# SCHENGEN

1. Schengen is a village at the Luxembourg tripoint with France and Germany and became known as the place where a partnership (Schengen Agreement) was closed between on the one hand the Benelux countries and on the other hand France and Germany. Even though meanwhile the Schengen *acquis* has been integrated into the European Union, its origin and the historical development are discussed separately to emphasise the importance of Schengen as a cooperation structure.

## 1 Origin and historical development

### 1.1 Link with existing cooperation structures

2. Not only Belgium, the Netherlands and Luxembourg had a cooperation structure. Besides the Benelux cooperation, there was also a cooperation structure between France and Germany which existed of the lifting of the internal border controls for persons at the French-German border. The border crossing between France and Germany had been blocked repeatedly by lorry drivers displeased about the time-consuming border controls. As a result thereof the Saarbrucken Agreement was signed on 13 July 1984 with a view to gradually abolishing these border controls. As a result, there were two co-existing cooperation structures that aimed at lifting border controls.

3. Following from that co-existence, France, Germany and the Benelux countries decided to sign the Schengen Agreement on 14 June 1985, in which they agreed to gradual abolishment of the internal border controls for persons at all their common borders. In doing so, an area was created between the five countries in which there were no internal borders. To implement the agreement, the Schengen Implementation Convention was signed on 19 June 1990.

### 1.2 Aims: lifting internal border controls for persons

#### 1.2.1 Lifting in practice

4. The Schengen Implementation Convention (SIC) established a free movement of persons without controls at the internal borders whilst reinforcing the control at the external borders of the Schengen states. To implement the lifting of internal borders a distinction needed to be made between on the one hand *"intra-Schengen movement"* (i.e. movement within the Schengen-area) for which in principal no border controls for persons existed anymore and on the other hand *"Schengen external border movement"* (i.e. movement in and out the Schengen-area) for which control controls were reinforced. At airports from then on a distinction is made between *"intra-Schengen travellers"* which are not subject to controls and *"other travellers"* which are subject to controls.

### 1.2.2 Flanking measures

5. To support the policy which regulated the entry of persons in to the Schengen area, several mechanisms were created.

*Carrier liability*

6. Firstly a system of carrier's liability was introduced. Anyone bringing third country nationals into the Schengen area is liable to pay for the costs of repatriation of these persons should it turn out that the third country nationals are not in the possession of the required travel and residence documents. This mechanism of carrier's liability has been picked up at the level of the European Union, where it was further developed and complemented with a fining system.

*Obligation to register*

7. Secondly an obligation to register was created for providers of accommodation. Anyone providing accommodation has to register the name, citizenship and ID number of all guests. These registration cards must be available to the competent authorities to support them in their duties to prevent danger, conduct preliminary judicial investigation, or clarify the fate of missing persons or victims of accidents.

*Handling asylum applications*

8. Thirdly, the Schengen Implementation Convention elaborated on a mechanism to determine which state is competent to deal with an asylum application submitted in any of the Schengen states. As a rule the so-called country of first entry is responsible to deal with the asylum application. Later, upon the entry into force of the so-called Dublin Convention on Asylum Seekers, agreed to on 15 June 1990 between the EC Member States in the context of European Political Cooperation (EPC (*infra*), this part of the Convention was replaced by the provisions of the said Convention.

*Information exchange via VIS*

9. Fourthly, the information exchange regarding visa applications had to be improved. Given the possibility for citizens to move freely within the Schengen area, it was important to have a common understanding with respect to the criteria to either or not allow non-Schengen-nationals into the Schengen area, i.e. not only common norms for the issuing of Schengen visas, but also an uniform visa for foreigners (that is third country nationals or non-EC nationals, now non-EU nationals) who remain in the Schengen area for less than three months. Except for the common norms themselves, the information exchange concerning the application of these norms is also important.

10. To facilitate information exchange the Visa Information System (VIS) was developed. Through VIS Schengen countries could exchange visa information and check if someone presenting himself at the external border of the Schengen area is in the possession of a valid

visa to enter the area. Moreover, this system also facilitates the issuing of visas and makes the handling of asylum applications easier.

*Operational police and judicial cooperation*

11. Fifthly, the SIC prioritised a bettered (operational) cooperation between police and judicial authorities to compensate the lifting of internal borders and formulate an answer to the possibility for criminals to actively abuse their right to move freely in the Schengen area. To support the possibility for police authorities to effectively tackle cross-border crime, cross-border observation and pursuit was regulated and provision with respect to the use of firearms and ammunition were introduced.

*Information exchange via SIS*

12. Sixthly, information exchange was improved through the introduction of the so-called Schengen Information System (SIS), looking to allow competent authorities, predominantly in light of their tasks to monitor the Schengen external border (land, sea and air border), to issue alerts in their national part of the SIS (NSIS).

13. These alerts among others relate to (i) foreigners for who should be denied access to the Schengen area, (ii) persons for whom a provisional arrest is warranted with a view to subsequent extradition (now subsequent "surrender" following the entry into force of the European Arrest Warrant), (iii) missing minors, (iv) persons who are considered to be a threat to national security by intelligence services or (v) stolen vehicles or money. Besides inserting their own alerts, competent authorities can also consult alerts entered by their counterparts from other states. A central computer in Strasbourg (CSIS) continuously synchronises the various national parts of the SIS. From a technical perspective that synchronisation is quite challenging. As a result thereof, the gradual expansion of the Schengen area and later the EU did not only give way for a number of legal questions, but also give way for a number of technical hurdles. Given the somewhat dated character of the technology behind the Schengen Information System, it proved to be impossible to allow all new Member States to all join the original system. The capacity of the first generation SIS did not allow that. The development of a second generation SIS (SIS II) was necessary. The opportunity to rebuild the Schengen information system was seized to not only formulate an answer to the technical problems, but to also introduce several new functions therein: e.g. the possibility to include biometrical data (such as fingerprints and photos), the possibility for Europol to access the database, be it under strict conditions. Making SIS II operational has been quite challenging. Several technical and legal difficulties have risen and the operationalization of SIS II has been postponed several times. Ultimately SIS II became operational in April 2013.

14. The information system was supplemented with a mechanism to bilaterally exchange additional information that can be required to be able to validate alerts (sometimes competent authorities require more detailed information before being able to give effect to the alert). To facilitate this kind of additional bilateral exchange, so-called SIRENE bureaus (*Supplementary Information Request at the National Entry*) were installed in each Schengen country, composed of

representatives of police, customs and justice. In 1999 the SIRENE network was replaced by a new communication structure, SISNET.

15. Furthermore, linked to the setting up of information exchange structures (be it via SIS, SIRENE or SISNET) an important *corpus* of data protection rules was elaborated, reflecting the bottom line of the 1981 Council of Europe Data Protection Convention (ETS 108) and the additional Recommendation R (87) 15 concerning the use of personal data in the police sector. In light of the ratification of SIC, most Member States were required to adapt their / adopt new national privacy legislation.

## 1.3 Link with the European Union

16. The origin of the Schengen area should not only be linked with Benelux cooperation. It should also be linked to cooperation at the level of the then European Community, later the European Union.

17. On 14 June 1985 the Schengen Agreement was signed, which was implemented via the Convention of 19 June 1990. Meanwhile the then 12 members of the European Community, amongst which were also the 5 Schengen countries, had signed the 1986 Single European Act. With that Act not only the approximation of the laws of the Member States was envisioned but also the gradual lifting of the internal barriers between the Member States in the areas of trade and free movement of people, with a view to increasing the competition position of the Member States. Because achieving those objectives would take many years, it was agreed that the intergovernmental Schengen construction would continue to develop but be loyal to the supranational EC aim of free movement of persons, such as was put forward in the Single European Act of 1986.

18. The loyalty towards the European Communities and the idea to at some point in time allow for the Schengen area to integrate into the larger European structure lead the five founding Schengen states to provide that even though in principle their cooperation structure was open for other states to join, that possibility to join would in fact only be open to other EC Member States (Article 140). In doing so, the integration would not be hindered as a result of states being part of Schengen and not being part of the EC. Furthermore it was also arranged that the Executive Committee (Committee of Minsters of the Schengen countries) would take to initiative to lift or amend SIC provisions when binding agreements were made between EC countries that had to potential to replace parts of the Schengen *acquis*. The SIC provisions would only exist as long as no similar or mirroring EC provision existed. This actually provided for a win-win situation. Not only did it constitute recognition of the EC agreements, it also ensured that each of the individual SIC provisions actually constituted an added value for the Schengen countries in that no useless double provisions would remain in force (article 142). This mechanism was used several times to lift Schengen provisions, among others the provisions concerning firearms and ammunition (as a consequence of the entry into force of the EC directive) and the responsibility of the handling of asylum applications (a consequence of the entry into force of the so-called Dublin Convention on Asylum Seekers established between EC Member States in the context of the EPC on 15 June 1990 – *infra*).

