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BRIEFING
ON
THE COMMUNITIZATION OF THE THIRD PILLAR (JHA)
OF THE TREATY ON EUROPEAN UNION

(First update)

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These briefings have been drafted by the Parliament Secretariat Task Force on the Intergovernmental Conference. Their purpose is to gather together, in an organized, summary form, the proposals and suggestions which the authorities in the Member States, the Union's institutions and specialist commentators have put forward on the issues likely to be on the IGC/96 agenda.

Briefings will be updated as negotiations proceed.

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- 1. The Court of Justice**
- 2. The Commission**
- 3. The Court of Auditors, ESC and COR**
- 4. Differentiated integration**
- 5. The common foreign and security policy**
- 6. The role of the national parliaments**
- 7. The hierarchy of Community acts**
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**PROPOSALS TO BE MADE BY THE MEMBER STATES AND INSTITUTIONS OF
THE EUROPEAN UNION ON THE COMMUNITIZATION OF THE THIRD PILLAR
(JHA) OF THE TREATY ON EUROPEAN UNION AT THE FORTHCOMING
INTERGOVERNMENTAL CONFERENCE**

SUMMARY

The implementation of genuine cooperation in the fields of justice and home affairs has met with many difficulties and has not yet been achieved in a way which conforms with the spirit and letter of Title VI of the Maastricht Treaty. Most of the acts adopted in this area have taken a legal form which might be described as traditional, that is to say that the Council and Member States have chosen to call these acts resolutions, recommendations or declarations, as is standard practice in international law, rather than acting in full accordance with Article K.3 of Title VI, which provides, among other things, for the adoption of joint positions and joint action.

In addition, the role of the European Parliament, already limited under Article K.6, has been marginalized in that it has not been regularly consulted (paragraph 2) and the information (paragraph 1) provided by the Presidency and the Commission has, in some cases, been inadequate.

The European Parliament has nevertheless held its debate on the progress made in implementing cooperation in the fields of justice and home affairs and decided to forward a recommendation to the Council expressing its reservations about the totally inadequate and incomplete application of Title VI (paragraph 3).

It is true that there is a certain weakness or ambiguity about the way in which the provisions of the third pillar have been applied. However, the European Parliament and Commission also consider that the areas under Title VI of the TEU, i.e. areas (listed in points 1 to 6 of Article K.1) which, under the present system can be communitized using the 'passerelle' provisions (Article K.9), should gradually, or at least partially, be brought into the Community domain.

This approach is also favoured by certain Member States, the Court of Justice and the Court of Auditors. The Court of Justice, in particular, has pointed out that, by virtue of Article L of the TEU, the European Union's activities in these areas are, for the most part, outside its jurisdiction. In the Court's view, the provisions on cooperation in the fields of justice and home affairs should guarantee consistency in the interpretation and implementation of Community law and of provisions adopted as part of this cooperation. The Court of Auditors, for its part, proposes that its role in these areas be specified as it is responsible for monitoring expenditure under the second and third pillars.

**BRIEFING
ON THE COMMUNITIZATION OF THE THIRD PILLAR (JHA)
OF THE TREATY ON EUROPEAN UNION**

I. LEGAL FRAMEWORK

I.1 TITLE VI OF THE TEU

Cooperation in the fields of justice and home affairs (JHA) was incorporated in the Treaty on European Union (TEU) in order to enable additional measures to be adopted in the context of intergovernmental cooperation in areas relating to the achievement of the objectives of the European Community, in particular free movement of persons.

Article K.1 gives a complete list of the areas regarded by the Member States of the Union as matters of common interest. They are:

- (1) asylum policy;
- (2) rules governing the crossing by persons of the external borders of the Member States and the exercise of controls thereon;
- (3) immigration policy;
- (4) combating drug addiction;
- (5) combating fraud on an international scale;
- (6) judicial cooperation in civil matters;
- (7) judicial cooperation in criminal matters;
- (8) customs cooperation;
- (9) police cooperation for the purposes of preventing and combating terrorism, unlawful drug trafficking and other serious forms of international crime.

In all of these areas, as Article K.3(1) of the TEU states, the Member States must inform and consult one another within the Council with a view to coordinating their action. The third pillar is therefore an **essentially intergovernmental structure** and it must be said that, despite its political importance, *'as conceived in the Maastricht Treaty it contains major structural weaknesses'*¹.

Nevertheless, the areas listed in Article K.1 impinge upon sensitive sectors in the Member States' social and judicial policies, and the fact that the third pillar has not

See Brinkhorst working document of 9 December 1994 on the process in the field of justice and home affairs.

yet been adequately implemented may in itself limit action by the Community and the Union in pursuance of certain fundamental objectives.

Under Article K.3(2), the Council may adopt joint positions and joint action (while respecting the principle of subsidiarity), adopt decisions in the form deemed most appropriate and draw up conventions.

However, the initiative setting in motion the decision-making procedure for such decisions varies according to whether they concern the areas referred to in Article K.1(1) to (6) (initiative of any Member State or the Commission) or areas referred to in Article K.1(7) to (9) (initiative of Member States alone).

This difference between the areas referred to in points (1) to (6) and those referred to in points (7) to (9) of Article K.1 is mentioned in Article K.9, which, being linked to Article 100c of the EC Treaty, establishes a *one-way Community 'passerelle'*.

Clearly, while the first group (e.g. asylum policy, immigration policy, combating drug addiction, combating international fraud and judicial cooperation in civil matters) are seen as areas which could gradually be communitized, areas relating to judicial cooperation in criminal matters, customs cooperation and police cooperation for the purposes of preventing and combating serious forms of international crime come under exclusively intergovernmental responsibility (exclusive intergovernmental jurisdiction).

This distinction may become increasingly important since it is now quite clear that, in the absence of any substantial modifications in the field of criminal law (which in fact remains completely outside the scope of the EC Treaty), the Member States have decided to maintain exclusive control of certain areas vital to internal security and law and order, allowing other areas to be gradually communitized as the Community's powers are extended.

I.2 PRESENT ROLE OF THE EUROPEAN PARLIAMENT

The European Parliament remains practically excluded from the adoption of such decisions, since Article K.6 only allows it: (1) to be informed of activities relating to the third pillar; (2) to give its opinion 'on the principal aspects of activities' (opinion to be duly taken into consideration by the Council); (3) to ask questions on the recommendations to the Council. In this connection, Rules 93 and 94 of Parliament's Rules of Procedure contain provisions governing consultation of, and provision of information to, Parliament in the fields of justice and home affairs and the recommendations concerning the implementation of the third pillar which Parliament may address to the Council. However, it should be noted that the detailed rules for consultation and information, including procedures and frequency, as provided for in Rule 93(5) of the Rules of Procedure, have not yet been adopted and annexed to the rules.

It must be pointed out that the consultation referred to in Title VI of the TEU is an intergovernmental matter and is not comparable to the consultation procedure under

the first paragraph of Article 138b of the EC Treaty which is an essential requirement for the validity of decisions adopted under this Community legislative procedure.

The European Parliament also holds an annual debate on the progress made in implementation of the areas referred to in Title VI. On 13 December 1994 Parliament adopted a resolution (on the progress made in these areas in 1994) emphasizing the inadequacy of legislation introduced by the Member States in the Council and calling for the obligations imposed on the Council and Presidency under Article K.6 of the TEU to be fully implemented.

Article K.9 stipulates that the Council, acting unanimously on the initiative of the Commission or a Member State, may decide to apply Article 100c of the EC Treaty to action in areas referred to in Article K.1(1) to (6), and at the same time determine the relevant voting conditions relating to it. This provision has been considered by commentators as a kind of link with the Community sphere ('*passerelle communautaire*'), enabling intergovernmental action to lead to Community decisions.

However, under this legislative procedure, the European Parliament has, at best, a consultative role (in accordance with Article 138b of the EC Treaty), under either Article 100c(1) or Article 100c(3) (applicable as from 1 January 1996).

Moreover, the Court of Justice has no jurisdiction in matters relating to justice and home affairs apart from the judicial control which it may exercise in the event of any disputes regarding the conventions provided for in Article K.3(2)(c).

I.3 ISSUES RAISED

The most important issues are:

- (a) **extending the areas** covered by cooperation in the fields of justice and home affairs, in view of the wider jurisdiction of the Union and European Community, while complying, of course, with the principle of subsidiarity;
- (b) **gradual communitization** of the areas of justice and home affairs, given that these also indirectly affect the Community's legislative activities in its own sphere of competence (in this connection, consideration should be given to the various possible ways of achieving this objective);
- (c) **as regards the European Parliament's role**, consideration should first be given to raising the status of the consultation procedure under Article K.6(2) to that of consultation under the first paragraph of Article 138b of the EC Treaty, thereby making it a substantive procedural requirement for the ensuing decision; this consultation should then be extended to all joint actions, without prejudice to the extension of fuller types of parliamentary involvement;
- (d) **in view of the principle of democratic accountability** in the decision-making procedure leading to the adoption of Community legislation, direct participation should be ensured - as part of more extensive changes -

through the application of the **codecision procedure** to all acts that cannot be regarded as intergovernmental joint action (revision of Article 100c of the EEC Treaty);

- (e) **lastly, the Court of Justice must be given jurisdiction over all acts adopted and conventions concluded¹.**

The 1996 IGC could also consider the possibility of altering the way in which matters referred to in Article K.1 relate to the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (see articles F and K.2 of the TEU), given the most recent decisions of the Court of Justice and the political steps taken by the European Parliament to ensure that respect for fundamental rights becomes a genuine and binding aspect of the Community legal system.

