

Negotiating the Third Pillar: The Maastricht Treaty and the Failure of Justice and Home Affairs Cooperation among EU Member States.

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Paper prepared for the 5th Biennial
European Community Studies Association Conference.

This paper examines the difficult genesis of justice and home affairs cooperation among Member States of the EU since the inclusion of the so-called 'Third Pillar' in the Maastricht Treaty. The paper attempts to set this analysis within a broader examination of the 'fit' between the development of the Third Pillar and theories of European integration. Although it would initially appear that the national preferences and intergovernmental practices of Member States continue to dominate the broad policy sector, a number of factors ensure a poor fit between intergovernmental theory and practice in the Third Pillar. The paper distinguishes between two key phases in the Third Pillar's development - its negotiation during the 1991 Intergovernmental Conference and the implementation of the relevant treaty articles in the three years since the Maastricht Treaty came into force - and illustrates how the different institutional dynamics of treaty making and day to day decision making in the EU's policy arena have ensured the Third Pillar's uneasy and often unsuccessful development. The paper also briefly introduces a 'sensitive policy sector' variable into the analysis, examining to what extent the policy sectors' significance to the contemporary discourse on national identity, internal security and sovereignty affects the Third Pillar.

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Introduction.

Establishing the Context:

The internal security of nation states, always a central concern of national policy making, has taken on a new political vitality in the post Cold War years. The gradual disappearance of direct military threats to the states of Western Europe has refocused elite and public attention on the more pervasive issues of internal security and societal stability.¹ This trend has been greatly reinforced by the internationalisation² of many of the threats to real - or perceived - levels of internal security with West European nations. Although the contemporary challenges to the internal security of nation states are in an almost perpetual state of intensification and diversification, the capacity of national governments to respond has failed to develop with the same momentum, leading to a situation in which 'the boundaries of the state no longer correspond to the boundaries of the problem'.³ The growth of international organised crime, the consolidation of international terrorism and the ever increasing phenomenon of illegal immigration have challenged the nation state's traditional conceptions of, and policy responses to, internal security.

Within the individual policy sectors both the degree of internationalisation and its perception by policy makers appear to vary over time. Thus an upsurge in international terrorist activity within Western Europe in the early 1970s led to a number of important initiatives for collaboration.⁴ In other policy areas the acknowledgement of a common European problem has been a much slower process adding to the piecemeal development of cooperation. Although justice and home affairs cooperation does not necessarily emanate directly from internal security concerns, the key elements of justice and home affairs cooperation among the European Union's Member States have their foundations in a desire to maintain a

¹ The pervasive nature of the threats is matched by a change in decision making, particularly its institutional form in the international arena: whilst military threats were, and continue to be, the concern of one key organisation - NATO, the locus of international level decision making in the case of internal security issues is far more dispersed.

² Internationalisation is a widely used, yet ill-defined concept. Waever, Buzan et al define internationalisation as a set of processes with many facets, including 'the construction of transport and communication facilities capable of sustaining high levels of interaction across the planet and about the development of transnational and international organisations able to use those facilities; the way in which scientific and technical knowledge and method have created global communities of research and production; and on the individual level it is about rising cosmopolitanism'. O. Waever, B. Buzan *et al* (1993) **Identity, Migration and the New Security Agenda in Europe**. Pinter, London.

³ M. Anderson (1993) 'The British Perspective on the Internationalisation of Police Cooperation in Western Europe', in C. Fijnaut (ed.) **The Internationalisation of Police Cooperation in Western Europe**. Deventer, Kluwer Law and Taxation Publishers.

⁴ Thus for example the Trevi forum was established in 1975 at the behest of the British government. Operating under international law the group consisted of the Justice and Interior Ministers of the Member States. The Group's area of competence soon expanded to include immigration, visas, asylum seeking, border controls, international crime and drug trafficking.

high level of internal security whilst allowing the frontier free Internal Market to function.

In response to the internationalisation of many of the facets of the internal security field, cooperation among Member States has generated an increasing momentum throughout the last two decades. A growing number of groups and bodies have been established to address the most pressing challenges to internal security.⁵ This dynamic culminated in the inclusion of a justice and home affairs element in the Treaty on European Union - Title VI of the Maastricht Treaty. Justice and home affairs cooperation was conceived as the third 'Pillar' of the EU's temple structure (complementing the First (European Community) and Second (Common Foreign and Security Policy) Pillars), although its actual design is so unsuited to the task it faces, that it is often difficult to visualise it as being comparable to the other pillars and thus capable of effectively keeping the temple standing.

Since the coming into force of the Treaty on European Union (the Maastricht Treaty) in November 1993, there would appear to be widespread consensus that the EU's first direct experiment with cooperation in the field of justice and home affairs has been spectacular only for its failures. As a result of national sensitivities and hesitancy, the path from legal codification towards the practical consolidation of justice and home affairs cooperation has been tortuous and disappointing. Title VI has been identified as one of the most significant failures of the Maastricht Treaty and the functioning of justice and home affairs cooperation has been subject to increasing scrutiny from politicians, practitioners and academics. The great majority of the judgements passed express an overwhelming disappointment with an endeavour which was heralded as a great advance for European political integration.

The underlying pressures for cooperation however are sufficiently powerful that even those Member States who are most hostile towards anything other than purely intergovernmental cooperation, have proposed some degree of redesign of the mechanisms, institutions and procedures created to facilitate cooperation in this field. However in coming up against the formidable alliance of national identity, national interest and sovereignty, cooperation in the fields of justice and home affairs is facing a herculean struggle for acceptance, support and affirmation.

⁵ These were both specific to Europe, for example Trevi, Schengen, and the Council of Europe and more global in their focus, for example Interpol and the United Nations' programme to combat drugs.

The Research Question:

The paper's concern with the development of justice and home affairs cooperation and the creation of the Third Pillar following the 1991 Intergovernmental Conference (IGC) leads to the proposal of two central questions:

- how and why was the Third Pillar created?
- how has cooperation progressed since Maastricht?

Although both questions can be analysed and answered in their own right, there is an important dynamic of continuity and progression between the two. Indeed it is a central assertion of the paper that the particular manner in which the justice and home affairs element of the Maastricht Treaty was negotiated has had fundamental repercussions for the development of cooperation in the post-1993 period. This hypothesis is developed in greater detail below and together with an analysis of the institutional structure of Third Pillar provides the foundation of the paper's explanation of the problems of justice and home affairs cooperation among EU Member States.

Identifying The Analytical Challenge:

The unexpected, uneven and often unconvincing development of justice and home affairs as a policy sector appropriate for highly institutionalised international cooperation presents the analyst with a number of obstacles and the analytical challenges raised by the paper's central questions appear complex and impenetrable. This complexity has important repercussions for the theoretical framework which informs the empirical research contained in the paper and a degree of 'jigsaw theorising' inevitably occurs. In essence, in order to make greater sense of an ill-defined and vastly under-researched policy area, aspects of a number of traditional and contemporary theories of domestic and international policies inform the paper's theoretical framework. However, despite the realisation that the deciphering of the enigma of the Third Pillar would require a 'creative' and perhaps too particular an approach to theory, it would appear to be in keeping with the current theoretical trend which attempts to bridge the gap between international relations and comparative politics approaches to the process of European integration.

A number of 'themes' run through the complex theoretical framework, providing both greater continuity and clarity and justification for the theoretical approach adopted:

- the theoretical starting point of the paper posits that the wholesale employment of the traditional 'grand theories' of integration in this particular case study obscures

the nuances of the Third Pillar and there is little evidence of sufficient harmony between theory and reality;

- although the arduous genesis of the Third Pillar and the sensitive nature of the policy sector has ensured that the nation state has been chosen as the primary level of analysis, it is placed within the wider context of the EU as a multilevel system of governance;
- the lack of parsimony this leads to results from the need to make a theoretical distinction between 'constitutional' and 'everyday' decision making. This requires a differentiated theoretical approach to the two elements of the research question, one applicable to treaty formation, the other to day to day policy formulation and implementation.