19. Because of the link to the EC, later EU, self-abolishment it is inherent to Schengen cooperation, because of the commitment to put aside their own provisions to the extent that the content thereof would have found its way to an EC instrument and in doing so become an *acquis* at the geographical level of the EC.

# 2 Geographic enlargement

## 2.1 Doubling the early 90's

20. When founded the Schengen area comprised 5 countries, being France, Germany and the three Benelux countries. In the early 90's Italy (on 27 November 1990), Portugal and Spain (on 25 June 1991), Greece (on 6 November 1992) and Austria (on 28 April 1995) joined, which meant that the number of countries in the Schengen area doubled in a short amount of time. Predominantly due to a number of technical difficulties to make SIS operational, the SIC was only "put into force" on 26 March 1995 between the Benelux countries, Germany, France, Portugal and Spain, even though it had been ratified by and thus "entered into force" in the countries involved. Italy, Austria and Greece followed on 26 October 1997, 1 December 1997 and 20 March 2000. Especially with respect to Italy and Greece, who had both already been party to the SIC since the early 90's, because of the problematic character to effectively reinforce border controls at the Adriatic coast and on the Greek islands, it took quite a long time for those two countries to satisfy all requirements for the SIC to be put into force.

## 2.2 Complications as a result of the loyalty to the EU

### 2.2.1 The Nordic Passport Union

21. The accession request of Denmark, Finland and Sweden on 19 December 1996 gave way for a first complication, because those three countries, together with Iceland and Norway, formed the "Nordic Passport Union", in which the border controls of persons were abolished. Because Iceland and Norway were not EC Member States (and had no intention to become an EC Member State) and it was agreed that accession to Schengen would only be open to EC Member States, accession was complicated. Having only Denmark, Finland and Sweden accede, would in practice have meant that either the Schengen area was de facto also extended to Iceland and Norway or that controls of persons within the existing Nordic Passport Union be reinstated at the new Schengen external border running through the middle of it. That last solution was politically inacceptable. To solve this deadlock, a special cooperation agreement was necessary governing the relation with Norway and Iceland.

22. This explains why – parallel to the SIC – a cooperation agreement was concluded between all the individual Schengen countries and both Iceland and Norway concerning the abolishment of the control of persons at the common borders. In doing so, it could be avoided that accession to the SIC by Denmark, Finland and Sweden would result in breaking the Nordic Union by instating a reinforced external border control of the Schengen area. Additionally, it facilitated the reinforcement of the external border, for it would have been very difficult to monitor the land border of Finland and Sweden with Norway, in particular due its

length. After this operation and the entry into force of the agreements on 25 March 2001, the Schengen area comprised 15 countries.

### 2.2.2 Switzerland and Liechtenstein

23. Meanwhile, a similar scenario took place in relation to the preparation of the accession of Switzerland to the Schengen area. In a referendum in June 2005 a small majority voted in favour of the accession of Switzerland to the Schengen area. 55% voted in favour, 45% against. Upon accession, Switzerland had to accept the Dublin mechanism to determine which state is responsible for an asylum application. Similarly, a creative solution was found with respect to the accession of Liechtenstein. A Protocol was signed to allow accession to the Schengen area, mirroring the solution found for Norway and Iceland.

## 2.3 New EU Member States

24. In addition to accession specifically to the Schengen area, the Schengen area also expanded as a result of the enlargement of the EU. On 1 May 2004 the Czech Republic, Estonia, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia became members of the Schengen area. Their membership entered into force on 21 December 2007. At that time the Schengen area existed of 24 countries. A year later that number rose to 25 countries, following the entry into force of the agreement with Switzerland. In December 2011 the number rose to 26 following the entry into force of the agreement with Liechtenstein.

25. However, membership does not mean that the Schengen provisions also have their effect. A distinction needs to be made between the accession to the Schengen area and the putting into force of the Schengen *acquis* (and the accompanying abolishment of controls of persons). The *acquis* is only put into force upon an explicit and unanimous decision to this end by the Council. The Council should investigate per Member State whether the Member State in question satisfies all requirements for the application of all components of the Schengen *acquis* in accordance with the so-called Schengen evaluation procedures. The opening of the internal borders with new Member States does not correspond with their accession.

## 2.4 Pending dossiers

26. There are still four EU Member States of which the putting into force of the Schengen provisions is pending, namely Cyprus, Bulgaria, Romania and Croatia. Firstly there is the complex situation concerning Cyprus. Cyprus became an EU Member State in 2004, but does not yet take part in the component involving the free movement of persons of the Schengen *acquis*, as a result of the political tensions and ambiguities with respect to the Turkish and Greek part of the island. Given that Turkey is not an EU-Member State and thus cannot be part of the Schengen area (following the Schengen-EU loyalty), the external border of the Schengen area would then run straight through Cyprus and will divide the island in two parts, which explains why the preparations are taking such long time. So far no specific date for the putting into force of the Schengen provisions has been proposed, though the aim is 2016. Secondly, the dossiers of Bulgaria and Romania are still pending. Bulgaria and Romania have been a member

of the European Union and the Schengen area since 2007. The concrete putting into force of the Schengen provisions is expected in 2014. Thirdly, it is anticipated that the Schengen provisions will be put into force in 2015 for the newest EU Member State Croatia.

# 3 Integration of the Schengen *acquis* in the EU

## 3.1 Closer cooperation through the Protocol

27. The Schengen *acquis* comprises the 1985 Agreement, the SIC, the various accession protocols and agreements, and also the decisions and declarations of the Executive Committee. From the very start of the Schengen cooperation, there was a clear link with cooperation within the then European Communities. The 1986 Single European Act was followed by the 1992 Maastricht Treaty and the 1996 Amsterdam Treaty which further shaped the European Union.

28. The Amsterdam Treaty introduced a possibility for 'closer cooperation'(*infra*). Pursuant to the then valid rules, it allowed a group of at least half of the then EU Member States to set up a reinforced or closer cooperation amongst them, using the institutional and legal structures of the Union. The first example of a group of Member States engaging in a form closer cooperation is the continuation of the development of the Schengen area after its integration into the European Union. A Protocol to the Amsterdam Treaty had provided for the complete absorption of the so-called Schengen *acquis* into the institutional and legal framework of the European Union.

29. In practice, the technical actual integration of the Schengen *acquis* into the EU's legal framework required that for each of the provisions and decisions included in the Schengen *acquis*, the JHA Council had to determine a new EU legal base (either Title IV of the EC Convention on visa, asylum, immigration and other policy areas that relate to the free movement of persons, or Title VI of the TEU, concerning provisions on police and judicial cooperation in criminal matter).

30. The integration of the Schengen *acquis* was not only complete at a legal level (integrating the legal provisions into the EU's legal framework), but also on an institutional and organisational level. The Schengen Protocol to the Amsterdam Treaty determined that the Council of the EU was to replace of the Executive Committee as a decision making body. Following its decision of 1 May 1999, the Council of the EU also determined the way in which the Schengen Secretariat, which was formerly located in the Benelux Secretariat, should be absorbed in the Secretariat-General of the Council and what that would mean for the existing staff of the Schengen Secretariat. Mirroring the specific Schengen tasks, a number of work groups were set up to support the Council in the further elaboration of the Schengen area. In addition thereto, a permanent assessment and application commission in relation to Schengen was founded and mandated to specifically deal with Schengen-related matters. In light of its mandate, the commission assesses for each members state the way (i) border controls and the surveillance is organised, (ii) issuing of visas happens in practice, (iii) the political and judicial cooperation at the internal borders is taking place and (iv) SIS is used. The Committee does not only look into the practice of existing Member States, but will also evaluate the situation of

Member States that have applied to become a member of the Schengen area and support them to prepare the correct implementation thereof.