I.4. POSSIBLE SCENARIOS FOR REVISION OF THE THIRD PILLAR

In view of the above, there are various possible scenarios for amending the third pillar in the context of the 1996 Intergovernmental Conference. These may be summarized as follows:

- (1) **fully incorporating third-pillar issues into the TEU Community pillar;**
- (2) **maintaining the status quo, waiting to gain real experience of the full implementation of the third pillar before making changes (institutional and procedural);**
- (3) **amending the provisions of the third pillar in order to solve some of the main operational problems without, however, fully incorporating cooperation in the fields of justice and home affairs into the Community pillar;**
- (4) **applying or amending Article K.9 and abolishing the unanimity rule for voting in the Council.**

Clearly, the first scenario would raise serious political difficulties. Maintaining the status quo would not meet the need for democratic scrutiny by the European Parliament and its active participation in the decision-making process. This has already given rise to remarks by the European Parliament, criticizing the structure and restrictive nature of Title VI of the TEU. It is therefore felt that consideration should be given to the last two scenarios and to various procedures which could lead to the gradual communitization of third-pillar issues.

In this connection, Article L of the TEU stipulates that the provisions of the EC Treaty concerning the powers of the Court of Justice apply only to the third subparagraph of Article K.3(2)(c).

II. POSITIONS OF THE MEMBER STATES

As regards the positions of the Member States for the 1996 Intergovernmental Conference, provided for in Article N(2) of the TEU, national governments have given the matter varying degrees of attention. The German, French and Dutch Governments, for instance, have given quite careful attention to considering institutional aspects and issues involved in cooperation in the fields of justice and home affairs, while other governments have not yet made official statements or have merely examined institutional and procedural aspects. Although the national parliaments have held debates on the subject, not all of them have adopted official positions.

1. GERMANY

The German Government has already defined its main aims as regards the Union's institutional development and the IGC. Germany considers cooperation in the fields of justice and home affairs to be one of the priorities for this Conference.

On 21 February 1995 Mr Klaus Kinkel, Foreign Minister, outlined the approach which Germany would be adopting at the IGC in reflection of its European political strategy.

Germany considers that the priority issues with regard to cooperation in the fields of justice and home affairs are as follows:

- (1) completion of the Europol Convention and establishment of a genuine European police authority;
- (2) implementation of asylum and refugee admission policies, given the need for a fair distribution of refugees among the Member States.

It is also worth mentioning the position of the political parties which have a relative majority in the Bundestag, i.e. the CDU and CSU.

On 1 September 1994, the CDU/CSU parliamentary group in the Bundestag put forward proposals for a wide-ranging reform of the European Union.

This programme mentions, among other things, the need to strengthen European political and legal tools for combating organized crime and to establish a common immigration policy.

On the subject of the possible enlargement of the European Union to include Eastern European countries, the CDU/CSU programme states that the accession of Central and Eastern European countries will need to be made subject to certain specific conditions and entail participation in cooperation on domestic and legal policies as regards the position of foreigners and the establishment of joint action on migration, asylum, visas and the Europol Convention.

As regards official statements made by public authorities in the Federal Republic of Germany, reference should also be made to the decision of the German Constitutional Court (*Bundesverfassungsgericht*) of 12 October 1993 on two constitutional appeals lodged against the law of 28 December 1992 relating to the Treaty on European Union of 7 February 1992 and the law of 21 December 1992 amending the *Grundgesetz* (Basic Law). In its ruling, the German Constitutional Court pointed out that, in adopting the TEU, the Member States had not incorporated *justice and home affairs into the supranational decision-making structure*. The *Bundesverfassungsgericht* also pointed out that, under Article K.9 of Title VI, even the simplified transfer of certain parts of Title VI to the European Community's jurisdiction was subject to *prior ratification by the Member States*. The German Constitutional Court noted that acts such as joint positions (Article K.3(2)(a)) *were in no way binding since they affected the fundamental rights of individuals*.

The Karlsruhe Court also pointed out that, in so far as Titles V and VI of the TEU stipulate respectively that the Council may adopt joint actions and adopt such actions with a view to implementing cooperation in the fields of justice and home affairs, the result can be no different. *'Notwithstanding an obligation on the Member States created under public international law by these decisions of the Council [...], which must be taken unanimously or at least be based on a unanimous decision of the Council [...], these decisions may not give rise to legal provisions that are directly applicable in the Member States and are able to enjoy precedence'*.

The document entitled *German objectives for the Intergovernmental Conference*, dated 26 March 1996 and submitted just before the Turin European Council, emphasizes in relation to the third pillar that combating transnational crime and drug trafficking has become an essential aim in all forms of cooperation on justice and home affairs.

The German Government believes that closer police cooperation is essential. A long-term objective in this context is the creation of a European police office with operational capability.

Other important objectives relate to:

- * harmonizing civil and criminal legislation;
- * integrating visa policy;
- * the right of asylum;
- * customs cooperation;
- * immigration;
- * the extension of European responsibility for tackling xenophobia;
- * combating racism;

- * fraud against the Community budget;
- * a greater consultative role for the Commission, Parliament and the Court of Justice.

It is clear from this that the German Government is among those who believe in the need for significantly stronger cooperation on justice and home affairs both in practical terms and as regards the decision-making process.

In particular, the German Government is so far alone among the Member States in having listed the harmonization of civil and criminal legislation among the most important issues to be addressed under the third pillar.

In considering Germany's views, attention must also be paid to the basic positions adopted by the federal *Länder*, because they will be involved in preparing Germany's position at the IGC. Rhineland-Palatinate and Bavaria will be the federal *Länder* rapporteurs for the IGC. In this context, on 3 March 1995 Mr Klär, the Secretary of State and authorized representative of Rhineland-Palatinate at federal and European level, submitted the final conclusions of the Conference of European Affairs Ministers of the German *Länder*. In relation to the third pillar, they call for the key areas of Title VI of the TEU to be transposed into the EC Treaty. They also urge that consideration should be given to including a list of fundamental rights in EU law.

2. AUSTRIA

Austria's position on the major issues of the 1996 Intergovernmental Conference was set out in a document drawn up following the Conference of *Landeshauptmänner* on 4 May 1995. Entitled *Länderpositionen zur Regierungskonferenz 1996*, the document is essentially concerned with the positions of the *Länder*. In it, Austria assesses how the third pillar of the TEU has been implemented and proposes solutions to the present situation.

Firstly, it stresses that in spite of substantial recent progress - particularly on judicial cooperation (with, for example, the second Brussels Convention and the Convention on the protection of the Communities' financial interests) and exchanges of information as part of cooperation on home affairs policy (measures against forgery, drugs and organized crime, the CIREA and CIREFI) - the new tools for establishing joint judicial and home affairs policy are underused.

To date, the Member States have confined themselves to adopting a number of international conventions, giving opinions and agreeing on joint measures which are binding only in particular cases. For the most part, they have chosen to adopt non-binding resolutions, which they could already do before the TEU came into force.

Referring to weakness in internal administrations, the document also expresses Austria's view that national administrations are not yet ready to use the potential of the third pillar.

The Austrian Government considers that cooperation on justice and home affairs with third countries (particularly the countries of Central and Eastern Europe) is of prime importance.

Legal systems must therefore be developed - both at constitutional level and at the level of civil and criminal legislation - to enable the immediate adoption of the measures taken in the context of cooperation in the fields of justice and home affairs.

The main points in the Austrian document concern:

- (a) the scope of third-pillar issues for European citizens;
- (b) the need to safeguard basic rights when implementing the policies and legal instruments of the third pillar;
- (c) the link, in the light of current problems, between cooperation on justice and home affairs and the abolition of controls on the free movement of persons;
- (d) the need for clear, uniform interpretation of what is to be regarded as the *acquis* in the areas affected by cooperation in the fields of justice and home affairs;
- (e) the establishment of effective control by the Court of Justice;
- (f) Austria's analysis suggests that convincing results can best be achieved through a step-by-step approach.

At this stage of the European Union's development, Austria sees the following as possible solutions:

- (1) harmonization of national law in the areas affected by cooperation on justice and home affairs;
- (2) the establishment of real cooperation with third countries (particularly the countries of Central and Eastern Europe);
- (3) the adjustment of formal structures to allow for a more efficient system of decision-making.

Just before the European Council meeting in Turin, the Austrian Government submitted a document outlining Austria's positions on the IGC.

A substantial section of this document of 26 March 1996 deals with third-pillar issues. Firstly, on internal security, the Austrian Government believes that the only way to achieve full freedom of movement for the citizens of the European Union is to give them a European-level guarantee of security, and the work of judicial and police authorities in tackling all questions relating to immigration, the right of asylum, action to combat crime, terrorism and drug abuse should therefore be coordinated at supranational level.

In particular, Austria proposes the following changes in areas affected by cooperation on justice and home affairs:

- * communitization of a number of policies that are currently included in the third pillar (particularly on visas, asylum, external border controls, immigration, arrangements for third-country nationals staying in the Union, action to combat drug trafficking and international fraud, and customs cooperation);
- * a greater role for the Community institutions and Community instruments and procedures in implementing the various provisions of the third pillar, in order to make this a more dynamic and ongoing process;
- * including a provision in the Treaty to ensure uniform interpretation of third-pillar legislation by the Court of Justice;
- * extending the European Parliament's right to be informed and consulted;
- * attention to the role of the national parliaments;
- * giving the Commission a greater role, in the interests of dynamism, continuity and consistency;
- * making greater use of qualified-majority voting, particularly in the area of action to combat organized crime;
- * significantly reducing the number of working levels;
- * clarifying the competences covered by the different pillars;
- * improving transparency in the third pillar (by publishing all non-confidential documents and keeping the European Parliament regularly informed);
- * establishing clearer methods of financing and making them subject to control by the Court of Auditors;
- * including the Schengen Convention in the TEU.