Often implicit as secondary factors in many theories of integration, but increasingly recognised as explanatory variables in their own right, the institutional structures and mechanisms of European policy making provide the continuity between these three themes. The assumption that institutions matter leads to the conclusion that 'the organisation of policy making affects the degree of power any one set of actors has over policy outcomes.....on the other hand organisational position influences an actors definition of his own interests, by establishing his institutional responsibilities and relations to other actors. Thus organisational factors affect the degree of pressure an actor can bring to bear on a policy and the likely direction of that pressure".⁶ Although resurrected originally as a tool for the comparative political scientist, the so-called 'new institutionalism' has been increasingly applied to the governance of the European Union.⁷ Adopting an institutional approach to the genesis of justice and home affairs cooperation allows a number of potential difficulties to be surmounted and the approach coexists well with the three themes outlined above. Explicit in new institutionalism is the idea that the way in which national preferences are pursued depends on institutional context and this assertion reinforces the need for different theoretical approaches to the 1991 IGC and the post-Maastricht period. Thus at the time of 'treaty making' the national executive is likely to dominate, whilst during day to day policy making the domestic politics of Member States and the relative power positions of the supranational organisations will become more important factors in determining policy outcomes.

⁶ Peter Hall cited in K. Thelen and S. Steinmo (1992), 'Historical Institutionalism in Comparative Politics,' S. Steinmo, K. Thelen & F. Longstregh (eds.), **Structuring Politics: Historical Institutionalism in Comparative Analysis** Cambridge, Cambridge University Press, 1992, p.2.

⁷ See for example S. Bulmer (1994)'The Governance of the European Union: A New Institutional Approach', **Journal of Public Policy**, Vol.13, No.4, pp.351-380.

An institutional approach is also compatible to the conception of the EU as a multilevel system of governance. Although the Third Pillar's current position in a half-way house between true intergovernmentalism and pure supranationalism has favoured Member States to the disadvantage of the EU's supranational institutions, there is certainly some potential for change. As Bulmer has asserted 'the supranational level is not simply the dependent variable: the product of interplay of national interests. Rather it takes on its own general institutional dynamics and norms.... The character of EU governance itself moulds the interests of states; the way in which member states (re-)define their interests domestically/ and the way in which they articulate them in the EU'.⁸ An examination of cooperation in justice and home affairs since the Maastricht Treaty should illustrate the extent to which the European level has been able to mobilise the effects of its own institutional dynamic on the current and future development of Pillar III.

The three explanatory variables identified above will therefore be analysed with reference both to the failure of traditional theories of integration to sufficiently explain the genesis of the Third Pillar and also to the importance of institutions in providing an insight into the brief and troubled history of Pillar III. The first section of the paper will take the form of a theoretical and empirical analysis of the introduction of justice and home affairs onto the agenda of the EU. The analysis will then move on to examine the consequences of the Maastricht negotiations for justice and home affairs cooperation, with particular reference to the institutional and procedural difficulties created by the Treaty on European Union. Finally the paper will consider what is perhaps one of the most consequential elements of the Third Pillar debate - policy sector sensitivity and the persuasive power of national sovereignty.

The Maastricht Treaty and the Third Pillar of the EU: Poor Cousin or Black Sheep?

The Maastricht Treaty formally introduced co-operation in the fields of justice and home affairs as a treaty based competence of the European Union. Title VI of the TEU defines the policy sectors to be covered, introduces for the first time formal, albeit limited, roles for the European Parliament and the Commission⁹ and provides

⁸ S. Bulmer **Britain and Germany in the European Union: British Realism and German Institutionalism**. Paper for the Conference of Europeanists, Chicago 14-16 March 1996.

⁹ Article K3(2) limits the Commission's power of initiative (which is shared with the member states) to the first six policy areas mentioned in Article K1, and thus excludes their initiative in the areas of criminal judicial, customs and police co-operation. Article K6 covers the role of the European

for a number of policy instruments with which to consolidate co-operation. It has become increasingly clear however, that the provisions included in Title VI are fundamentally flawed and justice and home affairs co-operation under the auspices of the Third Pillar has been widely rated as a failure. In view of the many criticisms levelled at the functioning of the Third Pillar, the negotiations which led to the establishment of Title VI warrant a detailed analysis. A key hypothesis in this respect posits that the random manner in which justice and home affairs issues appeared on the IGC's agenda and the negotiations proceeded, has both reflected and contributed to the difficult and uneven development of the Third Pillar.¹⁰

The strong element of disarray in the Third Pillar's genesis can be explained in part with reference to a relatively simple problem: one of the greatest obstacles facing the introduction of justice and home affairs issues onto the European policy agenda is the lack of a coherent policy sector. The multifaceted and complex nature of the justice and home affairs policy sector renders its conceptualisation as an issue area in terms of international cooperation almost untenable. The intrinsic concern with domestic policies, often of a highly sensitive nature, does not render the issue area as one naturally open to international cooperation - despite increasing internationalisation. Although Article K.1 of the TEU contains a list of policy sectors regarded as 'areas of common interest', the history of cooperation in these areas reveals little evidence of a coordinated international response to a common defined justice and home affairs issue area.¹¹ The Third Pillar of the EU was, therefore, to a large extent an artificial construct based on a relatively short history of piecemeal, uncoordinated responses of Member States to commonly perceived problems. This is not to imply that cooperation was unsuccessful, simply that it occurred within and across individual policy sectors without the broad (and often confusing) label 'justice and home affairs'.

Parliament, requiring the Council of Ministers and the Commission simply to provide information and consult the Parliament on the principal aspects of Third Pillar activities.

¹⁰ A further clear example is provided by the Schengen Convention, the other key European level mechanism which addresses issues of internal security. The need for a second Schengen Convention in 1990 to supplement the shortcomings of the original Schengen Agreement of 1985 is symptomatic of the complexities involved in codifying such co-operation in a treaty, particularly the problems encountered when 'operationalising' high level ministerial agreements.

¹¹ Cooperation among Member States of the EU although concerned primarily with issues of internal security, including terrorism, drug trafficking and crime, increasingly mixed these issues with questions concerning the free movement of persons and the crossing of internal and external frontiers. Concomitantly, the juridical implications of formalising cooperation in many of these policy sectors obliged Member States to consider introducing judicial cooperation onto the European policy agenda. Together all these issues currently form the policy basis of justice and home affairs cooperation envisaged by Title VI of the TEU.

A key element in the explanation of the troubled history of justice and home affairs cooperation can thus be identified as a lack of thought and consistency in defining the agenda and negotiating codification. The failure of the Member States to present a consistent approach to including justice and home affairs co-operation in a formal treaty can in fact be traced back to the Single European Act of 1986 and the negotiations which preceded it. The 1984 Fontainebleau European Council, in seeking to balance the economic motivations for further integration (the completion of the Single Market), established an *ad hoc* Committee on a People's Europe (Adonnino Committee) to 'respond to the expectations of the people of Europe'¹² and increase the Community's credibility in the eyes of its citizens. The aspiration to achieve the free movement of Community citizens was identified as a key objective by the Adonnino Committee, and its first report made a number of concrete proposals to bring about the gradual abolition of all police and customs formalities for people crossing intra-Community frontiers.