## 3.2 Mixed Committee (COMIX)

31. Given that integration of Schengen into the EU meant that decision making would take place using the institutional structures of the EU, questions arose with respect to the position of non-EU Schengen states. A distinction ought to be made between on the one hand the *"Schengen group within the European Union"* which will have closer cooperation and on the other hand the *"non-EU countries which are members of the Schengen area"*. After all, above it was explained that there are also non-EU countries which are part of the Schengen area because separate cooperation agreements were entered into with them. This involves Iceland and Norway (as the non-EU duo in the Nordic Passport Union), Switzerland and Liechtenstein. Because they are non-EU countries, they cannot take part in the EU's decision-making. To ensure that when dealing with the provisions of the Schengen *acquis* which are applicable to Iceland, Norway, Switzerland and Liechtenstein the interests of these countries are taken into account, the Mixed Committee (COMIX named after the French name 'Comité Mixte') was set up. This committee consists of representatives of the governments of Iceland, Norway, Switzerland and Liechtenstein and members of the Council of the European Union and of the European Commission. The representatives of Iceland, Norway, Switzerland and Liechtenstein have the right to make suggestions in the Mixed Committee concerning the provisions of the Schengen *acquis* applicable to them. After discussion of these suggestions the Commission or a Member State can take these into consideration in order to make a proposal or to take an initiative in accordance with the rules of the EU with a view to adopt a decision or measure. This means that the non-EU countries have not vote when actual binding decision are taken.

## 3.3 Mixed instruments

32. Even though the Schengen *acquis* is integrated into the framework of the EU, Schengen did not seize to exist and the Schengen *acquis* will be further developed within the EU framework. As a result, some EU instruments have a mixed character, in that part of their provisions are a continuation of the Schengen *acquis* (because they built on the articles contained in the SIC, which they reinforce or develop further), and the other provisions have no link to Schengen. Differently put, the integration of Schengen in the EU has given way for the adoption of *"mixed instruments"* the relevance of which is partly Schengen and partly just EU. This means that certain articles of these instruments shall be called upon in the relations with Norway, Iceland, Switzerland and Liechtenstein, whereas the scope of other articles is necessarily limited to the relations between EU Member States. An interesting example is for example the EU Convention of 29 May 2000 on mutual legal assistance in criminal matters.

## 3.4 Ireland, the United Kingdom and Denmark

33. Following the provisions of the Schengen Integration Protocol – both the original text with the Amsterdam Treaty as the new text with the Lisbon Treaty – Ireland and the United Kingdom are not bound by the Schengen *acquis*, but they retained the possibility to request at any time to become a party anyhow, be it to the entirety of the Schengen *aquis* or only to part of it. The protocol allows for Ireland and the United Kingdom to compile an *ad hoc* individual Schengen package as they see fit. Pursuant to the possibility thereto included in the protocol, both countries have requested to be able to take part in the *acquis* (not it its entirety given that the aspects of border control are not recognised by either of them). On 28 February 2002 the Council took the decision concerning the request of Ireland to take part in well-defined components of the Schengen *acquis*. For the United Kingdom this decision was already made in 2000. These decisions contain the stipulations of the participation of the respective countries. As was indicated above there is next to a decision on the applicability of the Schengen provisions also an implementation decision necessary concerning the entry into force of the applicable Schengen provisions. For the United Kingdom this decision on the implementation of the provisions involved was already made which entered into force in January 2005. For Ireland, so far, no decision has been taken concerning the implementation of the provisions involved.

34. Additionally, Denmark has an exceptional position. Similar to the Protocol annexed to the Amsterdam Treaty, a Protocol to the Lisbon Treaty stipulates that Denmark shall not take part to the further development of the Area of Freedom, Security and Justice (i.e. Title V of the TFEU). According to the text of the current Protocol, Denmark will assess each individual FSJ-measure adopted by the Council and will decide within six months after the adoption whether or not it will transpose this measure in its national legislation. If Denmark decides to do this, the content of the Council decision will be binding in the relation between Denmark and the other EU Member States. If Denmark decides not to transpose the measure into its national legislation, the Member States which are bound by the measure will have to consider whether specific measures in their relationship with Denmark are required. Other than with Ireland and the United Kingdom Denmark does not have the possibility to join at a later stage. Denmark can of course still indicate that it no longer wants to use the exceptions in the Protocol, which has a consequence that the Schengen *acquis* in its entirety will become applicable.

# 4 Schengen III: Prüm Convention

35. On 27 May 2005 Belgium, Germany, Spain, France, Luxembourg, the Netherlands and Austria signed the so-called Schengen III Convention in Prüm (Germany). Despite it being called 'Schengen III' this treaty is not part of the Schengen *acquis*. It is an example of closer cooperation between several Member States and in doing so is similar to Schengen cooperation. Based on the location of its conclusion, Schengen III is also called the 'Prüm Convention'. The signatories expressed the willingness to step up their cooperation in the fight against terrorism and go beyond the then existing EU mechanisms. To that end, they concluded a separate convention which aimed at facilitating information exchange between law enforcement authorities in the Member States, with a view to prevent terrorist attacks, providing a legal

basis to allow armed marshals in airplanes (*air marshals*), adopting measures against illegal immigration and further elaborating specific forms of cooperation such as the setting up of joint (cross-border) operations. Mirroring what happened with Schengen, the 2005 Prüm Convention was later integrated in the EU structures when adopted the 2008 EU Prüm Decision.

46. In sum, the three community treaties provide the foundation for the development of community law. This community law regulates the full extent of the triangular relationship between the Member States, the community institutions and the private individuals, which are active within the common internal market. The most prominent features of the supranational "European Communities" are:

- The presence of bodies which can act independently from the Member States, both regarding their composition and their working method;
- The possibility of decision making through majority voting, implying that Member States can be bound by decisions regardless of whether or not they voted in favour of said decision;
- The presence of bodies which can execute these decisions or can monitor their proper execution by the Member States and;
- The possibility of creating rights and duties, which are directly enforceable before the Member States' national courts, regardless of whether they are in line with that Member States' national legislation.

47. Euratom and the ECSC were the first to be formally abolished, leaving only the EEC, which would adopt the former two communities' competences. Following the reforms installed by the Lisbon Treaty the EC (the former EEC) was abolished as well, and its competences were reshaped to form a fully integrated European Union.

### 1.1.5 European Political Cooperation

48. The choice for supranational cooperation was never self-evident. Certain policy areas are too sensitive - and the mutual trust insufficient – to adopt supranational forms of cooperation. This is why an intergovernmental track of integration was developed in addition to the supranational integration track, which was referred to as "European Political Cooperation". The idea for European Political Cooperation came about within the framework of the so-called "European Council" Although the concept of the European Council had to wait on its formal recognition until the adoption of the Single European Act in 1986, the heads of state and government of all Member States had been regularly organizing meetings to discuss political bottlenecks within the communities' policies since 1961. During the Parisian Summit of December 9th and 10th, 1974 it was decided that these meetings would be held three times a year and include the ministers of Foreign Affairs. The body created to house these meetings was called the "European Council"

49. In Article 2 the Single European Act described only the European Council's composition, without making reference to its functions:

> *The European Council shall bring together the Heads of State or of Government of the Member States and the President of the Commission of the European Communities. They shall be assisted by the Ministers of Foreign Affairs and by a Member of the Commission. The European Council shall meet at least twice a year.*

50. Content wise, the European Political Cooperation was used to discuss aspects of the common foreign policy and the international cooperation in criminal matters.

### *1.1.5.1 Common foreign policy*

51. Foreign policy was the first policy area within the framework of European Political Cooperation on which Member States agreed to act in a coordinated fashion. This decision was based on the Davignon Report, which was presented on October 27th, 1970 and which stipulated the need for a mechanism which would allow for a more common vision towards international affairs. The steps taken following the release of this report can be considered to be mainly pragmatic in nature. The European Communities' then six Member States decided to organize semi-annual meetings with the ministers of Foreign Affairs, where a member of the Commission could additionally be invited.

52. These meetings allowed Member States to regularly consult one and other and exchange information, which would in turn give way to a more common vision on relevant issues in international politics. This also provides an opportunity for cooperation between Member States, allowing them to set forth a common stance on certain topics, which then allows for their common voice to have greater bearing. This intergovernmental cooperation in the foreign policy field will constitute the basis for what will become the European Union's second pillar in the next phase of the institution's development (*infra*).

### *1.1.5.2 International Cooperation in Criminal Matters*

53. A second policy area where the importance of European Political Cooperation became evident was that of international cooperation. This cooperation was oriented towards four particular subcomponents: Customs, police, justice and asylum and migration. These components were later incorporated into the framework of the European Union.

