Note concerning the future structure of work in the field of JHA (Brussels, 25 June 1998)

Caption: In a note addressed to the K.4 Committee on 24 June 1998, the incoming Austrian Presidency of the Council of the European Union considers the implications for the working structures of the Council of bringing some areas in the field of justice and home affairs (JHA) within the Community system resulting from the entry into force of the Treaty of Amsterdam.

Source: Note from incoming Presidency to K.4 Committee, Future structure of work in the field of justice and home affairs following entry into force of the Treaty of Amsterdam. 9836/98. Brussels: Council of the European Union, 24.06.1998. 15 p.

URL:

http://www.cvce.eu/obj/note_concerning_the_future_structure_of_work_in_the_field_of_jha_brussels_25_june_1998-en-343c67f1-40c8-4a77-9eac-83df6430b6b1.html

Publication date: 24/10/2012

Note from incoming Presidency to K.4 Committee

Subject: Future structure of work in the field of justice and home affairs following entry into force of the Treaty of Amsterdam

The Treaty of Amsterdam signed on 2 October 1997 is currently being ratified by the individual Member States. The Treaty is expected to enter into force in the first half of 1999. It is therefore urgent to deal thoroughly with questions concerning preparation for this new legal situation.

With the entry into force of the Treaty of Amsterdam, part of the field of justice and home affairs will be transferred as Title IV to the first pillar. The repercussions of this Communitarisation are far-reaching. For the fields of external border controls, visa, asylum and immigration policies and judicial cooperation in civil matters, Directives and Regulations will apply instead of Agreements, scrutiny will be exercised by the Court of Justice of the European Communities and the Commission will have an exclusive right of initiative after a transitional period. Five years after entry into force of the Treaty of Amsterdam, the Council will be able to decide unanimously on the transition from unanimity to decision-making by a qualified majority.

The Communitarisation of part of the field of justice and home affairs also alters the framework for the work of numerous Council working parties. Some Council working parties will be transferred from the third pillar to the first pillar and others will in future have to apply horizontally both the law of the Treaty establishing the European Community and the law of the Treaty on European Union.

This division of the field of justice and home affairs has procedural, legal and possibly also institutional consequences. The principles set out in this document should serve as a basis for discussion at the meeting of the K.4 Committee on 15 and 16 July 1998.

I. Impact of Communitarisation on the activities of the Council, K.4 and Coreper:

The transfer of the fields of visa, asylum and immigration policies and judicial cooperation in civil matters to Community law has no effect on the competence of the Justice and Home Affairs Council. This decision was confirmed inter alia at Mondorf on 9 and 10 October 1997 by the Ministers for Justice and Home Affairs who took the view that the Treaty did not require that responsibility for these matters be divided amongst other Ministers as well. Such a division of fields of competence would also entail the danger of conflicting results; owing to its knowledge of the subject and experience, the JHA Council remains the competent decision-making body in this context after the partial Communitarisation of the field of justice and home affairs.

For reasons of competence, this document will not deal in greater detail with possible future developments within the Council or Coreper but will limit its presentation to the K.4 Committee and working parties. Questions such as the possibility of holding separate Council meetings of Ministers for Justice and Ministers for the Interior or competence in those areas of the internal market which are the responsibility of the Justice and Interior Ministers in the Member States must be resolved at the political level.

The question arises, however, of which bodies should coordinate preparatory work for the Justice and Home Affairs Council in the sphere of the two pillars. There is a need for cross-pillar coordination at the level of officials. At present this is carried out by Coreper and this will also be the case after entry into force of the Treaty of Amsterdam. This does not however solve all the coordination problems:

The third pillar (Article 36 of the Treaty on European Union (TEU)) provides explicitly for a Coordinating Committee consisting of senior officials. The question arises of the extent to which this Committee can simultaneously be a steering and coordinating body for initiatives and proposals for Communitarised fields when it is not obliged to be active in that field. If it cannot, the alternative is to create a new coordination body or to do without coordination altogether.

In theory there are a number of possible solutions to this problem, as set out below. However, very

differentiated assessments of their suitability and feasibility can be made from the outset.

1st option:

Coreper Part II takes over cross-pillar coordination within the framework of its competence.

