## APPENDIX VI

## THE AMSTERDAM TREATY[1]

**The Amsterdam Treaty (Excerpt)**
Amsterdam; 2 October 1997

### INTRODUCTION

For more than 20 years now the Member States have joined forces to combat international phenomena such as terrorism, drug trafficking or illegal immigration. By 1986, however, when freedom of movement for people was recognised as a key element of the internal market, it was clear that this type of informal cooperation between the member states' governments was no longer adequate to combat the international spread of crime networks or satisfy the public's need for security in Europe. It was therefore decided to incorporate cooperation on justice and home affairs into the Maastricht Treaty so as to make it a fully-fledged policy of the European Union.

An intergovernmental pillar has been grafted onto the Community pillar and legal instruments of a new kind have been created. Cooperation on these lines was set up following the entry into force of the Treaty on European Union in 1993 but has not been seen as very satisfactory in terms either of how it works or of the results it has produced. So the revision of the EU Treaty has brought in some major changes in the decision-making process.

To create an area for freedom, security and justice, the Treaty of Amsterdam will introduces a new title headed "Visas, asylum, immigration and other policies related to free movement of persons" into the Treaty establishing the European Community. Controls on the external borders, asylum, immigration and judicial cooperation on civil matters all now come under the first pillar and are governed by the Community method. The incorporation of these areas into the Community, however, will be a gradual process dictated by the speed at which the Council of the European Union takes the decisions, to be completed by the latest five years after the entry into force of the new treaty. Only police and judicial cooperation in criminal matters remains under the third pillar, to which the new treaty adds preventing and combating of racism and xenophobia.

These institutional developments bring in new types of decision taking, which should make it possible to adopt more - and more effective - measures, leading to closer cooperation between Member States.

### HISTORICAL BACKGROUND

#### The beginnings of cooperation (1975-85)

From 1975 onwards intergovernmental cooperation was gradually established in the fields of immigration, the right of asylum and police and judicial cooperation. The first instance of this was the Trevi Group, in which the Ministers for Home Affairs met for the purpose of combating terrorism and coordinating police cooperation on terrorism in the Community. The Ministers in the Group discussed questions relating to law and order and terrorism, and various working parties and

[1] http://europa.eu/scadplus/leg/en/lvb/a11000.htm#a11011.

subparties were set up under its auspices. The European institutions were at the time excluded from this process, which was conducted on an intergovernmental basis.

**From the Single Act to the Treaty of Maastricht (1986-92)**

The Single European Act concluded in 1986 was a turning point in this process of cooperation, which up until that point had functioned in a far from transparent way as regards the public and the Community institutions. A new Article 8a defines the free movement of persons as one of the four main constituent elements of the single market and explicitly brings that field within the Community's sphere of jurisdiction. The new working parties set up after the signing of the Single Act took account of this development and from that point on included observers from the Commission. In addition, the ad hoc working party on immigration, which has since 1986 consisted of the ministers responsible for immigration, and CELAD, the European Committee to Combat Drugs, set up their secretariats with the secretariat of the Council of the European Union. Other working parties were set up, such as the Mutual Assistance Group or GAM, which is responsible for customs matters. A Council consisting of the Member States' Ministers of Justice used to hold regular meetings. From that time onwards it used to deal with judicial cooperation in criminal and civil matters and certain questions falling within the sphere of European political cooperation.

Despite the recommendations on free movement of persons in the Commission's White Paper of 1985, justice and home affairs continued to be largely matters for intergovernmental cooperation. In 1988, for example, the intergovernmental coordinators' group on the free movement of persons was instructed by the Rhodes European Council to propose measures for linking the free movement of persons and security together once controls at the internal borders had been abolished. In 1989 this group put forward a proposal for a work programme (the Palma document) advocating a more coordinated approach to the different aspects of cooperation on justice and home affairs. The fact was that the various working parties set up over the years were working separately and drafting their reports for ministers sitting in different combinations. What is more, the European Parliament and the national parliaments were unable to exercise any control over the measures taken in that context, owing to the very nature of the cooperation itself.

