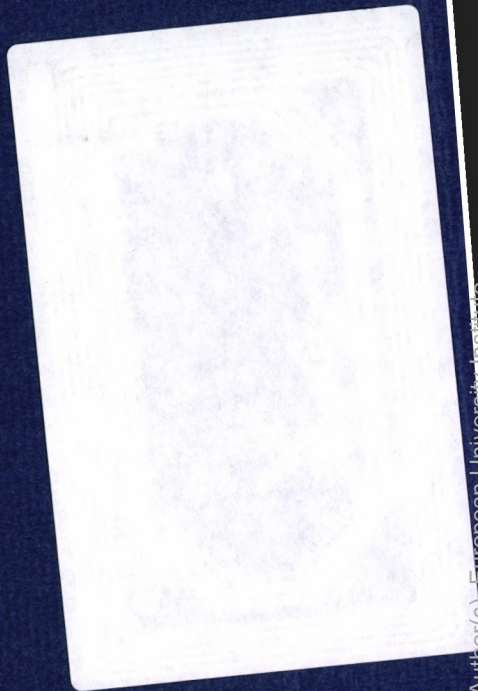
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Introduction¹

Discussions about the democracy of the EU, both on an academic and a political level, seem to be based on the general assumption that any "communitarization" of national policies, in particular the transfer of powers from the Member States to a Community level, leads to a democratic deficit. At the Maastricht Intergovernmental Conference in 1992, Cooperation in the fields of Justice and Home Affairs (CJHA) was formally integrated into Title VI TEU, establishing the new "Third Pillar" of the European Union. In fact, the Third Pillar does not imply total "communitarization", though it does place CJHA for the first time within the single institutional framework of the European Union. In the light of the above argument, this formal shift towards Community involvement appears to herald a further step away from democracy at the European level. The aim of this paper is to prove that quite the contrary is true.

Cooperation among the Twelve in the fields of justice and home affairs is, first of all, the consequence of the earlier agreed objective of establishing the internal market as an "area without internal frontiers in which the free movement of goods, persons, services and capital is ensured".² In particular, close links exist between the concept of *free movement of persons*, the removal of internal borders and the need for compensatory measures such as a uniform system of external border controls, a common policy towards third country nationals (visa, asylum and immigration policy) or police and judicial cooperation in order to avoid free movement of criminals, etc. Once the objective of establishing a European common market without internal frontiers is agreed, cooperation in the fields of justice and home affairs becomes virtually indispensable. However, questions such as *how much* cooperation and harmonization of laws is needed or *in what form* this should take place cannot be provided by legal reasoning only, i.e. by interpretation, *inter alia*, of article 7a EC. These questions remain substantially open to political choice.³ In spite of this, and this is the point being made here, cooperation among the Twelve in the fields of justice and

¹ Abridged version of an LL.M. Thesis, Florence, February 1995.

² Article 7a (2) EC.

³ The *political sensitivity* of the issue at stake, and *not* only the *legal coherence* of the system is clearly a determinant factor. E.g., the EC Member States accepted the Community procedure in the case of the EEC Directive on the control and acquisition of firearms and ammunition (91/478/EEC, OJ No. L 256 of 13.09.1991, pp. 51-58), whereas the United States of America, with a far more integrated structure of government, finds it much more difficult to achieve federal rules on the control and acquisition of firearms. By contrast, common immigration policy for all States has been established for a long time in the United States, whereas no such policy exists yet in the European Union.

home affairs corresponds to the almost inevitable logic of the common market and is very likely to increase in the future⁴.

In fact, although the public has been largely unaware of it, the EU Member States have been cooperating in these fields for several years already, i.e. long before Maastricht and the introduction of the Third Pillar. Whereas to a large extent responding to a Community imperative, they have done so outside the Community legal and institutional order. As will be described in Chapter 1 of this paper, the governments of the Member States have set up a vast number of institutions, working groups and agencies to cover immigration and asylum policy, police, judicial and customs cooperation, etc. These fora were generally established in an ad hoc fashion, at different times and as the need arose. The practical and procedural arrangements varied from area to area, as did the reporting arrangements to Ministers. Work in each of these areas was usually carried out independently of that in others. The result of all this has been an ever-extended, increasingly complex and opaque patchwork of groups, organizations and facilities, differing in terms of their territorial remit (e.g. EC, "Schengen-Group", Council of Europe), their area and the quality and intensity of the cooperation they pursue (e.g. coordination and development of legal capacities, policy-making, common operations, operational support). In the words of *van Ouirve*, governments have operated "like chess players who simultaneously play on several chessboards and who determine specific rules for each game".⁵ In this context a considerable amount of policy papers and decisions have been produced by relatively small circles of state officials in conditions of great secrecy mostly escaping any parliamentary supervision, and, partially as a consequence of the latter, often even escaping ministerial supervision. This is particularly disturbing because justice and home affairs

⁴ Of course, increased cooperation in these fields cannot only be explained as a consequence of the common market. Firstly, it is arguable that for many political actors the removal of some aspects of interior affairs to the Union level represents a *transfer of illegitimacy*. As stated by *Groenendijk*, p. 399, intergovernmental rule-making provides political actors with "a welcome shield against national lobbies and pressure groups in areas that are political minefields. Cautious activities on issues such as immigration and asylum policy seldom bring in many voters." Secondly, *external pressure*, especially the mounting financial and social cost of uncontrolled immigration into Europe creates a major incentive for harmonizing national *immigration and asylum* laws (likely at the basis of the common denominator of the least generous criteria) and closer cooperation, even for States remaining outside the Union. Thirdly, international crime, terrorism or drug trafficking are by no means a consequence of the establishment of the internal market only. Thus, provisions on mutual legal assistance and cooperation between law enforcement agencies are one which are desirable in their own right.

⁵ *Van Ouirve (1992b)*, p. 7.

touch upon some of the most fundamental human rights, both of Community citizens and of non-EC nationals. Also, *resolutions*, *recommendations* or *conclusions* adopted by ministers and state officials in the fora mentioned above, although not necessarily legally binding, *de facto* have had far reaching consequences on individual rights and freedoms.⁶ Consequently, one may argue, these acts should have resulted from a democratic and legislative procedure rather than a diplomatic one.

In Chapter 2 the new legal and institutional framework for cooperation in the fields of justice and home affairs provided by Title VI TEU will be examined, and in Chapter 3 to what extent this new framework will affect parliamentary scrutiny in these policy fields will be analysed at the national level in particular. The central question dealt with in Chapters 2 and 3 will be to what extent the establishment of the Third Pillar will make cooperation in these policy-fields "more democratic" than under the procedures existing up to 1993. Of course, creating any new theory of European democracy falls outside the scope of this research. Nor shall there be added a new definition of the so-called "democratic deficit" of the European Union.⁷ Instead, when discussing democracy I will take two basic elements as essential for that system of cooperation⁸: The first criterion is *openness*. This criterion is further divided into three subcriteria: (a) complexity of the institutional structure; (b) openness of the decision-making process (publication and explanation of votes, records of debates, etc.), (c)

⁶ See, e.g., the Commission's survey on the implementation of the 1991 work programme on asylum and immigration, in: *Communication from the Commission to the Council and the European Parliament on Immigration and Asylum Policies*, COM (94) 23 final, 23.02. 1994, Annex II.

⁷ See Neunreither, pp. 299-309.

⁸ Alexander Kreher and I have argued elsewhere that the "traditional" understanding of the democratic deficit of the European Union as an institutional or *parliamentary deficit* is too limited and incomplete. As shown by Max Weber, e.g., parliamentarism and democracy are not identical, and parliamentary procedures by no means guarantee democratic substance. Therefore, the "democratic deficit" was defined by the authors more broadly as the lack of public discourse accompanying and guiding the integration process. Yet, (formal) parliamentary participation and accountability, both at national and European level, does undoubtedly increase the chances of public discourse, and the criteria described in the following have to be assessed in this context. Nonetheless, it is clear that other criteria may be just as important (e.g. free elections, separation of powers, protection of minorities, freedom of press etc.). See in detail Kreher/Weber-Panariello, pp. 72-86; see also Max Weber, *Parlamentarisierung und Demokratisierung*, in: Kurt Kluxen (Hrsg.), *Parlamentarismus*, Köln 1969, pp. 27-40.

access to drafts and final documents.⁹ The second criterion is *chances of parliamentary participation in the decision-making process* (formal consultation during negotiations; parliamentary approval after decision-taking).

Chapter 1. European Cooperation in the Fields of Justice and Home Affairs until 1993

A. Community powers and the "Realpolitik of the Commission"

Cooperation among the Member States in the fields of justice and home affairs started well before the 1980s. However, the Commission's 1985 White Paper on the completion of the Internal Market and the adoption of the Single European Act one year later provided the major *impetus* for intensified cooperation in these fields. The White Paper *inter alia* set out a programme for the removal of internal frontier controls between Member States by 1992, and the Annex to the White Paper contained a list of measures (Directives) which, in the Commission's view, were essential in this respect, in particular on the:

- coordination of rules concerning the right of asylum and the status of refugees;
- approximation of arms and drugs legislation;
- coordination of rules concerning the status of third country nationals;
- easing of controls at intra-Community Borders;
- coordination of national visa policies;
- coordination of rules concerning extradition.¹⁰

Thus, it is of interest to note that the authors of the White Paper apparently had little doubt as to the legal possibilities for the Community to draw up Community legislation that would bring into effect the free movement of persons, including the compensatory measures that would be needed. Yet, at the time of the adoption of the SEA by the Heads of Governments which, in particular by introducing the new articles 8a and 100a EEC gave the go-ahead to the programme of Community proposals on the completion of the Internal

⁹ See for these three elements of openness *Report of the Committee on Institutional Affairs on openness in the Community*, Rap. Maurice Duverger, 21 March 1994, A3-0153/94 (PE 207.463/fin.). The criterion of openness seems to be of particular importance with regard to CJHA because, whilst probably the parliamentary system of each Member State provides for the possibility of controlling such activities, the questioning and examining procedures are, in such matters, rather theoretical, in practice, MPs must first and foremost be informed of the existence, composition and mandates of the intergovernmental fora, their agenda and their work programme.

¹⁰ COM (85) 310, 14.6.1985, pp. 14-16 and Annex, pp. 12-13.

Market, *inter alia*, two declarations were approved by the Governments of the Member States and attached to the SEA.¹¹ The first declaration was made on the subject of articles 13 to 19 SEA¹² to the effect that:

"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."

The second declaration was stated the following terms:

"In order to promote the free movement of persons, the Member States shall co-operate, without prejudice to the powers of the Community, in particular as regards the entry, movement and residence of nationals of third countries. They shall also co-operate in the combating of terrorism, crime, the traffic in drugs and illicit trading in works of art and antiques."

In addition, paragraph 2 of the new article 100a EEC explicitly excluded provisions relating to the free movement of persons from paragraph 1, the latter providing for qualified majority voting within the Council for provisions to achieve the objectives set out in article 8a EEC. The two declarations and the way article 100a EEC was formulated clearly reflected the reluctance shown by some Member States, the United Kingdom, Denmark and Ireland in particular, to "communitarize" matters of justice and home affairs.¹³ National powers were meant to prevail in these fields, and indeed the Council of Ministers and the Member States continued down the intergovernmental path. Accordingly, the debate on the appropriate legal basis for Community action remained mainly speculative, even though strong arguments were advanced by many legal scholars for the existence of such (limited) Community powers.¹⁴

In view of the evident reticence shown by some Member States to accept the "Community approach" in the sensitive area of immigration controls, asylum, visa, drugs control, crime prevention and the like, the Commission adopted a pragmatic strategy, defined elsewhere as the "Realpolitik of the Commission",¹⁵

¹¹ Bull. EC - Supplement 2/86.

¹² Articles 13 to 19 SEA introduced, *inter alia*, articles 8a and 100a into the EEC-Treaty.

¹³ See *Cloos et.al.*, p. 491.

¹⁴ See *Butt Philip*, pp. 172-175; *Donner*, pp. 20-21; *O'Keeffe (1992a)*, pp. 6-8; *Timmermans*, pp. 354-368.

¹⁵ See *van den Brink/Vierhout*, p. 384.

accepting the preferences of governments for the intergovernmental approach. Doubts about the competence of the Community to legislate in these fields were thus also fed by the attitude taken by the Commission itself.¹⁶ By 1988, the Commission wrote in its Communication to the Council on the abolition of controls of persons at intra-Community borders:

"The Commission is fully aware of the delicate nature of an exercise of this kind, and it considers that attention should be focused on practical effectiveness rather than on matters of legal doctrine. Therefore, without prejudging its interpretation of the Treaty as modified by the Single European Act, the commission proposes that Community legislation in this field be applied only to those cases where the legal security and uniformity provided by Community law constitutes the best instrument to achieve the desired goal. This would mean therefore that large scope would be left, at this stage, to co-operation among Member States notwithstanding the fact that the Commission should be permitted to participate, even on an informal basis, in this form of co-operation (...)"¹⁷

Consequently, only one of the above-mentioned directives was submitted to the Council and finally adopted by the latter.¹⁸ For the rest, the possibility of settling the free movement of persons within the framework of the Treaties had, in fact, been lost, and problems were dealt with in different fora, all of which used the intergovernmental formula. In this connection particular mention can be made, as frameworks for cooperation between the twelve Member States of the Community, of:

- Trevi
- Ad Hoc Group on Immigration
- EPC Group on Judicial Cooperation
- CELAD
- Mutual Assistance Group (MAG)
- Ad Hoc Group on Data Processing

Reference should also be made to Schengen as a framework for cooperation between a smaller number of Member States. Furthermore, some specific subjects which are of relevance to the free movement of persons were under discussion in a still wider framework, for instance, in the framework of the Council of Europe and the United Nations.

Because of the number of fora in which aspects of the circulation of persons

¹⁶ See e.g. Commissioner *Martin Bangemann* in: OJ, Debates of the EP, No 3-401, 21 February 1991, p. 288.

¹⁷ *Commission of the European Community (1988)*, p. 43.

¹⁸ Directive 91/478/EEC on control and acquisition of firearms and ammunition.

were discussed, there was a need for a coordination of positions to be taken by the Member States in these talks. The European Council, meeting in Rhodes, therefore decided in December 1988 to set up a *Group of Coordinators on the Free Movement of Persons*, which had to report directly to the European Council. In addition, there was ministerial supervision in meetings of Immigration Ministers, Justice Ministers, ECOFIN (in the case of Customs cooperation), and the Foreign Affairs Council (EPC). What follows is a summary of the most important fora and their principal activities.¹⁹

B. Co-ordinators' Group on the Free Movement of Persons

The Co-ordinators' Group was set up by the European Council in Rhodes in 1988 to co-ordinate Member States' actions relating to the free movement of persons. It was composed of 12 high-ranking officials, a chairman and, on behalf of the Commission, the vice-president. The Council Secretariat serviced the work of the Group, which met four or five times during each Presidency. The Group reported directly to the European Council. Its first task was the drawing up of a document which would contain two categories of measures, those indispensable for the suppression of internal borders and those which were desirable, but not indispensable; secondly, the document had to indicate the bodies responsible for adopting measures and set up a timetable. Adopted by the Group in Las Palmas and subsequently by the European Council in Madrid in June 1989, the report has since been called the "Palma Document".²⁰ In fact, to a considerable extent it froze Community action on the free movement of people and replaced large sections of the Commission's 1985 White Paper.

Despite its political importance the Palma Document remained largely

¹⁹ The following description is by no means complete. The reader should keep in mind that the framework of institutions, agencies and structures which aimed to promote cooperation in the fields of justice and home affairs was (and remains) far more complex than that mapped out below. Secondly, much of the cooperation proceeded through informal and often secret channels. Consequently, reliable data only exists to a very limited extent.

²⁰ The document contained an inventory of over sixty "essential" and "desirable" compensatory measures. It drew a distinction between: action at the external frontiers (fora: Ad Hoc Group on Immigration; Trevi; MAG); action at the internal frontiers (Ad Hoc Group on Immigration; Trevi; EC); action in connection with drug trafficking (EPC Group on Judicial Cooperation; Trevi; Council of Europe; UN; MAG); terrorism (Trevi; EPC); action in connection with admission to Community territory (Ad Hoc Group on Immigration); action in connection with granting of asylum and refugee status (Ad Hoc Group on Immigration; Council of Europe; UN); judicial cooperation in criminal and civil matters (EPC); goods carried by travellers (EC).

unknown to the public - national MPs included.²¹ This can be illustrated by the following example: The Palma Document was made public during a hearing of the Select Committee on the European Communities of the House of Lords in July 1989 and was ordered to be printed.²² Several months later a copy of the same document was given to Dutch MPs by their Government. Interestingly, some of the Dutch MP's considered the document to be for *confidential* use only, even though they could have ordered the same information from *Her Majesty's Stationary Office* in London at any time. *Groenendijk*, therefore, concludes:

"The unclear status of the Palma Document - is it public or confidential information and what is its legal or political status? - did not stimulate public parliamentary debate on the document in the Netherlands. Instead, it made it harder for MP's and outsiders to the negotiations to recognize the political importance of the Palma Document".²³

It should be added that the Group of Coordinators was not an extra forum for debate. In particular, it was not responsible for the course taken by negotiations in the different fora. Therefore, the coordination provided by the group remained rather fragmentary.²⁴ Secondly, the Group did very little to forward its second task, which was to give an impetus to the progress or conclusion of the proceedings in the various bodies.

C. Trevi²⁵

The Trevi Group was set up in 1975 as an intergovernmental body on police cooperation with the initial aim of co-ordinating efforts to combat terrorism. It expanded its brief in the mid-1980s to embrace all the policing and security aspects of free movement, including immigration, visas, asylum-seekers and border controls.

Trevi operated at three different levels: Ministerial (six-monthly meetings of Trevi Ministers); the Trevi group of "senior officials" (which also met six-

²¹ Neither national parliaments nor the EP had been informed of the proceedings within the Coordinators' Group in general and the drafting of the Palma Document in particular.

²² See Appendix 5 to *Select Committee on the European Communities, House of Lords* (1989).

²³ *Groenendijk*, p. 394.

²⁴ See *de Zwaan*, p. 346.

²⁵ A general overview of international police cooperation in western Europe is presented by *Benyon et.al.*; see also *Bunyan*, pp. 15-36, and *Home Affairs Committee, HC* (1990).

monthly); and four "working groups": Trevi I (Terrorism); Trevi II (Public order and Training); Trevi III (Drugs and Organised Crime); and Trevi 1992 (Abolition of Borders). Trevi's methods of operation were fairly similar to the system used by the EC Council of Ministers. The EC Presidency country was *ex officio* the Trevi Presidency country for six months of an EC Presidency term. Trevi had no permanent staff. From 1989, the two states on either side of the "troika" sequence provided staff help, thus creating a staff support network. Except for Trevi 92, the EC Commission was not involved in the Trevi structure.

While a major part of the value of Trevi rested simply on its existence as a forum for developing contracts between representatives of the EC member states, it also made a number of more tangible contributions to policing and security cooperation in Europe. The Dublin Ministerial meeting of Trevi in June 1990 agreed to a programme of action for future cooperation.²⁶ This programme outlined a number of priorities for improved police cooperation. In order to combat terrorism, drugs trafficking and organised crime, exchanges of personnel and information would be increased and agencies involved would meet regularly to pool information. Among the specific measures were the appointment of liaison officers, the display of "wanted" posters, the further development of a rapid and protected communication system, the use of joint teams where appropriate, the promotion of suitable training and research, and the sharing of information.

The ideas outlined in the Dublin programme were given further impetus a year later at the Luxembourg summit when Chancellor Kohl of Germany proposed the creation of a European Criminal Police Office (Europol). As a result, the *Ad hoc Working Group on Europol* was set up in August 1991. Its work has led to the establishment of the *Europol Drugs Unit*, which has acted as a "forerunner" for *Europol*, operating regularly in The Hague since 1 January 1994. Furthermore, preparatory work has been undertaken by the *Ad hoc* Group to draw up a *Convention on Europol*.

According to Bunyan, the work of the Trevi group was "shrouded in secrecy" from the time of its formation. For instance, it was not until 1989 that the first communiqué for public use was made available in the United Kingdom. Since, a written (ministerial) answer to British parliament followed each of the six-monthly meetings of the Trevi Ministers.²⁷ In addition, general observations in the EC Bulletin followed meetings of the Trevi Ministers. The negative assessment with regard to secrecy made by Bunyan seems to be confirmed by

²⁶ Printed in *Home Affairs Committee, House of Commons (1990) I*, pp. 1-liv.

²⁷ See Bunyan, p. 23. On the question of secrecy see also Benyon *et al.*, pp. 167 and 272.

the fact that information on the structures, working methods and results of Trevi is often incoherent if not to say contradictory. In fact, according to *Benyon et al.*, one respondent to their survey had questioned whether even ministers themselves were aware "of all that goes on in the working groups". Other informants had concluded that working groups had made policy decisions without ministerial oversight, which might have cumulatively affected major aspects of policing and criminal justice without any political agreement or accountability. Altogether, *Benyon et al.* concluded:

"Many if not all of these groups and networks appear to have virtually no accountability whatsoever. They are rarely held answerable for their activities and few parliamentarians, or others such as journalists, seem even to be aware of their existence. And yet, through these structures of information about individuals is being exchanged and operations against individuals may indeed be discussed and planned".²⁸

Finally, mention should be made of a considerable overlap between the working groups within the Trevi-structure²⁹ as well as between Trevi and other fora such as the *Ad Hoc Group on Immigration*, the *EPC Group on Judicial Cooperation*, MAG, Interpol. Walker even observes a tendency of the various emergent international policing and criminal justice systems and arrangements to compete with one another. As a result: "Programmes may be pursued which, at best, are imperfectly coordinated, and at worst, hinder the realisation of each other's full institutional potential".³⁰

D. Ad hoc Group on Immigration

The *Ad hoc Group on Immigration* emerged from the Trevi framework. It was set up at a meeting of ministers responsible for immigration matters of the Member States and the Vice-President of the Commission in London on 20 October 1986. The meeting endorsed the objective of providing for free movement in the EC within the terms of the SEA.

Bringing together ministers from the departments of governments dealing with

²⁸ *Benyon et al.*, p. 285. I should add that this statement did not only refer to police-cooperation under Trevi but also to several other fora dealing with cooperation in the fields of crime combating and terrorism such as *Interpol*, the *Pompidou Group* (Council of Europe), *MAG* (92), *GAFI* (G15), or secret Networks., e.g., Kilowatt.

²⁹ Referring to criticism made by various respondents, *Benyon et al.*, p. 164, write: "working groups were often thought to be unaware of each others' activities, let alone aware of the views of the politicians themselves".

³⁰ Walker, pp. 30-31. See also *Bigo*, pp. 167-169.

immigration issues, the ad hoc group differed from other aspects of the Trevi structure in that the Commission was allowed to attend its meetings in the capacity of observer. The secretariat was guaranteed by the General Secretariat of the Council of the EC. These facts notwithstanding, the participating governments, the United Kingdom, Ireland and Denmark in particular, resolutely maintained that it functioned entirely outside the ambit of Community institutions and law. The *Ad Hoc* Group was structured around six expert sub-groups, namely on: Admission/Expulsion; Visas; Forged Documents; Asylum; External Frontiers; Refugees. As in the Trevi system, the subgroups involved civil servants and representatives from the national authorities responsible for enforcing immigration policy. They also organised their work to coincide with the six-monthly meetings of the ministerial level of the *Ad hoc* Group meetings, which itself coincided with the ministerial level of Trevi meetings.