#### *Customs*

54. The cooperation between customs services was the first in line to take form. In 1967, a Convention was set up which determined that the participating states would provide mutual assistance to customs administration, also known as Naples I. To organize this mutual assistance, the Mutual Assistance Group (MAG) was founded. This group consisted of Member States' customs officers and representatives of the European Commission. Together, these participants stimulated administrative cooperation between customs administrations in order to combat, amongst other things, the illegal drugs- and weapon trade. MAG was founded in the first phase of the European development, however it would continue to play an important role in its second phase t as well, which will be discussed in the upcoming pages. On the eve of the birth of the pillar structure – a fundamental trademark of the second developmental phase – the first MAG's work was continued by the so-called MAG 92. It was under this heading that the fight against problems emanating from the completion of the internal market continued. MAG 92 prepared the Naples I Protocol. In 1997 Naples I would be replaced by its successor, Naples II.

*Police*

55. The cooperation between police services was the second in line to take form. In the mid 1970's, discussions on police cooperation took off. During the European Council Summit of December 1975 in Rome, an initiative was approved to install a biannual gathering of ministers aiming to discuss issues of public order, such as terrorism and other forms of international crime. These gatherings were assigned the name TREVI, which stands for 'Terrorisme, Radicalisme, Extrémisme et Violence Internationale'. The group also shares the name of a well-known fountain in Rome, where it was founded. The Member State chairing the Council at the time of the gathering would be responsible for its organization.

56. The group first convened in 1976 and was assigned the task of coordinating the Member States of the then EEC in their fight against terrorism. In order to work efficiently, the gatherings of the ministers of Justice and/or Domestic Affairs were prepared by a committee of senior officials, which additionally supervised five working groups: TREVI I (combatting terrorism), TREVI II (training and equipment of police forces), TREVI III (combatting drugs and major criminal issues, such as drug trafficking), TREVI IV (securing nuclear transports and those of other dangerous materials, in order to prevent disasters and accidents) en TREVI 92 (preparing measures of police and judicial cooperation, required to realize the free movement of persons within in internal market.) The accomplishments of TREVI '92 gave way to the founding of the Europol Drugs Unit, which in turn gave way to Europol in its current form.

*Justice*

57. The cooperation between justice departments was the third in line to take form. This entailed cooperation in both civil and in criminal matters. The developments in the field of judicial cooperation in civil matters have given way to, amongst other things, the coming into being of the EEX Convention (Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, done in Brussels in 1968), which was signed by Belgium, the Netherlands, Luxembourg, France, Germany and Italy.

58. It was in the same period that judicial cooperation in criminal matters took form. In 1977 the then French president Giscard d'Estaing launched the idea of 'Espace judiciaire européen'. With the objective of bolstering judicial cooperation, he aimed to draft a number of conventions which would allow a true 'European judicial area' to come forth. The fact that this idea was raised, is linked to the French disappointment in the weak cooperation at the Council of Europe-level. The 1977 European Convention on the Suppression of Terrorism, which was signed within the Council of Europe framework, had become symbolic for the French frustration, which helps explain both Giscard d'Estaing's timing and his motivation.

59. Before the 1977 European Convention on the Suppression of Terrorism, the general principle was that conventions on international cooperation in criminal matters contained a political exception. This political exception was introduced in order to meet certain concerns regarding cooperation when prosecution was based on political motives. Member States did not wish to cooperate when a person was being prosecuted for political reasons, however it was politically difficult to verbalize these concerns within a cooperation partnership. In an

effort to avoid situations in which Member States would be forced to accuse one and other of politically abusing their prosecutorial competences, a refusal ground was set up for those cases where cooperation was requested for political crimes. This refusal ground is known as 'the political exception': cooperation is deemed impossible when a political crime is being prosecuted.

60. During the 1970's it became increasingly clear that the political exception hindered cooperation in the fight against terrorism, seeing how terrorism is, by definition, political in nature. If cooperation is excluded for political crimes, then it is thus impossible to cooperate in the fight against terrorism. This explains why the Council of Europe Member States' wished to abolish the political exception from cooperation instruments via the adoption of the 1977 European Convention on the Suppression of Terrorism. The idea was to agree in a convention to no longer regard terrorism as a kind of political offence that would render cooperation impossible. However, not all parties agreed and seeing how the Council of Europe is an intergovernmental form of cooperation it is required that all participating states agree to the text at hand before it can be adopted. To mend the situation a political compromise was set forth, which entailed that Article 13 of the Convention would allow states to provide a declaration, stating that they did not agree to this limitation to the political exception's scope and want to retain the possibility to call on the exception to refuse cooperation. As a result of this possibility, the intended full-abolishment of the political exception was rendered completely void, leaving states with the discretion to either or not cooperate anyhow.

61. This specific case became a symbol of the failure of the Council of Europe's intergovernmental working method and served as a catalyst for the development of the 'Espace judiciaire européen'. In the 1979 Dublin Agreement the then EEC Member States agreed to wield a strict interpretation of the European Terrorism Convention, by not making use of the exception provided in Article 13. In the end only half the Member States ratified the Agreement, which required full ratification and thus never entered into force. This illustrates how the intergovernmental character of European Political Cooperation, though well-intended, did provide an added value to the Council of Europe.

62. The 'Espace judiciaire européen's' activities were later adopted by the working group on Judicial Cooperation. This working group set up five agreements between 1987 and 1991, in a second attempt by the EC to outshine the Council of Europe with regard to judicial cooperation in criminal matters. The subjects of these five consecutive agreements are: the application of the *ne bis in idem* principle (1987), transfer of sentenced persons (1987), simplification and modernization of methods of transmitting extradition requests (1989), transfer of prosecution (1990) and the enforcement of foreign judgments (1991). However, these agreements knew only limited success. None of them entered fully into force. The limited number of states that did in fact ratify these instruments usually added a declaration providing that the instrument will only take effect in relation to those states which equally added such a declaration to their ratifications.

*Asylum, immigration and external border issues*

63. Asylum, immigration and external border issues were the fourth in line to take form. Taking into consideration the possible removal of the internal borders between the EU Member States, a strengthening of the external borders and a common asylum policy were high on the European agenda.

64. In October of 1986 the Member States' ministers of home affairs established the '*Ad Hoc*-Immigration Group' in order to coordinate the Member States' national asylum and immigration policies. This initiative is directly linked to the 1986 Single European Act. In the Single European Act it is stated that "The internal market shall comprise an area without internal frontiers in which the free movement of [...] persons [...] is ensured". In practice, this means that for EC citizens the controls at the internal borders would be limited to providing the necessary documents to prove EC-citizenship. A complete removal of these controls, which would entail the possibility of crossing the border without presenting any kind of documentation, turned out to be too ambitious of an objective for the *Ad Hoc*-group.

65. Nevertheless, the complete abolishment of controls at the internal borders did remain an objective. And it is with this objective in mind that the European Council, held in Rhodos in 1988, founded the so-called Rhodos-Group. This group was given the responsibility of monitoring the progress that was being made towards reaching this objective. It had been clear from the beginning that an abolishment of the internal controls would have to coincide with a profound strengthening of the EU's external borders. In this regard, a draft-agreement on crossing the external borders was presented in 1990. However, the negotiations failed due to a discussion between England and Spain, as these two states failed to come to a consensus on the status of Gibraltar. However, this lack of consensus between the then 12 EC-Member States on the subject of the removal of controls at the internal borders did not prevent the 5 Schengen Member States from abolishing the controls at the Schengen internal borders through the Schengen Implementation Convention that very same year.

66. European Political Cooperation did succeed in establishing the so-called "Dublin Convention on Asylum Seekers". This Dublin Convention determines which state is responsible for examining the application for asylum done in one of the EC Member States. It equally provides the criteria which make a single Member State responsible for examining a certain application for asylum. This has a dual intention. Firstly, it aims to prevent situations where asylum seekers simultaneously or successively supply for asylum in multiple countries, only to be denied asylum or turned away each time. This used to be referred to as 'refugees in orbit', a phenomenon which occurred in part due to the principle of *non-refoulement*, which provides that refugees cannot be send back to their country of origin if this would cause them to suffer a threat to their personal safety. Such is provided in the 1951 UN Convention Relating to the Status of Refugees. Additionally, the convention meant to ensure that one Member State's decisions would not render void the decision of another Member State. Here one must keep in mind that when internal border controls are abolished, this would make it possible for a refugee whose application for asylum was denied and whose access to the territory of one Member State was thus refused could enter this territory after all, provided another Member State accepted his application for asylum. As such, one Member State's negative decision

would be made void by another Member State's positive decision. The Dublin Convention places the responsibility for examining and deciding over an application for asylum with the Member State on the territory of which the refugee's first entry takes place, regardless of which Member State the application is filed in. In order to prevent fraudulent additional applications following a first (and thus definitive) unsuccessful application in the Member State of first entry, Eurodac, a system which compares refugee-fingerprints was set up, years after the end of European Political Cooperation.