However, Austria considers that criminal issues should remain in the sphere of intergovernmental cooperation.

3. BELGIUM

Belgium's position on the IGC is set out in a government policy note - *Note politique du Gouvernement belge au Parlement belge* - dated 28 July 1995.

As regards the third pillar, the Belgian Government favours a Community approach to cooperation on justice and home affairs in so far as possible.

In particular, in a section on a 'Law and security union', it expresses the view that the limits of the intergovernmental approach have been demonstrated and the Community approach should therefore be extended to the third pillar.

The proposals outlined by the Belgian Government are as follows:

- i. all matters on which the Community has competence, particularly asylum policy, the area of visas (which also affects the free movement of persons) and customs cooperation to combat drug trafficking (which also affects the free movement of goods), should be transferred to the first pillar (the EC Treaty);
- ii. other third-pillar matters should be tackled more efficiently, with an approach based on Community methods in so far as possible;
- iii. the Commission's shared right of initiative should be extended to the areas of judicial cooperation in civil matters, customs and police cooperation;
- iv. majority voting should be extended;
- v. the European Parliament should be more deeply and practically involved in all cases where the Council adopts legislative decisions and/or approves decisions by a majority vote;
- vi. the Court of Justice should have mandatory competence;
- vii. European citizens should have international access to justice;
- viii. the Schengen Agreement should become part of the European Union.

However, the document indicates that the Belgian Government would be prepared to accept transition periods and differences both in legislation and at operational level.

The Belgian Government's position was further detailed in the 'Memorandum' of 7 March 1996, submitted jointly with the governments of Luxembourg and the Netherlands at the Hague summit.

The three governments set out a series of 'realistic' proposals on cooperation in the fields of justice and home affairs, taking account of the political and diplomatic difficulties which appear to prevent rapid progress in the area.

Firstly, the three governments wish matters relating to immigration policy (particularly asylum and visa matters) to be transferred to the first pillar, because decisions in this area can be taken more efficiently under Community procedure. They also call for a precise timetable to be fixed for implementing established objectives.

In other areas, however, such as judicial cooperation and action to combat crime and drug trafficking, the memorandum calls for cooperation on a provisional basis under the third pillar, with the possibility of improvements in the interests of efficiency.

Undoubtedly the most interesting section of the memorandum, as regards the third pillar, is the list of proposals on the procedure for adopting decisions.

The memorandum suggests that:

- * the Council and Commission should agree on multiannual work programmes and fix a timetable;
- * the Commission should have a 'joint right of initiative' in all areas of the third pillar;
- * the European Parliament should have a real right to be consulted on all legislative proposals;
- * the national parliaments should be involved well before decisions are taken in the Council.

The three governments suggest that it would be useful, as regards decision-making, to include the possibility of adopting directives (as in the Community pillar) so that measures taken under the third pillar could be made binding if necessary.

The Benelux governments also wish consideration to be given to the question of where decisions might be taken by qualified majority or by a form of 'near consensus'.

On the application of third-pillar measures, they propose that uniform interpretation of the rules should be ensured by giving jurisdiction to the Court of Justice. Finally, the three Member States favour including cooperation under the Schengen agreements within the EC Treaty.

4. DENMARK

The Danish Government report *Agenda for Europe: the Intergovernmental Conference 1996* makes a distinction between cooperation on foreign affairs and security policy and cooperation on justice and home affairs. The Danish Government supports the proposals to transfer certain areas out of the sphere of intergovernmental cooperation under the third pillar to the Community pillar.

As regards the voting system, the Danish Government's view appears to be that majority voting should be adopted for the third pillar.

While it is not explicit about the role of the Commission and the European Parliament, the Danish Government appears to side with those Member States who favour extending the powers of the two institutions with regard to third-pillar issues in

particular, inasmuch as decisions on justice and home affairs cooperation are often linked to Community legislation.

However, there is no doubt that the Danish Government believes intergovernmental cooperation should remain the norm under the third pillar.

Nonetheless, it also proposes simplifying the present decision-making process and making better use of the potential for cooperation already provided in the TEU, in order to make such cooperation more effective, particularly in areas such as the right of asylum and action to combat cross-border crime (organized crime, drug trafficking and illegal immigration).

5. SPAIN

The document containing the Spanish Government's basic considerations with regard to the 1996 Intergovernmental Conference suggests that, as far as the Union's third pillar is concerned, Spain has many reservations about the following:

- (i) moving from the present unanimity rule to **qualified-majority voting**;
- (ii) consequently, the possibility of **communitization**;
- (iii) freedom of movement for persons and **crossing of external borders**;
- (iv) **right of asylum**;
- (v) **immigration policy**.

On the other hand, Spain would probably vote in favour of moving from unanimity to qualified-majority voting in the areas of **drug addiction** and the **harmonization of civil and criminal legislation** if such a proposal were put forward.

Finally, the Spanish Government has added two further important considerations:

(1) the possibility of replacing the current bilateral extradition agreements with multilateral rules in order to make extradition more straightforward, in fact virtually automatic;

(2) strengthening the proposed institutional system by giving a more important role to all the Community institutions which at present are totally or partially excluded from the third-pillar procedures (i.e. the European Parliament, the Court of Justice and the Court of Auditors).

On 28 March 1996 the Spanish Minister for Foreign Affairs sent the parliamentary groups a document entitled *Elements of a Spanish position at the 1996 Intergovernmental Conference*.

It was noted that in its structure and content, this document broadly resembles the Reflection Group report of 5 December 1995.

In a section on cooperation in the fields of justice and home affairs, the document of 28 March 1996 sets out Spain's priorities for the IGC, namely combating terrorism, developing police and judicial cooperation on both civil and criminal matters, and communitizing some aspects of the issues covered by Title VI of the TEU.

Particular attention is given to combating terrorism. Spain urges that Europe should have the power to demand rapid and effective results. The Spanish Government believes that it is unacceptable for terrorist offences to be classed as political in democratic countries where the rule of law prevails.

Spain therefore argues that terrorist acts should no longer be treated as political offences, but simply as crimes. Consequently, the new Treaty should contain an explicit recognition that terrorist acts are not political offences and that extradition between Member States of the European Union may not be refused under the exception for political offences.

In Spain's view, the new Treaty should also establish that a citizen of a Member State of the European Union cannot be classed as a political refugee.

On police and judicial cooperation, Spain envisages closer intergovernmental collaboration and favours streamlining the procedure under Article K.9 of the TEU (the 'passerelle' provision).

In this context, the legal instruments should be improved and the role of the institutions amended, creating a general right of initiative that would include the Commission, giving the European Parliament a genuine consultative role and establishing jurisdiction for the Court of Justice.

Spain favours communitization of the third pillar in relation to all matters concerned with the crossing of external borders, namely alien status, immigration policy, the right of asylum and joint rules for external border controls.

The Spanish Government also believes that, given the nature of the third-pillar issues, national parliaments ought to have a greater voice at the IGC, and provision should be made for the use of more effective legal instruments such as directives.

In addition, Spain favours reducing the number of levels of decision-making as a means of improving the efficiency of cooperation in the fields of justice and home affairs. Finally, Spain supports paving the way for the possible inclusion of the Schengen agreements and the related *acquis* in the TEU in the form of a flexible arrangement linked to progress made in the interim.

6. FINLAND

The Finnish Government first took a position on the IGC in a Memorandum from the Ministry for Foreign Affairs dated 18 September 1995.

On cooperation in the fields of justice and home affairs (the subject of the fifth chapter), the memorandum states that the first task is to define the Union's

objectives in this area more clearly and precisely. In essence, the Finnish Government's position is that transferring matters covered by the third pillar to the Community pillar should be considered pragmatically and openly, case by case. However, Finland expresses reservations in relation to important basic questions that affect the national sovereignty of Member States, believing that such matters should continue to be dealt with through intergovernmental cooperation. The objectives envisaged by the Finnish Government may be set out as follows:

- * strengthening action against international crime;
- * developing cooperation between the police forces of the different Member States;
- * establishing a system of mutual (legal and administrative) assistance;
- * bringing the Europol Convention into force without delay;
- * creating a European judicial area;
- * combating fraud in the EC (which affects the smooth operation of the internal market);
- * ensuring that family law judgments are applied;
- * harmonizing approaches and acting together on immigration and other forms of entry to EU territory (and on the budgetary implications);
- * addressing the question of political asylum (Finland is prepared to sign the Dublin Convention as soon as it comes into force);
- * strengthening the Commission's role (the role of the European Parliament, however, is deemed adequate at present);
- * confining the role of the Court of Justice to areas other than those that impinge on national sovereignty;
- * ensuring that the Community institutions can assume competence automatically in relation to matters transferred from the third pillar to the Community pillar;
- * simplifying the present five-tier structure.

7. FRANCE

France drew up its position during its presidency of the European Union, which started on 1 January 1995.

On cooperation in the fields of justice and home affairs, the French Government was in favour of maintaining the unanimity rule for the adoption of acts under Title VI. Its general approach seems to rule out the possibility of transferring areas included in the third pillar to the Community pillar.