According to the conclusions of the ministerial meeting in 1986, the Group was instructed, *inter alia*, to examine: improved checks at the external frontiers; the contribution which internal checks can make; the role of coordination and possible harmonization of the visa policies of the Member States; the exchange of information about the operation of spot check systems; measures to achieve a common policy on eliminating the abuse of the right of asylum. These "terms of reference" were redefined and expanded by the Palma Document in 1989.

Even though the *Ad hoc* Group acted in conditions of secrecy similar to those of Trevi, the output has been much more visible. Also, there were considerably more meetings. According to *Bunyan*, a total of 100 meetings of immigration ministers, officials, police and immigration officers were held from 1991 to 1992 only.³¹ The *Ad hoc* Group has been associated with efforts to promote a common list of visa countries across the 12 Member States and the introduction of carriers' liability legislation. Furthermore, it has elaborated the *Convention Determining the State Responsible for Examining Applications for Asylum lodged in one of the member States of the EC*, also known as the *Dublin Asylum Convention*, signed on 15 June 1990,³² and the *draft Convention on the Crossing of External Borders*.³³ Other activities, *inter alia*, included:³⁴

³¹ See *Bunyan*, pp. 186-187.

³² Printed in Bull.EC 6-1990, point 2.2.2.

³³ Discussions on most of the text of the draft External Frontiers Convention were concluded in 1991. Since then further progress on the draft Convention has been blocked as a result of Spanish objections to its application to Gibraltar. The draft Convention is not an officially published document. The unpublished version of this draft prepared by the *Ad hoc* Group on Immigration Secretariat is dated 24 June 1991 (ref. SN 2528/91 WGI 822).

- the establishment of the *Centre for Information, Discussion and Exchange on Asylum (CIREA)*, and of the *Centre for Information, Discussion and Exchange on the Crossing of Border and Immigration (CIREFI)*;
- the adoption of countless *resolutions, recommendations, conclusions*, e.g., on the harmonisation of national policies on family reunification, on manifestly unfounded applications for asylum, on countries in which there is generally no serious risk of persecution, etc.;
- feasibility study of a *European Automated Fingerprint Recognition System (EURODAC)*;
- production of a joint manual of European asylum practice, and the development of a consular manual giving guidance to consular offices on the issuing of visas.

Conventions excluded, the format which was chosen to produce the results of the cooperation was confusing; in particular, the results were not designed in a format which was clearly indicative of an act of public international law.³⁵ However, *resolutions, recommendations, conclusions, statements*, etc. had been approved by the heads of government, and several documents even had deadlines by which time they should have been *implemented* in national law. Several authors have qualified some of these acts as *soft law*,³⁶ i.e. "*rules of conduct* which, in principle, have no legally binding force but which nevertheless may have practical effects".³⁷

As mentioned above, the work of the *Ad Hoc* Group was as secret as that of Trevi. Intergovernmental cooperation through the *Ad Hoc* Group therefore attracted many of the same criticisms that were directed against Trevi. General observations in the EC-Bulletin followed every six-monthly meeting of Immigration ministers. However, information after such meetings was often misleading if not to say false. For instance, a declaration adopted at the meeting of Immigration Ministers in Dublin on 15 June 1990 was published in the EC-Bulletin. The declaration regarded, *inter alia*, the Dublin Convention, signed by 11 Member States on the same date, and particularly referred to previous cooperation between the *Ad Hoc* Group and the United Nations High Commissioner for Refugees (UNHCR). According to the declaration: "The

³⁴ See *Communication from the Commission to the Council and the European Parliament on Immigration and Asylum Policies*, COM (94) 23 final, 23.02.1994, Annex II and III.

³⁵ The legal status and effect of these acts has to be determined by the applicable rules of international law. Accordingly, the question whether a *resolution, conclusion or recommendation* is legally binding depends upon the intention of the parties and the terms of the act itself. See *Verdross/Simma*, pp. 335-345. The form or title chosen is not of itself decisive. See article 2 (1) (a) of the Vienna Convention on the Law of Treaties.

³⁶ See e.g. *Alain Servantie*, in: *Groeben/Thiesing/Ehlermann*, Article 30 EEA, para. 20.

³⁷ *Snyder (1994b)*, p. 198. See also *Snyder (1993)*, pp. 31-36, and *Thürer (1990)*.

United Nations High Commissioner for Refugees was consulted on the terms of the draft Convention and welcomed prospects for a constructive dialogue in this field".³⁸ In fact, however, the UNHCR had been "consulted" by the *Ad Hoc* Group only at the very last phase of the negotiations,³⁹ which even may have constituted a breach of the obligations laid down in article 35 of the Geneva Convention of 1951 on the Status of Refugees to cooperate with the UNHCR and to furnish it with information about proposed legal measures concerning refugees.

Generally, the closed negotiations in the *Ad Hoc* Group (as well as in Trevi and other *fora*) attracted criticism for the rather *one-sided expertise* among negotiators (officials of immigration and police departments). This is particularly disturbing for negotiations in the fields of justice and home affairs, because, as *Weiler* points out:

"Bureaucracies tend to suffer from what may be called the *banalization of suffering*. Faced with large numbers of human problems, these become «cases», the problems become «categories», and the solutions become mechanical".⁴⁰

E. EPC-Groups on Judicial Cooperation

Judicial cooperation took place under the framework for European Political Cooperation (EPC) established by the SEA. Work was divided between criminal and civil judicial cooperation groups. The groups' main role was to draw up a number of international conventions in criminal and civil matters and to promote the ratification by States who had not already done so, of conventions concluded in the Council of Europe.⁴¹ Both groups reported to the *European Political Committee*. This was a somewhat odd structure for members of the working groups were typically officials of justice departments, whereas the European Political Committee consisted of head officials of national departments for foreign affairs. The Political Committee therefore had to report to the meetings of Justice Ministers and not to the European Council. The Commission was involved as an observer and the work was supported by the EPC Secretariat.

³⁸ Bull. EC 6-1990, point 2.2.1.

³⁹ See *Webber*, p. 144.

⁴⁰ *Joseph H. H. Weiler*, Thou Shalt Not Oppress a Stranger (Ex. 23:9): On the Judicial Protection of the Human Rights of Non-EC Nationals - A critique, in *Schermers et. al.*, p. 251. It should be added, however, that *Weiler* made this remark to stress the importance of obtaining sufficient judicial protection in these fields.

⁴¹ See *de Zwaan*, p. 341, and *d'Oliveira* (1994), p. 262.

Like EPC in general, judicial cooperation in this forum was carried out in great secrecy. Furthermore, due to its complexity, cooperation in these fields lacked efficiency. Finally, many subjects had also been discussed in the Council of Europe which lead to a duplication of work.⁴²

F. CELAD

The European Committee to Combat Drugs (CELAD, i.e. "Comité européen de lutte anti-drogues") was set up on a French initiative at the European Council in Strasbourg in December 1989. CELAD met four or five times during each Presidency with the remit to co-ordinate Member States' actions in the fight against drugs: prevention, drug addiction, drug trafficking and common international action. It was made up of senior officials from Member States. The Commission was also present and the Council Secretariat provided support. The work of CELAD was reported directly to the European Council.⁴³

G. Mutual Assistance Group (MAG)

MAG was a longstanding group which dealt with activities at an operational level on Customs matters outside Community competence. For example, it co-ordinated Community-wide intelligence-gathering exercises to detect discrepancies unlikely to be picked up by one Member State acting alone. Since 1989, the focus of work had been centred on MAG (92), set up in 1989. The Group provided a forum for EC customs services to develop compatible single market plans in enforcement matters, e.g. to combat drug smuggling. MAG (92)

⁴² In the civil law field, action had also been taken in pursuance of article 220 EEC. This provides, *inter alia*, that "Member States shall, so far as necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards". Notable achievements have been the 1968 Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (OJ No. L 299 of 31.12. 1972) and the Rome Convention on the Law applicable to Contractual Obligations (OJ No. L 266 of 09.10.1980).

⁴³ As for judicial cooperation (see above) some aspects of the fight against drug addiction were also subject of action under the EEC Treaty. E.g., on 8 February 1993 the Council adopted under article 235 EEC a Regulation establishing a European drug monitoring centre (OJ No. L 36 of 12.02.1993, pp. 1-8). It should be noted that the new article 129 EC now provides that "Community action shall be directed towards the prevention of diseases, in particular the major health scourges, including *drug dependence*" (emphasis added by the author).

came together in plenary sessions approximately every two months to prepare its recommendations and reports to the Directors General of the national Customs Services, but most of the work was done in *sub-groups*. The Commission was involved in the work of MAG (92) as an observer.⁴⁴

H. Horizontal Group on Data Processing

The Horizontal Group on Data Processing was set up to work on a draft Convention on the *European Information System (EIS)*. EIS is in real terms a Community-wide expansion of the *Schengen Information System*, which will be described further below.⁴⁵

I. The Schengen Group

According to *Cruz*, the Schengen Group originates from a large protest movement of lorry drivers in the spring of 1984, angry at the long queues at European borders.⁴⁶ Reacting to this situation, on 13 July 1984 Germany and France signed the *Saarbrücker Abkommen* which provides for the gradual suppression of the control of persons at the Franco-German border. These two countries subsequently contacted the Member States of the Benelux, whose internal borders for persons have been suppressed since 1960. The Schengen Group was thus created and less than twelve months after the *Saarbrücker Abkommen*, these five countries signed, on 14 June 1985, the Schengen Agreement on the gradual abolition of checks at the common borders (hereinafter referred to as Schengen I).⁴⁷

Schengen I is a short document and looks like a work programme containing the principal measures which the Five will have to put in place to realise the suppression of their internal borders.⁴⁸ Only in the Netherlands was it subjected

⁴⁴ For further details on the work of MAG and MAG (92) see *Brown*, pp. 112-114.

⁴⁵ See footnote 56 and, *Bunyan*, p. 31-32, and *Deutscher Bundestag* (1994), p. 87.

⁴⁶ See *Cruz*, p. 3.

⁴⁷ The text has been published in *Schermers et. al.*, pp. 547-551.

⁴⁸ Schengen I comprises 33 articles in two Sections; Section 1 "Measures applicable in the short term" (articles 1-16) and Section 2 "Measures applicable in the long term" (articles 17-33). The Section 1 measures were to be implemented by January 1986, those of Section 2 "if possible" (article 30) by January 1990. Section 1 relates primarily to methods of speeding up frontier crossings by people, goods and road and rail traffic. Section 2 deals with longer-term goals such as developing police cooperation and measures against illegal

to parliamentary approval before it came into force on 2 March 1986. As for the others, they considered Schengen I as only a *declaration of intent*, and did not submit it for parliamentary ratification. In fact, according to *Bolten*, for a long time its existence was known only in select gatherings in the other four countries. For example, the French Ministry of Foreign Affairs had even failed to inform the Ministers of Justice and Home Affairs.⁴⁹

Immediately after the conclusion of Schengen I, negotiators began work on drawing up the supplementary agreement, but their activities remained virtually unknown to the public. Four working groups (Police and security; movement of people; transport; customs and movement of goods) reported to a *Central Negotiation Group (CNG)*, which prepared decisions for the political level, namely meetings of the Ministers and State Secretaries. The EEC Commission has had observer status at meetings of the CNG and meetings at the political level since 1988. The entire negotiating process was serviced by the existing Secretariat of the Benelux Economic Union, which was enlarged especially for this purpose. After five years of protracted negotiations, the *Convention applying the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at common borders* (hereinafter referred to as Schengen II) was finally signed in Schengen on 19 June 1990.⁵⁰ Since, it has been ratified by all original contracting parties, i.e. the Benelux, France and Germany. It formally entered into force for these states on 1 September 1993.⁵¹ However, the signatory States have agreed upon a "two step" implementation procedure. In the first step, the *Schengen Executive Committee*, which is composed of one minister of each Member State, was formally established in September 1993 pursuant to article 139 (2) Schengen II. However, the core of the Convention would not be applied until the prior conditions for its implementation were fulfilled in the signatory States and checks at external borders are made effective.⁵² Pursuant to a

immigration.

⁴⁹ See *Bolten*, p. 9.

⁵⁰ Italy (1990), Spain and Portugal (1991), Greece (1992), and Austria (1995) have since signed conventions to accede to this Convention, as well as to the 1985 Schengen Agreement. The authentic French, German and Dutch texts are published in the Netherlands Treaty Series, *Tractatenblad* (1990) No. 145. For an unofficial English translation see *Schermers et. al.*, pp. 552-605.

⁵¹ *Deutscher Bundestag* (1994), p. 17. Subsequently Schengen II has also been ratified by Spain and Portugal. It entered into force for Spain and Portugal on 1 March 1994.

⁵² *Joint statement concerning article 139* attached to Schengen II. For a list of prerequisites to the implementation of Schengen II see *Cruz*, p. 31.

declaration adopted by the Schengen Ministers at their Madrid meeting of 30 June 1993, this would require an affirmative decision taken by the Executive Committee.⁵³

Numerous groups at the administrative and political levels have been working towards the application of Schengen II since signing the Convention in 1990, coordinating and directing the adaptation of national laws and practices,⁵⁴ and, after having adopted a final set of implementing measures, the Executive Committee on 14 December 1993 stated that the legal and political conditions for the implementation of Schengen II were now fulfilled.⁵⁵ However, the Committee made one important reservation: Due to "technical" problems, the *Schengen Information System (SIS)*,⁵⁶ often called the "heart" of the compensatory measures, was declared not yet operational. In fact, problems with the SIS have occurred since 1992 and they have repeatedly led to a postponement of the formal deadline for the complete entry into force of Schengen II. It may be supposed that some governments, France for example, have been using technical problems with SIS as a pretext, whereas it was in fact newly formed political opposition to the abolition of internal borders which was the true motive for objections. After further postponements⁵⁷ on 26 March 1995, Schengen II finally entered into force. However, as a first step, the Convention will only be applicable in some Schengen States, Italy and Greece

⁵³ See *Pandraud (1994b)*, pp. 21-25.

⁵⁴ See *van Ouirve (1993)*, pp. 14-16, and *Butt Philip*, pp. 179-180.

⁵⁵ See *Bericht des Bundesministeriums des Innern*, pp. 17-24, and *Pandraud (1994b)*, pp. 9-25.

⁵⁶ The SIS is a joint computerised information system containing information about persons and objects. According to article 92 (1) Schengen II, the designated authorities of the Contracting Parties may thereby have access to reports on persons and objects for the purposes of border checks and controls and other police and customs checks and for the purposes of issuing visas, the issue of residence permits, and the administration of aliens in the context of the application of the Convention's provisions relating to the free movement of persons. See articles 92 to 101 Schengen II; further *Baldwin-Edwards/Hebenton*, pp. 140-157; and *Schattenberg*.

⁵⁷ Having failed three consecutive times to respect the agreed date of application since the beginning of 1993, the Executive Committee announced, after its meeting in Bonn on 27 June 1994, that the Convention would be applied as from 1st October 1994 in five Member States, namely Germany, Belgium, France, Luxembourg and the Netherlands. Spain and Portugal would follow shortly afterwards, but no indication was given as to when Greece and Italy would be ready. Notwithstanding these decisions the full application of Schengen was once more postponed in October 1994.

remaining outside for "technical problems", thus creating a kind of "three-speed Europe", consisting of some EU Member States completely outside Schengen, some fully within Schengen and some in some kind of "twilight zone".

Limited to nine Member States, the Schengen II covers most of the above-mentioned fields of intergovernmental cooperation in a single legal and institutional framework. Its objective is thus to provide for a complete and integral approach to the problems to be overcome, once the controls at the internal frontiers have disappeared. Article 2 (1) is the central dispositive provision of Schengen II: "Internal borders may be crossed at any point without any checks on persons being carried out." Except for Title V, which deals with border controls regarding transport and goods, it deals almost exclusively with the consequences of this single paragraph.⁵⁸ A broad analysis of all these provisions is not required for this research.⁵⁹ Instead, I will restrict myself to the following four observations.

Firstly, as defined by *Carlos Westendorp*, Spanish Minister for European Affairs, Schengen is supposed to be a "self-destructing mechanism" that will "fade away from the EC" once the latter covers these issues.⁶⁰ Schengen is thus supposed to act as a *forerunner* or *testing ground* with regard to a later abolition of internal borders in all the EC Member States. Ergo, political agreements and compromises obtained at the level of the Schengen group will very likely preempt successive agreements at the Community level,⁶¹ even though decisions made later at Community level will, *from a legal point of view*, not be pre-

⁵⁸ The main elements of Schengen II are as follows: the institution of uniform controls and surveillance at the external frontiers, both in the interest of immigration and public safety and security; the measures with regard to the internal circulation of aliens (i.e. non-EC nationals), in particular with regard to refugees; police cooperation; judicial cooperation and assistance; harmonization and cooperation with regard to narcotics, drugs and firearms; the institution of computerized information exchange (SIS); the protection of privacy, both with regard to the automated exchange of information exchange and with regard to other forms of information exchange. Finally, Titles VII and VIII contain general procedural and final clauses.

⁵⁹ See *Meijers et al.*; *Nanz (1994)*; *O'Keeffe (1992b)*; *Pauly (ed.)*.

⁶⁰ *Agence Europe*, 2 July 1993 (N° 6013), p. 8.

⁶¹ They may even create a precedent on principles which might be enshrined in the future Treaty as regards the free movement of persons.

empted.⁶² Yet, why should nine Schengen states "destroy" a mechanism on which they have agreed after difficult negotiations if cooperation at the level of the Twelve and agreements resulting therefrom will not grant them similar advantages? Indeed, the *Dublin Convention*, the *Draft External Frontiers Convention* or the *Convention on the European Information System* and the corresponding chapters in Schengen II are strikingly similar, notwithstanding some divergences. Consequently, one may conclude that rendering cooperation-procedures in the fields of justice and home affairs at Community level "more democratic" may be a useless venture, if decisions have been "undemocratically" taken before this in the Schengen group.

This leads to the second remark: According to *O'Keeffe*, the lack of transparency with which the Convention was negotiated, and the failure to inform national parliaments led to considerable protest.⁶³ True enough, Schengen II was subjected to parliamentary approval in all Schengen States which have up to now ratified the convention. However, with the exception of the Netherlands, none of the ministers concerned were (publicly) questioned by their respective parliaments on the negotiations between 1985 and 1989.⁶⁴ These were conducted in secrecy, and only in their final phase did German and Dutch MPs *confidentially* receive a draft of the Schengen Convention.⁶⁵ In

⁶² Schengen II contains two provisions which determine the relationship of the Convention with EC law: articles 134 and 142. Article 134 provides that the "provisions of this Convention shall apply only in so far as they are compatible with Community law". Article 142 (1) provides:

"When conventions are concluded between the Member States of the European Communities with a view to completion of the area without internal frontiers, the Contracting Parties shall agree on the conditions under which the provisions of the Schengen Convention are to be replaced or amended in the light of the corresponding provisions of such Conventions.

The Contracting Parties shall, to that end, take account of the fact that the provisions of this Convention may provide for more extensive co-operation than that resulting from the provisions of the said Conventions.

Provisions which are in breach of those agreed between the Member States of the European Communities shall in any case be adapted in any circumstances."

⁶³ See *O'Keeffe (1992b)*, p. 188. For other deficiencies of Schengen which have been alluded to by numerous authors see *Meijers et al.*; *O'Keeffe (1992b)*; *Malangre*, pp. 15-22, and the numerous resolutions of the EP, e.g. in: OJ No C 323 of 27.12.1989, OJ No C 337 of 21.12.1992 and OJ No C 109 of 1.5.1995.

⁶⁴ See *Cruz*, p. 6; *van Iersel*, pp. 374-378; *Groenendijk*, pp. 397-399.

⁶⁵ According to French Senator *Paul Masson*, in 1989, the French Government had even urged the Dutch Government to systematically avoid informing its national parliament,

Germany, the drafts of the Schengen Convention were discussed between only four members of the Bundestag and representatives of the German Government at informal and secret consultations.⁶⁶ Even though those MPs raised no major objections, which implied an informal consent of the main political parties with the Convention, informal and secret consultations between four MPs and government representatives were certainly no substitute for democratic and public debate. In this connection it is worth quoting *Groenendijk* who underlines the following dilemma national MPs faced when they tried to become involved in intergovernmental cooperation in general and the Schengen negotiations in particular:

"[MPs] ... have the choice between refusing information that cannot be made public, or receiving the confidential information with the implication that not making objections will be interpreted as consent to its contents. In either case the main policy decisions would have to be made well before any informed public discussion of the issues would be possible. Such dilemmas do not reinforce democracy".⁶⁷

Like the proceedings in the above-described intergovernmental fora, negotiations to Schengen II were "traditional" international negotiations in the sense that they were the exclusive competence of national executives. Consequently, only casually preparatory documents and drafts were submitted to national parliaments. Except for vague reports, such information was at best given confidentially - often only to a handful of highly select MPs. In any event, it was not debated in public. With regard to the criteria defined in the introduction to this research, it can therefore be concluded that: access to documents was strictly limited; the decision-making process remained fairly

particularly as regarded the provisions of Schengen II currently being negotiated, as such a procedure might have set a precedent and could have prompted similar claims by the French parliament! See *Cruz*, p. 6. Only after the signing of Schengen II did French Parliament become active. A Senat screening committee issued an adverse report, in which it recommended a number of measures necessary in order to implement the agreement; see *Senat français* (1991). In the National Assembly, the *EC Delegation* (see below Chapter 3.B, pp. 41-44) drew up two reports: see *Pandraud* (1994b) and *Pandraud* (1993).

⁶⁶ Note that the *Foreign Affairs Committee* ("*Auswärtiger Ausschuss*") of the German *Bundestag* always meets in private. Minutes of the proceedings are confidential. Furthermore, this Committee is a so-called "closed committee" ("*geschlossener Ausschuss*"). Members of the *Bundestag* who are not members of the Committee do not have access to its meetings. Finally, subjects which require particular confidentiality are discussed between the chairman of the committee, one representative of each parliamentary group, and government representatives (so-called "*Ausschussvorstandssitzung*"). See *Weber-Panariello*, § 14.1.C.

⁶⁷ *Groenendijk*, p. 398.

closed; opportunities for a parliamentary input were low; and parliamentary sanctions were restricted to a "yes" or "no" at the end of the negotiations. However, the negotiations regarding the Schengen Convention enjoyed a major advantage in that they were conducted within a single institutional framework: the coordination and final responsibility for the texts on all matters which concerned the abolition of internal borders was concentrated at the administrative level in the hands of a central group of negotiators who were responsible to one Group of Ministers and State Secretaries. This organization stood in contrast to the discussions on the abolition of border controls among Member States of the Community in the above-mentioned fora. The institutional structure of Schengen was therefore less complex. Also, it should be added that the absence of public debate in general and the lack of parliamentary participation in particular was not only a result of insufficient information, but also a result of media apathy and the initial absence of interest on the part of pressure groups and MPs.⁶⁸ Looking at the Dutch example, where in contrast to most of the other Schengen States the parliament slowly became concretely involved in the negotiation process and where eventually a public debate emerged, we see that the above-defined deficiencies were not necessarily an integral part of the intergovernmental model but also a consequence of national procedures, or, quite simply, of insufficient interest.

The third observation regards the problem of the extensive powers of the Executive Committee: On many points Schengen II requires the elaboration of further implementing rules. Article 131 Schengen II provides for the establishment of an Executive Committee, whose general purpose is to ensure that the Convention is implemented correctly, and which may take decisions (unanimously) on necessary measures.⁶⁹ The Committee is not only assigned wide powers of supervision, interpretation and implementation of the Convention but is also empowered to act as a *legislative*: it has the power to adopt "rules", "detailed provisions" or "measures" and to make decisions on revising or amending the Convention.⁷⁰ Working groups comprising "representatives of the Administrations of the Contracting Parties" will prepare the decision-making of

⁶⁸ See the examples in *Cruz*, pp. 5-6.