## 1.2 Phase two: Pillar structure

67. Through the Maastricht Treaty, these developing policy areas were structured under an overarching EU-framework. Together, the supranational and intergovernmental tracks of integration formed the basis for the structuring of the policy areas within the European Union. These supranational and intergovernmental backgrounds remain reflected in the different decision making procedures. These distinct decision making procedures often cause for a reference to be made to different "pillars", dividing the policy areas. Between November 1st, 1993 and December 1st, 2009, the European Union consisted of three pillars. In order to understand the origin and development of the pillar structure, it is useful to go over the consecutive amendments to the Convention before examining the available legal instruments within each pillar.

### 1.2.1 Amendments to the Convention

#### *1.2.1.1 Maastricht Treaty*

68. The concept of the "pillar structure" started with the Maastricht Treaty, officially the Treaty on the European Union (TEU), signed at Maastricht of February 7th, 1992. The treaty entered into force on November 1st, 1993. This delay was caused by complications during the national ratification procedures. A number of objectives were set forth at the time of the establishment of the European Union:

> *Article B*
> *The Union shall set itself the following objectives:*
>
> *- to promote economic and social progress which is balanced and sustainable, in particular through the creation of an area without internal frontiers, through the strengthening of economic and social cohesion and through the establishment of economic and monetary union, ultimately including a single currency in accordance with the provisions of this Treaty;*
> *- to assert its identity on the international scene, in particular through the implementation of a Common Foreign and Security Policy including the eventual framing of a common defence policy, which might in time lead to a common defence;*
> *- to strengthen the protection of the rights and interests of the nationals of its Member States through the introduction of a citizenship of the Union;*

*- to develop close cooperation on justice and home affairs;*
*- to maintain in full the 'acquis communautaire' and build on it with a view to considering, through the procedure referred to in Article N(2), to what extent the policies and forms of cooperation introduced by this Treaty may need to be revised with the aim of ensuring the effectiveness of the mechanisms and the institutions of the Community.*

69. The Maastricht Treaty's further structure reflects the existing cooperation partnerships, which find their origin in the first phase. The treaty's articles are not numbered, but rather distinguished by letters. Following a number of more general provisions in Title I (Articles A through F), there are:

- Provisions amending the treaty establishing the European economic community with a view to establishing the European community (Title II– Article G);
- Provisions amending the treaty establishing the European coal and steel community (Title III– Article H);
- Provisions amending the treaty establishing the European atomic energy community (Title IV – Article I);
- Provisions on a Common Foreign and Security Policy (Title V- Article J); and
- Provisions on cooperation in the fields of justice and home affairs (Title VI – Article K)

70. Articles G, H and I formerly formed the three communities (which, due to their decision making process, comprised the first pillar), article J related to the Common Foreign and Security Policy (which, due to its decision making process, comprised the second pillar) and article K related to justice and home affairs (which, due to its decision making process, comprised the third pillar). The enumeration of the policy areas which the Member States considered to be "matters of common interest" in the field of justice and home affairs can be read in article K.1 of the TEU.

*Article K.1*

*For the purposes of achieving the objectives of the Union, in particular the free movement of persons, and without prejudice to the powers of the European Community, Member States shall regard the following areas as matters of common interest:*
*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 and policy regarding nationals of third countries:*
*- conditions of entry and movement by nationals of third countries on the territory of Member States;*
*- conditions of residence by nationals of third countries on the territory of Member States, including family reunion and access to employment;*
*- combatting unauthorized immigration, residence and work by nationals of third countries on the territory of Member States;*
*4. combatting drug addiction in so far as this is not covered by 7 to 9;*

*5. combatting fraud on an international scale in so far as this is not covered by 7 to 9;*
*6. judicial cooperation in civil matters;*
*7. judicial cooperation in criminal matters;*
*8. customs cooperation;*
*9. police cooperation for the purposes of preventing and combatting terrorism, unlawful drug trafficking and other serious forms of international crime, including if necessary certain aspects of customs cooperation, in connection with the organization of a Union-wide system for exchanging information within a European Police Office (Europol).*

71. On these matters of common interest, cooperation will be intergovernmental in nature. This implies that the governments of the Member States will at all times be involved – through the framework of the Council – and that no decisions can be made which are binding to the Member States when such is against their will. This explains the limited role of both the European Commission and the European Parliament. The European Commission was endowed with a very limited right of initiative. For issues 1 to 6, this was a shared right of initiative, shared with each of the Member States. For issues 1 to 9, no right of initiative existed, although here the Commission was fully involved in all proceedings. In practice, this implies that the European Commission could not present a proposal on accepting a Common Position, a Joint Action or a draft agreement relating to judicial, customs- or police cooperation in criminal matters. The European Parliament only needed to be consulted in the general sense of the word, as well as be informed. The European Court of Justice was only competent to interpret the agreements on justice and home affairs, between the Member States, when the agreement explicitly rendered the Court competent for its interpretation or to settle disputes between Member States on the its application. These intergovernmental cooperation trademarks are expressed in Article K.3 TEU.

72. Content-wise, the integration of these policy areas in to the European Union framework could hardly be considered revolutionary. It rather serves as a continuation of the work of the ad hoc initiatives, which started out as the *Ad Hoc* Immigration group, the working group on judicial cooperation, TREVI and other fora.

73. In an effort to coordinate these different policy areas, a committee was established which was appropriately named "K4", after its founding article, Article K.4 TEU. This type of coordination-committee previously existed exclusively in the asylum and migration policy area, taking the form of the Rhodos-group. In turn, three steering groups, which reflected a wide array of policy areas, prepared the work of the coordinating K4-committee.

74. The Maastricht Treaty also determined that in 1996 a Conference would take place, gathering the representatives of the Member States' governments in order to examine the provisions of the Treaty in the light of reaching the EU-objectives. Thus, an intergovernmental Conference (IGC) took place in the spring of 1996, under Italian Presidency of the Council of the EU. The IGC's work would continue up until the end of the Dutch Presidency in June of 1997. During the European Summit of Amsterdam, the IGC's work was formalized and on October 2nd, 1997 the so-called Amsterdam Treaty was finally signed.

### 1.2.1.2 *Amsterdam Treaty*

75. The Amsterdam Treaty entered into force on May 1st, 1999. It continued building on the existing pillar structure, nevertheless providing quite a few changes.

76. First and foremost, a number of policy areas shifted from the third to the first pillar, due to amendments in the decision making procedures. Secondly, the intergovernmental nature of the policy areas remaining in the third pillar was slightly weakened as the decision making process requiring Member States to share their right of initiative with the European Commission was introduced. Thirdly, the new treaty introduced the notion of 'closer cooperation'. As such, the Amsterdam Treaty provided a legal basis for this concept, which allowed a smaller number of Member States to further the integration of the European Union, using the EU's institutions. In this former form, closer cooperation required that half the Member States took part in this closer-cooperation construction. Additionally, it was required that no Member State vetoed this initiative due to 'important reasons of national policy'. Should such a situation arise, the Council would have to present the matter to the European Council, which would then settle the matter through a unanimous decision. The further development of the Schengen-*acquis* within the European Union is an example of a closer cooperation. Fourthly, the Amsterdam Treaty clarified the delimitation of competences, thus clarifying the EU's responsibilities in matters of police and judicial cooperation through the introduction of articles 29 to 42. Fifthly and lastly, the Amsterdam Treaty Protocol allowed for an integration of Schengen.

77. The Amsterdam Treaty further developed the EU's competence in matters of judicial cooperation. It introduced the notion of an "area of freedom, security and justice". Cooperation regarding controls at the external borders, asylum, immigration, judicial cooperation in civil matters, criminal matters and police cooperation were meant to shape this area. The intention was to simplify the free movement of persons, both European citizens and third country – residents, whilst accomplishing an effective cooperation between the different administrations, in order to combat international crime.