The instruments used were those appropriate to a traditional intergovernmental approach: on the one hand, conventions, and, on the other, the drawing up of resolutions, conclusions and recommendations. These acts, the classic instruments of international law, were adopted outside the Council of the European Union. They include the 1990 Dublin Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities, and the London resolutions also relating to asylum.

Instruments of a more binding type were adopted by some other Member States during the 1980s. These were the 1985 SchengenAgreement and the 1990 Schengen implementing convention, which set up new operational structures to ensure cooperation between police forces and customs authorities (through the Schengen Information System, SIS). It then became clear that the far from open system of consultation groups needed to be incorporated into a comprehensive structure: not only to make sure that the measures adopted by the Member States in

relation to justice and home affairs were more effective but also to coordinate the work of all these bodies and avoid duplication.

**Institutionalising cooperation in the fields of justice and home affairs: Title VI of the Treaty on European Union (1992-98)**

Title VI was partly modelled on this pre-existing intergovernmental cooperation system, which explains the charges levelled against it that there were too many working levels within the third pillar and that it was over-complicated and not transparent enough. The way the third pillar was structured, on the lines of the Common Foreign and Security Policy, gave the Community institutions only a small part to play and no real way of exercising any control over the Member States' decisions:

- the Court of Justicewas competent to interpret conventions only where there is a clause in the text (convention or other) expressly providing for this;
- the European Parliament could be consulted by the Council, but most of the time it was only informed;
- the European Commission's right of initiative was limited to certain areas and was shared with the Member States;
- the Council was often paralysed by the requirement to take every decision by unanimous vote.

The Treaty of Amsterdam has reshaped cooperation on justice and home affairs by setting up an area of freedom, security and justice. The aspirations are wider and more specific and the methods more effective and democratic, while the institutions have been given a more balanced role to play.

**HOW TITLE IV OF THE EC TREATY WORKS**

Title IV encompasses the following areas:

- Free movement of persons
- Checks at external borders
- Asylum, immigration and protection for the rights of nationals of non-member countries
- Judicial cooperation in criminal matters.

These are defined as questions of common interest and previously came under the rules laid down in Title VI of the EU Treaty (commonly known as the third pillar).

**Establishing an area of freedom, security and justice in five years**

The Treaty of Amsterdamhas transferred these areas to the EC Treaty, where the role of the institutions is very different from the role they used to play under Title VI.

The Council of the European Union will continue to play the main role over the next five years so that it can take a number of decisions in the areas referred to above. The object is to make it easier for European citizens and nationals of non-member countries to move freely, while at the same time building up effective cooperation between the different government departments concerned in order to combat international crime.

**The overall institutional machinery**

The Council is still the linchpin of the process but it is no longer the only actor involved.

Over the first five years after the new treaty has come into force, the Council will take decisions unanimously on proposals put forward by the Commission or a member state. It has to consult the European Parliament before taking any decision.

After that time, the Council will take decisions only on proposals from the Commission. The Commission, however, will have to consider any request by a member state for a proposal to be put before the Council. After consulting the European Parliament, the Council will have to decide by unanimous vote to apply the codecision procedure and qualified majority voting when adopting measures under Title IV and to modify the clauses relating to the Court of Justice of the European Communities.

Apart from its decision-making role, the Council's role as a coordinator between the relevant government departments in the member states and between them and the European Commission has been consolidated. The many different levels of working party that currently exist have been abolished. All the working parties now stand on the same footing and report directly to Coreper (Committee of Permanent Representatives).

Some measures, however, come under a different institutional mechanism (Article 67).

**The Court of Justice of the European Communities**

The new Treaty gives the Court of Justice a larger role to play in the areas of justice and home affairs. Previously it had no powers in these areas and could not review the measures adopted by the Council. Only in the case of Conventions did the Court have the right to interpret their provisions and rule on any dispute over their implementation - and even this only applied if they contained a special clause to that effect.