Although the European Councils of Brussels (March 1985) and Milan (June 1985) agreed with the Committee's conclusions, the Member States' approach to treaty-based progress in this area, unveiled in the SEA, revealed very mixed signals. Despite including a commitment to achieving the free movement of persons in the SEA¹³ (which preceding European Councils had recognised as requiring compensatory measures to combat crime and terrorism), the Member States also annexed a Political Declaration which implied co-operation outside the Community sphere and a General Declaration reserving the right to maintain national control over this issue area.¹⁴ The lack of a coherent approach to the issue, however, was not confined to the Member States and their representatives negotiating the SEA: the Commission's White Paper on Completing the Single Market identified 1992 as date by which the free movement of persons within the EC should be achieved and yet made only a cursory reference to enhanced co-operation between police and other relevant agencies with the Member States. It has been suggested that with respect to

12 Bulletin of the European Communities **A People's Europe. Reports from the *ad hoc* Committee.** Supplement 7/85. p5

13 Article 13 of the SEA amending Article 8a of the EEC Treaty states that 'the Community shall adopt measures with the aim of progressively establishing the internal market'. The latter is defined as 'an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty'.

14 The annexed Political Declaration by the Governments of the Member States on the Free Movement of Persons states 'In order to promote the free movement of persons, the Member States shall co-operate, without prejudice to the powers of the Community, in particular as regards the entry, movement and residence of nationals of third countries. They shall also co-operate in the combating of terrorism, crime, the traffic in drugs and illicit trading in works of art and antiques. General Declaration on Articles 13 to 19 of the Single European Act states 'Nothing in these provisions shall affect the right of Member States to take such measures as they consider necessary for the purpose of controlling immigration from third countries, and to combat terrorism, crime, the traffic in drugs and illicit trading in works of arts and antiques'.

the achievement of the free movement of persons, the White Paper was drafted somewhat naively, with insufficient thought given to the many implications for justice and home affairs issues and the respective roles of Member States and Community institutions.¹⁵

The development of momentum for the treaty revisions and policy initiatives envisaged for the 1991 Intergovernmental Conference mirrored key aspects of the SEA and the negotiations which led to it. Once again the motivation for further integration was primarily economic in origin with the Madrid European Council of June 1989 endorsing the contents of the Delors Report on Monetary Union and agreeing to convene an Intergovernmental Conference to discuss economic and monetary union (EMU). It was not until the early months of 1990 that there were calls for a parallel conference on political union (EPU) with the Dublin European Council of June 1990 finally agreeing for an IGC on political union, to begin alongside the IGC on EMU in December 1990. The IGC on political union was however principally concerned with internal institutional and procedural reforms (addressing motifs such as the democratic deficit, effectiveness and efficiency) and consolidating European Political Co-operation (EPC) into a Common Foreign and Security Policy (CFSP). Against the background of the collapse of the Soviet Union and the end of Cold War, German unification and the predictable fears it provoked among Germany's EC partners and the military engagement of some Member States in the Gulf War, an intense reassessment of both the Community's capacity to retain its internal cohesion and the advisability of developing a Community foreign and security policy was inevitable. Justice and home affairs co-operation did not fall easily into either of these two issue areas, which dominated the debate on EPU, and it initially appeared on the IGC's agenda under the heading 'extension of competences'.¹⁶ Perhaps unsurprisingly the absence of a strong concern with justice and home affairs issues is equally evident in the growing body of theoretical literature on European integration.¹⁷ This is a proclivity of both the traditional theories of integration and their more refined contemporary counterparts, both of which illustrate a overwhelming concern with economic policy, only occasionally giving mention to political integration, and then only with reference to CFSP.

¹⁵ Interview with a Commission official, 18 July 1996.

¹⁶ This included a catalogue of topics, for which it was proposed that the treaty should codify co-operation already occurring between Member States on the basis of Article 235 of the EC Treaty.

¹⁷ See for example W. Wessels (1994) 'The Third Pillar: Plea for a Single Theoretical Research Agenda', J. Monar & R. Morgan (eds.) **The Third Pillar of the European Union: Cooperation in the Fields of Justice and Home Affairs**. European Interuniversity Press, Brussels.

In stressing the ad hoc and almost random means by which justice and home affairs issues came to be part of the IGC's agenda, this paper's analysis contradicts the central tenets of both the neo-functionalism and the liberal intergovernmentalist approaches. In the case of the former, despite the appearance of substantial functional 'spillover' pressures for further integration emanating from the Internal Market programme, Member States have consistently been willing and able to resist the obligations for political spillover assumed by the theory. The linear progression from the former to the latter predicted by the theory has thus failed to materialise and pressures arising from economic integration have been successfully resisted. Furthermore although the Community's supranational institutions had experienced some success in pushing certain justice and home affairs issues forward during the 1980s,¹⁸ the Commission took a decidedly backseat approach during the 1991 IGC and the European Parliament appeared to have lost any momentum it had previously gained. The absence of a strongly defined issue area and the concomitant lack of a network of transnational forces which may have aided the consolidation of the issue area on the European agenda reinforce the inapplicability of a neo-functionalism analysis.

The rejection of neo-functionalism is reinforced by the institutional and procedural characteristics of IGCs. Developed to enable the discussion and agreement of decisions with 'constitutional' implications for the European Union and wholly intergovernmental in character, the IGCs of the EU empower the national executives of Member States to the disadvantage of both supranational and other domestic level actors.¹⁹ Reflecting the preceding account of justice and home affairs issues on the agendas of successive IGCs, the actions of the representatives of national executives figure strongly in the remaining analysis of the Maastricht negotiations. Although this would appear to be moving in the direction of a strictly intergovernmentalist analysis, a number of developments ensure a questionable 'fit' between liberal intergovernmental theory and Third Pillar reality.

An examination of the many non-papers and position papers presented in the months prior to and during the IGC reveals a preoccupation with developing political union in terms of the CFSP.²⁰ The well developed stable policy preferences and rational 'plans of action' presupposed by liberal intergovernmentalist theory were not

¹⁸ Particularly in the case of drugs where both the Commission and the European Parliament were involved in groundbreaking progress in the European policy arena.

¹⁹ Reinforcing the traditional notion of the national executive as 'gatekeeper' between the domestic and international policy arenas.

²⁰ The German delegation were the exception, producing two key position papers on the harmonisation of asylum, immigration and alien policy and the creation of Europol during 1991.

evident in the case of national policy towards justice and home affairs cooperation and the theory's assumption of an 'information rich, deliberative, rational setting'²¹ does not capture the uneven, random and last minute development of justice and home affairs during the IGC. Indeed there was little or no policy input from Member States in this issue area apart from a strong contribution from one particular Member State relatively late in the course of the IGC. Taking full advantage of his powers of policy initiative at the European level, the German Chancellor, Helmut Kohl, launched a concerted effort to find a European solution to Germany's domestic asylum crisis. Following this initiative, and having received concrete proposals from the German delegation, the Luxembourg European Council requested the Ministers responsible for immigration to submit proposals on the harmonisation of immigration and asylum policy at its meeting in Maastricht.²² Although vociferous opposition was heard from the British delegation, (who, given the nature of British political discourse on integration and the country's island status, were completely opposed to the introduction of these issues as competences of the European Community), there was neither great support for, nor substantial opposition to, the inclusion of justice and home affairs issues in a separate quasi-intergovernmental pillar, akin to the one created for CFSP. Ironically empirical research appears to suggest that having introduced these issues on the IGC's agenda, the German government failed to pursue its national interest in the vigorous manner liberal intergovernmentalism assumes. In fact the German delegation's acceptance of the first compromise offered in response to their two policy papers on immigration/asylum and Europol caused a certain amount of surprise among other delegations.²³ Thus although liberal intergovernmentalism may be able to account for Kohl's ability to exploit a window of opportunity on the European policy level for domestic political advantage, it cannot however, sufficiently explain the unusual and awkward genesis of the justice and home affairs issue area during the 1991 IGC.