2nd option:

Creation of Coreper Part III as a new steering committee for all fields of justice and home affairs via the General Affairs Council.

3rd option:

The Article 36 Committee is mandated by Coreper or the Council to coordinate also those fields under the first pillar which are concerned with visa, asylum and immigration policies and civil law matters.

4th option:

Creation alongside the Article 36 TEU Committee of a steering committee only for the above fields under the first pillar. Establishment and definition of the terms of reference are carried out by Coreper.

If the arguments for and against these options are weighed, options 2 and 4 meet with the most serious objections: the second option would fragment the decision-making process during the immediate preparations for the Council and distance it from the subject matter; the fourth option entails a loss of coordination. If one assumes that the field of justice and home affairs requires overall coordination, an initial judgment favours option 3.

II. Impact of Communitarisation on the structure of Council working parties:

The table in Annex A gives an overview of the existing Council working parties showing the pillars under which they will be classified following the entry into force of the Treaty of Amsterdam in the field of justice and home affairs.

III. Impact on the decision-making process and decision-making of the Protocol on the position of the United Kingdom and Ireland, the Protocol on the position of Denmark and the Protocol integrating the Schengen acquis into the framework of the European Union:

The number and membership of the bodies empowered to take decisions also changes following entry into force of the Treaty of Amsterdam. The admissibility of participation by the United Kingdom, Ireland and Denmark in dealing with documents and in decision-making – as well as the role of Norway and Iceland – will be determined by various factors:

The United Kingdom and Ireland may participate in discussions on proposals and initiatives to build upon the Schengen acquis and vote, provided that they notify the President of the Council in writing within a reasonable period that they wish to take part (Article 5 of the Schengen Protocol). Denmark's participation depends on whether a proposal in the context of the first or third pillar is involved. Although Denmark will cooperate and participate in decision-making in the area covered by the third pillar with full rights, it will not take part in decision-making on initiatives in the field of Title IV, in accordance with Article 1 of the Protocol on the position of Denmark (with the exception of the visa list and visa format).

Where the United Kingdom or Ireland have not given notification of their wish to take part in an initiative,

those countries have observer status without the right of veto. The same applies to Denmark in the field of Title IV of the TEC. Denmark is moreover entitled to decide within a period of 6 months after a decision has been taken by the Council, whether it will implement that decision in its national law. This will create an obligation under international law between Denmark and the other Member States referred to in Article 1 of the Schengen Protocol as well as Ireland or the United Kingdom if appropriate (Article 5 of the Protocol on the position of Denmark).

The ways and means for Norway and Iceland to participate in the further development of the Schengen acquis is the subject of discussions within the Council Working Party on Schengen/Iceland – Norway. In this context too, the most varied options between merely continuing current Schengen practice and a very different new model are conceivable.

The same principles apply to proposals and initiatives which are not based on the Schengen acquis, with the following exceptions:

In the field of the third pillar, the existing post-Maastricht legal situation does not change for Denmark, Ireland and the United Kingdom following the entry into force of the Treaty of Amsterdam.

– Pursuant to Article 3 of the Protocol on the position of the United Kingdom and Ireland, the latter are entitled to give notification within three months of the presentation of a proposal in the sector covered by Title IV, of their wish to take part in its adoption and application.

– Denmark has no corresponding right in the field of Title IV pursuant to Article 5 of the Protocol on the position of Denmark.

– Any participation by Norway and Iceland is ruled out.

The following options therefore exist, as shown in the table.

Options

At this stage, attention is merely drawn to the possibility of increased cooperation in accordance with Article 40 of the TEU or Article 11 of the TEC – in each case in conjunction with Articles 43 to 45 of the TEU. As these powers of flexibility are to be used as a last resort and will therefore be employed immediately on entry into force of the Treaty of Amsterdam, questions connected with those provisions do not require any clarification at the moment.

It is evident that the group of national representatives will be differently instituted according to the subject of the negotiations and the autonomous decisions of individual countries. Because of the existing system, these differences do not however apply to institutions (one Council working party is always composed of 15 members while another is always composed of 12 members – or to the respective subjects – the Visa Working Party takes one form and the External Frontiers Working Party another form) but to the respective procedure in individual cases.

