FROM THE SIDELINES TO CENTER STAGE?
THE COMMISSION IN POST-AMSTERDAM JUSTICE AND HOME AFFAIRS

Emek M. Uçarer
Bucknell University
Prepared for the biennial conference of ECSA in Pittsburgh, PA, June 2-June 5, 1999

International Relations Program
Bucknell University
Lewisburg, PA 17837

(570) 577-1498
(570) 577-3536 (Fax)
ucarer@bucknell.edu

Introduction[1]

Since its creation by the Rome Treaties in 1957, the Commission has always been somewhat of a tightrope walker, much like the poet in Lawrence Ferlinghetti's poem, "Constantly Risking Absurdity and Death."[2] As the executive organ of the European Communities/Union,[3] the role of the Commission has traditionally been one of initiator of policy, depository of legislative information, manager and executor of Union policies, and safekeeper of community *acquis*.[4] In fulfilling this role, the Commission has continuously attempted to mobilize momentum towards greater economic and political integration, implementing standards in a manner that could at times come across as "heavy-handed, intrusive, and sometimes offensive,"[5] much to the dismay of the Council of Ministers and the member states. Whatever problems the other three institutions of the EC might have had with the operating style of the Commission, however, its activities were legitimized and upheld to the extent that they were in conformity with the Rome Treaty. The duties of the Commission, the policymaking tools it has at its disposal, as well as the range of issues that fell under its competence were spelled out in Article 155 of the Treaty of Rome. The

---

[1] The author wishes to thank the Secretariat General of the European Commission for a five-month internship at the Task Force for Justice and Home Affairs at the Commission. I am deeply indebted to the staff of the Task Force for educating me on the third pillar and allowing me to observe and participate in the Commission's activities. However, the views expressed in this paper do not necessarily reflect the views of the Task Force, the Secretariat General or the Gradin Cabinet.

[2] Lawrence Ferlinghetti, *A Coney Island of the Mind* (New York: New Directions, 1958).

[3] The Treaty on European Union renamed the European Communities -- European Economic Community, European Coal and Steel Community and Euratom -- as the European Union (EU). The term EU thus denotes the post-Maastricht architecture consisting of three pillars: The first pillar is the Rome Treaty as amended by Maastricht, the second pillar is the common security and foreign policy (CSFP) and the third pillar is the competence area of justice and home affairs. In current EU parlance, especially when used by individuals active in the third pillar, the term EC is used when referring only to the first pillar and EU when referring specifically to third pillar structures and developments. Accordingly, this study employs the term EU when referring to post-Maastricht third pillar affairs and will use EC when appropriate

[4] Article 155 of the Treaty of Rome calls on the Commission to ensure that the provisions of the Treaty are applied, formulate recommendations or deliver opinions on matters dealt with in the Treaties, either if the Treaty provides for such action or if the Commission considers it necessary. It also stipulates the Commission to have its own power of decision and participate in the shaping of legislation by Council and Parliament and exercise the powers conferred on it by the Council, for the implementation of the rules laid down by the Council.

[5] Desmond Dinan, *Ever Closer Union? An Introduction to the European Community* (Boulder, Colorado: Lynne Rienner Publishers, 1994), p. 200.

implementation of the Treaty on European Union (TEU or Maastricht Treaty) in 1992 -- the negotiation of which the Commission was unable to influence to its satisfaction -- has made important changes in all three respects. These recent changes present new challenges for the European Commission, and, while enhancing the role of the Commission in the third pillar, have also added significant constraints on the Commission's ability to function effectively in this new environment.

This paper focuses on the European Commission's efforts to adapt to the post-Maastricht setup in Justice and Home Affairs (JHA) as it attempts to break new ground, take on new responsibilities in a different decision-making environment, and get involved in issue areas that were previously in the sole sovereign domain of the member states. The argument is informed by the hypotheses of the new institutional analysis[6] of European integration while pointing out some of the challenges faced by the Commission in this new issue setting. It argues that the pillar structure hastily agreed upon during the Maastricht debates made a potentially awkward actor of the European Commission in the dialogue and decision-making in the third pillar,[7] thereby putting constraints on its ability to act as a "competence-maximizing" institution.[8] The awkwardness of the Commission's position was further due to the general decline in its power in EU politics after 1992, treaty limitations placed on its capacity to maneuver.

In essence, the challenges that the Commission faces in the third pillar were in most part intimately

---

[6] See J. Peterson, "Decision-Making in the European Union: Towards a Framework of Analysis," *Journal of European Public Policy* 2 (1995): 117-137.

[7] In this paper, the term third pillar will refer to the policy spheres added to the EU's competence with the Maastricht Treaty. The Amsterdam Treaty, as will be discussed below, removed some of these issue areas from the third into the first pillar. However, for convenience, traditional third pillar issues will be analyzed under this rubric.

[8] Many EU scholars have argued that supranational organizations, particularly the Commission, are advocates for the deepening of European integration. In the case of the Commission, deepening would also suggest an institutional opportunity. See Mark Pollack, *The Engines of Integration? Supranational Autonomy and Influence in the European Community.* Berkeley: University of California, November 1996. Center for German and European Studies Working Paper, 2.41; George Ross, *Jacques Delors and European Integration* (New York: Oxford University Press, 1995). Michelle Cini, *The European Commission: Leadership, Organisation and Culture in the EU Administration* (Manchester: Manchester University Press, 1996); Laura Cram, "Calling the Tune without Paying the Piper? Social Policy Regulation: The Role of the Commission in European Community Social Policy," *Policy and Politics* 21, 2 (1993): 135-146; Laura Cram, "The European Commission as a Multi-Organization: Social Policy and IT Policy in the EU," *Journal of European Public Policy* 1, 2 (1994): 195-217.

linked to the problems of the third pillar itself. As we will see below, the genesis of the third pillar is in large part attributable to the different visions about the future architecture of the European Union that came close to bringing the constitutional negotiations to a standstill in 1991. The outcome was a compromise solution, which, though not optimal from the Commission's point of view, was seen as an stepping stone on which to build future Commission activity in the third pillar. However, under the Maastricht arrangements, the Commission's effectiveness in the third pillar was hindered by at least four different factors, which can be grouped into two general sets.

The *first set* of these factors involves *constitutional* constraints. The limitations on the Commission's range of operations are intimately related to the institutional setup of the European Union and the wording of Title VI of the Maastricht Treaty, largely because the Commission was unable to forge a more authoritative role for itself during the Maastricht negotiations and had to resign itself to its limited position to which the member states were willing to agree. Equally importantly, the vagueness of the Treaty on the types of policy instruments to be devised for the third pillar has made it difficult for the Commission to draft proposals, forcing it to search alternative, albeit less authoritative, avenues for involvement in the policymaking process. *Secondly*, the new decision-making rules that apply to Justice and Home Affairs matters, is closely linked to the first. The unanimity rule, which has hampered progress in the third pillar in general, has been particularly frustrating to the Commission, which has found it very difficult to table proposals that could stand the test of the unanimity rule. As a result, the Commission has been cautious to the point of inaction with respect to marshaling new initiatives. *Thirdly*, the post-Maastricht (and pre-Amsterdam) conduct of the Commission on the third pillar was largely anticipatory of the outcome of the 1996 IGCs which held the promise of altering the Maastricht architecture of the European Union, or, if that is not possible, at least alter the decision-making rules.

The *second set of factors* that constrains the Commission are *institutional* in nature. The Commission faces considerable organizational challenges as the college, cabinet, and civil servants seek to

come to grips with an expanded mandate. These organizational challenges range from budgetary concerns to leadership issues, making it difficult for it to be involved in the third pillar more effectively. The success with which the Commission overcomes these challenges directly contributes to the institutional leverage it might enjoy in a particular issue area.[9] The challenges are exacerbated by the fact that the Commission's entry into this policy domain has been somewhat tenuous, which in turn impacts the enhancement of its organizational capacity.

A review of the period of the Commission's activities in JHA leading up to the Amsterdam Treaty suggests that the Commission's work has been negatively impacted. This initial experience prompted repeated calls from the Commission to address primarily the first set of factors impeding its work and position within the Third Pillar. The conclusion of the Amsterdam Treaty, as will be discussed below, has brought some changes to the Commission's present and potential standing, even though the impact in terms of policy output remains muddled.

In order to demonstrate the sources and consequences of these challenges and the changes that resulted from the latest round of IGCs, the paper will begin by reviewing the developments that led to the creation of the third pillar by the Maastricht Treaty. It will highlight the Commission's position within Title VI, the section of the Maastricht Treaty that spells out the context and content of Justice and Home Affairs cooperation in the European Union. The paper will then identify the post-Maastricht factors that add to the constraints placed on the Commission and will subsequently discuss the institutional reform that resulted from the latest round of the IGCs. It will conclude with a comparison of the pre- and post-Amsterdam position of the Commission in JHA matters.

The Genesis of the Third Pillar

[9] On the organization, structure and the process of decision-making within the Commission, see Michelle Cini, *The European Commission: Leadership, Organisation and Culture in the EU Administration* (Manchester: Manchester University Press, 1996)., chapters 4 and 5.

Preceding the Maastricht debates, during the latter half of the 1980s, there was a dramatic increase in multilateral fora that dealt with JHA matters, particularly as these related to different aspects of migration in general and asylum in particular. During the very period justice and home affairs cooperation was being urgently projected into multilateral fora in Europe, Europe itself was preparing for its biggest institutional shuffle since the founding of the EC. The Maastricht Treaty transformed the European Communities into the European Union, and in so doing institutionalized an EU decision-making structure to deal with matters that would typically fall under the mandate of the justice and/or home affairs ministries of the national governments of the member states.