This assertion is reinforced by an examination of the manner in which the negotiations on EPU proceeded, once again with reference to the consequences of the institutional dynamics of IGCs. Given the centrality of the Committee of Permanent Representatives (Coreper) in pursuing the interests of Member States on the European level and consequently their key role in the EU's intergovernmental conferences, the responsibility for negotiating the Third Pillar was placed in the hands of

²¹ A. Moravcsik (1993) 'Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach', *Journal of Common Market Studies*, Vol.31, No.4. p.499

²² For an analysis of the domestic politics of Germany's role in the europeanisation of migration policy see P. Henson & N. Malhan (1995) 'Endeavours to Export a Migration Crisis: Policy Making and Europeanisation in the German Migration Dilemma', *German Politics* Vol.4, No.3.

²³ Interviews with members of Coreper, 11 and 12 July 1996.

representatives of the Foreign Offices of Member States. The degree to which the Interior and Justice Ministries were kept abreast of developments in the negotiations was a responsibility of the core executives of the Member States, a task which was often almost entirely neglected. Coreper's central role in negotiating the TEU, although institutionally defined, challenges the liberal intergovernmentalist presumption of rational and efficient bargaining in two ways. First it meant that the Third Pillar was negotiated and constructed by officials with little or no experience in the policy sectors it covered and secondly, in alienating the Interior and Justice Ministries of the Member States the slow and difficult development of co-operation under the Third Pillar was predestined.

The consequences of Coreper's lack of expertise in the policy sectors under discussion were reinforced by a further characteristic of the IGC's discussion of the Third Pillar. The evident lack of priority and political will in this issue area resulted in the last-minute, and thus rushed, construction of the Third Pillar. The discussions on how to ensure a single institutional framework for the Union took place primarily within the context of the Second Pillar (CFSP) and following a (completely inappropriate) dynamic of institutional isomorphism the vast majority of instruments, mechanisms and procedures of the Second Pillar were simply replicated in the Third. Important issues such as the role of the European Court of Justice (ECJ) and the European Parliament (EP) were side-stepped, with Member States opting for ambiguity rather than clarity in the articles defining institutional competences. Fundamental flaws can be identified in almost every element of the nine article Title and the following section is concerned with the implications of the Third Pillar's institutional form for the development of cooperation since Maastricht.

Exploiting Flaws and Settling Scores: Domestic Politics and the Institutional Legacy of Maastricht.

The development and consolidation of justice and home affairs cooperation under the auspices of the Third Pillar has been greatly disadvantaged by the failure of the 'single institutional structure'²⁴ to stand up to the strains placed upon it by the nuances of the EU's three Pillars. Rather than exhibiting either a clear supranational or intergovernmental bias, the Third Pillar occupies a half-way house, struggling to reconcile two very different institutional traditions neither of which has primacy. Naturally this situation presents the analyst with a number of problems in the

²⁴Article C of the Union Treaty provides that 'the Union shall be served by a single institutional framework which shall ensure the consistency and the continuity of the activities carried out in order to attain its objectives while respecting and building upon the *acquis communautaire*.'

application of theoretical paradigms. The codification of justice and home affairs cooperation in the EU's constitutional doctrines has not led the full 'europeanisation' of the issue area and the EU' supranational institutions are poorly provided for in Title VI: the employment of supranational theories of integration are thus problematic. However, in the day to day policy making processes of the Third Pillar an intergovernmental analysis is equally lacking in applicability, as it fails to provide for the significant contribution domestic politics can make on the European policy level. What has become clear since the TEU is not only the continued hostility of many of the domestic actors towards the Third Pillar, but also their ability to influence the European policy process, negating the notion of the monolithic national actor and a single national interest.²⁵ This section of the paper is concerned with clash between the institutional heritage of the European Community (most importantly its supranational institutions and procedures) and that created by the Maastricht negotiations (empowering the domestic actors of Member States).

At first sight it would appear as if the Third Pillar representatives of the Member States have countless opportunities to exploit the treaty provisions of Title VI and inject their scepticism into the internal workings of the Pillar. Reflective of the Third Pillar's abstruse genesis, the absence of a clear goal for the Third Pillar is perhaps one of the most debilitating and confusing problems of Title VI. It has been suggested that, in contrast to CFSP, there were no expectations as to how the Third Pillar should and could develop,²⁶ and the objective of co-operation is defined in the treaty in rather vague terms as 'achieving the purposes of the Union, in particular the free movement of persons' and the policy sectors covered by Title VI are referred to simply as 'matters of common interest' (Article K.1). This rather weak statement of intent is scarcely developed by Article K.3; which states only that 'Member States shall inform and consult one another within the Council with a view to co-ordinating their action'. There is no clarification of whether the codification of justice and home affairs co-operation is intended to provide for and/or encourage *legislative initiatives*, or whether practical, *operational co-operation* is the objective. This shortcoming has been identified by one Commission official as one of the key ambiguities obstructing progress in the Third Pillar: at the present time a great deal of time is spent negotiating legal texts which are later watered down to carry as little legal obligation as possible to ensure they are acceptable to all Member States.²⁷

²⁵ This is particularly relevant in the case of Germany where Kohl's enthusiasm for the Third Pillar is not reflected in the actions of the Ministry of the Interior. As a consequence the German Auswärtigesamt has striven to keep as much control over the issue during the negotiations for the current IGC.

²⁶ Interview with a member of Coreper, 12 July 1996.

²⁷ Interview with a Commission official, 23 July 1996.

The heavy and laborious process policy process prescribed in Article K.4(3) of the Treaty compounds the capacity of national representatives to obstruct progress: 'The Council shall act unanimously, except on matters of procedure and in cases where Article K.3 expressly provides for other voting rules'. The need for unanimity allowing one Member State to block any decision has been identified by a large majority of commentators as one of the most significant obstacles to achieving progress in the Third Pillar. At one Council meeting in December 1995 the requirement of unanimity led to near paralysis in the Third Pillar as fourteen decisions were apparently blocked by the objections of a minority of Member States (in many cases by just one Member State).²⁸ In addition Council bodies have shown no inclination to make regular use of majority voting even where it is provided for in the Treaty: its use has been limited to the creation of two new groups on drugs (covering co-operation with the Caribbean and Latin America).²⁹ The consequences of a prolonged search for consensus are either the avoidance of decision taking or the dilution of the original proposal to incorporate the different national positions.

The empowered national representatives can also make use of the fact that the substantive legal status of the joint positions and actions provided for in Article K.3.2 was not clarified in the TEU and has not been determined since. The 1995 Report of the Council on the functioning of the Treaty on European Union refers to the 'Member States continuing differences of opinion on the nature and the legal effects of such implements'.³⁰ This has resulted in a pronounced reluctance to make use of them and, instead, recourse is consistently made to the soft-law instruments of resolutions and recommendations,³¹ which, given the sensitivity of the policy area, are preferred by the Member States. Conventions are also considered an appropriate Third Pillar policy instrument by the Member States, although the obligation for adoption in accordance with the Member States' 'respective constitutional requirements' (Article K.3(2)c) renders Conventions an unwieldy policy instrument.³²

²⁸The European Report referred to the 'Fourteen Casualties of UK Spoiling Tactics'. **European Report** No.2087, November 25, 1995.

²⁹ Interview with a member of the K.4 Committee 8 July 1996.

³⁰ Council of the European Union **Report of the Council on the functioning of the Treaty on European Union**. September 1995. p37.

³¹ These are provided for by Article K.3(2)a, which allows the Council to 'adopt joint positions and promote **using the appropriate form and procedures**, any co-operation contributing to the pursuit of the objectives of the Union'.

³² The Convention Determining the State Responsible for Examining Applications for Asylum lodged in one of the Member States of the European Communities (Dublin Convention) signed by the Member States of the Community in June 1990 has not yet been ratified in all signatory states and thus is not fully implemented six years after the original agreement.

