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OPTING IN AND OPTING OUT OF RULES CONCERNING THE FREE MOVEMENT OF PERSONS: PROBLEMS AND PRACTICAL ARRANGEMENTS

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I. Introduction

The opt-ins and opt-outs, which appear at different places in the Amsterdam Treaty[1] where the policy related to movement of persons is concerned, are the result of difficult negotiations concerning the future of the Third Pillar, which was introduced by the Treaty on European Union.[2] More particularly, these arrangements are the result of the discussions on "communautarisation" and the integration of Schengen co-operation in the framework of the European Union. "Communautarisation" concerns the process of transferring substantive matters from the Third Pillar area to the First Pillar area. This process implies, as a result, that proper Community procedures become applicable in these new policy fields.[3]

In order to reach agreement on this development, and to the integration of "Schengen" in the European Union, solutions had to be found for objections expressed during the Intergovernmental Conference by the British, Irish and Danish delegations. These objections related, notably, to the conferral of competences on the European Community which necessarily result from acceptance of the proposal for certain subject matters related to movement of persons to be dealt with in future, in the First Pillar area.

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[1] OJ 1997 C340.

[2] Hereafter referred to as the TEU or the Maastricht Treaty. The Third Pillar is the substance matter dealt with in Title VI TEU.

[3] This process is to be distinguished from the possibility, mentioned in Article 42 TEU and according to which the Council may decide unanimously, on the initiative of the Commission or a Member State, that action in areas falling under the Third Pillar may be subjected to the procedures of the Community and which decisions are to be ratified by the Member States in accordance with their respective constitutional requirements.

Moreover, the United Kingdom and Ireland reminded the other delegations of the existence of the Common Travel Area, a bilateral framework concerning the movement of persons between these two countries. Further, neither country had thus far participated in the Schengen co-operation.[4] Denmark made reference to difficulties that occurred in the national Parliament in 1992, in the context of the ratification procedure of the Maastricht Treaty. In order to solve these problems a new decision had to be made, and this occurred with the Decision of 11/12 December 1992 of the Heads of State or government, meeting within the European Council, concerning certain problems raised by Denmark on the Treaty on European Union[5]. This decision states in Section D that Denmark will participate in co-operation on Justice and Home Affairs (only) on the basis of the provisions of Title VI of the TEU. The Danish delegation apparently wished to stress the mainly intergovernmental character of co-operation on Justice and Home Affairs in the framework of the European Union.

This paper will deal with the different modalities for "opts-in" and "opts-out" created by the Amsterdam Treaty.

II Protocol Concerning Article 14 (Article 7a) EC

The "Protocol on the application of certain aspects of Article 7a of the EC Treaty to the United Kingdom and Ireland"[6] focuses, in particular, on the competence of the United Kingdom to exercise controls on persons it deems necessary at its frontiers with other Member States (Article 1 of the Protocol). In fact it is only in the context of the existing bilateral arrangements, agreed between the United Kingdom and Ireland in the context of the "Common Travel Area" that Ireland is also entitled to exercise any such control (Article 2). The structure of the Protocol thus makes it clear that the real "*demandeur*" of these specific arrangements was the United Kingdom, and not so much Ireland.

The existence of the Protocol implies that within the territory of the European Community there will not exist identical modalities for the crossing of the internal borders. Indeed, between the parties to the

[4] The most important texts are the Agreement, signed in Schengen on 14 June 1985, between the governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders, Trb (Dutch Treaty Series) 1985,102; and the Convention between the Kingdom of Belgium, the Federal Republic of Germany, the French Republic, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands, Implementing the Agreement on the Gradual Abolition of Checks at their Common Borders, signed in Schengen on 19 June 1990, Trb (Dutch Treaty Series) 1990, 145.

[5] OJ 1992 C 348/1.

[6] Protocol B.3 of the Final Act of the Amsterdam Treaty, also to be referred to as the "Frontiers Protocol".

Schengen agreements controls at the internal borders have been lifted.[7] On the other hand, it follows from the text of the first Article of the Frontiers Protocol that the United Kingdom (and Ireland) may:

- verify the right to enter the United Kingdom of citizens of states which are contracting parties to the Agreement on the European Economic Area, as well as;
- determine whether or not to grant other persons permission to enter the United Kingdom.

Also the other Member States are entitled, according to the new arrangements, to exercise at their frontiers such controls on persons seeking to enter their territory from the United Kingdom or from Ireland (Article 3). The system, in other words, reflects the principle of reciprocity.

Nonetheless, one may wonder if such principles, once applied to Community citizens at the frontiers between the United Kingdom and/or Ireland and other Member States of the Union, are compatible with the modalities of Community law as it presently stands, and in particular in the light of the decisions of the European Court of Justice in *Commission* v. *Belgium*[8] and *Commission* v. *the Netherlands*.[9] According to these decisions, the only pre-condition which Member States may impose on the right of Community citizens to enter their territory is the production of a valid identity document or pasport.[10] Of course, the Frontiers Protocol, because of its character as treaty text, is to be considered as being at the same "level" as the Treaty itself, and could therefore contain a different approach from that which appears in the Treaty itself. Nonetheless, it is striking that, according to the second paragraph of the first Article of the Protocol, "nothing in Article 7a of the Treaty establishing the European Community or in any other provision of that Treaty or the Treaty on European Union shall prejudice the right of the United Kingdom to adopt or exercise any such controls". Now, the question arises if this statement is completely correct, and if the arrangements as laid down in the Protocol are in fact not to be considered as a regression, when compared to the earlier situation of Community law, as interpreted by the Court.