⁶⁹ See articles 131 (2) and 132 (2) Schengen II.

⁷⁰ See, *inter alia*, articles 3, 8, 12, 17, 75, and 131 Schengen II. In pursuance of article 132(2) Schengen II the Executive Committee has drawn up its own rules of procedure on 18 October 1993. They have been revised on 14 December 1993. The rules of procedure have not been officially published. The unpublished version is dated 14 December 1993 and referenced as SCH/Com-ex (93) 1, 2. Rev.

the Executive Committee.⁷¹

Rule-making by such a procedure has some obvious disadvantages, first in terms of openness (limited access to working documents, action plans and draft decisions; confidential proceedings, limited publication of records and decisions, etc.⁷²), and second because the status of such rules remains fairly unclear.⁷³ However, with regard to the first point, mention should be made of article 132 (3) Schengen II which provides that at "the request of the representative of a Contracting Party, the final decision of a draft on which the Executive Committee has taken its decision may be postponed until no more than two months after the submission of that draft". This "*terme de grace*" (*Groenendijk*) could thus be used for consultation with the national parliaments.⁷⁴ Also, article

⁷¹ Article 132 (4) Schengen II.

⁷² Schengen II contains no rule about publication of any decision of the Executive Committee. The Contracting parties only approved a non-binding Joint Statement concerning article 132, that they "shall inform their national parliaments of the implementation of this Convention". *In praxis* a vague press release follows every meeting of the Committee. Pursuant to article 3 and 12 of its Rules of Procedure, unless decided otherwise, the Executive Committee meets in private and minutes of the proceedings are confidential. Article 9(3) Rules of Procedures stipulates that the publication of (final) decisions adopted by the Executive Committee is determined by national rules. The Executive Committee may impose a confidentiality rule depending on the circumstances of the case. The Dutch bill concerning the ratification of Schengen II explicitly provides for the publication of decisions of the Executive Committee in the "*Tractatenblad*", which is the Official Bulletin for the Publication of Treaties. See *Groenendijk*, p. 396.

⁷³ See *Timmermans*, p. 366. As for the above-mentioned acts approved under Trevi etc., the legal status of acts of the Schengen Executive Committee will have to be determined, firstly, by the applicable rules of international law. Questions of direct effect and supremacy of such acts, however, may be considered solely a matter of national constitutional law. *Timmermans*, p. 366, argues that in some Member States rules enacted by the Executive Committee will "probably" be immediately applicable whereas in others they will have "the status of international agreements (in a simplified form), which are not automatically incorporated in the national legal order". The *van Ourive* (1992a) report, p. 27, simply states that "the Executive Committee takes decisions which have the same legal force as the Convention itself and which in some cases are more important than it". Finally, it is of interest to note that the French *Conseil Constitutionnel* in its decision of 25 July 1991, has stated that: "... aucune stipulation de la convention [de Schengen] ne confère aux décisions de ce comité un effet direct sur les territoires des parties contractantes". Décision n° 91-384 du 25 juillet 1991, *JO*, 27 juillet 1991, p. 10005.

⁷⁴ In the Dutch bill concerning the ratification of Schengen II a provision was added to the effect that the drafts of all decisions of the Executive Committee that will be binding on the Netherlands will be made public as soon as the text has become final and will be submitted to parliament. In special circumstances, it may be submitted to parliament in a

6(2) of the Rules of Procedure of the Executive Committee provides that decisions of the Committee will enter into force only after all the Member States have notified that the required parliamentary and judiciary procedures have been finalised to enable such decisions to take effect on their respective territories.

It should be added that, unless decided otherwise, according to articles 3(2) and 11(3) of the Rules of Procedures, the EU Commission may participate at meetings of the Executive Committee, of the CNG and of all Schengen working groups. Furthermore, pursuant to article 2(5) Rules of Procedure the Commission receives the provisional agenda for each meeting, which has to be sent to the Member States 21 days before the beginning of the meeting of the Executive Committee. Moreover, only items in respect of which the documents have been sent to the Member States (and to the Commission) at the latest by the date on which the provisional agenda is sent, may be placed on that agenda.⁷⁵

Finally notwithstanding the fact that cooperation among the Schengen States is taking place within a single institutional framework on a formal legal base, the gain of institutional transparency has been, if anything, rather moderate. Firstly, Schengen does not replace the other intergovernmental fora but runs parallel to them. Secondly, due to a proliferation of working groups within the Schengen framework, the structure of Schengen has become increasingly complex.⁷⁶ Both phenomena create considerable impediments with regard to coordination on national and intergovernmental level. As Cruz points out:

"In reality, information exchange is seriously lacking as the different fora dealing with the same issues are often not well informed of what the others are doing, or find out rather

confidential way, e.g., if compelling reasons occur or if the draft is secret or confidential. The member of the Executive Committee representing the Netherlands, can only cooperate and participate in the decision-making process after prior parliamentary agreement. Tacit approval is presumed, unless one or both Chambers express the wish - within a period of 15 days - to give its/their approval expressly. This provision guarantees some parliamentary control on the decision-making process within the Executive Committee and in fact gives the Dutch parliament a right of co-decision, since decisions of the Executive Committee have to be taken unanimously. See *Groenendijk*, p. 396, and *Outrive (1992a)*, p. 29. I should add that evidently no similar procedures have been formally established in the other Schengen States.

⁷⁵ Article 2(3) Rules of Procedure of the Executive Committee.

⁷⁶ According to an unpublished organigramme on 1 September 1994 Schengen was structured as follows: Six working groups (Police and Security; Visa and Asylum; Judicial Cooperation; External Relations; Treaties and Regulations; Narcotics) and the SIS Steering Group report to the CNG, which prepares decisions for the Executive Committee. In addition there is a Permanent Administrative Committee (CAP). The working groups are divided in several permanent/ad hoc sub-working groups. The Secretariat of the Benelux Economic Union still serves as a Secretariat of Schengen.

late. What is even worse is that certain civil servants must sometimes participate in one meeting after another without having sufficient time to share information with their colleagues participating in other groups. Among certain delegations, there are civil servants who are members of all or almost all of the groups working on similar issues and are, as a result, far better informed than the others who participate, for example, only in the Schengen working groups. It has already happened more than once that a civil servant participating in a Schengen working group made a proposal in contradiction with a decision already taken in another intergovernmental body".⁷⁷

It goes without saying that not only parliamentary control but also ministerial oversight becomes increasingly difficult under such conditions.

J. Summary of Chapter 1

Cooperation among the EC Member States in the fields of justice and home affairs is closely linked to the objective set out in article 7a EC of establishing a common market without internal frontiers. However, even though it responded to a Community imperative, at least until 1993, cooperation on these matters evolved almost completely outside the Community legal and institutional order. As various authors have argued, the reasons for this had little to do with the lack of Community powers to draw up legislation in these fields;⁷⁸ in reality, the intergovernmental path was taken because some EC Member States, the United Kingdom, Denmark and Ireland in particular, were unwilling to accept the Community approach in political highly sensitive areas such as immigration or asylum policy. Having little choice, the Commission "accepted" these preferences, thereby feeding the doubts as to the competence of the Community to legislate in these fields.

As claimed in the introduction, the result of the intergovernmental approach has been, so far, an ever-extending, increasingly complex and opaque patchwork of groups, organizations and facilities, differing in terms of their territorial remit, their area and the quality and intensity of the cooperation they pursue. After having portrayed some of the most important intergovernmental fora in Chapter 1, not much needs to be added to the introductory remarks regarding the complexity of the "system".

With regard to the other criteria established in the introduction observations made on Schengen above are transferable to virtually all the forms of cooperation described in Chapter 1. *Access to documents* being deliberated in the

⁷⁷ Cruz, p. 14.

⁷⁸ Indeed, except for cooperation in the fields of police, crime combating or terrorism, article 8a EEC in connection with articles 100 or 235 EEC could have served as legal grounds for Community action in many fields dealt with intergovernmentally.

71 // different fora was strictly limited, and *intergovernmental meetings* at administrative and political level were generally held *in private*. It was very difficult for national parliaments (and interest groups/NGOs) to find out when discussions were taking place, what was being discussed, what progress had been made, etc. Still today, it is difficult to find out what has been achieved and what is operational. In most cases, there was little or no previous consultation with the national parliaments for major meetings such as those of the Trevi and Immigration Ministers. *Chances for parliamentary input* at an early phase of decision-taking were thus low, and it was virtually impossible for matters to be publicly debated in advance. Moreover, the legal and political status of documents was never clear: were they public, secret or confidential, and who decided this? MPs were therefore often faced with the dilemma: either they had to refuse to accept information which they would not be at liberty to pass on, or else they had to accept it on condition that they raised no objections. Public debate was thus rendered impossible. Finally, except for conventions, the outcome of the meetings was not formally submitted to parliaments for their approval, the Netherlands being the only exception.⁷⁹ In any event, (treaty) texts resulting from intergovernmental cooperation were not subject to amendment by national parliaments.⁸⁰

The comments above on Schengen include some criticism with regard to the extensive competences and the future working methods of the Schengen Executive Committee. It is therefore of interest to note that both the *Dublin Asylum Convention* and the 1991 *Draft External Frontiers Convention*, which may at a later stage gradually replace the corresponding sections of Schengen II, provide for the establishment of similar Committees. It is striking that these committees always have three functions: *legislative*, as they adopt "rules" and "provisions", and amend or supplement the conventions; *executive*, as, for example, they decide on the suspension of an application by a country, extended

⁷⁹ See Robles Piquer, p. 11.

⁸⁰ E.g., Dutch Parliament had sent its delegate back to the Schengen negotiating table with instructions to renegotiate with a view to securing a number of supplementary protocols to improve the agreement. The subjects to be covered were, *inter alia*: greater openness and parliamentary control over the Executive Committee, and jurisdiction of the European Court of Justice to settle disputes between the Schengen machinery and citizens or between the contracting States. Further, it wanted the European Court of Justice to be assigned jurisdiction to give preliminary rulings on the interpretation of the agreements and protocols and of action by bodies set up pursuant to them. However, the Dutch Parliament afterwards ratified the agreement without any supplementary protocols. See *Outrive* (1992a), p. 29. However, as mentioned above, the Dutch government accepted an amendment to the Ratification Bill, granting parliament a right of information and approbation before decision-taking in the Executive Committee.

application etc.; and *judicial*, as they are entrusted with the *interpretation* of the respective conventions.⁸¹ As for the Draft External Frontiers Convention, it should further be added that the EC Commission has recently put forward a new proposal in which the EC Council will replace the Executive Committee.

Furthermore, Chapter 1 has offered evidence that the intergovernmental model in the version used by the EC Member States not only thwarts parliamentary scrutiny, it also hampers executive supervision. Intergovernmental cooperation in the fields of justice and home affairs has become the "battleground of bureaucracies" on a European scale. However, while a similar statement could probably be given with regard to the role of state officials in national politics, in justice and home affairs in particular, it seems far more accurate for intergovernmental cooperation. This phenomenon has been described by Robles Piquer, MEP, as follows:

"It is noticeable how much *senior officials* of Ministries of Justice and Internal Affairs, originally not diplomats, can behave like diplomats in old style in intergovernmental context, i.e. they are able to build up a position of power without the legitimacy they would have if they were politically accountable to elected bodies.

This is the core of the problem. Intergovernmental co-operation by its very nature leads to positions of power for officials. ... National bureaucracies are becoming too big and too complicated for ministers to keep an eye on everything, although they are deemed politically responsible for everything officials do or fail to do. Ministers of Justice and Interior are more preoccupied with their respective national problems and have little time to devote to international problems, of which they have only a superficial knowledge and which they often delegate to their staff. Frequently, when a minister does attend meetings, he is briefed in the plane on the way to the conference. It goes without saying that, as a consequence, his responsibility for the decisions taken is much more theoretical than practical. Only in the field of asylum policy has there been any change in recent years".⁸²

One may add to this that ministers are more preoccupied with their respective national problems because that is where parliamentary (and public) scrutiny and debate still takes place. Or, in short, because parliaments do not control their governments, ministers do not control their officials.

Finally, mention should be made of the participation of the EP in the fields of justice and home affairs prior to the introduction of Title VI TEU. Even though it has never resigned itself to the state of affairs concerning cooperation in the fields of justice and home affairs, the EP's possibilities to participate in these have been limited. As described above, European Community legislation in these fields continued to be exceptional with the result that a formal

⁸¹ See e.g. article 18 of the Dublin Asylum Convention.

⁸² Robles Piquer, p. 12.

consultation of the EP was generally bypassed.⁸³ The EP was thus restricted to the use of more general measures such as the drawing up of reports, the passing of resolutions, or oral and written questions. However, the EP has been remarkably active in considering topical problems in these areas. Practically all subjects falling under the scope of free movement of persons, asylum, immigration, racism, etc. have been covered by numerous in-depth reports and resolutions and countless parliamentary questions.⁸⁴

In addition, two information procedures were established especially for matters of justice and home affairs. Firstly, the EP's Committee on *Committee on Civil Liberties and Internal Affairs*⁸⁵ was generally briefed every six months on the most important results of the activities initiated by the ministers responsible for immigration affairs, though the quality of the information varied considerably (from extremely scant to extremely detailed).⁸⁶ Secondly, on 7 May 1990 the General Affairs Council decided that the president of the Council responsible for immigration affairs and the presidents of the EP's committees concerned should begin meeting every six months. Such meetings have taken place after the half-yearly assembly of the competent ministers. However, according to *van den Brink/Vierhout* they have been of questionable merit. Information has been supplied only *ex post* to a highly select number of MEPs; it had usually already reached the EP through other informal channels.⁸⁷

In addition, the EP's *Committee on Civil Liberties and Internal Affairs* operated on an informal basis in advance of the introduction of the Maastricht arrangements through reports from the *EC Commission* on the activities of the intergovernmental working parties and ministerial meetings. It did not receive any documents by right from these bodies, but informally the Committee

⁸³ The few Community acts adopted in these fields were generally based either on Articles 100, 113 or 235 EEC, which, at the most, provide for *consultation* of the EP.

⁸⁴ See e.g., the above quoted resolutions on Schengen or the reports by *Malangre; Outrive* (1992a) and (1993).

⁸⁵ The Committee was established in 1991. It was given responsibility, *inter alia*, for all matters relating to: human rights problems and civil liberties in the European Union; the security of free movement of persons; asylum policy; the fight against racism; immigration policy and policy towards nationals of third countries; the fight against international crime, drug trafficking and fraud; police cooperation. customs cooperation. Up to 1991 many of these fields were covered by the Committee of Legal Affairs and Citizens' Right. See *European Parliament*, Rules of procedure, Annex VI: Powers and responsibilities of standing committees, XIV.

⁸⁶ *Malangre*, p. 26, and *van den Brink/Vierhout*, p. 388.

⁸⁷ *Van den Brink/Vierhout*, p. 388.

received the resolutions and recommendations of some meetings from the President-in-Office, *after* they had been agreed.⁸⁸ Also, the Presidency began to attend at least one committee meeting during his term of office, giving a fairly full report and taking part in one or two hours of questioning.⁸⁹

Following *Groenendijk*, the outlined activities of the EP had, in particular, three effects.⁹⁰ First, they emphasized the civil liberties issues raised by the Schengen Convention and other intergovernmental agreements and conventions such as the Dublin Convention. Second, the EP brought attention to the interests of unrepresented groups and interests, such as the third country immigrants, who were put to oneside in the early years of the negotiations.⁹¹ Third, the EP constantly questioned the legitimacy of the intergovernmental model of legislation and underlined the democratic deficit of the latter. On the other hand, *Groenendijk* believes that the EP's activities have seldom given rise to new information on the status of the secret negotiations.

Chapter 2. Title VI TEU: A new Framework for Cooperation in the Fields of Justice and Home Affairs

A. The new legal framework

Title VI TEU, commonly referred to as the "Third Pillar" of the European Union, places cooperation for the first time among the Twelve in the fields of justice and home affairs (CJHA) on a formal treaty basis.⁹² Title VI TEU

⁸⁸ Even though the Committee has repeatedly requested draft texts of such texts before final adoption, it has never received anything in advance. See *Select Committee on the European Communities*, HL (1993), p. 23.

⁸⁹ Amédée Turner, Chairman of the EP's Committee on Civil Liberties and Internal Affairs, in: *Select Committee on the European Communities*, HL (1993), Evidence, p. 19. According to Turner, p. 20, the President of Schengen has also attended a number of the Committee meetings.

⁹⁰ See *Groenendijk*, pp. 399-400.

⁹¹ See e.g. *Report of the Committee on Civil Liberties and Internal Affairs on the harmonization within the European Communities of Asylum Law and Policies*, Rapporteur: Patrick Cooney, 5 November 1992, A3--337/92/Part A and B (PE 201.540/A and B/fin.).

⁹² The Three-Pillar structure of the Union has been widely discussed and I shall not repeat this discussion here. Instead, see *Constantinesco*, esp. pp. 253-264; *Dehousse* (1994), pp. 6-12; *Everling*, pp. 1056-1077.

comprises ten articles: articles K and K.1 to K.9 TEU.⁹³ Article K simply provides that: "Cooperation in the fields of justice and home affairs shall be governed by the following provisions." Hence, in principle CJHA is not governed by earlier provisions of the Treaty, in particular those relating to the European Communities.⁹⁴ Instead, articles K.1 to K.8 describe how that cooperation is to be carried out in a number of defined policy areas regarded as "matters of common interest". Article K.9 establishes a procedure for transferring some of these matters to the EC Treaty, thus placing them within Community competence. Mention should also be made of the new article 100c EC, by which one small aspect of justice and home affairs - parts of the visa policy - has been placed within the competence of the *European Community*, as opposed to remaining within the competence of the Member States acting in cooperation under the Third Pillar.⁹⁵

Article K.1 TEU contains an *exclusive* enumeration of areas which Member States, for "the purpose of achieving the objectives of the Union, in particular the free movement of persons, and without prejudice to the powers of the European Community", are to be regarded as "matters of common interest". The areas described as matters of common interest by article K.1 TEU are the following:

- "1. asylum policy;
2. rules governing the crossing by persons of the external borders of the Member States and the exercise of controls thereon;
3. immigration policy and policy regarding nationals of third countries;

⁹³ In addition, two declarations adopted by the Conference have been attached to the TEU, one on *Asylum*, the other on *Police cooperation*.

⁹⁴ However, article K.8(1) TEU applies, for the purpose of operating Title VI, several provisions of the EC Treaty: articles 137, 138, 139 to 142, 146, 147, 150 to 153, 157 to 163 and 217 EC. Secondly, article K.8(2) TEU provides that all expenditure incurred in the framework of Title VI TEU must be born either by the Member States or by the Community budget. If the Council decides that operational expenditure to which the implementation of provisions agreed on under Title VI TEU gives rise, is to be charged to the budget of the EC, the budgetary procedure laid down in the EC Treaty shall be applicable.

⁹⁵ Article 100c(1) EC requires the Council to determine the third countries whose nationals must be in possession of a visa when crossing the external borders of the Member States. The Council is to act by unanimity; but in recognition of the possible difficulty of reaching unanimous agreement, article 100c(2) EC enables temporary decisions to be taken by qualified majority, and article 100c(3) EC provides that from 1 January 1996 all decisions are to be taken by qualified majority. Article 100c(3) EC also requires the Council, before 1 January 1996, to adopt measures relating to a uniform format for visas. In each case the Council may only act upon the initiative of the Commission and after consulting the EP.

- a) conditions of entry and movement by nationals of third countries on the territory of Member States
- b) conditions of residence by nationals of third countries on the territory of Member States, including family reunion and access to employment;
- c) combating unauthorized immigration, residence and work by nationals of third countries on the territory of Member States;
- 4. combating drug addiction in so far as this is not covered by (7) to (9);
- 5. combating fraud on an international scale in so far as this is not covered by (7) to (9);
- 6. judicial cooperation in civil matters;
- 7. judicial cooperation in criminal matters;
- 8. customs cooperation;
- 9. police cooperation for the purposes of preventing and combating terrorism, unlawful drug trafficking and other serious forms of international crime, including if necessary certain aspects of customs cooperation, in connection with the organization of a Union-wide system for exchanging information within a European Police Office (Europol)."

Article K.3 TEU stipulates different forms and methods of cooperation which Member States shall use in areas referred to in article K.1. First, article K.3(1) TEU provides that in these areas, "Member States shall *inform* and *consult* one another within the Council with a view to coordinating their action. To that end they shall establish collaboration between the relevant departments of their administrations." Second, article K.3(2) TEU envisages several forms of cooperation going beyond the mere exchange of information and consultation. This provision starts by specifying who has the right of initiative, i.e. the right to propose action using any of these forms of cooperation. In the areas referred to in article K.1(1) to (6), the right of initiative belongs to any *Member State* or the *Commission*. In the areas referred to in article K.1(7) to (9) the right of initiative is restricted to any *Member State*.⁹⁶ Article K.3(2)(a) to (c) lists the following forms of cooperation: first, the adoption of *joint positions* and the promotion of any cooperation contributing to the pursuit of the objectives of the Union; second, the adoption of *joint action* and the decision on *measures implementing joint action*; and third, the drawing up of *conventions*.⁹⁷

⁹⁶ Article K.3(2) TEU.

⁹⁷ Article K.3(2)(a) to (c) provides: "The Council may: ...

- (a) adopt joint positions and promote, using the appropriate form and procedures, any cooperation contributing to the pursuit of the objectives of the Union;
- (b) adopt joint action in so far as the objectives of the Union can be attained better by joint action than by the Member States acting individually on account of the scale or effects of the action envisaged; it may decide that measures implementing joint action are to be adopted by a qualified majority;
- (c) without prejudice to Article 220 of the Treaty establishing the European Community, draw up conventions which it shall recommend to the Member States for adoption in accordance

Cooperation under Title VI takes place outside the Community procedures, and the resulting decisions and acts do not form part of Community law *stricto sensu*.⁹⁸ However, the Third Pillar is not without a legal quality: its substance is public international law.⁹⁹ Furthermore, article K.9 TEU provides for the possibility of transferring the areas referred to in article K.1(1) to (6) TEU into European Community competence:

"The Council, acting unanimously on the initiative of the Commission or a Member State, may decide to apply Article 100c of the Treaty establishing the European Community to action in areas referred to in Article K.1(1) to (6), and at the same time determine the relevant voting conditions relating to it. It shall recommend the Member States to adopt that decisions in accordance with their respective constitutional requirements."

Thus, pursuant to article K.9 TEU the unanimous decision of the Council to transform an area of common interest into a Community matter of article 100c EC requires adoption by the Member States in accordance with their respective constitutional requirements. The mechanism provided for in article K.9 TEU is therefore not much more than a simplified procedure for amending the Treaties.¹⁰⁰

The European Court of Justice is given no jurisdiction in respect of Title VI TEU itself. The only provision of Title VI TEU listed in article L is the one enabling conventions concluded under article K.3(2)(c) TEU to confer jurisdiction on the Court "to interpret their provisions and to rule on any disputes regarding their application, in accordance with such arrangements as they may lay down". The Member States therefore have discretion whether or not to provide in a convention for the European Court of Justice to have jurisdiction, and if so, to prescribe the extent of such jurisdiction and the arrangements applicable to it. However, since by virtue of article M TEU the

with their respective constitutional requirements.

Unless otherwise provided by such conventions, measures implementing them shall be adopted within the council by majority of two-thirds of the High Contracting Parties.

Such conventions may stipulate that the Court of Justice shall have jurisdiction to interpret their provisions and to rule on any disputes regarding their application, in accordance with such arrangements as they may lay down."