Although the intention of Article K.1(1-9) ostensibly appears quite specific and unequivocal, listing the policy sectors to be considered ‘matters of common interest’, on closer examination a number of anomalies become apparent with fundamental consequences for the functioning of both the Treaty and the Pillar system. Article K1 refers to the relevance of co-operation in the justice and home affairs sector for the free movement of persons and includes in the list of the policy sectors regarded as common interest, external frontiers and immigration policy, areas with fundamental implications for the achievement of Article 7a of the EC Treaty. Thus despite the claim of Article M that ‘nothing in the TEU shall affect the Treaties establishing the European Communities or the subsequent Treaties and Acts modifying or supplementing them’, Article K.1 appears to present the possibility of tension, if not downright incompatibility.³³

This incompatibility is exacerbated by the provisions on the right of initiative, as unlike the First Pillar where the Commission has the sole right of initiative, in the case of the Third Pillar it is either shared with the Member States or withdrawn completely in the case of Article K.1(7-9). The latter provision further complicates an already convoluted institutional configuration and the former is regarded with hostility within the Commission. Much of the Commission’s power with the EU policy process is derived from its legislative right of initiative (which can be interpreted as a ‘mandate to lead’) and the erosion of this right is seen as a direct challenge to the Commission’s authority. Another key objection to the shared right of initiative appears to centre around the tendency of Member States to respond to Commission initiatives with their own weaker and ill-prepared versions.³⁴ This phenomenon is exacerbated by the Pillar structure and the doctrine of ‘First Pillar primacy’, whereby the Commission is obliged to seek a First Pillar base for a proposal before it proposes an initiative under the Third Pillar. Due to the sensitivity of the subject matter, Commission proposals submitted with a Community base can be rejected by Member States, who either demand a rewritten initiative or resubmit a watered-down variant with a Third Pillar base. The provisions of K.3(2) would seem to co-exist uneasily with Article K.4(2) which states that ‘the Commission shall be fully associated with the work in the areas referred to in this Title’. O’Keeffe refers to the status of the Commission in the Third Pillar as one of ‘observateur privilégié’, suggesting that it ‘scarcely seems to meet the requirements of Article K.4(2)’.³⁵

33 D. O’Keeffe (1995) ‘Recasting the Third Pillar’ *Common Market Law Review* Vol.32 No.4. p.912

34 The Commission’s experience in the preparation of proposals and initiatives cannot be matched by the Member States, who have been known to submit policy proposals of a very poor quality.

35 D. O’Keeffe *op cit.* p.903.

Similarly, the European Parliament's potential for association with the work of the Third Pillar has been subject to a great deal of criticism, with particular reference to the ambiguous wording of the relevant treaty article. Despite the intentions of providing for a 'single institutional framework' for the TEU, in terms of policy making power Article K.6 merely provides for the European Parliament to be 'informed of discussions, consulted on the principal aspects of activities in the areas referred to in Title VI and have its views taken into consideration' and 'ask questions of the Council or make recommendations to it'. The interpretation of 'consult' and 'inform' remains the responsibility of the Member States and the Commission and although the Commission claims to involve the EP as much as it can, the Member States habitually inform the EP of its activities only after key policy decisions have been agreed and texts finalised: a practice reflecting a continued hostility to the supranational policy process.³⁶ The reluctance of Member States to countenance the active involvement of the European Parliament and consequently the minimal interpretation of 'consult' and 'inform' has ensured the EP's relative impotence in the Third Pillar. A recent report by the European Parliament's Committee on Institutional Affairs asserted that in relation to policy making in the Third Pillar the 'European Parliament remains practically excluded from the adoption of such decisions'.³⁷ There is potential for the EP to develop a further role for itself in the Third Pillar by virtue of the budgetary provisions contained in Article K.8. Operational expenditure related to the implementation of Third Pillar decisions can be charged to the EC's budget and subject therefore to the EC's budgetary procedures in which the EP has a influential role. Once again, however, Member States appear reluctant to apply this provision and the need for a unanimous decision has in reality negated the potential impact of Article K.8(2).

In addition to the many procedural difficulties created by Title VI for the EU's supranational institutions, the construction of the EU as a 'temple structure' with three pillars compounds the difficulties encountered in establishing and consolidating co-operation in the fields of justice and home affairs. One of the key issues in this respect, already mentioned in relation to Article K.1, is the manifest absence of a clear boundary between Pillars I and III in terms of policies and thus institutional competence. A fundamental consequence of the ambiguity has been the undermining of the functioning of the EC's institutions, in some cases both internally and within the wider EU policy process. This has been a conspicuous problem in the case of the

³⁶The European Parliament, for example, was not consulted on the Europol Convention until after the Council had taken its final decision. **Agence Europe** No 6659 3 February 1996.

³⁷European Parliament Committee on Institutional Affairs **The Communitization of the Third Pillar of the Treaty on European Union**. PE 214.395. September 1995.

Commission, where the existence of the Third Pillar appears to have given rise to a new internal communitarian/intergovernmental cleavage. The impact of the Third Pillar on the internal functioning of the Commission is particularly consequential in view of the need to respond to the challenges to its traditional Community role (as sole initiator of legislation for example) emanating from the Pillar structure.

Given the complex institutional organisation of the Commission - its two-fold division into functionally differentiated sectors, with Commissioners at the top level supported by Directorate Generals is compounded by the system of 'Cabinet' - the creation of further cleavages through the organisational and policy making repercussions of a tri-pillar model can only add to pre-existing tensions. The internal Commission structures created to manage the inclusion of justice and home affairs in the TEU are not only evidence of the fragmentation it creates, but also the reason for its perpetuation. Although there is now a Commissioner for Justice and Home Affairs (at present Anita Gradin), a full Directorate General has not as yet been established, instead a special Task Force has been created within the Secretariat General of the Commission. Despite the division of the Commission into functionally specific Directorate Generals, there are areas where policy competences may overlap: where for example does the free movement of persons (DGXV, Internal Market) end and migration, asylum and visa policy (Third Pillar Task Force) begin? This somewhat unclear division of labour within the Commission has also contributed significantly to internal tensions. The Justice and Home Affairs Task Force appears to interpret its role in very pragmatic terms, preferring to co-operate within the limits defined by the Member States as opposed to urging for the use of Article K.9. This is in fact the continuation of the approach adopted by the Commission in the late 1980s, when it was decided to work with the Member States in their preferred format of intergovernmental co-operation, rather than consistently (and ineffectually) push for the extension of Community competence into many of the areas now included in the Third Pillar. In contrast the Directorate Generals with an interest in aspects of the Third Pillar's work consistently favour the fostering of a more communitarian approach to justice and home affairs co-operation, seeking to build upon the foundations provided for by the Maastricht Treaty. The fact that the inherent tension between the supranational First Pillar and the quasi-intergovernmental Third Pillar introduced into the European Union by the Maastricht Treaty now appears to be affecting the internal processes and procedures of the European Commission is not a positive sign for decision making within the Union as a whole.

Ironically, although the balance of power between supranational and national actors within the Third Pillar appears to lean towards the latter, certain institutional

elements of Title VI have ensured that cooperation at the European level does not simply follow the policy preferences of the justice and interior ministries. Perhaps more ironically, the counterbalance to the influence of the domestic ministries (and the concomitant excessive parochial 'patriotism') within the Pillar has not only arisen from their slow socialisation into the 'ways' of the European policy arena, but also as a consequence of opposition from other national representatives - Coreper. The former has manifested itself as a growing dissatisfaction with the standard of policy making within the Pillar and latter as an outright competition for primacy.