In the new Title IV, which essentially concerns free movement of persons, asylum, immigration and judicial cooperation in civil matters, the Court of Justice now has jurisdiction in the following circumstances:

- if a national court of final appeal requires a decision by the Court of Justice in order to be able to give its judgment, it may ask the Court to rule on a question concerning the interpretation of the title or on the validity and interpretation of acts by the Community institutions that are based on it;

similarly, the Council, the Commission, or a member state can ask the Court to rule on a question regarding the interpretation of the new title or of acts adopted on the basis of it.

The Court of Justice does not, however, have the right to rule on measures or decisions taken to abolish all checks on individuals (both EU citizens and non-EU nationals) when they cross the internal borders.

**The Member States**

The Member States retain their prerogatives, above all as regards the free movement of persons. They continue to have sole responsibility for ensuring law and

order and safeguarding internal security. In this context, they may take foreign policy considerations into account.

In the event of an emergency, if there is a sudden influx of nationals of non-member countries into a Member State, temporary measures (for a maximum of six months) may be taken by the Council voting by qualified majority on a Commission proposal in the interests of the Member State concerned with a view to restricting the freedom of movement or entry of the nationals of the non-member country concerned.

**The protocols**

**Protocol on the position of the United Kingdom and Ireland**

These two countries are not taking part in measures under Title IV and are not bound by them. They do not, therefore, take part in votes in areas falling within the area of security, freedom and justice.

If, however, the United Kingdom or Ireland wishes to take part in the adoption and implementation of a proposed measure, they will have to inform the President of the Council within a period of three months starting from the submission to the Council of the proposal or initiative. They will also be entitled to agree to the measure at any time after its adoption by the Council.

Protocol on the application of certain aspects of Article 14 (ex Article 7a) of the EC Treaty to the United Kingdom and to Ireland

The United Kingdom and Ireland reserve the right to exercise controls at their frontiers on persons seeking to enter their territory, in particular citizens of states which are contracting parties to the Agreement on the European Economic Area or to any agreement by which the United Kingdom and/or Ireland is bound, and the right to decide whether or not to let them enter their territory. At the same time, the other member states may exercise controls on all persons coming from the United Kingdom or Ireland.

Ireland has expressed its wish to take part as far as possible in measures adopted under Title IV insofar as they allow the common travel area with the United Kingdom to be maintained. The common travel area is an area of freedom of movement between Ireland and the United Kingdom.

**Protocol on the position of Denmark**

Denmark is not taking part in measures under Title IV except those determining the non-member countries whose nationals must have a visa when crossing the external borders of the member states and measures introducing a uniform format for visas.

As far as building upon the Schengen acquis is concerned, Denmark will decide whether to implement any decision in its national law within six months after the Council has adopted it.

**HOW TITLE VI OF THE EU TREATY WORKS**

The object of Title VI ("Provisions on police and judicial cooperation in criminal matters") is to prevent and combat the following:

- racism and xenophobia;
- terrorism;
- trafficking in persons and offences against children;

- drug trafficking;
- arms trafficking;
- corruption and fraud.

These objectives will be achieved through:

- closer cooperation between police forces, customs authorities and other competent authorities in the Member States, both directly and through Europol;
- closer cooperation between judicial and other competent authorities of the Member States, both directly and through Europol;
- approximation, where necessary, of rules on criminal matters in the Member States.

Clearly, then, the objectives of Title VI of the EU Treaty have been made more specific. Aware that crime extends beyond national borders, the Member States have recognised that the only effective way to fight the international networks that have formed is through closer cooperation.

**The overall institutional machinery**

The Council of the European Union remains the main actor in the decision-making process under Title VI. To achieve the objectives set out above, it can use the following instruments:

- joint positions defining the approach of the Union to a particular matter;
- framework decisions to approximate the laws and regulations of the member states. Like directives (the instruments used in the Community pillar), framework decisions are binding upon the member states as to the result to be achieved but leave the choice of form and methods to the national authorities;
- decisions for any other purpose except approximating the laws and regulations of the member states. These decisions are binding and the Council, acting by a qualified majority, adopts the measures necessary to implement them at Union level;
- conventions, which are adopted by the member states in accordance with their respective constitutional requirements. Unless they provide otherwise, conventions enter into force once they have been ratified by at least half of the member states that adopt them.

