Step by Step Progress: An Update on the Free Movement of Persons and Internal Security[4]

Monica den Boer
Senior Lecturer, EIPA

The new Treaty of Amsterdam has been characterized as extraordinarily difficult by dignitaries, journalists and academics alike. The tremendous complexity of the Amsterdam Treaty is largely due to the many changes that were made in the area of Justice and Home Affairs (JHA) Cooperation. Before Amsterdam, cooperation in this field was already split between communautarian and intergovernmental action. In particular visa policy, fraud, money laundering, customs cooperation and drugs were topics that were scattered around in the Treaty. The fragmentation of some justice and home affairs issues will continue after Amsterdam. The three main 'zones' of cooperation will be: 1) A New Title 'Free Movement of Persons, Asylum and Immigration', which will eventually be subject to full Community competence; 2) The incorporation of the Schengen *Acquis* into the new Treaty; and 3) A revamped Third Pillar with provisions on Police and Judicial Cooperation.

What makes the new Treaty particularly difficult to read are the many protocols and declarations that clarify the positions (mostly reservations) of individual Member States. With this 'protocolarization', the tack has been firmly set on *à la carte* flexibility: even though some of the protocols are not enabling clauses but predetermined limits to integration, some Member States have effectively been given a wide margin to determine when they are ready for partial integration. The incorporation of the Schengen *Acquis* means the end of an awkward system of two parallel systems of governance and hence of multi-speed integration. But we should not overlook the fact that renewed flexibility reenters the stage through the backdoor by means of opt-in and opt-out protocols, temporal clauses, and even flexible conditions for the ratification of Third Pillar conventions. Most likely the results achieved by the Dutch Presidency will give lawyers and implementing officials in the Member States many sleepless nights.

A New Title 'Visas, asylum, immigration and other policies related to the free movement of persons' (IIIa)

In the 'old' Third Pillar construction, there are nine matters of common interest. Some of these matters have been found eligible for transfer to Community law, namely immigration, asylum, external borders (Visa Policy) and judicial cooperation in civil matters. This Title – in which communautarian instruments, methods of decision-making and legislation will apply – should enter into force within five years after the entry into force of the new Title (Article 73i). Taking account of the eighteen months period required for ratification, it may last six and a half years before the provisions in this new Title enter into force. The free movement of persons may thus only be realized in 2003 or 2004, which is more than a decade past the previous 1992 deadline.

Even if the Member States succeed in the progressive establishment of the Free Movement of Persons Area, free movement will not apply integrally to the whole EU. Exceptions to the abolition of internal border controls are made for the United Kingdom and Ireland (Article 73q). By means of a Protocol on the

application of certain aspects of Article 7a of the Treaty, the two countries have not only secured the maintenance of their internal border controls, but also the unscathed continuation of their 'Common Travel Area'. This solution is also seen as beneficial for Spain, because a solution to the dispute about the status of Gilbraltar does not need to be found immediately. Another Protocol ('On the Position of the United Kingdom and Ireland'), in particular Article 3, leaves the two Member States the space to adopt a Title IIIa measure. A special protocol on the position of Denmark has been designed to overcome (expected) domestic constitutional difficulties, which are anticipated following the rejection of the Maastricht Treaty in the first Danish referendum. This protocol secures Denmark's national sovereignty regarding the free movement of persons, which according to chief negotiator Patijn is a 'special' position, with a sort of 'legal opt-out' and a 'political opt-in'.

Furthermore, there is a protocol on the external relations of the Member States with regard to the crossing of external borders. The Member States can negotiate or conclude agreements with third countries as long as they respect Community Law and other relevant international agreements. Deeper, or more intensive cooperation, between Member States and third states can thus be pursued. The question is whether the protocol can be interpreted as a pretext for a divergent set of security standards and arrangements at the external border of the EU.

