

Cross Pillar Politics of the European Union

EU Actors and the Centralisation of Foreign and Interior Policies

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Abstract

The pillar structure of EU politics dates back to the Maastricht Treaty and has since then been subject to several reforms but has never been formally abolished. According to a standard view, there is a fundamental distinction between the allegedly ‘supranational’ first pillar and the ‘intergovernmental’ second and third pillars. This standard view asserts that policy making in foreign and interior affairs – those areas which are partly located in each of these pillars – also follows two different institutional logics.

This thesis proposes a different perspective on foreign and interior policies and analyses the role of EU actors - the Commission, the European Parliament, the Council Secretariat, the Court of Justice and the Court of Auditors - in these two areas. It argues that policy making is not primarily characterised by the supranational-intergovernmental divide but rather by functionally induced cross pillar dynamics applying equally to both policy areas. It shows that EU actors were able to shape ‘intergovernmental’ bargains and that the primary division in foreign and interior policies is not on the supranational-intergovernmental dimension but rather between executive actors and those controlling the executive. Middle East and migration policies serve as case studies for this analysis.

The thesis shows that both areas have since the Maastricht Treaty become an integral part of the political system of the EU. Moreover, the centralisation process in foreign and interior policies, which stretches beyond the pillar confines, has consolidated the specific functional feature of both areas. It is argued that both areas constitute one policy type, referred to as macro political stabilisation. The functional dynamics of macro political stabilisation policies affect the way in which capabilities have been delegated to EU actors within the cross pillar institutional setting of EU foreign and interior policies. Moreover, the preferences of actors as well as the specific patterns of interaction in the policy making process also have to be understood against this functional background.

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Abbreviations

CFSP	Common Foreign and Security Policy
CIREA	Centre for Information, Discussion and Exchange on Asylum
CIREFI	Centre for Information, Discussion and Exchange on the Crossing of Borders and Immigration
COREPER	Committee of Permanent Representatives
DG	Directorate General
EC	European Community
ECJ	European Court of Justice
ECU	European Currency Unit
EMP	Euro-Mediterranean Partnership
EMS	European Monetary System
EP	European Parliament
EPC	European Political Cooperation
EPP	European Peoples' Party
ERF	European Refugee Fund
EU	European Union
GMP	Global Mediterranean Policy
IGC	Intergovernmental Conference
JHA	Justice and Home Affairs
MEP	Member of European Parliament
PA	Palestinian Authority
PES	Party of European Socialists
PKK	Kurdish People Party
PLO	Palestine Liberation Organisation
PPEWU	Policy Planning and Early Warning Unit
REDWG	Regional Economic Development Working Group
RELEX	External Relations Directorate General (<i>Relations exterieure</i>)
SCR	Joint Service (<i>Service Commun</i>)

SEA	Single European Act
SIS	Schengen Information System
TCN	Third Country National
TEC	European Community Treaty
TEU	Treaty on European Union
UN	United Nations
US	United States

CHAPTER 1

Introduction

If we were to regard foreign and interior policies as two sides of one coin, the name of the currency would be 'sovereignty'. And, it would be a national coinage. At present, there are 15 of these national 'sovereignty currencies' traded on the market of the European Union (EU). Yet, in parallel to these traditional national frameworks, also the EU itself has emerged as a political authority with an own right of coinage. To take this analogy with numismatics one step further, one could draw an analogy between developments in EU foreign and interior policies with European policies on monetary union prior to the Maastricht Treaty. This does not suggest that EU foreign and interior policies will ultimately culminate in a 'single European sovereignty currency', comparable to the Euro. Indeed, many different paths for the future development of EU foreign and interior policies could be reasonably imagined, the emergence of single policies only being one among many options, and probably not the most likely one.

Notwithstanding this objection, the relationship between EU foreign and interior policies, on the one hand, and member states' foreign and interior policies, on the other, could be imagined as an attempt to provide for incremental convergence through the establishment of a common standard closely linked with but autonomous from national approaches (Tsoukalis 1996). Seen from that perspective, EU foreign and interior policies would have a similar function as the European currency unit (ECU) in the framework of the European Monetary System (EMS) set up in 1979. What matters, then, is not primarily the scope of decisions on EU foreign and interior policies but rather the inherent pressure for convergence emanating from the gradual establishment of a common European 'central rate' for these two areas. Just like the currency 'snake', a metaphor used to illustrate the fluctuation of national exchange rates *vis-à-vis* the ECU in the EMS, also the snake of

national foreign and interior policies could be observed as ‘wriggling its way through the chaotic zoo’ of international politics (*ibid.*: 282).

This thesis explores the way in which foreign and interior policies have been dealt with at the EU level from the entry into force of the Maastricht Treaty in November 1993 until the entry into force of the Nice Treaty in February 2003. It identifies the key functional, institutional and actor related features that shape policy making in both areas. In the words of the analogy suggested above, the thesis thus accounts for how head and tail of the EU ‘sovereignty currency’ look like. The specific focus of this thesis is laid on analysing the role of the Commission, the European Parliament, the Council Secretariat, the Court of Justice and the Court of Auditors in both areas. These actors, often referred to in the literature as ‘supranational’ actors, contribute to the coining process, yet their concrete role in both areas, in particular from a comparative perspective on both foreign and interior policies, has not yet been subject to a detailed study. For that purpose, this thesis draws from empirical examples derived from the study of two concrete case studies, namely Middle East policies as far as EU foreign policies are concerned, and migration policies regarding EU interior policies.

While it is not argued here that national policies have merged into single EU foreign and interior policies, the argument is espoused that EU foreign and interior policies are much more than largely non-compulsory settings of intergovernmental cooperation among sovereign states with only minimal integration at the EU level. In contrast, this thesis claims that both areas have been subject to considerable centralisation at the EU level. Foreign and interior policies have become an integral part of the political system of the EU. While centralisation has not resulted in the establishment of single foreign and interior policies, it has nevertheless led to the emergence of concrete, genuine EU policies, which cannot adequately be described as the (lowest) common denominator of the 15 member states. The focus of this study on the role of the aforementioned ‘supranational’ actors – referred to in this thesis as EU actors – in policy making processes in both areas reveals that they have been delegated considerable capabilities across those three pillars which formally

separate foreign and interior policies into seemingly ‘supranational’ and ‘intergovernmental’ settings.¹ One of the key arguments of this thesis, therefore, is that it is in particular the analysis of the role of EU actors in foreign and interior policies that helps to identify the characteristic features of the factual cross pillar institutional setting of both areas. It is against this background that the thesis yields scepticism regarding the attribution of the terms ‘supranational’ and ‘intergovernmental’ with regard to policy orientations of different actors in EU policy making. For the same reason, it is also highly sceptical about ascriptions of a ‘supranational’ or ‘intergovernmental’ logic of integration (Stone Sweet and Sandholtz 1998; Moravcsik 1998). As is shown in subsequent chapters, this distinction remains imprecise with regard to the underlying dynamics of European integration and does also conceal significant differences within the actually diverse groups of ‘supranational’ and ‘intergovernmental’ actors. As is argued at length, the orientations of EU actors are far from being coherent. Moreover, these different orientations are also not intrinsically opposed to those of member states, as if these were a somewhat united bloc.

This thesis proposes new empirical and theoretical perspectives on EU foreign and interior policies. As far as the empirical results are concerned, the following analysis provides evidence for the claim that foreign and interior policies have been subject to a centralisation process within the EU political system. While it is true that foreign and interior policies, from a formal perspective, continue to be divided into ‘supranational’ and ‘intergovernmental’ pillars, this thesis asserts that such a legal distinction has not been able to impede upon a factual cross pillar centralisation of both areas. Thus, by arguing that even without the classical Community method at work in most parts of foreign and interior policies, there are some underlying functional dynamics of policy making, which led to incremental centralisation of these policies at the EU level, the thesis directs attention towards the functional context within which institutions and actors operate. Its central

¹ See chapter 2 for a more detailed explanation on the usage of the term ‘EU actor’ in this thesis.

theoretical claim, therefore, is that the precise shape of institutions and actor preferences in EU foreign and interior policies has to be understood against the background of such a 'functional frame', referred to in this thesis as 'macro political stabilisation'.

This functional context has shaped the way in which national actors and EU actors interrelate with each other in the policy making process. Hence, as far as the institutional setting of EU foreign and interior policies is concerned, the thesis identifies the distinction between executive actors, on the one hand, and parliamentary and judicial 'control actors', on the other, as the main institutional feature of macro political stabilisation policies. In particular, the thesis stresses that what characterises EU foreign and interior policies is not so much the mere existence of this divide but rather the substantially unequal distribution of powers between the two sides. Thus, there is a strong dominance of executive actors in both areas, at the expense of firm parliamentary or judicial control. On the same note, the two sides of this 'executive-control divide' of EU foreign and interior policies should themselves not be considered as quasi-homogenous monoliths. Nevertheless, joint decision making mechanisms provide for a strong institutional impetus for consensual agreement between executive actors. An analysis of inner executive coordination demonstrates that interaction between the Commission and the Council – Secretariat and member states alike – is structured by an elaborated system of checks-and-balances within which opposing orientations and preferences are at all stages of the decision making process constantly jointly negotiated. These dynamics significantly increased the likelihood of consensual agreement among executive actors, although at the price of highly incremental decision taking and implementation of policies on the ground.

The 'functional frame' thesis put forward here leads to the overall conclusion that the actual impact of the pillar structure on policies has been much less pronounced than often assumed, for example by those national governments which are reluctant to transfer all policies to the Community pillar but also by intergovernmentalist approaches to the study of the EU. Thus, it was even without a

formal revision of the Maastricht Treaty pillar structure, that political processes in EU foreign and interior policies have transcended the officially enduring pillar divide. Two main reasons can be identified for this *de facto* 'de-pillarisation'. First, foreign and interior policies are an integral part of the EU political system. Hence, institutional mechanisms and actor constellations are nothing special to the second and third pillars but have to be seen in the way in which they relate to the wider context of EU policy making. Second, foreign and interior policies, although being formally divided across three pillars, are subject to a centralisation process which is triggered from the specific functional features pertaining to these two policy areas. Thus, a new policy type has emerged at the EU level, which is referred to in this thesis as 'macro political stabilisation' and this policy type sets the functional frame to which actors primarily relate in the policy making process.

Having said this, it must be emphasised that while the factual significance of the pillar structure on policy making has remarkably decreased over time, the symbolic relevance, which some member states continue to attribute to this formal division, remains high and it is this symbolic significance rather than clear-cut interests which explains the relative steadfastness of the pillar structure. However, notwithstanding its outward appearance, the pillar structure is gradually hollowed out by the dynamics of day-to-day policy making in both areas.

What stems from this analysis is the argument that some ten years after the Maastricht Treaty the 'snake' of national foreign and interior policies has found a branch around which to bend and this branch has, very gradually, grown thicker and more solid. While EU foreign and interior policies coexist with enduring national policies in both areas they are no longer a *quantité négligeable*. Both areas have become centralised at the EU level and bequeath the EU with 'sovereignty' by providing a functional frame of 'macro political stabilisation' within which actors operate. During the last ten years, a functionally induced stabilisation of the institutional setting of EU foreign and interior policies has taken shape that is characterised by hybrid, cross pillar institutions, which allow not only member states but also EU actors to play, with varying degrees, a quite considerable role in policy making across the three

pillars. Based on these observations, the subsequent chapters of this thesis will shed light on how, even without the full communitarisation of foreign and interior policies, these underlying functional dynamics of policy making in both areas have paved the way for a cautious yet significant centralisation process of EU foreign and interior policies.

CHAPTER 2

Shaping 'Intergovernmental' Bargains?

Research Questions and Research Design

Introduction

The Maastricht Treaty of 1993 increased the 'levels of politicization' within the EU by integrating two important policies, which hitherto were not part of the formal governance structure, into the Treaties (W Wallace 2000: 525). These policies became known under the acronyms of CFSP and JHA or – with reference to either ancient Greek architecture or their location in the Treaties – as the second and third pillar of the EU.² Notwithstanding this significance of the Maastricht Treaty's provisions, the origins of joint policies in both areas date back to the early 1970s when member states established Europeanised frameworks for cooperation in foreign and home affairs, albeit on a purely intergovernmental basis (Lobkowitz 1994; M E Smith 1998; Wallace and Wallace 2000). While these foreign and interior policy settings had already before the Maastricht Treaty gradually been linked with institutional structures of the EC, intergovernmental paths endured and significantly shaped the provisions on CFSP and JHA.³ This path dependence was also replicated on a linguistic level. Thus, most commentators used to refer to the 'two intergovernmental pillars' when analysing foreign and interior policies despite the existence of a European 'single institutional framework' which was meant to cover

² CFSP: Common Foreign and Security Policy; JHA: Justice and Home Affairs. Following the Greek Temple metaphor the overarching 'roof' of the European Union is carried by the three 'pillars' of the European Community (EC), the CFSP and JHA.

³ Foreign policies were for the first time linked with the EC in 1986 through the Single European Act (SEA). However, as opposed to the provisions of the Maastricht Treaty, the SEA did not provide for a 'single framework' covering all aspects of EC foreign policies. In contrast to the 'single institutional framework' referred to in the Maastricht Treaty, ex-Article 30 3(a) SEA (Title III) only mentioned the 'framework of European Political Co-operation' (EPC) and contained no overarching substantial linkage with the EC, save references to the Commission and Parliament. Therefore, EPC 'was clearly separated from the provisions of the Act which amended or related to the Community Treaties'. Consequently, 'EPC, pursuant to Title III, remained an intergovernmental process governed by international law' (MacLeod, Hendry and Hyett 1996: 411). On the SEA see also Moravcsik 1991.

policies across the three pillars (Bieber and Monar 1995; Regelsberger *et al.* 1997; Wallace and Wallace 1996). This terminology mirrored the ‘official’ pillar terminology on which member states agreed upon during the Maastricht Intergovernmental Conference (IGC) (Majer 1999).

Yet, as already indicated, CFSP and JHA were never strictly intergovernmental fora, but were from the outset characterised by an inherent tension between the attempt to continue with established intergovernmental practices on the policy making level and the integration of both areas into the ‘single institutional structure’ of the ‘new overarching entity – the European Union’ (McGoldrick 1997: 13). Thus, both areas can best be characterised as institutional hybrids which allowed for collective decision making in both areas under the umbrella of the EU while at the same time keeping policy making as separate as possible from the classical EC working methods of the supranational first pillar (Moravcsik 1998). On the face of it, the Amsterdam Treaty of 1999 did provide for significant changes to the way in which both policy areas are dealt with at the EU level (Weidenfeld 1998). However, in substance it did not fundamentally change the three pillar design since even those policy areas, which were transferred to the first pillar, were not communitarised in the ‘classical’ sense (Duff 1997; Moravcsik and Nicolaidis 1998 and 1999).⁴

Thus, migration policies shifted from the third pillar to the first pillar, yet with regard to decision making and, arguably, implementation and judicial overview, there have been rather minimal changes to the provisions of the Maastricht Treaty. Only after a five year period, by May 2004, can member states decide – by unanimity – to regulate this policy area with the ‘classical’ Community method. At least until the end of this transitory period, migration policies are part of a *semi-communitarised* institutional setting which still contains many features of the third pillar, such as unanimity requirements in the Council, a shared right of initiative of both the

⁴ Given the variety of institutional arenas in the first pillar, the term ‘classical’ Community method should be regarded as an ideal type notion (Wallace and Wallace 2000). See chapter 4 on the actual plurality of various institutional settings – also within the EC framework - in the areas of foreign and interior policies.

Commission and member states, a weak role of Parliament in the legislative process and restrictions to the jurisdiction of the Court of Justice (den Boer 1997; Stetter 2000).

Intergovernmental bargains?

This formal separation of policy areas into three pillars – one supranational and two intergovernmental – has led many scholars to assert that there are indeed ‘pillarised’ political processes at the EU level, thus assuming a relatively clear-cut separation between the pillars. As Ramses Wessel has noted, ‘the three-pillar structure of the European Union [...] is often used as a justification for separate analyses of the three pillars. To this very day one can observe the existence of largely isolated [...] research communities’ in studies on the three pillars (2000: 1135).

This underlying consensus on a separation of the pillars has even been able to bridge the otherwise deep divide between intergovernmentalist approaches to the study of the EU, on the one hand, and those studies which analyse the EU from a neofunctional or comparative politics perspective, on the other. Andrew Moravcsik, for example, notes that the Maastricht IGC created ‘the three-pillar structure, in which these policies [CFSP and JHA; SS] remained intergovernmental’ (1998: 467). Following this statement, Moravcsik’s ‘basic explanation of the process and outcome’ of IGCs can *mutatis mutandis* be applied to the study of decision making in CFSP and JHA as well (Moravcsik and Nicolaïdis 1999: 59). The institutional features of the second and third pillars – such as unanimity requirements between member states and seemingly severely restricted roles for EC institutions – resemble those during IGCs. Therefore, Moravcsik’s famous statement that ‘the EC has developed through a series of celebrated intergovernmental bargains, each of which set the agenda for an intervening period of consolidation’ could be refined as a liberal intergovernmentalist perspective on the second and third pillars (1993: 473). Thus, similar institutional rules for IGCs, on the one hand, and CFSP and JHA, on the other, would render domestic preference formation on the basis of economic interests, interstate bargaining on the basis of asymmetrical interdependence and institutional choice on

the basis of the need to ensure credible commitment between member states, the key variables for explaining outcomes in the intergovernmental pillars (Moravcsik 1998: 24).

Also those scholars who view the EU as a system which is less dominated by intergovernmental factors, have reached conclusions comparable to Moravcsik's when theorising about CFSP and JHA. Thus, Geoffrey Garrett and George Tsebelis have made predictions with regard to outcomes in the two 'intergovernmental' pillars. They argue that 'the dynamics of decision making in these areas are identical to that in the era of the Luxembourg compromise' (1996: 282). Their institutional critique of intergovernmentalism does, therefore, not cover CFSP and JHA. These areas are indeed dominated by the Council and decision making power rests 'effectively with the government with the least interest in changing the status quo.' While being less sceptical than Moravcsik about the prospect for further integration, they nevertheless conclude that for the areas of CFSP and JHA it is 'reasonable to conceive of decision making in terms of the Luxembourg compromise period and to ignore the roles played by other EU institutions' (*ibid.*: 283). In fact, Garrett and Tsebelis echo a widespread scepticism in EU studies about the extent to which insights from the study of policy making in the first pillar can be applied to the EU at large. Thus, Mark Pollack notes that his hypotheses on supranational influence only apply to the EC pillar and not to the 'two *strictly* intergovernmental pillars' (1997: 99; *emphasis added*). Also Simon Bulmer points out that the 'diversity of governance between the three pillars of the EU is striking' (1998: 367). He concludes that his findings on governance in the EU cannot, without recalibration, be applied to the second and third pillars of the EU (*ibid.*: 382).

Scholars who have focused on the two areas of CFSP and JHA have always been sceptical with regard to such far reaching conclusions regarding the differences between the pillars.⁵ The specialised literature cites many examples which show that

⁵ The emphasis in this thesis on the functional similarities between both areas should not lead to an underestimation of differences between both policy areas. The subsequent chapters of this thesis will address such differences.

the relationship between the pillars on the Treaty level and in day-to-day policy making is stronger than suggested by the aforementioned body of literature. Yet, while most CFSP and JHA experts acknowledge that there is some kind of interrelationship between the three pillars, the precise shape of ‘interaction and overlap’ between the Union’s alleged supranational and intergovernmental legal orders remains ‘often hotly disputed’ (Peers 2000: 1). There is, thus, a widespread assumption even in the CFSP and JHA literature that ‘the distinctions between the three pillars are quite substantial’ (*ibid.*: 13). John Peterson, notes that ‘the CFSP is distinct from the rest of what constitutes the “European Union”’ and emphasises that the special character of the second pillar stems from the quasi-constitutional character, which even technical decisions in this sensitive policy area have (1998: 15). Also Reinhardt Rummel and Jörg Wiedemann argue that in CFSP ‘any political issue will automatically be viewed as a means for bargaining over institutional arrangements’ (1998: 63). For these two authors, the pillar structure is foremost characterised by institutional paradoxes and dichotomies which are ‘contradictory rather than complementary’ (*ibid.*: 53). Thus, despite the provisions of both the Maastricht Treaty and the Amsterdam Treaty that all three pillars shall be governed by a single institutional framework, scholars continued to refer to both areas as belonging to ‘the sphere of intergovernmental cooperation’ (Hailbronner 1995: 95; Hailbronner 2000: 47-50).

Consequently, those political science approaches, which have emerged in the 1990s and which analyse first pillar policy making from a perspective which assumes that the EU is a quasi-governmental system, remain rather marginal for research on CFSP and JHA (Jachtenfuchs and Kohler-Koch 1996a; Marks *et al.* 1996; Marks, Hooghe and Blank 1996; Richardson 1996b; Scharpf 1994). Most CFSP studies are still based on international relations approaches, while the analysis of JHA continues to be dominated by international law researchers as well as law practitioners (Peers 2000; Zielonka 1998a). Such approaches have led to an emphasis on the alleged *sui generis* character of both areas and to relatively little communication with, for example, first pillar research. This relates to the aforementioned criticism expressed

by Wessel about 'largely isolated [...] research communities' on the three pillars, which render research 'frequently "content driven"' rather than starting from an institutional analysis of policy making (2000: 1135).

Shaping 'intergovernmental' bargains

This thesis aims to challenge these explicit or implicit assumptions of pillarised political processes at the EU level and also attempts to foster the linkage between comparative politics approaches to the study of the EU and research on CFSP and JHA. It argues that the functional dynamics of EU policy making, in general, and of EU foreign and interior policies, in particular, have led to the emergence of a cross pillar institutional setting in these two areas and this cross pillar setting reflects the gradual erosion of the three pillar design of the Maastricht Treaty, without its formal abolishment. This empirical observation has some far reaching theoretical consequences, for it challenges intergovernmentalist assumptions which hold 'that European integration was a series of rational adaptations by national leaders to constraints and opportunities stemming from the evolution of an interdependent world economy, the relative power of states in the international system, and the potential for international institutions to bolster the credibility of interstate commitments' (Moravcsik 1998: 472).

In stark contrast with these arguments, this thesis provides evidence that European integration has led to the emergence of its own functional dynamics which provide the primary reference point for actors, national governments and European institutions alike. This functional frame of EU politics renders policy making at the European level closely interlinked but structurally autonomous from the national level and international developments as well as from mere interstate bargaining. This claim is supported by the subsequent analysis of EU foreign and interior policies, thus two policy areas which are by definition closely linked to traditionally national notions of sovereignty. The arguments of this thesis on a 'functional frame' of EU foreign and interior policies, which shapes the space in which actors operate, thus, from a conceptual perspective, stretch beyond these two areas and direct attention

towards the underlying functional dynamics of European integration at large. This 'functional frame thesis' also relates to some of the key insights provided for by the schools of historical and sociological institutionalism (Pierson 1996 and 2000a; Fligstein and Mara-Drita 1996). It must be noted that the existence of an autonomous 'functional frame' at the EU level does in no way mean that future developments or actor choices are determined. What it does, however, claim is that actors operate within a functionally structured space and that the specific 'policy logics' of EU foreign and interior policies render, first, certain policy agendas more likely than others, second, structure the way in which institutional provisions work in the political process and, third, shape the set of policy options available to all actors. EU foreign and interior policies are therefore characterised by a 'functional frame', referred to in this thesis as 'macro political stabilisation', and the impact of this frame on policy making can be studied when analysing the institutional provisions and actor preferences in these two areas.

These arguments build upon those studies – either case oriented or theoretical - which have highlighted the interrelationship between the three pillars. Thus, William Wallace has suggested that while CFSP and JHA 'remain distinctive from other fields of EU policy' the main dividing line in EU politics does not derive from the pillar design (W Wallace 2000: 537). Nevertheless, he emphasises the special character of CFSP and JHA and notes that both areas share a similar policy mode which he identifies as 'transgovernmentalism' (*ibid.*: 525). Notwithstanding this emphasis on the importance of national governmental actors, the 'flow of policies' in both areas takes place within a single EU system of collective government, thus weakening the differences between the pillars (*ibid.*: 530). Accordingly, Elfriede Regelsberger *et al.* have pointed out that the CFSP is subject to a 'viability of an increased interconnectedness between the second and first pillars' (1997b: 9). Similar observations have been made with regard to the interconnectedness between the third and first pillars, which are characterised by a 'highly heterogeneous field [of] considerable overlap' between the provisions of the EC Treaty (TEC) and the Treaty on European Union (TEU) (den Boer and Wallace 2000: 499).

