also extends the *Vlassopoulou* recognition of qualifications[63] (and not just professional experience as now) to those falling under these directives.

Another case, *Aranitis*,[64] has recently given rise to a most significant judgment on mutual recognition.[65] Georgios Aranitis held a Greek diploma, "Ptichiouchos Geologikos", which is awarded after four years of university studies in geology. He had worked as a geologist in Greece for over a decade. He then moved to Berlin where he wished to carry on working as a geologist. The local employment office in Berlin classified him as an "unskilled assistant". He challenged this classification, relying on the general directive on mutual recognition of professional qualifications. The *Arbeitsamt* allowed him a literal translation of his Greek title, but refused to allow him to use the equivalent German qualification *Diplom-Geologe*.[66] The main distinction between the Greek and German qualification was the requirement in Germany of a dissertation.[67] The profession of geologist was not considered to be regulated in Germany and the German authorities thus considered that Aranitis was unable to rely on the mutual recognition directive. The Court agreed, observing that "whether or not a profession is regulated depends on the legal situation in the host member State and not on the conditions prevailing on the employment market in that member State".[68] But the Court went on to indicate[69] that Aranitis should, nevertheless, be able to rely on the *Vlassopoulou* jurisprudence which it extended to cover qualifications for unregulated occupations which could help holders gain employment. Thus, should an element of knowledge or ability not be attested to in Aranitis's Greek qualification the German authorities could refuse such recognition unless his practical or other academic experience compensated for the deficit. It seems that the general case law has been extended to require competent authorities to assess the equivalence of the academic qualifications and, if missing elements are found, then experience, knowledge and ability subsequently acquired should be taken into account. Confusion over qualifications could be averted by a tag indicating the qualification of origin.

JULIAN LONBAY*

II. JUSTICE AND HOME AFFAIRS

THE addition of "Justice and Home Affairs" (JHA) to the list of subjects covered in Current Developments reflects the growing significance of this area of

63. See Lonbay (1992) 41 I.C.L.Q. 212, 215.

64. Case C-164/94 *Georgios Aranitis* v. *Land Berlin* [1996] E.C.R. I-135.

65. The following analysis follows that used in J. Lonbay, "The Mutual Recognition of Professional Qualifications in the EC", in Hodgin *et al.*, *Professional Liability: Law and Insurance* (1996) Chap.1.

66. As Advocate General Léger stated, the Directive should not be used to "turn truth upside down by allowing persons who do not possess a certain diploma to make use of a diploma which they do not have": *supra* n.64, at para.45.

67. Report of the hearing: *Sitzungsberichi*, pp.2–3. I am grateful to Alex Bosch for translating this for me.

68. *Supra* n.64, at para.23.

69. *Idem*, paras.30–32.

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https://doi.org/10.1017/S0020589300061650 Published online by Cambridge University Press

European law and policy within the overall Treaty framework. In this introductory note, a brief account is given of the history of co-operation between EU member States in JHA matters, culminating in the significant changes announced in the Treaty of Amsterdam in October 1997. It is a historical record which is marked by discontinuity and institutional complexity, full justice to which would require detailed analysis.[1] Here we confine ourselves instead to a broad-brush approach, seeking to highlight the main themes which have characterised JHA co-operation. In future notes particular areas and issues of current interest will be examined more closely.

A. Before Maastricht

Prior to the conclusion of the Treaty on European Union (TEU) at Maastricht in 1992 there was no formal recognition of JHA within the EC Treaty framework. Areas such as policing, criminal justice and immigration tended to be viewed as far removed from the economic core of Community activity. Further, as home affairs were traditionally regarded as closely bound up with the security and sovereignty of the nation State, the possibility of encroachment by a supranational organisation such as the European Community was jealously guarded against.[2] Yet as economic integration encouraged closer social and cultural ties across the Community, the member States increasingly came to view modest co-operation in a number of JHA matters as mutually beneficial. Because of national sensibilities, however, such co-operation could only take place in the shadow of the Treaties. This informal activity may be seen as a series of discrete policy-making threads which, from the mid-1980s onwards, began to be woven together to form a coherent pattern.[3]

Two important early initiatives were provided by the Trevi and Schengen systems. From 1975 onwards, Trevi served as an intergovernmental forum for member States to develop common measures, first in respect of counter-terrorism and latterly concerning drugs, organised crime, police training and technology and a range of other policing matters.[4] Schengen was established with a wider remit but initially was restricted to a smaller group of States. The initial Schengen Agreement of 1985[5] paved the way for abolition of border controls between France, Germany and the Benelux countries. A more detailed Implementation Agreement of 1990[6] established a number of related law-enforcement measures includ-