In providing for the creation of the so-called K.4 Committee (senior national officials) to exist alongside Coreper, Article K.4 has had fundamental implications for the influence of domestic ministries within the Third Pillar. The K.4 Committee is just one element of a five tier decision making process (working groups, steering groups, K.4, Coreper, Council) which is convoluted and impracticable. Both the Group's composition (high ranking officials) and its duty to prepare for the Council's discussions, paralleling much of the work of Coreper, has resulted in a distinct tension in the relationship between the K.4 and Coreper.³⁸ It has been suggested that the K.4 Committee was created in response to the demands of certain Member States to balance the influence of Community institutions, norms and standard operating procedures in the Third Pillar and although the work of the K.4 Committee is supposed to proceed without prejudice to Article 151 EC Treaty (defining the traditional role of Coreper) the nature of the relationship between the two is not made clear. The relationship is in many respects one of the most significant for the future of the Third Pillar as the balance of power has fundamental consequences both for the functioning of the Pillar's internal policy process and for the possible communitarisation of the Third Pillar in the future. Coreper's integral role in the 'Brussels process' and its experience of decision making in the Community framework contrasts intensely with the K.4 Committee, which comprises nationally based officials³⁹ with little European experience, representing the rather more parochial Justice and Interior Ministries. Coreper consistently adopts a hyper-critical attitude towards the work of the K.4 Committee (itself unwilling to be considered the

³⁸ Tensions between the different levels of decision making are solely not confined to Coreper and the K.4 Committee and the subordination of the Steering Groups, which existed as fairly autonomous bodies in the pre-Maastricht period, to the K.4 Committee has also complicated the decision making process. The seniority of the members of the Steering Groups and the K.4 Committee varies nationally and in some cases members of the former may be senior (in terms of the national administration) and yet subordinate to members of the latter. An example is provided by Steering Group II, where ex-Trevi officials have found themselves acting under the K.4 Committee, made up of national officials who are often their junior: a scenario scarcely conducive to a smoothly running policy process, particularly in a policy sector of such great national sensitivity.

³⁹ Italy and Ireland appear the only exceptions with their K4 Representatives permanently based at the Permanent Representations in Brussels.

subordinate partner in the process) resulting in a degree of 'political' posturing within the Third Pillar policy process which has at times greatly impeded progress in achieving tangible policy results. The lower levels of the policy process regard the politicisation of decision making at the higher levels as a serious impediment to the formulation of rational and practicable policies.⁴⁰ The implications of the relationship for the future development of Community action in the area also emanates from this European/National level dichotomy: should the balance of power be tipped in favour of Coreper, with its pronounced European predilection, the potential for the Europeanisation and communitarisation of the Third Pillar would be more likely to be realised, than if the K.4 Committee, with its strong national bias, were to dominate the policy process below Council level.⁴¹

The K.4 Committee in fact faces a number of problems hindering its ability to fulfil the task of overall co-ordination in the Third Pillar. Perhaps most importantly it does not possess the clarity in terms of its composition seen for example in its Pillar II counterpart - the Political Committee - and its members include representatives from Ministries of the Interior, Ministries of Justice and Foreign Ministries, with some national delegations sending different representatives to different meetings. The mixed and changing nature of its membership has meant it has been unable to develop either a *corps d'esprit* or a dynamic for innovation, both of which are vital for the success of the Third Pillar. Furthermore, the infrequency of its meetings (once per month in contrast to the weekly meetings of Coreper) and the continued isolation of many of the members from the Brussels process has ensured the Committee has not yet developed the 'dual perspective' (defending the national position whilst maintaining policy dynamism at the European level) evident in the work of Coreper. The lack of European experience is also reflected in the internal dynamic of policy making within the K.4 Committee and its members have been criticised for a lack of flexibility, with members of the Committee attending meetings with a pre-determined national policy position rather than a flexible negotiating position.⁴²

The relative infancy of justice and home affairs co-operation within the EU can explain in part some of the difficulties facing, and created by, the K.4 Committee,

⁴⁰ Thus certain aspects of the text of the Extradition Convention agreed by Coreper are considered essentially unusable by experts in the field. Interview with a Permanent Representation official. 26 July 1996.

⁴¹ It has also been suggested that Coreper, representative of the Foreign Offices of Member States, is more likely to allow for the communitarisation of the Third Pillar as it affects policy sectors which are not naturally within their own domain: it thus follows that the future of the CFSP is a far greater source of tension within Coreper.

⁴² Interview with an official from the Council Secretariat, 11 July 1996 and a member of Coreper II, 12 July 1996.

although the intensification of ad hoc intergovernmental co-operation from the late 1970s provided the Justice and Interior Ministries with some experience of transnational co-operation before the TEU. The composition of the K.4 Committee does have a number of more positive facets, balancing the experience of Coreper with the justice and home affairs expertise it lacks. Furthermore the members of the K.4 Committee provide vital links with the domestic Interior and Justice Ministries: connecting two decision making arenas which would otherwise remain essentially isolated from each other.

The final article of Title VI appears at first sight to offer an important concession to those who opposed the establishment of justice and home affairs co-operation outside the Community framework. Article K.9 (the so-called Passarelle Clause) provides for the transfer of competences from the Third Pillar (although excluding K.1(7-9) to the Community framework under Article 100c EC Treaty on the initiative of the Commission or a Member State. The Member States' refusal to consider the possibility of communitarisation prior to the 1996 IGC, the necessity for a unanimous decision by the Council and the obligation for adoption in accordance with the Member States' 'respective constitutional requirements' has, however, rendered K.9 virtually unusable.

There are however not only problems with the nine articles included in Title VI and an important exclusion should be noted. Of particular importance is the absence of a comprehensive role for the European Court of Justice, with the potential for its jurisdiction restricted to the conventions agreed by the Council. Establishing a role for the European Court of Justice has in fact proved a question of extreme sensitivity for at least one member state⁴³ and has stood firmly in the way of progress in many of the conventions under discussion in the Third Pillar. The involvement of the ECJ in the activities of the Third Pillar does however provide an important means to ensure the consistent application of those decisions which are made and the securing of 'opt-ins' for ECJ jurisdiction for all Member States but Britain in the case of the Europol Convention has set an important precedent for future cases.

It is a stark reality that in the four years which have passed since the entry into force of the TEU and the implementation of the Third Pillar, the debate on the development of justice and home affairs cooperation has been forced to address the

⁴³The British Government refused to agree to the Europol Convention because of the provision it made for judicial review by the European Court of Justice. Following months of internal EU wrangling, a compromise was finally reached during the Florence Summit whereby fourteen Member States have 'opted-in' to accepting the jurisdiction of the European Court of Justice.

many issues that the 1991 IGC failed to resolve. However, in undermining the traditional roles of the EU's supranational institutions and allowing significant policy making power to the more hostile domestic ministries, the institutional structures established within the Third Pillar ensured that lessons have not been learnt. Within the policy process of the Third Pillar, it would appear that neither the supranational nor the domestic institutions are adjusting particularly well to the challenges they are facing and turf battles are likely to continue. However, although the ambiguity of the Third Pillar's 'half-way house' situation between intergovernmentalism and supranationalism has disadvantaged both European and domestic level actors, it is the latter which have had, and will continue to have, the greatest adjustments to make.