The French National Assembly has produced a document containing an initial assessment of the Schengen agreements and analysing prospects.

In this information report, submitted on 21 June 1995 by its delegation on the European Union, the National Assembly assessed the entry into force of the Schengen Convention and the difficulties and dangers which its implementation entailed, and adopted conclusions (1) calling on the French Government to take all the necessary legislative, regulatory, administrative and technical measures as soon as possible to ensure that the Schengen implementing agreement was properly applied and (2) proposing that these provisions as a whole should be reexamined by the States party to the convention on the basis of the experience acquired.

The report on preparation of the 1996 IGC, submitted on 12-13 May 1995 by Mr René Monory, President of the Senate, to the Conference of Presidents of Parliaments of the European Union, states that, as regards the monitoring role to be played by national parliaments, *'in areas where the European Parliament's role is more limited, whether because they are governed by intergovernmental procedures (second and third pillars of the Union) or because they concern Community policies in which the European Parliament's scope for action is fairly limited [...], the role of each national parliament is even more necessary and must be sufficiently guaranteed'*.

The Monory report considers that one of the tasks of the 1996 IGC will be to improve the effectiveness of the second and third pillars of the European Union and to simplify and readjust the European Parliament's means of action.

As regards Europol, Mr Chirac, President of the Republic, accepted at the European Council meeting in Cannes (26 and 27 June 1995) that the Member States have decided to set up this body immediately and to defer a decision on the controversial issue of the Court of Justice's jurisdiction until June 1996, under the Italian Presidency.

In considering the French position on the IGC, mention should be made of other, non-official documents which outline the key elements of French Government thinking.

In a joint letter of 6 December 1995, Mr Chirac and the German Chancellor, Dr Kohl, propose the following as the IGC's four primary aims:

- * the establishment of a joint foreign and security policy;
- * the completion of a common European area in which the free movement of citizens is guaranteed;
- * more efficient institutions for the European Union;
- * defining how to bring the Union closer to its citizens.

In relation to the second aim, Mr Chirac and Dr Kohl propose the establishment of a *homogeneous area* in which the free movement of persons will have to be underpinned by joint actions, particularly in the areas of asylum policy, immigration

policy and improved cooperation to protect people effectively against the scourges of terrorism, organized international crime and drugs.

On 20 February 1996 the French daily newspaper *Le Figaro* published a memorandum on the issues for France at the IGC.

This was an internal French Government document intended to assist the government committee preparing for the Intergovernmental Conference. As regards the third pillar, the document suggests:

- * that precautions should be taken as necessary on asylum and immigration where it is proposed to bring these issues closer to the Community sphere;
- * that intergovernmental cooperation is the most suitable and effective formula for cooperation on policing and should continue to apply in this area;
- * that, in the area of judicial cooperation, the Member States should be encouraged to align their civil and criminal legislation;
- * that the Commission's right of initiative should be extended;
- * that the national parliaments should be involved in drafting legislation;
- * that consideration should be given to the advantages of bringing into force legislation which the national parliaments had helped to draft, without waiting to receive instruments of notification from all the Member States, following a formula that is already standard in international law.

8. GREECE

On the subject of the third pillar, the Greek Government considers that the Council should be asked to explain its position more clearly when it wishes to adopt acts under Article K.3 of the TEU. It is also calling for special consideration to be given to immigration and asylum policies and increased powers for Parliament in these areas. On Article K.7, the Greek Government considers it important to avoid creating discrepancies between political requirements and legal rules.

In order to set out Greece's official position for the 1996 IGC, the Greek Prime Minister set up an inter-ministerial committee to consider the issues involved in amending the Treaty on European Union, and possible proposals.

In particular, the committee looked at the problems involved in implementing the third pillar, and the possibility of reforming it.

It concluded that making the European Union more democratic and strengthening the rule of law in the European order must depend, on the one hand, on the role of the European Parliament and, on the other, on the prospects for cooperation in the fields of justice and home affairs.

In this context, questions about maintaining the rule of law and protecting fundamental rights could be answered by communitizing the decision-making procedures.

In its *Memorandum* of 24 January 1996 on the IGC, the Greek Government supports an extension of the Commission's competences, particularly in relation to the second and third pillars of the EU, coupled with an increase in the European Parliament's powers of control.

In practical terms, the Greek Government wishes to see certain elements of the third pillar communitized. Greece favours extending the Commission's right of initiative in this sphere and expanding the roles of the European Parliament and the Court of Justice.

The Greek Government considers that, even if full communitization proves impossible, a degree of communitization is essential.

On the decision-making process, Greece believes that the principle of unanimity is the root cause of inefficiency in the procedures under Title VI, and calls for qualified-majority voting to be applied in certain areas, such as that of action to combat drug trafficking, while accepting that unanimity must remain the rule in other areas closer to national sovereignty.

9. IRELAND

On 26 March 1996 the Irish Government issued a white paper on foreign policy entitled *Challenges and opportunities abroad*.

This document sets out the Irish Government's views and Ireland's priorities for the IGC.

In the fields of justice and home affairs, the Irish Government is prepared to support every effort to see that the provisions of Title VI are adequately reinforced.

In particular, it supports consideration of proposals to transfer certain matters now under Title VI of the TEU to the Community pillar, in order to facilitate the decision-making procedure and accelerate progress in these areas.

The issues involved would include in particular those concerning immigration policy and the right of asylum.

The Irish Government also says it is prepared to accept that decisions adopted by the Council on all matters under Title VI of the TEU should be subject to appropriate parliamentary control at both European and national level.

As regards combating drug abuse (a priority for the Irish Government), Ireland announces that it has established an inter-ministerial committee to consider how to improve progress at European Union level.

10. ITALY

The most important document that we possess to date is the memorandum issued by the Foreign Minister (at the time, Mr Martino) on 12 October 1994. In this memorandum, the Minister put forward an important proposal concerning the possibility of setting up a secretariat at a higher level to plan the implementation of, and amendments to, the third pillar. Mr Martino also stressed the need to consolidate measures to protect human rights and fundamental freedoms, as referred to in Article F(2) of the TEU.

There is another reference to the need to strengthen the third pillar in the Italian Government's statement of 23 February 1995 on foreign policy. The Italian Government stressed the importance of promoting police and judicial cooperation and adopting legislation to harmonize national provisions on freedom of movement for persons.

Finally, the issues of concern to the Italian authorities include intergovernmental cooperation in combating corruption and the coordination of police and judicial systems in the countries of Central and Eastern Europe.

On 23 May 1995 the Italian Parliament (Chamber of Deputies and Senate) adopted resolutions pointing to the virtual absence of any coherent and effective action in the field of judicial cooperation and in the administration of internal affairs, and called for a strengthening of 'common policies' in the fields of justice and home affairs by **communitizing** policies on asylum, the crossing of external borders of Member States, immigration, and joint strategies for combating organized international crime.

In her communication of 23 May 1995 to the Chamber of Deputies, the Italian Foreign Minister, Mrs Agnelli, said that the Italian Government intended to pay very close attention to possible developments in the European Union's third pillar. Through a representative in the Reflection Group, the Italian Government will seek to strengthen cooperation in the fields of justice and home affairs, focusing on sectors (such as asylum, the crossing of external borders, immigration from third countries and combating organized crime) connected with the common foreign policy. In these areas, the Italian Government undertakes to propose solutions that will help simplify the decision-making process, reinforce the binding nature of legislation adopted, set up decision-making procedures specific to the Community institutions and overcome the present restrictions on powers of proposal and initiative.

On 12 December 1995, the Italian Chamber of Deputies set out its position on the 1996 IGC in a recommendation to the Italian Government.

Among the many issues mentioned in the document, the Chamber of Deputies stresses the need to establish the *European judicial area* suggested by the third pillar of the TEU.

The Italian Deputies consider it essential that the key elements of justice and internal security policy - among them immigration policy and action, including the creation of

a European police force, to combat organized crime - should be transferred into the sphere of European competence.

The Chamber of Deputies also favours communitizing the third pillar of the EU so that justice, home affairs and immigration issues can take on a real Community dimension.

In the run-up to the European Council meeting in Turin, the Italian Government submitted its position on the IGC. In a document dated 18 March 1996, it defines the Italian negotiating priorities for the Conference and, in particular, announces the three major themes that will underpin Italy's proposals. These are the relationship between European citizens and the Union, transparency and adjustment of the institutional system.

On cooperation in the fields of justice and home affairs, the Italian Government proposes a more precise definition of areas which could be the subject of joint positions, joint actions and conventions, and reaffirms the value of these instruments.

Italy also supports:

- * the gradual transfer of certain matters to the Community sphere, particularly immigration policy, the right of asylum and the legal status of aliens residing legally in the European Union;
- * reassertion of the legally binding nature of joint positions and joint actions, and the possible introduction of legal instruments similar to Community directives;
- * giving the Court of Justice competence to rule on acts adopted under the provisions of the TEU in the fields of justice and home affairs.
- * incorporating the Schengen Convention into the TEU as part of a solidarity mechanism with different levels of application;
- * rationalizing the decision-making apparatus.

11. LUXEMBOURG

Although it had not submitted any document on the 1996 IGC, the Luxembourg Government was able to outline its position in the statement on foreign policy made before the Luxembourg Chamber of Deputies by Mr Poos, Minister of Foreign Affairs, External Trade and Cooperation, on 16 February 1995.

The Luxembourg Government is calling for substantial progress to be made on the third pillar, given the operational difficulties encountered. In its view, the operating methods of Title VI and legislative procedures relating thereto will need to be seriously reconsidered.