Gathering steam from 1991 onward, negotiations about the structure of the emergent European Union resulted at Maastricht in a "three pillared" edifice that some enthusiasts imagined to be a new European temple. The symbolic "pillars" supporting European unity were in effect realms of public policy that would be closely coordinated at the Union level. Pillar I was the Treaty of Rome, amended and expanded, and matters economic that it addressed. Pillar II was foreign and security policy or "CFSP," still more a vision than a reality, but a Maastricht commitment nonetheless. Pillar III symbolized European policy coordination in justice and home affairs and henceforth would be the arena within which the Union's common immigration and asylum policies, as well as its efforts to combat organized crime, terrorism and drug trafficking, would be hammered out.

Technically speaking, Title VI of the Maastricht Treaty establishing the third pillar is a procedural and political halfway house between dealing with JHA matters intergovernmentally by way of elaborating conventions between member states and supranationally by charging the existing Community decision-making framework and its central institutions with preparing binding Community legislation. Title VI of the Maastricht Treaty sets up an institutional arrangement that allows intergovernmental negotiations to take place within the newly engineered "European Temple," though the influence of the temple's custodians in the European Commission is considerably constrained. During the pre-Maastricht preparatory negotiations,

the Commission adopted a pragmatic stance sensitive to the fundamental issues of national sovereignty inherent in questions of JHA matters. Accordingly, the Commission agreed that measures associated with any program for a frontier-free European Union would have to be drawn up by intergovernmental bodies, so that, in the short run, the Community institutions would be marginalized in policy making. Still, the Commission aspired to eventually get the Community institutions into the policy-making and review processes that would be involved in later stages of the harmonization. Therefore, contentious issues like border controls and the standardizing of the review of asylum applications would be discussed mainly among national governments, which would be subject to only limited Community oversight, limiting the role of the European Commission and the European Parliament.[10]

These developments were largely symptomatic of a broader debate in the pre-Maastricht era, one that focused on how to steer the EU into the new millennium. As has been the case during all of the instrumental turning points of European integration, there was a difference of opinion on how to do this as groups of member states continued to advance opposing views on future integration.

The Maastricht Debate: Temple or Tree. Soon after the germination of intergovernmental cooperation in JHA during the latter half of the 1980s,[11] at this point not yet strictly affiliated with the EC, Europe began preparing for the IGC that was to culminate in the Maastricht Treaty. This process was best characterized by the diametrically opposite views on how to extend Community competence to new areas, best characterized by the Temple vs. Tree debate. The debate was initiated by the submission of a draft treaty on political union by Luxembourg in mid-April 1991 during its presidency in the first half of 1991. Also

---

[10] Treaty on the European Union, Title VI.

[11] This frenzied pace of intergovernmental and multilateral activity, whereby 100 official meetings and eight ministerial conferences were held on immigration related issues in 1991 alone, was partially brought under the umbrella of the third pillar after the Maastricht Treaty took effect.

referred to as the Luxembourg "nonpaper,"[12] this document envisioned a European architecture that would design the Union as a temple with three "pillars." The first pillar was to be the Treaty of Rome, which encompassed the new provisions that were agreed upon during the negotiations on political union. Pillar II would house the CFSP and Pillar III would be competent in cooperation on justice and home affairs. The body that would form the link between the three pillars by way of being the roof to the temple was to be the European Council. This was an effort on the part of Luxembourg to compromise the two extremes on the architecture that the EU was to adopt and find a common ground between Germany, Italy and the Netherlands on the one hand (proponents of a supranational solution which would be in the interest of the Commission) and Britain and Denmark (proponents of intergovernmentalism and a limited role for the Commission and Parliament) on the other.

Creating these three distinct pillars and keeping CFSP and cooperation on Justice and Home Affairs outside of the jurisdiction of the Rome Treaty was an incentive for the latter antifederalist group to lend their support to the Luxembourg proposal.[13] Predictably, this proposal hit a dissonant chord with the pro-federalist sentiment which surfaced when the Luxembourg proposal was being discussed at a foreign ministers' meeting in Dresden on June 3, 1991. At this meeting, the Belgian foreign minister offered a new, and decidedly pro-federalist, conception for the future architecture of the Union. Instead of conceptualizing the EU as a temple with three pillars, he argued, member states ought to conceive of it in terms of a "tree with branches."[14] The trunk of this tree would be the Community institutions – Commission, Council, Parliament and Court – and the spreading branches would be the new competence areas that would be integrally linked to the traditional Community decision-making process. Nonetheless, his argument failed to alter the

---

[12] Demetrios G. Papademetriou, *Coming Together or Pulling Apart? The European Union's Struggle with Immigration and Asylum* (Washington, DC: Carnegie Endowment, 1996), p. 50.

[13] Desmond Dinan, *Ever Closer Union? An Introduction to the European Community* (Boulder, CO: Lynne Rienner Publishers, 1994).

[14] *Agence Europe*, June 4, 1991, p. 1. See also Papademetriou, *op cit.*, pp. 52-53.

Luxembourg proposal to abandon the pillar structure and only elicited responses emphasizing the linkages between the three pillars which would allow them to function in conjunction while paying lip service to the federalist goals of the Union.

After the Netherlands, clearly in favor of the federalist architecture, assumed the next presidency during the latter part of the year, the Temple vs. Tree debate was further provoked by the submission from the Netherlands a new and radically different draft embodying a unitary structure. Although the deputy Dutch representative to the Intergovernmental Conference was repeatedly warned by other member states not to table a draft that would challenge the pillar structure proposed earlier by Luxembourg, he was insistent on formally presenting the proposal at a foreign ministers' meeting on September 30, 1991. Angered by the deaf ear that was turned to their warnings, the remaining countries defeated the Dutch proposal, and only Belgium, itself responsible for the genesis of the temple vs. tree debate, came to the rescue.[15] The only real opposition thus defeated, the Luxembourg proposition remained the sole proposal on which the Treaty on European Union was ultimately based. The temple had outdone the tree. This represented a lost opportunity for the Commission, which, compared to the extension of its traditional role to JHA matters under the Dutch proposal, was now put in a position where it had to operate in an intergovernmental setting to which it was utterly unaccustomed. However, pragmatism on the part of the Commission demanded, for lack of an alternative, that the Commission play along, establish its roots in the third pillar and, this time, at least be able to struggle from within.

Constitutional Constraints on the Commission

[15] There is evidence that Dutch delegation was severely either substantially misinformed about the severity of opposition to its proposal, or it deliberately disregarded the feedback it was getting from the other members. Consequently, what Prime Minister Lubbers at one point thought to be a proposal acceptable to other members proved to be a very embarrassing defeat for their presidency. See *the Financial Times*, September 21-22, 1991, p. 3.

After the intergovernmental vs. supranational debate was temporarily resolved in favor of the former, a new title was added to the Maastricht Treaty to guide -- however vaguely -- policy and decision-making in the new fields of EU competence. Title VI of the Maastricht Treaty thus spelled out the nine areas of "common interest" which were to fall under the newly institutionalized JHA cooperation. These were enumerated in Article K.1 as:

- Asylum policy;
- Rules governing the crossing of the Community's external borders;
- Immigration policy and policy regarding third country nationals;
- Combating drug addiction;
- Combating international fraud;
- Judicial cooperation in civil matters;
- Judicial cooperation in criminal matters;
- Customs cooperation; and
- Police cooperation for the purposes of preventing and combating terrorism, unlawful drug trafficking, and other serious forms of international crime.

-- Figure 1 about here --

Figure 1 *Post-Maastricht Pre-Amsterdam Third Pillar Decision-making Bodies*

Furthermore, the Treaty established a five-tier negotiation framework, summarized in Figure 1, and created a mechanism into which the Commission civil servants could be integrated. These five levels of negotiations -- working group, steering group, COREPER, K4 and JHA Council -- was a substantial change from traditional EC decision-making (which consisted of three levels) and added two new negotiation levels to the already time consuming mechanism. Nonetheless, within this five-tiered setup, the Commission became officially -- and somewhat more authoritatively -- involved in the discussions in the most instrumental four of the five levels (excluding the Council of JHA ministers).

Admittedly, the position of the Commission has been strengthened by Article K.3 which gave the Commission a shared right of initiative "in the areas referred to in Article K.1 (1) to (6)," in other words in all JHA matters excluding the last three of the above mentioned nine areas of common interest. Additionally, K.4 of the Maastricht Treaty establishing the K.4 Committee stipulated that "the Commission shall be fully

associated with the areas of work referred to in this title" and thus allowed the Commission to be represented during the deliberations and engage in policy discussion. Until these stipulations, the Commission had at best an observer status in the pre-Maastricht cooperation undertaken by the Ad Hoc Group of Immigration Experts and various other groups that met periodically to discuss matters relating to immigration, organized crime and external borders: it could make suggestions to the policies when these were solicited, but it could not submit policy proposals. Nonetheless, while the stipulations in the Treaty elevated the Commission's level of involvement beyond the limited access involved with observer status, they were certainly not comparable to the privileged position the Commission held in the first pillar.[16]

When the dust settled after the Maastricht summit, the only thing that had changed was that business as usual had now been institutionalized into the Union's new framework, with some incentives for the Commission to assume a more active role. Surprisingly, however, it was exactly at this juncture that the Commission "so often the Community's intellectual, political, and administrative motivator ... experienced pronounced bureaucratic inertia"[17] as they became preoccupied with other politically pressing problems such as the one that was emerging in Yugoslavia.