A coordinating committeeconsisting of senior officials draws up opinions for the Council and helps prepare the ground for its deliberations.

The Commission is fully involved in the discussions in the areas covered by Title VI and its power of initiative has been extended to cover all fields.

**The Member States**

The new Treaty does not affect the Member States' exercise of their responsibilities for maintaining law and order and safeguarding internal security.

The Member States have virtually sole responsibility for cooperation in the fields covered by Title VI. To coordinate their action, they inform and consult one another and establish collaboration between their respective government departments.

They uphold common positions adopted under this heading in the international organisations and conferences that they take part in.

The Member States may establish closer cooperation using the EU institutions, procedures and mechanisms. However, this must not encroach on the powers and objectives of the European Community and must be aimed at enabling the Union to develop more rapidly into an area of freedom, security and justice (as the Schengen system succeeded in doing earlier). The Council gives its authorisation by a qualified majority (a vote in favour by at least ten members). If such closer cooperation creates problems for a particular Member State for reasons of national policy, the Council may ask for the matter to be referred to the European Council.

**The European Parliament**

Before adopting a framework decision or decision or establishing a convention, the Council has to consult the European Parliament.

The Presidency and the Commission will regularly inform the European Parliament of discussions in the areas covered by Title VI.

The European Parliament may ask questions of the Council or make recommendations to it. Each year it will hold a debate on the progress made in the areas of police and judicial cooperation in criminal matters.

**The Court of Justice**

The new Treaty recognises that the Court of Justice has jurisdiction to give preliminary rulings on the validity and interpretation of framework decisions and decisions, on the interpretation of conventions and on the validity and interpretation of the measures implementing them.

Regarding preliminary rulings, the Member States are required to make individual declarations accepting the jurisdiction of the Court of Justice and stating which national court or tribunal is empowered to request the Court of Justice for a ruling. Depending on the Member State's choice, either the national court of final appeal or any court in the country may then ask the Court of Justice for a ruling on any question regarding the interpretation or validity of one of the above acts, if it considers such a ruling necessary to enable it to give judgment.

**The Protocols**

**Protocol integrating the Schengen acquis into the framework of the European Union**

The Member States that have signed up to the Schengen Agreements (all the Member States apart from the United Kingdom and Ireland) now conduct their cooperation on abolishing internal borders under the institutional and legal framework of the European Union. The Council has taken the place of the Executive Committee established by the Schengen Agreements.

Ireland and the United Kingdom may take part in some or all of the arrangements under the Schengen acquis after a unanimous vote in the Council by the thirteen participating Member States plus the representative of the Government of the State concerned.

Iceland and Norway are associated with the implementation of the Schengen acquis and its further development.

**Protocol annexed to the Treaty establishing the European Community on asylum for nations of the Member States of the European Union**

Since all the Member States of the European Union already respect human rights and fundamental freedoms, an application for asylum by a national of a Member State may be taken into consideration only in the following cases:

- if the Member State of which the applicant is a national takes measures derogating from its obligations under the Convention for the Protection of Human Rights and Fundamental Freedoms;
- if the Council has determined that there has been a serious violation of human rights in the country of the applicant;
- if a Member State should so decide unilaterally (Belgium has undertaken to give individual consideration to any application for asylum in order to comply with its earlier international obligations: the 1951 Geneva Convention and the 1967 New York Protocol).

**CROSSING THE INTERNAL AND EXTERNAL BORDERS**

The Council of the European Union, within a period of five years from the entry into force of the Treaty, must adopt the measures necessary to attain the objectives set by the Treaty of Amsterdam.

**Checks on persons at the internal borders of the European Union**

All checks on persons, whether citizens of the Union or nationals of non-member countries, at the internal borders of the Union are to end.

In contrast to the other areas covered by Title IV, the Court of Justice does not have jurisdiction to pronounce on the validity and implementation of measures in this area.

**Crossing the external borders of the European Union**

The Council lays down the standards and procedures to be followed by Member States in carrying out checks on persons at the external borders of the European Union.