⁹⁸ See *Müller-Graff*, p. 507-510.

⁹⁹ Although, as underlined by *Müller-Graff*, pp. 495-503, due to its institutional, functional and procedural connections to the EC and Community Law the characterisation of the Third Pillar simply as public international law may not be appropriate. See also *Snyder (1994a)*, pp. 7-9.

¹⁰⁰ See article N(1) TEU.

Court retains jurisdiction in respect of the Community Treaties, it can properly determine the extent of the Community powers. Accordingly, in case of dispute, the Court can be expected to determine the boundary between the competence of the Community under EC Treaty and that of the Member States under Title VI TEU.¹⁰¹

The above-described provisions give rise to numerous questions and comments, both from a legal and a political perspective. However, four points seem to be of particular interest in the light of what has been stated in Chapter 1.

First, article K.1 TEU describes rather accurately the aspects of justice and home affairs on which the Member States have cooperated hitherto. In fact, pursuant to the Preamble of the TEU, the objective of the Third Pillar is "to facilitate the free movement of persons, while ensuring the safety and security of their peoples" through cooperation on justice and home affairs. Thus, *in substance* the catalogue does *not add anything new* to what has been subject to intergovernmental cooperation in the fields of justice and home affairs among the Twelve before Maastricht.¹⁰²

Second, article K.1, in conjunction with articles K.3 and K.9 TEU, draws a clear distinction between matters that may be "communitarized" at a later stage and those which will remain within the sphere of "pure" intergovernmentalism. Only the areas referred to in article K.1(1) to (6) TEU may, pursuant to article K.9 TEU, be transferred into European Communities' competence, and only in these areas has the Commission been entrusted a right of initiative.¹⁰³ Hence, there seems to be a list of policy areas which are to be given "preferential" treatment under the new Title VI TEU. However, taking a closer look at the areas to which article K.1(1) to (6) TEU is referring, it is striking to note that they all concern matters which - even without making use of the rhetoric of a "Eurofanatic" - may be considered as of *Community competence* anyway. In fact, except for "judicial cooperation in civil matters", they were all to be found among the policies identified by the Commission in its 1985 White Paper as matters which should be harmonized through Community legislation (Directives) in order to achieve the objectives of the internal market. Sure enough, several provisions in Title VI TEU explicitly state that they are "without prejudice to the powers of the European Community" as laid down, for example, in articles

¹⁰¹ See *Dehousse (1994)*, pp. 11-12.

¹⁰² As pointed out by *Weiler (1993)*, p. 49, footnote 1, CJHA is a "euphemism covering most particularly the cluster of issues concerning the status of third country nationals in the Community."

¹⁰³ Article K.3(2) TEU.

T! 57, 100, 113, 129, 209, 220 or 235 EC.¹⁰⁴ Furthermore, pursuant to article B TEU, maintaining "in full the «acquis communautaire»" has become an explicit objective of the Union, and article M TEU excludes the possibility of Title VI affecting the EC Treaties, or the subsequent Treaties and Acts modifying or supplementing them. Legally speaking, Title VI TEU does not therefore generally exclude areas of article K.1 TEU from being treated within the framework of the EC-Treaty.¹⁰⁵ Nonetheless, *de facto* this may be exactly the outcome, the hidden agenda of some Member States having supported the establishment of Title VI TEU.¹⁰⁶ In any event, for the areas listed in article K.1(1) to (6) TEU, the Commission's right of initiative is not much more than minimal and even article K.9 TEU may be considered not as a "bridge" but as an additional "barrier" for the "communitarization" of matters of justice and home affairs. Indeed, if Member States had wished to "communitarize" aspects of justice and home affairs in these areas, in most cases, if not to say in all cases, they could have done so without referring to article K.9 TEU.¹⁰⁷

a) B) Title VI TEU could therefore be described as *janus-faced*. In the first place, as will be shown below, it puts intergovernmental cooperation within the institutional framework of the European Union and, as a result, moves these policies closer to the Community institutions. In the second place, however, it adds even *more doubts as to the existing competences* of the Community to legislate in the fields of justice and home affairs and, in any event, it makes the delimitation of these fields from the decision-making competence of the Community extremely troublesome.¹⁰⁸ Eventually, it may well strengthen the

¹⁰⁴ See articles K.1, K.3(2)(c) and K.4(1) TEU.

¹⁰⁵ See Müller-Graff, pp. 503-506.

¹⁰⁶ In fact, the idea of providing for cooperation on justice and home affairs, in a part of the Treaty separate and distinct from the provisions modifying the Community Treaties, was a British one, and the resulting Treaty structure corresponds essentially to the original British conception. See Hendry, p. 297, footnote 8. On the negotiations to Title VI TEU see also Cloos *et al.*, pp. 492-495.

¹⁰⁷ As suggested in Chapter 1, the absence of Community legislation on these matters was caused not so much by the lack of Community competences, but rather by the reticence of (some) Member States to accept the Community approach in these sensitive areas. In fact, if, in exceptional cases, all EC Member States agreed on the need to legislate in fields of justice and home affairs at Community level they did so, and they didn't hesitate to do so on the grounds of articles 100 or 235 EEC. The above mentioned establishment of the European drug monitoring centre or the adoption of the EEC Directive on control and acquisition of firearms and ammunition are telling examples.

¹⁰⁸ See e.g., Curtin, p. 24.

intergovernmental approach even in fields which used to fall within Community competence and it may create a presumption to be defined as: "*in dubio pro intergouvernementalism*".¹⁰⁹ Indeed, it is interesting to recall what *Timmermans* has written with regard to intergovernmental cooperation on these matters before the establishment of Title VI TEU:

"Where all Member States agree on the necessity of a common action on the level of the twelve and the Community enjoys the necessary power to act, the Community as such should act, not its Member States by negotiating agreements in an intergovernmental framework. To accept a free option for Member States between using the Community framework or an intergovernmental approach would be incompatible with basic principles of the Community legal system."¹¹⁰

Is not this free option for Member States, between using the Community framework or an intergovernmental approach, exactly what the new Title VI TEU now provides?¹¹¹ Thus, what at first sight looks like the preferential treatment for some areas could instead be interpreted as an additional "safety clause" to keep these fields under (inter-)governmental control.¹¹² However, what is new about the Third Pillar is that where all Member States agree upon the necessity of common action by the Twelve in an area described in article K.1 TEU, Member States will presumably be bound to use the institutional

¹⁰⁹ *Nanz (1992)*, p. 133, for instance, writes: "Der grösste Teil der Themen aus den Bereichen Inneres und Justiz ist im Rahmen des Artikels K geregelt. Dies bedeutet einmal, dass es sich nicht um EG-Kompetenzen handelt, sondern um Bereiche intergouvernementaler Zusammenarbeit."

¹¹⁰ *Timmermans*, p. 362. See also *Schwartz*, in: *Groeben/Thiesing/Ehlermann*, Article 220, para. 43-69.

¹¹¹ Theoretically, there remain limits to the extent to which Community institutions may abstain from the use of Community powers, one of these being the scope of article 175 EC, another being the possible potential of article 138b EC, which summarizes the interinstitutional role of the EP. See *Müller-Graff*, pp. 505-506. Similarly, the *Commission* could use the infringement procedure provided by article 169 EC, and sue the Member States jointly for having violated their Treaty obligations. See *Dehousse (1994)*, p. 11, footnote 37.

¹¹² This becomes even more evident if we turn to the areas listed in article K.1(7) to (9) TEU. By contrast to the areas described in article K.1(1) to (6) TEU, these areas do fall quite clearly outside Community competence. For instance, the EC Treaty does not give the EC legal competence in respect of policing. Consequently, entrusting the Commission a right of initiative in these areas or providing for the possibility to transfer these matters to the EC Treaty would have signified a substantial change. Instead, this has been explicitly excluded by article K.3(2) and K.9 TEU.

framework of the Union as laid down in Title I and VI TEU.¹¹³

C) Thirdly, pursuant to article K.7 TEU, the "provisions of this Title shall not prevent the establishment or development of closer cooperation between two or more Member States". This provision is particularly aimed at the Schengen Convention and the respective implementing measures. However, article K.7 TEU places a limit on such close cooperative arrangements. They may exist only "in so far as such cooperation does not conflict with, or impede, that provided for" in Title VI TEU. The intention is to give precedence to action under Title VI TEU; and, according to *Hendry*, "the implication appears to be that, once agreed, cooperative action by the Twelve would override any incompatible arrangements concluded between only some of them".¹¹⁴

This sounds good in theory. Reality, however, may be more complicated. For instance, even if a decision was taken at the level of the Twelve, provisions agreed previously under Schengen may not be fully replaced, for the latter may deal with the same subject from different points of view; they may be applicable under different circumstances, or they may be supplementary. The last case is especially likely to occur as (some) Schengen States may, due to broader consensus, agree on more extensive cooperation in a particular field.¹¹⁵ Thus, it could often be unclear whether agreements are incompatible at all, for they may constitute a *lex specialis*. Secondly, according to *Hendry*, the implication of article K.7 TEU "*appears*" to be that cooperative action by the Twelve would override any incompatible arrangements concluded between only some of them. However, even though this is what the wording may suggest it is not absolutely *certain* whether article K.7 TEU actually constitutes a clause of precedence. If not, a solution would have to derive from international public law, in particular from the *lex posterior* principle as embodied in the Vienna Convention on the Law of Treaties.¹¹⁶

Of course, none of the questions raised in the previous paragraph are really new. Yet they are particularly disturbing in this context, for they may occur *quite often* and they may occur *in politically and legally highly sensitive fields*. These questions will primarily be dealt with by national executives and courts. The result of this will inevitably be diverging interpretations in the Member

¹¹³ Nanz (1992), p. 133.

¹¹⁴ Hendry, p. 309.

¹¹⁵ See also article 142(1)(2) Schengen II, quoted above in footnote 62.

¹¹⁶ See article 30 of the Vienna Convention, and *Wolfram Karl*, Treaties, conflicts between, in: *Rudolf Bernhardt*, Encyclopedia of Public International Law, Vol. 7, Elsevier Science Publishers, Amsterdam 1984, pp. 467-473.

States, a lack of clarity about legal force, and uncertainty about which regulation has precedence.

Finally, as described in Chapter 1, a confusing element of intergovernmental cooperation in the fields of justice and home affairs has been the lack of coherence with regard to the legal status and effect of acts adopted. Title VI TEU will not put an end to this *legal disorder*. Instead, article K.3 TEU provides for various "new" forms of cooperation, and only "conventions" drawn up pursuant to article K.3(2)(c) TEU will be clearly indicative of a (binding) act of public international law. By contrast, the terms "joint positions" and "joint actions" are very general and seem to be appropriate for CSFP (Title V TEU), i.e. *foreign policy*, rather than for cooperation in the areas covered by Title VI TEU.¹¹⁷ Are these forms of cooperation intended to be legally binding? Will they be public or confidential? Will they require parliamentary ratification or not? Similar questions will occur with regard to the measures decided by the Council implementing joint actions and conventions in pursuance to article K.3(2)(b) and (c) TEU. The Treaty is silent on all these questions.¹¹⁸

According to Müller-Graff, "it seems most likely that a joint position in the context of the third pillar has to be understood as a joint declaration or recommendation without a legally binding effect".¹¹⁹ With regard to *joint actions* the author notes that on a linguistic level the term parallels the wording of article J.3 TEU, providing for *joint action* in the context of the CFSP. Yet the adoption of a joint action as set out in article K.3 TEU is not attributed expressly the same consequence as the adoption of the joint action in article J.3(4) TEU.¹²⁰ Müller-Graff therefore concludes: "... comparing the wording of articles J.3 and K.3 TEU, it seems doubtful that a joint action in article K.3 TEU - lacking the specific language of article J.3(4) TEU - can be understood to have a committing effect on the Member States in that sense".¹²¹ However, this conclusion cannot be generalized. Instead the question whether or not an act in the form of a *joint action* (or *joint position*) is binding in international law will primarily depend upon the intention of the parties and the terms of the

¹¹⁷ The terms and tools established under Title VI TEU indicate that the Treaty was drafted by diplomats, and that Title V TEU had served them as a model.

¹¹⁸ See *Cloos et. al.*, pp. 504-507.

¹¹⁹ Müller-Graff, p. 509.

¹²⁰ Article J.3(4) TEU provides: "Joint actions shall *commit* the Member States in the positions they adopt and in the conduct of their activity." [Emphasis added].

¹²¹ Müller-Graff, p. 509.

concrete act itself.¹²² The legal effect of such acts within the national legal orders will depend upon national constitutional law.

Again, all these questions will be dealt with primarily by national executives and courts, and again the result of this will inevitably be diverging interpretations in the Member States and a lack of clarity about the legal force of such acts. Whilst this may (still) be acceptable in the fields of "traditional" foreign affairs, it seems to be far less so in the fields of justice and home affairs. Indeed, legal uncertainty in *justice* affairs seems almost a contradiction in terms.

Presumably, acts adopted under the new Title VI TEU will, from the lawyer's point of view, often have to be qualified as "soft law",¹²³ thus changing the situation very little in respect to the situation as it was prior to 1993. Interestingly, Title VI TEU even establishes a *legal and institutional framework for the systematic use of such a regulatory technique*. In practice, this may lead to the result that action under Title VI TEU, when taken, will be *increasingly discretionary* and *opaque*, and that it will be subject only with difficulty to democratic and legal controls.¹²⁴ Parliamentary participation at national level, for instance, often depends on the *legal effect* of the respective international agreement under negotiation. Usually, only agreements binding in international law are subject to prior parliamentary information and consultation or to approval, even though the political impact of legally non-binding acts may often be equivalent to that of a treaty instrument proper.¹²⁵

¹²² See above footnote 35.

¹²³ See above Chapter 1.D, pp. 8. In fact, Member States may continue to use the same formats of acts as before. E.g., at its meeting in Luxembourg on 20 June 1994, the Justice and Home Affairs Council adopted a *resolution* on limitations on admission of third-country nationals to the Member States for employment. On the one hand, Member States have pledged to endeavour to seek to ensure by 1st January 1996 that their national legislation conforms with the principles of this resolution, and, on the other, the text stipulates that these same principles "are not legally binding on the Member States, and do not afford a ground for action by individual workers or employers". See *Migration News Sheet*, July 1994, No. 136-07, p. 1. At its 29/30 November 1993 meeting the Council adopted, *inter alia*, a *recommendation* on crimes against the environment, a *recommendation* on the liability of organisers of sporting events, *conclusions* concerning racism and xenophobia, and a *declaration* on extradition. See *European Report*, 1 December 1993 (No. 1906), I/4.

¹²⁴ See Snyder (1994), pp. 13-14.

¹²⁵ See below Chapter 3, and Tomuschat (1978), pp. 32-34.

B. The new institutional framework

"It is the central feature of the pillared approach, ... that we wanted to extend into these areas, that we wanted the European Union, but the thing we had to assure was that the Commission would not lead it, it would not be subject to the European Parliament, not subject to the European Court".¹²⁶

When in the future all the Member States agree on the necessity for cooperation among the Twelve in an area described in article K.1 TEU, such matters will have to be pursued within the institutional framework of the European Union established under Title I and VI TEU.¹²⁷ This new framework is thus supposed to eliminate the networks and institutions described above insofar as they comprise *all twelve* Member States. As underlined by Müller-Graff, the simplification and the concentration of these contacts and cooperation together into one single institutional framework is, in practice, "the most important step taken in establishing" the Third Pillar.¹²⁸

Pursuant to article D TEU, the *European Council* shall provide the Union "with the necessary impetus for its development and shall define the general political guidelines thereof". As for the role of the EP, the Council, the Commission and the European Court of Justice, article E TEU provides that these bodies "shall exercise their powers under the conditions and for the purposes provided for, on the one hand, by the provisions of the [EC] Treaties ... and, on the other hand, by the other provisions of this Treaty". Title VI TEU represents some of these "other provisions". The objective of article E TEU is thus to draw a clear line between the actions of these institutions within and outside the European Communities. In exercising functions pursuant to Title VI TEU, these institutions thus act according to specially defined procedures, and not according to EC-law and procedures.

However, as mentioned above, article K.8(1) TEU contains a list of EC Treaty provisions applicable to the provisions relating to the areas referred to in Title VI TEU. Significantly, article K.8(1) TEU applies to the operating of the Third Pillar, *inter alia*, articles 142, 151 and 162 EC. Thus, even when acting under Title VI TEU, the EP, the Council and the Commission will follow a course of conduct according to their ordinary rules of procedure.

¹²⁶ Kenneth Clarke, in: *Home Affairs Committee, House of Commons, Intergovernmental Co-operation in the fields of Justice and Home Affairs, Minutes of Evidence, Wednesday 21 April 1993, HC (1992-93) 625-i, p. 9.*

¹²⁷ See article C and K.1 TEU.

¹²⁸ Müller-Graff, p. 496.

1. Council of Interior and Justice Ministers

Title VI TEU puts an end to the different forms of ministerial meetings among the Twelve as described in Chapter 1. The new *Council of Interior and Justice Ministers* is the body within which the Member States are to act formally under Title VI TEU. It is part of the "Council of Ministers" under the TEU and will, therefore, be serviced by the Council Secretariat. The Secretariat will assist in making sure that papers are available and circulated, in making the practical arrangements, in preparing minutes, and so forth.

Pursuant to article K.4(3) TEU, the Council shall act unanimously, except on matters of procedure and in cases where article K.3 TEU provides for other voting rules. Article K.3(2)(b) TEU provides that the Council may decide "that measures implementing joint action are to be adopted by a qualified majority",¹²⁹ and, according to article K.3(2)(c) TEU, measures implementing conventions drawn up under the Third Pillar "shall be adopted within the Council by a majority of two-thirds of the High Contracting Parties".

Thus, in contrast to the executive committees established under previous (draft) conventions on matters of justice and home affairs, the Council, which is supposed to replace such committees, will not necessarily have to act unanimously when deciding on implementing measures.¹³⁰ However, article K.3(2)(c) TEU only sets up a presumption that measures to implement any convention concluded under Title VI shall be adopted by a majority of two-thirds of the parties; the convention itself can override that presumption by stipulating different decision-making rules. Similarly, article K.3(2)(c) TEU only sets up a presumption that these measures will be adopted "within the Council"; again, this presumption can be overridden by the terms of the convention itself.

The first meeting of the new Council of Justice and Interior Ministers took place in Brussels on 29/30 November 1993. At this meeting the Council agreed, *inter alia*, on a *priority work programme for 1994* for all the areas within its responsibility.¹³¹ In addition, the Council prepared an *action plan in the fields*

¹²⁹ Article K.4(3) TEU: "Where the Council is required to act by a qualified majority, the votes of its members shall be weighted as laid down in article 148(2) of the Treaty establishing the European Community, and for their adoption, acts of the Council shall require at least 54 votes in favour, cast by at least eight members."

¹³⁰ See e.g. article 26 of the (revised) draft External Frontiers Convention, proposed by the Commission (COM (93) 684 final, 10 December 1993). See also articles 2(5), 5(3), 8(5), 10(4), 11(3), 15(3), 16, 20(2), 21(2), 22(3) of this draft Convention which all give power to the Council to adopt implementing measures.

¹³¹ Spain maintained formal reserves on several topics though it was established that the document before the Council did not give rise to any objections in principle.

of Justice and Home Affairs which had been requested by the European Council on 29 October 1993.¹³² Both documents were subsequently presented to the European Council and were agreed on by the latter at its Brussels meeting on 10/11 December 1994.¹³³

The *work programme*, which fits into the more general *action plan*, contains a fairly detailed list of "priority actions" and "other actions" to be taken by the Council in the fields of: (1) *asylum and immigration*;¹³⁴ (2) *police cooperation, customs cooperation and cooperation in the fight against drugs*;¹³⁵ and (3) *judicial cooperation*.¹³⁶ Furthermore, the programme provides for working structures (working groups) to be set up in these fields. The objective of the measures proposed by the Council is to "enable progress to be made towards the creation, in accordance with the provisions of the Treaty, of an area without internal frontiers thanks to satisfactory security arrangements, and a considerable boost to be given to cooperation between the

¹³² See Bull.EC 10-1993, point I.5.

¹³³ See Bull.EC 12-1993, point I.8. Both work programme and action plan are not officially published documents. The unpublished version of the *work programme* is dated Brussels, 2 December 1993 and referenced as *European Union - The Council*, 10655/93 (incl. Annex 10655/93), JAI 12 (hereinafter: *Council, work programme*); the unpublished version of the *action plan* is dated Brussels, 2 December 1993 and referenced as *European Union - The Council*, 10684/93, JAI 11 (hereinafter referred to as the *Council, action plan*).

¹³⁴ In these fields, the following areas are, *inter alia*, defined as *priority actions*: Monitoring the implementation of the Dublin Convention; Eurodac; harmonized application of the definition of refugee within the meaning of article 1.A of the 1951 Geneva Convention; definition of minimum guarantees in procedures for examining asylum applications; signing and completion of proceedings on application on the draft external frontiers Convention; consultation/cooperation on the execution of expulsion measures. See *Council, work programme*, pp. 2-4.

¹³⁵ In these fields, the following areas are, *inter alia*, defined as *priority actions*: Conclusion of *Europol Convention*; finalization of the *Convention on the Customs Information System*; completion of work on the *Convention on the European Information System*. See *Council, work programme*, pp. 5-10.

¹³⁶ In these fields, the following areas are, *inter alia*, defined as *priority actions*: examination of possible improvements in the area of extradition; mutual judicial assistance; enforcement of foreign measures (disqualification from driving, confiscation); protection of the financial interests of the Union; action against international organized crime; possible extension of the scope of the Brussels Convention to family matters and succession. See *Council, work programme*, pp. 11-15, and *Council, action plan*, pp. 14-15.

Member States in these areas, to the benefit of the citizens of the Union".¹³⁷

Work programme and *action plan* can thus be compared with the above-described "Palma Document". They are of considerable *political importance*. Nonetheless, like the "Palma Document", they have not been officially published by the European Union.

2. The new working structure

Article K.4(1) TEU provides for the setting up of a *Coordinating Committee*, the so-called "K.4 Committee", consisting of senior officials.¹³⁸ The K.4 Committee replaces, *inter alia*, the previous Coordinators' Group on the Free Movement of Persons, which has ceased to exist.¹³⁹ The K.4 Committee is supposed to bring into effect a more structured (channelled) communication between the ministries and law enforcement agencies responsible, and to streamline the link between policy-making and financial resources.¹⁴⁰ However, the K.4 Committee does not displace COREPER,¹⁴¹ which retains its role in preparing the Council's work alongside the K.4 Committee. Quite obviously, there is a potential for conflict of powers between these two bodies

¹³⁷ *Council, action plan*, p. 4 [emphasis added].

¹³⁸ In addition to its coordinating role it shall be the task of the K.4 Committee to:

- give opinions for the attention of the Council, either at the Council's request or on its own initiative;
- contribute, without prejudice to Article 151 of the Treaty establishing the European Community, to the preparation of the Council's discussions in the areas referred to in Article K.1 and, in accordance with the conditions laid down in Article 100d of the Treaty establishing the European Community, in the areas referred to in Article 100c of that Treaty." (Article K.4(1) TEU).

¹³⁹ See *d'Oliveira (1994)*, p. 263, and *Cloos et. al.*, p. 509.