[7] Article 2(1) of the Schengen Implementing Convention, above n 4.

[8] Case C–321/87 [1989] ECR 1997.

[9] Case C–68/89 [1991] ECR I-2637.

[10] See paragraph 11 of the decision in *Commission* v. *Belgium* above n 8, and paragraphs 11–12 of *Commission v. the Netherlands*, above n 9.

III Protocol United Kingdom and Ireland

According to the "Protocol on the position of the United Kingdom and Ireland"[11] the United Kingdom and Ireland shall not participate in the adoption by the Council of proposed measures based on the new EC title on free movement of persons[12] (Article 1). The most logical interpretation of this phrase seems to be that both countries may participate in the deliberations but not in the final decision making process.[13] Equally Article 1 provides for specific decision making modalities when qualified majority or unanimity voting applies.[14]

However, both countries are entitled to demonstrate their willingness to participate in the co-operation concerned. For this situation the concept has been developed that either the United Kingdom or Ireland, or both countries, notifies the Presidency of the Council of their willingness to take part in the decision making on measures pursuant to the new Title IV of the EC Treaty (Article 3(1) of the Protocol). Once they make such a statement, their participation is automatically granted.[15] However, if after a "reasonable" period of time, the measure concerned cannot be adopted with the United Kingdom and/or Ireland taking part, the Council may adopt such measures without their participation (Article 3(2) of the Protocol).

Now, no definition of the term "reasonable" has been laid down in the Protocol: the duration of such a period has therefore to be appreciated in the light of the specific circumstances of each individual case. Here obviously the implications for the Member States resulting from the general obligation to co-operate under Article 10 (Article 5) EC are of importance. On the other hand, a consequence of the construction is that the co-operation between the other Member States pursuant to Title IV cannot, formally speaking, be obstructed at the end of the day by the positions taken by the United Kingdom and Ireland in the discussions concerned. Of course, practice will need to demonstrate if the construction agreed is a workable one.

Moreover, a readiness of the United Kingdom and Ireland to accept a measure pursuant to the new EC title may also be shown "at any moment"

[11] Protocol B.4 of the Final Act of the Amsterdam Treaty.

[12] Title IV (Title IIIa) EC.

[13] These modalities correspond to the modalities for closer co-operation, as laid down in the first paragraph of Article 44 TEU. However, they differ from the modalities provided for in the Social Protocol annexed to the Maastricht Treaty to the extent that the United Kingdom in that case was not even allowed to participate in the deliberations of the Council: see paragraph 2 of Protocol 14 on Social Policy.

[14] See for the modalities Article 205(2) EC (Article 148(2)).

[15] "... whereupon that State shall be entitled to do so": first sentence of Article 3(1) of Protocol B.4, above n 11.

after the adoption of the measure concerned (Article 4 of the Protocol). This is to take place pursuant to the relevant procedures on closer co-operation, also known as "flexibility", in Article 11 (Article 5a) of the EC Treaty in the First Pillar, so the final decision upon the request of the United Kingdom and/or Ireland shall be taken by the Commission. These arrangements seem to be favourable to the United Kingdom and Ireland. At least they are better suited for both countries in comparison with the arrangements established in the Schengen Protocol. I will return to this later.[16]

One final point concerning the United Kingdom and Ireland Protocol has to be stressed: also here the Irish position is more flexible than the position of the United Kingdom. Indeed, according to Article 8 of the Protocol Ireland may notify the Presidency of the Council that it no longer wishes to be covered by the terms of the Protocol. The interest Ireland apparently has in participating in First Pillar co-operation is moreover illustrated by a unilateral Declaration of Ireland, from which it follows that Ireland intends to take part in the co-operation on free movement of persons, to be developed by the Community, to the maximum extent possible.[17]

IV. Protocol on Denmark

The "Protocol on the position of Denmark"[18] places that Member State completely outside the co-operation to be developed in the framework of the Community pursuant to the new Title IV of the EC Treaty. By way of an "opt-out" construction it is simply stated that Denmark shall not take part in the adoption of proposed measures, to be based on Title IV (Article 1 of the Protocol). As in the case of the United Kingdom and Irish Protocol, this means that Denmark may participate in the deliberations, but not in the final decision-making process.[19]

However, in order to avoid divergent developments in both legal orders—that is, the Danish and Community legal orders—under Article 5(1), first sentence, Denmark has to decide, within a period of six months after the Council has taken a Title IV decision, whether it will implement this decision in its national law. It is added then in Article 5(1), second sentence, that, should Denmark decides to do so, this decision creates an *obligation under international law*. The specification concerning the existence of an obligation "under international law" expresses the Danish desire that any connotation whatsoever with Community law should be avoided. It is submitted that, as a consequence of the wording, the Danish

[16] See Section V below.