This thesis traces the various substantive, legal, institutional and organisational linkages between the three pillars in a systematic way, arguing that policy making in the EU after the Maastricht Treaty was characterised by a process of a *de facto* merging of the pillars, despite the on-going *formal* separation between them. As subsequent chapters will show, this merging process has resulted from an unfolding of the functional dynamics of European integration in foreign and interior policies. The *merging proposition*, which is further outlined below, is tested on the basis of two case studies from each area, these being EU Middle East policies, on the one hand, and EU migration policies, on the other.⁶ In an attempt to test the validity of the merging proposition, this thesis looks at the way in which EU actors, thus those actors explicitly referred to by Article 7 TEC and Article 5 TEU, were able to shape allegedly 'intergovernmental' bargains in foreign and interior policies. Therefore, the prime focus of this thesis is to provide an analysis on the role of the European Parliament (EP), the Council Secretariat, the Commission, the European Court of Justice (ECJ) and the Court of Auditors in policy making in foreign and interior policies, in general, and Middle East and migration policies, in particular.

The usage in this thesis of the term 'EU actors' requires some additional specifications, in particular with regard to the inclusion of the Council Secretariat in the analysis. Acknowledging that studies 'of the EU can often present the reader with a baffling array of terminology' the choice to refer to EU actors (as opposed to national governmental actors which are also an important part of the EU system of governance) is better suited to describe their role in policy making than alternative terminologies (Geddes 2000: 11). Take, for example, the term 'EC actors', which would be too limited, since it exclusively refers to the first pillar and would, consequently, be less appropriate to describe the inclusion of various actors *across* the pillars. Another alternative term could be 'supranational actors' which is, however,

⁶ This thesis does not cover some other important parts of the second and third pillars, such as defence policies or police and judicial cooperation. It would, however, be worthwhile to study the extent to which the concepts and arguments in this thesis also apply to these areas, in particular how they relate to issues of internal and external security. A case in point could be the study of emerging transgovernmental networks relating to Europol or the European Security and Defence Policy

not used here due to the aforementioned conceptual scepticism about the actual usefulness of the supranational-intergovernmental dichotomy for describing developments in EU politics.

The term 'EU actors', as it is used in this thesis refers to those actors which are explicitly referred to by the Treaties, which are from an organisational perspective permanently based at the EU level, either in Brussels (EP, Commission and the Council Secretariat) or, as the ECJ and the Court of Auditors, in Luxembourg and which are not primarily made up by representatives of national governments - such as the Council of Ministers, Presidencies or Council Working Groups.

As Christiansen notes, the 'inclusion of the Council Secretariat may require further justification since it is usually not regarded as either "supranational" or as an "institution" [...] However, in spite of the official nomenclature, the Council Secretariat is clearly an institution, possessing a formal structure with a set of internal rules and administrative practices which regulate the work of a body of permanent staff. And it is located at the European level, possessing a high degree of institutional autonomy and may therefore be regarded as supranational' (2002: 35). This view is supported here, yet for the reason stated above the term 'supranational' is replaced by the more neutral reference to 'EU actors'. This perspective also takes note of the observation that the functions of the Council Secretariat in the policy making process have gradually been extended since the Maastricht Treaty. As subsequent chapters will show in greater detail, the traditional functions of the Secretariat to support the Presidencies and being the 'institutional memory' of the Council, have been supplemented by a gradual politicisation of the Secretariat, which has become - in particular in the area of foreign policies - a more autonomous actor.

As a word of caution it should be noted, that articles 7 TEC and 5 TEU refer to the Council as a whole. This thesis, however, merely looks at the Council Secretariat and not at those parts of the Council's structure - such as Presidencies, specialised Councils, Working Groups, the Committee of Permanent Representatives (COREPER), the Political Committee, the K.4 Committee or other institutions - that are primarily constituted by national governmental actors. Since the Secretariat is not

such a nationally constituted institution, it is reasonable to compare it with the other EU actors and to ask how the Secretariat was involved in shaping 'intergovernmental' bargains – while acknowledging that in its day-to-day operations the Council Secretariat is closely linked with other actors in the Council's complex institutional structure.

The usefulness of such a distinction between the Council Secretariat, on the one hand, and the other aforementioned actors within the Council structure has been acknowledged by other scholars who have analysed the evolution of the role of the Secretariat, in particular with regard to EU foreign policies (M E Smith 2003; Christiansen 2002; Hayward-Renshaw and Wallace 1997). This should, however, not lead to the conclusion that the distinction between the Council Secretariat and other Council institutions is 'clear-cut' (Christiansen 2002: 35). While some actors within the Council structure, such as the Presidency, the Council of Ministers and the Working Groups are characterised by a 'duality' of being both EU and national actors, the role of the Council Secretariat is less blurred (*ibid.*) Thus, as Michael E Smith has argued with a view to EU foreign policies, the establishment of the CFSP Secretariat with the Maastricht Treaty has rendered this institution 'an arm of the Council Secretariat General [...] a *Community* institution' (2003: 188). This delegation of powers to the Council Secretariat must not be mistaken for an abdication of political power by member states. In fact, the delegation of powers to the Council Secretariat has been used by member states in an attempt to avoid delegation to another EU actor, namely the Commission. The establishment of the offices of the CFSP Secretariat, the High Representative for the CFSP (who also acts as Secretary General of the Council), the Policy Planning and Early Warning Unit (PPEWU) and the Special Representatives with the Maastricht and Amsterdam Treaties points to an increasing shift of power *between* EU actors from the Commission to the Council Secretariat.⁷ Thus, 'the Council Secretariat has gained additional powers and responsibilities in recent rounds of treaty revision, in particular with respect to the

⁷ See also chapter 4 in which the delegation of capabilities to the Council Secretariat is discussed in greater detail.

establishment of the EU's foreign, security and defence institutions – a development that, while reflecting concern among member states that such powers should not be accrued by the Commission, also underlines the ability of the Council Secretariat to provide institutional solutions in such a context' (Christiansen 2002: 46).

The inclusion of the Council Secretariat in this analysis does, therefore, not suggest that it is the most powerful actor within the complex institutional structure of the Council (*cf.* Hayes-Renshaw and Wallace 1997). Neither does it imply that the distinction between Secretariat and other Council actors is sharp. For example, the Council Secretariat – but also the EPC Secretariat from 1986 to 1993 – is characterised by a strong institutionalised interrelationship with and dependence on the rotating Presidencies. Thus, the 'Secretariat's relationship with the Presidency [...] is a flexible one. Much of [...] the significance of the Council Secretariat's role in drafting agendas and meetings, providing legal and other advice, and fine-tuning the detail of negotiations crucially depends on the permissiveness of the Presidency to provide such opportunities for influence' (Christiansen 2002: 47-48). This form of intense structural coupling between the Council Secretariat and other Council actors must, however, not only be seen as a limitation to the influence of the Secretariat. In fact, its close institutional relationship with member states in parallel to its overall political responsibility to the EU as such (and not to Presidencies or member states) actually provides the Council Secretariat with a strong institutional backing *vis-à-vis* both member states and other EU actors, in particular the Commission. Hence, the argument of this thesis about the growing importance of the Council Secretariat in policy making, in particular in the area of foreign policies, must be viewed against the background of both the Secretariat's close linkage with member states and the Presidencies, on the one hand, and its role as an executive counter-weight to the Commission, on the other.

Having said this, it is essential to note that while being closely linked to other actors within the Council's institutional structure, the Secretariat differs from these other actors in a crucial way, for the Secretariat does not fully or partly represent individual member states' governments but, as Michael E Smith argues, represents

the 'power of the Community's bureaucratic machinery' (2003: 148). This does not neglect the sense of hierarchy ingrained in the Treaties between the Secretariat and other Council institutions, for example in the area of EU foreign policies. Thus, Article 18 TEU emphasises that it is the Presidency that represents 'the Union in matters coming within the common foreign and security policy'. In this context, the High Representative 'only' has the task to assist the Presidency. However, in contrast to the provisions prior to the Maastricht Treaty, in which the then-EPC Secretariat was directly responsible to the rotating Presidency, the Maastricht and Amsterdam Treaties have fostered the autonomy of the Secretariat – and the High Representative – as EU actors. Thus, the new directive for the CFSP Secretariat (which became part of the Council Secretariat) and, with Amsterdam, the High Representative and the PPEWU, was 'to serve the CFSP (rather than the EU Presidency)', thereby consolidating the status of the Council Secretariat as an EU actor (M E Smith 2003: 188).⁸

The distinction which this thesis draws between national governmental actors (member states), those actors representing both member states and the EU (Presidency, Council of Ministers, COREPER, the Political Committee, the K.4 Committee, Working Groups) and EU actors is not an argument about the distribution of power between these actors in the policy making process. As this thesis argues again and again, member states continue to play the key role in policy making in the two areas of foreign and interior affairs, thus reflecting the close link of these two areas with traditional national prerogatives. Yet, while there is ample evidence in the literature on the decisive role of national governments and Council institutions in EU foreign and interior policies, no study has until today focused from a comparative perspective on the role of EU actors in this context. The thesis hence follows the conceptual demand raised by Christiansen who has argued that a

⁸ Prior to the Maastricht Treaty, the EPC Secretariat was clearly separated from the Council Secretariat. Although both Secretariats were, since the establishment of the EPC Secretariat with the SEA, located within the same building, yet they remained detached from each other. Not only were they placed in different wings of the Council building, but the EPC Secretariat was separated from the Council Secretariat 'by doors with special locks on them' (Smith 2003: 168).

‘systematic analysis of the role of supranational institutions [...] is not only promising, but indeed necessary’ (*ibid.*: 34). While not neglecting the central role of national governments in the policy making process – for example in providing political leadership and continuity of policy making - the permanent and systematic involvement of EU actors in foreign and interior policies endows ‘the EU bargaining context with a rich normative environment that cannot be explained away as epiphenomenal or a mere lubricant of intergovernmental negotiation’ (Lewis 2000: 261). At this point, a second conceptual clarification must be introduced, namely that there is an important difference with regard to both case studies. While Middle East policies are pursued in all of the various issues areas relating to EU foreign policies in both the first pillar and the CFSP, migration policies are only one amongst several issue areas in the interior policy setting of the EU. Thus, JHA cooperation also encompasses issues such as drug prevention policies, the combat of fraud, judicial cooperation in both civil and criminal matters, customs cooperation and, in particular, police cooperation in order to prevent terrorism and international crime. While, hence, from the outset the ‘subject-matter [of JHA] was heterogeneous’, there is nevertheless an important linkage between these various JHA issues which allows us to concentrate on migration policies in order to detect more general trends in the development of interior policies at large (W Wallace 2000: 494).

Thus, all of these ‘law and order’ issues were traditionally considered as ‘matters of executive control in all states’ and, consequently, as central components of national sovereignty (*ibid.*: 501; *cf.* Geddes 2000). However, European integration and, in particular, the economically motivated relaxation of border regimes between EU member states, brought to the fore the requirement to coordinate policies in law and order issues at the European level and to collectively respond to new cross border challenges. Notwithstanding their partially different institutional frameworks, this shared cross border context of law and order issues is relevant for as different phenomena in the area of interior policies, such as cross border movements of migrants, cross border litigation, cross border marriages, cross border drug trafficking or cross border crime. Given the linkage of all these areas with (internal)

sovereignty and erstwhile national prerogatives, EU policies in all areas of JHA contribute to the construction of an ‘internal law and order identity’ of the EU and, consequently, a nascent political sovereignty.

In the light of these functional similarities between the heterogeneous subject-matters of JHA, migration policies seem to be a particularly useful case for a detailed analysis of cross pillar politics. This is because migration policies - understood as those policies which regulate conditions of entry and sojourn of non EU citizen - not only establish EU specific law and order practices, but do so in relation to a clearly demarcated outside, namely third country nationals (TCN).⁹ Thus, migration policies are a particularly visible example of the stabilisation of an internal identity of the EU induced by policy making in interior policies in general.

Given this thesis’ focus on the role of EU actors in foreign and interior policies, the particular objective here is to show that EU actors were indeed able to establish and to exploit various linkages between the pillars and to shape policy outcomes *across* all three pillars, thus at least partially overcoming their formally negligible role in CFSP and JHA on the Treaty level. EU actors were thus able to shape ‘intergovernmental’ bargains since the functionally induced cross pillar institutional setting provides a stable, EU-specific frame within which the preferences of EU actors – alongside those of national governments – are constantly channelled into the EU decision making process. The analysis covers the years from 1993, when the Maastricht Treaty entered into force, until February 2003, when the Nice Treaty entered into force. Turning the spotlight on policy making processes in the two areas, this thesis argues that EU foreign and interior policies cannot sufficiently be explained by looking solely at member states’ preferences and bargains between them but are to a significant extent shaped by the inputs of EU actors as well. This does not imply that EU actors were able to dominate policy making. Indeed, member states continue to hold the most powerful institutional resources in

⁹ Notwithstanding the significance of this basic distinction between EU citizen, on the one hand, and TCNs on the other, it should be emphasised that EU law provides for a multifaceted system of rights of TCNs. Thus, the legal status of those TCNs, which are permanent residents in the EU, often approximates the status of EU citizen, at least in the economic sphere (*cf.* Peers 2000).

both areas (Hill 1996 and 1997; Kuijper 2000). Notwithstanding these limitations to the role of EU actors, a systematic analysis of the conditions under and the extent to which they can make use of their formal and informal powers in policy making, which often stem from first pillar prerogatives, is well suited both to account for the centralisation process in the two areas and to capture the institutional complexities of cross pillar politics.

While it is, thus, argued that an analysis of policy making in both areas supports the hypotheses of both a gradual merging of the pillars in everyday policy making and of a significant influence of EU actors in shaping policies, it is not claimed that this development has led to a supranationalisation of foreign and interior policies. Member states and the Council continue to be the central players in both areas and the Treaties, in particular in the area of foreign policies, have codified the centrality of the (European) Council and the rotating Presidencies in the policy making process. In fact, the price EU actors had to pay for shaping policies across the pillars, has been the assertion by member states within the framework of the Council and the European Council to provide for collective executive leadership in both areas. By doing so, also member states embarked upon the opportunities provided for by the merging of the pillars. Thus, the inroad EU actors made into formally intergovernmental domains has been mirrored by the attempt of member states to gain more control over both the cross pillar policy agendas in foreign and interior affairs – including erstwhile ‘supranational’ policy domains of the first pillar and the implementation of policies across all three pillars (Fligstein and McNichol 1998).

One of the immediate implications of the argument put forward here relates to terminology. It is based on scepticism regarding the distinction in most literature between first pillar foreign policies and CFSP, on the one hand, and first pillar interior policies and JHA, on the other hand. The strict delineation between the different parts of these policy areas, as they are spread across the pillars is, according to the findings presented in this thesis, less important than suggested by a terminology that reproduces this very *pillarisation* by imprecise and often normatively

laden labels such as 'intergovernmental' and 'supranational'. In particular, the interchangeable usage of the terms foreign and interior policies with the acronyms CFSP and JHA is rejected. Acknowledging the implications of the merging proposition, the terms EU foreign and interior policies cover the whole spectrum of policies in both areas including first pillar provisions, whereas CFSP and JHA are not distinct policy areas but specific decision making rules for *parts of* EU foreign and interior policies.

Institutions: Cross pillar politics

The merging proposition put forward here builds upon two key insights into EU politics provided by recent political science and legal studies literature, which both make the case for a unity of the EU on a political and legal level. With regard to the *political unity* thesis, scholars have argued from a comparative politics perspective, that politics and policies of the EU are by and large comparable to other (national) political systems (Lindberg 1969; Wallace 1982; Hix 1999). While this political system perspective has been advocated by Hix, it can, in fact, be found as an underlying assumption for the majority of political science research on the EU (Jachtenfuchs 2001; Hix 1994 and 1998). Thus, scholars have in particular for those policy areas covered by the TEC used methods, which were traditionally applied to the analysis of national political systems, to the study of EU politics and policies. Hence, they have, first, identified a 'stable and clearly-defined set of institutions for collective decision-making' comprising the (European) Council, the Commission, the EP and jurisdiction by the ECJ.¹⁰ Second, scholars have looked at the way in which 'citizens and social groups seek to achieve their political desires through the political system'.¹¹ Third, various studies have shown that 'collective decisions [at the EU level] have a significant impact on the distribution of economic resources and the allocation of social and political values', and, finally, that 'there is a continuous interaction

¹⁰ See among others for the Council Hayes-Renshaw and Wallace 1997; Hosli 1996; for the EP Tsebelis 1994; Earnshaw and Judge 1996; and for the ECJ Alter 1998.

¹¹ For these state-society relations see among others Gabel 1998; Hix and Lord 1997; Reif and Schmitt 1980.

("feedback") between these political outputs, new demands on the system, new decisions, and so on'¹² (Hix 1999: 8). Thus, at least with regard to politics of the first pillar, there is an emerging consensus that the EU is indeed a 'polity' sharing structural similarities with traditional national polities.¹³ Notwithstanding this observation, it should be stressed that due to its relatively unstable and contested institutional setup and due to the contested dimension of democratic accountability and legitimacy, the EU is predominantly considered a polity-in-the-making rather than a fully fledged political system (Weiler 1997; Wallace 1999). Having these remarks in mind, the EU can thus be characterised as a political system, while still being different from national political systems of other Western liberal democracies due to the 'incomplete' or 'partial' character of its polity (H Wallace 2000b: 66; W Wallace 2000: 533).

Second, scholars of EU law have following the Maastricht Treaty and the Amsterdam Treaty developed a new holistic perspective on the interplay between the various Treaties.¹⁴ Thus, Armin von Bogdandy argues, that the significance of the Maastricht Treaty goes beyond the establishment of three only loosely connected pillars. Challenging mainstream legal perspectives which assume a separation between the pillars, he notes that the establishment of the EU led to the emergence of a 'single organisation [...] called the "European Union"' and that, therefore, the 'terms "Communities" and "pillars of the European Union" do not demarcate different organisations but only different capacities with partially specific legal instruments and procedures' (1999: 1). This thesis has some far reaching consequences for policy making in all three pillars since 'all the Treaties and secondary law form a single legal order' (*ibid.*). Therefore, legal principles developed for the first pillar can, under certain conditions, be equally applied to the second and third pillars.¹⁵ It is worth

¹² For this allocation function see Ireland 1996 or Majone 1991, 1993 and 1996a and 1996b.

¹³ As this thesis will argue at length, also policy making in EU foreign and interior policies is an integral part of this EU polity (Guéhenno 1998).

¹⁴ See Lenaerts 1991 for an account on pre Maastricht legal perspectives on the EC. See also Bardenhewer 1998; Barents 1997; Bogdandy and Ehlermann 1998.

¹⁵ This legal unity thesis is not mere legal abstraction but has been applied by the ECJ in its *Airport Transit Visa* judgement on migration policies in 1997. This judgement will be analysed in greater detail in chapter 6.

noting, that von Bogdandy's analysis reveals the existence of a legal environment at the EU level that was neither planned nor foreseen by member states during the Maastricht IGC. Quite on the contrary, at Maastricht member states agreed upon the pillar design since (some) member states wanted to avoid a 'contamination' of CFSP and JHA with traditional EC practices (Moravcsik 1998: 467). Following the arguments of the political and legal unity perspectives, this thesis asserts that such an objective has largely failed, thereby challenging the view that the time between IGCs should be considered as merely an 'intervening period of consolidation' rather than as a period with its own functional dynamics (Moravcsik 1993: 473).

These two key arguments, namely that the EU both is a political system and is equipped with a single legal order, are thus regarded as the conceptual starting points of this thesis. The empirical studies on Middle East and migration policies will further explore the precise conditions under which and the extent to which these assumptions can be applied to policy making processes across the three pillars. The *merging proposition* can, thus, be summarised as follows.

Proposition 1 If the EU is characterised by one legal system stretching across all three pillars and if politics and policies of the Union resemble those of a political system, then CFSP and JHA cannot be separated from those parts of foreign and interior policies contained in the first pillar. In that case, foreign and interior policies are expected to be characterised by a significant cross pillar dimension, which also renders them an integral part of the political system of the EU.

Notwithstanding this argument, it should be emphasised that it is not claimed here that the merging of foreign and interior policies from the first pillar, on the one hand, with those from the second and third pillars, on the other, is an automatic, predetermined process. The degree to which merging takes place rather depends upon concrete decision in day-to-day policy making in foreign and interior policies and on the extent to which the merging *potential* offered by the Treaties is made use of politically. Moreover, since this merging of foreign and interior affairs is an unintended consequence of the institutional choice to establish a pillarised system for both areas, the occurrence of such processes is likely to provoke conflict between those member states with preferences for a formal separation of the pillars, on the one hand, and those member states (and, supposedly, EU actors) which support

merging, on the other. Against this background it can be explained that also after the Amsterdam IGC there is a continuity at the Treaty level with regard to the guiding principles of the original pillar structure, including the semi-communitarisation of migration policies. Therefore, in spite of merging processes at the policy making level, a persistence of (some) member states' preferences, as expressed during the Maastricht, Amsterdam and Nice IGCs, can safely be assumed. In other words, the formal linkage between sensitive policy areas such as foreign and interior affairs, on the one hand, and intergovernmental institutions for cooperation, on the other, has not been entirely abandoned until today. Consequently, the legal and political set up of EU foreign and interior policies continues to reflect the reservations held by some member states with regard to a communitarisation of both areas (Hill 1998a; Hix 1995; Hix and Niessen 1995).

Function: Macro political stabilisation

While the cross pillar politics proposition outlined above is based on the assumption that CFSP and JHA are subject to, first, linkages with 'parallel' foreign and interior policy provisions of the first pillar and, second, a 'centralisation' of both areas at the EU level, it does also acknowledge that merging is likely to be constrained by the sovereignty concerns some member states attach to both areas (Dunleavy 1997). This argument, thus, insinuates that there are also certain shared policy characteristics between both areas. Embracing this idea of shared characteristics, a second proposition is suggested, which will be referred to as the *macro political stabilisation proposition*. It is argued that both EU foreign and interior policies are characterised by a functional similarity shared between both areas, namely their relevance for the stabilisation of an internal and external identity of the EU, and that it is this functional similarity which distinguishes both areas from other areas of EU policy making. Thus, both foreign and interior policies constitute a distinct policy type, described as macro political stabilisation, and these policy similarities also result in similar patterns of policy making. Also this proposition will be tested in the empirical

chapters of this thesis on the basis of the two case studies on Middle East and migration policies.

The attempt to classify policies into typological categories, although not yet applied to EU foreign and interior affairs, is a quite common exercise for the study of other policy areas at the EU level. The basic idea behind the concept of policy types is to replace 'the descriptive, subject-matter categories' of many case studies with a *functional* approach that identifies arenas comprising different policy areas with each arena 'developing its own characteristic political structure, political process, elites, and group relations' (Lowi 1964: 689-690). Theodore Lowi argued in his seminal work that *policies determine politics*, thereby demonstrating that shared structural features of different policy areas on the policy dimension lead to similarities in the way in which these areas are dealt with in the political process. Following Lowi's basic typology, scholars of EU politics have most commonly distinguished between regulatory, distributional and redistributive policies. Hix has used another related categorisation, namely Richard Musgrave's typology of regulatory, redistributive and macro economic stabilisation policies to account for political processes at the EU level (Musgrave and Musgrave 1959; Hix 1999).

Notwithstanding the popularity of policy typologies in EU studies, they have mainly been used in order to account for socio economic policies and have not yet been extended to cover foreign and interior affairs as well. Also Lowi's and Musgrave's typologies, if applied to the EU, relate to first pillar areas. Policies covered by the second and third pillars do not easily fit into one of these categories, although they might comprise elements of the aforementioned policy types, such as regulatory features of migration policies (Stetter 2000). Yet, it is argued here that foreign and interior/migration policies can be understood as constituting a distinct policy type. Both areas share a similar allocation function since they provide for policies which define the relations of the EU *vis-à-vis* third parties, be they *third countries* or *third country nationals*, thereby consolidating an internal and external identity of the EU. Both areas are, thus, contributing to the emergence of a political dimension of EU sovereignty since decisions in both areas construct the EU *vis-à-vis*

‘others’, thus, fostering the insider-outsider dimension of the Union which is a central element in the emergence of a European identity (Jenkins and Sofos 1996; Leitner 1997; Ugur 1995).