Contributing to this inertia were a few other factors. The first was that the JHA cooperation got off to a deceptively good start which waned soon afterwards. The initial workload was heavy, not because all of the initiatives being discussed had suddenly been mounted after the Maastricht Treaty, but because the workload carried over from the progress made in pre-Maastricht intergovernmental cooperation.[18] As a result, the Commission had little say over texts that were already negotiated for the most part. Furthermore, progress was slow and problematic. In fact, some of the dossiers, most notably the External Borders

---

[16] Peter Meyers, "The Commission's Approach to the Third Pillar: Political and Organizational Elements," in Roland Bieber and Joerg Monar, Eds. *Justice and Home Affairs in the European Union: The Development of the Third Pillar* (Brussels: European Interuniversity Press, 1995).

[17] Papademetriou, p. 60.

[18] Fortescue, op cit., p.

Convention, ended in irreconcilable differences of opinion between member states, deadlocking any progress and defying any brokering attempted by the Commission. Progress was further hampered by the ambiguity of the treaty on the kinds of instruments that could be brought to bear in the third pillar. Title VI foresaw joint decisions and actions which were not only new kinds of policy instruments but also ambiguous in terms of whether they were binding or not. The truth was, since nobody really knew what a joint decision or action was, and what it was supposed to do in terms of community legislation, the Commission, as well as most of the member states, shied away from using them. The Commission was in favor of adopting unambiguously binding documents, and as this proved all but impossible in the intergovernmental setting, steered away from using its right to draft and propose Title VI instruments. Its stance on the policy tools of the third pillar was summarized by its report to the Reflection Group in 1995 where it was argued that:

> "(t)he question of whether the legal instruments and the practice of the cooperation -- both inspired by Title V which deals with Common Foreign and Security Policy matters -- are indeed appropriate for the field of Justice and Home Affairs is worth reflecting upon. Title V and Title VI cover completely different areas: whereas the former deals with the appropriate responses to changing international conjuncture, the latter deals mostly with normative questions which deal with basic rights and therefore demand a uniform legal basis."[19]

One further problem that arose out of the Treaty, and one that was particularly problematic for the Commission, was the lack of a clear delineation between the first and third pillars on some issues, as some of the nine areas of common interest – most notably the Community's external borders, and policies regarding third country nationals – were dealt with in the first pillar as well. As such, these issues where the line between first and third pillar competence became blurred represented coordination problems between the newly emerging third pillar bureaucracy and the existing cadres in DG V and DG XV.

In addition to these Treaty limitations imposed on the Commission's work, it was apparent that member states continued to regard the Commission with suspicion. This was evident in the powers they have

---

[19] Commission of the European Communities, "Bericht über die Funktionsweise des Vertrags über die Europäische Union," May 10, 1995, SEK (95) 731 endg., p. 52, author's translation.

accorded the Commission in the Maastricht Treaty. Perhaps the most important setback to the Commission's work has been that of the absence of an exclusive right of initiative which the Commission continued to enjoy in the first pillar. Though an improvement from its previous position in the intergovernmental discussions relating to pillar three affairs, a *shared* right of initiative was clearly an indication that the Commission was envisioned as one of *sixteen* actors in the third pillar to take initiative in JHA matters.

Its entitlement to an *exclusive* right of initiative in the first pillar did not of course imply that all of the Commission's policy proposals were adopted verbatim. A Commission proposal would go through the traditional decision-making procedure in the European Union -- involving multiphase feedback from the Council and the Parliament -- before it is finally acted upon by the Council. During this process, the Commission has the opportunity to respond to the proposed changes to the proposed legislation and seek to get a draft adopted which would be mostly in line with the original proposal. When all else fails, the Commission can defend itself against undesirable and unacceptable amendments to the Commission's proposal by withdrawing the proposal if a stalemate is preferable to the amended proposal. The fact that the Commission only enjoyed a shared right of initiative in the third pillar robbed the Commission of this weapon, the supreme tactical move by the Commission to avert unfriendly amendments and undesirable policies. Within the new constitutional setting, the impact of the withdrawal of a Commission proposal would be in essence neutralized by the tabling of an alternative proposal by any of the member states, forcing the Commission to think twice before it tabled any initiative. Table 1 outlines the differences in decision-making between the first and third pillars in post-Maastricht JHA cooperation.

— Table 1 about here —

With these constraints stacked against it, the Commission adopted a strategy of "not pushing its luck in competence terms" between 1989 and 1992, even as this applied to legislation necessary to complete the project of accomplishing free movement of persons, part of which fell under the competence of DG V and

DG XV.[20] Instead, immediately following the creation of the pillar structure, the Commission became engaged in a process that was different than the traditional first pillar mechanism of tabling various legislative proposals. Rather than tabling proposals, and running the risk of failure to get them adopted and further discrediting the Commission, it opted for a strategy of confidence building with the Council and the individual member states. Accordingly, instead of introducing a barrage of new initiatives in the third pillar, it opted in favor of preparing and tabling communications that sought to describe the existing challenges in JHA cooperation as well as attempting to set the agenda by creating a dialogue around its framework.

In 1994, after a long period of preparation, the Commission tabled two such communications, one on immigration and asylum policies,[21] and another on drugs. Its emphasis on the root causes of immigration aside, the Commission's communication appeared to be a compendium of the existing policies in the member states, carefully worded to avoid antagonizing member states which would stall further progress and isolate the Commission. The February 1994 Communication to the Council and the Parliament on Immigration and Asylum Policies was about as ambitious as the Commission was willing to get in the third pillar. It was launched in the hope that member states would pick up on its suggestions and embark on initiatives -- especially with respect to its root causes argument -- that would move the agenda forward. This, however, did not happen and as the member states chose not to engage in the dialogue that the Commission wished to initiate, its effort to set the agenda was suspended in midair.

In 1993, the Commission also fulfilled its obligation set out in the declaration on asylum[22] annexed

---

[20] John Adrian Fortescue, "First Experiences with the Implementation of the Third Pillar Provisions," in Roland Bieber and Joerg Monar, Eds. *Justice and Home Affairs in the European Union: The Development of the Third Pillar* (Brussels: European Interuniversity Press, 1995), p. 21. The European Parliament, among others, has been unhappy with this cautious attitude of the Commission and has in fact taken the Commission to the European Court of Justice for failing to realize its treaty obligation to phase out border controls.

[21] Commission of the European Communities, "Communication from the Commission to the Council and the European Parliament on Immigration and Asylum Policies," *Commission of the European Communities*, 23.2.1994.

[22] The Declaration on asylum stipulated that "1.The Conference agrees that, in the context of the proceedings provided for in Articles K.1 and K.3 of the provisions on cooperation in the fields of justice and home affairs, the Council will consider as a matter of priority questions concerning Member States' asylum policies, with the aim of adoption by the beginning of 1993, common action to harmonize aspects of them, in the light of the work programme and timetable

to the Maastricht Treaty by preparing a report on whether asylum should be moved to the first pillar.[23] Article K.9 of the TEU foresaw a possible transfer, known as the *pasarelle* of some of the issues from the third to the first pillar, asylum issues being the prime candidate.[24] Cognizant of the lack of consensus among member states on the "communautarization" of asylum, let alone unanimity, the Commission concluded in this report that "as of the end of 1993, the time was not yet ripe to take such action."[25]

In terms of legislation, the Commission tabled a revised version of the External Borders Convention.[26] This new version sought to make the draft convention, which had been in the pipeline for some years at that point, compatible with the Treaty on European Union. Finally, the Commission invoked Article K.1 (5) to initiate a process which would culminate in a convention on fraud against the community budget. Other than these, however, the Commission did not table any other initiatives for fear of irreparably antagonizing the member states. The member states were not terribly forthcoming about new initiatives, either. Other than inching along on business that was already long underway, and attempting to smooth out the differences of opinion between the member states on the various issues that were being discussed, few concrete results were reached in the post-Maastricht period.

Institutional Constraints

---

contained in the report on asylum drawn up at the request of the European Council meeting in Luxembourg on 28 and 29 June 1991. 2.In this connection, the Council will also consider, by the end of 1993, on the basis of a report, the possibility of applying Article K.9 to such matters."

[23] "Applying Article K.9 of the Treaty on European Union to Asylum Policy," *Commission of the European Communities*, 4 November 1993, SEC (93) 1687 final.

[24] Article K.9 stipulates that "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." TEU, emphasis added.

[25] "Applying Article K.9 of the Treaty on European Union to Asylum Policy," *Commission of the European Communities*, 4 November 1993, SEC (93) 1687 final.

[26] The debate on this convention remains deadlocked over a disagreement between the UK and Spain over the status of Gibraltar. Consequently, the convention is still pending signature.

With the extension of the Commission's mandate to cover new areas, it became necessary to create a new bureaucracy to administer the newly created workload. At the top of this bureaucracy is a Commissioner and her Cabinet.[27] Below the Commissioner and the Cabinet, the Commission is divided into 24 directorates-general (DGs) with an additional 15 or so specialized services. Each DG is headed by a director-general, reporting to a Commissioner who has the political and operational responsibility for the work of the DG.