¹⁴⁰ The establishment of Title VI TEU in general and of the K.4 Committee in particular may also entail a more structured communication between (and within) the responsible ministries at national level. E.g., in France government's position in CJHA (and Schengen) is now being coordinated by the "*Secrétariat général du Comité interministeriel pour les Questions de Coopération économique européenne (SGCI)*". The SGCI has a staff of about 140 persons and is placed under the direct authority of the Prime Minister. In the past, it has already coordinated French position in Community affairs very efficiently. See *Premier Ministre*, Circulaire du 21 mars 1994 relative aux relations entre les administrations françaises et les institutions de l'Union européenne, JO, Lois et Décrets, 31 mars 1994, 4783-4785.

¹⁴¹ Article 151 EC is expressly saved by the second indent of article K.4(1) TEU.

inherent in this construction.

As indicated above, work under the aegis of the K.4 Committee has been organised by the Council into three sectors: immigration and asylum; police and customs-cooperation; judicial cooperation. Each sector has a *senior Steering Group* which proposes a work programme/timetable to the K.4 Committee each year, and monitors progress within the respective working groups. In practice, the three *Steering Groups* comprise the same senior officials who previously coordinated the various working groups under *Trevi*, the *ad hoc Group on Immigration*, *MAG* and *EPC Judicial Cooperation*. The latter fora have thus been merged into the K.4 structure. Each *Steering Group* is served by several permanent/*ad hoc* working groups. The new working structure can be described as follows:¹⁴²

Council
↑↓
COREPER
↑↓
K.4 Committee
↑↓

Steering Group I: Immigration and Asylum (former Ad hoc Group on Immigration)

Working Groups:

- asylum
- migration
- visas
- external frontiers
- forged documents

Steering Group II: Security and law enforcement, and police and customs cooperation (former Trevi, MAG)

Working groups:

- terrorism
- police cooperation (operational and technical)
- drugs and organized crime
- customs
- ad hoc working party on Europol

Steering Group III: Judicial Cooperation (former EPC judicial cooperation) ad hoc working parties:

- extradition

¹⁴² See *Council, work programme*, pp. 4, 10, 13 and 15 ; see also *Monika Den Boer*, *Policy Cooperation in the TEU: Tiger in a Trojan Horse?*, *Common Market Law Review*, 1995, pp. 555-578, esp. 558.

- international organized crime
- relationship between criminal law and Community law
- disqualification from driving
- extending the scope of the Brussels Convention to family matters and succession
- simplify and expedite procedures for the transfer of documents between Member States

However, not all the previous arrangements among the Twelve in the fields of justice and home affairs have been merged into the K.4 structure. For instance, CELAD will continue to work outside this framework, and the *Horizontal Group on Data Processing*, which is examining the possibilities of the creation of the EIS, reports directly to the K.4 Committee.

3. The role of the Commission

Pursuant to article K.4(2) TEU the Commission "shall be fully associated with the work in the areas referred to in" Title VI TEU. Accordingly, the Commission is now officially and institutionally involved in CJHA, and it has been given the right to attend and participate in all meetings (at all levels) held in applying Title VI TEU. However, this largely reflects the practice already followed before the Maastricht Treaty.

Legally speaking, the upgrading of the Commission's role is limited: its (partial) right of initiative is shared with Member States, and unanimity is not required to alter its proposals in the few instances, where majority voting is possible.¹⁴³ Most significantly, the Commission is not given the task of implementing the provisions of the Title VI TEU.¹⁴⁴

Wishing to derive maximum benefit from the new machinery, the Commission has quickly made use of the right of initiative. Immediately after the entry into force of the TEU, the Commission submitted a proposal on a (revised) draft *Convention on the crossing of the external frontiers of the Member States*, and a proposal for a regulation based on article 100c EC.¹⁴⁵ Subsequently, the Commission adopted a *Communication on Immigration and Asylum Policies*.¹⁴⁶ This communication was followed by further reports and

¹⁴³ See article K.3 TEU.

¹⁴⁴ Article K.8(1) TEU, which applies certain EC Treaty provisions for the purpose of operating Title VI TEU, does not mention article 155 EC.

¹⁴⁵ COM (93) 684 final, 10.12.1993.

¹⁴⁶ *Commission of the European Communities (1994): Communication for the Commission to the Council and the European Parliament on Immigration and Asylum Policies*, COM (94)

initiatives.¹⁴⁷

Notwithstanding these varied activities, it remains to be seen whether the Commission will succeed in obtaining an active part under the Third Pillar. *D'Oliveira*, for instance, believes that the real impetus and initiative may come largely from the K.4 Committee, and that in the now established intergovernmental framework with its high frequency meetings machinery, it becomes less probable that the Twelve will allow the Commission to play an important role.¹⁴⁸

4. The role of the European Court of Justice

Title VI TEU as such is not under the jurisdiction of the European Court of Justice. As noted by *Dehousse*, "national governments have offered evidence of their aversion to «judicialization» of diplomatic processes".¹⁴⁹

The Court may have power where it has expressly been given a role in conventions under article K.3(2)(c) TEU. This, for example, was proposed by the Commission with regard to the new draft External Frontiers Convention.¹⁵⁰ However, several Member States, France and the United Kingdom in particular, have already indicated their opposition to such a provision.¹⁵¹ Besides, similar objections have been made with regard to other (draft) Conventions being prepared within the working groups described above.¹⁵²

23 final, 23.02. 1994.

¹⁴⁷ See e.g., *Commission of the European Communities*, Proposal for a Council Regulation laying down a uniform format for visas, COM (94) 287 final, 13.07.1994.

¹⁴⁸ *Oliveira (1994)*, pp. 263-264.

¹⁴⁹ *Dehousse (1994)*, p. 10.

¹⁵⁰ Article 29 of this draft Convention provides that: "The Court of Justice of the European Communities shall have jurisdiction:

- to give preliminary rulings concerning the interpretation of this Convention; references shall be made as provided in the second and third paragraphs of Article 177 of the Treaty establishing the European Community;
- in disputes concerning the implementation of this Convention, on application by a Member State or the Commission."

¹⁵¹ See *Ameline (1994a)*, p. 26.

¹⁵² See, for instance, with regard to the draft *EIS Convention*, *Agence Europe*, 20/21 June 1994 (No. 6255), p. 8. Furthermore the European Council of 26/27 June 1995 in Cannes has reached an agreement as to the conclusion of the *Europol Convention*; however the final decision as to the jurisdiction of the ECJ has been postponed by the heads of governments.

5. The role of the European Parliament

Before Maastricht the EP was not officially involved in intergovernmental cooperation on justice and home affairs. Article K.6 TEU now provides that:

"The Presidency and the Commission shall regularly inform the European Parliament of discussions in the areas covered by this Title.

The Presidency shall consult the European Parliament on the principal aspects of activities in the areas referred to in this Title and shall ensure that the views of the European Parliament are duly taken into consideration.

The European Parliament may ask questions of the Council or make recommendations to it. Each year, it shall hold a debate on the progress made in implementation of the areas referred to in this Title."

The terms used in article K.6 TEU are extremely vague. Moreover, at least the first and third sentence of article K.6 TEU reflect only the practice that was already well established before 1993. As described in Chapter 1, successive Presidencies kept the EP informed of progress on justice and home affairs, both by transmitting documents and through ministerial appearances at least once every six months. In addition, the Commission reported on the activities of the intergovernmental working parties and ministerial meetings. Article K.6 TEU turns these voluntary arrangements into an (indistinct) treaty requirement. Also, the EP had already asked questions, held debates and passed resolutions, making recommendations on matters which now form the basis of Title VI TEU.¹⁵³

The second sentence of article K.6 TEU may, theoretically, be interpreted as an advance on previous practice. The EP is given, for the first time, the right to be "*consulted*" on the "principal aspects of activities in areas referred to" in Title VI; furthermore, the Presidency is obliged to ensure that the parliament's views are "duly taken into consideration". However, article K.6 TEU provides for various "loopholes" to minimize such parliamentary participation. Firstly, it is by no means clear what falls under "principal aspects of activities" on which the parliament should be consulted. Does this include all the measures the Council wants to adopt on the grounds of article K.3 and K.9 TEU? Obviously, article K.6 TEU leaves the Presidency with *great discretion* on this behalf, and there will, in principle, be no jurisdiction of the European Court of Justice to protect

See Bull.EU 6-95, points I.20-27, and Monika Den Boer (above footnote 142), pp. 568-572.

¹⁵³ See on this behalf the new article 94 (Recommendations in the fields of justice and home affairs) of the Parliament's rules of procedure.

the parliament's rights.¹⁵⁴ Secondly, "consultation" must logically be carried out *in advance*. This implies the early transmission of draft texts and the willingness of Member States (and of the Commission) to give oral evidence to the EP before any decision-taking. Yet under article K.6 TEU the Presidency and the Commission are only (explicitly) obliged to inform the EP of "discussions in the areas covered by this Title". Again, there remains a large margin of discretion. The same, finally, is true for the obligation of the Presidency to "ensure that the views of the EP are duly taken into consideration". In his report on parliament's role in CJHA, *Robles Piquer*, MEP, commented this clause as follows:

"A clause such as that which instructs the presidency to ensure that the views of the European Parliament are «duly taken into consideration» is almost moving in its naivety. How is a recommendation of this kind possible, without anyone having the power to enforce it? How does something as non-binding as this get into a treaty?"¹⁵⁵

Up to now, the restrictive interpretation of article K.6 TEU has prevailed. The EP has obtained *draft texts* only in exceptional cases, and the majority of Member States has favoured simple information *ex post* rather than consultation *ex ante*.¹⁵⁶ The Greek Presidency, for instance, has declined the invitation of the Committee on Civil Liberties and Internal Affairs to inform the Committee *prior* to the meeting of the Justice and Home Affairs Council of 23 March 1994 in Brussels of the issues to be treated during the meeting.

However, the EP finds itself in a better position when proposals are put forward by the Commission. For instance, the above-mentioned Commission's proposal for an External Frontiers Convention, together with the proposal for an EC regulation on visa policy, was published as a *Communication from the Commission to the Council and the European Parliament*.¹⁵⁷ Both proposals were submitted to the EP by the Commission on 10 December 1993. Three

¹⁵⁴ By contrast, at Community level, where Treaties require the Council to consult the EP before an act is adopted, the opinion of the European Parliament must be sought and obtained before an act can be lawfully adopted. If, in such a case, the Council purports to adopt an act without consultation, such an omission would supply grounds for seeking the annulment of the act because an essential procedural requirement had been infringed. See e.g., ECJ, Case 138/79: *SA Roquette Frères v. EC Council* [1980] ECR 3333.

¹⁵⁵ *Robles Piquer*, p. 17.

¹⁵⁶ See *Agence Europe*, 9 September 1994 (N° 6311), p. 8, and 20/21 June 1994 (N° 6255), p. 8.

¹⁵⁷ COM (93) 684 final, 10 December 1993.

months later, the same communication was forwarded to the EP by the Council; but the Committee on Civil Liberties and Internal Affairs had started to consider the draft Convention well before being officially consulted by the Council. After four meetings, the Committee, on 29 March 1994, adopted a report and a motion for a resolution,¹⁵⁸ which were both debated in parliament on 21 April 1994. Parliament approved the Commission's proposal subject to a number of substantial amendments.¹⁵⁹

The Commission finds itself in a delicate position when communicating with the EP on justice and home affairs. According to the second sentence of article K.6 TEU, the consultation of the EP falls under the (sole) responsibility of the Presidency. If proposals do not stem from the Commission, the latter may be especially reluctant to give the EP information Member States probably want to maintain confidential. If the Commission does not respect this choice, it may soon find itself outside the decision-making process.

To sum up, the establishment of the Third Pillar has not changed the EP's legal status significantly with regard to cooperation on justice and home affairs. Access to documents has remained restricted, the chances of participation are limited and strongly dependent on the goodwill of the Member States.¹⁶⁰ In any event, the parliament's views and recommendations have no binding force, and the Member States' failure to respect article K.6 TEU by no means affects the validity of acts adopted under Title VI TEU.¹⁶¹

Parliament has therefore called on the Council and the Commission to enter into negotiations with it regarding the conclusion of an *interinstitutional agreement* on the application of article K.6 TEU. A draft for such an agreement

¹⁵⁸ *Committee on Civil Liberties and Internal Affairs*, Report on the Communication of the Commission containing a proposal for a decision, based on article K3 of the Treaty on European Union establishing the Convention on the crossing of the external frontiers of the Member States, Rapporteur: *Christopher Beazley*, A3-190/94 (PE 208.169/final).

¹⁵⁹ See OJ No. C 128 of 9.5.1994, p. 358.

¹⁶⁰ Mention should also be made of the new article 93 (Consultation of and provision of information to Parliament in the fields of justice and home affairs) of the European Parliament's rules of procedure. In this article the Committee on Civil Liberties and Internal Affairs is given responsibility to ensure that parliament is fully informed and consulted on the activities covered by CJHA. Article 93 (3) stipulates that the "Council and Commission shall provide the committee responsible with full, regular and timely information on the development of cooperation in the fields of justice and home affairs". Of course, this provision cannot bind the Council or Commission. So far, it has remained meaningless.

¹⁶¹ The process of consultation on the grounds of article K.6 TEU should, therefore, not be confused with the consultation procedure on proposals for Community legislation required by several EC Treaty articles.

was forwarded to the Council and the Commission in December 1993.¹⁶² This draft agreement contains very detailed and far reaching provisions on parliamentary *information, participation* and *accountability* under the Third Pillar. It is divided into three sections. The first section regards the *information* ("access to documents" etc.) which has to be made available to the EP:

- "1. The Council and Commission shall keep the European Parliament informed at all times of the progress of work in the fields of justice and home affairs.
2. Halfway through, and at the end of, its term, the Council shall submit to the European Parliament a biannual report on work in hand and progress achieved in this field. Parliament shall hold a debate on this report in presence of the President of the Council on the basis of a report by its competent committee.
3. There shall be a biannual colloquy between the President of the Council and the competent committee of the European Parliament on cooperation in the fields of justice and home affairs. The European Parliament's competent committee may request the President of the Council to appear before it for the purpose of information.
4. The Council shall be represented at the appropriate possible level at the meetings of the competent body of Parliament and shall accept the introduction of question time in committee.
5. The institutions shall set up a joint information network for the transmission of documents, including working documents on the COREU model. Members of Parliament directly concerned may not be refused access to such documents on the grounds of confidentiality.
6. The Council and the Commission shall supply the competent body of Parliament, without delay, with all the data on which the decision to adopt a joint action or position is based.
7. The Commission shall regularly inform the competent body of Parliament of the content of the proposals with its intends to submit to the Council. This information shall also cover the activities of the external delegations in third countries or to international organizations."

Section two of the draft agreement regards the consultation ("participation") of the EP:

- "1. The Council shall formally consult the European Parliament in advance, and in accordance with the appropriate procedures, on proposed joint positions, joint action and conventions as specified in Article K.3(2). Parliament undertakes to deliver its opinion within a period agreed with the Council.
2. Parliament shall be immediately informed of any initiative by a Member State or the Commission with a view to the conclusion of a new international agreement. It shall be involved in the deliberations and in any decision to invoke Article 100c of the Treaty

¹⁶² *Interinstitutional Conference - European Parliament Delegation (The Secretariat)*, Draft interinstitutional agreement between the European Parliament, the Council and the Commission on the procedures for implementing Title VI of the Treaty on European Union, Brussels, 1 December 1993, PE 207.086/rev.

establishing the European Community in conjunction with Article K.9 of the Treaty on European Union.

3. Parliament shall be fully involved in the substance of deliberations between the Member States and the Commission on the content of the agreement; for this purpose, close cooperation shall be established between the Coordinating Committee referred to in Article K.4 of the Treaty on European Union and Parliament's competent committee.

4. Parliament or, where appropriate, its competent committee, shall be regularly informed of the progress of implementation of the agreement and shall be involved in any amendment thereof; the principles defined above shall extend to conventions implementing agreements and agreements requiring to be concluded with third countries.

5. The President of the Council may invite the representative of the European Parliament to attend a Council meeting in order to elucidate orally the opinions delivered by Parliament."

Section three, finally, regards the significance of parliamentary recommendations ("accountability") on matters of justice and home affairs

"1. The President of the Council shall include on the agenda of each Council meeting Parliament's questions and recommendations pursuant to Article K.6, third paragraph, of the Treaty on European Union.

2. The Council and Commission shall inform Parliament as soon as possible of the action taken on its recommendations and shall, in each case, specify the measures undertaken. Where the Council has failed to take action on Parliament's opinion, it shall inform Parliament of its reasons."

Quite obviously, these proposals go far beyond the intentions of the Maastricht Contracting Parties and of the content of article K.6 TEU. Parliament, *inter alia*, wants to have access to practically all the documents produced under the Third Pillar, confidential documents and working documents included. It wants to be consulted on the drafts of all joint positions, joint actions or conventions as well as of draft measures implementing any of these acts before they are adopted by the Council in accordance with article K.3(2) TEU. Parliament even wants to participate in deliberations in the Council on the contents of such measures.

The Council's response to these claims has been disapproving, and *Monar* suggests that the *excessive character* of parliament's proposals may be one of the reasons why, in February 1994, the Council informed the EP that it did not wish to enter into negotiations on the draft interinstitutional agreement on CJHA at all.¹⁶³

C. Summary of Chapter 2

¹⁶³ See *Monar*, p. 716.

Title VI TEU places intergovernmental cooperation on justice and home affairs among the Twelve within a *legal and institutional framework*. However ambiguous it may seem, it is demonstrably less ramshackle and disorganised than before.

The *institutional structure*, however, remains rather complex. Firstly, cooperation under Title VI TEU will take place at five different levels: in the Council, in COREPER, in the K.4 Committee, in three steering groups, and in numerous permanent/*ad hoc* working groups. The distribution of powers between COREPER and the K.4 Committee, in particular, is far from clear.¹⁶⁴ By contrast, in the European Community COREPER is directly connected to the working groups. Yet such a comparison might be misleading for in the Community most of the preparatory work is undertaken by the Commission. Secondly and more importantly, Title VI TEU does not merge all existing forms of cooperation into one coherent framework. On the one hand, intergovernmental cooperation on justice and home affairs among (some) Member States will continue to evolve outside the European Union, for instance within the Schengen Group. On the other hand, some aspects of justice and home affairs will be dealt with at Community level. Obviously, this rather puzzling distribution of powers between the EU, the EC and the Member States, with different legal instruments and procedures creates additional complications. Visa policy, for instance, will be dealt with partly at Community level (EC-regulations),¹⁶⁵ partly on the grounds of article K.1(2) and (3a) TEU (joint actions, conventions, implementing measures), partly within the Schengen Group (implementing measures)¹⁶⁶ and finally at national level.¹⁶⁷ It may therefore be concluded with Weiler that "the variety of decision-making procedures within the Community are complex and obstruct the transparency of governance. But the Three Pillar structure adds to this complexity without ... really achieving the goal of separateness".¹⁶⁸

¹⁶⁴ Similar problems exist under the Second Pillar (CFSP). Article J.8(5) TEU provides for the establishment of a *Political Committee* consisting of Political Directors which, without prejudice to the competences of COREPER, is supposed to fulfill functions, comparable to the ones entrusted to the K.4 Committee.

¹⁶⁵ Article 100c EC, and Commission's proposal for a regulation determining the third countries whose nationals must be in possession of a visa when crossing the external borders of the Member States, COM (93) 684 final, 10.12.1993, pp. 40-48.

¹⁶⁶ See articles 9-18 Schengen II.

¹⁶⁷ Visas for long visits, e.g., will remain a matter of national competence.

¹⁶⁸ Weiler (1993), p. 51.

3. Although the involvement of the Commission and (marginally) the EP holds out the prospect of greater openness and wider debate, *decision-making procedures* remain opaque and closer to those of classical diplomacy. Discussions and debate will be concentrated in *closed meetings* of ministers and their officials. Also, the rotating presidency of the Council, which holds a major responsibility in managing business, is not easily accessible, in particular not to parliamentarians from other Member States. Nonetheless, in contrast to previous arrangements, the Council of Interior and Justice Ministers will now act under its ordinary rules of procedures, and this bears several advantages with regard to the transparency of the decision-making process. Eventually, work within the Council will be more formalized and predictable.¹⁶⁹

Secondly, article 7(5) of the revised Council's Rules of Procedure provides for the publication of votes (unless the Council decides otherwise by simple majority).¹⁷⁰ Therefore, where the Council will adopt measures under Title VI by majority vote,¹⁷¹ theoretically, the results of such votes will have to be published. In addition, according to the revised article 6 of its Rules of Procedure, the Council may decide to hold meetings in public. However, it would be unrealistic to expect such public Council meetings under the Third Pillar in the near future.

Limited access to draft and final texts remains one of the most troublesome facts under the Third Pillar. Indeed, in contrast to Community legislation there is no automatic publicity for proposals. Furthermore, Title VI TEU does not provide for the publication of all measures adopted under article K.3 TEU.¹⁷² The Council's *work programme for 1994* and the *action plan*, for instance, which are of undoubted importance, have not been officially published by the European Union.¹⁷³ Moreover, just as before the introduction of Title VI TEU, the *legal status of documents* will remain unclear since article K.3 TEU is rather ambiguous on this regard. Acts under preparation will often be considered as legally non-binding, and this may serve Member States as a (convenient) shield

¹⁶⁹ See e.g., article 2 [agenda-setting] Council's Rules of Procedure.

¹⁷⁰ See OJ No. L 304 of 10.12.1993, p. 1.

¹⁷¹ See article K.3(2)(b) and (c) TEU.

¹⁷² Pursuant to article 15(3) of the Council's Rules of Procedure, the Council may decide unanimously to publish directives, decisions and recommendations in the *Official Journal*. This provision may also apply to acts adopted under Title VI TEU.

¹⁷³ Summaries of these documents are published in Bull.EC 11-1993, point 1.5.1., and Bull.EC 12-1993, point 1.8.

to keep things outside public or parliamentary scrutiny.¹⁷⁴

However, as shown above, under Title VI TEU, the Commission now shares a right of initiative with the Member States, and in contrast to the latter, it has not hesitated to publish proposals. The Commission's proposal for a draft External Frontiers Convention, for example, was published as an official COM-Document the day it was submitted to the Council. It may be recalled that the previous draft on the External Frontiers Convention, on which the *Ad hoc Group on Immigration* had almost finished its work by 1991, has never been submitted to public scrutiny.¹⁷⁵ Similarly, the Dublin Asylum Convention was only published after its signature by eleven Member States on 15 June 1990.

Title VI TEU does not explicitly provide for the general publication of proposals put forward and acts adopted thereunder. The EP's rights with regard to information, participation and accountability have remained strictly limited. All this, however, does not mean that the establishment of the Third Pillar has not had a positive impact with regard to openness and parliamentary involvement in CJHA at the national level. As will be shown for the United Kingdom, France and Germany below in Chapter 3, the introduction of the Title VI TEU has led in these (and other) EU Member States to the establishment of special parliamentary procedures which will allow for more systematic information and chances of parliamentary participation. The silence of Title VI TEU on such questions may thus also be interpreted as an attempt to keep the EP outside the decision-making process.

Chapter 3. National Parliaments and Cooperation in the Fields of Justice and Home Affairs after Maastricht¹⁷⁶

In this chapter it will be argued that even though the integration of matters of

¹⁷⁴ See above in Chapter 2.A, pp. 24-25, with regard to the legal nature of acts adopted under Title VI TEU, and below Chapter 3. See also Deirdre Curtin/Herman Meijers, "The principle of open government in Schengen and the European Union: Democratic retrogression?", *Common Market Law review*, 1995, pp. 391-442.

¹⁷⁵ See above Chapter 1.D, footnote 32.