The conclusion can be drawn from this finding that it will in future not be a question of creating specific institutions for the fields of competence of the first pillar, third pillar, Schengen, and the field in which Denmark, Ireland and the United Kingdom have reservations. Such an approach would lead to institutional proliferation and to completely confusing decision-making structures. It is rather a question of creating an organisational structure which is as simple as possible, in which the same institution applies different procedures for dealing with different projects, depending on the sphere of competence and the option decided on. In future it will therefore be necessary to consider the various options when drawing up the agenda and to structure the agenda accordingly.

IV. Implications for the structure of Council working parties, particularly in the light of Schengen integration:

As shown in point I, the Justice and Home Affairs Council will have to take cross-pillar action in future. It will therefore have to divide its meetings into several parts, to which different conditions of participation and decision-making requirements will apply.

The same applies to Coreper and could also apply to an Article 36 Committee or to another body to be set up, to which coordinating tasks in the field of the first pillar would be transferred and/or which would retain the tasks of the Schengen Central Group.

The Council working parties could proceed in the same way. Another problem must be solved in this connection:

The future structure of Council working parties will also be marked by the further development of the Schengen acquis. The Protocol integrating the Schengen acquis into the framework of the European Union enables the Schengen Contracting Parties to establish closer cooperation within the institutional framework of the European Union. All proposals and initiatives on the basis of the Schengen acquis are subject to the relevant provisions of the Treaties and should be discussed in the Council working parties (or possibly also in other EU bodies). This means that the Schengen working parties as such will be disbanded at the time of the entry into force of the Treaty of Amsterdam but their tasks will be transferred to existing or future Council working parties.

Annex B therefore contains a first draft of a comparison between Schengen working groups and Council working parties. The table contains four columns. Column A lists all Schengen working groups, subgroups and ad hoc working groups. Column B contains all the existing EU Council bodies. Column C contains proposals for new groups to be established. Column D describes the pillar under which a Council working party falls.

The future spheres of competence of the EU Council working parties should be established before the entry into force of the Treaty of Amsterdam to avoid serious, detrimental jurisdictional disputes. In principle, this should take place by merging the Schengen working parties with the existing Council working parties wherever possible. For example, the Council Visa Working Party could continue the work of Schengen Working Group II on Movement of Persons, Subgroup on Visas. This approach recommends itself also in the case of allocations of other tasks with a similar content (for instance the K.4 Committee and the Central Group). In cases in which no suitable Council working party counterpart of a Schengen body exists, it will be necessary to suggest to Coreper that a new Council working party be set up.

V. The Presidency recommends the following further action:

1. suggest which of the options listed in Point I should be adopted;

2. recognise that it is permissible to apply different procedural mechanisms in a Council working party and to clarify the operational consequences of this;

3. request Coreper to mandate the Council Working Party on the Schengen Acquis to examine how Schengen working parties relate to Council working parties and make suggestions for setting up new Council working parties if appropriate;

4. request Coreper to mandate the K.4 Committee to draw up proposals for structural changes outside the Schengen sphere, in particular also for the aspect of judicial cooperation in civil matters;

5. further consider the extent to which tasks should be allocated to other Council working parties for the period after the entry into force of the Treaty of Amsterdam, for example the Evaluation Group in the field of the third pillar or the Council Working Party on Iceland – Norway.

Annexes

Annex A
Areas of activity of Council bodies in the field of justice and home affairs following entry into force of the Treaty of Amsterdam: (1)

EU Council bodies	1st pillar		3rd pillar	
JHA	X	X		
K.4		X		
Multidisciplinary Group			X	
Horizontal Drugs Group		X	X	
Police Cooperation		X		
Europol		X		
Terrorism		X		
False Documents		X	X	
Migration		X		
Expulsion		X		
Visa	X			
Asylum		X		
CIREA		X		
CIREFI		X		
EXTERNAL FRONTIERS		X		
EURODAC		X		
Civil matters (currently ROME II)			X	
Criminal/Community law			X	
Mutual Assistance in Criminal Matters				X
Customs cooperation		X		

[…]

([1]) This list should be supplemented in accordance with the decision on the options in Point I.