On 30 June 1995, the Luxembourg Government issued an *Aide-mémoire* on the 1996 Intergovernmental Conference. A large section of the document is devoted to

possible proposals for strengthening cooperation in the fields of justice and home affairs.

The Luxembourg Government emphasized that, despite recent difficulties, there was a general desire for effective collaboration in the areas of police and judicial cooperation and in tackling immigration and asylum.

At the same time, it noted that results on the ground had been less tangible than might have been hoped, although one convention on simplified extradition procedures had been adopted and two draft conventions were about to be finalized.

The reasons suggested for the lack of progress in areas covered by cooperation in the fields of justice and home affairs may be summarized as follows:

- (a) the complex nature of the issues and the sensitivity of the areas concerned, which go to the heart of the Member States' sovereignty, and in which the particular attitudes and structures of certain Member States have prevented movement in many cases;
- (b) decision-making by unanimity which is the rule for adopting legislation under Title VI;
- (c) the fact that the provision for giving jurisdiction to the Court of Justice is optional - something that has proved a major stumbling-block to the adoption of conventions;
- (d) the five-tier working structure which slows down decision-making considerably.

The Luxembourg Government makes the following proposals for resolving the situation of 'near impasse' on the third pillar:

- (1) the Treaty should provide for the Court of Justice to have jurisdiction in disputes between States and between States and the Commission, and to be empowered to make preliminary rulings, in such a way as to strengthen legal certainty;
- (2) the way should also be cleared for implementation of the rules on decision-making under Article 100C of the EC Treaty;
- (3) finally, in order to accelerate the decision-making process effectively, there must be a reduction in the number of procedural stages that a proposal has to pass through.

See also the Benelux countries' memorandum of 7 March 1996, under BELGIUM.

12. NETHERLANDS

As regards the position of the Dutch Government, mention should be made of the note sent to the Houses of Parliament on 14 November 1994 and discussed in plenary sitting on 14 February 1995 on the opportunities and difficulties raised by the enlargement of the European Union. The practical questions highlighted by the Dutch Government include two issues which come under the third pillar, namely immigration policy and cooperation between national (civil and criminal) judicial authorities. The Dutch Government proposes arranging for transitional periods during which the Union could apply certain restrictions on freedom of movement for workers in order to prevent large-scale immigration. The Dutch Government considers the implementation of a harmonized immigration policy, in conjunction with the provisions adopted under the EC Treaty, to be of vital importance, given the problems caused by uncontrolled migratory flows from Central and Eastern European countries.

It is proposed that procedural arrangements could be based both on joint actions and intergovernmental agreements. The appropriate legal basis is quite clearly Article K.3 in its current form.

In its report of 23 May 1995 on cooperation in the fields of justice and home affairs, the Dutch Government assessed the implementation of cooperation in these fields and the problems which have arisen during this initial period and pointed out that this cooperation was currently characterized by a number of shortcomings. These were obvious in the following areas:

- (1) efficiency of the policies concerned and decision-making capacity;
- (2) access to information, judicial control and democratic accountability.

As regards point 1, the Dutch Government specified the most important issues, namely:

- (a) misuse of the unanimity rule;
- (b) lack of practical objectives;
- (c) lack of guidance by the Presidency in preparing cooperation policy in the above-mentioned areas and limited role of the Commission;
- (d) slowness of the decision-making process.

As regards point 2, the Dutch Government emphasized the following points:

- (e) limited access by parliaments and citizens to administrative information;
- (f) no jurisdiction for the Court of Justice;
- (g) limited influence of parliaments on decision-making in the field of justice and home affairs.

In its report, the Dutch Government, after analyzing the present situation, proposes improvements to European cooperation in the fields of justice and home affairs.

First of all, it stresses the importance of the 1996 IGC as a means of remedying the above problems. It also lists the possible options for amending the TEU at the Conference. These options may be summarized as follows:

A. The two extremes

- (A.1) total communitization of cooperation in the fields of justice and home affairs;
- (A.2) total intergovernmentalization of cooperation in the fields of justice and home affairs.

B. Intermediate options

- (B.1) Clarification of the Treaty's objectives;
- (B.2) improvement of organization and multiannual work programmes;
- (B.3) strengthening of the Commission's right of initiative;
- (B.4) simplification of the decision-making process;
- (B.5) clarification of legal status in the matter of justice and home affairs;
- (B.6) clarification of the financing method;
- (B.7) greater involvement of the European Parliament and national parliaments;
- (B.8) strengthening of the role of the Court of Justice.

The Dutch Government also considered the possibility of introducing partial communitization, i.e. communitizing only certain areas of cooperation in the fields of justice and home affairs and the possibility of a *'multi-speed approach'* (see example of the Schengen Convention). On this point, the Dutch Government stated that:

'the limited results of cooperation in justice and home affairs is, to a certain extent, offset by the results of cooperation in the Schengen framework. However, Schengen has not remedied the inadequate access to information, judicial control and involvement of national parliaments at European level. The Dutch Government considers that it would not be appropriate to introduce separate Schengen measures for this purpose. The European Union must seek to take on board the Schengen provisions without allowing them to become watered down.'

Finally, the Dutch government draws conclusions which may be considered as a summary of the most important issues that will be on the agenda for the 1996 IGC. It is convinced that *'new political objectives and improved procedures can facilitate cooperation, but cannot force it'*. It believes that *'the progress that will be achieved at the Intergovernmental Conference will to a large extent depend on the positions that have emerged in the Member States'*.

As a corollary, the Dutch government adds a number of remarks which may be summarized as follows:

- (i) the very nature of cooperation in the fields of justice and home affairs calls for a political will to make adjustments on all sides;
- (ii) this means gradually becoming more acquainted with one another and developing contacts;

- (iii) it will in any case be necessary, even after the 1996 IGC, to carry out regular assessments and revision of the TEU.

In March 1996, in a communication entitled *From Madrid to Turin: Dutch priorities on the eve of the 1996 IGC*, the Dutch Government presented the outcome of the Reflection Group's work to the Dutch Parliament, at the same time stressing the main positions that the Netherlands intended to pursue in the negotiations.

On cooperation in the fields of justice and home affairs, the Netherlands considers it necessary to strengthen the roles of the Court of Justice, the Commission and the European Parliament, to communitize visa and asylum policies, to incorporate the arrangements deriving from the Schengen Convention into the TEU, and to make it generally easier to use the 'passerelle' provision between the third and first pillars, thus facilitating the potential transfer of some areas from the third pillar into the Community legislative system.

See also the Benelux countries' memorandum of 7 March 1996, under BELGIUM.

13. PORTUGAL

The first official submission of Portugal's view on the IGC came in a Ministry of Foreign Affairs document in March 1996.

On cooperation in the fields of justice and home affairs, Portugal proposes three separate categories of measures to make the current system more effective:

- * Firstly, matters relating to asylum and combating illegal immigration should be transferred to the Community pillar, and there should be an option to do likewise with the rules on crossing external borders, the conditions for allowing aliens to move freely in the Union, and those aspects of visa policy that have not yet been communitized.
- * Should full communitization prove impossible, the proposal is that Community procedures should be extended to cover such matters by introducing specific new instruments and new powers for the Community institutions by qualified or possibly ultra-qualified majority voting.
- * In other areas, particularly police and judicial cooperation and action to combat drug trafficking, Portugal proposes that existing mechanisms for intergovernmental cooperation should be significantly strengthened.

As regards institutional organization, the Portuguese Government proposes:

- * more frequent use of binding judicial instruments;
- * simplifying and reducing the number of levels involved in preparing the Council's work;
- * strengthening the role of the Commission and extending its right of initiative;

- * giving the Court of Justice wider jurisdiction.

Portugal also considers that the national parliaments should be encouraged to work more closely together and with the European Union institutions, maintaining flows of information and mechanisms for consultation.

14. UNITED KINGDOM

On 2 March 1995, the British Government submitted a memorandum on European defence issues at the 1996 IGC, i.e. essentially on issues relating to the second pillar. In this context, the only remark which also relates to the third pillar is that made by Mr Hurd on 12 January 1995 in his address to the French Institute for International Relations, in which he reaffirmed his Government's wish to maintain the present division of powers between the Community pillar and the second and third pillars of the TEU. Basically, the United Kingdom believes that intergovernmental cooperation can achieve the objectives set out in Title VI of the TEU, without any need for the involvement of the Community institutions.

On 12 March 1996, the British Government submitted a *white paper* on the IGC to the British Parliament. Entitled *An association of nations*, it set out, on the one hand, Britain's notion of the European Union (largely as a free trade area, a basis for consolidating democracy and prosperity throughout Europe, and an element in overcoming the damaging historic divisions of the continent) and, on the other, its conception of the IGC.

As regards the third pillar, the British Government favours leaving all issues related to combating terrorism, organized crime, drug trafficking and illegal immigration within this intergovernmental pillar. The principle of unanimity must therefore continue to apply in the decision-making process, as part of a single institutional system. Essentially, the British Government considers that the roles of the Commission, the European Parliament and the Court of Justice must remain strictly limited in this sphere.

At the same time, in Annex E to the white paper, the British Government sets out a series of proposals for more effective cooperation on third-pillar issues. One of the most important suggestions is to simplify the structure in which the work of the Council of Ministers is prepared.

In general, the British Government remains opposed to the transfer of certain matters from the third pillar to the Community pillar, and to any substantial change in the role of the Community institutions in this area.