¹⁷⁶ This Chapter will focus on the role of the British, French and German parliaments. These parliaments were chosen, in particular, for two reasons: firstly, the role attributed to them within their national constitutional system differs distinctively. It may therefore be interesting to compare whether European Union affairs are, notwithstanding these constitutional discrepancies, dealt with in a similar way. Secondly, the United Kingdom, France and Germany may be considered as the politically and economically most important EU Member States. For a detailed survey on the EC-scrutiny procedures in EU-Member States see *Weber-Panariello*.

justice and home affairs into the framework of the European Union has not changed the *intergovernmental character* of cooperation substantially, it has led national parliaments to commit their own governments to more openness and to accept a deeper parliamentary involvement in these matters at national level. Taking the British, French and German examples it will be shown that in these Member States cooperation in the fields of justice and home affairs is no longer legally defined as (traditional) *foreign affairs* which should come under the "domaine réservé" of the executive. Instead, these matters are now treated like or similar to *European Community affairs*, for which all Member States' parliaments have established *special scrutiny procedures*.

A. United Kingdom

1. The role of Parliament in *foreign affairs* and in *Community affairs*

As a general principle, the conduct of *foreign policy* under the United Kingdom constitution is within the prerogative of the Crown. This means that decisions on such matters of foreign policy as the recognition of foreign states or the conduct of diplomatic relations are taken by the government. Ministers are responsible to parliament in a broad sense for their conduct of foreign policy.¹⁷⁷ Their actions may be examined or criticised through oral or written questions or by debate in either House of Parliament. In addition, the House of Commons *Foreign Affairs Committee* of the House of Commons examines "the expenditure, administration and policy of the Foreign and Commonwealth Office and of associated public bodies".¹⁷⁸ Other so-called *departmentally related Select Committees*, for example the *Home Affairs Committee*, may conduct inquiries and report on "foreign affairs" insofar as they are related to their fields of competence.¹⁷⁹

Ministers do not, however, require prior authority from parliament for any action which can be carried out within the existing law of the United Kingdom. There is, in particular, no direct parliamentary involvement in the making of treaties, which is a wholly executive act. Parliament does not need to be

¹⁷⁷ On parliament's role in foreign affairs see Brownlie, pp. 4-9; Wade/Bradley, pp. 324-334, *Select Committee on the European Communities, House of Lords*, 17th Report, HL (1990-91) 80, Appendix 4.

¹⁷⁸ See St. Orders HC No. 130.

¹⁷⁹ Regarding the functions and powers of Select Committees see Gavin Drewry (ed.), *The New Select Committees*, 2nd ed., Oxford 1989. Departmentally related Select Committees do not exist in the House of Lords.

consulted before or during negotiations on a treaty or before a text is initialled. Draft treaties and other negotiating documents are not disclosed unless the originator of such documents has released them.

To this, two qualifications must be made. Firstly, treaties as such do not form part of United Kingdom law. Where they impose commitments at variance with internal law, effect must be given to them by or under statute. For this reason, treaties requiring changes in law are given effect by legislation in parliament *before* they are ratified or otherwise brought into force for the United Kingdom. Yet often a minister may be able to make the required changes in national law by exercising powers of delegated legislation. Secondly, under the *Ponsonby Rule*,¹⁸⁰ the government is obliged to lay on the table of both Houses of Parliament every treaty, *when signed*, for a period of 21 days, after which the treaty will be ratified. This both informs parliament of the treaty and enables it to be debated.¹⁸¹ The Ponsonby Rule applies when the text of a treaty has been authenticated by *signature* or by *adoption* in a Final Act of a Conference or international organisation, but not when a text has only been initialled. It only applies when the consent of the United Kingdom to be bound by the instrument is subject to a further formal act such as the exchange or deposit of an instrument of ratification.¹⁸² If a treaty does not come under the Ponsonby Rule but needs legislation before it can be brought into force in the United Kingdom, it has now become common to lay a text before parliament before the legislation is debated.

On the whole, the parliament rather plays a secondary role in foreign affairs. Usually it becomes involved only *after* the final decision-taking at international level. Early information or consultation are exceptional procedures. Sanctions exist in theory, but in practice parliament has never refused to authorise the ratification of a treaty laid before it.

¹⁸⁰ The Rule was so called after an undertaking given to the House of Commons in 1924 by the then Parliamentary Under-Secretary of State in the Foreign Office, Mr Ponsonby (later Lord Ponsonby).

¹⁸¹ As a general rule, when a treaty or international agreement in any form is signed on behalf of the United Kingdom with a foreign State or States or with an international organisation it is presented to parliament. Constitutionally, it is so presented by command of the Queen and therefore becomes a *Command Paper*. In practice the responsibility for presentation lies with the Minister in charge of the relevant Government Department. Command Papers are printed following their presentation to parliament and are included in a numbered series. When a treaty has been presented in this way its text becomes public domain and questions may be asked to the Minister responsible about its content.

¹⁸² About one in four of treaties entered into by the United Kingdom are subject to the Ponsonby Rule.

By contrast, special procedures have been established under which parliament is *consulted on draft Community legislation before* decisions are taken in Brussels. The United Kingdom system of parliamentary scrutiny of Community legislation is quite sophisticated; it cannot be described here in full detail.¹⁸³ In short, it rests on three pillars: extensive and early information; establishment of special EC-Committees; "parliamentary reserve".

Firstly, effective scrutiny implies the early provision of all relevant documents. Accordingly, government supplies parliament with the following "EC-Documents":

- "(i) any proposal under the Community Treaties for legislation by the Council of Ministers;
- (ii) any document which is published for submission to the European Council or the Council of Ministers;
- (iii) any document (not falling within (ii) above) which is published by one Community institution for or with a view to submission to another Community institution and which does not relate exclusively to consideration of any proposal for legislation;
- (iv) any other document relating to EC- matters deposited in the House by a Minister of the Crown".¹⁸⁴

The government has undertaken to supply parliament with EC-Documents within forty-eight hours of their receipt by the Cabinet Office (European Secretariat); it also agreed to supply both Houses with *explanatory memoranda* on the documents within two weeks.¹⁸⁵

Secondly, in both Houses up to one thousand EC-Documents are examined by special *EC Select Committees* every year.¹⁸⁶ These scrutiny committees,

¹⁸³ See Bates; Denza; Weber-Panariello, §§ 4-5.

¹⁸⁴ See St. Order HC No. 127(1).

¹⁸⁵ *Explanatory memoranda* always contain the following information: subject matter; ministerial responsibility; legal and procedural issues; subsidiarity; government's view on policy and financial implications; timetable.

¹⁸⁶ In the House of Commons a *Select Committee on European Legislation* is appointed under St. Order HC No. 127. In the House of Lords a *Select Committee on the European Communities* is appointed each session by a special motion. See e.g., HL Deb, 23 November 1993, Col. 140. Both Committees, *inter alia*, possess all the powers normally granted to Select Committees, including: power to send for persons, papers and records; power to adjourn from place to place; power to appoint sub-committees; power to appoint specialist advisers.

inter alia, report on the legal and political importance of such documents.¹⁸⁷ If a document is of sufficient importance, the committees may recommend it for debate, either on the Floor or in special *European Standing Committees* (ESC).¹⁸⁸ After such a debate either House may vote a Resolution. Such resolutions do not bind the government legally. Less important documents are cleared by the committees immediately and the scrutiny process is completed.

Thirdly, when Britain acceded to the EC in 1972, the government undertook not to agree to any proposal in the Council of Ministers until parliamentary scrutiny was complete. The government's undertaking was subsequently embodied in a resolution of the House of Commons of 30 October 1980.¹⁸⁹ A Minister may, however, decide "for special reasons" to give agreement in the Council of Ministers to a proposal still subject to scrutiny. The Minister must explain his reasons to the Select Committee or to the House. The principle of "*parliamentary reserve*" is applied in the same way in the House of Lords.

Thus, in the United Kingdom parliamentary participation in Community affairs and in foreign affairs differs quite significantly. Parliament is kept informed about EC legislative proposals and other important documents *systematically and at an early stage*. The government will give its consent in the Council only after parliament has been given the possibility to scrutinize and debate such a proposal. Some scholars therefore even consider that influence can be brought to bear at a much earlier stage in the formulation of EC-legislation than is true for domestic law (or international treaties), where parliament is often the last to be consulted. *Brew*, for instance, concludes: "It may be ... that while the formal power of Parliament has been eroded, its real influence has actually

¹⁸⁷ Both committees may conduct special inquiries. However, the methods of scrutiny in the House of Commons and the House of Lords differ widely. The function of the House of Commons EC Select Committee is confined to determining which proposals are legally or politically important and to advising which of these should be debated by the House. Only recently the Committee has started to advise on the merits of a proposal, or to consult outside expert opinion or vested interests on its substance. By contrast, the House of Lords EC Select Committee has much more focussed on in-depth enquiries and reports on Community proposals or other documents.

¹⁸⁸ ESC only exist in the House of Commons. In contrast to *departmentally related Select Committees* they are pure "debating committees", using the same debating procedures as the House, and indeed are much like the House in miniature.

¹⁸⁹ This Resolution has been revised by a second Resolution, voted by the House of Commons on 24 October 1990, in order to take into account the institutional changes of the Single European Act [introduction of the cooperation procedure pursuant to article 149 EEC]. See *Select Committee on European Legislation*, Scrutiny after Maastricht, First Special Report, HC (1993-94) 99, p. iii.

been enhanced".¹⁹⁰ And the British Secretary of State for Foreign Affairs, *Douglas Hurd*, recently expressed the following opinion: "I feel that the way in which this Parliament controls and deals with European decision-making, *to put it mildly*, is at least as brisk and thorough as that which it does with domestic".¹⁹¹

2. Parliament and CJHA

Title VI TEU does not provide for "*Community legislation*", and proposals will not be "*Community*" proposals. Accordingly, the above described special EC-scrutiny procedures do not automatically apply to the Third Pillar.

The question of parliamentary scrutiny of the intergovernmental pillars was, therefore, addressed during 1993 in both Houses on several occasions.¹⁹² The House of Lords' Select Committee on the European Communities, in particular, set up a full inquiry on this matter. In its final report, the Committee noted that:

"By comparison with Community legislative procedures, the Commission will have a smaller role, there will be no automatic publicity for proposals and governments will tend to prefer for their negotiations the secret ways to which they are accustomed. This lays a greater responsibility on national parliaments each to hold their own ministers to account. The European Parliament's formal powers under the Maastricht Treaty are limited in regard to ... justice and home affairs, and the Parliament is less able to influence the outcome of inter-governmental negotiations through the Commission whose role is also limited. As with Community legislation, the work of the European Parliament and the work of national parliaments are complementary, but we see national parliaments as having the stronger potential in regard to the inter-governmental pillars".¹⁹³

The Committee continued:

"The key to effective supervision is to obtain the right documents, and to obtain them in time to influence the outcome. Acquiring documents which are subject to inter-governmental negotiation is much more difficult than acquiring draft Community legislation, where almost all measures begin with a formal proposal from the Commission which is in the public domain. ... In order to exercise influence over the substance of international agreements and decisions it is essential to see texts in draft. Once a text is

¹⁹⁰ *Brew*, p. 246.

¹⁹¹ *Douglas Hurd*, in: *Foreign Affairs Committee, House of Commons*, Europe after Maastricht, Second Report, HC (1992-1993) 642-I, p. xxv [emphasis added].

¹⁹² See *Home Affairs Committee, HL* (1993), and *Foreign Affairs Committee*, above footnote 224.

¹⁹³ *Select Committee on the European Communities, HL* (1993), p. 22 (para. 48).

finalised at the international level the only choice available in practice to national parliaments is between acceptance, outright rejection or a demand for re-negotiation. ... We seek to make a more constructive input".¹⁹⁴

To this end, the Committee proposed that the government should in principle provide parliament with any document qualifying under one of the following three tests:

- significance (particularly where the rights or duties of individuals may be affected);
- eventual need for United Kingdom primary or secondary legislation;
- imposition of legally binding commitments on the United Kingdom.¹⁹⁵

These documents should be deposited in parliament within forty-eight hours, and followed after the normal period by an explanatory memorandum. In the Committee's opinion, the need for a speedy decision should not restrict disclosure. Also, Ministers should be reluctant to displace the presumption of public availability of a negotiating document, and they should be prepared to explain the need for secrecy to parliament when the matter does become public knowledge. Furthermore, the Committee proposed that parliamentary supervision of the Third Pillar should proceed as for the supervision of EC legislation,¹⁹⁶¹⁹⁷. Particularly, the objective should be to install a system under which the government undertakes wherever possible, not to agree to a proposal in the Council until parliamentary scrutiny has been completed.¹⁹⁸

¹⁹⁴ *Select Committee on the European Communities, HL (1993), p. 22 (para. 50).*

¹⁹⁵ See *Select Committee on the European Communities, HL (1993), p. 23 (para. 53).*

¹⁹⁶ In the Committee's opinion parliament can best contribute to the effective formation of policy in justice and home affairs by extending its mainly public procedures: "This method permits our own views to be strengthened by the reception of independent evidence and permits open questioning of the government's position and the reasons for it ... We would not wish to exclude altogether the opportunity for confidential briefings, but we recognise that the disadvantage of these is our inability to refer to this information either in reporting to the House or in public debate." *Select Committee on the European Communities, HL (1993), p. 24 (para. 57).*

¹⁹⁷ Besides, in recent years the House of Lords EC Select Committee has already carried out several enquiries in the areas within the Third Pillar. These include, *inter alia*, the Report on *Passport Union* (10th Report, HL (1979-80) 58), *Community Policy and Migration* (10th Report, HL (1992-93) 35), and *Select Committee on the European Communities, HL (1989)*. In all these areas there was some claim to Community competence and for that reason some proposal or communication from the Commission, deposited by the government pursuant to their undertakings relating to EC scrutiny, which formed the starting point for the enquiry.

¹⁹⁸ See *Select Committee on the European Communities, HL (1993), p. 24 (para. 62).*

The government's response to these proposals and similar proposals put forward by the House of Commons' Foreign Affairs Committee and the Home Affairs Committee was ambiguous.¹⁹⁹ On the one hand, the government agreed that accountability for work under the intergovernmental pillars should be to national parliaments, and that the key to effective parliamentary supervision was to make available the right documents in time to influence the outcome. It considered that parliament should receive in relation to Title VI:

- the first full text that is tabled of any Convention or proposals which will, if agreed, require later primary legislation in the United Kingdom, except where the proposal relates to security arrangements or operational matters and publication could prejudice the effectiveness of the intended action;
- substantial changes which subsequently occur during the negotiation of the final text;
- other documents going to the Council of Interior and Justice Ministers which are of significant importance.²⁰⁰

If the government concluded that a document regarding the Third Pillar fell under the agreed criteria for submission to parliament, it would be the government's intention to deposit it "quickly" and to supply an explanatory memorandum within ten working days of its deposit. Also, government welcomed the House of Lords' EC Select Committee's conclusion that parliament should focus and give independent views on government policy in this area through hearings and briefings. Ministers would be ready to offer briefings on matters of particular interest to the Committee. Such meetings should be held mainly in public. For certain business, however, confidential sessions might be more appropriate.²⁰¹

¹⁹⁹ See *House of Lords Scrutiny of the Inter-Governmental Pillars of the European Union - Observations by the Secretary of State for Foreign and Commonwealth Affairs and the Secretary of State for Home Affairs*, Presented to Parliament by the Secretary of State for Foreign and Commonwealth Affairs by Command of Her Majesty, February 1994, Cm 2471 (hereinafter referred to as the *Government's Response*).

²⁰⁰ See *Government's Response*, p. 4, and *Memorandum by the Home Office*, Intergovernmental Cooperation in the Fields of Justice and Home Affairs, in: *Select Committee on the European Communities, HL (1993)*, Evidence, p. 5. In its response the government anticipated that documents of a *legally binding nature* would fall under the heading of *other documents of significant importance* and could "accept an explicit commitment to provide them, subject to the requirements of security and confidentiality". Furthermore, the government agreed that secrecy may restrict disclosure under the Third Pillar but would take "reasonable steps to ensure that this exception is only used where absolutely necessary". *Government's Response*, p. 4.

²⁰¹ See *Government's Response*, pp. 4-5.

Thus, the government committed itself to quite extensive and early information. On the other hand, it was not persuaded that a *formal scrutiny reserve* was appropriate for cooperation carried out under the Third Pillar. *Michael Howard*, Home Secretary, defended this view before the House of Lords' EC Select Committee as follows:

[There will be *no formal power of scrutiny reserve* which the Committee would have to lift] but the reason for that is this: the scrutiny reserve has been exercised up to now in the context of proposals for legislation, for Community legislation, which is of course binding upon this country. That is in a particular category where I think the machinery of scrutiny reserve is directly relevant. We are not here talking about Community legislation and I therefore do not think that that precise procedure is appropriate. We are seeking to reproduce in general terms the opportunities for scrutiny which this and other committees will have, but the procedures will not be identical because the decision making processes are not identical".²⁰²

Consequently, except for the "traditional" constitutional tools (Ponsonby Rule) which continue to apply to CJHA, there will be no special scrutiny requirements which could prevent the United Kingdom's agreement to a proposal in the Council. Accordingly, there will be less *incentive* for the government to provide parliament with early information since it is not bound to await the completion of parliamentary scrutiny before it may act. By contrast, in the scrutiny of EC legislation, the principle of *parliamentary reserve* has served parliament as a useful weapon to push through early and complete information.

Nonetheless, under these new arrangements British parliament finds itself in a position which is clearly better than that prior to Maastricht. The institutional and legal framework under Title VI TEU has enabled CJHA to become more efficiently structured and transparent and therefore easier to follow. Most importantly, the government now earlier and systematically provides both Houses with more information. Significantly, only in exceptional cases will this information be subject to confidentiality.

B. France

1. The role of Parliament in *foreign affairs* and *Community affairs*

The powerful position of French parliament under the Third and Fourth Republics led to permanent governmental crises, and to the bad reputation of the parliamentary government in France. Consequently, under the Fifth Republic the

²⁰² *Select Committee on the European Communities, HL, (1993), Evidence p. 11; see Government's Response, p. 5.*

previous "*parlementarisme exacerbé*" was replaced by the "*parlementarisme rationalisé*". Parliament's legislative powers and those to control the Executive were rigorously reduced. The conducting of foreign affairs was almost entirely entrusted to the Executive, i.e. to the government on the one side and to the President on the other.²⁰³

As in the United Kingdom, there is no parliamentary involvement in the making of treaties, and Parliament does not need to be consulted before or during negotiations on a treaty. The *Foreign Affairs Committees*, which theoretically could communicate with the government, play a very marginal role and have been described by *Cot* as "friendly clubs which meet once a week to talk of this and that".²⁰⁴ The possibilities for Parliament to criticise the government have been considerably reduced since the *Conseil Constitutionnel*, in a decision of 1959 held that Parliament should not vote resolutions "qui tendraient à orienter ou à contrôler l'action gouvernementale".²⁰⁵ In other words: governmental actions may be examined or criticised through oral or written questions, but if parliament wants to influence, before final decision-taking, a certain governmental action in foreign policy by putting it to vote the only possibility is a vote of censure (article 49(2) Cf.). A further restriction of parliament's powers is evident in the fact that only the *government* is responsible to parliament. The directly elected *President* who plays an important role in foreign policy is not accountable to parliament at all. *Zoller* therefore concludes:

"Depuis 1958, il est clair qu'en matière extérieure, les assemblées n'ont aucune initiative, ni aucun pouvoir d'orientation. Sur le plan juridique, la raison essentielle en est que la politique étrangère n'est plus seulement l'affaire de l'exécutif, comme c'était déjà le cas sous les Républiques antérieures et comme c'est d'ailleurs le cas dans tous les régimes politiques; la politique étrangère est aujourd'hui l'affaire *exclusive* de l'exécutif dans la mesure où, d'une part, le parlement ne peut plus comme autrefois se saisir de n'importe quelle question et, d'autre part, il existe non seulement des dispositions (notamment, art. 20 et 52 de la Constitution), mais aussi un organe (le conseil constitutionnel) pour l'empêcher de sortir du rôle bien défini que le constituant lui a assigné".²⁰⁶

In practice, parliament becomes involved only after a treaty has been initialled or signed. Pursuant to article 53 Cf., *inter alia*, treaties of peace, trade

²⁰³ See esp. articles 20 and 52 Cf.

²⁰⁴ *Cot*, p. 13.

²⁰⁵ Décision n° 59-2 DC, 17, 18 et 24 juin 1959. See also *Zoller*, 37f.

²⁰⁶ *Zoller*, 37.

agreements, treaties relating to international organization, those involving a financial burden for the state, and treaties modifying laws²⁰⁷ can only be *approved or ratified* by virtue of a law. Interestingly, article 53 Cf. stipulates the intervention of parliament not only before ratification but also before approval. Thus, parliamentary intervention is not justified by a formal criterion (the existence of a treaty *needing ratification* in order to enter into force), but by a material one (the subject-matter of the however legally binding agreement). Nonetheless, article 53 Cf. gives parliament only limited power. Firstly, the government can make such a law of approval an issue of confidence and the constitution makes it very difficult for the parliament to defeat government.²⁰⁸ Secondly, parliamentary approval can be bypassed if the president decides to hold a referendum on the respective law to approve a treaty.²⁰⁹ Thirdly, according to *Cot*, parliamentary control "is severely limited in practice, sometimes by an unbelievable disorder in the selection process by which treaties are submitted to parliament and by a too strict interpretation" of article 53 Cf. itself.²¹⁰

Until 1979, parliamentary participation in *European Community affairs* was practically non-existent. After the first direct elections to the EP, the French Parliament adopted a law on the establishment of special parliamentary "*EC Delegations*".²¹¹ This law was revised in 1990.²¹² The government was

²⁰⁷ Article 34 Cf. contains a list of matters which have to be dealt with by (parliamentary) laws ("loi"). Pursuant to article 37 Cf. all matters which don't (explicitly) have to be dealt with by law may be dealt with by (governmental) regulations ("règlement").

²⁰⁸ See article 49(3) Cf.

²⁰⁹ See article 11 Cf., and *Zoller*, p. 321.

²¹⁰ See *Cot*, pp. 16-20.

²¹¹ Loi n° 79-564 du 6 juillet 1979 modifiant l'ordonnance n° 58-1100 du 17 novembre 1958 relative au fonctionnement des Assemblées parlementaires en vue de la création de délégations parlementaires pour les Communautés européennes, JO, Lois et Décrets, 7 juillet 1979, 1643f., hereinafter: Ordonnance 58-1100.

I should add that according to article 43(2) Cf., neither House may establish more than six (permanent) parliamentary committees. This provision, which fits well with the concept of the "parlementarisme rationalisé", was introduced in 1958 in order to hinder the previously deplored "government of committees". In 1979, both Houses already had six committees. The establishment of (permanent) *EC Committees* was hence impossible. The French Constitution does not provide for "parliamentary delegations"; consequently, only limited powers could be entrusted to the EC-Delegations of both chambers. However, today the EC-Delegations have achieved a position which, both legally and practically, is almost equal to that of parliamentary committees.

obliged to provide the delegations with proposals for directives and regulations and other "necessary" documents produced by the *European Community* institutions. Furthermore, the government had to inform the delegations on the course of negotiations at Community level. To this end, the EC Delegations were given the power to receive evidence from ministers and from other persons and institutions such as the EC Commission.²¹³ As a result, the EC Delegations became increasingly well-informed about EC matters and steadily improved the number and quality of their (public) reports. However, these reports could not be especially debated in parliament. In particular neither House had the right to vote resolutions on the results of such reports in order to influence government's strategy in negotiations at Community level. Consequently, the work of the EC-Delegations remained known to "insiders" only and parliamentary participation in Community affairs continued to be a thankless "hobby" for a handful of experts.