This allocation function of foreign and migration policies is the reason why, as many scholars have noted, the emergence of Europeanised settings in both areas stands in a direct tension with traditional national sovereignty. By providing policies which construct new identities of insiders and outsiders with the poles of the EU and EU citizens, on the one hand, and third countries and third country nationals, on the other, not only the distinction between EU member states themselves and their citizens gradually diminishes, but the EU also becomes the bearer of the two main principles of what Max Weber has identified as the central elements of sovereignty and, indeed, of statehood itself. In his famous Munich lecture on ‘Politics as a Vocation’, Weber has argued that ‘today, however, we have to say that a state is a human community that (successfully) claims the *monopoly of the legitimate use of physical force within a given territory*. Note that ‘territory’ is one of the characteristics of the state’ (Weber 1988: 506; *second emphasis added*).¹⁶ Indeed, the inherent tension between a traditional notion of territory and authority with emerging processes at the EU level is of particular relevance in those areas linked to member states’ external and internal sovereignty. As Nohlen has argued in line with the aforementioned Weberian definition, sovereignty can be understood as ‘those claims which constitute the modern state on the basis of authority *within* and *vis-à-vis* the *outside*’ (Nohlen 1992: 902; *emphasis added*).¹⁷ While it is not argued that the EU is a state, this thesis nevertheless asserts that by providing public policies in foreign and interior affairs, the EU is embarking upon erstwhile constitutive prerogatives of the state.

Thus, the EU is, first, developing a single *territorial* dimension and, in a second step, centralised institutions of this territory provide for *authoritative* decisions

¹⁶ Translation SS. In the original version of *Politik als Beruf*, Weber argues that ‘Staat ist diejenige Gemeinschaft, welche innerhalb eines bestimmten Gebietes – dies: das „Gebiet“ gehört zum Merkmal, das *Monopol legitimer physischer Gewalt* für sich (mit Erfolg) beansprucht’ (Weber 1988: 506; *emphasis in the original version*).

¹⁷ Translation SS.

within the EU and *vis-à-vis* the outside world.¹⁸ However, this development of an insider-outsider dimension, which strengthens the territorial and authoritative significance of the EU, develops in parallel to the persistence of national prerogatives in foreign and interior policies and, therefore, the EU is not claiming a Weberian monopoly to regulate both areas – but no longer is the state. To use the terminology of the German constitutional lawyer Georg Jellinek, foreign and interior policies are, nevertheless, valuable examples for the establishment of *Staatsgebiet* and *Staatsgewalt* at the EU level (1919). The third category developed by Jellinek, namely the existence of a *Staatsvolk* is, when compared to the emerging territorial and authoritative dimension, least developed. Along these lines, Joseph Weiler has argued that there is no European *demos* the existence of which he considers a prerequisite for providing the political system of the EU with statal legitimacy (1997). This thesis does not attempt to further expand on this – fascinating but also challengeable – assertion. It simply derives from the aforementioned argument regarding the territorial authority of the EU, that policies in foreign and migration policies do contribute significantly to the allocation of political and social values in the Union, *inter alia* stabilising the political system properties of the EU by stepwise consolidating its internal and external identity.¹⁹

Consider again Hix's adaptation of Musgrave's typology. Hix argues that there are five different policy types at the EU level, these being regulatory, (re-) distributional, macro economic stabilisation, citizen rights and global policies (Hix 1999: 8). While not neglecting the differences between EU foreign and interior policies, this thesis proposes that both areas can be defined as belonging to one policy type. This policy type has as its main elements the two Weberian categories of 'authority' and 'territory'. As opposed to the traditional policy types analysed in EU studies, foreign and interior policies are not mainly of a socio economic nature.

¹⁸ It is suggested here to equate Weber's terminology of 'physical force' with 'authority'.

¹⁹ EU policies in foreign and interior policies are also relevant for fostering the aforementioned other dimension of a political system. Thus, since 1993 the set of institutions for collective decision making has stabilised, interest groups and political parties at the EU level, which engage in policy making in both areas, have developed and, finally, policies in both areas are subject to a constant 'feedback' mechanism.

Nevertheless, both areas share a specific allocation function and, in line with Musgrave's argument, the provision of public policies in foreign and interior affairs rests on 'the proposition that certain goods – referred to [...] as *social* as distinct from private goods – cannot be provided for through the market system' (Musgrave and Musgrave 1959: 7). Musgrave and Musgrave have shown that political systems depend not only on the allocation of specific 'technical' policy provisions, but also on the formulation, maintenance and achievement of wider policy goals and objectives which form the context for the continuous allocation of more specific policy provisions. In the fiscal realm, they have therefore distinguished between (re-) distributional policies, on the one hand, and macro economic stabilisation policies, on the other. The policy goals and objectives, which are usually associated with macro economic stabilisation policies are 'lower unemployment, lower inflation and higher productivity' (Hix 1999: 241). In the context of the EU, for example, the primary goal of macro economic stabilisation policies is, according to the Treaties' provisions, the goal of price stability. What is furthermore important is that these goals and objectives require a political setting from which they can emerge. This holds true for macro economic stabilisation policies in which there is 'no adjustment process by which the economy is automatically returned to high employment and stability' (Musgrave and Musgrave 1959: 13). In the EU it is in particular the European Central Bank and the Economic and Financial Affairs Council (with a special role for the informal Euro-11 group of those states which are members of the Euro zone) which define and maintain these wider policy objectives. This corresponds with the observation that 'the stabilization [...] function must be largely performed at the central or federal level' (*ibid.*: 19). The same arguments can now be applied for non economic policies of the EU.

Thus, decisions in foreign and interior policies allocate 'authority' on the issues of *political relations* (foreign policies) and *political rights* (interior policies). Moreover, since policy making in foreign and interior policies fosters the insider-outsider dimension of the Union, decisions in both areas also give substance to the nascent *political sovereignty* of the EU. Thus, EU foreign and interior policies serve,

through decisions stemming from the central level, the shared objective to formulate, achieve and maintain an - external and internal - identity of the EU. Such a goal is explicitly recognised by the Treaties. For example, Article 2 TEU, which refers to the objectives of the EU, states in its second indent that it is one of the objectives of the EU 'to assert its identity on the international scene'. In a similar way, Article 2, fourth indent TEU formulates the objective of an internal identity of the EU by calling for the development of a border free 'area of freedom, security and justice' within the EU in parallel to the establishment of rules for 'external border controls, asylum, immigration', thus the drawing of a distinction between the internal and the external (both territorially and personally).

Seen from that perspective, the allocation of policies in foreign and interior policies indeed serves the purpose to give substance to the aforementioned policy function of distinguishing the EU / EU citizen from non-EU states / TCNs, in other words to foster the internal and external identity of the Union and, thereby, EU sovereignty. Foreign and interior policies thus constitute a fourth policy type additional to the classical typology applied to EU studies. In both areas the EU allocates, through decisions made at the central level, political rules which construct an inside and an outside, i.e., as far as the two case studies are concerned, Middle Eastern states and territories, on the one hand, and TCNs, on the other.²⁰ Due to this identity formation function of foreign and interior policies, this policy type will be referred to as 'macro political stabilisation', drawing analogies to the way in which monetary politics set the (macro economic) framework for regulative and (re-) distributive policies in the socio economic sphere.

Being aware of these substantial functional similarities between foreign and interior policies and recalling Lowi's verdict, that policies determine politics, it is not surprising that the policy making frameworks for EU foreign and interior policies do

²⁰ Another structural feature shared by both areas is that both depend heavily on events and actors *outside* the EU and are thus under limited control of the Union. This thesis is not investigating these external dynamics in greater detail but rather focuses on the inside dimension of EU politics.

indeed share many institutional properties.²¹ As has been the case with macro economic stabilisation policies, also macro political stabilisation policies are characterised by an increasing centralisation of policies at the EU level. As this thesis will argue at length, policy making in macro political stabilisation policies is – in contrast with regulatory and (re-) distributive policies – characterised by the centrality of executive actors, such as the Council, the member states but also the Commission and, in some areas, the Council Secretariat at all stages of the decision making process. Indeed, some studies on both areas have indicated such similarities and have identified the Treaty rules of both the Maastricht and Amsterdam Treaties on foreign and interior policies as having quite parallel structures with regard to actor involvement, interaction rules, legal frameworks and financing provisions. Based on these substantial and institutional similarities between both areas, therefore, the second proposition reads as follows.

Proposition 2 The functional similarities between both areas on the policy dimension explain the similarities on the institutional dimension. Foreign and interior policies do thus constitute a single policy type and provide for macro political stabilisation of the EU political system by fostering the internal and external identity of the Union, thereby consolidating a nascent political sovereignty. Additionally, both areas are expected to be characterised by similar structural features on the politics dimension governing actual policy making.

Patterns of policy making and EU actors

On the basis of these two propositions, which assume a merging of the pillars into a cross pillar institutional setting, on the one hand, and functional policy similarities between both areas, on the other, the overall research design can now be outlined. As argued above, the merging proposition applies to day-to-day policy making and also the functional similarities between both areas are expected to be visible in

²¹ This emphasis on the similarities between foreign and interior policies – both on the functional and the politics dimension – should, however, not lead to the conclusion that differences between the two areas are negligible. As subsequent chapters of this thesis illustrate, each area has its specific institutional mechanisms and also partly different sets of actors engaged in policy making. Notwithstanding, this observation, the thesis does assert that the functional similarities – which also lead to many shared features on the politics dimension – justify to consider both areas belonging to one policy type, namely macro political stabilisation.

everyday policy making. Therefore, the two propositions can be tested when looking at concrete policy making processes in the two areas. This thesis, therefore, attempts to account for *patterns of policy making in foreign (Middle East) and interior (migration) policies*.

But why should such an analysis focus on the role of EU actors? Consider what Hinich and Munger have described as the ‘fundamental equation of politics’ (1997). Thus, policy outcomes are generally regarded as the result of a (complex) interplay between actor preferences and institutional provisions. In fact, scholars of EU foreign and interior policies have already identified patterns of the interplay between actors and institutions in policy making in both areas and this body of literature will also be referred to in subsequent chapters when dealing with functions, institutions and actors in foreign and interior policies (Geddes 2000; Hill 1996). What matters at this point is rather the provision of a solid justification for choosing the role of EU actors as the main research focus. In other words, what institutions and what actors do explain policy outcomes in both areas?

As will be discussed in detail in subsequent chapters, policy making processes in Middle East and migration policies have predominantly be explained by looking at the intergovernmental institutions of the second and third pillars, on the one hand, and preferences of member states, on the other. Scholars, thus, took note both of the particular sovereignty concerns of member states in these two areas as well as of the weakness of the classical Community method in policy making in foreign and interior affairs. When relating these two elements to the aforementioned ‘politics equation’, the following null-hypotheses of patterns of policy making in foreign and interior politics can be derived.

Figure 2.1 Null-hypotheses of intergovernmental politics

H_{0a}: Policy making Foreign policies = institutions intergovernmental (CFSP) + preferences member states

H_{0b}: Policy making Interior policies = institutions intergovernmental (JHA) + preferences member states

Indeed, as has been emphasised in the introductory part of this chapter, explanations on outcomes in both areas often view policies as the result of the interplay between the different preferences of member states in both areas and the various intergovernmental institutions of the second and third pillars, thus coming close to intergovernmentalist assumptions on EU politics (Moravcsik 1999). While this thesis does also assume that member states and intergovernmental institutions are central for explaining patterns of policy making in both areas, the two key propositions developed above, suggest that the two null-hypotheses might not be able to account for all variance with regard to policy making. Thus, if there are cross pillar institutions then policy making processes must reflect this 'EU context' rather than the intergovernmental institutional framework suggested by the null-hypothesis. Moreover, if, as suggested by the macro political stabilisation proposition, the functional similarities of both areas lead to shared structural features on the politics dimension, there should be considerable overlap between the two key variables 'actor preferences' and 'institutions' in both areas. Having said that, this thesis, therefore, assumes that the cross pillar institutional context of the EU political system allows also actors organised at the EU level to significantly influence policy making in both areas – in particular if they are able to exploit linkages between the pillars. Moreover, the way in which EU actors try to shape 'intergovernmental' bargains should show similar structural features in both areas. It is, thus, argued that patterns of policy making in foreign and interior affairs cannot solely be explained by looking at the interests of and action by the member states within intergovernmental institutional settings. Therefore, the alternative hypothesis can be formulated as follows.

Figure 2.2 *Alternative hypothesis of cross pillar politics and policies* ²²

$H_{1a/b}: \text{Policy making}_{\text{Foreign / Interior policies}} =$ $\text{functional features}_{\text{macro political stabilisation}} + \text{institutions}_{\text{cross pillar}} + \text{preferences}_{\text{member states / EU actors}}$

Thus, the hypothesis which is tested in this thesis is that policy making processes in foreign (Middle East) and interior (migration) policies are the result of the complex interplay between preferences of member states and EU actors within the cross pillar institutional setting of both areas and that the interplay between these two variables is shaped by the specific functional features of macro political stabilisation policies.

It should be noted that the two null-hypotheses are actually included in H_1 . In other words, it is assumed that member states and intergovernmental institutions do indeed explain some variation regarding patterns of policy making in both areas. Given member states' veto power on many parts of the policy agenda in both areas and given the strong relationship between foreign and interior policies with the issue of sovereignty, it is safe to assume that preferences of member states account for a significant amount of variation (Tsebelis 2000). Moreover, even in entirely communitarised settings, member states do hold considerable institutional resources. While not neglecting the important role of the Council and member states, this thesis, however, also argues that in order to obtain the 'full picture' on the dynamics of policy making in the two areas, such an intergovernmentalist approach does not suffice and that one has to account as well on the role of EU actors acting within the functionally structured cross pillar institutional setting of macro political stabilisation policies. This explains the focus of this thesis on the role of EU actors in foreign and interior politics. Following the merging proposition it is, thus, argued that EU actors

²² Note that this is an ideal typical equation of policy making in EU foreign and interior policies. As has been mentioned before, both areas are highly dependent on external events, thus factors different from 'functional features', 'institutions' and 'actors'. While this thesis asserts that macro political stabilisation functions, cross pillar institutions and the orientations of national and EU actors do explain the shape of EU foreign and interior policies, it nevertheless recognises that some variance in both areas must be credited to variables not considered in this equation, such as, for example, international developments in Middle East and migration policies. See also chapter 3 which briefly discusses the role of these external variables.

can make strategic use of 'parallel' powers from the first pillar in an attempt to influence policy making processes across the pillars. Following the macro political stabilisation proposition it is, moreover, claimed that the way in which EU actors influence policy making should be similar due to the shared functional characteristics of the two policy areas. What sets apart these two areas from other areas of EU politics are then the particular features of macro political stabilisation policies which provide the functional frame within which both institutions and actors operate (Lowi 1964).

In spite of the functional and institutional similarities between foreign and interior policies, i.e. their parallel integration into the Treaty framework as well as their shared functional features, there has been, to the best of the knowledge of the author, no study which has analysed both areas from a comparative perspective. However, some scholars have pointed to these similarities and have encouraged further efforts to establish 'pillar studies' in EU research (Majer 1999; Monar 1997b; W Wallace 2000). A word of caution is, however, advisable since notwithstanding these structural similarities a variation in the observed patterns of policy making in both case studies does exist. Thus, why were migration policies with the Amsterdam Treaty transferred to the first pillar, albeit with institutional rules until 2004 that in many ways resemble those which previously existed in the third pillar rather than those of 'traditional' first pillar areas? Why did a similar change not occur with regard to Middle East and foreign policies? Why is the Council Secretariat (through the establishment of the offices of the Special Representative and the High Representative) a more active player in foreign policies than in interior policies? How can the differences in the influence of the EP, the Commission, the ECJ or the Court of Auditors in both areas be accounted for? It should thus be kept in mind that while the case studies do share certain key characteristics, foreign and interior policies are nevertheless distinct policy areas with their own 'policy histories'. The empirical

chapters will, therefore, not only discuss the validity of the two propositions but also account for variation in the influence of EU actors with regard to the case studies.²³

One obvious reason for this expected variation is that from an organisational perspective there are partially different sets of EU actors engaged in policy making. First, in Middle East policies these are various Directorate Generals (DG) of the European Commission with foreign policy capacities, the Foreign Affairs Committee of the EP and, since 1996, the Special Representative to the Middle East Peace Process, and after 1999 the High Representative. Second, in migration policies the relevant actors are the DG JHA of the European Commission and the Civil Liberties Committee of the EP. Moreover, the ECJ has made two important judgements on migration policy cases, whereas the Court of Auditors has been particularly active in the area of foreign policies. The role of the Council Secretariat in migration policies is more based on its 'traditional' functions as a 'politically neutral' actor than in foreign affairs (Hayes-Renshaw and Wallace 1997: 101). This partially different set of actors is one of the reasons why a certain variation of patterns of policy making can safely be assumed without, however, harming the overall conclusions drawn from the two key propositions.

A second reason for some variation between both policy areas relates to their partially different forms of decision making. This corresponds with the observation that 'there is no single pattern of policy-making in the EU. Different modes of policy-making [...] have emerged in different policy domains' (W Wallace 2000: 524). These partially different modes of policy making in foreign and interior policies can be exemplified by using Nugent's classification of eight different categories of EU decision making procedures (Nugent 1999: 144).²⁴ As subsequent chapters will show

²³ Subsequent chapters draw from institutionalist literature on the role of the various actors in EU politics. To cite but a few, the literature on the Court of Justice has profited from insights derived from the debate on the role of the court as a political actor in EU politics (Alter 1996; Burley and Mattli 1993; Garret, Kelemen and Schulz 1998; Mattli and Slaughter 1998 or Stone Sweet and Caporaso 1998). The role of the various legislative procedures is, for example, discussed in Crombez 1996, Garrett 1995, Tsebelis 1996 or Moser 1996. On the Commission see, among others, Christiansen 1996 and Schmidt 2000.

²⁴ Nugent proposes 'a basis of classification that is especially useful in helping to draw out the sheer number and variety of procedures that exist is the type of decision that procedures produce. Taking this as the basis for classification, the main categories of decision-making procedures are those leading

in greater detail, interior policies rest to a larger extent on legislative decision making when compared with foreign policies in which executive decisions, framework decisions and budgetary decisions dominate. This argument should, however, not divert attention from a shared characteristic, namely that despite a somewhat different balance between these various decision making procedures, both policy domains are characterised by a dominance of ‘soft institutions’ (H Wallace 2000a: 34). Thus, even most legislative decisions in foreign and interior policies – for example in the second and third pillars but also, to a lesser extent, in external trade and in the semi-communitarised migration policy regime after the Amsterdam Treaty - do not have the same ‘hard law’ character as do legislative decisions in classical first pillar areas.²⁵

This corresponds with Helen Wallace’s argument that different patterns of policy making should not prevent a combined perspective on joint structural features between policy domains. Thus, foreign and interior policies have been identified as two domains which ‘were among the most dynamic areas of EU policy development at the end of the 1990s’. Moreover, they are characterised by a shared policy mode which allows us to regard these ‘new areas of sensitive public policy’ as belonging to one policy making type, namely ‘intensive transgovernmentalism’ (H Wallace 2000a: 34). This thesis argues from a similar point of departure that in spite of the relevance of partially different modes of decision making, the functional unity of both areas, which centres around the shared identity formation dimension of macro political stabilisation policies, provides a solid justification for a comparative perspective on both foreign and interior policies.

to: decision on the content of the treaties; broad directional decisions – that is decisions laying down a framework for EU policy development; legislative decisions; common commercial policy (external trade) decisions; pillar two and pillar three decisions (arguably two separate categories, especially since the Amsterdam Treaty); budgetary decisions; and administrative decisions. Each of these procedures is distinctive, not least in terms of their institutional mix and balance’ (Nugent 1999: 144).

²⁵ On the specific migration policy provisions of the Amsterdam Treaty see chapter 4.

Research design

A study on the role of EU actors in policy making in foreign and interior policies does not have to start from scratch. The influence of the EP, the Council Secretariat, the Commission, the ECJ and the Court of Auditors in EU policy making have been subject to intensive scholarly research (Richardson 1996a; Hayes-Renshaw and Wallace 1997; Hix 1999). While drawing from these and other studies, this thesis deals with the analysis on the role of EU actors in these two policy areas from a systematic approach, that analyses in turn the functional, institutional and actor related variables which account for the specific patterns of policy making in foreign and interior affairs. In other words, to borrow a phrase by Fritz W Scharpf, the thesis looks at the 'games real actors play' in order to detect the structural features of EU foreign and interior policies (Scharpf 1997; Zangl and Zürn 1999).

The research design of this thesis makes use of some recalibrated conceptual 'lenses' as they have been developed by Scharpf but also utilises insights provided for by institutionalist approaches in political science, in general, and historical and sociological institutionalism, in particular (Scharpf 1997; March and Olson 1989; Hall and Taylor 1996; Immergut 1998; Koelble 1995; Pierson 2000b). Actors thus operate under the constraining and enabling impact of a specific historical or functional context. The precise impact of this context can be seen when looking at the way in which actor preferences relate to such a 'frame' and how this frame, in a second step, structures 'real world' interaction amongst a variety of actors. According to the hypotheses developed above, the first part of this thesis attempts to specify the precise way in which the variable of *functional characteristics* of the two policy areas can be conceptualised. For that purpose, the thesis looks in greater detail at the policy history of EU Middle East and migration policies, assuming that this history helps to detect the shape of the 'functional frame' of foreign and interior policies within the political system of the EU. As mentioned before, migration policies are defined here as those policies which regulate conditions of entry and sojourn of TCNs (in particular non-permanent residents) in the EU. The movement of TCNs into and within the EU is regulated by the specific provisions of the Treaties on external and

internal border controls, on the one hand, and those policies dealing with TCNs directly such as asylum policies, visa policies, policies on legal and illegal immigration as well as policies on refugees and displaced persons, on the other. An analysis of the policy history of both areas allows us to elaborate the historical paths which have led to the emergence and consolidation of the policy type of macro political stabilisation. It is argued that the decision at the time of the Maastricht Treaty to integrate foreign and interior policies into the EU framework has created a path dependency towards (incremental) centralisation.²⁶ Noting that ‘political power must create visibilities’ such as ‘internal/external borders’, the analysis of these functional features also sheds light on the dynamics stemming from the emerging territorial and authoritative dimension of the EU, in spite of the formal persistence of the three pillar framework (Nassehi 2002: 47).²⁷

In a second step it can then be studied how, on the basis of these functional characteristics, the institutional features in both areas have developed. Due to the focus upon the role of EU actors, attention is directed towards the *institutionalised capabilities* of these actors, i.e. the formal powers they possess in foreign and interior policies. Capabilities are defined as the ‘action resources that allow an actor to influence an outcome in certain respects and to a certain degree’ (Scharpf 1997: 43). Regarding the two case studies, the proposition that EU actors are able to use their competencies from the first pillar, but also from the second and third pillars, to shape policies across the pillars will be investigated in this part of the thesis. Given the paradox that the Treaty level continues to reflect the original pillar division while actual policy making to some extent transcends these formal characteristics, it is proposed here to distinguish between two kinds of capabilities. According to this perspective, primary capabilities are those institutional powers delegated to EU actors on the basis of Treaty provisions, whereas secondary capabilities are those

²⁶ For this policy history in EU foreign and interior affairs see also the Annual Reviews of the *Journal of Common Market Studies* since 1994 on ‘External Policy Development’ by David Allen and Michael Smith, on ‘Internal Policy Developments’ (from 1994 to 1999 by John Redmond and since then by Hussein Kassim) as well as on ‘Justice and Home Affairs’ (since 1998 by Jörg Monar).

