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EDITORIAL COMMENTS

The Treaty of Amsterdam: Neither a bang nor a whimper

The Treaty that emerged from the European Council of Amsterdam is likely to have as few admirers as its predecessor of Maastricht. This will not be the fault of the technicians who have shown their customary talent for bridging seemingly unbridgeable political differences, or at all events papering them over. The leaders of the European Union were simply not ready to take enough of the hard decisions that will be necessary before the impending enlargement. We can only hope they make a better showing as salesmen of the new text to their parliaments and electorates, than they did during the ratification process of the Maastricht Treaty – another technical triumph, though a near political disaster. It is a text which does indeed have some worrying features but still quite a lot to recommend it.

The "pillared" structure erected by Maastricht has been preserved, but with a significant shift of matters relating to the treatment of third country nationals from Title VI of the TEU ("the third pillar") to a new EC Treaty Title on the free movement of persons, asylum and immigration. That Title will establish a legal basis for legislation aimed at ensuring, within five years, the complete abolition of controls on persons, whatever their nationality, when crossing the Union's internal frontiers. In addition, legal bases will be provided for the "flanking" measures needed to make a reality of internal free movement – on things such as external border controls, asylum and immigration. Judicial cooperation in civil matters will also pass into the Community sphere, whereas police cooperation and judicial cooperation in criminal matters remain under Title VI, though their scope is to be notably enhanced.

Those provisions, aimed at creating "an area of freedom, security and justice", have as their corollary the integration of the so-called "Schengen *acquis*" into the framework of the European Union.[1] The Protocol on Schengen is a clever – perhaps too clever – piece of drafting, over which many litres of academic ink are likely to be spilt. However, the basic idea is a simple one. The provisions or decisions which constitute the *acquis* are to be consigned, by the Council acting unanimously, to the legal bases, found either in the EC Treaty or in Title VI of the TEU, which are appropriate to their subject-matter. A Declaration to the Final Act will call for the necessary preparatory work to be done in good time to allow the adoption of the requisite Council measures on the date of entry into force of the Amsterdam Treaty; though, as a fail-safe, it is provided that, in the absence of such measures, the Schengen provisions and decisions are to be regarded, in their entirety, as acts based on Title VI.

At this point, the *leitmotif* that sounds persistently throughout the draft Treaty – flexibility or, as we must learn to call it, "closer cooperation" – can no longer be ignored. It was Maastricht that made respectable what was then lumpishly, but less tendentiously, known as "variable geometry", the idea that all of the Member States need not be committed, even in principle, sooner or later to participate fully in all Union activities: the notorious example of this technique, soon to be consigned to history, was the Social Protocol; more interesting and lasting examples are the derogations from EMU and the arrangements under Article J.4 of the TEU on decisions having defence implications. The novelty of Amsterdam-style flexibility lies in the insertion into the Common Provisions of the TEU of a *general* flexibility clause, complemented by similar clauses in the EC Treaty and in Title VI. These are enabling provisions available, under specified conditions, to authorize closer cooperation between certain Member States, in fields which

1. The Schengen *acquis* is defined in an Annex as comprising: the Schengen Agreement itself, of 1985; the implementing Convention of 1990; the various Accession Protocols and Agreements; and decisions and declarations adopted by the Executive Committee, as well as acts adopted by the organs on which the Committee has conferred decision-making powers.

need not have been identified in advance at the level of the Treaties themselves.

The mechanism is, accordingly, one of "secondary flexibility", allowing new fields of activity to be opened up, through differentiated arrangements established under internal legislation. A first question that arises is whether such a mechanism is compatible with the principle of the attribution of powers, now enshrined in Article 3B of the EC Treaty. The intention is, apparently, that it should be, since one of the conditions laid down by the new Article 5A EC is that any proposed cooperation "remains within the limits of the powers conferred upon the Community by this Treaty".[2] In other words, an existing legal basis in the Treaty will have to be found for closer cooperation proposals. But could the mechanism be used to modify the procedure provided for by the chosen legal basis: for instance, to create for the participating Member States the possibility of harmonizing indirect taxation by qualified majority decision? Presumably not, since the attribution principle has traditionally been regarded as having both substantive and procedural aspects. All that may be reassuring, but it leaves room for wondering just how useful, in practice, the new mechanism is likely to be.