1. See e.g. R. Bieber and J. Monar (Eds), *Justice and Home Affairs in the European Union* (1995); D. Cullen, J. Monar and P. Myers (Eds), *Co-operation in Justice and Home Affairs: An Evaluation of the Third Pillar in Practice* (1996); M. Anderson, M. den Boer, P. Cullen, W. C. Gilmore, C. D. Raab and N. Walker, *Policing The European Union: Theory, Law and Practice* (1995).

2. See N. Walker, "Policing the European Union: The Politics of Transition", in O. Marenin (Ed.), *Policing Change, Changing Police* (1996).

3. For a more detailed analysis, see J. Benyon, L. Turnbull, A. Willis, R. Woodward and A. Beck, *Police Co-operation in Europe: An Investigation* (1993).

4. *Idem*, pp.152–167.

5. A text in English is reproduced as an annex to H. Schermers *et al.* (eds), *Free Movement of Persons in Europe* (1995), pp.547–551.

6. *Idem*, pp.552–605.

https://doi.org/10.1017/S0020589300061650 Published online by Cambridge University Press

ing a computerised information system (Schengen Information System) and police co-operation. More broadly, it made provision for the development of common policies on asylum and illegal immigration.

Of the many other early developments in JHA co-operation, two stand out. First, there is immigration and the related matters of asylum and visa policy and practice. In the 1970s and 1980s there was a running dispute between the Commission and the member States over the competence of the Community to proceed by supranational means, in particular by means of directives and decisions, as opposed to the more informal, State-centred method of intergovernmental co-operation. On the whole, the latter view prevailed, a position reinforced by the establishment in 1986 of the Ad Hoc Group on Immigration.

Progress within the framework of the Community was also largely frustrated in the area of judicial co-operation in matters of criminal law. The work of the EC member States was consistently overshadowed by that of the larger regional organisation—the Council of Europe, which generated a substantial body of international criminal legislation in the post-war years.[7] A bold plan by Giscard D'Estaing in the late 1970s to develop a common "European Judicial Space" across the Community ultimately foundered on its own excessive ambition, and criminal law and procedure duly remained outside EC competence. One casualty of this failure was a more modest intergovernmental steering group—the European Political Co-operation (EPC) Judicial Co-operation Working Group (JCWG)—although it was eventually reconstituted in the mid-1980s.

Renewed impetus was given to the activities of a number of these agencies with the development in 1985 of the Commission's "1992" single market programme. If its deadline was to be honoured, co-ordination would be required over a wide range of matters, including the strand of single market policy most closely associated with JHA—the free movement of persons. As the vehicle of an integrationist inner core of member States which wished to accelerate progress in this area, the Schengen system was a direct result of the 1992 initiative. Within the Community itself, the Co-ordinators Group on the Free Movement of Persons was established in 1988 to oversee the measures necessary to implement the 1992 programme in this area.[8]

The Co-ordinators Group set out its manifesto in the "Palma Document",[9] which sought to justify the expansion of Community interest into new areas by arguing that the effective functioning of the Community post-1992 demanded that the member States adopt a number of compensatory measures in response to the anticipated loss of national security consequential upon the abolition of internal frontier controls. These should include new measures to tackle international terrorism, drug-trafficking and other illegal trade, improved police and judicial co-operation, and—in pursuit of a strengthened external frontier in lieu of internal controls—the development of a common visa and of uniform asylum policies.

7. See Anderson *et al.*, *op. cit. supra* n.1, at chap.7.

8. *Idem*, chap.4.

9. Reproduced as App.5 to the Report of the House of Lords Select Committee on the European Communities, "1992: Border Controls of People"; Session 1988–89, 22nd Report (H.L. Papers 90).

https://doi.org/10.1017/S0020589300061650 Published online by Cambridge University Press

As well as providing more ambitious terms of reference for existing bodies such as Trevi and the JCWG, the Palma Document and the political climate which surrounded it also stimulated the development of new forms of co-operation. These included, most notably, the Mutual Assistance Group 1992 (MAG 92), which addressed the implications of free movement for European customs agencies, and the European Committee to Combat Drugs (CELAD), established in 1990 to develop and co-ordinate preventive and repressive anti-drugs strategies among member States.