²⁷ Translation SS.

powers delegated as a result of secondary decisions, such as regulations, directives, joint actions or other legislative and executive instruments.²⁸

The third step, then, is to assess the orientations and preferences of EU actors and the way in which these relate to the functional characteristics of the two areas. While acknowledging that functional frames do account for some variation in the overall preferences of EU actors in the two areas, preferences must not be regarded as entirely determined. EU actors are not passive 'recipients' of capabilities but actively form and adapt their *policy preferences* in the two area. These orientations take the form of more narrow day-to-day orientations towards Middle East and migration issues as well as long term, normative orientations towards the preferred institutional design of EU foreign and interior policies at large. When looking at the preferences of EU actors in foreign and interior policies the thesis, thus, focuses in particular on 'the players involved, their strategy options, the outcomes associated with strategy options, and the preferences of the players over these outcomes' (*ibid.*: 44). Given the central role of member states in both areas, it is particularly interesting to find out how the preferences of EU actors relate to those of the member states and the Council. Assuming that the Council as a collective actor does not support major changes to the status quo due to the unanimity requirement on most Middle East and migration policy issues, it seems safe to argue that the Council's preferences for new policies will be located close to the status quo (Garrett and Tsebelis 1996). From the description of the Council's preferences, 'the level of potential conflict' between EU actors, member states and the Council can then be identified (Scharpf 1997: 72).

This analysis of functions, institutions and actor preferences allows, finally, to identify the patterns of interaction between these various actors in the two areas. Generally speaking, patterns of interaction can range from policy networks in which actors aim for consensual agreement and the floating of ideas, to unilateral action

²⁸ This distinction between primary and secondary capabilities is based on the legal distinction between "primary acts" between the governments of the EU member states' (Treaties and other conventions) and "secondary" legislative and executive acts of the European Parliament, the Council, and the Commission, that derive from the articles in these Treaties' (Hix 1999: 103).

with recourse to hierarchical direction (*ibid.*: 46). As far as Middle East and migration policies are concerned, the patterns of interaction chosen by EU actors are expected to be closely related to the degree with which these actors are incorporated in actual decision taking of the Council. Those EU actors, which have direct access to the Council's negotiating networks are more likely to opt for cooperative interaction strategies relying on 'arguing' and consensus, whereas peripheral EU actors will attempt to substitute their lacking network relations with non-cooperative means such as hierarchical direction (e.g. filing charges at the ECJ), cross issue linkages or threats (Risse 2000).

The theoretical implications of this research programme stretch beyond the mere analysis of EU Middle East and migration policies. The theoretical core of this thesis is that EU politics and policies are characterised by some underlying dynamics that equally apply to all three pillars of the Union. These dynamics of the political system of the EU can be detected by looking at the functional, institutional and actor related features at work in specific policy areas. What, then, sets apart foreign and interior policies from other (first pillar) policies is not so much institutional provisions, such as specific rules on agenda setting, voting in the Council or interinstitutional relations, nor actor preferences, such as preferences for intergovernmental forms of cooperation on the side of some actors versus preferences for Communitarisation on the other side of the extreme. The main differences with regard to politics in foreign and interior affairs primarily relates to the specific functional features of both areas, namely of providing the EU with macro political stabilisation. It is this functional frame which brings up a particular 'policy logic' and which structures the way in which institutions and actors operate. In other words, the same institutions and actors operate differently, if other functional frames, such as, for example, regulatory or redistributive policy types are in place. Having said this, it has to be clearly emphasised that the primacy accorded to 'functional frames' does not mean that institutional roles or actor preferences do not matter. What it does, however, mean, is that institutions and preferences cannot be seen in isolation from the functional context to which they relate and which

structures the space within which they operate. This theoretical core challenges some underlying assumptions of other theoretical approaches. On a general level, it questions those institutionalist approaches that assume a primacy of institutional rules *vis-à-vis* the preferences of actors while ignoring the functional frames within which both institutions and actors are embedded (Shepsle 1986). More specifically, however, it is critical of those static approaches to the study of EU politics and policies which, such as liberal intergovernmentalism, induce directly from preferences to outcomes without properly laying out the dynamic features of the constantly evolving functional space of EU politics.

The analysis is based on a qualitative research design (King, Keohane and Verba 1994). Around 50 interviews with experts on both areas were conducted, most of them in Brussels.²⁹ Moreover, the study has drawn from a wide range of documents from the various EU institutions. This empirical basis was supplemented by a comprehensive coverage of all articles on the two areas from *Agence Europe* since 1993.

Thesis structure

The structure of this thesis is as follows. Chapters 3 to 6 analyse the three dimensions, which are referred to in figure 2.2, and which account for the patterns of policy making in both areas. Chapter 3 discusses the functional policy dimension of both areas. By looking at the policy history in Middle East and migration from 1993 until 2003, it attempts to give substance to the claim that both areas share key functional features and can, indeed, be identified as belonging to one policy type. This policy type is referred to as macro political stabilisation. Chapters 4 and 5 discuss the institutional dimension of both areas, depicted in figure 2.2. Arguing that these institutional features are shaped by the functional features of both areas, it analyses the cross pillar institutional setting with particular reference to the capabilities of EU actors in the two areas. Chapter 4 looks at those capabilities in foreign and interior policies which have been delegated to EU actors directly by the

²⁹ See list of interviews in the Annex.

Treaties. As mentioned above, these are referred to as *primary capabilities* since they are established by primary law. Chapter 5 examines those capabilities derived from secondary legislation in Middle East and migration policies, which accordingly are referred to as *secondary capabilities*. Chapter 6 then turns directly to EU actors and studies the preferences of these actors in the two policy areas and how these relate to the functional frame of macro political stabilisation policies. Chapters 7 and 8 conclude this thesis by accounting for how these three dimensions have an effect on patterns of policy making in both areas and, therefore, to what extent EU actors were able to shape 'intergovernmental' bargains.

By arguing that EU foreign and interior policies are characterised by an incremental process of centralisation around the functional frame of 'macro political stabilisation', the thesis is able to account for the emergence of cross pillar institutional settings and a significant role of EU actors in policy making in the two areas. This argument supports the aforementioned scepticism with regard to the factual importance of the pillar structure in everyday policy making. While centralisation has certainly not led to a supranationalisation of both areas, it has nevertheless strengthened the centre (EU level) *vis-à-vis* the periphery (member states). Furthermore, the thesis asserts that EU actors are actively participating in that process across the three pillars and that they were on many occasions able to shape 'intergovernmental' bargains. Notwithstanding the claim of a significant role of EU actors in policy making in the two areas, it must be emphasised that the divergence between the preferences of EU actors has been greater than is often *a priori* assumed (Tallberg 2000). Indeed, the main dividing line in EU foreign and interior politics on the actors' dimension is not on the supranational-intergovernmental divide, but rather between executive actors, on the one hand, and those actors controlling the executive (subsequently referred to as 'control actors'), on the other. It is only within this dominant setting that conflicts over authority emerge between national and EU executive actors, such as in inner executive relations between Council and Commission. Having regard of these main characteristics of policy making in both areas, it could be argued that policy making in macro political stabilisation policies

shows features of a Lijphartian 'consociational democracy' or a 'confederal consociation' (Stavridis 2000). Thus, with the advent of foreign and interior policies at the EU level a new policy type of macro political stabilisation has emerged, confronting the EU with the dilemma of increased centralisation of both areas alongside an increasing politicisation of its political system, on the one hand, and unresolved questions concerning the efficiency and democratic legitimacy of transferring such sovereignty related policies to the EU level, on the other (Geddes 1995; Scharpf 1999).

CHAPTER 3

Policy Function

The Centralisation of Macro Political Stabilisation Policies

Introduction

The analysis of this chapter is based on propositions 1 and 2, outlined in the previous chapter, which state that the integration of foreign and interior policies signals the emergence of a new policy type within the context of the political system of the EU. The chapter focuses on how these functional features have shaped the way in which these two policy areas have become integrated at the EU level. Since both areas are, from a functional perspective, fostering the territorial and authoritative construction of an 'inside-outside' dimension of the Union, this policy type is referred to as macro political stabilisation. It is argued here that the institutional setting as well as the actor preferences, both of which will be analysed in subsequent chapters, have to be understood against the background of this functional frame. On the basis of this observation, this chapter attempts to explain several processes related to the centralisation of policies so closely linked with sovereignty. How is integration of both areas at the EU level proceeding and what is the precise relationship between macro political stabilisation policies and the pillar design of foreign and interior affairs? Moreover, what kind of policies in foreign and interior policies does the EU actually provide for? What are the dynamics of centralising macro political stabilisation policies in contrast to other policy types?

A mere institutional analysis of decision making rules in both areas would hardly suffice to explain the fundamental process of integration in two areas so closely linked with a traditional understanding of national sovereignty. As Vivienne Jabri has argued, such a traditional perspective regards the nation as the primary 'location for discursive and institutionalised practices, which at the same time lead to the emergence of both legitimacy and exclusion' (cited in Diez 2002: 191).

Integration in foreign and interior policies is challenging these practices. As already argued in chapter 2, centralising macro political stabilisation policies at the EU level establishes entirely new patterns of inclusion and exclusion. Accordingly, this new 'location for discursive and institutionalised practices' differentiates between the EU and EU citizens, on the one hand, and third countries and third country nationals, on the other (Morris 1997b; Mitchell and Russell 1996). Antje Wiener has demonstrated how the incorporation into the Treaties of such 'constituent policies' opens up new and often unintended pathways on the dimension of the 'social construction of Europe' (Wiener 2001; Christiansen, Jørgensen and Wiener 2001). Hence, when analysing the centralisation of 'constituent', or macro political stabilisation policies, not only the function of communication as a provider of meaning regarding *material factors* such as finance or power related aspects should be taken into consideration. What also has to be accounted for are the *associative factors* of communicatively constructed ascriptions of meaning since 'both factors influence the behaviour of actors in the process of policy-implementation' (Wiener 2001: 79).³⁰ This chapter therefore argues that the actual significance of the centralisation process of foreign and interior policies cannot only be measured against the background of its incremental, piecemeal and overtly cautious nature on the 'material factors dimension'.³¹ Additionally, the associative function of constructing a new inside-outside dimension has to be elaborated. This analysis thus takes note of the insight that 'social order presupposes [...] some underlying mental order based on fundamental distinctions between that which is included and that which is excluded' (Lapid 2001: 13). The institutional and actor related aspects of EU foreign and interior policies cannot be sufficiently accounted for without a prior analysis of the functional frame of these policies, as it is provided for by the construction of the EU as a location of 'foreign' and the 'interior', i.e. ascriptions traditionally associated with the Westphalian state (Caporaso 1996). The characteristic features of this functional

³⁰ Translation SS.

³¹ On these institutional rules see in particular chapters 4 and 5.

frame will be detected by analysing the way in which both areas have, from the policy perspective, become integrated at the EU level.

The emergence of an insider-outsider dimension of the EU is thus regarded as a critical juncture of EU politics since it introduces an additional notion of sovereignty, on top rather than instead of a hitherto nationally defined understanding of 'foreign' and 'interior'. The centralisation of these two policy areas at the EU level, based on the 'associative factor dimension' of an 'inside' and an 'outside' has some far reaching consequences which are more than the sum total of the *acquis* in both areas. Or, to use a phrase by Etienne Balibar, 'what can be demarcated, defined, and determined maintains a constitutive relation with what can be thought' (1998: 216).

This gradual shift of policy making in foreign and interior policies to the EU level has, to use an example from the foreign policy literature, been described as a process in which national governments, following the SEA, have given up the 'pretence that foreign policy activity could be kept away from Brussels' and that this process can, therefore, be understood as a dynamic process of "Brusselisation" of national foreign policies' (Allen 1998: 49-50). This 'Brusselisation' – a process which can equally be observed in interior policies – has been the result of the acknowledgement that in order to ensure consistency of EU policies across the pillars, a greater coordination and, hence, more 'Brussels-based activity' than originally intended by member states at the time of the design of the SEA or of the 'intergovernmental' pillars was required. Thus, processes of 'intensive transgovernmentalism' not only emerged in Brussels but got also gradually interwoven with traditional EC policy settings both on the actor and on the policy dimension (den Boer and Wallace 2000). This development, however, must not be mistaken for a smooth or coherent process. In fact, inconsistencies between institutional frameworks, hesitation by some member states regarding the overall need to shift the policy focus to Brussels as well as a fragmented application of 'Brusselisation' with regard to specific aspects of foreign and interior policies point to the overall piecemeal and cautious shift to the European capital. Hence, 'Brusselisation' affects certain parts of foreign and interior policies to a larger extent

than others. While, for example, in diplomatic relations agreement on the establishment of Brussels-based offices for Special Representatives was soon reached after the Maastricht Treaty, 'issues still dear to foreign policy establishments in national capitals' such as 'nuclear testing [or] arms sales' have until today been largely immune against this process (Allen 1998: 56). Similarly, to take the example of EU migration policies, 'Brusselisation' seems to be more apt to describe developments in asylum policies, while the more limited progress on issues of immigration shows that the 'various interrelated policy-making areas have reached rather uneven stages of common policy development' (Monar 2001: 761).

Notwithstanding the empirically compelling observation of 'Brusselisation', this thesis prefers to use the analytically more convincing concept of a *centralisation* of macro political stabilisation policies. As much as the EU as such is not *sui generis* but rather one specific political system among a wide variety of political systems, so should also analytical concepts of EU politics and policies be supportive to generalisable and comparative perspectives (Hix 1998). This necessarily involves the usage of analytical and theoretical concepts that do not lead to a methodological 'sui generisation' of EU politics. Therefore, the process of integration of foreign and interior policies at the EU level is understood in this thesis as a centralisation process of macro political stabilisation policies, in line with the theoretical arguments set out in chapter 2. What is important is that centralisation should not be misunderstood as a homogeneous and prescriptive model, but rather as a flexible analytical concept which is sensitive not only to further centralisation but also to possible set backs and fragmentation of such centralisation processes.

The central role of this emerging functional frame in no way suggests that centralising foreign and interior policies is a smooth, 'coherent' or predetermined process. Quite on the contrary, the fundamental political significance of macro political stabilisation policies renders integration of this policy type inherently difficult. Indeed, both foreign and interior policies are characterised by a gradual, cautious, often incoherent and highly incremental centralisation process. A focus on the general path of integration, however, supports the notion of a centralisation

process, starting from an initially intergovernmental focus towards the consolidation of an explicit EU framework. The role ascribed here to functional frames should, however, not be confused with (neo-)functional theories of European integration (Sandholtz and Stone Sweet 1998). While it can be argued that spill over effects from market integration have had a certain share in bringing foreign and interior policies on the EU agenda, they cannot sufficiently account for the underlying dynamics within these specific areas. The functional perspective suggested by this thesis is based on a different understanding of what the concept of 'function' entails. Function is henceforth defined as the 'policy logic', which stems from the functional frame within which specific policy areas are embedded, i.e. the functions a policy area has for a specific political system such as macro political stabilisation in the case of EU foreign and interior affairs. By analysing EU foreign (Middle East) and interior (migration) policies from the Maastricht Treaty onwards, this chapter argues that when looking at the policy history of both areas a centralisation process can be observed which gives substance to the policy function of bequeathing the Union with macro political stabilisation. As already mentioned in chapter 2, this approach bears resemblance with elaborated notions of 'path dependency' or 'cultural frames' as they have been put forward by historical and sociological institutionalisms in political science (Pierson 1996, 2000b; Fligstein and Mara-Drita 1996; Mahoney 2000). In a similar way to the schools of historical and sociological institutionalism also this thesis argues that formal rules, institutions and actors do not operate in a quasi-vacuum. Hence, 'time' and 'construction' matter and structure both institutions and interaction within these institutions to the extent that actual policy choices are made within these particular frames (Aspinwall and Schneider 1997).

This chapter is divided in four main sections. The following part takes a look at the internal and external factors which initially brought foreign and interior policies on the European policy agenda. It deals both with spill over effects from market integration on both areas as well as external stimuli. While both factors certainly had some share in explaining why foreign and interior policies emerged on the EC/EU policy agenda, they alone do not suffice to identify the precise

characteristics of policies in the two areas. Therefore, the second section of this chapter then accounts for the way in which foreign and interior policies have become formally integrated at the Treaty level. It argues that macro political stabilisation policies are characterised by a 'Treaty paradox'. The actual incoherence of foreign and interior policies at the policy dimension, exemplified by the pillar divide, is matched by a coherence on the polity dimension, as provided for by the concept of the 'single institutional framework'.³² While changes to the initial Maastricht model towards greater centralisation have occurred, these changes have, on the Treaty level, been highly incremental. Third, and notwithstanding this observation, the *acquis* in both areas points to multiple overlaps between the pillars. The development of a cross pillar policy history in both areas, which is more than just the accumulated 'stock' of single decisions, can thus be understood as the gradual emergence of a functional frame of macro political stabilisation policies. Hence, while also integration on the dimension of concrete policies has been cautious and rather piecemeal, a *notion of the 'common'* has emerged which allows us to construct the EU as the location of Union wide macro political stabilisation. The final section then turns to the way in which the development of macro political stabilisation policies at the EU level has impacted the budget of the Union. It is shown that the general patterns of centralising macro political stabilisation policies have also left their mark on this dimension. While there has been a significant increase of budgetary resources in the two areas, this increase at the same time reflects the cautious and incremental approach of giving solid substance to macro political stabilisation policies.

On the basis of these four key observations this chapter, therefore, attempts to specify the development and precise shape of the functional frame evolving from the gradual centralisation of foreign and interior policies. Noting that this centralisation process is a highly incremental endeavour, the integration of foreign and interior policies into the 'single institutional framework' with the Maastricht

³² The coherence introduced by the single institutional framework does, however, not mean that there is a coherence with regard to the capabilities of (EU) actors across the three pillars. See chapters 4 and 5 on these capabilities.

Treaty, can nevertheless be seen as a 'critical juncture' in EU history. Not so much because these 'new' policy areas have in any way replaced national policies in foreign and interior affairs or because these policies would be very efficient, but rather because the provision of policies in both areas at the Union level is a key element in the construction of a territorial and authoritative dimension of the EU *vis-à-vis* the outside world.

The internal and external context of EU foreign and interior policies

The alternative hypothesis depicted in figure 2.2 suggests that patterns of policy making in foreign and interior policies can be analysed by focusing on the functional characteristics of macro political stabilisation policies within the political system of the EU and the way in which these characteristics provide a frame for both the cross pillar institutional setting in both areas as well as the orientations of actors. However, it has also been emphasised that such a perspective leaves certain other factors, which account for developments in both areas, outside of the main analysis. There are, of course, factors beyond these three variables which are relevant for the development of EU foreign and interior policies and in particular the original appearance of these policies on the EC/EU policy agenda. Two of these additional factors will be briefly outlined in this section, namely the internal context of spill over effects from market integration as well as the external context of international developments.

Spill over effects

Spill over effects from market integration had a considerable impact on bringing both foreign and interior policies on the European policy agenda. As far as foreign policies were concerned, policies on the so-called 'low politics' dimension of foreign economic relations have gradually developed at the EC level. With some resistance, particularly from the French government, the Commission has for example already in the late 1960s 'sought to enhance its status through formalizing diplomatic relations with missions from third states in Brussels' (Forster and Wallace 2000: 463). As Michael E Smith has argued, the 'initial creation' of cooperation in the area of 'high

politics' in the intergovernmental framework of the 'EPC could be viewed in part as a product of functional or sectoral "spillover" [since] it was intended to augment the expanding economic policies of the EC' by an intergovernmentally dominated setting (1998: 305). In time, various linkages between the EC and EPC frameworks developed and were somewhat codified by the SEA of 1986. However, both settings were not formally integrated under one roof until the Maastricht Treaty of 1993. This also points to the limits of a mere neofunctionalist account on developments in European foreign policies. Thus, in spite of the spill over potential, the economic and diplomatic settings of EU foreign affairs reveal until today significant differences both with regard to institutional rules and the content of policies.³³ In other words, developments 'can not be treated in terms of supranational institutionalism or federalism' (*ibid.*: 332). What can be argued, however, is that the institutionalisation of 'an intensive transgovernmental network' in EPC and CFSP as well as the increase of linkages between these settings and the EC proper can be understood against the background of the various functional overlaps between the various parts of foreign policies stretched across quite divergent institutional settings (Forster and Wallace 2000: 489; M E Smith 1998: 311-315). Such arguments on institutionally fragmented yet functionally connected policies can also be brought up when looking at EU interior policies. Thus, as Geddes has pointed out, 'free movement is central to the contemporary EU, while immigration and asylum are not' (2000: 43). The functional logic can indeed account for linkages between economic policies and these two settings. Hence, integration of interior policies into the EU framework has brought the EC setting, on the one hand, and the intergovernmental or transgovernmental settings, on the other, closer to each other. This movement, however, occurred 'against all the conventional wisdom of neofunctionalist theories, yet driven by functionalist imperatives' (den Boer and Wallace 2000: 518). Spill over effects might have initiated and sustained integration across the pillars but cannot account for the direction, shape and speed of centralisation.

³³ On the institutional provisions see chapters 4 and 5.

'Free movement chimes with the EU's fundamental market-making purposes, but has brought with it immigration and asylum policy cooperation and limited integration. These connections between free movement and immigration and asylum demonstrate the blurred distinction between "low" and "high" politics that arises because of the ways pressure can build for integration in policy areas that impinge directly on state sovereignty as a result of integration in areas where national sovereignty issues are less pronounced and where economic interdependence is more clearly evident (Geddes 2000: 43).

It is to this limited extent that spill over effects had a role in initiating the centralisation processes of macro political stabilisation policies.³⁴ Neofunctionalist accounts thus rightly point to patterns of sectoral coherence of specific policy areas but largely fail to reflect upon the specific functional features of different policy areas.³⁵

External developments

It was not only developments within the EC or the EU that shaped the centralisation of foreign and interior policies. In addition, developments external to the EU also had an impact upon policies of the Union. For example, the evolution of the Yugoslav crisis during the 1990s functioned as a 'painful learning process' of EU foreign policies and provided a reference point for subsequent internal reforms with regard to both policies and institutional provisions (Forster and Wallace 2000: 477). A similar impact of events in the 'outside world' on the shape of European policies, can be observed in Middle East policies. Thus, it has been attributed to objections from the United States (US) and Israel to EC Middle East policies, mainly on the issue of the inclusion of the Palestine Liberation Organisation (PLO) into peace negotiations, that the EC was kept on the sidelines throughout the 1980s (Greilsammer and Weiler 1988; Hollis 1997; Robin 1997). It was only after the Oslo Agreement between Israel and the PLO, that the US and Israel softened their stance on a European role in Middle East politics. Indeed, the multilateral setting of the peace process, set up at the 1991 Madrid conference, was the (economic) platform

³⁴ On the legal aspects related to free movement see Handoll 1995.

³⁵ On (neo)functionalism and the role of Community-building see, among others, Deutsch 1957, Hass 1958, Sandholtz and Stone Sweet 1998 and Stone Sweet and Sandholtz 1997, respectively. For an institutionalist critique on neofunctionalism see Tsebelis and Garrett 1998.

on which the EC and later the EU could place its efforts to increase its leverage in the region (Hollis 1994).³⁶ The external stimulus provided for by the peace process equipped the EU with various other opportunities to become engaged in Israeli-Palestinian relations (Peters 1996; Salamé 1994). EU policies on the Middle East are also affected by the actual state of bilateral relations with the US (Watzal 1995). Volker Perthes has argued that 'US-European differences on the Middle East, and on Middle East policies, are largely linked to developments in the region' (2002b: 53). It is suggested that EU-US differences have in particular emerged in periods of a stalemate of the peace process when the EU blamed the US of not sufficiently using its alleged influence on Israeli politics (Hadar 1996; Marr 1994). In contrast, the EU had a modest political role in the peace process in particular during periods of Israeli-Palestinian rapprochement when a policy consensus between the Union and the US could more easily be evoked. This was the case prior to the drafting of the 1999 Berlin declaration of the European Council or during the establishment of the Mitchell commission in the year 2000 (Perthes 2002b: 54).

A similar impact of external developments can also be detected with regard to interior and migration policies (Collinson 1994). International migratory movements are not under the control of the EU and due to its geographical and economic disposition 'one has to expect constantly high immigration pressure' towards the Union (Klos 1998: 21; Sassen 1996).³⁷ Indeed, the various waves of intergovernmental cooperation on migration policies had 'over the two decades before Maastricht been largely responsive to perceived threats and public anxieties' as well as to 'changing patterns of migration [which] provided a second set of pressures for closer cooperation' (den Boer and Wallace 2000: 495). The fall of the Iron Curtain as well as migratory pressures resulting from the Yugoslav wars underline the significance of these external variables. But also an increase of clandestine migration in southern regions of the EU, originating mainly from the Arab world, Kurdish-

³⁶ On the role of the EU as an international actor see, for example, Ginsberg 1999, Jørgensen 1998, Rosecrance 1998 or M Smith 1996. From a theoretical perspective this issue is covered by Jupille 1999.