Common rules on visas for intended stays of up to three months include the following:

- a list of non-member countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement;
- the procedures and conditions for issuing visas by Member States;
- a uniform format for visas (Member States will issue the same format of visa to nationals of non-member countries);
- rules on a uniform visa (the issuing of visas by the Member States is governed by common rules).

The general procedure for decisions under Title IV requires measures under the second and fourth points above to be taken by the Council acting unanimously. Within five years after the new Treaty has come into force, such measures will have to be taken by codecision with the European Parliament.

By way of an exception to the general procedure applied under this Title, measures under the first and third points above are decided by the Council by a

qualified majority, acting on a proposal from the Commission after consulting the European Parliament.

**Free movement of nationals of non-member countries**

Measures will have to be adopted setting out the conditions under which nationals of non-member countries will have the freedom to travel within the territory of the Member States during a period of no more than three months.

**Protocol on external relations of the Member States with regard to the crossing of external borders**

The Member States retain the right to conclude agreements with non-member countries as long as they do not conflict with Community law and other relevant international agreements.

**ASYLUM AND IMMIGRATION POLICIES**

Within five years after the Treaty of Amsterdam has come into force, the Council has to adopt measures in various areas relating to asylum and immigration. This time limit does not, however, apply to measures on ensuring a balance between Member States in accommodating refugees and displaced persons, on the conditions of entry and residence for immigrants, and on the rights of nationals of non-member countries.

**Asylum policy**

International rules on asylum were laid down by the Geneva Convention of 1951 and the New York Protocol of 1967 on the status of refugees. In addition, there will be consultations with the United Nations High Commission for Refugees and other relevant international organisations on questions of asylum policy. Against this background, the Council takes decisions to determine:

- the criteria and mechanisms for determining which Member State is responsible for considering an application for asylum submitted by a national of a non-member country in one of the Member States;
- minimum standards on the reception of asylum-seekers in the Member States;
- minimum standards with respect to the qualification of nationals of non-member countries as refugees;
- minimum standards on procedures in Member States for granting or withdrawing refugee status.

Other measures on refugees and displaced persons that also have to be adopted are:

- minimum standards for giving temporary protection to displaced persons from non-member countries who cannot return to their country of origin and for persons who otherwise need international protection;
- promoting a balance of efforts between Member States in receiving and bearing the consequences of receiving refugees and displaced persons (the problem of refugees from former Yugoslavia in Germany, in particular, has shown how useful such a measure would be if such a situation were to arise again).

In the event of one or more Member States being confronted with an emergency situation characterised by a sudden inflow of nationals of non-member countries, the Council may, acting by qualified majority on a proposal from the Commission, adopt provisional measures of a duration not exceeding six months.

**Immigration policy**

For this policy, measures will be adopted in the following areas:

- conditions of entry and residence, and standards on procedures for the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunion;
- illegal immigration and illegal residence, including repatriation of illegal residents.

Measures will also be adopted defining the rights and conditions under which nationals of non-member countries who are legally resident in a Member State may reside in another Member State.

The Member States may maintain or introduce national provisions under their immigration policies as long as they are compatible with the Treaty of Amsterdam and with international agreements.

**JUDICIAL COOPERATION IN CIVIL MATTERS**

Since judicial cooperation in civil matters has cross-border implications, measures in this area are adopted under the arrangements of Title IV of the EC Treaty. The aims are as follows:

- assisting other Member States in understanding judicial and extra-judicial acts adopted in a particular Member State; improving and simplifying cooperation in the taking of evidence and the recognition and enforcement of decisions in civil and commercial cases, including decisions in extra-judicial cases;
- promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction;
- eliminating obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States.

**JUDICIAL COOPERATION IN CRIMINAL MATTERS**

The goals set for the development of judicial cooperation in criminal matters are:

- facilitating and accelerating cooperation between competent ministries and judicial or equivalent authorities of the Member States in relation to proceedings and the enforcement of decisions;
- facilitating extradition between Member States;
- ensuring compatibility in rules applicable in the Member States, as may be necessary to improve such cooperation;
- preventing conflicts of jurisdiction between Member States;
- progressively adopting measures establishing minimum rules relating to the constituent elements of criminal acts and penalties in the fields of organised crime, terrorism and illicit drug trafficking.