The difficulty with administering third pillar affairs began in that while a Commissioner and Cabinet was charged with shaping third pillar policies and initiatives, no commensurate directorate general was created to provide the technical and administrative background for the work. Instead, a small Task Force was created, headed by a *Conseiller hors Classe* -- a bureaucratic title accorded to someone who cannot officially be given a directorship general. Separate from all the DG's that are responsible for various functional areas, the Task Force was created within the Secretariat General of the Commission. This Task Force reported directly to the Commissioner and her Cabinet and was organized along the lines of the three main areas of cooperation: while Unit 1, headed by a veteran of the intergovernmental negotiations on immigration prior to the creation of the third pillar, was charged with assuming the work on immigration, asylum, and external frontiers, Units 2 and 3 worked on drugs and judicial cooperation respectively. Finally, one member of the Task Force was charged with dealing with external relations, such as being involved with reviewing the compatibility of the third pillar related domestic legislation of the Central and Eastern European countries as these prepared for membership in the European Union.

The Task Force is staffed in part by newly recruited civil servants but also by national experts on secondment from their governments for a period up to three years. These civil servants and national experts

---

[27] During the first two post-Maastricht years, third pillar issues were added to the competence of Pádraig Flynn in the Delors College.

are responsible for attending the meetings of the working groups, steering groups, COREPER and K4 meetings outlined above. In addition, they are essentially responsible for the drafting of Commission initiatives, representing the Commission at the appropriate committee meetings of the Parliament as well as responding to their written and oral questions, administering the budget set aside for third pillar matters, organizing and running conferences and a host of other activities.

Though the Task Force is run by able career bureaucrats who have had considerable practical and political experience over the years, besieged by chronic manpower shortages and increasing workload, the Task Force faces the challenge of representing an institution already constrained by the factors outlined above. The Task Force expanded their ranks somewhat by recruiting some new civil servants and engaging some new national experts. Nonetheless, the Task Force is clearly overworked and understaffed. Adding to this the problem of turnover and continuity, because the seconded personnel has to return to the headquarters after a certain period, the Task Force's staffing is less than optimal and makes for a very stressful working environment.

One final challenge for the Task Force is its rising rivalry for power with the Council bureaucracy. Just as the Cabinet and the Task Force are in charge of representing the Commission and initiating Commission policies, its counterpart in the Council is charged with similar duties. The bureaucracy that prepares third pillar related dossiers is the Commission's archrival, the Council Secretariat. While there were no signs that the Task Force was eventually going to be expanded into a Directorate General, demonstrating their preference for the direction of third pillar affairs, member states agreed to strengthen the Council Secretariat. In terms of access, the Council secretariat has better leverage compared to the Commission's ranks. The Council Secretariat, which also assists the revolving presidency, is closer in institutional culture to the member states which seem more comfortable with this particular outfit.

In addition to these personnel problems briefly outlined above, the Commission's work in the third pillar is further challenged, if not beset, by leadership problems. JHA related matters currently fall under

the mandate of Commissioner Anita Gradin. When the Santer College was installed for the period between 1995 and 2000, Anita Gradin -- the oldest member of the College -- was inaugurated as the new Swedish Commissioner in charge of immigration, home affairs and justice, relations with the newly created European Ombudsman, financial control and fraud prevention after a confirmation hearing by the European Parliament. Gradin, trained in social work and public administration was a long time member of the Swedish Parliament and was actively involved with labor and trade relations in Sweden. She had served as the Council of Europe's Committee on Migration, Refugees and Demography between 1978 and 1982 and worked as the minister with responsibility for immigrant and equality affairs at the Swedish Ministry of Labor between 1982 and 1986. Immediately preceding her appointment as the new Commissioner, she had worked as the Ambassador of Sweden to Austria and Slovenia and to the International Atomic Energy and UN in Vienna between 1992 and 1994 and was therefore somewhat removed from the current JHA developments.[28]

Despite her credentials, however, she had her work cut out for her as she took office. She not only became the Commissioner of a new member state in the Union, but also the Commissioner in charge of issue areas completely new to the Commission. In a move the logic of which was highly questionable, she put together her Cabinet and Cabinet staff which consisted almost exclusively of fellow Swedes who were not yet well versed in the workings of the Commission and Union apparatus.

Her leadership style was also markedly different from her colleague Pádraig Flynn who was in charge of social affairs and employment, immigration, home affairs and justice between 1993 and 1994 in the Delors Commission. The Irish Commissioner, who is now responsible for employment and social affairs as well as relations with ECOSOC in the Santer Commission, brought to the job his experience as the previous Irish Minister of Justice, a position he occupied immediately prior to his appointment as the

---

[28] European Commission, *The European Commission 1995-2000* (Brussels: Directorate-General for Information, 1995), pp. 28-29.

Commissioner in charge of Justice and Home Affairs.[29] In sharp contrast to the bold and at times impassioned attitude of Flynn, Gradin was generally more low key, appeared not to want to rush into things which sometimes came across as indecisiveness. This excessive caution or indecisiveness caused harm both to her image as an effective Commissioner who was able to carry the Commission to an authoritative policymaking position in JHA and to the morale of her civil servants who routinely had to shelf efforts in which considerable time, human resources, and hope was invested.

Often, her follow-through on initiatives that she publicly announced to the European Parliament was frustratingly lagging behind her own timetable. The Commission initiative on temporary protection is perhaps the best illustrative example. As early as 1994, the Commission Communication began paving the way for the discussion of harmonizing temporary protection schemes to make them a viable and efficient response mechanism for member states. The Communication made the case that, especially since the current efforts result from the practical difficulties of extending protection to a considerable number of people, "some degree of harmonization would seem worth seeking."[30] It further argued that such a harmonized approach would need to address the questions of identifying situations that would require international protection, determining the legal rights of the beneficiaries of temporary protection and establishing the period after which longer-term solutions ought to be sought.

Accordingly, Commissioner Gradin has expressed before the European Parliament her desire to initiate debate on this issue on a number of occasions. On 20 September 1995, during a debate concerning the Wiebenga report, Commissioner Gradin announced that she was planning a series of new third-pillar initiatives which would be proposed *by the end of 1995.* She announced that "an initiative covering ... displaced persons" was being planned. After calling the Parliament's attention to the different practices in

---

[29] European Commission, *The European Commission 1995-2000* (Brussels: Directorate General for Information, 1995), pp. 24-25.

[30] Communication from the Commission to the Council and the European Parliament on Immigration and Asylum Policies, COM (94) 23 final, pp. 25-27.

the Member States, she concluded that "joint action is the most appropriate form for such an initiative to take" and expressed her hope that this could "contribute to a more uniform approach by the Member States in a field where they currently act completely independently of one another."[31]

Later, in a speech given to the European Parliament's Committee on Civil Liberties and Internal Affairs on 23 January 1996, she similarly announced that she intended to launch discussion on temporary protection. Yet, the long-awaited Commission initiative was not forthcoming, not because the services were unable to produce the initiative, but because the Commissioner could not be convinced by her staff to launch it. Finally, two years behind schedule, and apparently at the urging of some key member states, the Commission finally proposed the Joint Action on Temporary Protection of Displaced Persons on 5 March 1997 to the Council.[32] This proposal became the Commission's first proposal on a European Union instrument in the asylum area, yet ran into significant difficulties very soon.

At the confluence of these factors, what was understandably an initial adjustment period got off to a rocky start as discontent mounted within her own cadres. While her Cabinet argued in favor of exercising restraint in the name of confidence building, she began to be viewed as not bold enough, lacking a certain political vision to seize the small window of opportunity that was accorded to the Commission by the Maastricht treaty and turn it into an enhanced role for the Commission. While some of these criticisms levied against her were admittedly harsh – after all, the Commission had an unflattering reputation among the member states even before she stepped in and this reputation extended well beyond JHA – they were symptomatic of low organizational morale which resigned most bureaucrats to concentrating on staying afloat amidst a staggering workload instead of aggressively pushing for Commission visibility.

Last, but not least, the Commission's work in JHA was hampered by the lack of resources. It was

---

[31] European Parliament Debate on 20 September 1995 concerning the Wiebenga Report," OJ4-467, p. 93.

[32] Commission Press Release, "Commission Proposal on Joint Action for Temporary Protection of Displaced Persons," Brussels, 5 March 1997, IP/97/178.

not until 1996 that the third pillar received a separate budget line from the Union. This budget is used to finance not only the Commission's programs underway in the third pillar, but also the administrative costs of creating a bureaucracy which will run the activities. As of this year, the Gradin cabinet and the Task Force for Justice and Home Affairs, which collectively make the Commission's workforce in the third pillar, together had an administrative budget that is equivalent to the budget of the fruits and vegetables unit of DG VI, the directorate general that is in charge of agriculture related policies. Keeping in mind that this budget is for the entire third pillar, the workload of which encompasses a broad range of issues such as immigration, asylum, external borders, drugs, fraud, judicial cooperation in civil and criminal matters, customs and police cooperation, the Commission's lack of resources is crucial to its work. The lack of resources was especially chronic with respect to personnel matters which were briefly discussed above, making it all but impossible to expand the Commission's workforce to allow it to work more effectively. Given the realities of the budget, to hope for dramatic increases in manpower commensurate with the expanding workload is unrealistic, which would continue to haunt the Commission unless the constitutional reform being shaped by the IGC was complemented with budgetary and administrative reform within the third pillar.

Reforming the Third Pillar: What Did the Commission Stand to Gain?

The previous section listed the constitutional and institutional factors that have made the Commission an awkward yet aspiring actor in the third pillar. The result so far has been that the Commission's aspirations for a more prominent role in the decision-making framework of the third pillar have fallen short of what the Commission would have wished. Yet, following the most recent round of IGCs, which among other things attempted to reform the third pillar, the Commission looks forward to an enhanced role in the new institutional setup.