The new Title is linked up with one of the objectives set out in Article B, namely that the Union should be maintained and developed 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, immigration, asylum and the combating of crime. This link reveals a much clearer correspondence between free movement of persons and 'flanking measures'. The emphasis on security becomes more than obvious from the French insistence on a declaration relating to the Schengen protocol, namely that the level of protection and security within the New Area should remain the same as under Schengen (Declaration 41). This possibly implies that Member States who fear that their internal security is at stake, can reintroduce internal border controls, which corresponds with Article 2A Schengen Implementing Agreement and which is similar to what France has done with its northern borders with Belgium and Luxembourg. The Amsterdam Treaty does not explicitly state the criteria of what constitutes a real threat to the internal security of Member States. In this regard, Article 73l reasserts the sovereignty of the individual Member States in the maintenance of law and order and the safeguarding of internal security. The Council can decide by qualified majority (on a proposal from the Commission) to 'adopt provisional measures of a duration not exceeding six months for the benefit of the Member States concerned.' Such a rule would become operational in the event of an emergency situation characterized by a sudden influx of third country nationals (old Article 100C (2)).

Germany, with its major intake of asylum seekers, has won a case by insisting that the unanimity rule will not automatically change into a qualified majority decision-making process once the five years have subsided (Article 73o). The application of qualified majority voting will not only be subject to an evaluation but also to a unanimous decision of the Council as to whether or not to actually introduce this new method. The much heralded extension of Community competence therefore only seems to be a bit of a sop. This is partially compensated for by the fact that the right of initiative, which during the initial five years will be shared between the Member States and the Commission, will automatically be an exclusive right for the Commission without further political ado.

The protocol on asylum for nationals of EU Member States is a blow in the face for human rights organizations across Europe. Spain had wanted a total suppression of that right, following the refusal by Belgium to extradite suspected ETA terrorists. The Spanish wish has been diluted only to a certain extent as the final protocol now lists certain conditions under which an application made by a national of a Member State may be taken into consideration or declared admissible. The basic presumption that underlies the protocol is that all EU Member States are safe countries. Apparently, the Dutch Presidency proposed, during the negotiations, amending a passage and adding a declaration which stipulates that the Protocol would be interpreted in accordance with the provisions of the 1951 Geneva Convention and the 1967 New York protocol. Unfortunately, only Belgium has made a declaration to this extent. Other EU Member States should follow this example.

The communautarization of immigration, asylum, external borders and legal cooperation in civil matters enhances the role of the institutions more generally. The European Parliament has to be consulted prior to the taking of initiatives (Article 73o). The role of the Court of Justice is expanded if there is no remedy under national law, the Court may be requested to give a ruling, but it can only be asked to do so by the highest judicial authorities in the Member States (Article 73p). Its position is strengthened as the Commission is enabled to question certain practices.

The Incorporation of Schengen into the New Treaty

The Protocol which integrates the Schengen *Acquis* into the framework of the European Union requires that not only the two Schengen Conventions (1985 and 1990), but also all the decisions of the Executive Committee (about 200 mostly unpublished decisions), should be incorporated into the New Treaty. The Schengen Implementing Convention states that all rules should be compatible with Community law. But the question is whether all the decisions by the Executive Committee are also in line with Community

law, and whether they have any legally binding force at all.

The ultimate consequence of the incorporation of Schengen is that the *Acquis* will be separated between the already existing *acquis communautaire*, the new Title (see above) and the remaining Third Pillar. Some parts of Schengen have effectively been encapsulated by Community directives (firearms, money laundering). Rules and regulations that relate to visa, immigration and asylum will in due time be transferred to the new Title, while provisions concerning executive cross-border police competences and mutual legal assistance in criminal matters will stay in the Third Pillar. For the time being however, the Schengen arrangements will fall under the Third Pillar unless the Council decides otherwise (Article 2 Schengen Protocol).[5]

It is clear that the Dutch Presidency has been adamant that more institutional coherence be guaranteed. The Amsterdam Summit invited the Council to take appropriate measures as soon as possible to ensure, as soon as the Treaty enters into force, the adoption of certain implementing measures relating to the protocol incorporating the Schengen *Acquis* into the Treaty. This includes the integration of the Schengen Secretariat into the Council's General Secretariat (Article 7 Schengen Protocol). Most likely, a special Committee will be created to deal with the institutional and legal aspects of the incorporation of Schengen into the Treaty. The Committee will at least be composed of members of the Schengen Secretariat, the Secretariat of the Council and the European Commission, but individual lawyers (public officials of national ministries) who have been actively involved in masterminding this operation may also get a seat on the Committee.