15. SWEDEN

Although the Swedish Government has not yet issued an official document, it has already made known certain steps which it intends to take, in particular with regard to the role of the European Parliament which should, in its view, be strengthened to improve democratic accountability in areas coming under intergovernmental cooperation. It also believes that special consideration should be given to measures

to combat international fraud and all forms of discrimination, and in particular racism and xenophobia.

Sweden further detailed its current positions and outlined its objectives for the IGC in a written communication from the Swedish Government to the national parliament (*Riksdag*) on 30 November 1995. On the third pillar it states:

- * that it is prepared to join in the cooperative arrangements under the Schengen Agreement, provided that more efficient action is taken to tackle the drugs problem;
- * that it hopes, in the long term, to see the free movement of persons realized throughout all the Member States of the EU, not only those of the Schengen group;
- * that it is proposing a rationalization and strengthening of police and judicial cooperation (which must, of course, take place between Member States, with a greater functional role for the Community institutions if necessary);
- * that it favours the transfer of provisions on asylum and immigration to the Community sphere.

As regards the way in which measures are adopted, Sweden calls for a reduction in the present number of tiers in the deliberation and decision-making process and the abolition of either the steering groups or the coordinating committee.

On the role of the Community institutions, the Swedish Government is content to support giving the Commission the task of monitoring compliance with agreements that are made under the third pillar, and to urge the changes necessary to allow the Court of Justice to exercise control over and interpret conventions concluded by the Member States in the areas covered by the third pillar.

III. POSITIONS OF THE COMMUNITY INSTITUTIONS

1. EUROPEAN PARLIAMENT

The European Parliament outlined its position on amendments to be made to the Treaty on European Union at the Intergovernmental Conference in the resolution it adopted on 17 May 1995 on the functioning of the Treaty on European Union with a view to the 1996 Intergovernmental Conference (implementation and development of the Union).

A substantial proportion of the amendments to the TEU will need to be devoted to introducing **effective action** in the field of justice and home affairs. The changes which the European Parliament wishes to see in the fields of justice and home affairs may be summarized as follows:

- (1) these areas should no longer be dissociated from related policies coming under the scope of the EC Treaty;
- (2) decisions on asylum policy, the crossing of the Member States' external frontiers and checks on such crossing, immigration policy and policy on non-Community nationals, and action against drug abuse must be progressively brought within the Community domain;
- (3) Europol should steadily be given a more important role in combating serious international crime and should be given the operational power it needs for this purpose;
- (4) the European Parliament considers that there is still an urgent need for a more broadly-based, flexible approach as regards applying the 'passerelle' procedure provided for in Article K.9 of the TEU (extending it, in particular, to cover all the areas listed in Article K.9, including points 7 to 9, that are not covered at present);
- (5) in adopting acts in these areas, the Council should act by a qualified majority;
- (6) existing restrictions on the Commission's right of initiative and implementation should be removed;
- (7) the roles of the European Parliament, Court of Justice, Court of Auditors and European Parliament should be strengthened;
- (8) lastly, in view of the gradual integration of the third pillar, the Schengen agreements should be progressively integrated into Union policy.

The resolution of 17 May 1995 gives special attention to maintaining and strengthening the single institutional framework and, consequently, unifying the existing Treaties, partly by bringing foreign and security policy (Title V of the TEU) and cooperation in the fields of justice and home affairs (Title VI) within the Community system, but with specific features of the former 'pillars' being retained for certain items for a predetermined transitional period. The Court of Justice should play its role in exercising judicial control over acts in all areas of European Union activity, including all those which currently relate to the second and third pillars.

In a resolution of 14 December 1995 on the agenda for the 1996 Intergovernmental Conference with a view to the Madrid European Council, the European Parliament regrets *'that there is no consensus on the main reforms necessary in the Union'*, and that the Reflection Group's report *'has a number of major shortcomings and fails to give a full and clear answer to vital questions such as the abolition of the pillars'*. It then urges the European Council, among other things, to ensure real progress in the fields of justice and home affairs *'by bringing them within the Community sphere and by using Community procedures and institutions, in order to promote, in particular, a European asylum policy and to strengthen internal security in the European Union by combating crime in the Union and drug trafficking effectively'*.

The European Parliament also urges action to strengthen Community and national instruments for combating fraud and maladministration at European Union and Member State level.

On 13 March 1996, the European Parliament adopted a resolution on Parliament's opinion on the convening of the Intergovernmental Conference, in which it set out its key priorities for the future of Europe.

One of the most important priorities is the need for a more effective response to the concerns of the public over internal security.

The European Parliament believes that this must be achieved by:

- * giving a Community dimension to the external aspects of policy on justice and home affairs (visa, asylum and immigration policy, rules on crossing external frontiers), as well as measures to combat drug trafficking and to promote judicial cooperation in civil matters;
- * greater recourse to Community institutions and procedures in respect of police, naval and customs cooperation and cooperation between the courts on criminal matters.

In particular, in the section of the resolution outlining a strategy, an institutional dynamic and instruments in the service of the key priorities, the European Parliament specifies that subjects related to the following should be communitized:

- * asylum policy (Article K.1(1));
- * the rules governing the crossing of the external borders (Article K.1(2));
- * the rules governing immigration policy and policy towards third-country nationals (Article K.1(3));
- * action to combat drug trafficking (Article K.1(9)), together with the inclusion of an explicit reference in that article to the traffic in human beings, especially minors and women;
- * action to combat international fraud and organized crime (Article K.1(5));
- * judicial cooperation in civil matters (Article K.1(6)) where they are related to the exercise of the free movement of persons.

Other subjects included in Title VI of the TEU should be dealt with in a way that incorporates the following:

- * strengthening the powers of the Commission (right of initiative) and the European Parliament (codecision), in order to improve the level of democratic control;

- * recognition of the competence of the Court of Justice, particularly its jurisdiction over disputes concerning the interpretation of the text of conventions;
- * reinforced protection of human rights;
- * greater use of qualified-majority voting;
- * transparency (in particular, publication of Council proposals and acts in the Official Journal);
- * ending of the frequent use of legal instruments not provided for in the Treaty on European Union (resolutions, recommendations and conventions), so as to allow democratic control to be exercised.

The European Parliament also considers that *'a "passerelle" should be maintained for giving a Community dimension to these matters'* and that the conditions for application of Article K.9 of the Treaty should be made more flexible using qualified-majority voting in Council. Finally, the European Parliament believes that *'the commitment of democracies to combating terrorism should be strengthened'*. As part of this process, the Member States must undertake in particular to withdraw the reservations they have lodged in this connection in accordance with Article 13 of the European Convention on the Suppression of Terrorism.

In a resolution of 17 April 1996 on the outcome of the European Council meeting in Turin on 29 and 30 March 1996, while welcoming the priority given to the safeguarding of fundamental human rights in the European Union, the European Parliament considers that it is of prime importance for the IGC to ensure that significant progress is made in the areas of citizenship, justice and home affairs, it being imperative for the European Union to respond to the concerns of its citizens.

The European Parliament also considers that to avoid any risk of paralysis the question of including a *'reinforced cooperation clause'* in the TEU will have to be raised, to enable all Member States so wishing to advance further on the road to integration, subject to certain conditions.

Among the points made by Mr Hänsch, President of the European Parliament, in his speech to the European Council meeting in Florence on 21 June 1996 was an affirmation of support for the Italian presidency's position that cooperation must be particularly encouraged in the area of internal security. Mr Hänsch considered that if the fifteen Member States did not intend to give the Court of Justice the power to exercise control over the activities of Europol, it would be better for the decision to be taken by fourteen countries than to postpone the date when Europol comes into operation.

The President also said that if the European Union was to be allowed to function as such, the only way to make progress in the medium and long term was to amend the TEU.

2. THE COUNCIL

The last part of the Council's report on the functioning of the Treaty on European Union is devoted to implementation of Title VI. The Council notes, first of all, that the application of provisions relating to cooperation in the fields of justice and home affairs has been totally inadequate.

The plan of action approved by the European Council in Brussels in September 1993 has not been fully applied. Moreover, the new legislative instruments provided for in Title VI of the TEU have rarely been used. The Council has in fact generally used the traditional instruments of intergovernmental cooperation, namely declarations, recommendations and resolutions.

The Council also points out that the problems in implementing Title VI are also due to the absence of a clear definition of the scope of Community powers and the large number of structures currently employed. The TEU does not contain clear objectives or strict deadlines in the fields of justice and home affairs.

On the subject of decision-making procedures and structures, the Council noted that:

- (1) the possibility of using qualified-majority voting afforded by the Treaty has not been used;
- (2) the five-tier structure (i.e. Council, Coreper, K.4 Committee, directors' groups and working parties) has proved cumbersome and has slowed down the decision-making process;
- (3) in view of these difficulties, the function of the directors' groups and working parties assisting the K.4 committee would need to be reassessed;
- (4) account should also be taken of the provisions of Articles K.3(2) and K.4(2), which allow the Commission to play an important role in implementing Title VI.

3. THE COMMISSION

In its report on the functioning of the TEU, the European Commission noted that, as regards cooperation in the fields of justice and home affairs, *ineffectiveness was not due solely to the lack of coherence of the institutional framework but also to the unsuitability of existing instruments, compounded by extremely cumbersome decision-making procedures and a total lack of transparency.*

The Commission believes that the Intergovernmental Conference could offer an opportunity to carry out a radical review of the whole system. It points out that, to date, the Council has rarely used the new instruments provided for in Title VI of the TEU (it has not adopted a single joint position and has only adopted two joint actions and a convention on simplified extradition procedures for consenting persons), preferring to use traditional intergovernmental cooperation procedures, i.e. resolutions, recommendations and conclusions. The Commission points to two types of problem which are responsible for the unsatisfactory functioning of the third pillar:

problems relating to the legal instruments used and problems relating to the methods used.