The Nation State and the Persuasive Power of Sovereignty:

The development of this analysis is in fact greatly enhanced by the introduction of the 'sensitive policy sector' variable into the wider institutional analysis. This paper has already alluded to widespread cooperation occurring prior to the 1991 IGC, suggesting that nation states are not entirely averse to responding to interdependence in this sector. There has however been an underlying implication thus far that the means to manage interdependence has been dictated by the nature of the policy sector, in particular its intrinsic concern with issues at the heart of the nation state's identity and survival. The sovereign power to control borders and thus protect territory is of central concern to national governments and coexists uneasily with the EU's commitment to provide for free movement and cooperate in areas such as immigration and policing. In the case of the former the power to exclude aliens is inherent to sovereignty and essential for any political community and with reference to the latter one of the more durable priorities of states remains the monopolisation of the legitimate means of coercion within fixed territorial boundaries.⁴⁴ The significance of sovereignty in this issue area is also deeply embedded with the wider national psyche of a state's citizenry - in theory as well as in the popular mind sovereignty is an unquestioned axiom belonging equally to the world of politics and to the world of culture and identity.⁴⁵ Research carried out by political anthropologists has stressed how bounded territories are not simply a matter of control or access to resources or of networks of interaction within fixed geographical limits, rather they denote participation in a collective consciousness (rituals, customs,

⁴⁴ It could perhaps be argued that the support for the Common Foreign and Security Policy is enhanced by its concern with activities and events on foreign soil and responses to them. In contrast cooperation in the Third Pillar concerns responses to developments within the Member States' own territory and the right to self-determination becomes a defining factor in deciding the appropriateness/acceptability of a common European policy.

⁴⁵ U. Hedetoft (1994) 'The State of Sovereignty in Europe', S. Zetterholm (ed.) **National Cultures and European Integration**. Berg, Oxford.

traditions and laws) associated with a particular territory. Territorial borders are thus sacralised via nationalism and the implications of justice and home affairs cooperation for this sacrosanct area of national policy are perceived as damaging and dangerous.

An examination of the concept of sovereignty within the case study of justice and home affairs cooperation leads the analysis back to the key questions identified in the introduction and to the discovery of a clear paradox: if sovereignty is such a defining and constraining issue (and if cooperation was already occurring within a framework of policy integration and interdependence) why did the Member States instigate the legal codification of justice and home affairs cooperation in the EU Treaty and attempt to transform policy integration into political integration? Milward (working with the general hypothesis that European integration has 'rescued' the nation state) identifies a number of 'rewards' which may encourage nation states to seek integration in place of interdependence.⁴⁶ The benefits include the prospect of greater predictability, greater compliance to the policies agreed upon and the failure of previous attempts to manage interdependence. The pressures emanating from publics concerned with the levels of both domestic and international crime are evident across all Member States and no politician is exempt from the responsibilities this occasions. A further feature identified by Milward is the fact that integration better justifies discrimination against outsiders and this assumption takes on new (and far reaching) implications when placed in the context of the collapse of the Warsaw Pact and the ramifications of the fall of the Iron Curtain for internal security in many of the EU's Member States.

As national governments have become increasingly unable to provide for the internal security of their territory, the prospect of regaining some control through the institutionalisation of European cooperation appears to have superseded the attachment to national sovereignty of **certain** policy actors. By pooling sovereignty and creating common EU responses to these issues it was hoped that the Member States would ensure their own survival in the face of direct threats to their societal stability. This pragmatic approach to sovereignty, diametrically opposed to what could be termed the 'virgin school of thought' (you either have it or you don't), sees it very much as a resource to be traded. The dichotomy it presents is also reflective of a wider disparity between the aspirations of the justice/interior ministries and the foreign offices/Heads of Government on this issue, the latter being far more likely to 'trade' sovereignty than the former. The predilection of the more parochial and

⁴⁶ A. Milward, F. Lynch, R. Ranieri, F. Romero & V. Sorensen (1993) **The Frontier of National Sovereignty: History and Theory 1945-1992**. London, Routledge.

inward looking justice and interior ministries to reject anything other than purely intergovernmental cooperation is illustrative of the institutionally defined doctrine of sovereignty as a zero-sum game.

The institutions and procedures that dominate the decision making milieu of the Third Pillar at present ensure that the justice/interior ministries of Member States retain the capacity either to sanction or impede progress. Ironically however, the institutions and procedures have also ensured the widespread failure of the Pillar to confront the challenges facing the internal security of the EU's Member States and the future of the Third Pillar has dominated much of the agenda of the current IGC. Unsurprisingly many domestic ministries remain opposed to proposed plans for 'communitarisation', however as happened during the Maastricht negotiations, the institutional dynamics of the EU's IGCs ensure both Heads of Government and Coreper officials can potentially counteract this reluctance and the reform of the Third Pillar has been widely mooted throughout the course of the IGC. This must of course be balanced by the awareness that the domestic ministries will remain important players in the policy process of the Third Pillar following the conclusion of the IGC.

Highlighting the Achievements.

The final section of this paper is concerned with highlighting what has actually been achieved since the Maastricht Treaty in the fields covered by Title VI. One of the most evident problems in this respect is defining how 'achievement' can be measured, a particularly difficult task given the absence of agreement on the legitimate function(s) of the Third Pillar. If success is measured wholly in terms of legislative/policy output, this may distort from the equally important Third Pillar task of consolidating co-operative links between the political, bureaucratic and practitioner communities within the Member States.

This examination must also be subject number of qualifications: first, the Third Pillar covers a huge range of issues which considerable implications for the everyday lives of the EU's populace. Achieving coherent and co-ordinated progress across such a broad spectrum of policies (ranging from visa policy to data protection for the European Information System) is not a straightforward process, particularly given the lack of resources both technically and in terms of personnel at national and European level.⁴⁷ Secondly, the Third Pillar has only been in operation since late

⁴⁷ A lack of resources assigned to the consolidation of co-operation under the Third Pillar was a common complaint during many of the interviews conducted during the empirical research for this paper, in both the European Union's institutions and in the Permanent Representations of the Member

1993 and thus insufficient time may have lapsed for a fair judgement on the success or failure of the Third Pillar to be passed. This remains a key tenet in the defence of those Member States who do not wish to see any fundamental changes to the current Third Pillar structure at the 1996 IGC.

An important point of reference for an analysis of progress under the Third Pillar is the work programme for 1994 agreed at the Justice and Home Affairs Council meeting in November 1993. This work programme actually remained applicable in 1995 and 1996 as few of the proposed initiatives were agreed or implemented during 1994 (and no subsequent annual work programmes were submitted). In fact it has taken almost three years for the initiatives proposed in November 1993 to be even partially addressed and progress was made on the most significant elements of the 1994 programme, particularly the Europol Convention and the Convention on Simplified Extradition, only following some highly publicised and acrimonious conflict between Member States. The eventual signing of the Europol Convention was heralded as a major step forward for Third Pillar co-operation, although the opt-out relating to ECJ competence secured by the British government could signal the development of 'variable geometry' as it has been suggested that it serve as a model for a number of other conventions currently blocked by the opposition of a small minority of Member States to the establishment of competence for the ECJ (Conventions establishing the Customs Information System and the Protection of the Community's Financial Interests). The trend towards opt-outs would have fundamental implications for the internal functioning of a Pillar already beset by some fundamental procedural and political problems.

Superficially the policy output of the Third Pillar would appear to belie the difficulties faced by policy makers and certainly there is insufficient scope to chronicle in detail all the decisions reached by the Justice and Home Affairs Council.⁴⁸ However, it is not the extent of policy output that indicates the success of the Third Pillar, rather the quality and legal status of the decisions provide a more genuine measure of achievement. The Council has produced a growing number of recommendations, resolutions, decisions, statements and conclusions, all of which fail to legally bind the Member States to the substance of the decision. This in many respects suggests a distinct lack of qualitatively different co-operation from the pre-Maastricht period. The legally binding Conventions which have been drawn up by

States. Internal security may be a pressing issue, however, in the light of current European-wide economic problems it is not a policy priority for EU governments.

48 For further details see the Council's **Report on the Functioning of the TEU** Brussels 1995.

the Council are (or have been) paralysed by the decision making process of the Third Pillar and the need for unanimity.