Exemptions are apparently again the price to be paid for progress. The UK, Ireland and Denmark negotiated special provisions. The first two countries are allowed to opt into certain Schengen provisions, which can be characterized as a form of differentiated integration: Article 4 of the Schengen Protocol allows the UK and Ireland to request 'at any time' to take part in some or all of the provisions of the Schengen *Acquis*. This creates a situation in which the two Member States can maintain its border controls and deny citizens the freedom to travel, and at the same time take part in compensatory security arrangements, such as the Schengen Information System. The balance between the two constituents seems to have got lost in the negotiation process. While the UK and Ireland are allowed to enter Schengen bit by bit, the future EU Member States will have to accept the Schengen *Acquis* in full (Article 8 Schengen Protocol).

The positive side of the integration of Schengen into the TEU is that we will have one regulatory régime for internal security management in Europe instead of two. Nonetheless, as the door has been opened wide for differentiated integration, there may be considerable problems at implementation level. Another risk is the (indirect) contamination effect the Schengen provisions can have on Community legislation, as they are mostly negotiated behind closed doors and with little or no participation of EC institutions. This contamination effect may be countered by the formal adoption rules that apply to the Schengen provisions before they are transformed into Community rules. The Schengen Protocol is notoriously vague on this important aspect.

Provisions on Police and Judicial Co-operation in Criminal Matters

The new Title VI comprises fewer matters of common interest than its predecessor, but its provisions should be interpreted as a prelude to intensified cooperation between police forces, customs authorities and 'other competent authorities' (Article K.1). The latter, rather open-ended, formulation possibly opens the door to wider participation of the Secret Intelligence Services which may imply less transparency. The deepening of police cooperation finds its basis in a number of new provisions, the most spectacular of which are the possibility of having operational cooperation between competent authorities (Article K.2 (1); the executive cross-border police competences from the Schengen Implementing Agreement will most likely be inserted into this Article), and the assignment of 'operative' powers to Europol and joint 'teams' (respectively Article K.2 (2) (a) and (b)). Apparently, the negotiations on the strengthening of Europol's powers were quite arduous. Although politicians have often said that they absolutely do not want executive powers for Europol liaison officers, the door has been left ajar for a truly executive European police agency. This gives rise to concern, certainly when read in conjunction with the recently signed protocol that assigns immunity to Europol liaison officers. The liaison officers will be subject to fifteen different régimes given the fact that they and their activities will be under the judicial review of the competent national authorities only. Even if these liaison officers have no operational competences, their role in international intelligence-gathering can be decisive in court cases against criminal organizations.

Title VI introduces two new legal instruments, namely decisions and framework decisions, both of which have a binding character (Article K.6 (2)(b) and (c)). Although this implies more distancing from the legal instruments that were originally introduced under the umbrella of European Political Cooperation, considerable vagueness remains about what is to happen with the old battery of 'grey' legal instruments (conclusions, recommendations, resolutions and declarations), and whether the Third Pillar *Acquis* is to be transferred to the new Title. Although it is not written in the Treaty, the instruments that were developed under 'Maastricht' are operational under the rules and conditions of the Maastricht Treaty. The conventions that are currently under negotiation, such as Brussels II,[6] are problematic because in the new

situation these instruments will be transferred to the First Pillar. If they are not ready before the Treaty of Amsterdam enters into force, these instruments will have to be redrafted and possibly even be renegotiated.

The revamped Third Pillar assigns a larger role to the European Court of Justice and the European Parliament. The competence of the European Court of Justice (Article K.7) has been widened to more legal instruments, as it can now also give preliminary rulings on the validity and interpretation of decisions, framework decisions and conventions. The matter can also be arranged by means of declarations that can be made by individual Member States (Article K.7 (3)). A precedent for this rule was already created with the protocol to the Europol Convention, and this type of arrangement may have an inbuilt capacity to undermine any general competence that the Court may exercise. With regard to some of its other competences it is important to note that an exemption applies, namely that the Court will not be allowed to review the validity or proportionality of operations carried out by the police or other law enforcement agencies (Article K.7 (5)). Hence, official judgements on international criminal investigation activities will remain a matter for the national courts and the European Court of Human Rights.