The objectives remain general and there is no specific timetable. Nevertheless, with a subject as complex as this, the fact that there is now a list of targets to be achieved represents a major first step in judicial cooperation.

## POLICE COOPERATION

Police cooperation is reflected in joint operations agreed by the Council of the European Union and through Europol.

### Common action

Common action includes:

- operational cooperation between the police, customs and other specialised law enforcement services of the Member States in relation to the prevention, detection and investigation of criminal offences;
- the collection, storage, processing, analysis and exchange of relevant information, including information on suspicious financial transactions;
- cooperation and joint initiatives in training, the exchange of liaison officers, secondments, the use of equipment, and forensic research;
- the common evaluation of particular investigative techniques in relation to the detection of serious forms of organised crime.

This list is not exhaustive.

### The European Police Office (Europol)

The Council is also required to promote cooperation through Europol and, within five years after the new Treaty has come into force, to adopt measures to enable Europol:

- to facilitate, support and coordinate specific investigative operations by the competent authorities of the Member States;
- to ask the competent authorities of the Member States to conduct their investigations and to develop specific expertise which may be put at the disposal of the Member States to assist them in investigating cases of organised crime;
- to work in close cooperation between prosecuting/investigating officials specialising in the fight against organised crime.

Lastly, the Council is to establish a research, documentation and statistical network on cross-border crime.

Operations carried out in the area of police cooperation (including Europol activities) are subject to appropriate jurisdictional control by the competent authorities under the rules applying in each member state.

## INCORPORATING THE SCHENGEN AREA INTO THE EUROPEAN UNION

The abolition of border checks within what has been described as the Schengen area became possible because of an initiative by Germany, France and the Benelux countries in 1985. The Schengen Convention of 1990 laid down common rules for visas, the right of asylum, checks at the external borders and cooperation between police forces and customs authorities to allow freedom of movement for individuals within the territories of the signatory countries without disturbing law and

order. A reporting system has been set up for the exchange of data about the identity of individuals. Member States of the European Union (apart from the United Kingdom and Ireland), plus Norway and Iceland, have joined this intergovernmental initiative.

**Protocol integrating the Schengen acquis into the framework of the European Union**

The Member States that are signatories to the Schengen Agreements now conduct "closer cooperation" on the abolition of internal frontiers within the institutional and legal framework of the European Union. The Council of the European Union has taken the place of the Executive Committee established by the Schengen Agreements. The common rules referred to above have been incorporated either into Title IV of the EC Treaty or into Title VI of the EU Treaty. Any new proposal in the areas of visas, right of asylum, checks at the external borders and cooperation between police forces and customs authorities will rely on one of these new bases.

The arrangements will help to further the goal of free movement for persons enshrined in the Single European Act in 1986. At the same time they guarantee democratic control and give citizens channels for appealing to the courts if their rights are called into question (the Court of Justice and/or national courts, depending on the area concerned).

Ireland and the United Kingdom may take part in some or all of the provisions of the Schengen acquis after a unanimous vote in the Council by the thirteen states that are parties to the Agreements and the representative of the Government of the State concerned.

Iceland and Norway are associated with the implementation of the Schengen acquis and its further development.

**The Schengen acquis**

The following acts are described as the Schengen acquis:

- The Agreement signed in Schengen on 14 June 1985 between the Benelux countries, Germany and France on the gradual abolition of checks at their common borders.
- The Convention signed in Schengen on 19 June 1990 between Belgium, Germany, France, Luxembourg and the Netherlands implementing the Agreement of 14 June 1985, with related Final Act and common declarations.
- The Accession Protocols and Agreements with Italy (signed on 27 November 1990), Spain and Portugal (signed on 25 June 1991), Greece (signed on 6 November 1992), Austria (signed on 28 April 1959) and Denmark, Finland and Sweden (signed on 19 December 1996), with related Final Acts and declarations.
- Decisions and declarations adopted by the Executive Committee established by the 1990 Implementation Convention, as well as acts adopted for the implementation of the Convention by the organs upon which the Executive Committee has conferred decision-making powers.