Further significant points of reference as to the degree of success are provided by (1) the (non)use of the new instruments provided for in Title VI (joint positions and joint actions) and perhaps more importantly (2) the policy sectors where agreement has not been possible. With reference to the former, as this paper has already asserted, there has been little recourse to the 'new' policy making instruments provided for in Title VI (joint positions and joint actions) and certain Member States (the United Kingdom with greatest consistency) are reluctant to use decisions with ambiguous legal bases. As a result a joint position on the harmonised application of the term refugee (agreed in November 1995) and a joint action on racism and xenophobia (agreed in March 1996) are the only examples of specific Pillar Three instruments being used within the last twelve months. Although an increasing number of decisions have been made across the broad spectrum of Third Pillar policy sectors, including recommendations on harmonising the means to combat illegal immigration, a regulation on the third countries whose nationals must be in possession of visas to cross the external frontiers of Member States, statements on terrorism and extradition etc., there have been a number of high profile policy 'failures' in areas with significant implications for the future of justice and home affairs co-operation among Member States. The External Borders Convention⁴⁹ is perhaps the most critical failure in this respect given its implications for the implementation of some many other elements of Third Pillar co-operation. The levels of internal security within the EU will never be achieved without a coherent and effective policy towards the securing of the EU's external borders: Member States will be reluctant to countenance increased co-operation without the basic foundation provided by the External Borders Convention in place. Other critical problems include the absence of agreement on the role of the ECJ in the Conventions on the Customs Information System and the Protection of the Community's Financial Interests and the consistently acrimonious disputes among Member States⁵⁰ which appear to suffuse almost all major decisions. Furthermore, the Third Pillar has failed to make any significant progress in terms of policy output with reference to Article K.1(4) (combating drug addiction), although this is intrinsically linked to the ambiguous nature of the article. Moreover it has been suggested that the TEU has

⁴⁹ Negotiations on the unblocking of the Convention have been at a stalemate for a number of years, in particular in relation to a dispute between the United Kingdom and Spain over the status of Gibraltar. More recently Portugal has raised the problem of its relations with East Timor and outstanding questions vis a vis the competence of the European Court of Justice also remain to be answered.

⁵⁰ The most recent disputes have included the Belgian-Spanish altercation over extradition, the argument between the Netherlands and France over drugs policy and the division between the United Kingdom and the remaining Member States over its blocking tactics at Council meetings.

had little innovative impact as the majority of advances made in policy output emanate from initiatives and proposals which predate the creation of the Third Pillar.⁵¹

Despite the deficit in legally binding decisions, the above analysis can be partially qualified with the acknowledgement that the number of meetings have significantly increased and thus contact between policy makers intensified. This, however, does not necessarily lead to positive outcomes. Interviews carried out during the research for this paper revealed a widespread dissatisfaction with the progress and nature of co-operation under the Third Pillar and the increasing frustration and resentment of policy makers and practitioners can only damage the attempts to consolidate justice and home affairs co-operation within the EU.

Conclusion

Although the many deficiencies in the nine articles covering justice and home affairs co-operation are indisputable, the countless criticisms can in part be offset by underlining the need for realism in the analysis. The legal/constitutional, procedural and institutional problems of the Third Pillar should not be allowed to obscure the fact that problems in consolidating justice and home affairs co-operation at the European level have existed since the time of the SEA. In introducing a formal (albeit limited) role for the Commission and the European Parliament, the TEU has constituted a step forward. The progress embodied by Title VI may have been insufficient and created a great deal of internal (and external)⁵² confusion, but justice and home affairs co-operation is now formally and irrevocably on the agenda of the Union.

A key advance made by the codification of pre-existing justice and home affairs co-operation among Member States are the actual (and potential) consequences this has for the key issues of transparency and accountability. In the pre-Maastricht period, the forums in which co-operation occurred were often highly secretive, remaining out of the scrutiny of both politicians and electorates alike. Although the

51 European Commission **Report for the Reflection Group** (Luxembourg, 1995). p.51.

52 Chapter Four will address the external challenges facing the Third Pillar including enlargement and the inclusion of a justice and home affairs element in the Transatlantic Agenda of December 1995 in some detail. With particular reference to the problems created by the establishment of the Third Pillar it would appear that the inclusion of Title VI in the TEU sent a clear message to the EU's partners that a common EU response to the challenges presented by the internationalisation of the policy sectors would be forthcoming. The projection of an image of constant in-fighting and the palpable slow progress in consolidating co-operation has damaged the potential for developing Third Pillar co-operative links with third states.

tendency towards secrecy can again be explained in part by the sensitive nature of many of the policy sectors, an element of institutional determinism is also discernible. Justice and home affairs co-operation involves officials from national Justice and Interior Ministries and/or domestic practitioners: in both cases officials representing institutions with no experience of co-operation within the structured confines of the Community's policy making arena and thus unaccustomed to the political scrutiny of the European Parliament, the judicial review of the ECJ, the administrative control of the Commission and so on. Accountability and transparency have become key motifs in the contemporary discourse on European integration and the Community's political process, as both Member States and Community institutions seek to combat the euro-sceptic malaise that appears to be flourishing amongst the Union's populace. The meagre opportunities for the ECJ to function within the Third Pillar and the insufficient provisions governing the rights and role of the European Parliament are issues which need serious consideration if the current elite-led demands for transparency and accountability are to be taken seriously.

The paper has already referred to the lack of co-ordination nature of co-operation prior to the Maastricht Treaty and this is yet another area in which codification has signified some (albeit limited) progress. Although in the late 1980s a number of co-ordinating groups were established to address the proliferation of co-operative bodies in particular policy sectors (for example CELAD to co-ordinate drugs related groups, the Group of Co-ordinators on the Free Movement of Persons (the Rhodes Group) and so on), there was no overarching organisation to co-ordinate co-operation in the broad field of justice and home affairs. The absence of a commonly defined justice and home affairs issue area provides a partial explanation for the lack of overall co-ordination of the justice and home affairs sector, however, in view of the increasing overlap between the policy interests of the various sector specific and more general groups and the intensifying internal security challenges facing Member States, the need for a more systematic and coherent approach was increasingly evident. In fact one of the first tasks of Coreper during the negotiations for the Maastricht Treaty was to catalogue all the justice and home affairs policy sectors in which co-operation was already taking place.⁵³ Once again however, although the Third Pillar of the TEU constitutes an advance on previous practices providing some semblance of central co-ordination, as a result of the many problems examined earlier in this paper, especially the protracted five level decision making

⁵³ Unfortunately this catalogue then became the basis for Article K.1 of Title VI without any significant discussion on the need to amend its contents. Interview with a member of Coreper, 15 July 1996.

process and the inherent intra-Pillar tensions, there is still much scope for improvement.

The highly sensitive nature of the policy sectors covered by the Third Pillar for the Member States' national governments should not be overlooked in an analysis of the form and content of Title VI of the TEU, as the intensity of national concerns over ceding full sovereignty to the supranational institutions of the Union has been a paramount component in the Third Pillar debate. The key element in consolidating justice and home affairs co-operation under the auspices of the Third Pillar is encouraging political commitment from all those involved; particularly the national Justice and Interior Ministries and the domestic constituencies of practitioners. Given the nature of the policy sectors involved and the institutional predilections of the domestic actors the successful development and consolidation of justice and home affairs cooperation will require both patience and vision (a relatively rare combination). The strong institutional focus of this paper has illustrated just how important both domestic and European level institutions have been in contributing to the troubled genesis of the Third Pillar. An institutional reform of justice and home affairs cooperation will not provide all the answers (particularly where sensitivity towards sovereignty rears its head), however as the fall-out from Maastricht has illustrated institutions provide the arena in which both attitudes and actions are not only pursued but also created.