The European Parliament (Article K.11) will be consulted by the Council before the adoption of a new legal instrument (with the exception of common positions). The EP has to deliver an opinion within three months or less if so laid down by the Council. It is expected that the national parliaments will benefit from this 'scrutiny reserve'.[7] It is also significant that the EP will have more to say about the operational expenditure of the Third Pillar budget in its competence of budget control authority (Article K.13 (3)).

Progress under the Third Pillar has been rather slow as a consequence of the unanimous voting system and the time-consuming ratification procedures in the Member States. The only Convention – which actually predates Maastricht – which was ready for entry into force by 1 September 1997, is the Dublin Asylum Convention. The IGC has come up with a trick to accelerate the implementation of Conventions. Article K.6 (d) allows entry into force of a convention once adopted by at least half of the Member States (unless conventions provide otherwise). This form of 'rolling ratification' replaces the declarations for the provisional application of conventions.

And then there is Article K.12 (the former Article K.7), which authorizes Member States to make use of institutions, procedures and mechanisms of the Community if they want to establish closer cooperation. Article K.12, which should be seen as an enhancement clause, is considerably longer than the former K.7, and it is larded with all kinds of 'ifs' and 'buts'. The Justice and Home Affairs Council may, for instance, refer authorization to the General Council if one Member State opposes closer cooperation on the basis of a qualified majority vote. What scenario did the negotiators have in mind when they inserted this condition into the text?

Finally some comforting news for the fans of the famous bridge-provision in the Third Pillar: the *passerelle* has been infused with new life as the old article K. 9 becomes Article K.14.

Concluding Remarks

Gil-Robles, President of the European Parliament, has said that the solution chosen for the Third Pillar is dangerously ambiguous. Intergovernmentalism has triumphed: it is and will be a policy-making process strongly dominated by the Council. This can also be derived from Article 73n, which states that the Council shall take measures to ensure cooperation between the relevant departments of the administrations of the Member States, which can be read as an official impetus for horizontal networking between national bureaucracies and as a reassertion of the (already) strong position of public officials in the Member States.

The question that poses itself is whether the revision of JHA cooperation should be interpreted as the outcome of a belligerent horsetrading exercise. Perhaps unsurprisingly, every Member State got more or less what it wanted, perhaps with the exception of Belgium, which kept insisting on a wider introduction of qualified majority voting. For the time being, and at least not until the Treaty is signed and ratified, no radical changes can be expected within the field of JHA cooperation. Meanwhile, hectic activity has been taking place to amend, refine and renumber the draft Treaty text. Soon after it signature, muscles will be flexed for the hurdled implementation of the protocols, declarations, opt-in clauses and the many 'ifs' and 'buts'. ❑

NOTES

1 Elsewhere in this EIPASCOPE issue, you will find the contribution of Professor Antonio Bar Cendón, who spoke about legitimacy of the new EU during the IGC-afternoon.

2 Problems which might result from the improvements in the fields of free movement of persons, asylum and immigration are discussed below.

3 It should be noted that the agreement on the reweighting of votes could be operationalized even without convening a mini IGC since article 148.2 EC could be amended by any accession Treaty.

4 A previous version of this text appears in the *Maastricht Journal of European and Comparative Law*, 1997, Volume 4, Number 3; a longer, adapted version in Dutch will be published in the *Nederlands Juristenblad*. The underlying text refers to SN 3111/97 (Draft of Amsterdam Treaty in final form, 11 July 1997).

5 *Justice in Europe*, Issue 2, 1997, p. 2.

6 Draft Convention on the service in the Member States of the European Union of judicial and extrajudicial documents in civil or commercial matters.

7 *Justice in Europe*, Issue 2, 1997, p. 5. ❑