78. The amendments brought about by the Amsterdam Treaty by no way completed the development of the European Union (and its pillar structure). On February 14th, 2000, no more than a year after the Amsterdam Treaty's entry into force, a new Intergovernmental Conference took place. Its main objective was to adapt the European institutions to the EU's upcoming expansion. The Intergovernmental Conference examined a number of questions, which were added to its mandate during the European Summits of Cologne (June 3-4, 1999) and Helsinki (December 10-11, 1999). These included, amongst others, (i) the European Commission's scope and composition, (ii) the weighing of the Member States' votes in the Council and (iii) the potential extension of qualified majority voting. In June of 2000, under the Portuguese Presidency, a report concerning the progress of the negotiations was drafted. During the European Summit in Feira (June 19-20, 2000) the Member States decided to add 'closer cooperation' to the IGC's agenda. During the European Summit of Nice (December 7 – 11, 2000) – comprising the final piece of the IGC 2000 – an agreement was finally reached, following a difficult period of negotiations. This agreement found expression in the Nice Treaty (further discussed below) and included a number of aspects relating to the reforms of the European institutions and decision making processes, with the objective of preparing the

upcoming expansion of the European Union. Additionally, the European Council provided her consent to the Charter of Fundamental Rights of the EU, drafted by a European Convention consisting of representatives of the different European institutions, as well as the national Parliaments.

#### *1.2.1.3 Nice Treaty*

79. The heavily criticized Nice Treaty was signed on February 26th, 2001 and entered into force on February 1st, 2003. First and foremost, it contained a number of amendments to the weighing of the votes and the decision making process. The weight of the votes of each of the Member States is now correlated to that Member State's population. Not only did the Nice Treaty reflect a compromise in relation to a weighing of the votes between the 15 existing Member States. It equally provided the number of votes each Member State would have, after the EU's expansion to 27 Member States.

80. Secondly, the composition of the European Commission was reconsidered. An agreement was reached, limiting the number of Commissioners. Up until this agreement, larger states had had two seats at their disposal, whilst smaller states were provided with a single seat. This allocation of seats was, however, no longer tenable, because this would render effective decision making impossible, specifically in light of the upcoming expansion from 15 to 27 Member States. It was thus important to arrive at a workable compromise. The compromise provided by the Nice Treaty consisted of, on the one hand the larger Member States giving up their second seat, and on the other hand the instalment of a system of rotating seats after the expansion to 27 Member States. Thus the Member States would take turns chairing in the European Commission. The fact that not all Member States are at all times represented in the European Commission serves as a clear trademark of this institution's supranational character, as it allows the European Commission to take decisions without requiring that these be approved by all Member States.

81. Thirdly, a re-examination of the provisions relating to the concept of 'closer cooperation' took place. Bearing in mind the EU's upcoming expansion, it was necessary to limit the required number of partaking Member States, in order not to render the concept practically infeasible. Thus, the variable requirement that half the Member States should take part was amended to a fixed "minimum of eight Member States". The possibility for the Member States to veto a closer cooperation initiative, which had been provided by the Amsterdam Treaty, was deleted.

82. Fourthly, the Nice Treaty contained the first reference to a potential establishment of Eurojust, allowing the Council to express its preference for the intergovernmental Eurojust (over the supranational European Public Prosecutor's Office, envisaged by the Commission). The Nice Treaty amended the text of Articles 29 and 31 TEU in this regarding, including an explicit referral to Eurojust and the existing European Judicial Network.

*Article 29*

*[...]*

*That objective shall be achieved by preventing and combating crime, organized or otherwise, in particular terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud, through:*

*- closer cooperation between police forces, customs authorities and other competent authorities in the Member States, both directly and through the European Police Office (Europol), in accordance with the provisions of Articles 30 and 32,*

*- closer cooperation between judicial and other competent authorities of the Member States including cooperation through the* ***European Judicial Cooperation Unit ("Eurojust"), in accordance with the provisions of Articles 31 and 32,***

*- approximation, where necessary, of rules on criminal matters in the Member States, in accordance with the provisions of Article 31(e).*

*Article 31*

*1. Common action on judicial cooperation in criminal matters shall include:*

*[...]*

*2 The Council shall encourage cooperation through* ***Eurojust*** *by:*

*a) enabling Eurojust to facilitate proper coordination between Member States' national prosecuting authorities;*

*b) promoting support by Eurojust for criminal investigations in cases of serious cross-border crime, particularly in the case of organised crime, taking account, in particular, of analyses carried out by Europol;*

*c) facilitating close cooperation between Eurojust and the European Judicial Network, particularly, in order to facilitate the execution of letters rogatory and the implementation of extradition requests.*

83. It quickly became clear that the amendments brought about by the Nice Treaty were insufficient to prepare the European Union for its upcoming expansion. As such, it was the ambition to reach an agreement on a number of further options relating to the future of the European Union during the European Summit of Laeken, in December of 2001, under Belgian Presidency. The results were set forth in the so-called 'Laeken Declaration'. In this declaration a number of options were distinguished and the decision was made to establish a Convention which was to determine Europe's future. Under the Presidency of Valérie Giscard d'Estaing, the representatives of a number of European institutions and national Parliaments provided recommendations, aiming to establish a new, more invasive amendment to the architecture of the European Union's decision making process. However, the European Summit of Laeken's activities were not limited to preparing Europe's future architecture. This moment also represented a time for evaluating the progress the European Union had made in implementing the conclusions of the European Summit of Tampere, done October 15-16, 1999. This Tampere Summit was the first European Summit which was completely dedicated to issues relating

exclusively to justice and home affairs. Additionally, it is important to keep in mind that the objectives of the Belgian Presidency were largely thwarted by the 9/11 attack on the WTC, and the global fight against terrorism which has dominated the international agenda ever since.

### 1.2.2 Legal instruments

#### *1.2.2.1 First pillar instruments*

84. Within the framework of the first pillar, the following instruments can be established: regulations, directives, resolutions, recommendations and interpretative guidelines.

85. Regulations have a general scope. In other words, they are not intended to address a specific person or a specific situation and thus address an unknown number of persons or situations. They are immediately applicable in all Member States – no implementation in a Member State's national law is required – and are binding in their entirety. Additionally, regulations can be called upon directly by parties before the national court of a Member State.

86. A directive, on the other hand, addresses only the Member States, not their citizens. Through directives, the EU obliges its Member States to amend their national legislation. However, a directive is solely binding with regards to its timing and the objective that is to be achieved. How this objective is reached and which means are to be applied is to be decided by the Member States.

87. Resolutions address a specific Member State or a specific private actor (e.g. an entrepreneur) and are legally binding in their entirety vis-à-vis the person or state they address.

88. Lastly, recommendations and interpretative guidelines can be formulated. These are, however, never binding.

#### *1.2.2.2 Second pillar instruments*

89. In the second pillar a joint strategy, a joint action and a common position are made explicit. Additionally a joint declaration is included.

90. The joint strategy was introduced by the Amsterdam Treaty and is based on Article 13 TEU, which provides that the European Council determines the principles and general guidelines for the Common Foreign and Security Policy and decides on the joint strategies, to be implemented by the EU, in areas where the Member States share important common interests. This means that the joint strategy determined both the objectives to be achieved and the timing and means to be provided by the Member States. The Council would implement the joint strategy through joint actions and common positions. Nevertheless, this instrument would be used only very rarely.

91. By means of a joint action, accepted within the framework of the Common Foreign and Security Policy, it was decided that the Member States would engage in a coordinated action, using a wide array of means (staff, knowhow, financial means, material means, etc.) to reach the objectives set forth by the Council of Ministers on the basis of general guidelines of the European Council.

92. The common position was primarily used to better coordinate, and allow a more systematic approach towards, cooperation between the different Member States. The Member States were thus obliged to continue adhering to and defending these common positions.

93. A common declaration, as an instrument, is not included in title V TEU. However, common declarations were one of the trademarks of the European Political Cooperation (*supra*). These declarations, which are not binding, continue to play a dominant role in the cooperation relating to Common Foreign and Security Policy.

*1.2.2.3 Third pillar instruments*

94. Within the third pillar, following the amendments introduced by the Amsterdam Treaty, the following instruments can be established: common positions, framework decisions, decisions and conventions.