From the early days of the intergovernmental setup that was institutionalized by the Maastricht

Treaty, it became apparent that the apparatus created was unable to deal efficiently with the existing workload. The EU institutions -- most notably the Parliament[33] and the Commission -- as well as most of the member states -- with the exception of the UK and Denmark -- acknowledged the shortcomings of the institutional structure. Their arguments -- all well known by now to the critics of the third pillar -- centered around the premise that this new model of intergovernmental negotiations was not only not particularly fruitful, but also posed significant problems with respect to transparency[34] and the democratic deficit,[35] two issues that are of paramount importance to the image of the European Union as an organization that serves the peoples of western Europe.[36] The frustrations with the actual work that was being done was obvious: due to the unanimity rule, and problems associated with the ratification of the conventions that were concluded in the third pillar, tangible progress in terms of legislation was hard to demonstrate. It was also increasingly difficult to explain and defend the secrecy with which many of the instruments were negotiated and concluded. In the words of the Irish Presidency, which took over the helm in June 1996 soon after the

---

[33] The Parliament, as the only democratically elected body of the European Union, has been very unsatisfied with the cursory role it has been given in the third pillar. Often circumvented in ingenious ways in the policy debate, the Parliament is one of the most vocal critics of the pillar structure and has made its discontent be known in a series of reports prepared by Jean-Jouis Bourlanges and David Martin in 1995. For a detailed list of its proposals for reform see Jean Louis Bourlanges, and David Martin, "Report on the Functioning of the Treaty on European Union with a View to the 1996 Intergovernmental Conference - Implementation and Development of the Union: Motion for a Resolution," *European Parliament Committee on Institutional Affairs*, 4 May 1995; Jean Louis Bourlanges, and David Martin, "Report on the Functioning of the Treaty on European Union with a View to the 1996 Intergovernmental Conference - Implementation and Development of the Union: Opinions of the Other Parliamentary Committees," *European Parliament Committee on Institutional Affairs*, 4 May 1995; Jean Louis Bourlanges, and David Martin, "Report on the Functioning of the Treaty on European Union with a View to the 1996 Intergovernmental Conference - Implementation and Development of the Union: Co-Draftsmen's Working Documents," *European Parliament Committee on Institutional Affairs*, 4 May 1995. See also "The European Parliament's Stance on the 1996 IGC," *Agence Europe*, 29 May 1995.

[34] For further reference on these arguments, see David O'Keefe, "Recasting the Third Pillar," *Common Market Law Review* 32 (1995): 893-920; David O'Keefe, "A Critical View of the Third Pillar," in Alexis Pauly, ed. *De Schengen a Maastricht: Voie Royale et Course d'Obstacles* (Maastricht: European Institute of Public Administration, 1996); Sarah Collinson, *Beyond Borders: West European Migration Policy Towards the 21st Century*(London: Royal Institute of International Affairs, 1993), and Sarah Collinson, "Toward Further Harmonization? Migration Policy in the European Union," *Studi Emigrazione* 31, 114 (1994): 210-237.

[35] Deirdre Curtin, and Herman Meijers, "The Principle of Open Government in Schengen and the European Union: Democratic Retrogression?," *Common Market Law Review* 32 (1995): 391-442.

[36] Justus Lipsius, "The 1996 Intergovernmental Conference," *European Law Review* 20, 3 (1995): 235-267.

IGC was launched, "(m)atters such as asylum , visas and immigration have until now been dealt with largely through the provisions for cooperation set out in Title VI of the Treaty on European Union. Cooperation has, in the view of many, lacked sufficient coherence, consistency and impetus."[37]

The disagreements challenging the reform process were twofold: on the substantive side was the question of how far the harmonization process was to go and what it was ultimately to cover, on the institutional side was the question of decision-making. This latter issue was a particularly divisive one, pitting those who favored supranational decision making against those who had more intergovernmental aspirations. Of particular concern was whether the Third Pillar would be *communautarized*, which implied exclusive competence for the Commission, increased input from the Parliament, a new competence for the ECJ, and a move toward qualified majority voting (QMV) which is a move that is generally associated with supranational decision making. Alternatively, a decision against the complete *communautarization* of Third Pillar issues could be followed by the implementation of a multi-speed Europe in which the member states would participate with varying levels of involvement. This could be supplemented with the marginal improvement of the decision making process within the Third Pillar by eliminating some of the five complicated levels of negotiation. Table 2 summarizes the member states' stance on these questions based on the position papers they issued prior to the IGC.

— Table 2 about here —

Not surprisingly, the Commission was vocally yet guardedly critical of the functioning of the third pillar, not least because of the constraints that were imposed upon it by the Treaty. The Commission was particularly unsympathetic to the unanimity rule, which , it argued, made decision-making all but impossible, and the limitations on

---

[37] Council of the European Union, *The European Union Today and Tomorrow, Adapting the European Union for the Benefit of Its Peoples and Preparing It for the Future: A General Outline for a Draft Revision of the Treaties*, CONF 2500/96, 5 December 1996.

its right of initiative which had, up to this point, forced it to be overly cautious with exercising it. Like the other EU institutions who sought to create a platform for reform, the Commission enumerated its reasons for discontent with the Title VI arrangements in two reports on the reform of the Maastricht Treaty in light of the approaching start of the IGC in March 1996. The first was a report on the functioning of the treaty, submitted to the IGC Reflection Group in May 1995.[38] The second represented the Commission's stance on political union and enlargement, delivered to the IGC in February 1996.[39] This opinion by and large reiterated the argument made in the 1995[40] report and proposed reforming the third pillar along the following lines:

* Summarizing third pillar objectives into main themes, including common rules of entry and residence of third-country nationals and mutually recognizing the judgements of national courts;
* *Replacement of the unanimity rule in all areas by qualified majority voting*;
* *Extending to the Commission the right of initiative in all areas*;
* Developing more effective legal instruments, such as directives instead of joint actions or common positions; and
* Submitting decisions to review by the European Court of Justice.[41]

While the entire list sought to address the main causes of concern with the functioning of the Treaty, the italicized items were particularly geared towards bolstering the Commission's position in the third pillar and securing it wider space for negotiating with the member states. Especially with respect to the move from a unanimity rule to one that represented some sort of a qualified majority, the Commission hoped that having to secure the support of only a qualified majority of the member states would enhance the likelihood of support for its initiatives -- particularly those of a binding nature -- which would allow it to use its right of initiative more actively.

As the IGC proceeded, the Commission's services were asked to produce a draft for possible amendments to the Treaty. The draft revision that was produced by the Irish presidency in December 1996 appeared to have taken the

---

[38] Commission of the European Communities, "Bericht über die Funktionsweise des Vertrags über die Europäische Union," May 10, 1995, SEK (95) 731 endg.

[39] Commission of the European Communities, *Intergovernmental Conference 1996: Commission Opinion -- Reinforcing Political Union and Preparing for Enlargement* (Luxembourg: Office for Official Publications of the European Communities, 1996).

[40] Simon Hix, and Jan Niessen, *Reconsidering European Migration Policies: The 1996 Intergovernmental Conference and the Reform of the Maastricht Treaty* (Brussels: Churches Commission for Migrants in Europe, 1996), 32.

[41] *Ibid.*, pp. 11-12.

Commission suggestions into account, and even though it was by no means the authoritative text, showed some signs of moving in a favorable direction for the Commission. The presidency's draft addressed the five major aims of the IGC as these were set by the Florence European Council. The first of these aims geared towards making "the Union more relevant to its citizens and more responsive to their concerns" was of direct relevance to the third pillar as the Union, it was argued, must be able to "extend as necessary across those borders the protection of its citizens."[42]

Appropriately, the first section of the draft concerned the creation of "an area of freedom, security and justice" for which the presidency proposed to set a target deadline of 1 January 2001. In the areas of free movement of persons, asylum, and immigration, the presidency proposed setting target dates for adopting clear procedures governing the crossing of external borders, establish provisions for common visa regulations, tackling the issue of asylum and illegal drugs collectively. In order to achieve these goals, the presidency "considered" the drafting of a new title and the incorporation of this title in the Treaty Establishing the European Community (TEC) which would mean a transfer of these issues to the first pillar. Noting that not all of the member states were in favor of such a move, the presidency suggested the adaptation of the (decision-making) rules of the TEC to be applied to these a new areas. The draft revision remained silent on the issue of the Commission's enhanced position in the decision-making. Arguing that the role of the institutions remain to be considered in the conference -- and hinting at the lack of consensus -- it suggested the initiation of a process during which the shared right of initiative for the Commission would move along a previously-decided-upon schedule towards an exclusive right of initiative. Similarly, the presidency suggested that the conference could consider retaining the unanimity rule but setting the schedule for a move towards qualified majority decision-making.