[17] Unilateral Declaration 4 of the Final Act of the Amsterdam Treaty, above n 1.

[18] Protocol B.5 of the Final Act of the Amsterdam Treaty, above n 1.

[19] See above n 13.

follow-up acts cannot be controlled either by the Commission (ie in the framework of a procedure for breach of treaty obligations[20]) or by the Court of Justice.[21] They are to be appreciated as sovereign acts of the Danish authorities, to be assessed only by national courts and tribunals.

It is further stated in Article 5 (2), second paragraph, that, should Denmark decide not to implement the decision concerned, the Member States "will consider appropriate measures to be taken". In fact reference is made here to the Member States referred to in Article 1 of the Schengen Protocol. Drafted as it is, the reference therefore remarkably includes Denmark itself! This construction, strange as it may appear—because it is difficult to imagine that Denmark would be prepared to participate in decision-making, for example, on the establishment of sanctions against itself—was deliberately choosen in order to illustrate the primarily "political" character of the procedure.

All in all it is clear that the Danish Protocol is of a somewhat different nature from the Protocol concerning the United Kingdom and Ireland. Whereas the United Kingdom, and more particularly Ireland, are disposed at least to consider participation in current decision making based on the new EC Title, Denmark only accepted an engagement to take a national position to Community decisions "*ex post facto*". Nonetheless Denmark has made it clear that its "opt-out" position does not necessarily reflect a permanent situation. Indeed, according to Article 7 of the Danish Protocol, Denmark may, at any time, and "in accordance with its constitutional requirements", inform the other Member States that it no longer wishes to avail itself of the facilities of the Protocol.

V. Schengen Protocol

The construction developed in the Amsterdam Treaty for the integration and further development of the Schengen co-operation is an example of closer co-operation, formally dealt with in Title VII TEU, Articles 43 to 45. Indeed, we are confronted with a form of flexibility which has been laid down in primary law, where the mandate is given to a limited number of Member States to co-operate in furthering one of the objectives of the European Union.

According to the first Article of the "Protocol integrating the Schengen *acquis* into the framework of the European Union"[22] 13 Member States are

[20] Article 226 EC (Article 169).

[21] Notably Article 234 EC (Article 177) is of importance here.

[22] Protocol B.2 of the Final Act of the Amsterdam Treaty (also to be referred to as the "Schengen Protocol"). See on this subject also de Zwaan, J.W. "Schengen and its Incorporation into the New Treaty", and the contribution of Piçarra, N. "La mise en œuvre du protocole intégrant l'acquis de Schengen dans le cadre de l'Union européenne: règles et

authorised to continue the Schengen co-operation within the institutional and legal framework of the Union. These countries include Denmark. Indeed, the United Kingdom and Ireland are the only members of the European Union which do not participate in the Schengen co-operation.

In the context of the authorisation given, it is stated that the Schengen *acquis* immediately applies to the 13 states concerned as from the date of entry into force of the Amsterdam Treaty, as *acquis* of the Union (Article 2(1), first sub–paragraph of the Protocol). However, at this particular moment it is in principle not yet known in which Pillar the legal basis for all individual Schengen texts is to be found. After all it is only after decisions of the Council, to be taken unanimously—that is to say, with the consent of the United Kingdom and Ireland—that the legal basis of each individual Schengen provision will be established (Article 2(1), sub-paragraph 2 of the Protocol). It is furthermore stated in a parallel Declaration, namely Declaration number 44 of the Conference,[23] that the necessary preparatory work in this respect shall be undertaken in due time, in order to be completed prior to the date of entry into force of the Amsterdam Treaty. However, here we are confronted with a commitment of a purely political nature. Therefore, it has been made explicit that, as long as the said implementing measures have not been taken by Council, the Schengen texts are presumed to have their origin in the Third Pillar (Article 2(1), sub-paragraph 4 of the Protocol).

As foreseen in the Protocol discussed in Part III above on the position of the United Kingdom and Ireland both countries may also, in the Schengen context, ask to participate in Union co-operation building upon the Schengen *acquis* (Article 4). However, in contrast with the more flexible arrangements in the Protocol discussed in Part II concerning the application of Article 14 of the EC Treaty to the United Kingdom and Ireland,[24] in the Schengen context a decision of the Council, requiring unanimity between all 13 Schengen states is needed before the United Kingdom and Ireland are fully entitled to participate.

Of course the requirement to reach consensus between the 13 Schengen states is a difficult one. Therefore, in a declaration that is parallel to Article 4 of the Schengen Protocol, that is declaration number 45,[25] it has been made clear that the Council, before deciding on the request concerned, will seek an opinion of the Commission. Here parallels can be drawn with the procedure set out in Article 4 of the Protocol on the position of the United Kingdom and Ireland with respect to Article 14,

procédures", in Den Boer, M. (ed.) *Schengen's Final Days? The Incorporation of Schengen into the New TEU, External Borders and Information Systems* (European Institute of Public Administration,1998) 13 and 25 respectively.