*Article 34 Means, decision making process*

> *1. In the areas referred to in this Title, Member States shall inform and consult one another within the Council with a view to coordinating their action. To that end, they shall establish collaboration between the relevant departments of their administrations.*
> *2. The Council shall take measures and promote cooperation, using the appropriate form and procedures as set out in this Title, contributing to the pursuit of the objectives of the Union. To that end, acting unanimously on the initiative of any Member State or of the Commission, the Council may:*
> *(a) adopt common positions defining the approach of the Union to a particular matter;*
> *(b) adopt framework decisions for the purpose of approximation of the laws and regulations of the Member States. Framework decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect;*
> *(c) adopt decisions for any other purpose consistent with the objectives of this Title, excluding any approximation of the laws and regulations of the Member States. These decisions shall be binding and shall not entail direct effect; the Council, acting by a qualified majority, shall adopt measures necessary to implement those decisions at the level of the Union;*
> *(d) establish conventions which it shall recommend to the Member States for adoption in accordance with their respective constitutional requirements. Member States shall begin the procedures applicable within a time limit to be set by the Council.*

*Unless they provide otherwise, conventions shall, once adopted by at least half of the Member States, enter into force for those Member States. Measures implementing conventions shall be adopted within the Council by a majority of two-thirds of the Contracting Parties.*
*3. Where the Council is required to act by a qualified majority, the votes of its members shall be weighted as laid down in Article 205(2) of the Treaty establishing the European Community, and for their adoption acts of the Council shall require at least 62 votes in favour, cast by at least 10 members.*
*4. For procedural questions, the Council shall act by a majority of its members.*

95. Before the amendments provided by the Amsterdam Treaty, in the Maastricht era, one could distinguish two types of Joint Actions, roughly speaking. Firstly, there were joint actions aiming to achieve the approximation of Member States' national legislation. An example of this is the Joint Action of February 24th, 1997, adopted by the Council on the basis of Article K.3 of the Treaty on European Union concerning action to combat trafficking in human beings and sexual exploitation of children. Another example can be found in the Joint Action of 15 July 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, concerning action to combat racism and xenophobia. Secondly, there was a category of Joint Actions aiming to serve a different goal. An example of this can be found in the Joint Action of 29 June 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on the creation of a European Judicial Network. Another example can be found in the Joint Action of 10 March 1995, adopted by the Council on the basis of Article K.3 of the Treaty on European Union concerning the Europol Drugs Unit. The Amsterdam Treaty introduces a distribution of these two types of Joint Actions over two distinct instruments. After the entry into force of the Amsterdam Treaty, the mutual approximation of national legislation was done using framework decisions. The other objectives were reached using decisions, also following the entry into force of the Amsterdam Treaty.

*Joint Positions*

96. The joint position, as a legal instrument, exists for both the second and the third pillar. This instrument allows the Council the express the EU's approach towards a specific issue. Practically speaking this implies that the Member States politically (not legally!) commit themselves to complying with the EU's stance in their national legal order and their foreign policy. An example is the Joint Position of 4 March 1996 defined by the Council on the basis of Article K.3 of the Treaty on European Union on the harmonized application of the definition of the term 'refugee' in Article 1 of the Geneva Convention of 28 July 1951 relating to the status of refugee.

*Framework Decisions*

97. The instrument of the framework decision was introduced by the Amsterdam Treaty as a partial replacement for the (removed) Joint Action in the field of Justice and Home Affairs. Based on the text of the TEU, it is clear that the intention behind the framework decision was that it be used exclusively for the mutual approximation of the Member States' legal and administrative provisions, in order to achieve their 'approximation'. With regard to framework

decisions, the right of initiative lays with the European Commission, as well as with the Member States. The final framework decision must be accepted through a unanimous vote. As is implied by its name, a framework decision is only binding in regard to the result that is to be achieved. Each Member State is free to choose the means through which they aim to achieve this objective. Because of this, the framework decisions seem awfully similar to the first pillar directive (Although no sanction regime is installed in case of belated, incomplete or incorrect implementation). Examples are the 2003 Framework Decision on terrorism, the 2005 Framework Decision on attacks against information systems and the 2008 Framework Decision on racism.

98. Framework Decisions were a point of discussion for three reasons: (1) content-wise, due to the fact that the offenses which are susceptible to approximation are limited, (2) due to the division of competences between the first and third pillar regarding the harmonization of competences and (3) due to the utilization of framework decisions for improper purposes.

99. The first discussion relates to the list of offences which can be approximated using Framework Decisions. To understand this discussion it is important to keep in mind that article 29 TEU determines that the mutual approximation of criminal law is allowed only when such is necessary. The treaty additionally provides a preliminary description of what could be considered necessary. In Article 31 (e) TEU, three policy areas are enumerated: organized crime (although this isn't a clear cut offence types, but rather a potential manifestation of a wide array of crimes), terrorism and the illegal trade in narcotics. The interpretation of this delimitation of competences through later policy documents is rather extensive. The Vienna Action Plan, the Tampere conclusions and the Millennium strategy resulted in approximation being intended for human trafficking, specifically for the exploitation of women and the sexual exploitation of children, offences against the legislation relating to the illegal trade in narcotics, corruption, counterfeiting the euro, tax fraud, computer fraud, environmental crime (evidently including those cases where these crimes are committed in a non-organized manner), criminal acts committed using the internet and money laundering connected to these types of crimes in so far as they are connected to organized crime, terrorism and drug trafficking. This broad interpretation of the three policy areas enumerated in the treaty was subject to much discussion. In addition, when looking at the practical application of the instrument and the offences which are approximated through this instrument, it becomes evident that its factual interpretation is in fact even broader. Other forms of crime have equally been made subject of approximation, e.g. racism, xenophobia and even offering assistance to the entry, transit and residence of illegal migrants (even if this takes the form of humanitarian aid).

100. The second discussion is connected to the delimitation of competences between the first and the third pillar. For long, the question whether the communities are competent to compel Member States to use criminal law provisions, was unanswered. Criminal law belongs to the third pillar and there were doubts as to whether the community was competent to seek the criminal enforcement of her provisions. The Framework Decision on protection of the environment through criminal law and the Framework Decision to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution gave way to two formerly discussed landmark judgments by the Court of Justice, respectively that of September 13th, 2005 and that of October 23rd, 2007, clarifying the delimitation of competences. This

allowed the EC to provide in the obligation of a minimum penalization as well as the obligation of installing effective, proportionate and dissuasive penalties, using a first pillar instrument, namely a directive. Approximation regarding the nature and extent of the penalties falls outside of the scope of EC-competences. This is clearly an artificial distinction, giving way to a delimitation of competences between the first and third pillar, which is not completely clear cut. This inconsistency will be alleviated in the third phase, with the elimination of the pillar structure and the introduction of one common decision making process and one centralized set of legal instruments.

101. The third discussion is connected to an improper utilization of framework decisions for other objectives than the approximation of substantive criminal law. Fundamental questions were posed regarding the utilization of framework decisions for the approximation of matters of procedural criminal law and even – as a replacement for the traditional agreements, although these agreements are maintained as a legal instrument by article 34 TEU – for introducing new standards in and between the Member States relating to judicial cooperation in criminal matters (as is provided in article 31 (a) to (d) TEU). This final observation first took place in the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender of procedures between Member States, in which extradition between Member States, a matter which up until that time had been regulated through agreements or treaties, was replaced by a system of (nearly) blind surrender procedures. The democratic basis of these framework decisions is quite weak, particularly when compared to the traditional agreements, which were to be approved by the parliaments or even by a Member State's population by means of a referendum. The national parliaments are not (necessarily) consulted in light of the framework decision's decision making procedure. In other words, the national legislator is bound the convert framework decisions – accepted by the JHA-Council – to national law within a certain timespan. As such, the European ministers bind the national parliaments. In the *Advocaten voor de Wereld* case, the Belgian Court of Arbitration posed a preliminary question to the European Court of Justice relating to the validity of the utilization of a framework decision in relation to the European Arrest Warrant. Here, the Court concluded that the use of a framework decision was not problematic. This explains why, at the current time, every further elaboration upon the subject of mutual recognition of judicial decisions in criminal matters is done using framework decisions, which replace or complement existing treaty-law between the Member States.

*Decision*

102. After the dissolvement of the formerly mentioned Joint Action, the new decisions were used to achieve all objectives other than mutual approximation of the Member States' legal and administrative provisions. The Commission and the Member States once again share the right of initiative. Decisions are adopted unanimously and are – like framework decisions – legally binding for the Member States. The Council will, via a qualified majority vote, take the necessary measures to ensure their implementation on the EU-level. Here, two examples are the Council Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime and the more recent Council Decision of 6 April 2009 establishing the European Police Office (Europol). The adoption of the Europol Decision did not go over smoothly. Even after the final decision that the adoption of a framework decision was the best

option in order to provide Europol with a more flexible legal basis, which would not be dependent upon ratification, it took an additional 15 months before a compromise was reached as to the text and wording of the instrument.