B. The Third Pillar

The Treaty on European Union (TEU) accorded formal recognition to this burgeoning area of activity by providing a separate title on co-operation in Justice and Home Affairs. This quickly became know as the third pillar, in recognition of the fact that the Treaty structure now encompassed not only the central (or first) pillar of European Community law, but also two flanking pillars dealing with Common Foreign and Security Policy (second pillar) and JHA respectively.

The third pillar sought to integrate the various areas of JHA co-operation and the various levels of personnel through an elaborate structure, spanning five levels. At the apex is the Justice and Home Affairs Council, which comprises ministers from the member States and which acts as the supreme policy-making body. Situated immediately below the JHA Council is COREPER, where permanent representatives from the member States negotiate and agree agendas on behalf of JHA ministers. Below these two familiar Community organs lies the K4 Committee, which is the direct institutional successor to the Co-ordinators Group. The K4 Committee has in turn generated a network of sub-groups which provide the fourth and fifth levels of the hierarchy. Three *comités directeurs* (CDs) report to K4. CD I is concerned with immigration and asylum, absorbing the functions of the pre-Maastricht Ad Hoc Group on Immigration. CD II is concerned with police and customs co-operation, replacing Trevi and extending the MAG initiative. CD III is concerned with judicial co-operation of a criminal and civil nature, taking over the work of the JCWG. Finally, each steering group has a number of sub-committees, or working groups, which have emerged gradually since the basic framework was put in place. These working groups presently number around 20, ranging from general flagship concerns, such as terrorism, police co-operation and external frontiers, to more detailed policy areas such as false travel documents and the international enforcement of driving disqualifications.[10]

These structural arrangements are a peculiar hybrid, reflecting continuing ambivalence about the appropriate degree of international control over internal security matters. They are not "pure intergovernmental co-operation",[11] since Community institutions are involved at a number of points; but neither are they part of EC law in the same way as the first pillar, since the Community continues to lack direct legislative competence in JHA matters and, more generally, the balance of influence between Community institutions and members States in the policy process continues to favour the latter.

10. For more detailed analysis see Anderson *et al.*, *op. cit. supra* n.1, at chap.2.
11. D. O'Keefe, "Recasting the Third Pillar" (1995) 32 C.M.L.R. 893, 902.

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In the absence of any direct legislative competence, the Council nevertheless has various types of decision-making authority under the third pillar, namely joint positions, joint actions and conventions.[12] While the development of such instruments is an important advance, doubts remain over their efficacy. Joint positions and joint actions mirror the position under the second pillar (Foreign and Security Policy), but are less obviously suited to a domain which by its nature requires "legislative action rather than external posture".[13] Further, they are subject to the requirement of Council unanimity, thereby ensuring that progress can be made only at the pace of the most reluctant member State. Third pillar conventions occupy the firmer legal ground of classical public international law, but they require not only unanimity within the Council but also ratification by all member States in accordance with their domestic constitutional requirements. Such a "double-lock" procedure represents a formidable obstacle. Finally, the *passarelle* provision, which allows a transfer of competence from third to first pillar in respect of the majority of JHA matters, offers opportunities for effective EU enactments, but it too is guarded by the double-lock.[14]

A similarly mixed picture emerges from an examination of the relevant institutional competences. The Commission "shall be fully associated with" the work of the third pillar. Yet in contrast to its role under the first pillar, the Commission does not enjoy exclusive power of initiative. Instead, it shares this right with the member States in most areas and, as regards judicial co-operation in criminal matters, customs co-operation and police co-operation, it has no right of initiative whatsoever.[15] The European Parliament is consulted on "principal aspects of [JHA] activities", yet, while it may also ask questions of the Council and make recommendations to it,[16] the Parliament lacks the significant role in the law-making process and in the monitoring of executive power which it has gradually acquired under the first pillar. As for the Court of Justice, it has no inherent jurisdiction under the third pillar, but it may be given powers under specific third pillar conventions to interpret their provisions and rule on disputes.[17] So far, however, the vesting of jurisdiction in the Court under particular conventions has proved deeply controversial and has led to delays in their ratification and implementation.[18]

While it marks a qualitative shift from the informality of the pre-Maastricht era, the third pillar has tended to attract two kinds of criticism. On the one hand, it has been criticised as ineffectual; as an unduly complex and cumbersome framework

12. Art.K.3(2) TEU.

13. J. Monar, "European Union—Justice and Home Affairs: A Balance Sheet and an Agenda for Reform", in G. Edwards and A. Pijpers (Eds), *The Politics of European Treaty Reform: The 1996 Intergovernmental Conference and Beyond* (1997), pp.326–339, at p.330.