³⁷ Translation SS.

populated areas and Albania, has added yet another stimulus on previously less concerned member governments to seek cooperation on migration policy issues at the EU level (Baldwin-Edwards 1997).

Treaty dimension: single institutional framework – multiple policies framework

Macro political stabilisation policies are, on the Treaty level, characterised by the fragmentation of policies across quite divergent institutional regimes. Indeed, the pillar structure of the Maastricht Treaty splits up the two areas of foreign and interior policies into two main blocs – one located in the ‘classical’ EC pillar one in the newly established ‘intergovernmental’ pillars of the CFSP and JHA.³⁸ While the following chapters will in greater detail elaborate the institutional provisions within these three pillars, this section aims to outline how the Treaties’ provisions structure on a general level the two areas of foreign and interior policies.

EU foreign and interior policies are subject to an inherent tension which can be identified as the *policy-polity paradox*. The Treaties divided both areas into two (rather than three) separate pillars with the objective to avoid a ‘contamination’ between the two separate ‘pillar logics’. At the time of the Maastricht Treaty, as far as foreign policies were concerned, external economic relations and developmental assistance measures were part of the EC pillar whereas diplomatic foreign policies (and security measures) were integrated into the CFSP framework. In interior policies, economic free movement provisions and parts of visa policies belonged to the EC pillar while asylum and immigration (as well as policing and judicial cooperation measures) were part of the JHA pillar. Subsequent Treaty reforms did change little to this multiple policies framework. Hence, the Amsterdam Treaty upheld the clear cut division between the EC and CFSP in foreign policies. As regards JHA, migration policies did shift to the EC pillar but – as argued above – this area still resembles key features of the third pillar. While the pillar logic has thus to

³⁸ It should be noted that talking about the ‘classical’ EC pillar is only an ideal typical notion. In practice, the first pillar is characterised by a variety of institutional regimes. This will be at length discussed in the following chapter.

some extent weakened in interior policies – note that police and justice cooperation still belong to the third pillar – it continues to provide third pillar path dependency on migration policies (Majer 1999: 123-124). The Nice Treaty, at last, did not provide for further changes to this pillar divide and has had no further impact on the fundamental principle of a divergent policies framework for macro political stabilisation policies.

The pillar metaphor is useful to describe the principle of solid, separate and independent frameworks on the policy dimension as they exist in theory (Moravcsik 1998: 449-452). The aforementioned objective to avoid a cross pillar contamination, is even explicitly referred to in the Treaties. Hence, in the view of the drafters of the Treaty, ex-Articles L and M TEU provided for a clear cut division between ‘supranational’ and ‘intergovernmental’ frameworks.³⁹ Ex-Article L TEU restricted the powers of the Court of Justice mainly to the EC pillar, with the only possible exception being conventions in the JHA framework thus ‘protecting’ the second and third pillars from encroaching EC powers. In a similar way, ex-Article M TEU aimed to ensure the ‘integrity’ of the EC pillar by providing that nothing in the TEU ‘shall affect the Treaties establishing the European Communities or the subsequent Treaties and Acts modifying or supplementing them’. The Amsterdam Treaty changed these provisions only in detail. Thus, Article 46 TEU (ex-Article L) continues to limit the powers of the Court of Justice, most notably in the second pillar. The reach of the Court’s jurisdiction was only marginally extended to cover, with clear restrictions, the remaining third pillar, the (newly incorporated) provisions on closer cooperation and the provisions of Article 6(2) on respect of the EU on fundamental rights.⁴⁰ The newly acquired competencies of the Court of Justice on migration policies were subject to considerable limitations, which shall be analysed in the following chapter. No changes to these provisions were, finally, made by the Nice Treaty.

³⁹ As discussed further in chapter 6, the concept of a strict legal separation between the pillars has been undermined by the Court of Justice in its *Airport Transit Visa* judgement.

⁴⁰ In this thesis, references to the Treaty on European Union are marked with the abbreviation TEU. Treaty articles for which no reference is made, originate from the TEC.

This *multiple policies framework* is, however, less solid and less exclusive than the pillar metaphor suggests. It stands in an inherent tension with the parallel concept of a *single institutional framework* on the polity dimension. The provisions on this single institutional framework are set out in Article 3 TEU. This article states that ‘the Union shall be served by a single institutional framework which shall ensure the consistency and the continuity of the activities carried out in order to attain its objectives while respecting and building upon the *acquis communautaire*’. This suggests, that the separation between the pillars is less strict than it appears when looking at the aforementioned policy provisions only. Article 3 TEU establishes connecting points between the pillars on two dimension. First, on the policy dimension it calls for ‘consistency’ of EU policies, independent of their Treaty base. While this provision applies to all pillars, it is elaborated further by the second paragraph of Article 3 TEU regarding foreign policies. This article lays out that ‘the Union shall in particular ensure the consistency of its external activities *as a whole* in the context of its external relations, security, economic and development policies’ (*emphasis added*). Second, on the institutional dimension the provisions of Article 3 TEU ensure the participation of various actors across the three pillars and refer to the European Council (Article 4 TEU) as well as the EP, the Council, the Commission, the Court of Justice and the Court of Auditors (Article 5 TEU). Moreover, Article 3 TEU provides for the joint responsibility of two different executive actors for EU foreign policies. ‘The Council and the Commission shall be responsible for ensuring such consistency and shall cooperate to this end. They shall ensure the implementation of these policies, each in accordance with its respective powers’.

The concepts of the single institutional framework of the Maastricht Treaty and of the consistency of EU policies, first introduced in the EPC provisions of the SEA, were meant to solve coordination and power problems arising from the aforementioned policy-polity paradox (Nuttall 2000: 25-27). In contrast to the Maastricht Treaty, the provisions of the SEA on EPC were careful in clearly separating foreign policy cooperation from traditional EC tasks. However, it was

already Article 30(5) SEA, which addressed the problem of split competencies in foreign policies between EPC and EC frameworks, and which delegated to both the Presidency *and* the Commission the task to seek and maintain the ‘consistency’ of European foreign policies (Macleod *et al.* 1996: 412). Consistency, thereby, took on at least three different connotations. First, policies in both settings should not be ‘inconsistent with each other’; second, policies in both settings should be coordinated ‘in the service of an overriding purpose’ and, thirdly, policies should reflect the ultimate authority on European policies and, therefore, ensure that ‘EC external policies were to be subordinated to the political control of [...] the Member States’ (Nuttall 2000: 25-26). The Maastricht Treaty’s provisions on interrelated but separate pillars did then not change the general problem of consistency, namely that ‘there were still to be two modes of foreign-policy making’ (*ibid.*: 181). However, in line with the aforementioned arguments on a slow but significant process of centralisation of macro political stabilisation policies, the Maastricht Treaty provided for some important changes. First, in contrast to the SEA, the Maastricht Treaty brought the three pillars of the Union under one institutional heading, namely the EU. Second, in the area of foreign policies, the task of ensuring consistency was no longer the responsibility of the Presidency (thus a single member state) and the Commission but rather the joint responsibility of the Council (thus a collective actor) and the Commission. This was more than a mere change in semantics and must, in the light of the arguments presented in chapter 2, be seen as a further step towards cautious centralisation of EU macro political stabilisation policies.

Having said this, it must be emphasised that the Treaties have until today not solved the paradox of two formally separate pillars which *at the same time* are part of a single institutional setting. Inconsistencies in the application of consistency not only occur in day-to-day policy making in cross pillar politics, as for example in the coordination of developmental assistance or in the use of economic sanctions, but have even led to obvious contradictions in the Treaties. Thus, Article 13 TEU, which sets out the responsibilities of the Council in CFSP, stands in marked contrast to the aforementioned joint responsibility of the Council and the Commission for the

consistency of EU external activities as set out by Article 3 TEU. Thus, Article 13 TEU, surprisingly, states that it is the Council alone that 'should ensure the unity, consistency and effectiveness of action by the Union'.

As this discussion on the 'Treaties' provisions show, the ultimate relationship between the pillars and, consequently, the shape of macro political stabilisation policies cannot be determined from mere Treaty exegesis. Treaty provisions are neither self explanatory nor coherent. They rather institutionalise the aforementioned policy-polity paradox. What the Treaties, however, do is to recognise the indivisibility, from a functional perspective, of foreign and interior policies as an integral part of the political system of the EU. At the same time, the Treaties do leave, to some extent, open the question of how the linkage between the pillars should in practice look like. This underlying tension or paradox between a multiple policies framework, on the one hand, and a single institutional framework, on the other, points to the dynamic potential of EU foreign and interior. While a certain distinction between the two kinds of pillars has been codified and been upheld by the Treaties, the Treaties integrate all parts of both policy areas into the EU framework, thus formally ending the division of macro political stabilisation policies into an EC setting and a strictly intergovernmental framework. The task to define the precise shape of the exact delineation between the pillars has, then, been delegated to the institutions involved in future policy making.

Policy history: the notion of the common

When looking at the policy history in Middle East and migration policies, three main features come to the fore. First, the pillar distinction shapes but not determines the development of cross pillar foreign and interior policies. Second, a process of centralisation of policies in both areas as well as a modest convergence across the pillars can be observed. This has not culminated in a harmonisation of policies into 'single' foreign and interior policies but has fortified a *notion of the common* and documents the emergence of a functional frame for macro political stabilisation

policies. Third, the centralisation process is characterised by its incremental and piecemeal nature rather than by grand decisions.

Middle East

European foreign policies towards the Middle East were prior to the Maastricht Treaty based on two only loosely connected policy tracks in the frameworks of the EC and the EPC and characteristic features of these two settings also provided the background against which Middle East policies within the 'single institutional setting' developed. Thus, the origins of EU Middle East policies can be traced back to the 1970s. Two main approaches can be identified and this chapter argues that the noteworthy development of the post Maastricht period was not so much the continuation of these approaches but rather the incremental process of centralisation across the pillars fostering a notion of the common.⁴¹ The first policy approach had been developed within the EPC setting and builds upon the 'classical' intergovernmental EPC method of declaratory policies. It is based on consensual agreement between member states and resembles working features typical of international organisations, such as emphasis on consensus and declarations rather than concrete action. It not only defined the European approach to certain issues, but was meant to over time to lead to convergence of national interests in the area of foreign affairs. The second approach shows a striking similarity with what has been identified as a key feature of West German foreign policies prior to unification (Paterson 1996). Along the lines of this analogy, the EU is also characterised by its economic weight, on the one hand, and its constrained political reach within the international arena, on the other, and could, therefore, be described as an 'economic giant' and a 'political dwarf'. Indeed, bilateral relations of the EC with Middle Eastern countries were mainly based on trade relations, as well as a 'cheque book diplomacy' via considerable financial assistance towards less developed countries. Having these policy paths in mind, Middle East policies had after the Maastricht Treaty not to be reinvented. What did, however, happen was that these different

⁴¹ See also for policy instruments of the EU in the area of foreign affairs K Smith 1998.

policies were gradually linked and synchronised with the objective to establish a centralised, common appearance of EU foreign policies.

It was already prior to the Maastricht Treaty that Middle East policies figured prominently on the European policy agenda. Within the EPC framework, the Middle East has since the inception of EPC been a key area of European foreign policies. It was in the immediate aftermath of the 1969 Hague Summit that member states were seeking to define priority areas for increased consultation and cooperation (European Parliament 1999e: 14-16). Following the Yom Kippur War of 1973, efforts among member states to develop a common position on the Middle East conflict increased. In an EPC resolution of 1973 member states for the first time ‘recognised the need to take into account “the legitimate rights of the Palestinian people”, and to no longer treat the Palestinian question solely as a refugee issue’ (*ibid.*: 14). Moreover, in the mid 1970s two interlinked institutionalised processes towards the Middle East were established, namely the Euro-Arab Dialogue, which provided for action both in the EPC and EC frameworks, and the Global Mediterranean Policy (GMP) in the EC setting (Rhein 1999). However, action in both settings – the GMP was slightly reformed in 1989 and renamed as the Redirected Mediterranean Policy (RMP) – has overall been criticised as doing little in actual results and only slightly improving the quest for a coherent common approach towards the region. Consequently, both settings were depicted as manifestations of what Christopher Hill has termed the ‘capability-expectation gap’ of European foreign policies (1993; Hill 1998b; Regelsberger and Wessels 1996; Gomez 1998). Notwithstanding these shortcomings regarding the content of policies, the period prior to the Maastricht Treaty nevertheless documents the relative importance attached within the EC and EPC frameworks on the Middle East. Thus, between 1985 and 1992, 73 out of 742 working group meetings of the Council dealt with the Middle East, a total of almost 10 per cent. If the 22 meetings for Euro-Arab dialogue are added to that list, than ca.

15 per cent of all meetings dealt with this part of the world. No other policy area or region even approached these figures.⁴²

The strong focus on the Arab world reflected by various EPC statements, the Euro-Arab dialogue and also the GMP did impact the European stance regarding the Israeli-Arab conflict and culminated in the Venice Declaration of 1980 which set out the major guiding lines of European Middle East policies until today. With this declaration, the EC was the first international actor that called for an inclusion of the PLO in future peace negotiations. On the one hand, the Venice Declaration has been severely criticised by Israel and the US. Opposition from these two countries on a stronger political involvement of the EC and later the EU in the conflict can be related to their critical assessment of the content of European policies as expressed by the Venice Declaration (Greilsammer and Weiler 1988). On the other hand, the interest of Arab states and the Palestinian Authority (PA) for a stronger role of the Union in the peace process can only be understood against the background of 'trust' created by *inter alia* the Venice Declaration.

Within the EC setting, the GMP and later the RMP were the most important frameworks. As part of the GMP, the EC concluded on a bilateral basis free trade agreements with all Mediterranean countries except Libya and Albania (Tovias and Bacaria 1999; Tovias 1997). The free trade agreement between Israel and the EC dates from 1975 while in 1986 the Community concluded an agreement for preferential trade for products originating from the Occupied Territories (Ahiram and Tovias 1995). These two agreements also included protocols on financial assistance which were regularly updated throughout the 1970s and 1980s. Notwithstanding the significance of economic linkages between the EC and Israel, which made Israel increasingly dependent on imports from and exports to the Community, the political role of the EC in the region was hardly strengthened during that period (*ibid.*; Giersch 1980).

⁴² Data calculated from Regelsberger 1997: 70.

It was an external event, namely the signing of the Declaration of Principles between Israel and the PLO, that provided a new access point for a collective European role on the political dimension (Anderson 1999). Hence, in the framework of the Madrid Peace Conference, which was convened after the Gulf War of 1991, the EC took over a key role in the framework of the multilateral dimension of the peace process. Europe remained excluded from the bilateral dimension on which the US and, ironically, a small European country and non member state like Norway played an important broker role (Ries 2000). However, within the multilateral track the EC and later the EU chaired the working group on regional economic development (REDWG) which became the most active and ambitious segment of the multilateral setting (Peters 1996; Stetter 1997). The EU had a quite proactive interpretation of its mandate in REDWG. A permanent secretariat in Amman was established which comprised representatives from the governments of Egypt, Israel, Jordan and from the PA as well as a representative from the EU. A thick institutional framework of various working groups was established and several concrete multilateral projects on economic cooperation were developed. Yet, while the secretariat formally operates until today, REDGW has effectively stopped producing results, in particular on the level of implementation, since the first major crisis of the Middle East peace in early 1996.⁴³

The entry into force of the Maastricht Treaty did not change EU Middle East policies overnight but rather created the institutional prerequisites, which, supported by favourable external circumstances, allowed the Union to foster the linkages between its multiple policies towards the region and incrementally provided for further convergence and centralisation of these policies. The first three years after Maastricht can be understood as a period of adaptation to the new institutional setting of the TEU. Initially, the EU made little use of the new instruments provided for by the Maastricht Treaty. For almost two years after the entry into force of the

⁴³ The Commission has attempted to revitalise REDWG by organising a meeting of the REDWG steering committee in Moscow in January 2000. However, the decisions of this meeting were not able to unblock the deadlock of REDWG cooperation caused by the stalemate of the peace process (European Union 2000).

TEU the Council only once adopted one of the new instruments provided for by the CFSP. And also the Joint Action of 1994 in support for the Middle East peace process remained declaratory and resembled much more an EPC statement than a legal act (Council 1994a). This initial period furthermore bears similarities with another feature of the EPC period, namely the issuing of consensual declaratory policy instruments, such as Presidency declarations and statements. They still served the old EPC purpose of documenting and invoking consensus amongst member states rather than triggering a particular activity. The huge amount of declaratory statements without any implementation aspects, which were published by the EU in this initial period, documents the lack of real political influence as well as the ongoing internal quest for consensus (European Parliament 1995).

Notwithstanding these shortcomings, the period from 1993 until 1996 also laid the foundations for more centralised cross pillar foreign policies and by the end of 1996 the EU had set in place the key institutional structures of its post Maastricht Middle East policies. For example, in late 1995 the Euro-Mediterranean Partnership (EMP) was launched which, while being formally organised as a multilateral forum, mainly operates as an EU policy towards the region (Joffé 1999; Stavridis and Hutchence 2000). Moreover, by 1996 the EU had also become the biggest donor of financial assistance to the PA, while it has concluded two trade agreements with the PA and Israel which transcended the mere economic foci of prior agreements. Finally, by the end of 1996 the EU had also appointed, within the CFSP setting, a Special Representative to the Middle East peace process.

Leaving aside for a moment the actual success of these different policies, the significance of their mere consolidation should not be underestimated. For example, the EMP is indeed a much more ambitious project than its predecessors. 'Having spent several decades as not much more than a preferential trade deal, the EU's new Mediterranean policy at least allows for the pursuit of economic *and* political goals in a reasonably coherent institutional framework' thus documenting the functional unity of cross pillar foreign policies (Gomez 1998: 150; *emphasis added*; Edis 1998). It should, however, also be mentioned that the EMP did raise expectations, in

particular on the southern shores of the Mediterranean, which could not be met by the constrained internal capabilities of the EU (Stetter 2003). Second, the remarkable financial assistance of the EU towards the PA was for some time an 'eminently political support' although it has ultimately not been able to stabilise the peace process. Yet, it has established a division of labour between the US and the EU. From that perspective, the EU acted 'as the "payer" and the United States as the "player" in this region' (Sterzing and Böhme 2002: 39).

Third, the new Association Agreement between the EU and Israel had a substantially wider scope than all its predecessors and was supplemented by intensified scientific cooperation. Indeed, Israel is the only non European country which has the status of a member state within the EU framework programmes for research and development. The Association Agreement is not restricted to cover EC foreign policy competencies but includes national competencies as well, thus, pointing to further cross pillar linkages. The Interim Association Agreement between the EC and the PLO has mainly a political significance and documents the indirect recognition by the EU of the PA as the government of a future state of Palestine (Paasivirta 1999). The intensification of economic relations did, however, not lead to an automatic increase of political weight. Finally, the appointment of the Special Representative has made EU policies in the framework of the CFSP more visible and documents the cautious centralisation process of EU foreign policies beyond the first pillar. However, the significance of this decision should, at the same time, not be overstated. As far as the internal dimension of the EU was concerned, the mandate of the Special Representative has been carefully circumscribed by the Council, while concrete results on the ground remained the exception rather than the rule.

By the end of 1996 EU foreign policies towards the Middle East were, thus, characterised by the establishment of various cross pillar institutional settings which point to the emergence of a functional frame within which macro political stabilisation policies could evolve. Policies pursued within the EMP as well as the Association Agreement with Israel had such an explicit cross pillar design. Moreover, the mandate of the Special Representative was on a practical level also linked with

the activities of the Commission in the first pillar. And, assistance measures from the EU level had to be coordinated with parallel national assistance by member states. The institutionalisation of these various cross pillar settings points to a cautious centralisation of EU Middle East policies - without a parallel abandoning of national competencies. The concrete policies which emerged out of these various institutional settings after 1996 resembled this piecemeal and cautious approach to centralisation. First, it was only by mid 1995 that the EU started to make consistent use of the new policy tools provided for within the CFSP framework. Since then, however, a total of 13 Joint Actions have dealt with the Middle East. All of these Joint Actions directly deal with the implementation of policies thus documenting the shift from the declaratory style of policy making during the EPC and the early CFSP period towards a cautious yet active understanding of CFSP instruments. Two Joint Actions dealt with the establishment of a European Electoral Unit to oversee the first Palestinian elections of January 1996 and provided for a budget of € 10 million to cover the expenses of the unit. The bulk of Joint Actions, seven in total, addressed the mandate of the Special Representative. The mandate of the Special Representative dates from November 1995 and has since then been prolonged on a yearly basis. The budget at the disposal of the Special Representative has increased from € 2.1 million in 1996 to € 3 million in 1998 and € 2.8 million in 1999 but has since then considerably diminished to € 1.1 million in 2001, mirroring the collapse of the peace process. Notwithstanding this development, the mandate of the Special Representative has on several occasions been widened, mainly to enable the inclusion of security issues among his responsibilities. This corresponds with the mandate of the EU Special Adviser on counter terrorism which has been laid down by three Joint Actions in 1997, 1999 and 2000. Operating on a less visible basis than the Special Representative the EU Adviser, who reports directly to the Council, has received budgetary resources of € 13.6 million. Regarding the impact in the region, the appointment of a Special Representative has not caused a dramatic increase of leverage of the EU on the political track. While at least some Middle East leaders and diplomats involved in the process consider Moratinos [the Special

Representative; SSJ naive and inexperienced, it appears that thus far he has avoided making serious mistakes, and has contributed to the process within the modest parameters that he has defined for his mission'. While the Special Representative has 'neither challenged American supremacy nor sought in any way to pressure Israel' he was not able to firmly establish the EU as an 'acceptable primary mediator' for the peace process (Alpher 2000: 198-201; Alpher 1998; Heller 1998). Assessments on the work of the EU Adviser have been more enthusiastic than those on the Special Representative but there are rare public accounts due to the secretive approach adopted by the EU Adviser (Economic Cooperation Foundation 2002).⁴⁴

Second, on the dimension of declaratory Council statements the Berlin Declaration of April 1999 has been identified as a rare occasion of direct diplomatic impact of the Union. In order to prevent the Chairman of the PA, Yasser Arafat, from proclaiming a Palestinian state after the expiry of the Palestinian-Israeli interim agreement on 4 May 1999, for the first time an official EU document referred not only to the 'right of the Palestinians to exercise self-determination' but explicitly stated that this right 'includes the option of a state' (European Council 1999a).⁴⁵ This statement corresponded with a rare convergence of US and European approaches to

⁴⁴ Interview 47, Berlin, July 2002. One Common Position of the Council is not discussed here. It dates from April 2002 and outlines the conditions for the reception by some member states of Palestinians expelled by Israel following their participation in the occupation of the Church of the Nativity in Bethlehem.

⁴⁵ The analysis of statements from the Council level on the issue of Palestinian statehood is a fascinating exercise. They often read like mysterious sentences from the oracle of Delphi and have the hermeneutic appeal of Kremlinology or Vatican studies. The November Declaration of member states of 1973 for the first time dealt with that issue and referred to the 'legitimate rights of the Palestinians' thus 'no longer treating the Palestinian question solely as a refugee problem'. In the London Statements of 1977, then, 'the right of the Palestinians to a homeland' has been recognised thus giving a territorial notion to the Palestinian cause. The Venice Declaration then 'emphasises the right of the Palestinians to self-determination' thus adding a notion of authority to prior positions. This support became more concrete after the Palestinian elections of 1996, and since then the EU started to speak in official declarations of 'self-determination for the Palestinians, with all that this implies', without, however, specifying what it does imply. But the EU did not leave it to the fantasy of the addressees of these statements to find out what self-determination 'implies'. After the stalemate of the peace process since summer 1996 the EU became more explicit about its approach. One Council conclusion of 1997 referred to 'the right of the Palestinians to exercise self-determination, *without excluding* the option of a state' (*emphasis added*). It was, finally, the Berlin Declaration which directly recognised 'the right of the Palestinians to exercise self-determination, *including* the option of a state' (*emphasis added*). In the summer of 2000, expecting the success of the Camp David meeting, the EU already considered Palestinian statehood a *fait accompli* and supported US mediation efforts by ensuring its support for the 'viability of any resulting Palestinian state'. For internal developments in Palestine see Jamal 2001.