[23] Annexed to the Final Act of the Treaty of Amsterdam, above n 1.

[24] See above, Section II.

[25] Annexed to the Final Act of the Treaty of Amsterdam, above n 1.

according to which it is within the competence of the Commission to decide on a British or Irish request. In the Schengen Declaration it is furthermore stated that the "Schengen" states undertake to make their best efforts to allow the United Kingdom and/or Ireland to make use of the facilities offered by Article 4 of the Schengen Protocol. This is clearly a political commitment to satisfy potential British and/or Irish requests as much as possible. Also, it is to be remembered that the continuation of Schengen co-operation in the framework of the European Union has to be open to all Member States. This is in view of the fact that the integration of Schengen reflects the realisation of a Treaty objective accepted by all 15 Member States, and notwithstanding the fact that Member States will not participate in the first instance in that project.

As far as the further development of Schengen is concerned, it is stated in the first paragraph of Article 5 of the Schengen Protocol that proposals and initiatives to build upon the Schengen *acquis* shall be subject to the relevant provisions of the Treaties. It follows from this principle that either the procedures and provisions of the First Pillar will apply, or those of the Third Pillar.

The decision making modalities for future acts in the area of Schengen co-operation are (also) inspired by the equivalent provisions of the Protocol on the position of the United Kingdom and Ireland. So it is made explicit in Article 5, second line of the first paragraph of the Schengen Protocol. Where either the United Kingdom or Ireland or both have refrained from notifying the Council in writing, within "a reasonable period", that they wish to take part, the authorisation referred to in Article 11 (Article 5a) of the EC Treaty (First Pillar) or in Article 40 (Article K.12) of the Maastricht Treaty (Third Pillar) *shall be deemed to have been granted* to the 13 Member States.[26] Also here no definition of what is to be understood by "reasonable" has been given. In this context too the duration of such a period has therefore to be appreciated in the light of the circumstances of each individual case.[27] Moreover, there is an accompanying Declaration, namely Declaration number 46,[28] according to which the contracting parties undertake all efforts in order to make action among all Member States possible in the domains of the Schengen *acquis*, in particular whenever Ireland and the United Kingdom have accepted some or all of the provisions of that *acquis* in accordance with Article 4 of the Schengen Protocol.

Another complication resides in the fact that up to now, even the 13 Member States of the Union, which are at the same time Schengen partners,

[26] And, as is stated in Article 5(2), to Ireland or the United Kingdom where either of them wishes to take part in the areas of co-operation in question.

[27] See the discussion above, in Section III, related to the interpretation of Article 3(2) of the Protocol on the United Kingdom and Ireland.

[28] Annexed to the Final Act of the Treaty of Amsterdam, above n 1.

have not participated in an identical way in Schengen co-operation. For example, the Agreements on Accession to the Schengen co-operation of Denmark, Finland and Sweden[29] has not yet entered into force. Paragraph 2 of Article 2 of the Schengen Protocol provides that their respective participation in the Union activities starts from a date to be decided by the Council, acting with the unanimity of all the 13 "Schengen" states.[30] Also, Greece is for the moment not yet fully involved in Schengen co-operation. Here the modalities of the controls at the Greek borders which are external Schengen borders, are of importance. However, it may be foreseen that, when the Amsterdam Treaty enters into force—to be scheduled realistically somewhere during the second quarter of 1999—at least the Greek problem will have been solved. With regard to the accession of Denmark, Finland and Sweden and, parallel to that, the co-operation with Norway and Iceland,[31] it is less probable that the respective Treaty texts will have entered into force by that time.

VI Norway and Iceland

It is true that the future of Schengen co-operation is further complicated by arrangements permitting Norway and Iceland to be associated with this co-operation in the framework of the European Union. This as a consequence of an Agreement of 19 December 1996, concluded between the 13 Schengen partners, on one side, and Norway and Iceland on the other.[32]

The background of the establishment of the Co-operation Agreement was that, in order to be able to agree on the accession of Denmark, Finland and Sweden to the existing Schengen co-operation, a solution had to be found for the fact that, between all the Nordic countries, a Passport Union existed.[33] On the other hand, because Norway and Iceland could not fully become members of the Schengen co-operation, in view of the fact that that they are not members of the European Union,[34] a separate agreement

[29] Signed in Luxembourg on 19 December 1996, Trb (Dutch Treaty Series) 1997.128, 130 and 132.

[30] In Article 2(2) of the Schengen Protocol, above n 22, it is added: ". . . unless the conditions for the accession of one of those states to the Schengen acquis are already met before the date of entry into force of the Amsterdam Treaty". In that particular situation apparently a start of the participation, as from the date of entry into force of the Amsterdam Treaty is the rule.

[31] Article 6 of the Schengen Protocol, above n 22.

[32] Trb (Dutch Treaty Series) 1997, 133.

[33] The relevant treaty text is the Convention between Denmark, Finland, Norway and Sweden concerning the waiver of passport control at the intra-Nordic frontiers (translation), signed in Copenhagen, on 12 July 1957, UNTS 1959, 4660.