On the occasion of the ratification of the Maastricht Treaty, which in France required a change of the constitution, the parliament succeeded in pushing through a new provision, article 88-4 Cf., by which government, for the first time, became constitutionally obliged to provide parliament with all proposals for Community acts which, if they were adopted at national level, would be subject to a law. More importantly, both Houses of Parliament were explicitly empowered to vote resolutions on such proposals.²¹⁴

Especially in the National Assembly, the EC-Delegation immediately took the lead, and established a scrutiny procedure which has become similar to that of the EC Select Committee in the House of Commons.²¹⁵ The delegation has

²¹² Loi n° 90-385 du 10 mai 1990 modifiant l'article 6 bis de l'ordonnance n° 58-1100 du 17 novembre 1958 relative au fonctionnement des assemblées parlementaires, JO 1990, Lois et Décrets, 11 mai 1990, 5619.

²¹³ See article 6bis (IV) Ordonnance 58-1100.

²¹⁴ "Le Gouvernement soumet à l'Assemblée nationale et au Sénat, dès leur transmission au conseil des Communautés, les propositions d'actes communautaires comportant des dispositions de nature législative.

Pendant les sessions ou en dehors d'elles, des résolutions peuvent être votées dans le cadre du présent article, selon les modalités déterminées par le règlement de chaque assemblée." (article 88-4 Cf.).

²¹⁵ It should be added that the previous article 6bis Ordonnance 58-1100, which constitutes the legal base for the operation of the EC-Delegations remained untouched by article 88-4 Cf. This is important, because this provision obliges the government to far more extensive information than article 88-4 Cf. The situation may therefore, in short be described, as follows: the EC-Delegations continue their work under article 6bis Ordonnance 58-1100. In addition, parliament has established special information, debating and voting procedures

begun to systematically sift all incoming EC-proposals, to produce regular reports and to make proposals for resolutions.²¹⁶ These proposals are first deliberated in a committee and then debated on the Floor.²¹⁷ Resolutions adopted by either House do not legally bind the government.²¹⁸

Two remarks should be added to this. Firstly, as noted above, article 88-4 Cf. only applies to Community proposals which, if they were adopted at national level, would be *subject to a parliamentary law*. The possible scope of article 88-4 Cf. is thus significantly narrowed, for under article 34 Cf., in conjunction with article 37 Cf., parliament's legislative powers are fairly restricted.²¹⁹ Secondly, article 88-4 Cf. contains no clause, which, as in the case of the United Kingdom, would oblige government to give its consent in the Council only after parliament has had the possibility to complete the scrutiny. As a result of this, in the two years following the introduction of article 88-4 Cf. parliament was frequently informed by the government *too late*, often even after the Council had adopted an act. At best, early and complete information took place if the government sought parliamentary backing for negotiations at Community level.

This situation has, however, now started to change, since on 19 July 1994 French Prime Minister, *Edouard Balladur*, undertook to respect, within the scope of article 88-4 Cf., a "*réserve d'examen parlementaire*", which, on paper, looks quite similar to the *scrutiny reserve* in the United Kingdom.²²⁰

To sum up, during the last two years, the French system of EC-scrutiny has undergone an astounding evolution. After almost forty years of lethargy, the parliament has, in a short time, succeeded in establishing a scrutiny procedure which has become very similar to that which is successfully applied in the United Kingdom. Thus, in France, *Community affairs* are no longer treated as *foreign affairs*. It should be added that the recent upsurge of the conservative

for EC-proposals that fall within the scope of article 88-4 Cf.

²¹⁶ The EC Delegation of the National Assembly is assisted by a staff of some 15 persons.

²¹⁷ On the work of the EC-Delegation and the scrutiny procedures in the National Assembly see *Pandraud (1994a)* and articles 151-1 to 151-4 RAN. In the Senat, the EC Delegation plays a less important role and initiatives do more often stem from one of the six permanent parliamentary committees. See article 73bis RS and *Genton*.

²¹⁸ See *Conseil Constitutionnel*, DC n° 92-314 du 17 décembre 1992, printed in: *Luchaire*, 321 (consideration 7).

²¹⁹ See above footnote 206.

²²⁰ See *Premier ministre*, Circulaire du 19 juillet 1994 relative à la prise en compte de la position du Parlement français dans l'élaboration des actes communautaires, JO, Lois et Décrets, 21 juillet 1994, 10510.

and nationalist parties in France has undoubtedly furthered this process.

2. Parliament and CJHA

Up to now, however, the government has taken a more cautious approach with regard to parliamentary participation on CJHA. Like the United Kingdom it has not accepted complete analogy to Community affairs. Supported by an advisory opinion of the French *Conseil d'Etat*, the government has decided to apply the new article 88-4 Cf. neither to the Second Pillar (CFSP) nor to the Third Pillar. The government argues that these European Union policies were not within the scope of article 88-4 Cf. which only mentions "proposals for *Community* acts" ("propositions d'actes communautaire"). No doubt, from a legal point of view this grammatical interpretation of article 88-4 Cf. is correct. As a result, Parliament may not vote resolutions on proposals under Title VI TEU and the government is not bound to respect the "réserve d'examen parlementaire".

However, in June 1994 Parliament pushed through a revision of article 6bis Ordonnance 58-1100, which, as explained above,²²¹ continues to form the legal basis for the operation of the EC-Delegations in both Houses of Parliament.²²² The delegations were renamed *EU-Delegations* ("*délégations parlementaires pour l'Union européenne*"), and their competence to obtain information from the Government (and others) was explicitly extended to all matters regarding the *European Union*.²²³ Accordingly, article 6bis (IV)(1) to (3) Ordonnance 58-1100 now provides:

"Les délégations parlementaires pour l'Union européenne ont pour mission de suivre les travaux conduits par les institutions de l'Union européenne en application des traités du 18 avril 1951 et du 25 mars 1957, de l'Acte unique européen des 17 et 28 février 1986, du traité sur l'Union européenne signé le 7 février 1992 et des textes subséquents afin d'assurer l'information de leur assemblée respective.

A cet effet, le Gouvernement leur communique, dès leur transmission au Conseil de

²²¹ See above footnote 214.

²²² Loi n° 94-476 du 10 juin 1994 in: JO, Lois et Décrets, 11 juin 1994, 8449.

²²³ See also *Lucien Lanier (Rapporteur)*, Rapport fait au nom de la commission des Lois constitutionnelles, de législation, du suffrage universel, du Règlement et d'administration générale sur: 1° la proposition de loi de M. Jacques Genton tendant à modifier l'article 6 bis de l'ordonnance n° 58-1100 du 17 novembre, ... , Sénat, N° 415 (Second S.O. 1993-1994); and *Pierre Mazeaud (Rapporteur)* Rapport fait au nom de la commission des lois constitutionnelles, de la législation et de l'administration générale de la République sur la proposition de loi (n° 1055) de M. Robert Pandraud et plusieurs de ses collègues, tendant à modifier l'articles 6 bis de l'ordonnance n° 58-1100 du 17 novembre 1958, Assemblée nationale, N° 1140 du 20 avril 1994.

l'Union européenne, les projets de directives et de règlements et autres actes de l'Union, à l'exception des projets d'actes à caractère nominatif établis sur le fondement du titre VI du traité sur l'Union européennes, ainsi que tout document nécessaire établi par les différentes institutions de l'Union européenne. Le Gouvernement les tient en outre informées des négociations en cours.

Les délégations peuvent demander à entendre les ministres ainsi que des représentants des institutions de l'Union."

The government is thus supposed to provide both delegations with proposals going to the Council of Interior and Justice ministers and with other documents established by the institutions of the European Union under the Third Pillar. Furthermore, article 6bis (IV)(2) Ordonnance 58-1100 oblige the government to keep the EC Delegations informed of ongoing negotiations regarding CJHA.²²⁴ Parliamentary access to documents and to the decision-making procedures in the areas of Title VI TEU has thus become easier.

On the whole, like in the United Kingdom, the French parliament finds itself in an ambiguous situation. Thanks to the inclusion of CJHA into the framework of the TEU, it is now provided with information at an earlier stage and more systematically than under previous arrangements. Importantly, these policies will now be scrutinized by parliamentary bodies, the EU Delegations, which in the last years have built up a considerable expertise and started to conduct a substantive dialogue with the government on Community affairs. Apart from that, however, matters of Title VI TEU are still dealt with much like foreign affairs: there is no "réserve d'examen parlementaire" and parliament may still not vote any resolution on matters of justice and home affairs.²²⁵

²²⁴ However, excluded are pursuant to article 6bis (IV)(2) Ordonnance 58-1100 "des projets d'actes à caractère nominatif établis sur le fondement du titre VI du traité sur l'Union européennes". Acts and information regarding appointments, which in particular for safety reasons may require strict confidentiality (e.g. combating terrorism) will thus not be transmitted to parliament.

²²⁵ Interestingly, in practice, parliament has found a way to evade the restrictions of article 88-4 Cf. and to vote resolutions on matters of Title V and VI TEU. The EC Delegation of the National Assembly produced a report on CFSP. The findings of this report were subsequently inserted into a draft resolution on the draft Community budget for 1995, which had been transmitted to parliament pursuant to article 88-4 Cf., and which included expenditures on CFSP (and CJHA). On 14 July 1994, the draft resolution was debated in the National Assembly and finally adopted in a modified version. See *Pierre Lellouche (Rapporteur)*, Rapport d'information déposé par la Délégation de l'Assemblée nationale pour les Communautés européennes sur l'Europe et sa sécurité: bilan et avenir de la politique étrangère et de sécurité commune (PESC) de l'Union européenne, Assemblée nationale, N° 1294 du 31 mars 1994, and JO, Assemblée nationale, Débats, 14 juillet 1994, 4852-4865.

C. Germany²²⁶

1. The role of Parliament in *foreign affairs* and in *Community affairs*

From a legal point of view, the German *Bundestag*'s position in *foreign policy* does not look much different from that of the two parliaments described above. Foreign policy under the German constitution is within the prerogative of the government, and ministers' actions may be examined or criticised through oral or written questions or by debate.²²⁷ Like the British parliament, the *Bundestag* may vote (legally non-binding) resolutions on matters of foreign policy. However, the *Bundestag* does not need to be formally consulted by the government before or during negotiations on a treaty or before a text is signed. After signature, pursuant to article 59(2) GG, the assent or the participation of the legislative bodies to be given in statutory form "is required with respect to treaties which regulate the political relations of the Federal Republic or which relate to subjects of federal legislation". The first group of treaties concerned are "political" treaties.²²⁸ The second and more important group of treaties includes those for the implementation of which federal legislation has to be enacted.²²⁹ As in France (and in the United Kingdom) the *Bundestag*'s right of formal approval depends upon the legal force of the act in question. Therefore, "soft law" (and other legally non-binding acts) is not susceptible to being brought before parliament for formal authorization.

Notwithstanding the described similarities, in practice, parliamentary participation in foreign affairs in Germany differs rather significantly from that in the United Kingdom and in France. Notably, much more importance is given

²²⁶ This section will only deal with the directly elected *Bundestag*, which is the primary *parliamentary* body in Germany and to which alone the federal government is accountable. For a detailed and up-to-date description of the role of the *Bundesrat* in matters of the European Union see *Weber-Panariello*, § 17.

²²⁷ See *Tomuschat* (1980), p. 26-40.

²²⁸ These have been defined by the German *Bundesverfassungsgericht* as agreements which affect "the existence of the state, its territorial integrity, its independence, its indecency, its position or its relevant weight in the international community". BVerfGE 1, 380.

²²⁹ BVerfGE 1, 388. Thereby included are all treaties which directly affect the citizen, as in particular legal duties of the citizen can be created only by an act of parliament, the executive - in contrast to France - lacking any autonomous powers of passing regulations or other acts of delegated legislation. See *Tomuschat* (1980), p. 27.

to the work of (departmentally-related) specialist committees.²³⁰ International treaties for which parliamentary approval is required under article 59(2) GG are referred to the competent committee(s) which proceed(s) to a rather detailed assessment. Only questions of principle are raised in public debate on the Floor. Furthermore, the government normally furnishes regular information to the Foreign Affairs Committee on any important negotiating process which it has started or is about to initiate.²³¹ According to *Schweitzer*, however, deliberations in this committee often remain rather superficial and the information furnished to it by the government is not always complete.²³² More detailed or confidential information may be given in meetings of the head representatives of each parliamentary group in the Foreign Affairs Committee.²³³ Probably the most substantial dialogue between the government and its majority is conducted in the so-called "*working parties*" of the parliamentary groups.²³⁴ *Working parties* meet before every session of their corresponding specialist committee in order to discuss matters on the committee's agenda. On government side, ministers and officials regularly attend such meetings, thereby granting earlier information and opportunities to participate for the parliamentary majority. It should be added, however, that this dialogue between the government and its majority is conducted far more intensively on *national* policies than on foreign policy.

In the past the German *Bundestag* has shown little interest in scrutinizing *Community affairs*. This may, firstly, be explained by the pro-European consensus among all the major parties. Secondly, the *Bundestag* has always supported the EP's claims for more powers. Accordingly, it has considered itself more as a "temporary substitute" for the EP; that is, it would scrutinize such issues only until the EP was a parliament "in the full sense of the word". Thirdly, the work of the *Bundestag* rests heavily on a sophisticated groundwork of specialist committees. In these committees, and in the *working parties*, national policies are discussed among parliamentary experts and government representatives *at length* and in *great detail*. Thereby, parliament tries to make a substantial contribution and to add more expertise to the final outcome of such

²³⁰ Even though the *Foreign Affairs Committee* is entrusted with the great bulk of activities concerning foreign policies, it does not have exclusive jurisdiction.

²³¹ See *Tomuschat (1980)*, pp. 35-37.

²³² See *Schweitzer (1980)*, pp. 12-13.

²³³ See above, footnote 65.

²³⁴ The "*working parties*" comprise all members of a parliamentary group sitting on a specific committee.

policies. For obvious reasons (e.g. less time, more actors, limited information etc.), the application of such procedures to *Community affairs* is far more difficult and may easily cause great frustration among MPs. Therefore even though, in 1957, government undertook to provide regular information to the *Bundestag* on developments within the Council,²³⁵ Community affairs were rarely discussed in detail in committees or *working parties* or debated on the Floor. Several attempts to establish powerful EC-Committees have also failed.

However, the situation changed after the signing of the Maastricht Treaty. As in France, the ratification of the TEU in Germany required a change of the constitution. To this end, a new article 23 GG was adopted by the *Bundestag* and the *Bundesrat* in December 1992. Article 23 GG not only authorises German membership in the European Union,²³⁶ it also introduces special rules regarding parliamentary participation in European Union affairs. Article 23(2) and (3) GG, in particular, stipulates:

"In Angelegenheiten der Europäischen Union wirken der Bundestag und durch den Bundesrat die Länder mit. Die Bundesregierung hat den Bundestag und den Bundesrat umfassend und zum frühestmöglichen Zeitpunkt zu unterrichten.

Die Bundesregierung gibt dem Bundestag Gelegenheit zur Stellungnahme vor ihrer Mitwirkung an Rechtssetzungsakten der Europäischen Union. Die Bundesregierung berücksichtigt die Stellungnahmen des Bundestages bei den Verhandlungen. Das nähere regelt ein Gesetz".²³⁷

The government is thus obliged to inform the *Bundestag* comprehensively and early with regard to European Union affairs.²³⁸ Furthermore, *before* giving its

²³⁵ See article 2 of the act confirming the EEC and EAEC treaties, BGBl. II, 753.

²³⁶ See article 23(1) GG, and Ulrich Everling, Überlegungen zur Struktur der Europäischen Union und zum neuen Europa-Artikel im Grundgesetz, in: Deutsches Verwaltungsblatt 1993, pp. 936-940.

²³⁷ Article 23(4-6) GG contains detailed provisions regarding the participation of the *Bundesrat* in matters of the European Union.

²³⁸ In order to bring into effect article 23(2) and (3) GG parliament adopted a special law - the EUZBTG (see List of Abbreviations). With regard to the *information* of the *Bundestag*, this law, *inter alia*, provides in § 4: "Die Bundesregierung übersendet dem Bundestag insbesondere die Entwürfe von Richtlinien und Verordnungen der Europäischen Union und unterrichtet den Bundestag zugleich über den wesentlichen Inhalt und die Zielsetzung, über das beim Erlass des geplanten Rechtssetzungsakts innerhalb der Europäischen Union anzuwendende Verfahren und den voraussichtlichen Zeitpunkt der Befassung des Rates, insbesondere den voraussichtlichen Zeitpunkt der Beschlussfassung im Rat. Sie unterrichtet den Bundestag unverzüglich über ihre Willensbildung, über den Verlauf der Beratungen, über die Stellungnahme des Europäischen Parlaments und der Europäischen Kommission, über die

consent to a legislative proposal in the EU Council, the government must provide the *Bundestag* with the opportunity to give an opinion on such a proposal ("parliamentary reserve").²³⁹ Opinions given by the *Bundestag* shall be taken into account by the government in negotiations at the level of the European Union.²⁴⁰

In addition to article 23 GG, a new article 45 GG was adopted which stipulated the establishment of a parliamentary *Committee for European Union Affairs*. This Committee may, by delegation, exercise the *Bundestag's* powers under article 23 GG.²⁴¹

On the whole, parliamentary participation in European Union affairs has thus become significantly more formalised. Basic principles are now explicitly laid down in the constitution; detailed rules are set up in the EUZBTG. The establishing of a special committee widens the chances of a *more systematic* and *coordinated* parliamentary participation than under the previous arrangements. Interestingly, the German EC scrutiny system, like the French system, seems to be moving towards the British model, which, as shown above, rests mainly upon the three pillars: early and extensive information based on a formalised procedure, systematic examination of proposals by special EC-Committees, and "parliamentary reserve".

2. Parliament and CJHA

In contrast to the United Kingdom and France, however, in Germany legally no distinction is made between *European Community Affairs* and *European Union Affairs*. The special procedures established under the new article 23 (2) and (3) GG apply fully to the Third Pillar. As in the parliaments described above, these arrangements do not displace the *Bundestag's* "traditional" powers concerning the ratification of international treaties under article 59 GG.

Stellungnahmen der anderen Mitgliedstaaten sowie über die getroffenen Entscheidungen."

²³⁹ § 5 EUZBTG provides: "Die Bundesregierung gibt vor ihrer Zustimmung zu Rechtssetzungsakten der Europäischen Union dem Bundestag Gelegenheit zur Stellungnahme. Die Frist zur Stellungnahme muss so bemessen sein, dass der Bundestag ausreichend Gelegenheit hat, sich mit der Vorlage zu befassen. Die Bundesregierung legt die Stellungnahme ihren Verhandlungen zugrunde."

²⁴⁰ Such opinions, however, do not legally bind the government. See *Möller/Limpert*, pp. 27-28.

²⁴¹ Article 45 GG provides: "Der Bundestag bestellt einen Ausschuss für die Angelegenheiten der Europäischen Union. Er kann ihn ermächtigen, die Rechte des Bundestages gemäss Artikel 23 gegenüber der Bundesregierung wahrzunehmen."

With regard to the special procedures for European Union Affairs, it is of interest to note, however, that the principle of "parliamentary reserve" as laid down in article 23(3) GG and § 5 EUZBTG only applies to proposals for *legislative acts* ("Rechtsetzungsakte") at the Union level. A similar qualification was made with regard to the government's obligations to inform the *Bundestag*. The above quoted § 4 EUZBTG,²⁴² which specifies government's respective obligations, is aimed at *EU-legislative proposals*. Documents which do not concern such proposals will, pursuant to § 3 EUZBTG, only be submitted to the *Bundestag* if they are "of interest to Germany".²⁴³ As acts adopted under Title VI TEU will in many cases not be clearly legally binding, the German government is left with great discretion when applying article 23 GG and the EUZBTG to CJHA.

These reservations notwithstanding, the *Bundestag's* rights with regard to information and participation in CJHA have been strengthened by article 23 GG. Firstly, the new arrangements will lead to a more comprehensive and systematic informing of the *Bundestag* on matters of Title VI TEU. Presumably, information will no longer be reserved for a handful of highly select MPs within the parliamentary group on the side of government or within a specialist committee. Secondly, according to article 23(3) GG the *Bundestag* now has the explicit right to be formally consulted *before* the government gives its consent to a legislative act in the Council of Interior and Justice Ministers.

Conclusions

The establishment of the Third Pillar has not, as such, changed the intergovernmental character of CJHA. It has, however, changed the *model* of intergovernmental cooperation in these fields significantly.

As argued in Chapter 2, cooperation under the new legal and institutional framework of Title VI TEU has become more structured and formalized than under previous arrangements as described in Chapter 1. Even though numerous deficiencies remain²⁴⁴, it may be suggested that this new framework will lead to more "legislative" procedures - in contrast to "diplomatic procedures" - and openness in CJHA at the level of the European Union.

In addition, the conclusion of the TEU has, at *national* level, stimulated debates on the role of national parliaments not only in *Community affairs* but in all *European Union affairs*. Importantly, due to the introduction of CJHA into

²⁴² See above footnote 238.

²⁴³ See *Weber-Panariello*, § 16.V.B.

²⁴⁴ See Chapter 2.A and the summary of Chapter 2.

the framework of the TEU, national parliaments have become more aware of the cooperation among the Twelve in these fields which, as shown above, had started a long time before 1993.

Consequently, during the ratification of the TEU, national parliaments have pushed their governments to commit themselves to more openness and deeper parliamentary involvement. Before the establishment of the Third Pillar, intergovernmental cooperation in the fields of justice and home affairs was generally assessed as *foreign policy*. Traditionally, the conduct of foreign policy comes within the prerogative of the executive and the rights of parliaments to participate are fairly limited. However, Maastricht has made it clear that because of the close links between the First Pillar and the Third Pillar, the proper analogy should be with the scrutiny of *Community affairs*, for which all Member States' parliaments have established special scrutiny procedures granting them more extensive information and earlier participation.

In the Member States described here as well as in other EU Member States,²⁴⁵ these special arrangements now also apply to the Third Pillar. However, not in all Member States have governments agreed to full analogy.

Also, the application of the EC scrutiny procedures to CJHA is rendered difficult by various facts. Notably, in contrast to Community legislation, not all measures will begin with a *formal proposal* from the Commission which is in the public domain. Similarly, not all changed proposals and final texts will automatically be published. Also, parliaments' rights of access to information and to participate in EU decision-making, in many Member States, depend upon the legal effect which such acts will supposedly have. However, in Chapter 2 it was suggested that the legal nature of acts negotiated under the Third Pillar will often remain unclear.

The EP has repeatedly expressed the view that the best way of strengthening the democratic legitimacy of CJHA would be to give more power to the EP.²⁴⁶ This leaves national governments with the dilemma either to accept the EP's claims or to prove that the democratic legitimacy of CJHA can be strengthened by "improved" procedures at national level. The British and French parliament, in particular, used this argument in order to strengthen their own position when they ratified the Maastricht Treaty. However, to play national parliaments and the EP off against one another may well be the wrong strategy. Instead, the role of these bodies is *complementary* and should be assessed as such. Also, it should be noticed that since the entry into force of the TEU rather little progress has

²⁴⁵ For recent descriptions of the Danish example see *Ameline (1994b)*; with regard to the other Member States, The Netherlands in particular, see *Pandraud (1994)*, pp. 269-320.

²⁴⁶ See e.g., the Resolution of 15 July 1993, OJ No. C 255 of 20.09.1993, p. 168, and above chap. 2 B.5.

been achieved in the fields of justice and home affairs. The ability of national parliaments to control their governments in CJHA has thus not fully been tested yet. A stronger involvement of the EP will become inevitable, if Member States eventually agree to hold majority votes under Title VI TEU in order to accelerate decision-making and to (finally) achieve more substantial results in CJHA.