Middle East policies between mid 1998 and the end of 2000 when, almost in parallel, a change of leadership occurred both in Israel and in the US, which again estranged both the transatlantic partners as well as the EU and the new Israeli government. However, in mid 1998, during the first major crisis of the peace process between 1996 and early 1999, 'the US administration became more responsive to Palestinian grievances and demands' thus *inter alia* documenting a convergence of perceptions from the EU and the US. 'US and European officials agreed, silently, in their wish for a change of government in Israel. They were also concerned about the possibility of a Palestinian declaration of statehood on 4 May 1999'. The Berlin Declaration is the visible product of this shared concern. 'US and European officials effectively coordinated their positions on the issue, with both sides working on Arafat to dissuade him from a state proclamation before the Israeli elections' (Perthes 2002b: 56).

Third, regarding the new mixed agreements between the EU and partner countries to the EMP, the Association Agreements with Israel and the PLO reflect the new cross pillar approach of EU foreign policies since these (mixed) agreements address both political and economic issues of bilateral relations. Thus, a member of the legal service of the Commission has argued that the EC-PLO agreement, although formally not a mixed agreement and being confined to first pillar policies, fulfils 'political purposes' by alleviating the Palestinian self administration to the same status which otherwise applies to states in the framework of the EMP (Paasivirta 1999). Also the EU-Israel Association Agreement documents a politicisation of cross pillar foreign policies. It was the 1994 Essen European Council that had proposed the establishment of a 'special relationship' between Israel and the EU (European Council 1994). However, what seemed to be special in EU-Israeli relations was the dependence of economic relations upon the actual state of the peace process. In periods of Israeli-Palestinian rapprochement, economic relations were smooth and led to the quick conclusion of agreements, such as in 1995 on the Association Agreement and the acceptance of Israel as a member state of the EU scientific

framework programmes.⁴⁶ However, economic relations suffered blows during crises of the peace process. Hence, the Association Agreement only entered into force in February 2000 since the French and Belgian parliaments, supported by the Commission, had prevented ratification for political purposes. Also public quarrels between the Commission – supported by several member states – and Israel on an alleged breach of the rules of origin provisions of the agreement concerning imports to the EU of Israeli orange juice served, according to a Commission official, such political purposes.⁴⁷

Fourthly, also the significant financial assistance of the EU to Palestine has not been a smooth operation. On the one hand, the EU has been, as already mentioned the biggest donor to the PA. Indeed, there is no other country in the world which has received a similar amount of assistance from the EU as Palestine (Brynen 2000). When looking at the combined assistance from the EU and its member states to Palestine, the EU has during the period 1994-99 committed more than € 2 billion, which covers approximately half of all international contributions (West Bank and Gaza 2000: 6). Moreover, the funds allocated in Palestine amount to more than 10 per cent of the overall MEDA budget in the framework of the EMP. This is by far the largest per capita support the EU grants to any country in the world, including those in central and eastern Europe. The ratio between per capita contributions to Palestine in comparison with the average per capita assistance for all Mediterranean countries is around 23:1. On the other hand, this remarkable assistance programme has come under criticism. It was neither able to prevent the collapse of the peace process and, subsequently, the demolition by the Israeli army of the largely EU sponsored Palestinian infrastructure nor to moderate the stance of the Palestinian and Israeli leaderships (Asseburg 2002a and 2002b). Moreover, as far as the internal dimension was concerned charges of mismanagement and even of corruption within the Commission have obstructed the smooth allocation of funds.

⁴⁶ During the Barak administration, EU member states were, among other European states, responsible for incorporating Israel into the West European country group of the United Nations (UN), thus putting an end to Israel's previously non aligned status within the UN.

⁴⁷ Interview 13, Commission, Legal Service, Brussels, June 2000.

This only added to the complex internal decision making procedures which rendered the implementation of funding a painstaking exercise.⁴⁸ Moreover, further allegations that the monthly budgetary aid of € 10 million, which the EU pays to the PA since 2001, has been used by the Palestinians to finance terrorist activities have further deteriorated the credibility of EU assistance. While these accusations have been rejected by the responsible Commissioner they were, however, not refuted until today.⁴⁹

Fifthly, the EMP itself has a rather mixed record. On the face of it, the EMP is a success. Association Agreements have been signed and ratified with most partner countries, financial assistance to the region has increased and is also distributed to non governmental organisations in these countries (Galal and Hoeckman 1997). Moreover, the thick institutional structure has remained intact in spite of the ups and downs of the peace process. Indeed, EMP is the only international forum – besides the UN – in which Israeli officials participate alongside those from Mediterranean Arab countries, including Syria and Lebanon. On the other hand, however, the EMP has not fulfilled all expectations. The Arab countries perceive the economic focus as one sided and serving EU interests in industrial exports and agricultural protectionism, while Israel considers the partnership as preventing the exploitation of the full economic potential of EU-Israel relations. The EMP has also not been able to significantly improve regional cooperation among partner countries which would be a prerequisite for the establishment of a Euro-Mediterranean free trade area by the year 2010 (Dessus and Suwa 2000; Zaafrane and Mahjoub 2000). Moreover, EMP has not really stabilised the political relations between Israel and the

⁴⁸ See chapter 7.

⁴⁹ In the light of the freeze of transactions by Israel of custom duties revenues since the beginning of the *Al-Aqsa Intifada*, the EU decided to transfer direct budgetary support of € 10 million a month to the Palestinian Authority. These transactions started in July 2001 and document the changing prioritisation of the EU from project funding towards government stabilisation. Investigations by the German weekly *Die Zeit* have revealed that these transactions have been used by the Palestinian leadership to support terrorist activities. This accusation has, however, been strongly rejected by the Palestinian Authority and the Commission (Kleine-Brockhoff and Schirra 2002). This rejection has, however, not silenced criticism on these payments. Thus, tensions between the Commission and Parliament on this issue are currently increasing while only recently the EU anti fraud agency has taken over investigations on these payments.

Arab world, while the collapse of the peace process has halted progress on the political dimension of the EMP, for example with regard to the drafting of a Euro-Mediterranean security charter (Hollis 2000; Behrendt and Hanelt 1999).

Finally, the Common Strategy of the EU on the Mediterranean region of June 2000 reveals a mixed picture (House of Lords 2001). With this document the European Council recognised the Mediterranean as a region of prime strategic importance to the EU's interests, thus fostering a notion of the common amongst EU member states. The Common Strategy also acknowledged the multiple cross pillar linkages of EU policies.⁵⁰ Yet, it documented at the same time the limitations to EU foreign policies. The Common Strategy did not really add anything new to the objectives already contained in the multilateral Barcelona Declaration of 1995 (Hakura 1997). The only remarkable feature was that, while itself being adopted unanimously by the European Council, the Common Strategy allowed for subsequent decisions to be taken by qualified majority. However, this general rule does not apply to decisions on the Middle East. 'Apparently the member states are afraid that the "Common Strategy" could mean that decisions concerning the Middle East in the future [...] could not be prevented by one member state with its veto'. It seems that 'the Israeli-Palestinian conflict bears potential for conflict within the EU as well' (Sterzing and Böhme 2002: 43).

Migration

Comparable to developments in EU Middle East policies, migration policies witnessed after the Maastricht Treaty an incremental centralisation process at the EU level. Moreover, previously only very loosely connected policies, such as migration policies at the intergovernmental level, the EC level or within the Schengen cooperation, were cautiously merged, thereby attempting to develop a notion of the

⁵⁰ It is quite interesting to note that the Common Strategy also provides for linkages between foreign and interior policies. Thus, an entire section of the Common Strategy deals with the issue of Justice and Home Affairs and how these policies relate to EU Mediterranean policies. This corresponds with the increased focus of Euro-Mediterranean conferences on this area, such as during the 2002 Valencia meeting, which 'has firmly implanted the JHA dimension within the third chapter of the Barcelona process' (Gillespie 2002: 111). Notwithstanding this increase of declaratory linkages between foreign and interior policies on the paper, actual results on the ground have, however, until now been meagre.

common also on these issues (Favell 1998). This centralisation process of macro political stabilisation policies can be documented by looking at the conclusions of Tampere European Council as well as the concept of deploying a scoreboard to the regulation of migration policies.

Prior to the Maastricht Treaty there was only very limited action on migration policies in the EC framework and most activities remained limited to provisions on the free movement of workers. These rules however, only partially applied to TCN and were mainly directed towards citizens of the EC member states. As Geddes notes 'the Treaty's provisions did not cover TCNs *qua* TCNs' (2000: 46). Attempts to link EC provisions with migration policy action, as they were pursued by the Commission and the EP failed prior to the Maastricht Treaty. In 1976 the Council rejected a Commission proposal for a directive against clandestine migration and in 1985 the Court of Justice issued a judgement which prevented the adoption of migration related matters under the social policy provisions of the TEC. The Court of Justice consented only with the policy of the Commission to collect, as long as the EC employment situation was concerned, national information regarding TCNs. Beyond the narrow confines of these free movement and employment provisions as well as the provisions in bilateral association agreements, 'the majority of developments remained intergovernmental' (Peers 2000: 66). This intergovernmental cooperation, which emerged from the Trevi setting, did primarily deal with issues related to free movement, terrorism and policing but did not, until the mid 1980s tackle migration policies as such (den Boer 1996).⁵¹

It was then the SEA of 1986 that triggered intergovernmental cooperation also on migration policy issues (Lobkowitz 1994; Korella and Twomey 1993). The provisions of the SEA 'for the creation of a single market made it clear that free movement had unavoidable immigration and asylum implications' which, as most member states agreed, should be dealt with outside the EC setting (Geddes 2000: 67). Hence, linked with the Trevi setting, member states established in 1986 an *ad hoc*

⁵¹ Trevi was 'cryptically named after its first chairman, A.R. Fonteyn, and the Trevi fountain in Rome (where its first meeting was convened)' (den Boer 1996: 394).

working group on immigration. However, actual results within this setting remained meagre and subsequent attempts to streamline cooperation at the intergovernmental level, such as the establishment in 1988 of a group of coordinators as well as the drafting of the Palma documents of 1989 on priority action on free movement and migration issues, did not lead to extensive action.

Notwithstanding this development, the period prior to the Maastricht Treaty witnessed two important institutionalisation processes on the intergovernmental level, namely the Schengen framework, on the one hand, and the elaboration of two conventions dealing with asylum and external border provisions, on the other (Callovi 1992; Nanz 1995). The Schengen *acquis* was formally integrated into the EU framework by the Amsterdam Treaty in 1999. But also prior to that date Schengen was on an institutional and policy level linked with the EC framework (Convey and Kupiszewski 1995). Against the background of the deadlock on achieving an abolishment of internal border controls in the EC due to the resistance of some member states, five of the then 12 member states agreed in 1985 to move ahead, with an early form of closer cooperation, with the abolishment of internal border controls between them. In order to compensate for the loss of internal border controls, which was the main objective of Schengen cooperation, flanking measures were adopted which related to determining common principles governing the entry into *Schengenland*, such as rules on external border controls, the issuing of visas as well as entry and procedural issues concerning asylum seekers (Kostakopoulou 1998). Until the Amsterdam Treaty entered into force all other member states except for the United Kingdom and Ireland, being linked by the Common Travel Area, became member states of the Schengen agreement, which now forms part of the EU *acquis*.⁵² With Norway and Iceland also two non member states participate in the Schengen

⁵² The special provisions on the application of Title IV and Schengen provisions for the UK, Ireland and Denmark can be related to arguments on variable geometry and differentiation within specific policy areas (Cullen 1995; Ehlermann 1998).

cooperation, while the United Kingdom and Ireland have in the meantime opted in to most provisions of the Schengen setting.⁵³

Second, the Dublin Convention of 1990 as well as the External Frontier Convention of 1991 were meant to establish common rules on asylum and external border policies, thereby putting in place flanking measures for the attainment of the free movement of person provisions of the SEA (Müller-Graf 1995). Both conventions documented the willingness of member states to establish joint provisions on migration policy issues but also revealed the inherent problems of intergovernmental cooperation. The Dublin Convention, which took note of the objective raised by the Palma document to establish 'a European system of responsibilities for the adjudication of asylum claims', was signed in 1990 but only entered into force in 1997 when, at last, it was ratified by the French *assemblée nationale* (Guild 1996; Hailbronner 1997). The Dublin Convention became the 'core' of the EU asylum policy regime and set out a 'hierarchically ordered catalogue' which defined criteria for determining the exclusive responsibility of one member state to consider an asylum application (Hailbronner 2000: 385; Hailbronner and Thiery 1997). Notwithstanding the slow ratification process, the Council adopted between 1993 and 1997 several legal acts related to the convention, most of them linked to its implementation.⁵⁴ Already prior to the Maastricht Treaty, member states agreed in the 1992 London Resolutions on asylum related matters, which built upon provisions contained in the Dublin Convention, and set up clearing houses to deal with information exchange on asylum (CIREA) and immigration (CIREFI) related matters. When compared with the already protracted implementation of the Dublin Convention, the External Frontier Convention did even fare worse. Although the

⁵³ Due to the development of positive law on migration policies in the formal EU setting of the third and first pillars after the Maastricht Treaty and due to the increasing number of EU member states participating in the Schengen cooperation even before the formal integration of Schengen into the EU framework in 1999, there has been a *de facto* approximation between both settings prior to the Amsterdam Treaty.

⁵⁴ The slow ratification process can be related to reservations in some member states on the exclusion of burden sharing provisions, on the one hand, and the limited role of the Court of Justice, on the other. See also Agence Europe, No 6436, 9 March 1995: 6 and Agence Europe, No 6610, 22 November 1995: 10-11.

principal agreement was ensured by 1991, the ratification process was permanently halted since the United Kingdom and Spain disagreed over the application of the convention with regard to the status of Gibraltar, while some member states raised objections regarding the Commission's proposals on the role of the Court of Justice in the framework of the convention.

The TEU for the first time brought all migration policy related issues within a formal Europeanised framework (Weber-Panariello 1995; Baldwin-Edwards and Schain 1994; Butt Philip 1994). Indeed, in the time between the Maastricht and the Amsterdam Treaties, member states made regular use of the instruments provided for by the first and third pillars. Table 3.1 depicts all decisions adopted with regard to migration policies during this period and reveals the amount of legal acts concluded (all from the third pillar except for one decision on visa policies adopted in 1999 in the EC framework). The number of legal acts adopted increased when compared to the pre Maastricht period. Moreover, in this period the Schengen member states adopted additional migration related measures in this intergovernmental setting.

Table 3.1: Amount of migration policy decisions, 1994-1999

Year	1994	1995	1996	1997	1998	1999 (May)	Total
Number of decisions	9	8	10	10	6	3	46

Data: own collection from Official Journal, various issues.

Table 3.1 also indicates a decline of formal decisions following the Amsterdam Summit in June 1997 at which member states agreed upon the new Treaty. This relates to the informal agreement to shelve the adoption of some legal acts from the third pillar until the first pillar setting of Title IV of the Amsterdam Treaty would enter into force. Notwithstanding the considerable amount of 46 formal decisions on migration policies, which highlights the incremental centralisation of migration policies, the Maastricht Treaty framework did not really operate smoothly. As an illustration, table 3.2 lists the content of all formal decisions on migration policies from 1993 until May 1999, separated according to issue areas.

Table 3.2 allows us to draw several conclusions regarding the way in which migration policies were dealt within the 'single institutional framework' prior to the Amsterdam Treaty. Thus, the 46 decisions address a wide array of different issues

and document a centralisation process of macro political stabilisation policies. On the other hand, however, the piecemeal character of legislation as well as the fragile legal status of decisions reveals the reluctance on the side of most member states to harmonise migration policies. Within these different issue areas, the bulk of decisions, namely fifteen, was taken on matters related to asylum and refugee issues. The Dublin Convention indeed required the adoption of further legislative acts specifying some of its provisions. Furthermore, even those member states that were resisting an abolishment of internal border controls agreed with common provisions regarding asylum. However, it should also be noted that the Dublin Convention as well as its various implementing decisions did not provide for integration on the substance of asylum procedures or conditions for the reception of asylum seekers (Klos 1998).

A cautious step towards a Europeanised setting with regard to the substance of asylum provisions was provided for by the Joint Position of 1996 on a harmonised application of the term 'refugee'. The act establishes common rules with regard to the question which refugees qualify as asylum seekers in the framework of the Geneva Convention. The 1995 Council resolution on minimum guarantees in asylum procedures seemed to already assume the existence of such an approximation of policies when stating that asylum decisions must 'be taken on the basis of equivalent procedures in all Member States and common procedural guarantees' (Council 1995b; Peers 2000: 119). The Council acts referred to in table 3.2 do, however, also reveal the obstacles with regard to the establishment of a Europeanised setting on asylum policies. Among the 46 legal acts on migration policies, which were published in the Official Journal between 1994 and May 1999, only one act was adopted within the first pillar, namely a Regulation on a common visa list. All other acts were adopted within the framework of the third pillar and had, consequently, 'soft law' character.⁵⁵ Member states were not bound by these decisions and implementation

⁵⁵ The first pillar act on visa policies was formally adopted by the Council in 1995, but was subsequently annulled by the Court of Justice due to procedural shortcomings relating to the consultation of the European Parliament. This case will be discussed in chapter 6.

could not be invoked either by other EU actors or EU citizens. Even more striking, most decisions were not adopted on the basis of the legal instruments provided for by ex-Article K.3(2) TEU. This article referred to Joint Positions, Joint Actions and Conventions. However, among the 45 third pillar acts, only twelve were adopted with such a clear legal basis, and all other decision were termed conclusions, recommendations, decisions and resolutions, all of which did not have a Treaty base. Only in the area of asylum policies, thus an area in which a general consensus for further legislation existed after the Dublin Convention had been signed in 1990, there was a somewhat equal balance between explicit third pillar instruments and even softer forms of soft law.

Table 3.2: Content of decisions on migration policies, 1994-1999

<i>Number in subgroup</i>	<i>Legal Base</i>	<i>Issue</i>	<i>Legal form</i>	<i>Year of adoption</i>
Institutional affairs				
1	JHA	Application of article K.9 TEU	Conclusion	1994
2	JHA	Commission communication	Conclusion	1994
3	JHA	Organisation of CIREA and CIREFI	Conclusion	1994
4	JHA	Implementation of third pillar acts	Recommendation	1995
5	JHA	Publication of third pillar acts in Official Journal	Decision	1995
6	JHA	Setting up of 'Sherlock' training programme	Joint Action	1996
7	JHA	Priorities of action	Resolution	1996
8	JHA	Priorities of action	Resolution	1997
9	JHA	Setting up of 'Odysseus' training programme	Joint Action	1998

table continued on page 89.

Free movement for TCN / admission				
1	JHA	Admission of TCN for employment	Resolution	1994
2	JHA	Travel for pupils from member states who are TCN	Joint Action	1994
3	JHA	Admission of TCN who are self employed	Resolution	1994
4	JHA	Admission of TCN for study purposes	Resolution	1994
5	JHA	Monitoring implementation on admission	Decision	1995
6	JHA	Status of TCN who are long term residents	Resolution	1996
7	JHA	Provisions on unaccompanied minors	Resolution	1997
Asylum seekers / refugees / displaced persons				
1	JHA	Minimum guarantees for asylum procedures	Resolution	1995
2	JHA	Burden sharing on displaced persons	Resolution	1995
3	JHA	Emergency procedure on displaced persons	Decisions	1996
4	JHA	Definition of term 'refugee'	Joint Position	1996
5	JHA	Implementation of Dublin Convention	Conclusion	1997
6	JHA	Monitoring implementation of Dublin Convention	Decision	1997
7	JHA	Projects for asylum seekers and displaced persons	Joint Action	1997
8	JHA	Projects for asylum seekers and refugees	Joint Action	1997
9	JHA	Dublin Convention	Convention	1997
10	JHA	Implementation of Dublin Convention	Decision	1997
11	JHA	Implementation of Dublin Convention	Decision	1997
12	JHA	Projects for asylum seekers and displaced persons	Joint Action	1998
13	JHA	Projects for asylum seekers and refugees	Joint Action	1998
14	JHA	Implementation of Dublin Convention	Decision	1998
15	JHA	Emergency measures for Kosovo refugees	Joint Action	1999
Expulsion / readmission / illegal immigration				
1	JHA	Standard travel document for expulsions	Recommendation	1994
2	JHA	Specimen readmission agreement	Recommendation	1994
3	JHA	Principals for protocols to readmission agreements	Recommendation	1995
4	JHA	Cooperation on expulsion	Recommendation	1995
5	JHA	Combating illegal immigration	Recommendation	1995
6	JHA	Combating illegal employment	Recommendation	1996
7	JHA	Monitoring implementation of expulsion	Decision	1996
8	JHA	Exchange of information on repatriation	Decision	1997
Visa / residence permits				
1	JHA	Airport transit visa	Joint Action	1996
2	JHA	Consular protection	Recommendation	1996
3	JHA	Uniform format for residence permits	Joint Action	1996
4	JHA	Sharing costs for uniform residence permits	Decision	1998
5	JHA	Common standards for uniform residence permits	Decision	1998
6	JHA	Detection of false visa	Recommendation	1999
7	EC	Positive visa list	Regulation	1999

Data : own collection from Official Journal.

It is also striking that in the area of visa policies, thus, the only migration policy issue which was already with the Maastricht Treaty transferred to the EC pillar, only one first pillar measure entered into force. In fact, the provisions of the first pillar on

migration policies became after the Maastricht Treaty a field of interinstitutional wrangling. A Regulation of 1995 on a uniform format for visas was annulled by the Court of Justice after the EP had filed a charge against this measure. This decision of the Court of Justice effectively halted further decisions on visa policies prior to the Amsterdam Treaty. The cautious approach to the integration of migration policy issues is also well documented by the Joint Action of 1996 on airport transit visa. Member states choose to adopt this measure in the framework of the third pillar, although, on the face of it, visa policies belonged to the EC setting. The Court of Justice rejected an annulment charge by the Commission arguing that the Council was justified in adopting this measure under ex-Article K TEU.⁵⁶ In the area of expulsion, readmission and illegal immigration not a single measure was adopted under an official third pillar legal instrument, while on admission policies only one out of seven measures was based on the TEU's provisions. No single decision on external borders was published in the Official Journal in the period under consideration, thus providing evidence of the deadlock in this area caused by the dispute on the External Frontiers Convention.

The period of JHA cooperation on migration policies from 1993 to 1999 thus reveals a mixed balance regarding the centralisation of this area at the EU level. On the one hand, the amount of decisions increased considerably when compared with the cooperation prior to the Maastricht Treaty. The incremental process of developing a European migration regime, which started in the late 1980s, has therefore gathered speed after 1993. Moreover, the development of a whole set of policies dealing exclusively with TCNs provided substance to the creation of an 'insider-outsider divide' of the EU and, therefore, signals the emergence of a functional frame for macro political stabilisation policies. On the other hand, the legal form of these decisions, the piecemeal approach to the various issues, the lack of an overarching framework on migration policies as well as the lack of progress on external border policies demonstrated the limits to a centralisation of this policy area.

⁵⁶ For a detailed discussion of these two cases see chapter 6.

The Schengen cooperation did not really present an alternative to an EU migration policy regime. Not so much because Schengen cooperation as such was not working – indeed, for many issues, such as external border provisions, visa policies or asylum rules Schengen functioned as a ‘laboratory’ for measures which would later be adopted at the EU level (Hailbronner 2000: 141; Monar 2001). Yet, ‘the ongoing “widening” and “deepening” of Schengen, as its organs made a number of decisions implementing the [Schengen] Convention, meant that the cross-over between Schengen and JHA cooperation was continually increasing. The convergent geographical and material scope of official European integration under the EU-Treaty and “black-market” Schengen integration led some Member States to suggest that the two processes should be formally reconciled’ (Peers 2000: 36).