[34] See Article 140(1) of the Schengen Implementing Convention above n 4, according to which provision (only) Member States of the European Communities could become a party to the Convention.

had to be concluded between the Member States of the European Union participating in the Schengen co-operation, on one side, and Norway and Iceland on the other.

According to the first paragraph of Article 6 of the Schengen Protocol appropriate procedures shall be established in an Agreement to be concluded with Norway and Iceland by the Council.[35] Furthermore, a separate Agreement has to be concluded with Iceland and Norway by the Council, in order to establish the rights and obligations between Ireland and the United Kingdom on the one hand, and Norway and Iceland on the other, in areas of the Schengen *acquis* which apply to these states (Article 6 paragraph 2). The necessity to conclude a second agreement with Norway and Iceland is due to the fact that, as a result of the arrangements of the Schengen Protocol, the United Kingdom and Ireland are not obliged to participate in the continuation of Schengen co-operation in the framework of the European Union.

One may wonder what the contents could be of the second agreement, relating to the position of the United Kingdom and Ireland *vis à vis* the Schengen *acquis*. Indeed, at least for the moment there is no indication that the United Kingdom or Ireland would be willing to accept any part of Schengen co-operation. On the other hand, according to Declaration 47,[36] both Agreements should preferably enter into force on the same date as the date of entry into force of the Treaty of Amsterdam. Furthermore, it is clear that the contents of the First Agreement with Norway and Iceland have to be established with the utmost accuracy. Notably it should be guaranteed that the procedures to be elaborated in the Agreement concerning the scope of the participation of Norway and Iceland in the European Union framework will not give these third countries a disproportionate impact on the decision making process within the Union. They, Norway and Iceland, are obviously to be consulted; moreover consideration might be given to allowing them to participate in certain deliberations in the framework of the Council. However, they should not be allowed to participate in the final decision making process, the stage of the formal adoption of decisions in the Council. Therefore, here the modalities on consultation, as have been developed in the framework of the Agreement on the European Economic Area, may serve as an example.[37]

[35] It is worth noting that the designation of the "Council" as contracting party on behalf of the Member States of the European Union represents a unique and unprecedented institutional innovation. Here exists a relationship which the discussion the Intergovernmental Conference had concerning the opportunity to confer—after the example of the European Community—legal personality to the European Union: See Articles 281 and 282 EC (Articles 210 and 211). On this point, however, no agreement was reached.

[36] Annexed to the Final Act of the Treaty of Amsterdam, above n 1.

[37] OJ 1994 L1/3. See notably Articles 99–102 EEA.

VII. Other Schengen Aspects

It is stated explicitly in Article 8 of the Schengen Protocol that the Schengen *acquis*—and further measures taken by the institutions within its scope—shall be regarded as an *acquis* which must be accepted in full by applicant states. This provision intends to rule out all uncertainty about the character of closer co-operation. However, in view of the fact that we are confronted with a form of co-operation in which only a number of Member States participate, it is at least questionable whether the adoption of follow-up measures may be imposed on candidate countries. For example, it has generally been accepted that measures taken pursuant to the so-called Maastricht Social Protocol, in the adoption of which the United Kingdom did not participate,[38] form part of the "*acquis*" to be accepted by new Member States. However, in the case of Schengen not only is the number of Member States involved more limited than in the social area, but also the status of the partners which participate in Schengen is different.

A final remark concerns the unilateral French Declaration "concerning the situation of the overseas departments in the light of the Protocol integrating the Schengen *acquis* into the framework of the European Union".[39] According to the text of this Declaration, France considers that the implementation of the Schengen Protocol has no effect on the geographical scope of the Schengen Implementing Convention of 1990, as defined by Article 138(1) of that Convention.[40] It states that the provisions of the Schengen Convention are only applicable on the European territory of France, and therefore not in the "*Départements d'outre mer*" (DOMs).[41] However, in view of the fact that Community law fully applies to the DOMs,[42] it is hardly imaginable that a text of a declaration can produce the legal effect that Community law, to be developed after the integration of Schengen in the *acquis* of the Union, will not extend to the DOMs.

VIII. Flexibility or Closer Co-operation

On top of all this, the "flexibility" principles of the Amsterdam Treaty may in principle also be applied in the framework of co-operation in the field of

[38] Protocol 14 on Social Policy. As is well known, the British reservation to this Protocol has since been dropped. The Amsterdam Treaty integrates the content of the Social Protocol now formally in the text of the EC Treaty: Articles 136–143 EC (Articles 117–120).

[39] Unilateral Declaration 7 of the Final Act of the Amsterdam Treaty.

[40] Above n 4.

[41] Mentioned in Article 299 (2) EC (Article 227)(2)).