These arguments were surprising, given that many, including those in the Commission, had resigned themselves to the prospect of no meaningful reform of the third pillar. Before the beginning of the IGC, it was generally expected that third pillar issues -- partly due to the lack of consensus and partly as a result of overwhelming political attention to other issues such as the EMU -- would not figure prominently on the IGC's agenda. The developments since the beginning of the conference have proven these arguments wrong. In fact, the reform of the third pillar now occupies

---

[42] Council of the European Union, *The European Union Today and Tomorrow, Adapting the European Union for the Benefit of Its Peoples and Preparing It for the Future: A General Outline for a Draft Revision of the Treaties*, CONF 2500/96, 5 December 1996, p. 6.

an important position on the agenda, and though consensus is still lacking, there is a better chance of reforming the third pillar to allow for a stronger Commission. Recently, in his monthly letter to the nongovernmental organizations on the progress on the IGC, Marcelino Oreja, the Spanish Commissioner in charge, *inter alia*, of the preparations for the IGC, informed:

> Despite some outstanding problems, particularly on the part of Britain and Ireland (as islands) and Denmark (because of the 1992 referendum), the reform of the Treaty in the field of judicial and home affairs seems to be taking shape. Under this reform, all matters which are not concerned purely with criminal law or the police (for example immigration, the crossing of external borders, etc.) will be transferred from the intergovernmental to the Community framework, and working methods in these fields will be improved.[43]

When the Netherlands took the helm of the EU presidency in January 1997, it demonstrated its resolve to preside over the conclusion of the IGC by speeding up the tempo. During the six months it held the presidency, the Irish Draft Treaty was polished and elaborated, especially with respect to JHA issues which were cursorily referred to. On June 16, 1997, agreement was finally reached on a new draft treaty, the Treaty of Amsterdam, to mark the end of the IGC. The final provisions on JHA matters were very elaborate and, unlike the Maastricht Treaty, specific. The Treaty of Amsterdam inserted a new section into the First Pillar and moved asylum, immigration and safeguarding the rights of nationals of third countries, and judicial cooperation in civil matters from Title VI of the TEU to Article 73 of the newly drafted Title IIIa.[44] The treaty, agreed to at the Amsterdam European Council of 16-18 June, 1997, was formally signed on 2 October, 1997.

The new provisions brought about the changes foreshadowed by Commissioner Oreja. To guarantee that an "area of freedom, security and justice" is established gradually in the Community, Article 73o of the draft treaty prescribed that there will be a five year period from the entry into force of the Treaty during which the Council will continue to take decisions by unanimous vote.[45] When these five years expire, "the Council, acting unanimously after consulting the European Parliament, shall take a decision with a view to providing for all or parts of the areas covered

---

[43] Marcelino Oreja, Monthly Letter of March 1997, available on the internet at <http://europa.eu.int/en/agenda/igc-home/eu-doc/letter/mar97en.htm>.

[44] For the complete text of the Treaty of Amsterdam, see the European Union server at <http://europa.eu.int/Amsterdam>. The full title of the treaty is *Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts.*

[45] See also <http://europa.eu.int/abc/obj/amst/en/qa.htm#10>

by this Title to be governed by the procedure referred to in Article 189b[46] and adapting the provisions relating to the powers of the Court of Justice."[47] This article essentially provides for the final *communautarization* of the issue areas that are now part of Title IIIa by allowing for a move towards supranational decision-making through qualified majority voting. Such a move would need the unanimous approval of the member states, something that is difficult but not impossible.

The Amsterdam Treaty: What's New for the Commission?

With the Amsterdam Treaty, the EU committed itself to maintaining and developing "the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, *asylum*, immigration and the prevention and combating of crime."[48] The Treaty embodied several provisions that were designed to make this possible. The comparison in Table 3 reveals a fundamental institutional change in JHA cooperation, especially for those issues that were now housed in the first pillar. Asylum issues, now dealt with under Article 73k of the new Title IIIa of the amended TEC, were among those that were lifted out of the Third Pillar. Article 73i of the Treaty charged the Council with developing the necessary compensatory measures relating to the abolishing of external border controls, which included further work on minimum standards and temporary protection. The pertinent provisions of the Amsterdam Treaty are reproduced in Appendix I.

— Table 3 about here —

Not surprisingly, the substantive content of the treaty was left vague in order to allow for crafting policies as the need arose. What was more of interest, however, were the institutional changes to which most of the participating states agreed. For the *communautarized* issues, there was now potentially a greater role for the Commission, Parliament,

---

[46] Article 189b spells out the decision-making procedure in the European Union. Accordingly, the Commission has an exclusive right of initiative, the Council gives the final approval and the European Parliament is directly involved in the decision-making process.

[47] Article 73o(2)ii of the Treaty of Amsterdam.

[48] Amended Article B of the TEU, emphasis added.

and Court, something generally associated with increased supranationality. The intergovernmental Third Pillar was streamlined, and reduced to the areas of police cooperation and judicial cooperation on criminal matters. Its objectives were spelled out more explicitly and the Commission was given a right of initiative in police and criminal justice cooperation which was clearly an improvement from the Maastricht setup where the Commission was explicitly excluded from the decision making.

Yet, despite the *communautarization* of immigration and asylum issues, perhaps the biggest shortcoming of the 1996 IGCs has been the failure to agree on an automatic transition from unanimity to qualified majority decision-making, which is the cornerstone of supranational governance. The Irish and Dutch draft treaties both foresaw such an automatic transition after a five-year period following the entry into force of the new treaty. Yet, during the final days of negotiation, this idea was struck down by Germany's Chancellor Kohl. Feeling pressured by Germany's *Länder* governments which adopted an increasingly unfriendly stance against the transfer of decision-making capacity to Brussels on immigration and particularly asylum matters, Chancellor Kohl eventually insisted on unanimity in decision-making, at least for the first five years following the implementation of the treaty.

The final text of the treaty reflects this compromise: while member states agreed to transfer some of the Maastricht third pillar issues to the first, they did so by retaining the unanimity rule for five years. After this time, the Council will decide "unanimously, but without the need for national ratification" whether qualified majority voting should become the rule for some or all of the new First Pillar issues.[49] Predictably, the Union institution that was least satisfied with the compromise was the Commission. Commissioner Oreja complained that it was

> unfortunate that when these powers were transferred from intergovernmental cooperation to the Community there was not a parallel shift from unanimity to qualified majority voting in the Council. We must also regret that Parliament's opportunity to carry out its true mission (legislative function) has been deferred for five years, and is subject to a Council decision (by unanimity) on an amendment.[50]

---

[49] Petite, *op cit.* The fact that this decision does not require national ratification is potentially beneficial for a shift to QMV as it eliminates the need to sell this idea to national parliaments. However, compared to an automatic transfer, it involves further haggling which could make the shift more difficult.

[50] Marcelino Oreja, *Monthly Letter on the IGC from the Commissioner Marcelino Oreja to the NGO's.* Brussels: European Commission, October 1997, http://europa.eu.int/en/agenda/igc-home/eu-doc/letter/oct97en.htm. In a more formal report, the Commission reiterated its objections:

> The issue of decision-making arrangements has been put on hold. Some Member States suggest a shared right of initiative between the Commission and the Member States for the areas transferred

Another cause for concern for the supranationally-driven Commission was that the countries that were even less sympathetic to bringing Third Pillar issues into the supranational domain, namely the UK, Ireland, and Denmark, received even further concessions at the IGCs. Instead of opt-outs which were secured for the Eurosceptics on other occasions during the European integration process, the new treaty provided for opt-ins: while the new Title III of the amended Rome Treaty does not apply to the UK or Ireland, both countries are allowed to participate in issues of their own choosing. Denmark, on the other hand, secured a general opt-out from the new Community framework, a stance to which it became committed during the ratification process of the Maastricht treaty.

During the IGC, various concepts were entertained to ensure further JHA cooperation that would bring the largest number of member states together. Vague as it was, it wasn't long before the idea of "flexibility" began to circulate among the negotiating parties. The reasoning behind this concept was that "if a common will is ultimately found to be lacking, that should not prevent those who wish and even need to make the Union progress from doing so."[51] By this token, flexibility would give the UK, Ireland and Denmark an opt-out or that would break deadlocks and allow the other states to continue at a faster pace or an opt-in that would make it possible for these countries to participate in dossiers of their choice. This arrangement was not particularly palatable to the Commission. Nonetheless, as was the case with the Maastricht treaty, the Commission had little leverage to produce an alternative -- or more *communautarian* -- outcome.

With the Amsterdam Treaty, four protocols that related to JHA matters were appended to the Treaty on European Union and the Treaty establishing the European Community, three of which specifically targeted members who, one way or another, could not agree to the *communautarization* of the Third Pillar. The one that was most pertinent for asylum harmonization was *Protocol (No 2) Integrating the Schengen Acquis into the Framework of the European Union* which sought to integrate the Schengen framework into the EU, something that was the goal of the

---

> to the first pillar. It would be more effective to maintain the Commission's normal right of initiative if necessary with arrangements to allow requests from the Council and the Member States to be accommodated, for which certain provisions already exist (for example, in Articles 100c(4) and 109d).

European Commission, *The IGC - State of Play at the End of 1996 Prepared by the IGC Task Force - European Commission*. Brussels: European Commission IGC Task Force, 5 March 1997, http://europa.eu.int/en/agenda/igc-home/eu-doc/commissn/state96.htm.