While following the entry into force of the Amsterdam Treaty the centralisation of migration policies at the EU level thus gained momentum, the general pattern of incremental integration did not substantially change (Hailbronner 1998). Notwithstanding the significance of the semi-communitarisation of migration policies and the ‘Treaty monument of the area of freedom, security and justice’, actual progress on migration policies lacked behind the determination suggested by this formula (Chalmers 1998: 1). On the one hand, the commitment for establishing the area of freedom, security and justice as well as the more comprehensive approach to deal with migration policy issues, as expressed by the setting up of a scoreboard, point to the gradual centralisation of migration policies within the EU setting. On the other hand, however, the lack of progress on the detailed legislative objectives formulated in this area not only documents the typical incremental nature of integration in macro political stabilisation policies but also casts some serious doubts on whether the self set deadline of May 2004 for the adoption of all legislative measures entailed in the scoreboard can actually be attained.

The new ‘policy reference point’ of establishing an area of freedom, security and justice initially triggered the expectation that following the entry into force of the Amsterdam Treaty EU migration policies would move beyond the patchwork approach of prior third pillar cooperation. Being aware that the ‘miscellany of

achievements' in migration policies so far, does not form 'a single concept', several initiatives, from the Commission, various Presidencies as well as from the Council level aimed to predefine how a 'comprehensive' overall migration strategy' should look like (Commission 1998a; European Council 1998). The Vienna Action Plan of December 1998 aimed to set the guidelines for EU migration policies under the Amsterdam Treaty rules.⁵⁷ The Action Plan was particularly ambitious with regard to asylum and refugee issues. It even referred to the need of establishing a 'single European asylum procedure', thus linguistically underlining the centralisation dynamics of this area. However, the notion of 'single' policies was as quickly abandoned as it appeared on the horizon. It was already the Tampere European Council Conclusions of October 1999 which more cautiously referred to the establishment of a 'common European asylum system' (European Council 1999b; House of Lords 1999). It should, however, also be noted that the Tampere meeting was the first European Council summit which was fully devoted to EU interior policies, thus once more underlining the potential provided for by the Amsterdam Treaty. In the Tampere conclusions, the European Council enumerated the main areas on which action should be taken within the framework of *inter alia* Title IV. This included action on partnership with countries of origin, a common European asylum system, fair treatment of third country nationals (including admission and residence) and management of migration flows. These 'Tampere priorities' as well as the specific objectives formulated by the European Council on these various areas, were subsequently taken up by the Commission when drafting the scoreboard. The Tampere provisions structure the scoreboard which has the goal to ensure the legislative adoption of those migration decisions by May 2004 which are needed in

⁵⁷ Some initial drafts of the Austrian Presidency met with vigorous criticism from non governmental organisations and some member states, because Austria made no reference to the Geneva Convention raising doubts of whether a future EU migration policy regime would be based on this provision. In subsequent meetings the reference to the Geneva Convention was again introduced in official EU papers, Agence Europe, No 7332, 29 October 1998: 7-8. It should, however, also be noted that the Geneva Convention has already been explicitly referred to in the Amsterdam Treaty thus already documenting its relevance for a future EU migration regime.

order 'to attain the objectives set by the Amsterdam Treaty and Tampere European Council' (Commission 2002b: 2).

Yet, as indicated by table 3.3 actual progress on adopting the necessary legal measures enumerated at length in the Amsterdam Treaty, the Vienna Action Plan, the Tampere Council conclusions as well as in the scoreboard lacked behind the widely accepted ambition to give 'flesh' to the concept of an area of freedom, security and justice. Legislation on migration policies issues after the Amsterdam Treaty continued to reflect the highly incremental, piecemeal character of policies. Thus, not even a single legal measure had been adopted regarding the admission and residence of TCNs, while provisions on borders and visa related issues remained mainly restricted to highly technical operational provisions, such as adaptation to the Schengen common consular instructions (House of Commons 2002). Progress was only achieved on those issues on which there already was some first pillar legislation prior to the Amsterdam Treaty, namely visa lists and the uniform format for visa. Highly visible projects such as the establishment of EURODAC or a European Refugee Fund (ERF) do document some institutional centralisation of migration policies at the EU level but cannot cover the lack of overall substantial approximation of migration law.

Table 3.3. Legal acts adopted in migration policies, 1999-2002

Number in subgroup	Issue	Legal form	Year of adoption
Countries of origin			
1	Implementation of action plans	Report to European Council	2000
Asylum			
1	EURODAC	Regulation	2000
2	EURODAC application rules	Regulation	2002
3	Minimum standards for refugee status	Conclusion	2001
4	Temporary protection for displaced persons	Directive	2001
5	European Refugee Fund	Decision	2000
Illegal immigration, readmission, external action			
1	Combating illegal immigration	Plan	2002
2	Combating illegal immigration by sea	Conclusion	2002
3	Harmonisation of laws on carrier's liability	Directive	2001
4	Readmission agreement with Hong Kong	Agreement	2001
5	Minimum standards on repatriation	Directive	2001
6	Combating trafficking in human beings	Undertakings	2001
7	Repatriation programme	On basis of a Green Paper	2002
Visas and Internal and external borders			
1	List of exemptions from visa requirement	Regulation	2001
2	Amending the list of exemptions from visa requirement	Regulation	2001
3	Implementation of visa applications	Regulation	2001
4	Updating of Common Consular Instructions	Decision	2001
5	Amendment to Common Consular Instructions	Decision	2001
6	Amendment to Common Consular Instructions	Decision	2002
7	Uniform format for visa	Regulation	2002
8	Uniform format for forms for affixing the visa	Regulation	2002
9	Travel on a long stay visa	Initiative	2001
10	Detection of false documents: exchange of information	Decision	2000
11	Implementing powers on border checks	Regulation	2001
12	Amending Common Consular Instructions	Decision	2002
13	Amending Common Consular Instructions	Decision	2002
14	Development of SIS II	Regulation and Decision	2001
15	Management of external borders	Plan	2002

Data: own collection from Commission 2002b.

Such a sceptical evaluation regarding the implementation of the repeatedly endorsed objective to establish a comprehensive migration policy framework at the Union level was recognised by both the European Council and the Commission. However, appeals from both institutions to speed up the adoption of legislative measures in order to meet the 2004 deadline did not bear fruits. The Laeken European Council of 2001 was critical about developments in migration policies arguing that 'progress has been slower and less substantial than expected' and that 'a new approach is therefore

needed' (European Council 2001). An evaluation from the Presidency became more specific (Council 2001d). Various obstacles, such as the highly technical nature of some measures proposed by the scoreboard, 'real differences on the scope of the instruments to be adopted' and 'Member States' reluctance to go beyond the confines of their national laws' all hampered centralisation of migration policies beyond the general will expressed in Amsterdam, Vienna and Tampere on 'formulating common policies' (*ibid.*: 4). In fact, the Presidency identified the ongoing unanimity requirement in the Council on most migration policy measures as a 'serious hindrance to progress' (*ibid.*: 5). However, the call of the Laeken European Council to 'make good delays' on the implementation of migration policy issues enlisted in the scoreboard did not change the overall slow 'flow of policies' (Wallace 2000).

Hence, one year after the Laeken European Council the Commission could conclude that the appeal by heads of state and government did not change the cautious approach in the Council. Thus, 'the backlog referred to by the Laeken European Council has not been cleared in some areas, notably as regards the common policies on asylum and immigration' (Commission 2002b: 4). The considerable divergence of national migration policies, often intensified by *new* legislative measures from member states, the complex institutional provisions of Title IV, uncertainties stemming from the next round of enlargement as well as a potential legislative congestion in the migration policy pipeline prior to the 2004 deadline were identified as major stumbling blocs for the establishment of more than piecemeal, often technical legislative acts (*ibid.*).

Budget

The financing of macro political stabilisation policies within the single institutional framework has been a contested issue between the Council, the Commission, Parliament and the Court of Auditors. This section leaves the discussion on the powers of these actors, their policy preferences on budgetary issues as well as patterns of interaction between them to subsequent chapters. What will be of interest

here, is to provide further substance to the claim that foreign and interior policies since 1993 were characterised by a cautious and incremental, yet ongoing centralisation process, which anchored this 'new' policy type at the EU level. This is not a mere discussion on figures. 'Budgets matter politically, because money represents the commitment of resources to the provision of public goods', such as, in this case, macro political stabilisation policies (Laffan and Shackleton 2000: 212).

As will be further discussed in chapter 4, one of the practical consequences of the single institutional framework related to the financing of cross pillar policies. Thus, ex-Articles J and K TEU provided for the financing of CFSP and JHA activities from two different budgetary sources. On the one hand, so-called 'administrative' expenditure had to be charged to the EC budget, whereas 'operational' expenditure could be charged to the EC budget by unanimous agreement of all member states. Otherwise, 'operational' expenditure had to be charged to the member states. The financing of the second and third pillars was, in the first years following the entry into force of the Maastricht Treaty, a contested issue both within the Council as well as between the Council, the Commission and Parliament.

Following the establishment of the second and third pillars, some member states were reluctant to make recourse to the EC budget for the financing of these policies, fearing that this might lead to a creeping communitarisation of foreign and interior policies. However, the failure of member states to credibly commit themselves to finance 'intergovernmental pillar' activities out of national budgets, soon led to such a recourse to EC budgetary resources (Monar 1997b). Table 3.4 provides data on the development of the foreign and interior policy budgets in relation to the total EC budget for the years from 1992 to 2003.⁵⁸ Moreover, table 3.4 includes data on expenditure in the second pillar, enlisted for each consecutive year, and for third pillar expenditure up until 1998. It should be noted that data on interior

⁵⁸ For all data on foreign policy expenditure referred to in this chapter, the appropriations for funding enlargement have been excluded. Enlargement expenditure appears in the foreign policy chapter of the EC budget but does not really regulate the EU's relations with the outside world but rather with future insiders.

policies from 1999 onwards relates to the cross pillar budget for the creation of an 'area of freedom, security and justice' and mainly comprises first pillar migration policy expenditure. A comparison of expenditure on CFSP and JHA measures reveals the greater reluctance on the side of some member states to finance interior policy measures from EC budgetary resources than those involving external action (*ibid.*). This correlates with the aforementioned reluctant use of Treaty based legal instruments, such as Joint Actions, in particular in the JHA setting. Little legislative activities are, thus, mirrored by reluctant recourse to the EC budget.

The financing of foreign and interior policies also affected interinstitutional relations. Thus, Parliament has been keen to ensure its 'power of the purse' on non compulsory expenditure also with regard to the financing of CFSP and JHA from the EC budget and has opposed attempts by the Council to 'elude parts of Community budgetary principles in decisions on the introduction and the implementation of EC funding for measures within the intergovernmental pillars' (*ibid.*: 77). Thus, Parliament has pushed in both areas for the conclusion of interinstitutional agreements which would regulate the relations between the different arms of the budgetary authority. While on the CFSP such an agreement was ultimately agreed upon in 1997 and amended in 1999, on JHA no agreement between the Council and Parliament could be reached, again documenting the reluctance of some member states for legislative and budgetary commitments in the third pillar (Interinstitutional Agreement 1997 and 1999). These interinstitutional agreements contained a declaration of intent that the institutions 'shall annually assure' (agreement of 1997) or 'endeavour' (agreement of 1999) to agree on the amount of operational expenditure to be charged to the EC budget. Moreover, they agreed that funds will not be entered in a reserve, which escapes the control of Parliament, and that for urgent actions a maximum of 20 per cent of yearly CFSP expenditure will be entered in the budgetary heading. While the Commission was responsible, under the EC budgetary provisions, for the implementation of all expenditure, thus also those from the CFSP and JHA entries, it did not have a political responsibility for acts adopted within these areas. This led to a 'blurring of responsibilities' and rendered the

Commission ‘a mere “cashier” of intergovernmental co-operation deprived of political responsibility but nevertheless accountable to the European Parliament’ (Monar 1997b: 77-78). As will be discussed in the following chapters, accusations of the Court of Auditors, which were taken up by Parliament, on a mal-administration of budgetary resources, mainly those on first pillar foreign policies, led in 1999 to the resignation of the entire college of Commissioners.

The functional relevance of the EC budget for the centralisation of macro political stabilisation policies comes to the fore when looking at the expenditure in both areas since ‘the budget is a useful yardstick to measure positive integration’ (Laffan and Shackleton 2000: 213). The absolute figures in table 3.4 reveal the differences made in the cautious yet significant use of CFSP expenditure and the extremely reluctant recourse to finance JHA from the EC budget. It was only the semi-communitarisation of migration policies with the Amsterdam Treaty which caused a major increase of expenditure on interior (migration) policies. This expenditure has been mainly earmarked for the ERF.

Table 3.4 Expenditure foreign and interior policies, 1992-2003 (Mio €)

year / area	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003
Foreign Policies (CFSP)	2,433 (0)	2,873 (14)	3,070 (10)	3,410 (83)	3,874 (61)	3,835 (24)	4,223 (23)	4,725 (37)	4,201 (38)	5,043 (39)	5,085 (35)	4,949 (48)
Interior Policies	0	0	0	3	2	7	8	36	80	148	145	154
Total budget	58,857	65,269	59,909	66,758	77,454	80,003	81,637	84,268	82,868	106,924	95,655	99,686

Data: own calculations from Budget 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003.

Figures 3.1 and 3.2 aim to illustrate the anchoring of macro political stabilisation policies at the EU level. Thus, figure 3.1 shows the steady increase of the combined expenditure on both areas for the years from 1992 until 2003. In proportion, however, only a tiny bit of expenditure related to interior policies, with the bulk of budgetary resources spent on first pillar foreign policies, in particular aid. For example, in the 2002 budget on foreign policies € 1.3 billion were spent on cooperation with countries in central Asia and the Balkans. Commitments of € 0.9

billion were devoted to food and humanitarian aid, cooperation measures in the framework of the Lomé Convention as well as cooperation with Mediterranean partner countries to the EMP. Budgetary resources were, furthermore, committed to democracy promotion (€ 100 million) and other measures (Budget 2002).

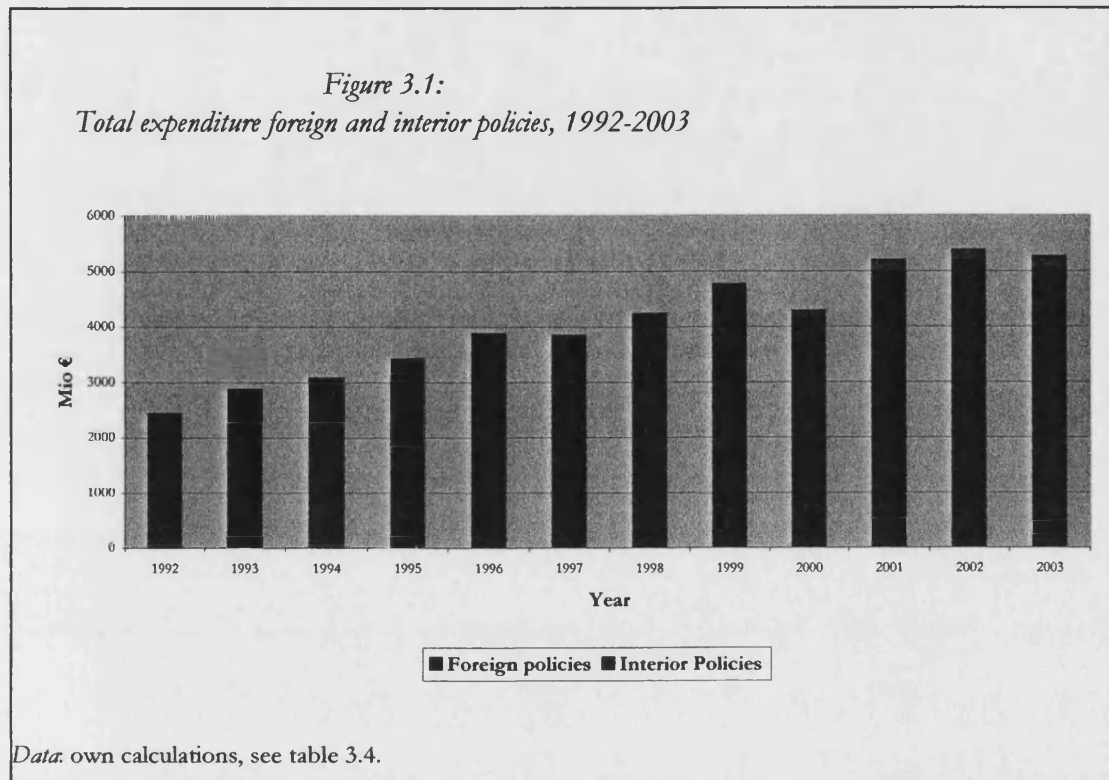
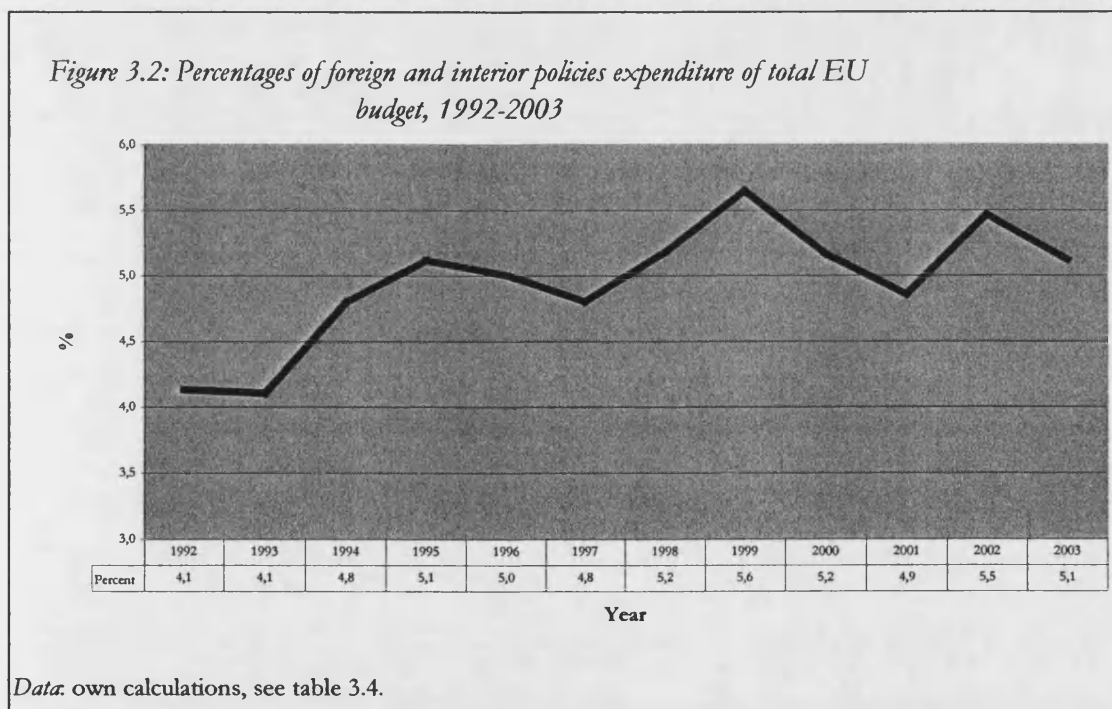


Figure 3.1 reveals that there has been a steady increase of foreign and interior policy expenditure but no major change which would point to a dramatic juncture. This is also reflected by figure 3.2 which relates expenditure in foreign and interior policies to the total EC budget. As can already be seen in table 3.4 it was not only foreign and interior policy expenditure which modestly increased since 1993 but also the total size of the EC budget (Laffan and Shackleton 2000). Figure 3.2 relates the increase in foreign and interior policies expenditure to the increase of the total EC budget. An incremental and small but nevertheless visible increase of the relative share of macro political stabilisation policies *vis-à-vis* other policy types within the overall EC budget can be detected. While in 1992 and 1993, thus the two years prior to the entry into force of the Maastricht Treaty, the share of foreign and interior policies was 4.1 per cent of the total EC budget, the share increased until 1995 to more than 5 per cent

and by 1999 already 6 per cent of the budget were spent on macro political stabilisation. In the following years the budget floated between 4.9 per cent and 5.5 per cent with an overall tendency on modest growth.

As a sum, the development of the budgetary dimension of foreign and interior policies underlines the conclusions drawn from the prior analysis on the cautious approach to integrating these policies with regard to Treaty provisions and policy history. On the one hand, there has been a steady increase of expenditure in both areas both in total figures as well as with regard to the overall budget which suggests that both areas have become firmly anchored at the EU level. On the other hand, however, this increase has been far from breathtaking and documents once more the cautious and incremental approach to centralise macro political stabilisation policies.



Conclusion

The analysis of this chapter has aimed to provide substance to the claim that the study of EU foreign and interiors has to include considerations on the way in which the incremental centralisation process of macro political stabilisation policies has

fostered the functional frame around which these policies evolve. Since both areas constitute a single policy type and provide the Union with macro political stabilisation, integration in both areas is subject to conditions that differ from those applying to other policy types. The linkage between macro political stabilisation policies at the EU level, on the one hand, with traditionally held exclusive national competencies on this policy type, on the other, has led to a remarkably cautious and piecemeal centralisation process.

At the Treaty level macro political stabilisation policies have been split up into different pillars. The combination of a multiple policies framework with a single institutional framework has shaped the policy history in both areas. The development of policies in foreign and interior policies has been characterised by a gradual increase of providing macro political stabilisation policies for the Union. However, the policy history was also a history of highly incremental and piecemeal measures which did not culminate in a 'comprehensive', let alone exclusive, EU framework. This lack of comprehensiveness has been emphasised, rather than accommodated for, by the ambitious objectives formulated in both areas, such as the Common Strategy on the Mediterranean region or the Tampere European Council conclusions. What has, however, emerged in the process of integrating both areas at the EU level has been a notion of the common – the objective is not to create single foreign and interior policies, in the sense that these policies would replace national policies in these areas, but rather to gradually develop a solid, functional frame for EU policies on foreign and interior affairs.⁵⁹

⁵⁹ This argument closely relates to those approaches that attach importance to 'ideas' or 'frames' on which, at a later stage, concrete political action could be built (Garrett and Weingast 1993; Parsons 2002).

CHAPTER 4

Cross Pillar Institutions I

Primary Capabilities

Introduction

This chapter investigates the capabilities of EU actors in foreign and interior policies as defined by the Treaties, thus turning to the analysis of the institutional variables set out in chapter 2. Since these capabilities have been delegated to EU actors by primary law, they will be referred to as primary capabilities. Following the key propositions outlined in chapter 2, the main questions which are addressed here are. How do the functional features of macro political stabilisation policies affect the primary capabilities of EU actors? Hence, to what extent do the capabilities of EU actors reflect the ‘pillar divide’ of both foreign and interior policies? Given the endurance of these two basic institutional arenas, what is the actual difference with regard to the powers of EU actors between those parts of foreign and interior policies which belong to the first pillar, on the one hand, and those parts belonging to the second and third pillars, on the other? And also, are there differences regarding the capabilities of EU actors when comparing their *individual* role in foreign and interior policies?

As outlined in chapter 2, this analysis aims to contribute to a better understanding on the interrelationship between the three pillars and, more precisely, on the interplay between ‘supranational’ and ‘intergovernmental’ institutions in foreign and interior policies. In particular, it seeks to shed light on the question of what role member states devised in both areas for collective actors at the EU centre – such as the Commission, Parliament, the Council Secretariat, the Court of Justice or the Court of Auditors. As an analytical background to the analysis on primary capabilities of EU actors, this chapter – as well as the following chapter on secondary capabilities – draws from insights of delegation theory (Kiewiet and McCubbins

1991; Pollack 1997). As the previous chapter has shown, market integration and, subsequently, negative externalities stemming from (market) integration have been a stimulus to initiate cooperation between member states in all institutional arenas of foreign and interior policies (Gatsios and Seabright 1989). This has resulted in the emergence of a functionally defined new policy type at the EU level, which has been defined as macro political stabilisation. This chapter argues that the particular functional characteristics of macro political stabilisation, namely the linkage between this policy type, on the one hand, and notions of sovereignty, on the other, explains both the cautious delegation of capabilities to EU actors as well as the noteworthy institutional fragmentation of their capabilities in the two areas.