The effectiveness of the legal instruments has been weakened by the following factors:

- (1) uncertainty as regards the legal nature of joint positions and actions;
- (2) problems relating to the frequently slow and complicated entry into force of conventions;
- (3) the need for unanimity in all areas covered by Title VI, which has in fact created a deadlock;
- (4) the lack of control over the implementation and interpretation of actions taken.

As regards problems relating to the methods used, a number of remarks can be made:

- (1) the initiative as regards joint actions, which lies with the Member States and, except in the case of judicial cooperation in criminal, customs and police matters, the Commission, has been used only once by a Member State other than the one holding the Presidency and twice by the Commission;
- (2) the transparency of initiatives and consultation of the European Parliament, as provided for in Title VI, are not sufficient to guarantee genuine and effective democratic accountability in respect of acts adopted by the Council in the fields of justice and home affairs;
- (3) working structures in these fields, which are divided into five levels instead of three as is usual in Community affairs, have proved unduly cumbersome and complex.

On 28 February 1996, the Commission submitted its opinion on reinforcing political union and preparing for enlargement. This document constitutes the Commission's official position on the IGC.

On issues in the third pillar, the Commission notes that although the TEU provides in principle for the free movement of persons in the territory of the Union, in practice substantial restrictions still remain.

On the one hand, the principle is implemented only partially throughout the Union, while on the other, some Member States have had to resort to an ad hoc convention, namely the Schengen Agreement, as a means of making progress in this area.

Because the exercise of freedom of movement also depends upon overcoming the complex associated problems, the Commission proposes to make good the shortcomings of the TEU as regards cooperation in the fields of justice and home affairs - particularly its inefficiency and the lack of democratic and judicial control - by including in the Treaty clear objectives and appropriate instruments and methods.

The Commission considers that the specific objectives should fall into four categories:

- * establishing common conditions in relation to third-country nationals entering and residing in the Union and to their status;
- * enabling the effective mutual recognition of rulings by national courts;
- * combating various types of crime and fraud;
- * encouraging effective cooperation between the administrations of Member States.

The Commission also proposes that the following instruments and methods should be adopted:

- * The present general rule of unanimity either creates deadlock in the Council or results in a minimal level of decision-making. The Commission considers that it should be replaced by qualified-majority voting as the general rule.
- * The European Parliament must have closer involvement, particularly on issues that may affect people's individual rights.
- * Provision should be made for the Commission's power of initiative to cover all the areas concerned.
- * Neither joint actions and positions, the legal effect of which is unclear, nor traditional international conventions, with the uncertainty and delay of their entry into force, are appropriate, and the Union must have more effective legal instruments in this sphere.
- * Decisions taken should be subject to the control of the Court of Justice, if only to ensure that legislation is uniformly interpreted.
- * The Council's present multi-level working structures, which make for inefficiency, must be simplified.

Finally, the Commission believes that the best way to meet these objectives is to transfer competences, other than those relating to judicial cooperation on criminal matters and police cooperation, from the area of cooperation on justice and home affairs to the legal framework of the Community. Logically, such a step would also entail including the substance of the Schengen Agreement in the TEU.

4. THE COURT OF JUSTICE

In its report on certain aspects of the application of the Treaty on European Union, the Court of Justice states, first of all, that the role and powers of judicial bodies should be safeguarded in order to maintain the essential features of the Community legal system.

With regard to cooperation in the fields of justice and home affairs, the Court of Justice points out that, by virtue of Article L of the TEU, Union activities in this area, for the most part, lie outside its jurisdiction. The attention of the Intergovernmental Conference should therefore be drawn to the legal problems which may, in the Court's view, arise in the foreseeable future.

The Court adds that, *clearly, the judicial protection of individuals affected by the Union's activities, especially by virtue of cooperation in the fields of justice and home affairs, should be guaranteed and organized in such a way as to ensure the consistent interpretation and implementation of Community law and of measures adopted in the context of this cooperation.*

It also believes that the limits of the Union's powers vis-à-vis the Member States should be defined, as should those of each Union institution. Finally, the Court believes that appropriate mechanisms will need to be set up to guarantee uniform application of decisions taken within the Union's legal framework.

Finally, the Court of Justice notes that the only convention adopted pursuant to Article K.3(2)(c) of the TEU, namely the Convention on a simplified extradition procedure between the Member States of the European Union, established by the Council act of 10 March 1995, does not provide for any jurisdiction of the Court in the matter.

5. THE COURT OF AUDITORS

The Court of Auditors considers that the 1996 Intergovernmental Conference must take account of its role in the institutional system set up by the Maastricht Treaty.

In its report to the Reflection Group on the functioning of the TEU, the Court of Auditors points out that, *in a system characterized by the division of legislative and executive functions between several institutions, the status of the Court of Auditors has evolved in line with changes in the institutional balance.*

In the Court of Auditors' view, priorities for the IGC are as follows:

- (a) clarifying certain powers, in particular the monitoring powers of the Court of Auditors, which logically means specifying the scope of the Court of Auditors' powers in areas not covered or only partially covered by the current provisions on its work;
- (b) improving the current system of internal control in the areas of Community management and protection of Community finances, especially with regard to budgetary implementation.

A significant part of the specific powers and tasks of the Court of Auditors concerns the monitoring of the second and third pillars of the TEU (common foreign and security policy and cooperation in the fields of justice and home affairs). The Court of Auditors' proposals may be summarized as follows:

- (1) it is proposed, first of all, that the Court of Auditors be mentioned in Article E of the TEU among the other European Union institutions;
- (2) given that the Court of Auditors is responsible for monitoring expenditure in the second and third pillars [administrative expenditure (Articles J.11(2), first subparagraph and K.8(2), first subparagraph) and operational expenditure (Articles J.11(2), second subparagraph, first indent, and K.8(2), second subparagraph, first indent)], which is borne by the budget of the European Communities, its role in these areas will need to be specified;
- (3) the Court of Auditors should also be enabled to improve its monitoring of expenditure borne by the Member States on the basis of a predetermined scale (e.g. the Europol budget);
- (4) lastly, powers of control could be conferred on the Court of Auditors (with due respect for the powers of national control bodies) where expenditure for projects developed under the second and third pillars continue to be directly borne by national budgets and was controlled by national control bodies working independently.

6. THE ECONOMIC AND SOCIAL COMMITTEE

The Economic and Social Committee submitted its opinion on the IGC on 22 November 1995.

Although it is not directly affected by all aspects of activity in the intergovernmental sphere, the Committee makes a number of proposals including an amendment to Article K.6 of the TEU, to add in the first paragraph after '*European Parliament*' the words '*and the Economic and Social Committee*', thus giving the Committee the right to be *consulted* under the established procedure for third-pillar matters.

The Economic and Social Committee also advocates a greater role for the European Parliament in those areas of policy that are subject to cooperation under Title VI of the TEU, even in areas outside the Community sphere, because most of the policies concerned have a significant impact on the public, European society and organizations.

In addition, the Economic and Social Committee asks to be kept *informed* so that, in its dealings with the Council and Commission, it can act on a firmer basis with maximum transparency.

7. THE REFLECTION GROUP REPORT ('Westendorp report')

On 5 December 1995, the Reflection Group set up (at Messina on 2 June 1995) to prepare for the IGC submitted its report.

Prominent among the many issues addressed in the report are proposals for amending the third pillar of the TEU. After analysing the provisions of Title VI of the TEU and the way it has functioned, the Reflection Group recognizes that cooperation in the

fields of justice and home affairs is recent and represents an advance on the situation that existed previously, but unanimously takes the view that the results achieved fall short of the challenges being faced.

A large majority of the group, while acknowledging the effects of lack of experience and the substantial intergovernmental aspect of the issues covered by Title VI, considers that neither these factors nor an alleged lack of political will can, in themselves, account for the lack of results in this area. The fault lies rather in the inadequacy of certain provisions under Title VI and the obviously ineffective way in which they have functioned, as noted in the reports of the Commission and the European Parliament on the operation of the Treaty. At the same time, some members of the group point to the political difficulties involved in surrendering national sovereignty in this area and suggest that the lack of progress is not necessarily due to the intergovernmental nature of the cooperation; they consider that many existing problems could be solved by improving the present complicated structures.

A substantial majority of members of the Reflection Group considers that three factors are responsible for the impasse:

- * a lack of clear objectives, with a timetable for meeting them;
- * the inadequacy of the legal instruments for the tasks to be carried out;
- * the lack of any real institutional mechanism for providing impetus.

In the view of a large majority of the group, the necessary steps are:

- * to analyse the objectives and the instruments provided for cooperation in the fields of justice and home affairs;
- * to take a more pragmatic approach;
- * some members believe that police and judicial cooperation in relation to both civil and criminal matters should be developed by means of closer intergovernmental cooperation;
- * to include a specific legal base in the Treaty for implementing actions to combat drug trafficking;
- * to include a harmonized provision in Member States' penal codes making fraud against the Community budget a crime that attracts similar penalties in the different countries.