[51] Reflection Group, *op cit.*, paragraph 14.

signatories from the outset. The resulting arrangement was yet another example of two-speed Europe whereby the non-Schengen EU members (UK and Ireland) as well as non-EU Schengen associate members (Norway and Iceland) were given special status. In keeping with the Bonn protocol of 26 April 1994 and Article 142 of the Schengen Implementation Convention, the entry into force of the Convention supplanted the Schengen rules on asylum. By this token, at least for the asylum dossier on the responsible state norm, adherence from *all* EU members was achieved, collapsing Schengen into Brussels. Yet, collapsing the Schengen organization into the Brussels institutional framework did *not* mean that the Commission would take charge of housing the Schengen bureaucrats. Previously, the Benelux secretariat in Brussels acted as the Schengen secretariat. After the conclusion of the Amsterdam Treaty, it was decided to transfer the Schengen secretariat to the *Council* secretariat and not to the Commission secretariat. The next three protocols provide for various degrees of flexibility for sluggish member states.[52]

In addition to these four protocols annexed to the TEU, another protocol was annexed to the Treaty Establishing the European Community. This protocol is not as easy to classify as the other four which were clearly on institutional matters. Yet, in contrast to the other protocols the *Protocol (No 6) on Asylum for Nationals of Member States of the European Union* was singularly substantive in nature, writing into the treaty the previously agreed-upon concept of regarding EU member states as safe countries and dismissing the asylum claims of EU citizens as manifestly unfounded (see Appendix I for the provisions of the Sole Article of this protocol).

Such were the institutional and substantive developments in the post-Maastricht period, leading to the adoption of significant changes in cooperation on asylum. Some observations can be made from the developments presented

---

[52] These were *Protocol (No 3) on the Application of Certain Aspects of Article 7a of the Treaty Establishing the European Community to the United Kingdom and to Ireland* gives the United Kingdom the right to "exercise at its frontiers with other Member States such controls on persons seeking to enter the United Kingdom as it may consider necessary," which is tantamount to an *opt-out* for the UK from Article 7a of the revised Rome Treaty. As a result of the common travel area between the UK and Ireland, Ireland can also avail itself from this opt-out. *Protocol (No 4) on the Position of the United Kingdom and Ireland* allows the two countries an *opt-in* for Title III matters in which they want to participate. It follows that unless the UK and Ireland expresses their wish to participate, the Council would decide without them. In order to ensure that the UK and Ireland cannot opt in simply to filibuster a particular measure, the protocol contains provisions for overcoming deadlocks. Finally, *Protocol (No 5) on the Position of Denmark*, secured this a Schengen member an *opt-in* for Title III policies that are related to the development of the Schengen *acquis* and an opt-out from all other Title III matters. Interestingly enough, in cases where Denmark chooses to opt in, the protocol secured that this opt in would be implemented into national law and would create an obligation between Denmark and the other members under *international law* instead of becoming part of the Community *acquis*. This way, Denmark could ensure that the European Court of Justice would have no jurisdiction over these issues, something that Denmark steadfastly opposed throughout the IGCs and achieved only with this Protocol.

above. *First*, it appears that the routine consultation process has raised expectations about the level of cooperation in the EU. While most member states were initially unwilling to consider *communautarizing* some of the JHA matters, the resistance waned considerably over time, culminating in the institutional restructuring in the Amsterdam Treaty.

Secondly, EU members are trying their hand at further spelling out the decision-making procedures of the emergent JHA policy domain. The trend is moving cautiously towards QMV, which could become the norm sometime in May 2004, promising potential for more visible policy output when obstinate opposition can be brought to heel by the majority. Furthermore, the Union institutions that were hamstrung by the Maastricht Treaty, most notably the Commission, the Parliament, and the Court, have gained significant concessions with the Amsterdam Treaty, allowing them to become more forceful partners in the decision making process and signaling the supranational review of the policies adopted. This would suggest a further strengthening of the regime which would produce more binding policy output.

Yet, the opt-ins, opt-outs and exceptions granted with the protocols annexed to the Amsterdam Treaty are cause for concern. Do the recent developments imply a multi-speed Europe as well as a *Europe à la carte*? Are the unusual decision making provisions and a right of initiative for member states which are incorporated into the new Title III the result of an effort to buy five more years of negotiations, or are they, in fact, tantamount to the sneaking of intergovernmentalism and unanimity into the First Pillar?[53] There is undoubtedly some truth to these arguments. Such creeping intergovernmentalism could further frustrate the Commission's work during the first five years after May 1, 1999 when the Amsterdam Treaty was ratified. Nonetheless, the new Treaty could potentially invigorate the Commission and the Parliament. It can be expected that the Commission will be involved more actively in tabling policy proposals and perhaps initiate efforts to come up with a regulation or directive that would collate the various asylum policies agreed upon previously.

On the other hand, while there are some improvement on the *constitutional* constraints that frustrate the Commission, the *institutional* difficulties remain. Perhaps the most significant institutional difficulty at this point is the resignation of the College which exacerbates the institutional problems at this time. Romano Prodi, former Italian premier, was appointed by the Council during the Berlin European Council of 24 and 25 March, 1999. His nomination

---

[53] Youri Devuyst, "The Treaty of Amsterdam: An Introductory Analysis," *ECSA Review* 10, 3 (1997), p. 13.

was approved by the Parliament on 5 May and which voted 392 to 72 with 41 abstentions to approve his nomination as President of the Commission until the end of 1999.[54] With this approval, he is to form the caretaker Commission by selecting the 20 Commissioners who will inherit their previous counterparts' dossiers. This is not a negligible development since it hinges on leadership issues discussed earlier in the paper, which have added to the institutional constraints highlighted earlier. How the JHA portfolio will be assigned remains to be seen. Other institutional concerns, such as staffing of the Task Force (which was *not* made into a Directorate-General) and budgetary problems also remain unresolved by Amsterdam which was a constitutional overhaul.

Concluding Remarks

Approximately six years after its creation, the third pillar of the European Union is no longer in the shadows it used to be at its inception. While the current scholarship criticizes the intergovernmental negotiation procedure that characterizes the third pillar *per se*, little attention is given to the Commission, an actor that occupies an awkward and less significant position in the third pillar. Instead, the literature focuses on the shortcomings of the third pillar, as well as the lack of effectiveness with which it has worked so far and offers policy proposals on reforming the third pillar. This paper attempted to concentrate on the Commission as an awkward, yet potentially significant actor, in an area which has put its traditional powers and policymaking capacities to the test. It sought to illustrate the factors that forced the Commission to display its skills as a tightrope walker as it attempts to cross the precarious institutional space that was created with the Maastricht Treaty. While some of these factors arise from the Treaty itself -- unanimity rule, shared right of initiative, vagueness of policy tools -- others are linked more closely to the Commission as an institution -- division of labor, staffing, workload, and leadership and argued that both sets of factors pose

[54] "Endorsement for Prodi," http://www.europarl.eu.int/dg3/sdp/journ/en/n9905051.htm#4, 25 May 1999.

significant constraints on the Commission's effectiveness in the third pillar.

The constitutional changes brought about by the Amsterdam Treaty present modest grounds for optimism for the Commission. Substantial reform of the third pillar, which was achieved by incorporating some of its content into the first, altering the decision-making rules to allow for qualified majority decision some time in the near future, enhancing the Commission's policymaking position by according it an exclusive right of initiative after five years, makes improvements on the constitutional constraints outlined earlier in the paper. Yet, the caveat to be aware of is that the changes pertaining to the decision-making arrangements are *not* automatic and are subject to further debate within the Council which must arrive at such decisions unanimously.[55]

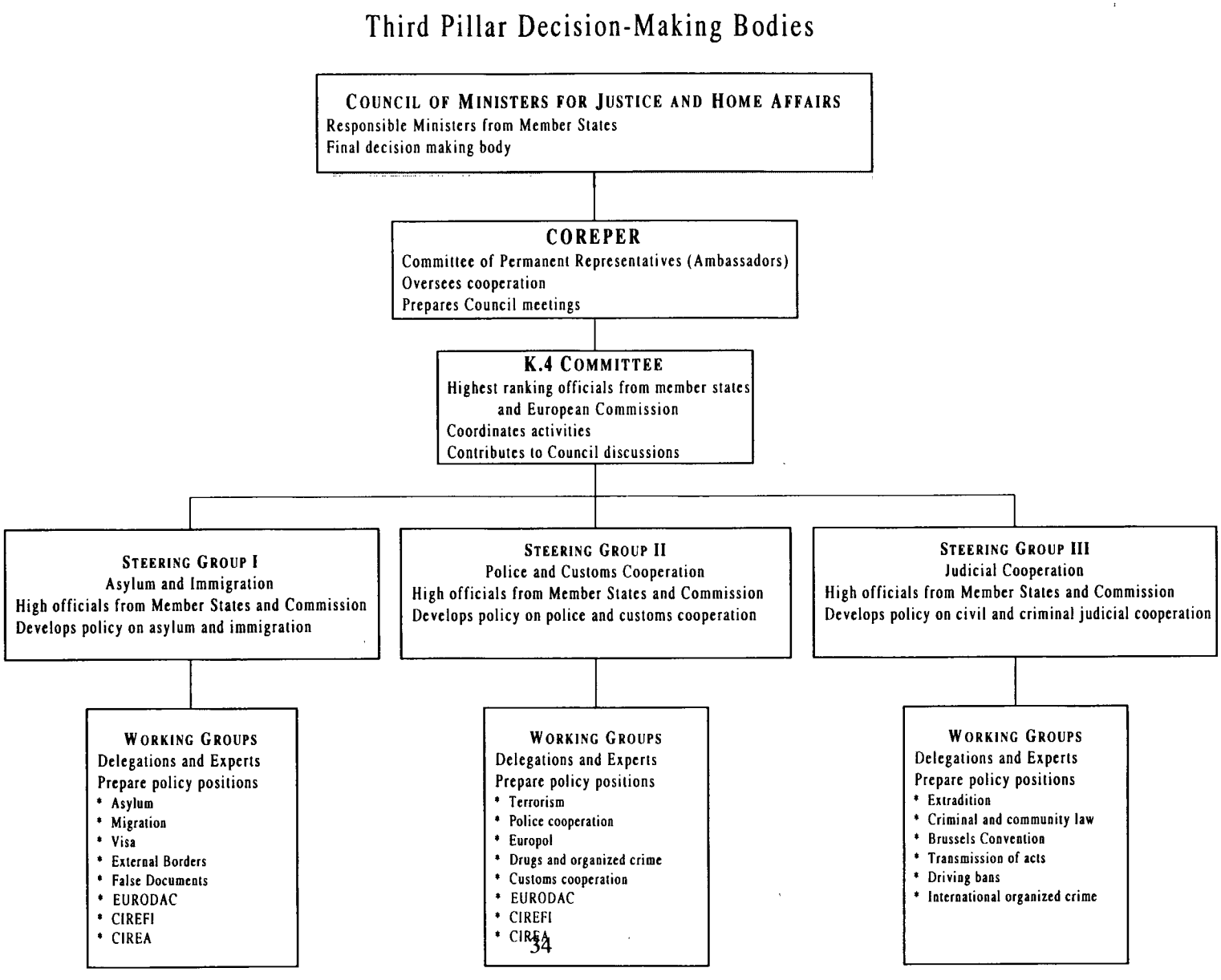
Yet, the alleviation of constitutional obstacles is only part of the problem. Successful reform along these lines, however, still does not ameliorate the Commission's institutional problems as these are likely to become even more pronounced after the expansions of its mandate and powers. It would appear that, unless such institutional issues are resolved to empower the Commission to engage in the kind of competence-maximizing behavior that it displays in other policy domains, the Commission cannot automatically and immediately be expected to move from the sidelines to the center stage in Justice and Home Affairs matters regardless of in which pillar they now reside.