*Conventions*

103. The use of 'traditional' conventions, which was transferred to the 'intergovernmental' third pillar by the Maastricht Treaty, is maintained by the Amsterdam Treaty, be it that it is limited to judicial and police cooperation in criminal and customs-matters, to which the third pillar has been narrowed down. Conventions are to be unanimously adopted by the Council, following a consultation of the European Parliament, after which they are to be adopted by the Member States in accordance with their proper constitutional provisions. During the Maastricht era, conventions would not enter into force until all Member States had completed their internal adoption procedure. Since the Amsterdam treaty, conventions will enter into force once half the Member States have adopted them. The entry into force will however be limited to those Member States which have completed the adoption procedure. Examples are the Convention of July 26th, 1995 on the establishment of a European Police Office (Europol) and the Convention of May 29th, 2000 on Mutual Legal Assistance in Criminal Matters.

## 1.3 Phase three: Towards the current European Union

104. The third phase comprises the transformation to what is our current day European Union, which no longer operates according to a pillar structure. It does, however, contain traces of the distinction between the original supranational and intergovernmental cooperation.

### 1.3.1 Renewal of the founding treaties

105. On October 4th, 2003 a new IGC began in Rome, endowed with a clear cut assignment, which was to reach an agreement on the draft text for an EU Constitutional Treaty. This draft text contained prominent amendments, such as a simplification of the legal instruments, a generalization of qualified majority voting to, amongst others matters, JHA-issues and the composition of the Commission following the 2004 EU-expansion.

106. On June 17th and 18th, 2004, the European heads of government reached an agreement on the text of the Constitutional Treaty, which would be signed on October 29th of that same year. The treaty, which had gathered all existing treaty-law in a single text, was supposed to be the centrepiece of a long period of difficult work, as the final step in a long history of integration. It would provide one single decision making procedure and thus abolish the pillar structure, ringing in a third phase of development.

107. Due to the negative outcome of referenda held in France and the Netherlands, the European Union was, once again, in a deadlock. A large number of Member States announced that they would postpone their ratification until there was more clarity concerning the future of the Constitutional Treaty. Although the need for reform was met with increasing public support, the subsequent reflection period remained without results.

108. The first small step towards re-initiating the process was made during the European Summit of June 2006, where the future German Presidency was requested to prepare a summary status of the discussions surrounding the Constitutional Treat and analyse possible solutions to this crisis by the European Summit of June 2007. Determined to resuscitate the European integration process, a number of bilateral consultations were held between January and June of 2007, with the support of France, aiming to outline a potential compromise. The Berlin Declaration, following the Treaty of Rome's 50th anniversary, turned out to be an important catalyst for a new intergovernmental conference.

109. The idea of one single, consolidated text, as proposed by the Constitutional Treaty, was abandoned. Notwithstanding this seemingly fundamental change of course, the so-called Reform Treaty which was adopted in Lisbon, applies largely the same choices as were previously provided by the European Constitution, particularly with regard to justice and home affairs. Hoping to meet some of the political concerns, these reforms were not adopted through a "consolidated constitution", but rather in a European Union Treaty, which provides a traditional manner of reforms, i.e. by amending and renaming the existing treaties. The renewed TEU contains the Union's general and institutional principles and the regulation relating to the Common Foreign and Security Policy (CFSP) whilst the new TFEU (Treaty on the Functioning of the European Union) comprised the remainder of material law, including the criminal law which formerly resided under the third pillar. The entry into force of the Lisbon Treaty and the corresponding removal of the pillar structure has had a significant impact, particularly on the area of freedom, security and justice. This is because, before, the different aspects of the area of freedom, security and justice had been divided amongst two different pillars, making them subject to different regulations. Under former treaty law, the civil aspects, as well as the border controls, visa, asylum and immigration, were covered by the first pillar, while police and judicial cooperation resided under the third pillar. The difference in nomenclature and decision making procedures often brought about confusion, and the unanimity requirement in the third pillar was considered an important obstacle to the decision making's efficiency and effectiveness. The procedures were no longer adjusted to a Europe which then counted 27 Member States. In the framework of the third pillar's unanimity requirement, numerous political agreements were made based on a largest common denominator-approach, causing many of these texts to be void of any tangible added value. In the Reform Treaty a firm decision was made to opt for a co-decision procedure as the standard procedure for police and judicial cooperation in criminal matters.

110. Like any other treaty, the Reform Treaty required Member State ratification. The completion of all ratifications was originally expected for the end of 2008, meaning that the entry into force was expected to take place before the European elections of June 2009. However, in June of 2008 the Irish population voted against the treaty in a referendum, rendering the preconceived date infeasible. A second Irish referendum, dated October 2nd, 2009, provided rescue. Starting December 1st, 2009, the Lisbon Treaty entered into force.

### 1.3.2 Decision making procedure

111. The abolishment of the pillar structure is mostly linked to the introduction of a common decision making procedure for the policy areas which used to belong to the first and third pillar. Decision making by a qualified majority vote was set forth as the new standard procedure. In order to reach a qualified majority, a majority is required which simultaneously represents 55% of the Member States and 65% of the population. In order to avoid that large Member States could block the decision making process, these groups require a minimum of four Member States. As such, a group representing at least three quarters of a so-called blocking-minority can delay the decision making process in order to obtain a wider consensus. This new rule, representing the general principle to which exceptions can be made, came into force starting November 2014.

112. The reform of the decision making procedure also included a reform of the system of closer cooperation. Whilst closer cooperation following the amendments brought about by the Nice Treaty required a fixed participation on at least 8 Member States, the negotiations leading up to the Constitutional treaty lead to the decision of returning to a variable number of participating Member States. It was inscribed that closer cooperation would only be possible if 1/3 of the Member States participated. Although few substantive changes coincided with the conversion of the Constitutional Treaty to the Reform Treaty, adopted in Lisbon, it was in fact decided to replace this variable 1/3 by a pre-recorded fixed number of Member States. Closer cooperation thus becomes possible when there are 9 participating Member States. At the time of the adoption of the Reform Treaty, the EU consisted of 27 Member States. As such, the switch from 1/3 to 9 Member States had little practical bearing at that time. Since, the difference between the variable 1/3 of Member States and the fixed number of 9 Member States has become more clear. Due to the accession of Croatia, the EU now counts 28 Member States. If the 1/3 requirement had been maintained, this would mean that a closer cooperation would require 10 participating Member States. Opting for the introduction of a fixed number of 9 participating Member States reflects a more flexible regime in comparison to the original compromise stated in the Constitutional Treaty.

113. In addition to the autonomous manner of utilizing the closer cooperation procedure, this procedure can also be started as a result of a Member State using the "emergency brake" procedure. In an effort to compensate the removal of the unanimity requirement, the qualified majority decision making procedure was complemented by a kind of "alarm bell" - or "emergency brake"- procedure. This implies that should a Member State be of the opinion that a proposal would undermine a fundamental aspect of its criminal law system, it can address the European Council asking to suspend the regular legislative procedure. Following discussions and within a period of four months, the European Council can either resubmit the proposal to the Council and restart the regular procedure or the Commission or the group of Member States which had taken the original initiative can request to submit a new proposal. Should the situation arise where either the European Council has not taken any actions with regard to the original proposal within four months or the Council has not taken a decision regarding a new proposal within 12 months, then a group of at least 9 Member States can engage in a 'closer cooperation'. This implies a simplified procedure, as it is assumed that the prior agreement, required by the general regulations, is automatically provided.

### 1.3.3 Legal instruments

114. The current legal instruments are the same as those which were formerly provided for the so-called first pillar-issues. This means that the Council and the European Parliament have at their disposal, with the objective of further expanding the European instruments; regulations, directives, decisions and recommendations.

115. Regulations have a general scope. In other words, they are not intended to address a specific person or a specific situation and thus address an unknown number of persons or situations. They are immediately applicable in all Member States – no implementation in a Member State's national law is required – and are binding in their entirety. Additionally, regulations can be called upon directly by parties before the national court of a Member State. An example of a regulation is Council regulation No 1272/2012 of 20 December 2012 on migration from the Schengen Information System (SIS 1+) to the second generation Schengen Information System (SIS II).

116. A directive, on the other hand, addresses only the Member States, not their citizens. Through directives, the EU obliges its Member States to amend their national legislation. However, a directive is solely binding with regards to its timing and the objective that is to be achieved. How this objective is reached and which means are to be applied is to be decided by the Member States. Examples can be found in Directive 2011/36/EU of the European parliament and of the council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA and Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European Arrest Warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.

117. Resolutions address a specific Member State or a specific private actor (e.g. an entrepreneur) and are legally binding in their entirety vis-à-vis the person or state they address.

118. Lastly, recommendations and interpretative guidelines can be formulated. These are, however, never binding.