This closer cooperation requires improved legal instruments (conventions are frequently unwieldy and in some cases could be replaced, or should be allowed to come into force as soon as they have been ratified by a majority of Member States), or a greater role for the institutions: generalizing the Commission's (shared) right of

initiative, consulting the European Parliament and providing the Court of Justice with jurisdiction.

Many members of the group who favour these changes agree that one area which should fall within the competence of the Community is the set of issues relating to the crossing of external borders: arrangements for aliens, immigration policy, the right of asylum (excluding citizens of the Union from a right of asylum) and joint rules for checks at external borders. Given that other aspects of the crossing of external borders, such as visa formats and a joint list of visas, are already dealt with in the framework of the first pillar, communitization would make the Union's foreign affairs activities in these areas more consistent - a precondition for efficiency.

Other members consider that the existing division into pillars is vital if intergovernmental management of these issues, which closely affect national sovereignty, is to be respected. Consequently, they believe that the best means of making Title VI work more effectively is to find practical ways of strengthening cooperation.

Finally, the Reflection Group favours enabling the national parliaments and Community institutions to develop closer relations in the fields of justice and home affairs.

It is suggested that COSAC or an ad hoc interparliamentary committee could facilitate exchanges of information between parliaments on this subject. The notion of a high consultative council comprising two representatives of the national parliaments has also been suggested as a particularly interesting one in the context.

IV. LATEST DEVELOPMENTS

'In view of the lessons which may be learned more than a year and a half after the entry into force of the Treaty on European Union and of the challenges and risks linked in particular to the prospect of a further enlargement, the European Council' (meeting in Cannes on 26 and 27 June 1995) 'considers that thoughts should now focus on a number of priorities to enable the Union to respond to its citizens' expectations'.

These priorities include providing 'a better response to modern demands as regards internal security, and the fields of justice and home affairs more generally'.

As regards Europol, the Cannes European Council considered the need to begin preparations for this joint European organization but did not reach a practical decision. The main problem still to be solved is the British objection to giving the Court of Justice jurisdiction to settle disputes relating to this Convention. On the subject of combating drugs, the European Council referred the proposals on adoption of joint actions in this field to the next summit (Spanish Presidency). However, on the initiative of Germany, the European Council decided to sign the Convention and to begin setting up the necessary structures. It was agreed that the question of the possible jurisdiction to be attributed to the Court of Justice of the European

Communities (to which the United Kingdom continues to object) would be solved after ratification of the Europol Convention by the national parliaments. In this connection, the Netherlands, one of the countries most strongly in favour of the Court of Justice's powers, stated that it would not ratify the Convention until a decision was taken on the role to be played by the EC Court.

The Luxembourg Prime Minister, Mr Juncker, was highly critical of the direction taken by discussions on Europol. Mr Klaus Hänsch, President of the European Parliament, was also critical of the British Government's attitude at the Cannes European Council meeting: *'by acting in this way, the European Council has failed to take account of the concerns and needs of the citizens of Europe who expect international crime to be combated effectively'*. He added that *the procedure adopted on Europol was a further example of the inefficiency of the third pillar. This showed that intergovernmental cooperation alone was an unsuitable means of dealing with the issues facing Europe.*

Priorities in the field of police cooperation necessarily include political and legal efforts to reduce migratory pressures, combating illegal immigration and more widespread use of readmission as an international legal instrument, cooperation in the field of border checks, more frequent exchanges of information between the administrative departments responsible for dealing with illegal immigration and the routes taken by immigrants, and the use of bilateral joint committees. It would also be appropriate, and in fact necessary, to introduce a coordinated approach to combating drug trafficking, including close police and customs cooperation in the following areas:

- exchanging information on drug trafficking;
- eliminating crops used for the production of drugs;
- providing customs services with information on techniques for targeting hazardous freight;
- coordinated, effective and efficient monitoring operations in respect of maritime traffic in the context of the relevant international conventions;
- strengthening judicial provisions to punish drug trafficking and ensure respect for international undertakings;
- cooperation and exchanges of information between relevant services to combat:
- misuse of chemical precursors of drugs;
- money laundering.

Other actions are essential at European level to prevent and combat terrorism and establish effective police and customs administrative cooperation in order to combat the various forms of crime in the Euro-Mediterranean area, including those relating to environmental protection and measures to combat environmental crime, the combating of the trade in counterfeit goods and the various forms of child abduction.

As regards asylum and immigration policies, mention should be made of two meetings of the CIREFI (Information, Reflection and Exchange Centre on Internal Frontiers) with experts from the countries of Central and Eastern Europe. The main topics on the agenda for the ministerial meeting which took place on 20 June 1995 were: forged documents, approximation of laws on freedom of movement, the questionnaire on procedures relating to visas issued in third countries, and readmission. It was also

decided to initiate discussions on the implementation of the Berlin Declaration on police and customs cooperation to combat organized crime and the establishment of a police academy in Budapest.

A significant proportion of the report of the presidency of the European Council on the work of the Intergovernmental Conference, dated 17 June 1996, relates to cooperation in the fields of justice and home affairs.

The report's observations on these areas start from the premise that the need to improve the effectiveness of the Union's action in the third pillar is broadly accepted. The presidency considers in outline terms the following elements of cooperation in the fields of justice and home affairs:

- * **Objectives and scope:** particular emphasis is placed on clarifying the objectives of cooperation in the fields of justice and home affairs (considering working methods and setting out multiannual programmes) and extending its scope (to include policies to combat crime, aligning rules on conflicts of laws, combating racism and xenophobia and tackling corruption on an international scale).
- * **Methods of action:**
 - * partial communitization;
 - * using certain Community mechanisms and methods;
 - * strengthening the forms of cooperation provided for in Title VI of the TEU.
- * **Decision-making process and instruments:**
 - * simplifying and reducing the number of levels of preparation for acts under Title VI (Article K.4);
 - * creating a new legal instrument (*joint measure*) which, like a Community directive, would be binding upon the Member States as to the result to be achieved while leaving to the national authorities the choice of form and methods;
 - * giving the national parliaments a direct role (either by strengthening COSAC or creating a *high parliamentary council*).
- * **Jurisdiction:**(the Court of Justice to have mandatory competence).
- * **International cooperation:**(linked to the European Union's legal capacity).
- * **Closer cooperation:**
 - * introducing an *enabling clause* (allowing closer cooperation between Member States along lines and for purposes to be defined at a later stage);
 - * including the Schengen arrangements in the institutional system of the TEU.

It was announced in the section of the conclusions of the European Council meeting in Florence (21-22 June 1996) dealing with cooperation in the fields of justice and home affairs that a solution had been reached on the outstanding area of contention in relation to the establishment of the Europol Convention, which allows the Court of Justice to make preliminary rulings on its interpretation.

Consequently, the Member States are invited to ratify the Convention and Protocol. In this context, the European Council also urged the Council to consider a similar solution to the question of what powers the Court of Justice should have to interpret the Convention for the protection of the Communities' financial interests and the Convention on the use of information technology in the field of customs (SID).

The European Council also stressed the urgent need to strengthen cooperation between the Member States to combat drug abuse and organized crime.

In a further observation on combating drug trafficking, the European Council stressed the importance of completing a study on harmonization of the Member States' legislation and the impact this would have in reducing drug use and trafficking. In particular, following the Franco-British initiative on the Caribbean, which was extended to Latin America, the Council called for the recommendations on these areas to be implemented, in cooperation, where necessary, with the Union's US and Canadian partners.

The European Council also underlined the need for closer cooperation with the countries of Eastern and Central Europe so that drug trafficking can be combated effectively.

Recognizing that outstanding problems in relation to the Convention on the crossing of external frontiers had not been settled, the European Council called for greater efforts to resolve these issues so that work on this project could be completed before the end of 1996.

As regards extradition between Member States, the European Council expressed its satisfaction with the substantial progress achieved towards the adoption of a convention to facilitate this procedure. Indeed, great importance is attached to the convention's role in combating organized crime, including terrorism.

Finally, the European Council reaffirmed the Union's determination to take the strongest possible stand against racism and xenophobia.

It announced that it had given approval in principle to the establishment of a European observatory. It has asked the Council to consider the legal and budgetary status of the future observatory and its links with the Council of Europe, and has instructed the consultative committee on racism and xenophobia to pursue its work until the observatory is established.

V. CONCLUSIONS AND ASSESSMENT

In view of the above considerations, the proposals made by the Community institutions and initial steps taken by the Member States, the following items are likely to be high on the agenda for cooperation in the fields of justice and home affairs at the 1996 IGC:

1. **Communitization of some of the areas provided for in Article K.1 of Title VI (in particular, asylum policy, rules governing the functioning of the external borders of the Member States, immigration policy, combating drug addiction, combating fraud on an international scale and judicial cooperation in civil matters);**
2. **adoption of the qualified-majority rule in the decision-making process;**
3. **defining the role of the European Parliament and the national parliaments in this area;**
4. **removing ambiguities concerning the legal nature of acts adopted in these areas and clearly defining their legal basis;**
5. **strengthening the role of the Court of Justice and Court of Auditors.**

As regards the interinstitutional balance, further integration within the framework of the Treaty on European Union must, clearly, lead to greater involvement of the European Parliament, as the institution representing the peoples of Europe, and of the Court of Justice, as the judicial body responsible for interpreting acts adopted in these areas and ensuring their legality and compliance with the Treaty.

As regards the decision-making process, the adoption of the qualified-majority rule instead of unanimity in respect of acts taken in areas liable to be communitized following their inclusion in the EC Treaty, and effective participation of the European Parliament must be seen as vital aspects of proposals to amend the third pillar.

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