14. Art.K.9 TEU.

15. Art.K.4(2) TEU.

16. Art.K.6 TEU.

17. Art.K.3(2) TEU.

18. The most controversial example to date has been the Europol Convention (1995) O.J. C316. After its conclusion in July 1995, ratification and implementation were delayed pending an agreement on the role of the ECJ. When the matter was finally resolved in the form of a Protocol to the European Convention in July 1996, it effectively took the form of an agreement to differ, with each high contracting party retaining the option to accept the jurisdiction of the ECJ to interpret the Convention by means of a declaration to that effect.

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whose early record suggests that it will be unable to deliver significant results. In particular, it is claimed that progress on the conclusion and ratification of conventions—the highest legal instrument under the third pillar—has been slow and uneven; and as regards other less formal decision-making mechanisms, although joint actions have become increasingly popular, joint positions have been almost entirely neglected, and there has been a tendency to fall back instead upon classical non-binding measures of intergovernmental action such as resolutions, statements and conclusions.[19] On the other hand, the third pillar has also been criticised as being unduly authoritarian in its policy orientation. On this view, it has demonstrated an excessive concern with repressive instruments of security and order.

Arguably, these two criticisms have a common root in the continuing preoccupation of member States with the retention of sovereignty in JHA matters. If the third pillar is cumbersome and slow, it is at least in part because the reluctance to move towards taking decisions by majority votes leads to progress within the third pillar being determined by the most cautious member State. Equally, if the third pillar is unduly committed to a narrow security perspective, it is because sovereignty concerns continue to militate against the full involvement of supranational institutions, like the Parliament and the Court of Justice, no matter how well placed they may be to check and monitor third pillar activities and safeguard individual freedoms.[20]

C. *"Maastricht II"—The Amsterdam Treaty*

These criticisms gained momentum during the period leading up to the 1996 Inter-Governmental Conference (IGC), with all the European institutions, including the normally sceptical Council, admitting that there was a case for greater involvement of EC institutions to improve effectiveness and accountability.[21] These concerns were crystallised in the Reflection Group report of December 1995 which served as the agenda for the IGC, and ultimately, in the Treaty of Amsterdam itself.

The Treaty, when ratified, will undoubtedly signal a new step towards the integration of JHA matters within the mainstream of European law. However, because of continuing disagreement between member States as to the speed and direction of JHA activity, the legislative strategy chosen to bring about this further integration is marked by complexity and qualification. Under the umbrella of a new chapter on the so-called "area of freedom, security and justice"[22] are to be found both a new EC Treaty Title on visas, asylum, immigration and other policies related to free movement of persons[23] and a revised and streamlined Title VI of the TEU covering police and customs co-operation and judicial co-operation in crimi-

19. See e.g. Monar, *op. cit. supra* n.13; B. Meyring, "Intergovernmentalism and Supranationality: Two Stereotypes for a Complex Reality" (1997) E.L.Rev. 221.

20. See e.g. D. Bigo, "The European Internal Security Field", in M. Anderson and M. den Boer (Eds), *Policing Across National Boundaries* (1994), pp.161–173; M. Spencer, *States of Injustice: A Guide to Human Rights and Civil Liberties in the European Union* (1995).

21. See Monar, *op. cit. supra* n.13.

22. The present note refers only briefly to the relevant provisions of the new Treaty. A more detailed analysis of these provisions in so far as they relate to the free movement of persons will be provided in a subsequent note by Julian Lombay.

23. New Title IIIa, Art.73i–q.

https://doi.org/10.1017/S0020589300061650 Published online by Cambridge University Press

nal matters. Accordingly, JHA matters no longer have a single Treaty source, but now straddle the first and third pillars. Superimposed upon this dual structure is the incorporation of the entire Schengen *acquis*.[24] This represents a significant political victory for the Schengen system and its expanding membership, which now includes all EU member States except the United Kingdom and Ireland, together with Norway and Iceland as associate members.