A thoroughly unreassuring feature of closer cooperation, however, is the rule in Article 5A(2) that, if a member of the Council declares that, for important and stated reasons of national policy, it intends to oppose the granting of an authorization by qualified majority, a vote shall not be taken; in which case, the Council may, by a qualified majority, request that the matter be referred to the European Council for decisions by unanimity. Predictions of the demise of the Luxembourg Compromise were thus distinctly premature: it has been given a new lease of life, no longer in the *demi-monde* of political deals but as part of the legal machinery of the EC Treaty. True, the goodwill costs of invoking the rule will be high, and it will seldom, perhaps never, be resorted to: the worry is that, once legally baptized, the Luxembourg Compromise may start popping up in other places. Indeed, its reception into the EC Treaty may have been facilitated by the acceptance, at an earlier stage of the IGC, of a similar rule in the context of the common foreign

2. See Art. 5A(1)(d).

and security policy (as to which, more below). It would have been less subversive of the Community order to have stuck to the unanimity rule.

Returning to Schengen, one of the clevernesses of the Amsterdam text is to treat the *acquis* as a particular case of closer cooperation. That was necessary, because Ireland and the United Kingdom have not acceded to the Schengen Agreement and have, moreover, negotiated an opt-out from the new free movement Title of the EC Treaty. A rather alarming impression of the far-reaching implications of flexibility can be gathered from Article 2 of the opting-out Protocol.[3] According to that Article, Ireland and the United Kingdom will be immune not only from the provisions of the new Treaty Title but also from measures adopted, or the provisions of international agreements concluded, pursuant to that Title and from decisions of the Court of Justice interpreting any such provision or measure. What is more, "no such provision measure or decision shall in any way affect the *acquis communautaire* nor form part of Community law as they apply to the United Kingdom or Ireland". Maintaining the unity of the constitutional order under such conditions will be an uphill task.

Truly bizarre are the specific arrangements applicable to Denmark.[4] Though a party to the Schengen Agreement, that country will enjoy an opt-out from the free movement Title of the EC Treaty; and it will also stand aside from the incorporation of the Schengen *acquis*, so far as elements of the latter are determined to have legal bases in that Title. If, pursuant to Article 5 of the relevant Protocol, Denmark decides to apply in its national law a Council measure building on the Schengen *acquis*, its decision to do so will generate an obligation of *international* law, not of Community law. This gives a new twist to flexibility: Denmark will be a participating Member State in the field covered by Schengen, and yet the rules by which it is bound will have a different legal character from those binding the other Member States. There is no objective justification for this, as there is in terms of geography for the British/Irish opt-out.

3. Currently designated "Protocol Y".
4. See Protocol Z.

It would be wrong, though, to go on too long about possible threats the Amsterdam Treaty may pose to the constitutional order of the polity built up over the past 40 years. In fact, there is much in the Treaty that readers of this Review should feel able to applaud.

First and foremost, perhaps, is the stronger emphasis given to the fundamental values of the Union and the establishment of new machinery to ensure that they are respected. The procedure for the suspension of a Member State's rights, in the face of serious and persistent breaches of the principles spelt out in the new Article F(1), may never, in practice, be used; but it is nevertheless timely, with countries pressing for membership of the Union, where democracy and the rule of law are still a recent and tender growth. It is good news, too, that the Council will have power under the new Article 6A of the EC Treaty to legislate against a much wider range of discrimination; and that equal treatment between men and women will receive an explicit mention in both Article 2 and Article 3.

Surely, also, the new Article K.7 must count as a gain. The Court of Justice is to have jurisdiction to give preliminary rulings on law-making acts adopted under Title VI of the TEU – though admittedly only if the Member State of the referring court has made a declaration accepting such jurisdiction. Regrettably, the Court's jurisdiction is to be excluded, here as well as under Article H of the free movement Title of the EC Treaty, in respect of measures or decisions relating to the maintenance of law and order and the safeguarding of internal security; but the interpretation of that restrictive provision will be a matter for the Court itself.

As for the decision-making procedures of the institutions, significant progress was made towards simplifying and rationalizing the legislative process. Except in the domain of EMU, which was untouchable, the cooperation procedure is to disappear; and more streamlined co-decision will provide the standard way of enacting most measures of a genuinely legislative nature. However, it is indeed a pity that the Heads of State and Government ran out of steam over the issue of reweighting the qualified majority. The changes in CFSP procedures are broadly welcome, too. It was pie in the sky to suppose that qualified majority voting would become the rule in an area of such acute

political sensitivity. The constructive abstention mechanism is a good – because realistic – compromise solution; and, in fact, there should be considerable scope for majority decisions, on matters covered by a common strategy or when a joint action or common position is being implemented – a shame, though, that the Luxembourg Compromise was allowed to creep into the new Article J.13.

So all is not doom and gloom. Except perhaps for the negotiators, who will have to reassemble all too soon to complete their unfinished business.