It can thus be concluded that Title VI TEU may lead to greater openness of CHJA, more parliamentary accountability of the executive, and increased possibilities of parliamentary and (public) participation in the fields of justice and home affairs. The Maastricht Treaty therefore constitutes a step towards more democracy. However, it remains to be seen whether national authorities will cooperate on an equal partner basis with parliaments at national level and at European level. The structure still retains plenty of opportunities for executive authorities to remove themselves from an open review of their work.²⁴⁷

²⁴⁷ See on this regard, David O'Keffe, "Recasting the Third Pillar", *Common Market Law Review*, 1995, pp. 893-920, and Curtin/Meijer (above footnote 174).

Bibliography

Ameline, Nicole (1994a): Rapport d'information par la Délégation de l'Assemblée nationale pour les Communautés européennes sur les propositions de la Commission européennes relatives au franchissement des frontières extérieure et à la politique des visas, Assemblée nationale, n° 1351 du 8 juin 1994.

Ameline, Nicole (1994b): Les Parlements et l'Europe. Les leçons de l'expérience danoise, Documents d'information de l'Assemblée nationale, Rapport d'information n° 1437 du 28 juin 1994.

Anderson, Macolm (1994): The Agenda for Police Cooperation, in: *Anderson/Den Boer (eds.)*, pp. 3-21.

Anderson, Macolm/Monica Den Boer (eds.) (1994): Policing Across National Boundaries, Printer Publishers.

Baldwin-Edwards, Martin/Bill Heberton (1994): Will SIS be Europe's "Big Brother"? In: *Anderson/Den Boer (eds.)*, pp. 137-157.

Bates, T. St. J.N (1991): European Community Legislation before the House of Commons, Statute Law Review, pp. 109-134.

Benyon, John/Lynne Turnbull/Rachel Woodward (1994): Understanding police cooperation in Europe: setting a framework of analysis, in: *Anderson/Den Boer (eds.)*, pp. 46-65.

Benyon, John et.al. (1993): Police Co-operation in Europe: An Investigation, University of Leicester. Centre for the Study of Public Order, November 1993.

Bericht des Bundesministeriums des Innern über die innenpolitische Zusammenarbeit im Rahmen der EU und der Schengener Vertragsstaaten, Bonn 1994, hereinafter: *Bericht des Bundesministeriums des Innern*.

Bieber, Roland (1994): Die Abkommen von Schengen über den Abbau der Grenzkontrollen, Neue Juristische Wochenschrift, 294ff.

Bigo, Didier (1994): The European internal security field: stakes and rivalries in a newly developing area of police intervention, in: *Anderson/Den Boer (eds.)*, pp. 161-173.

Blessmann, Carl-Heinz (1994): Praktische Fragen der Grenzkontrolle, in: *Pauly (ed.) (1994)*, pp. 55-68.

Boeles, Pieter (1993): Data Exchange, Privacy and Legal Protection, in: *Schermer et al.*, pp. 52-57.

den Boer, Monica (1994): Europe and the Art of International Police Co-operation: Free Fall or Measured Scenario? In: *O'Keeffe/Twomey (ed.)*, pp. 279-291.

den Boer, Monica/Neil Walker (1993): European Policing after 1992, *Journal of Common Market Studies*, pp. 3-28.

Bolten, José J. (1992): From Schengen to Dublin: The new frontiers of refugee law, in: *Meijers et al. (1992)*, pp. 8-36.

David Brew (1979): National parliamentary scrutiny of European Community legislation: the case of the United Kingdom Parliament, in: *Valentine Herman/Rinus van Schendelen (ed.)*, *The European Parliament and the National Parliaments*, Saxon House, pp. 238-257.

van den Brink, Mathilde M./Rob M.S. Vierhout (1993): Democratic Control without Frontiers? The European Parliament and free movement of persons, in: *Schermers et al.*, pp. 379-390.

Brown, Martin (1993): The Single Market after 1992 and Custom Cooperation in the EC, in: *Schermers et al.*, pp. 99-114.

Brownlie, Ian (1980): Parliamentary Control over Foreign Policy in the United Kingdom, in: *Cassese (ed.) (1980)*, pp. 1-10.

Bunyan, Tony (ed) (1993): Statewatching the new Europe - a handbook on the European State, Russel Press.

Butt Philip, Alan (1994): European Union Immigration Policy: Phantom, Fantasy or Fact? In: *West European Politics*, Vol. 17, 2/1994, pp. 168-191.

Callovi, Guisepppe (1992): Regulation of Immigration in 1993: Pieces of the European Community-Jig-Saw Puzzle, in: *International Migration Review*, Vol. 26, 2/1992, pp. 353-372.

Cassese, Antonio (ed.) (1980): Parliamentary control over foreign policy, *Alphen aan de Rijn*.

Cloos, Jim/Gaston Reinesch/Daniel Vignes/Josephes Weyland (1993): *Le Traité de Maastricht*. Genèse, Analyse, Commentaires, Bruxelles.

Committee on Civil Liberties and Internal Affairs (1993a): Report on the participation by the European Parliament in international agreements by the Member States and the Union on cooperation in the fields of justice and home affairs, 21 December 1993, Rapporteur: Mr. Georg Jarzembowski, A3-0436/93 (PE 206.245/fin).

Committee on Civil Liberties and Internal Affairs (1993b): Report on cooperation in the field of justice and internal affairs und the Treaty on European Union (Title VI and other provisions), Rapporteur: Mr Carlos Robles Piquer, 1 July 1993, A3-0215/93 (PE 204.587/fin).

Constantinesco, Vlad (1993): La structure du traité instituant l'Union Européenne, in: *Cahiers de droit européen*, pp. 251-284.

Cot, Jean-Pierre (1980): Parliament and foreign Policy in France, in: *Cassese (ed.) (1980)*, pp. 11-24.

Cottrel, Yves (1983): Note sur le controle du parlement sur la politique étrangère de la France sous la V^e République, *Revue du droit public et de la science politique en France e à l'étranger*, pp. 965-982.

Craig, Paul P. (1991): Sovereignty of the United Kingdom - Parliament after *Factortame*, *Yearbook of European Law*, pp. 221-255.

Curti Gialdino, Carlo (1993): Il Trattato di Maastricht sull'Unione Europea, Roma.

Cruz, Antonio (1993): Schengen, Ad Hoc Immigration Group and other Intergovernmental bodies in view of a Europe without internal borders, CCME Briefing Paper 12, Bruxelles, Churches Committee for Migrants in Europe, May 1993.

Curtin, Deirdre (1993): The constitutional structure of the Union: A Europe of bits and pieces, *Common Market Law Review* 30, pp. 17-69.

Dehousse, Renaud (1994): From Community to Union, in: *Renaud Dehousse (ed.)*, *Europe after Maastricht. An ever closer Union?* München 1994, pp. 5-15.

Deutscher Bundestag (1994): 53. Bericht der Bundesregierung über die Integration der Bundesrepublik Deutschland in die Europäische Union, Drucksache 12/7132 vom 23.03.1994.

Denza, Eileen (1993): Parliamentary Scrutiny of Community Legislation, *Statute Law Review*, pp.-56-63.

Donner, J.P.H. (1993): Abolition of Border Controls, in: *Schermers et al.*, pp. 5-26.

Elsen, Charles (1994): Les mécanismes institutionnels: Trevi, Schengen, Dublin, Maastricht, in: *Alexis Pauly (ed.) (1994)*, *Schengen en panne*, Maastricht, pp. 43-54.

Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament (1989): Edited by C. J. Boulton, Twenty-first Edition, London, hereafter: *Erskine May*.

Everling, Ulrich (1992): Reflections on the structure of the European Union, *Common Market Law Review*, pp. 1053-1077.

Fijnaut, C.J. (1993): The "Communitarization" of Police in Western Europe, in: *Schermers et al.*, pp. 75-92.

Fischer, Wolfgang (1993): Die Europäische Union im Grundgesetz: der neue Art. 23, *Zeitschrift für Parlamentsfragen*, pp. 32-49.

Fode, Henning (1993): Cooperation on Law Enforcement, Criminal Justice and Legislation in Europe; Nordic experience, in: *Schermers et al.*, pp. 61-69.

Genton, Jacques (1994): Le Sénat face à la législation communautaire, Rapport d'information fait au nom de la délégation du Sénat pour les Communautés européennes, Sénat, N° 338 du 13 avril 1994, in: "Les rapports du Sénat", N° 338 (1993-1994)

Golliet, Jacques (1994): Le Contrôle des Parlements nationaux sur l'Union européenne, Délégation du Sénat pour les Communautés européennes, Sénat, N° 339 du 13 avril 1994.

Groebe, Hans v.d./Jochen Thiesing/Claus-Dieter Ehlermann (Hrsg.) (1991): Kommentar zum-EWG-Vertrag, 4. Aufl., 4 Bde., Baden-Baden, hereafter: *Author*, in: *Groebe/Thiesing/Ehlermann*, Article, para.

Groenendijk, C.A. (1993): Three Questions about Free Movement of Persons and Democracy in Europe, in: *Schermers et al.*, pp. 391-402.

Grosheide, J. (1993): Cooperation in the Field of Criminal Law, Police and other Law Enforcement Agencies, in: *Schermers et al.*, pp. 70-74.

Groud, Hervé (1991): Les délégations parlementaires pour les Communautés européennes, Revue du droit public et de la science politique en France e à l'étranger, pp. 1309-1349.

Guillaume, Marc (1992): Déficit démocratique et déficit juridique: quoi de neuf en France? Revue française d'administration publique, pp. 435-444.

Hailbronner, Kay (1992): Perspectives of a harmonization of the law of asylum after the Maastricht summit, Common Market Law Review, pp. 917-939.

Hailbronner, Kay (Hrsg.) (1992): Asyl- und Einwanderungsrecht im europäischen Vergleich, Schriftenreihe der Europäischen Rechtsakademie Trier, Bd. 1.

Hendry, I.D. (1994): The Third Pillar of Maastricht: Cooperation in the Fields of Justice and Home Affairs, in: German Yearbook of International Law, Vol. 36, 1993, Berlin.

Home Affairs Committee, House of Commons (1993): Intergovernmental co-operation in the fields of justice and home affairs, Minutes of evidence, 15 Dec. 1993, HC (1993-94) 121-i.

Home Affairs Committee, House of Commons (1990): Practical Police Co-operation in the European Community, Seventh Report, 2 Vol. (I Report; II Evidence), HC (1989-90) 363-I/II.

Hondius, Frits W. (1993): The Last Frontier: Free Movement of Persons in Greater Europe. The role of the Council of Europe, in: *Schermers et al.*, pp. 154-165.

Hoogenboom, T. (1993): Free Movement and Integration of Non-EC Nationals and the Logic of the Internal Market, in: *Schermers et al.*, pp. 497-511.

van Iersel, Jost (1993): Free Movement of Persons - Democratic Control, in: *Schermers et al.*, pp. 369- 378.

Ipsen, Knut (1990): Völkerrecht, München, 3. Aufl.

de Jong, C.D. (1993): Cooperation in the Field of Aliens Law. The granting of visas, passports and asylum and refugee status, in: Schermers et al., pp. 183-198.

Kapteyn, P.J.G./P. Verloren van Themaat (1989): Introduction to the Law of the European Communities, Kluwer.

Keohane, Robert/Stamley Hoffman (1991): Institutional Change in Europe in the 1980s, in: The New European Community. Decisionmaking and institutional Change, Boulder, pp. 1-40.

King, Mike (1994): Policing refugees and asylum seekers in "greater Europe": towards a reconceptualisation of control, in: Anderson/Den Boer (eds.), pp. 69-84.

Kreher, Alexander/Philippe Weber-Panariello (1994): Gedanken zum Demokratiedefizit der Europäischen Union, in: Traverse (Chronos Verlag Zürich) 1994/3, pp. 64-88.

Labayle, H. (1992): La coopération dans les domaines de la justice et des affaires intérieures, in: Les accords de Maastricht et la constitution de l'Union européenne, Paris, Montchrestion, pp. 147-177.

Lasok, D./J.W. Bridge (1991): Law and Institutions of the European Communities, 5th. ed., Butterworths.

Luchaire, François (1992/1993): L'Union européenne et la Constitution, Revue du droit public et de la science politique en France et à l'étranger 1992, pp. 589-616, 933-981, and 1587-1624; 1993, pp. 301-324.

Malangre, Kurt (Rapporteur) (1991): Report of the Committee on Legal Affairs and Citizens' Rights on freedom of movement for persons and problems relating to national security in the Community, 2 July 1991, A3-0199/91 (PE 143.354/fin.).

Meijers, H. et al. (1992): Schengen. Internationalisation of central chapters of the law on aliens, refugees, privacy, security and the police, Sichtung NJCM 1992.

Möller, Franz/Martin Limpert (1993): Informations- und Mitwirkungsrechte des Bundestages in Angelegenheiten der Europäischen Union, Zeitschrift für Parlamentsfragen, pp. 21-32.

Monar, Jörg (1994): Interinstitutional agreements: The phenomenon and its new dynamics after Maastricht, in: Common Market Law Review, Vol. 31, 4/1994, pp. 693-719.

Müller-Graff, Peter Christian (1994): The legal bases of the third pillar and its position in the framework of the Union Treaty, Common Market Law Review 31, pp. 493-510.

Nanz, Klaus-Peter (1994): Schengener Übereinkommen und Personenfreizügigkeit, Zeitschrift für Ausländerrecht, pp. 99-107.

Nanz, Klaus-Peter (1992): Der "3. Pfeiler der Europäischen Union": Zusammenarbeit in der Innen- und Justizpolitik, Integration, pp. 126-140.

Neunreither, Karlheinz (1994): The Democratic Deficit of the European Union, Government and Opposition, Vol. 29/3, pp. 299-314.

O'Keeffe, David (1994): Non-Accession to the Schengen Convention: The Cases of the United Kingdom and Ireland, in: Pauly (ed.) (1994), pp. 145-153.

O'Keeffe, David (1992a): The Movement of Persons and the Single Market, European Law Review, pp. 3-19.

O'Keeffe, David (1992b): The Schengen Convention: A Suitable Model for European Integration? Yearbook of European Law, pp. 185-219.

O'Keeffe, David/Patrick M. Twomey (ed.) (1994): Legal Issues of the Maastricht Treaty, Chancery Law Publishing.

d'Oliveira, Hans Ulrich Jessurun (1994): Expanding External and Shrinking Internal Borders: Europe's Defence Mechanisms in the areas of Free Movement, Immigration and Asylum, in: O'Keeffe/Twomey (ed.), pp. 261-278.

d'Oliveira, Hans Ulrich Jessurun (1993): Fortress Europe and (Extra-Communitarian) Refugees: Cooperation in Sealing of the External Borders, in: Schermers et al., pp. 166-182.

van Ouirve (Rapporteur) (1993): Report of the Committee on Civil Liberties and Internal Affairs on the setting up of Europol, 26 November 1992, A3-0382/92 (PE 202.364/fin.).

van Ouirve (Rapporteur) (1992a): Second Report of the Committee on Civil Liberties and Internal Affairs on the entry into force of the Schengen Agreements, 5 November 1992, A3-0336/92 (PE 202.540/fin.).

van Ouirve (1992b): Legislation and Decision-Making in Europe - International Police Cooperation and Human Rights, Paper presented at the Twentieth Annual Conference of the European Group for the Study of Deviance and Social Control, 3-6 September 1992, Padova.

Pandraud, Robert (1994a): L'Assemblée nationale et l'Europe - Bilan et perspectives, Documents d'information de l'Assemblée nationale n° 1436 du 28 juin 1994.

Pandraud, Robert (1994b): Rapport d'information déposé par la Délégation de l'Assemblée nationale pour les Communautés européennes sur les conditions de mise en oeuvre des Accords de Schengen, Assemblée nationale n° 968 du 25 janvier 1994.

Pandraud, Robert (1993): Rapport d'information déposé par la Délégation de l'Assemblée nationale pour les Communautés européennes sur la mise en oeuvre des Accords de Schengen, Assemblée nationale n° 600 du 14 octobre 1993.

Pauly, Alexis (ed.) (1994): Schengen en panne, Institut Européen d'Administration Public, Maastricht.

Pauly, Alexis (ed.) (1993): Les accords de Schengen: Abolition des frontières intérieures ou menace pour les libertés publiques? Institut Européen d'Administration Public, Maastricht.

Raab, Charles D. (1994): Police cooperation: the prospects for privacy, in: Anderson/Den Boer (eds.), pp. 121-136.

Ress, Georg (1993): Die Auswirkungen der Abkommen von Schengen und Dublin auf die Asylpolitik der EG, in: Pauly (ed.) (1993), pp. 79-104.

Robles Piquer, Carlos (Rapporteur) (1993): Report of the Committee on Civil Liberties and Internal Affairs on cooperation in the field of justice and internal affairs under the Treaty on European Union (Title VI and other provisions), European Parliament, 1 July 1993, A3-0215/93 (PE 204.587/fin.)

Rupprecht, Reinhard (1993): Europäische Zusammenarbeit in der Innen- und Justizpolitik, in: Werner Weidenfeld/Wolfgang Wessels, Jahrbuch der Europäischen Integration 1992/93, Bonn, pp. 205-210.

Schattenberg, Bernd (1993): The Schengen Information System: Privacy and Legal Protection, in: Schermers et al., pp. 43-51.

Schermers, Henry G./Cees Flinterman/Alfred E. Kellermann/Johan C. van Haersolte/Gert-Wim A. van de Meent (ed.) (1993): Free Movement of Persons in Europe. Legal Problems and Experiences, Nijhoff, hereafter: Schermers et al.

Schermers, Henry G. (1993): Human Rights and Free Movement of Persons: The Role of the European Commission and Court of Human Rights, in: Schermers et al., pp. 235-247.

Schutte, J. E. (1991): Schengen: Its Meaning for the Free movement of Persons in Europe, in: Common Market Law Review, 28, pp. 549-570.

Schweitzer, Carl-Christoph (1978): Die nationalen Parlamente in der Gemeinschaft - ihr schwindender Einfluss in Bonn und Westminster auf die Europagesetzgebung, Bonn.

Schweitzer, Carl-Christoph (1980): Der Auswärtige Ausschuss des Deutschen Bundestages im ausenpolitischen Entscheidungssystem, in: Aus Politik und Zeitgeschichte, B19, pp. 3-16.

Select Committee on the European Communities, House of Lords (1993): House of Lords Scrutiny of the Inter-Governmental Pillars of the European Union, 28th Report, HL (1992-93) 124.

Select Committee on the European Communities, House of Lords (1989): 1992: Border Control of People, 22nd Report, HL (1988-89) 90.

Sénat français (1991): Rapport fait au nom de la Commission de Contrôle chargée d'examiner la mise en place et le fonctionnement de la Convention d'application de l'accord de Schengen, 12 décembre 1991.

Simma, Bruno (Hrsg.) (1991): Charta der Vereinten Nationen. Kommentar, München, hereafter: *Author*, in: *Simma*, Article, para.

Snyder, Francis (1994a): Institutional development in the European Union: Some implications of the Third Pillar, in: *J. Monar (ed.)*, The Third Pillar of the Maastricht Treaty, Bruges, College of Europe, in press.

Snyder, Francis (1994b): Soft Law and Institutional Practice in the European Community, in: *Stephen Martin (ed.)*, The Constitution of Europe. Essays in Honour of Emile Noël, Kluwer 1994, p. 197-225.

Snyder, Francis (1993): The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques, in: *Modern Law Review* 1993, pp. 19-54.

Taschner, Hans Claudius (1992): Asyl- und Einwanderungsrecht aus europäischer Perspektive. Grundstrukturen eines europäischen Asylrechts aus der Sicht der Europäischen Gemeinschaften, in: *Hailbronner (Hrsg.)*, pp. 113-119.

Thürer, Daniel (1991): Die Schweizerische Bundesversammlung und die Europäische Gemeinschaft - Zu den Chancen einer verstärkten parlamentarischen Legitimierung des europäischen Gemeinschaftsrechts im nationalen Rahmen, in: *Parlamentsdienste (Hrsg.)*, Parlament, "Oberste Gewalt des Bundes"? - Festschrift der Bundesversammlung zur 700-Jahr-Feier der Eidgenossenschaft, Bern/Stuttgart, pp. 443-473.

Thürer, Daniel Thürer (1990), The Role of Soft Law in the Actual Process of European Integration, in: *Olivier Jacod-Guillarmod (éd.)*, L'avenir du libre-échange européen, Zürich, pp. 129-139.

Timmermanns, C.W.A. (1993): Free Movement of Persons and the Division of Powers between the Community and its Member States. Why do it the intergovernmental way? In: *Schermers et al.*, pp. 352-368.

Tomuschat, Christian (1980): Parliamentary Control over Foreign Policy in the Federal Republic of Germany, in: *Cassese (ed.) (1980)*, pp. 25-51.

Tomuschat, Christian (1978): Der Verfassungsstaat im Geflecht der internationalen Beziehungen, in: *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer (VVDStRL)* 36/1978, pp. 7-58.

Vincenzi, Christopher (1993): Cooperation in Aliens Law: The Implications for Individual Rights Enforcement, in: *Schermers/Flinterman/Kellermann/Haersolte/Ment (ed.)*, pp. 227-231.

Wade, E. C. S./A.W. Bradley (1993): Constitutional and Administrative Law, Eleventh Edition by A.W. Bradley and K.D. Ewing, Longman.

Weber-Panariello, Philippe: Nationale Parlamente in der Europäischen Union. Eine rechtsvergleichende Studie zur Beteiligung nationaler Parlamente an der innerstaatlichen Willensbildung in Angelegenheiten der Europäischen Union im Vereinigten Königreich, Frankreich und der Bundesrepublik Deutschland, Baden-Baden 1995.

Weiler, Joseph H.H. (1993): Neither Unity Nor Three Pillars - the Trinity Structure of the Treaty on European Union, in: Joerg Monar/Werner Ungerer/Wolfgang Wessels (ed.), The Maastricht Treaty on European Union, European Interuniversity Press 1993, pp. 23-34.

Weiler, Joseph H.H. (1991): The Transformation of Europe, Yale Law Journal, pp. 2403-83.

Zoller, Elisabeth (1992): Droit des relations extérieures, Paris.

de Zwaan, Jaap W. (1993): Institutional Problems and Free Movement of Persons. The legal and political framework for cooperation, in: Schermers et al., pp. 335-351.

List of abbreviations

BVerfGE : Entscheidungen des Deutschen Bundesverfassungsgerichts
Cf.: Constitution française du 4 octobre 1958
CFSP : Common Foreign and Security Policy (Title V TEU)
CJHA : Cooperation in the Fields of Justice and Home Affairs (Title VI TEU)
COREPER : Comité des Représentants Permanents des Etats Membres
ECJ : European Court of Justice
EC : Treaty on European Community (Title II TEU)
EEC : Treaty on European Economic Community
EP : European Parliament
EUZBTG : Gesetz über die Zusammenarbeit von Bundesregierung und Deutschem Bundestag in Angelegenheiten der Europäischen Union vom 12. März 1993
GG : Grundgesetz (Basic Law) der Bundesrepublik Deutschland vom 23. Mai 1949
GOBT : Geschäftsordnung des Deutschen Bundestages
HC/HL Deb : Parliamentary Debates House of Commons/House of Lords; hereafter: HC/HL Deb, Date, Col
JO : *Journal Officiel* de la République française
MEP : Member of the European Parliament
MP : Member of Parliament
OJ : *Official Journal* (EC)
RAN : Règlement de l'Assemblée nationale française
RS : Règlement du Sénat français
TEU : Treaty on European Union



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