[42] Decisions of the Court in Case 148/77 *Hansen* [1978] ECR 1787 and Case C–163/90 *Legros* [1992] I–4625.

movement of persons. The general regime on flexibility, or "closer co-operation" as the formal wording of the concept in the Treaty reads, is to be found in Title VII TEU, whereas specific regimes have been laid down for the First Pillar in Article 11 (Article 5a) EC and for the Third Pillar in Article 40 (Article K.12) TEU.[43]

In the light of the fixed conditions for the application of flexibility in Third Pillar co-operation,[44] it should not to be excluded that closer co-operation may indeed be applied in that context. However, in the context of First Pillar co-operation this is more difficult to envisage, because of the obligation to protect the *acquis communautaire*[45] and, in that connection, notably the proper functioning of the Internal Market. On the other hand, such an application is not to be completely excluded, at least in the context of the content and particularities of the new Title IV on movement of persons. But, as interesting as such a theoretical discussion may be, it is not useful in solving the problems that have been canvassed here. Clearly further developments have to be awaited; developments which, moreover, may only occur after the entry into force of the Amsterdam Treaty.

IX Court of Justice

The "opt-in" arrangements, agreed in Amsterdam in the context of the role of the Court of Justice in the Third Pillar merit examination.[46] From the outset the role of the Court of Justice was one of the more complicated items during the negotiations in the conference concerning the future of the Third Pillar. In this context a majority of the Member States were clearly not disposed to accept the existing and limited arrangements of the Maastricht Treaty as final modalities of the involvement of the Court in co-operation pursuant to Title VI TEU. In this respect it may be recalled that jurisdiction of the Court over co-operation in the fields of Justice and Home Affairs is in principle excluded. This follows from the drafting of Article 46 (Article L) of the TEU. More particularly, the involvement of the Court, according to Article K.3(2)(c) TEU, is purely potential, and is limited to the application and interpretation of conventions. The Court's role in interpreting conventions was to be decided on an *ad hoc* basis.

In fact, during the conference a majority of partners favoured affording wide scope for the Court's jurisdiction. In particular the importance of full jurisdiction concerning preliminary rulings was stressed, on the basis of the example of the arrangements of Article 234 EC Treaty (Article 177).

[43] See on this subject also Ehlermann C.D. "Différenciation, flexibilité, coopération renforcée: les nouvelles dispositions du traité d'Amsterdam" [1997] *Revue du Marché Unique Européen* 53; Shaw J. "The Treaty of Amsterdam: Challenges of Flexibility and Legitimacy"4 (1998) *ELRev.* 63; Gaja G., "How Flexible is Flexibility under the Amsterdam Treaty" 4 (1998) *CMLRev.* 855.

[44] Article 40(1) TEU. [45] Article 43(e) TEU. [46] Article 35 TEU.

However, the United Kingdom objected to full involvement of the Court in this kind of Third Pillar co-operation. In that context mention was made of the essentially intergovernmental character of this form of co-operation and the sensitivity of the subject matters concerned. In the negotiations the British arguments were shared to a certain extent by other Member States, such as the Scandinavian states of Denmark and Sweden, while Finland favoured wide competences for the Court.

The British position on the Court became clear during negotiations that took place after the entry into force of the Maastricht Treaty. Here, according to the principles of the existing Article K.3(2)(c), the opportunity to confer jurisdiction on the Court has to be debated on an *ad hoc* basis. The most important example in this respect is the discussion in Council relating to the establishment of a Court Protocol to the Europol Convention. Although the Convention itself was signed in 1995,[47] the negotiations to reach a Protocol were more protracted. They lasted a year and resulted in a text signed in July 1996.[48] The Europol negotiations were, indeed, focussed on the possibilities of conferring on the Court jurisdiction to give preliminary rulings. More particularly the United Kingdom was reluctant to agree to this, in so far as it concerned sending questions to Luxembourg by national courts or tribunals. On the other hand, the United Kingdom did in principle accept conferring on the Court competence to settle conflicts between Member States concerning the application of the Convention.[49]

In view of the the result of the negotiations on references to the Court of Justice from national courts, the Europol Protocol has become known in Brussels as an "opt-in" model, because Member States are able to provide a facility for references to the Court of Justice, but are not obliged to do so.[50] In this way the construction offers the Member State an option to confer on the European Court no competence at all. Moreover, once opting in, Member States are in a position to declare either that any of their courts or tribunals may request the Court to give a preliminary ruling, or that such a competence is limited to the supreme courts or, more precisely, courts or tribunals against whose decisions there is no judicial remedy. This is the formula of the third paragraph of Article 234 of the EC Treaty.[51]

[47] Convention on the establishment of a European Police Office (Europol Convention), signed at 26 July 1995, OJ 1995 C 316/2.

[48] Protocol on the interpretation, by way of preliminary rulings, by the Court of Justice of the European Communities of the Convention on the establishment of a European Police Office (Europol Convention), signed at 23 July 1996, OJ 1996 C299/2.

[49] The equivalent arrangement in the EC context is Article 227 EC (Article 170).

[50] Article 2(1) of the Court Protocol on Europol, above n 48.

[51] As drafted, the construction does not provide for an obligation for these "supreme" courts to refer cases to Luxembourg, as is the case under Article 234 EC. However, the solution agreed to in the Europol context provides also for a text of a Declaration of eight Member States, annexed to the Court Protocol on Europol, according to which these Member States reserve the right to make provision in their national law to the effect that,

Although the negotiations in the Intergovernmental Conference were, from the outset, aimed at arriving at a uniform model for the Court's involvement in the newly reformed Third Pillar co-operation, the final decisions were only taken during the summit meeting of 16–18 June 1997 in Amsterdam. However, partners did agree to a substantial change of the original Maastricht model concerning the Court's involvement in Third Pillar co-operation.