The argument presented in this paper rests on the belief that the Commission would have to tackle *both sets* of constraints simultaneously if it wishes to become a more powerful actor in justice and home affairs cooperation. With respect to constitutional issues, it needs to decidedly use the enhanced powers it now has (without, of course, alienating the member states) and take initiative. On the institutional side, it needs to improve its existing resources (human and financial) as well as using those more efficiently in order

[55] The Amsterdam Treaty provided that such a decision is not subject to ratification, which might make the move somewhat easier.

to be able to take initiative authoritatively. The Commission's position in this policy domain is promising but unenviable. Just like the tightrope walker that risks failure with each step but is doomed to walk forward or look foolish, the Commission is in the process of honing its balancing skills, encouraged by the fact that the rope on which it has to walk in the post-Amsterdam era is somewhat thicker than the previous one.

Figure 1 *Pre-Amsterdam Decision Making Bodies*



Processes Under Pillars I and III	
Pillar I (Article 100c)	**Pillar III (Title VI)**
Instruments available	
Binding (regulations, directives, decision) and nonbinding (recommendations) Community instruments	Joint positions and joint actions, conventions. Joint positions and actions include nonbinding resolutions, recommendations and declarations.
Right of Initiative	
Exclusive Commission right of initiative but Art. 100c.4 requires Commission to "examine any request made by a member state that it submit a proposal to the Council.	According to Article K.3 "Any member state or the Commission" has a right of initiative
Decision Making Procedure	
Obligatory opinion of the Parliament. Proposal examined through Council working groups. Voting rules determined on case by case basis.	Proposal examined through Council working groups under auspices of K.4 Committee and COREPER. Decisions taken by Council acting unanimously.
Democratic Control and Transparency	
Commission proposal sent by Council to European Parliament for its opinion. Open debate in Parliament. Interested outside bodies can express opinions on basis of published text. Single reading in Parliament.	No obligation to make proposals public before final adoption. Parliament kept "regularly informed." Parliamentary control in member states during the ratification process of conventions.
Judicial Review	
National Courts. Uniform interpretation by the Court of Justice. All other procedures relating to judicial review and enforcement of Community law by the Court.	National courts. Uniform interpretation of conventions (and ruling on disputes regarding their application) by the Court if so provided in individual conventions.

Table 1 **Processes Under Pillars I and III**

Source Adapted from Commission of the European Communities, *Report to the Council on the Possibility of Applying Article K.9 of the Treaty on European Union to Asylum Policy*. Brussels: EC Commission, 1993, SEC(93) 1687, Annex.

Options	Commission	Parliament	Reflection Group	A	BENELUX	DK	SF	F	D	GR	IRE	I	P	E	S	GB
Multi-Speed Europe/Europe à la carte	✗	✗	✓		✗	✗		✓	✓	✗	✓*	✗	✓	✓	✓	✓
Subsume the Third Pillar under the First Pillar	✗	✓	✗	✓	✓	✓*	✓*		✓	✗	✗	✗	✗	✗	✗	✗
Move asylum to the first pillar	✓	✓	✓		✓	✓*		✓	✓	✓	✓	✓	✓	✗	✓	✗
Reduce the number of negotiation levels	✓	✓	✓	✓	✓	✓							✓	✓		✓
Increase the Commission's right of initiative	✓	✓	✓	✓	✓	✗	✓	✓	✓	✓	✓	✓	✓	✓	✓	✗
Increase the role of the Parliament	✓	✓	✓	✓	✓	✗	✗	✗	✓	✓		✓	✓	✓	✓	✗
Allow for legal competence of the Court	✓	✓	✓	✓	✓	✗	✓	✗	✓	✓			✓	✓		✗
Move to qualified majority decision-making	✓	✓	●	✓	✓	✓*	✓		✓[56]	✓		●	✓[5]/7	✗	✗	✗
Introduce binding legal instruments	✓	✓	●		✓			✓		✓		✓	✓			
Integrate Schengen into the Union				✓	✓	✓		✓			✓	✓		✓		

✓ Agree ✓* Agree with qualification ✗ Disagree ● Ambiguous position, Empty cells indicate that no position was taken on the issue

A (Austria), Benelux (Belgium, Netherlands, Luxembourg), DK (Denmark), SF (Finland), F (France), D (Germany), GR (Greece), IRE (Ireland), I (Italy), P (Portugal), E (Spain), S (Sweden), GB (United Kingdom)

Table 2 Member States' Positions before the IGC

Source Compiled from the Member States' position papers on the IGC, available on the IGC homepage <http://europa.eu.int/en/agenda/igc-home>, see also European Parliament, *Summary of Positions of the Member States of the European Union with a View to the 1996 Intergovernmental Conference.* Brussels: Intergovernmental Conference Task Force, 29 March 1996. http://europa.eu.int/en/agenda/igc-home/eu-doc/parlment/index.html.

[56] Germany was in favor of a double majority principle.

[57] Portugal favored a superqualified majority scheme which requires an even larger majority than is the case under the current qualified majority procedures.

	Post-Maastricht	Post-Amsterdam First Pillar (*Communautarized* areas of former Third Pillar)
Asylum, Immigration, External Borders	Third Pillar, Title VI, Article K of TEU	Article 73 of Amsterdam Treaty
European Parliament (EP)	Limited role	Consultation for the first five years after Amsterdam Treaty takes effect, co-decision after wards
European Court of Justice (ECJ)	No jurisdiction	Referral for an obligatory first ruling for national last-instance courts
Decision-making	*Unanimity* rule on all issues	Council acts *unanimously* on proposals from Commission and member states for the first five years. After five years, Council will act unanimously on a move towards *qualified majority voting* (with no need for national ratification of this decision)
Commission's Right of Initiative	*Shared* right of initiative for the Commission and Member States	Commission has *exclusive* right of initiative in Title IIIa five years after the entry into force of treaty

Table 3 *Comparison of Treaty Provisions in the post-Maastricht and post-Amsterdam Pillar Structure*

Source Maastricht and Amsterdam Treaties

Appendix I

Pertinent Clauses in the Amsterdam Treaty

Article 73k

The Council, acting in accordance with the procedure referred to in Article 73o, shall, within a period of five years after the entry into force of the Treaty of Amsterdam, adopt:

(1) measures on asylum, in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and other relevant treaties, within the following areas:

  (a) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum submitted by a national of a third country in one of the Member States,

  (b) minimum standards on the reception of asylum seekers in Member States,

  (c) minimum standards with respect to the qualification of nationals of third countries as refugees,

  (d) minimum standards on procedures in Member States for granting or withdrawing refugee status;

(2) measures on refugees and displaced persons within the following areas:

  (a) minimum standards for giving temporary protection to displaced persons from third countries who cannot return to their country of origin and for persons who otherwise need international protection,

  (b) promoting a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons.

Article 73i

in order to establish progressively an area of freedom, security and justice, the Council shall adopt:

(a) within a period of five years after the entry into force of the Treaty of Amsterdam, measures aimed at ensuring the free movement of persons in accordance with Article 7a, in conjunction with directly related flanking measures with respect to external border controls, asylum and immigration, in accordance with the provisions of Article 73j(2) and (3) and Article 73k(1)(a) and (2)(a), and measures to prevent and combat crime in accordance with the provisions of Article K.3(e) of the Treaty on European Union;

(b) other measures in the fields of asylum, immigration and safeguarding the rights of nationals of third countries, in accordance with the provisions of Article 73k.

Protocol (No 6) on Asylum for Nationals of Member States of the European Union

The Sole Article of this protocol proclaims that "(g)iven the level of protection of fundamental rights and freedoms by the Member States of the European Union, Member States shall be regarded as constituting safe countries of origin in respect of each other for all legal and practical purposes in relation to asylum matters."

Source Amsterdam Treaty, Title III