In turn, this new JHA system will allow for flexibility and a wide variety of involvement by member States. The United Kingdom and Ireland are allowed to maintain their existing border controls,[25] and need take no part in the adoption by the Council of measures pursuant to the new EC Title on free movement, asylum and immigration.[26] Equally, they may opt out of those existing or new parts of the Schengen *acquis* which fall within the third pillar.[27] Denmark is not required to adopt those parts of the Schengen *acquis* which are determined to be part of the new EC Title, although it has no such exemption in respect of those part of the Schengen *acquis* which fall within the third pillar.[28] There are also flexible arrangements for Iceland and Norway, which are to be involved in the deliberations of the JHA Council and be bound by its decisions, but only in matters, under either first or third pillar, which form part of the Schengen *acquis*.[29] Finally, in addition to these particular provisions, the new third pillar strengthens the facility in the Maastricht Treaty for any number of member States to "establish closer co-operation" on any matter.[30]

Arguably, the new arrangements go some way to increasing both the efficiency and the accountability of JHA co-operation. Matters which were previously located within the third pillar or within Schengen have been transferred to the first pillar, so that majority voting and parliamentary and judicial supervision associated with the latter will now be available. Even within the streamlined third pillar, there is some strengthening of the role of the EC institutions. The consultative role of the Parliament is clarified[31] in respect of conventions and two other new policy instruments under the draft Treaty—"framework decisions" made "for the purpose of approximation of the laws and regulations of the Member States" and other non-legislative "decisions";[32] the power of the Commission to initiate decision-taking is extended to all third pillar matters;[33] and for the first time general provision is made for the jurisdiction of the Court (a) to give preliminary rulings on the interpretation of conventions and on the validity and interpretation

24. Protocol Integrating the Schengen Acquis Into the Framework of the European Union.

25. Protocol on the Application of Certain Aspects of Article 7a of the Treaty Establishing the European Community to the United Kingdom and to Ireland.

26. Protocol on the Position of the United Kingdom and Ireland.

27. Protocol, *supra* n.24, Arts.4–5.

28. Protocol on the Position of Denmark.

29. Protocol, *supra* n.24, Art.6.

30. The further development of this provision under the Amsterdam Treaty, replacing the existing Art.K.7 with new Arts.12, 15 and 16 TEU, allows member States to make use of Community mechanisms, institutions and procedures in the furtherance of co-operation.

31. New Art.K.11 TEU.

32. Under the new Treaty, joint actions and joint positions are both abolished, to be replaced by framework decisions, decisions, and common positions; see new Art.K.6 TEU.

33. New Art.K.6 TEU.

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of measures implementing them, and also of the new decisions and framework decisions (albeit this jurisdiction does not apply in respect of any member State until it has made a declaration accepting it); (b) to review the legality of framework decisions and decisions in actions brought by a member State or the Commission; and (c) to rule on disputes between member States or between member States and the Commission on the application of the various policy instruments.[34]

Whatever progress there has been, however, has been at the cost of uniformity. In the words of one commentator, the new institutional landscape is "frighteningly indeterminate",[35] and this may cause problems which outweigh the benefits of partial transfer to the first pillar and strengthening of the residual third pillar. The benefits of a co-ordinated approach across member States and the various JHA policy sectors (which was one of the main arguments for the introduction of the third pillar at Maastricht) are endangered by the introduction of variable geometry within the Treaty framework. The membership of JHA Council and its supporting bureaucracy and operations will be constituted differently for different tasks with no guarantee that its various strategic agendas or policy initiatives will be mutually complementary. Even within particular policy fields, the right of individual member States to refuse the jurisdiction of the Court suggests that tensions and conflict over the terms of co-operation may emerge. Further, increased institutional complexity may make the already intricate system of JHA co-operation even less transparent and less easily understood by the European public, and so less amenable to genuine democratic involvement and accountability.

Of course, this is not to deny that some variable geometry was required at Amsterdam if member States ideologically divided over the acceptable limits of further integration were to avail themselves of mechanisms for deepening their commitment to joint action wherever the will existed. Neither should the possibility be dismissed that measures currently taken by the integrationist core will set a standard to which all member States will aspire in due course. In the shorter term, however, as regards the likelihood of its increasing co-operative efficiency and democratic responsiveness in JHA matters, "one step forward and two steps backward" would appear to be the verdict on the new Treaty.

NEIL WALKER*

34. New Art.K.7 TEU.

35. Professor Dierdre Curtin, in a lecture to the Annual Congress of the Academy on European Law in Trier, 20 June 1997; quoted in *Statewatch*, Vol.7, No.3 (May–June, 1997), p.18.

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