It has to be stressed, however, that the new arrangements, laid down in Article 35 (Article K.7) TEU, imply involvement of the Court not only in the context of conventions, but also with respect to all legal instruments that operate in the Third Pillar, which would include framework decisions and decisions.[52] Further, whereas the Conference eventually accepted, after the example of the Court's Protocol on Europol, an "opt-in" formula for the Court's competence to give preliminary rulings, in all other respects the competences conferred upon the Court were framed according to a uniform model, and were destined therefore to be applicable in all Member States.

The options presented in the new Article 35 TEU concerning preliminary rulings imply that Member States are in a position not to confer this power on their national courts at all.[53] In view of views expressed during negotiations in the Conference, this will most probably be the British position. Once Member States do opt in favour of vesting the Court of Justice with authority to give preliminary rulings under Article 35(2) and (3), they have to make a declaration, at the time of signature or at any time thereafter, *stating the exent to which* they accept the competence of the Court of Justice to give preliminary rulings. More precisely, Member States should indicate whether any of their courts or tribunals may request the Court to give a preliminary ruling, or that such competence is restricted to the supreme courts or, more precisely, courts or tribunals against whose decisions there is no judicial remedy.[54]

Furthermore, in conformity with the arrangements provided for in the context of the Court's Protocol on the Europol Convention, Member States may reserve the right to make provisions in their national law to the effect that, where a question relating to the validity or interpretation of an

where a question relating to the interpretation of the Europol Convention is raised in a case before a national court or tribunal against whose decision there is no judicial remedy under national law, that court or tribunal will be required to refer the matter to the Court of Justice: OJ 1996 C299/14.

[52] In fact, it follows from the wording of the first paragraph that the jurisdiction of the Court to give preliminary rulings concerns the validity and interpretation of framework decisions and decisions in the meaning of Article 34 TEU, the interpretation of conventions, and the validity and interpretation of measures implementing conventions.

[53] The option "not to choose" follows from the facultative wording of paragraph 2: "any Member State shall be able to accept . . .".

[54] See, again, the modalities of Article 234(3) EC.

act referred to in Article 35(1) TEU is raised in a case before a national court or tribunal against whose decision there is no judicial remedy under national law, that court or tribunal will be required to refer the matter to the Court of Justice (Declaration number 10 annexed to the Final Act of the Amsterdam Treaty).[55]

In the end, therefore, as far as preliminary rulings are concerned, at least five options are available to the Member States:

- a Member State may not opt in favour of any competence of the Court to give preliminary rulings;
- a Member State may opt in favour of a competence only for "supreme" courts to refer questions to the Court of Justice;
- a Member State, although opting in favour of such a limited scope of the preliminary competence, provides in his national law for an "obligation" for the courts concerned to refer questions to the Court of Justice;
- a Member State may opt in favour of a wide competence, to the benefit of all national courts and tribunals, to refer questions to the Court of Justice;
- a Member State, opting in favour of such competence may provide in its national law, also for an "obligation" for the "supreme" courts to refer questions to the Court of Justice.

Furthermore, in Article 35(6) of the Maastricht Treaty provision has been made for direct appeals, brought before the Court by Member States or by the Commission. Under Article 35(7) the Court has also been declared competent in general terms to settle conflicts between Member States as well as between Member States and the Commission. Finally, under Article 35(5) a general exception to the Court's jurisdiction has been made concerning "the validity and proportionality of operations carried out by police or other law enforcement agencies of a Member State or the existence of the responsabilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security'. This exception is apparently inspired by the same considerations as those reflected in the general clause, included in Article 33 (Article K.5) TEU, according to which co-operation in the framework of the Third Pillar shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.

X Entry into Force of Conventions

A final element of differentiation, although not resulting from the application of proper "opt-in" or "opt-out" arrangements, results from the

[55] Annexed to the Final Act of the Treaty of Amsterdam, above n 1.

innovation included in Article 34(2)(d) TEU according to which conventions, as a rule,[56] shall enter into force once adopted by at least half of the Member States. Of course this innovation is to be understood as a general means to promote a relatively early entry into force of individual texts of conventions. Obviously the course of time needed for the fulfillment of all the national ratification procedures is of importance. However, this innovation is only to be considered positively, since it may produce, in practice, situations in which a number of Member States will, at least for a period of time, refrain from applying the convention concerned.

XI Final Remarks

If one considers all "opt-in" and "opt-out" arrangements to be applied after the entry into force of the Amsterdam Treaty in their context, the following overall impression emerges.

In the area of the Third Pillar, normally all 15 partners may participate. Indeed, in this particular area no specific derogations have been asked for by, and granted to, Member States. However, if any particular action is explicitly presented as a follow-up to Schengen co-operation,[57] the United Kingdom and Ireland cannot be obliged to participate due to the modalities which are peculiar to the Schengen Protocol. More precisely, unanimity between the 13 Schengen states is required to permit the United Kingdom and Ireland to come in.[58] Furthermore, in such a case the participation of Norway and Iceland is indicated, to the extent that the relevant dossiers clearly concern further development of the former Schengen regime to which these countries have become a party.[59] On the other hand, Denmark, which is already a partner to Schengen co-operation, has no obstacles to co-operating in the Third Pillar area.

In the area of the First Pillar co-operation the situation is more complicated. Generally speaking only 12 Member States will participate, namely all 15 minus the United Kingdom, Ireland and Denmark. This is a result of the derogations granted in this area to these three states.[60] Indeed, it is only to the extent that the United Kingdom and Ireland express the wish to participate in the First Pillar that the scope of 12 Member States may be

[56] According to the wording of Article 34(2)(d), second subparagraph, TEU individual texts of conventions may provide otherwise.

[57] According to the wording of Article 5(1) of the Schengen Protocol such proposals and initiatives "build upon" the Schengen acquis.

[58] Article 4(2) of the Schengen Protocol.

[59] Indeed, according to the wording of Article 6(1) of the Schengen Protocol, Iceland and Norway "shall" be associated with the implementation of the Schengen *acquis* and its further development.

[60] See in this context notably the Protocol on the position of the United Kingdom and Ireland, above n 11, as well as the Protocol on the position of Denmark, above n 18.

enlarged. However, seen from the perspective of the United Kingdom and Ireland, relatively flexible arrangements do apply to enable their co-operation, as far as is possible.[61] The Danish position is different. Leaving aside the possibility that Denmark will formally abandon its Protocol,[62] this Member State cannot participate in First Pillar co-operation. Indeed, at the maximum this Member State will implement any Community measures adopted by virtue of "an obligation under international law".[63]

However, action once proposed under the First Pillar is presented explicitly as an initiative to build further upon the Schengen *acquis*, the modalities of the Schengen Protocol once again come into play. As a consequence, also in this context the United Kingdom and Ireland are prohibited from participating. In this case too unanimous support of all 13 Schengen states is needed before their exclusion can be lifted. Moreover the participation of Norway and Iceland also arises here. On the other hand, nor will Denmark participate, although it is a partner to Schengen co-operation. Indeed, as has already been mentioned, Denmark obtained a general derogation excusing it from participating in any First Pillar co-operation on movement of persons.

In the light of the foregoing it seems that the application of the normal working methods and procedures of the European Union has the best potential to achieve a wide geographical scope for co-operation concerning movement of persons. Although not covering all Member States, its potential reach is wider than that resulting from the application of the different methods of the Schengen Protocol. Indeed, it would permit *inter alia* the United Kingdom and Ireland to co-operate as much as possible in this field. Therefore, it may be concluded that the interests of the European Union are best served if future proposals related to co-operation on movement of persons will be presented as autonomous actions of the European Union, to be founded either in the First Pillar or in the Third Pillar. As a consequence, such proposals should in principle not be presented as actions to "build upon" the former Schengen *acquis*, nor should they make any reference to the Schengen Protocol.

This being said, after the entry into force of the Amsterdam Treaty, in practice the question has to be answered, in each individual case, of the extent to which Title IV of the EC Treaty or, alternatively, Title VI of the Maastricht Treaty, *may* be used as the legal basis for a proposed action, and in which situation Schengen co-operation is obligatory, or might be the most appropriate basis for the proposed decision. It seems that this appreciation has to be made on a case by case basis, in view of the objectives, the content and the exact wording of the proposed actions.

[61] See the arrangements of Article 3 of the Protocol United Kingdom and Ireland.
[62] Article 7 (Part III) of the Danish Protocol, above n 18.
[63] Article 5(1) of the Danish Protocol, *ibid.*

Apart from these aspects, it would be in the interest of the European Union and its Member States to establish with great care the modalities of the association of Iceland and Norway to Schengen co-operation within the European Union. As far as substance is concerned, the scope of the association is determined by the state of Schengen co-operation at the time of signature of the Co-operation Agreement (19 December 1996). With regard to procedures for future decision-making, these modalities, again in the interest of the Union and its Member States, should not be of such a nature as to permit Iceland and Norway to hinder further progress in the Union. In this connection it is repeated that modalities such as those provided for in the Agreement on the European Economic Area[64], to the benefit of former EFTA states, may be considered appropriate.

It is to be hoped that the derogations created by the Treaty of Amsterdam for the benefit of the United Kingdom, Ireland and Denmark will only have a temporary character and will not reflect a permanent situation. Indeed, the area of freedom, security and justice, as elaborated in Title IV of the EC Treaty and in the newly reformed Third Pillar of the Maastricht Treaty, represents a Treaty objective which has been accepted by all partners.[65] In such a situation it is only logical that all partners do participate actively in the process of implementation of the said objective.

In that sense, and parallel to the gradual disappearance to the background of the Schengen origin of the co-operation on movement of persons, the general procedures and working methods of the European Union in this field, be it those of the First Pillar or those of the Third Pillar, should, after a certain period, be of general application to all Member States of the European Union.

[64] Above n 37.
[65] Article 2 TEU (Article B), 4th indent.