It was already with the Treaty of Rome that external economic cooperation, developmental assistance as well as provisions on the free movement of persons became part of the EC. In contrast to this communitarisation of *economic* foreign and interior policies, cooperation on classical diplomatic relations, security policies as well as on migration, policing and judicial policies remained prior to the Maastricht Treaty outside of the EC context (Peers 2000: 9-15). However, this merely intergovernmental cooperation in both areas faced, first, serious credibility and coordination problems (Majone 1996b). Second, 'the economic logic of market-making had political consequences that drew issues of high politics into the EU's remit' (Geddes 2000: 93). Therefore, member states decided in 1993 to bring the *political* arenas of foreign and interior policies within the 'single institutional setting' of the EU, thus replacing the previous 'working model of intergovernmental cooperation without formal integration' through a model that tried to reconcile intergovernmental cooperation *and* formal integration (Forster and Wallace 2000: 466). By doing so, member states also agreed to delegate within the newly created fields of the Common Foreign and Security Policy, on the one hand, and Justice and Home Affairs, on the other, certain capabilities to EU actors (Regelsberger 1993; Monar and Morgan 1994). However, the actual powers of these actors remained small when compared to their entrenched capabilities in economic sectors of foreign and interior policies. 'The reason is that Member States take the view that JHA

cooperation, and foreign policy cooperation, are issues so central to their sovereignty that the “supranational” approach of Community law must be set aside’ (Peers 2000: 13). And indeed, this overall ‘pillar design’ of the EU has not been subject to substantial change neither with the Amsterdam nor the Nice Treaty (den Boer 1997; Monar 1997a).

Notwithstanding this observation, EU actors have in all three Treaty reforms of the 1990s been delegated new capabilities in all institutional arenas of foreign and interior policies. While member states governments maintain the main sources of power and legitimacy in both areas, they have begun to share some of these sources with EU actors. Such delegation of capabilities should not be regarded as a zero sum game in which delegated capabilities necessarily mean a loss of capabilities on the side of principals. Principals can thus ‘use delegation to effectively pursue their policy objectives’ (Kiwiet and McCubbins 1991: 234). Hence, the focus of this chapter on the capabilities of EU actors is not suggesting that there has been a kind of ‘abdication’ of member states (*ibid.*). Instead, member states share power with EU actors, notably the Commission and, increasingly the Council Secretariat. This process resulted in two main features. First, the dominant divide in EU foreign and interior politics is between executive and non-executive actors, which are meant to control the executive but whose capabilities are more limited than those of the executive. These actors will be referred to in this thesis as ‘control actors’. Second, inner executive relations are mainly characterised by cooperative modes of interaction. Open conflicts are rare but do, of course, occur. Chapter 7 will discuss these patterns of interaction in greater detail.

Authority delegation in foreign and interior policies was necessitated, as the previous chapter has argued, by the scope of and the functional demands from policy making in both areas as an integral part of the EU political system. The precise way in which this delegation has materialised institutionally will be the topic of the following analysis.

Primary delegation and the role of EU actors as agents

At the Maastricht Treaty summit member states put in place the three pillar structure of the EU which is characterised by one 'supranational' and two 'intergovernmental' pillars. This division between a 'classical' communitarised institutional arena, on the one hand, and member states' dominated arenas, on the other, has subsequently not been subject to a radical change.⁶⁰ Treaty reforms neither in Amsterdam nor in Nice led to a wholesale turn towards one of these two ideal type forms of EU government. While the Maastricht Treaty, thus, led to the incorporation of two previously strictly intergovernmental policies into the EU system of governance, the type of Europeanisation in foreign and interior policies was quite different from other policy areas. The qualitative gap between the EC, on the one hand, and CFSP as well as JHA, on the other, becomes particularly evident when looking at the capabilities of EU actors within these two different institutional arenas.

Thus, as H Wallace has noted, 'for the new "high politics" issues of foreign and security policy, and justice and home affairs, the price for their inclusion within the scope of what would thereafter be the Union was that they would be subject to different and weaker institutional regimes' (1996b: 55). Along the same lines, Moravcsik has analysed the capabilities of EU actors in the second and third pillars. He has argued that member states had designed 'this three-pillar structure, a metaphor proposed by the French representative Pierre de Boissieu, [...] to restrict definitively, through qualitative institutional breaks, the Commission and Parliament's prerogatives in foreign and interior policy' (1998: 450).

However, such an exclusive focus on the second and third pillars does distort a policy perspective on foreign and internal affairs. 'The three-pillar institutional structure of the European Union comes under fire [...] because it artificially separates external and internal sectors of public life' (Zielonka 1998b: 5). Moreover, a closer look behind this dominant pillar structure reveals, as has already been indicated in the

⁶⁰ This chapter argues that even in the 'supranational' first pillar there is not a single institutional model that defines the capabilities of EU actors. The so-called Community method has itself become increasingly hybrid and complex as EC coverage and competencies widened. Therefore, also the first pillar is characterised by a multitude of institutional arenas.

previous chapters, that both the CFSP and JHA are but some of the various 'institutional regimes' of EU foreign and interior policies and these regimes are spread across all three pillars. Based on this understanding, this chapter investigates the cross pillar capabilities of EU actors in these two policy areas. Notwithstanding this approach, the thesis does not follow a claim which has been made by Michael Smith, who has looked at the interrelationship between first and second pillar foreign policy provisions, and who has argued 'that the place to look for "foreign policy" is in the development of external economic policies' (M Smith 1998: 77). It is rather argued that in order to comprehensively grasp developments in both policy areas, one must equally focus on the Treaty provisions in all three pillars.

Since the analysis of this chapter is based on the provisions of the Maastricht, Amsterdam and Nice Treaties, the specific kind of capabilities, which are investigated here, will be understood as 'primary capabilities'. Such a terminology rests on the observation that Treaty provisions are not the only source of delegation of capabilities.⁶¹ Moreover, a study on primary capabilities of EU actors promises to be particularly fruitful for a cross pillar comparative analysis. Indeed, this section reveals both important differences but also similarities between first pillar provisions, on the one hand, and the more intergovernmental provisions, on the other. Thus, while the capabilities of EU actors in foreign and interior policies are much more pronounced in the first pillar, these actors nevertheless possess capabilities across all types of institutional regimes and pillars. The analysis of this chapter proceeds in three steps thereby focusing on the main domains in which capabilities have been delegated to EU actors by the Treaties. First, it considers the legislative powers of EU actors in both areas. Thus, it focuses on the powers of the 'legislative triangle' consisting of the Council, the Commission and Parliament and their respective roles in the various legislative regimes of both areas. Second, the capabilities of the Commission and the Council (Secretariat) as the two poles of the EU double executive are analysed. Third,

⁶¹ Delegation of capabilities does also occur by secondary decisions as part of day-to-day policy making in the EU. These 'secondary capabilities' of EU actors in foreign and interior policies will be dealt with in the next chapter.

spill over provisions from the first pillar, these being budgetary authority and judicial remedy, and their effect on the cross pillar capabilities of EU actors, such as the Commission, Parliament, the Court of Justice or the Court of Auditors, form the substance of the final section.

Four main insights are the result of this analysis. First, a study on primary capabilities shows that the pillar structure of the EU continues to be highly relevant for a proper understanding of foreign and interior policies at the EU level. Thus, there is a clear distinction between the capabilities of EU actors in the first pillar, on the one hand, and their powers in the second and third pillars, on the other. EU actors are, generally spoken, much more powerful in the former. The Treaty provisions, therefore, seemingly support arguments in favour of a 'pillarised perspective' on foreign and interior policies. Even the transfer of migration policies from the third to the first pillar with the Amsterdam Treaty did not result in a communitarisation of this area. Rather, migration policies do present a 'new institutional regime' half way between the two kinds of pillars. As Hailbronner notes: 'The Member States have been anxious to retain a certain *domaine réservé* and an active say on its definition; Title IV was framed on this premise' (2000: 36).

Second, despite this general endurance of two parallel institutional frameworks, each Treaty reform provided for both more delegation of cross pillar capabilities to EU actors and an increasing amount of linkages between the three pillars. Therefore, the originally quite strict division between these two different institutional arenas is incrementally undermined. Third, these Treaty changes paved the way for the nascent 'hybrid institutional setting' which characterises both areas. This new hybrid regime mirrors the centralisation of macro political stabilisation policies at the EU level, which *inter alia* equipped some EU actors with a considerable amount of new capabilities the delegation of which accompanied this centralisation. Thus, the functional frame provided for by macro political stabilisation policies left its mark on the precise capabilities which EU actors received through primary delegation. Notwithstanding this observation, member states continue to dominate and control developments in foreign and interior policies to a much larger extent

than they usually do in classical first pillar areas. To that extent, the 'EU remains a partial polity, without many of the features which one might expect to find within a fully developed democratic political system' (W Wallace 2000: 533).

Finally, the 'pillar perspective' tends to underestimate the considerable differences which exist *between* EU actors with regard to their individual cross pillar capabilities. Since it is argued here that the centralisation process has in particular strengthened *executive* EU actors, it was mainly the Commission and the Council Secretariat that were able to increase their leverage *vis-à-vis* the member states. The legislative and judicial branches of the EU political system, on the other hand, have not been delegated similar capabilities. While Parliament, the Court of Auditors and the Court of Justice have received some new powers through Treaty reforms, the institutional endowment for these three actors does not put them on a footing equal to the EU executive, let alone member states.

Primary delegation in legislative domains of foreign and interior policies

The legislative process in the EU is based on three main principles. First, legislative politics in the EU are embedded within a bicameral system in which the Council and Parliament are the key decision makers. However, the legislative system is also characterised by a variety of legislative procedures. While a majority in the Council is required under each of these procedures in order to pass a legislative act, the powers of Parliament vary considerably. Under some of these procedures Parliament acts on equal footing with the Council, i.e. in the codecision and the assent procedures a parliamentary majority is required for the adoption of a legislative act. Under the cooperation procedure Parliament can, under certain conditions, amend legislation while the consultation procedure allows at least to delay the adoption of legislative acts. Finally under the 'information procedure' as well as for those cases in which it is not mentioned at all, Parliament does not really act as a legislature but rather as a forum which publicly scrutinises Council legislation, either before or after its adoption. Table 4.1 presents an overview on the powers of Parliament in each of these six procedures. The ranking in Table 4.1 suggests that the powers of Parliament

decrease in descending order. This ranking is based on two observations. First, the greatest weight is given to the question if a parliamentary majority is required for the adoption of a piece of legislation. The second consideration then is whether Parliament can propose changes to such a legislative proposal or not.

A second characteristic of the EU legislative process is that the Commission also participates as an active player by taking on the role of an agenda-setter.⁶² Through its right of initiative the Commission holds a powerful resource in shaping future decisions. However, the actual significance of the right of initiative, which the Commission enjoys in all institutional arenas of foreign and interior policies save defence issues, depends on both the exclusivity of this provision and the voting rules in the Council. In some institutional regimes, the Commission is the only institutions which can initiate a legislative proposal, whereas in some others it has to share this right with the member states. This, of courses, reduces the Commission's capabilities since member states can rely on their own legislative activism (Pierson 1998: 35-38).

As mentioned before, the third important element in the legislative process is the majority requirements within the Council. These rules do, for example, determine the actual significance of the Commission's sole right of initiative. Thus, if the Council decides by a qualified majority, the sole right of initiative of the Commission has a greater weight than for cases in which the Council decides by unanimity. This is the case, because under qualified majority the Commission can propose legislation that is closer to its 'ideal point' than under unanimity. In the former case, the Commission can 'ignore' those member states that are most distant to its own proposals and which are not required for such a majority. In contrast, under unanimity the Commission has to incorporate even the positions of those member states that are most distant to its own policy positions (Tsebelis 1994). Having this

⁶² Agenda setting is understood here in the formal sense and refers to the initiation of legislation. Of course, the setting of the EU agenda does not depend on the Commission alone. Thus, 'in treaties and reforms, the Council sets the long term policy goals of the EU' whereas 'the European Council (of heads of government) and certain other councils set the medium-term policy agenda' (Hix 1999: 25). Moreover, in the second and third pillars it has in particular been the rotating Presidencies which have often taken a lead in agenda setting by bringing their individual policy preferences on the formal EU agenda.

ideal typical model in mind, the actual usage of qualified majority voting in the EU policy making process should, however, not be overestimated. Empirical studies have shown that the Council often prefers to decide on a consensual basis even in those areas in which the Treaty requires a qualified majority only (Hayes-Renshaw and Wallace 1997). This insight has also been confirmed by primary research for this thesis. To give but one example, an official from the Council Secretariat, when reflecting about the possible use of majority voting on migration policies, has stated that ‘a constant use of QMV against Germany is not possible on this issue’.⁶³ Table 4.2 presents a list of all the legislative constellations for foreign and interior policy across the three pillars. It incorporates a ‘triangular’ perspective on the two policy areas thus taking note of the role of Parliament as defined by the six different legislative procedures, the role of the Commission as exemplified by the rules on its right of initiative and, finally, the voting rules in the Council.⁶⁴

⁶³ Interview 26, Director, Legal Service, Council Secretariat, Brussels, June 2000.

⁶⁴ It should be mentioned that the Treaty provisions on the free movement of persons, which are of relevance for the analysis of interior policies, make also reference to the Economic and Social Committee as an institution involved in the legislative process. However, due to its overall insignificant role in foreign and interior policies, this thesis does not cover the activities of the Economic and Social Committee.

Table 4.1: Role of Parliament in the six legislative procedures for foreign and interior policies

Procedure	Role of Parliament
1. Codecision	<ul style="list-style-type: none"> • Three stage procedure (earlier agreement possible); • Parliamentary majority required in each stage (absolute majority in plenary, simple majority in Conciliation Committee); • Parliament can propose changes to legislation; • If no agreement in first two readings, Conciliation Committee between Parliament and Council convenes; • Procedure introduced with Maastricht Treaty, reformed with Amsterdam Treaty which further strengthened the role of Parliament (Article 251).
2. Cooperation	<ul style="list-style-type: none"> • Two stage procedure; • Parliamentary majority not required (but easier for Council to accept proposals from Parliament than to reject them); • Parliament can propose changes to legislation (Parliament as 'conditional agenda setter' (<i>cf.</i> Tsebelis 1994); • Introduced with the Single European Act, but for foreign and interior policies abolished with the Amsterdam Treaty.
3. Assent	<ul style="list-style-type: none"> • Single stage procedure; • Parliamentary majority required; • Parliament cannot propose changes to legislation.
4. Consultation	<ul style="list-style-type: none"> • Single stage procedure; • Parliamentary majority not required (but following the 1980 <i>Isoglucose</i> case at the Court of Justice Parliament has a de facto power of delay since Council has to await the opinion of Parliament before the adoption); • Parliament can propose changes to legislation.
5. Information	<ul style="list-style-type: none"> • Council and Commission are asked but not bound to keep Parliament informed; • No powers to prevent, change or delay legislation; • Parliament can publicly scrutinise legislation • Introduced for the second and third pillars with the Maastricht Treaty.
6. No Parliament	<ul style="list-style-type: none"> • No role for Parliament at all • Note: Applies to certain first pillar [<i>sic!</i>] areas

Sources: Hix 1999; Nugent 1999.

It is, therefore, not surprising that the Commission tends to adopt a cautious approach when initiating legislation independently on whether the right of initiative is sole or shared.⁶⁵ It was only in those areas in which the Commission already enjoyed long standing Community prerogatives that it was willing to use the right of initiative in a more proactive manner. The economic basket of the EMP, thus trade issues and developmental assistance, was mentioned as such an example (Licari 1998).⁶⁶ However, also in these communitarised areas the Commission had to keep a

⁶⁵ Interview 42, Legal Service, Commission, Brussels, July 2000.

⁶⁶ Interview 12, Head of Unit, Commission, Brussels, June 2000.

watchful eye on the Council. Thus, one official lamented that the Commission 'never used its right of initiative to combine trade and politics' since member states continue to regard political relations with third countries as their prerogative.⁶⁷

The Commission's legislative powers in foreign policies remained largely unchanged between the Maastricht and the Nice Treaty. Thus, no major changes occurred with regard to those institutional regimes in which the Commission has the sole right of initiative and those in which this right is shared with the member states. The sole right of initiative covers the first pillar foreign policy areas, these being external economic relations and developmental assistance, while in the second pillar the Commission shares this right with the member states.⁶⁸ When looking at the voting rules in the Council, however, the picture becomes more complex. While in developmental assistance the Council votes with qualified majority, the bulk of decisions in external economic relations and the CFSP is decided by unanimity. Parliament, finally, has its strongest role in the area of developmental assistance, where it is a colegislator in the framework of the codecision procedure. Whereas for some international agreements Parliament's assent is required, it is a rather peripheral actor in the common commercial policy and the CFSP. Thus, when comparing the powers of the Commission and Parliament in the legislative domain of external economic relations, the former has been delegated the greater amount of primary capabilities. However, due to the predominance of unanimity voting in the Council in this area, member states hold the keys for an effective control over the way in which the Commission uses the right of initiative.

⁶⁷ Interview 32, Deputy Head of Cabinet, Commission, Brussels, July 2000. When confronted with empirical findings this statement, however, could be questioned. Cases such as the 'orange juice conflict' between the EU and Israel or the debate on the relationship between EU assistance to the Palestinian Authority and corruption cases in Palestine, show that the Commission has not been reluctant to combine trade and politics if it was able to do so.

⁶⁸ When arguing about the 'law driven' character of EU politics, a member of the Commission's legal service, who was previously working for the Finnish Foreign Ministry, argued that the Commission has developed a particular 'initiative ethos'. Since national governments, which are thinking much more in political terms, do not have such an institutional approach to EU politics, the Commission has a structural advantage in using this instrument even when the right of initiative is shared. Interview 13, Legal Service, Commission, Brussels, June 2000 (M Smith 2001).

The economic dimension of EU foreign policies has two Treaty bases, these being the Common Commercial Policy, on the one hand, and the provisions on Mixed Agreement, on the other. With regard to the Common Commercial Policy, Articles 132(1) and 133(2) delegated to the Commission the sole right of initiative on all legislative measures in this field. Moreover, with the Amsterdam Treaty, this right has been extended by Article 133(5) to cover also the issues of services and intellectual property, which were previously not part of the Common Commercial Policy. The actual political weight of the sole right of initiative in this field is strengthened by the provisions on the powers of the Council and Parliament. Thus, on all Common Commercial Policy issues the Treaty stipulates that the Council decides with a qualified majority. Parliament, surprisingly for such a 'classical' first pillar arena, is virtually excluded from the legislative process. Thus, the Maastricht Treaty does not mention Parliament at all in its provisions on the Common Commercial Policy. It was only with the Amsterdam Treaty that a minor change in favour of Parliament has been introduced. Since then, Article 133(5) allows Parliament, on the basis of the consultation procedure, to scrutinise legislation on the issues of intellectual property and services in international agreements.

Notwithstanding these provisions, the main Treaty base for economic relations with Middle Eastern countries is not the Common Commercial Policy, but the provisions on 'Mixed Agreements' and 'Association Agreements' pursuant to Articles 300 and 310. On Association Agreements, thus the kind of agreements the EU has concluded with both Israel and Palestine, the Commission's legislative role is more restricted and Parliament's powers significantly enhanced when compared to their respective capabilities under the Common Commercial Policy. While also for Association Agreements the Commission has the sole right of initiative, its actual significance is circumscribed by the unanimity requirement in the Council. Article 300 stipulates that unanimity is required for all Association Agreements and for all those agreements which cover 'a field for which unanimity is required for the adoption of internal rules'. And indeed, both the Association Agreements and also all other bilateral agreements with Israel and Palestine in the 1990s did actually cover

areas in which internal rules of the EU required unanimity.⁶⁹ Qualified majority voting only comes into play in the case of sanctions towards countries with which the EU has concluded an Association Agreement. Following Article 301, the Commission has in this case the sole right of initiative, while the Council decides – without any parliamentary involvement – by qualified majority.⁷⁰ Notwithstanding this limitation to Parliament’s role, its rights in the legislative process in this institutional regime are greater than in the Common Commercial Policy.

Association Agreements require the assent of Parliament. Parliament has occasionally used its rights under the assent procedure to link its vote with political demands towards third countries. Since a parliamentary majority is required for the conclusion of Article 300 agreements, such a linkage is a quite ‘credible threat’. In Middle East policies such a linkage has successfully been used when Parliament in 1988 blocked the conclusion of three trade agreements with Israel. As Hollis notes, ‘the hold-up was temporary, but the point was made (1994: 129).’⁷¹ Finally, in order to speed up the decision making process - and to prevent Parliament from delaying decisions - Article 300 allows that Council and Parliament can prior to any decision jointly determine a time limit for the assent.

⁶⁹ See the previous chapter for these additional agreements. The Commission failed when attempting to base those parts of Association Agreements, which are decided internally with qualified majority, on Article 228. An example has been the free movement provisions in international agreements. Notwithstanding the Commission’s efforts, the Council succeeded in ensuring that these provisions remained in the framework of mixed agreements which require a unanimous vote in the Council. Interview 26, Director, Legal Service, Council Secretariat, Brussels, June 2000.

⁷⁰ An interesting side note is that Article 301 is an example of a direct link between the first and the second pillars. Thus, a decision on sanctions according to Article 301 by qualified majority does actually require a prior decisions in the framework of the CFSP on the basis of a joint action or a common decision. Note that these decisions require a unanimous vote in the Council. This equips all member states with a de facto veto on sanctions pursuant to Article 301.

⁷¹ Moreover, in 1993 several parliamentarians recalled that the 4th financial protocol with Israel of 1992 contained a specific clause on the humanitarian situation in the Occupied Territories. Some Socialist members raised the issue of human rights’ violations in the Territories and brought up the possibility that Parliament could consider suspending the protocol or blocking the financing provisions therein (Agence Europe, 21 January 1993, No 5902: 6). The relationship between parliamentary votes under the assent procedure, which confronts Parliament with a take-it-or-leave-it proposal, on the one hand, and the political situation in a conflict region, on the other, is exemplified by the conclusion of Association Agreements in the framework of the EMP. Thus, when the Middle East peace process seemed to be well under way, Parliament gave in 1996 its assent to the Association Agreement with Israel with almost unanimous support of 265 to 2 with 3 abstentions (Agence Europe, 1 March 1996, No 6678: 11). The 1997 Interim Association Agreement with the Palestinians received a similar margin with 372 to 5 votes with 4 abstentions (Agence Europe, 10 April 1997, No 6951: 3).

It has been argued that the exclusion of Parliament from Article 133 Agreements can be explained by the need to have a fast track procedure for international agreements between the EU and third parties alongside Association Agreements which, additionally to parliamentary involvement, do also require unanimity in the Council. This constellation brings to the fore an interesting alliance between those member states seeking to limit the Commission's influence under Article 133, on the one hand, and Parliament trying to push for international agreements to be concluded pursuant to Article 300, on the other (McGoldrick 1997: 92-93).

Compared to this wide range of institutional regimes in external economic relations, the delegation of legislative capabilities to the Commission and Parliament on developmental assistance has been quite straightforward and establishes one standard procedure only. Thus, since the Maastricht Treaty the Commission has the sole right of initiative in this area, whereas the Council decides across the board with a qualified majority. It was only with regard to Parliament's powers that the Treaty provisions have undergone some changes. While the Maastricht Treaty delegated to Parliament a legislative role in the framework of the cooperation procedure, the Amsterdam Treaty introduced the codecision procedure for all developmental assistance decisions, thus rendering Parliament a powerful colegislator alongside the Council.

The role of the Commission and Parliament remains much more restricted in the area of the CFSP. While there have been some changes from Maastricht to Nice with regard to the legislative process in the second pillar, these changes only related to the voting provisions in the Council. The rules on the legislative capabilities of the Commission and Parliament remained completely unchanged since Maastricht. With regard to the Commission's right of initiative, Article 22(1) TEU stipulates that the Commission, but also any member state, 'may refer to the Council any question relating to the common foreign and security policy and may submit proposals to the Council'. Until today, more legislative proposals in this field are tabled by the member states, while the Commission remains cautious in making use of right of

initiative.⁷² According to Article 23 TEU unanimity is required for the adoption of legislative acts in the Council. There are, however, some exceptions to this rule. Thus, whereas the Maastricht Treaty provided for qualified majority voting only on procedural issues and on those joint actions where the Council decided beforehand to do so, Article 23(2) TEU of the Amsterdam Treaty foresaw qualified majority voting for all legislative acts which are either based on a common strategy or for implementing decisions for a joint action or a common position. Moreover, the rules on procedural questions were further relaxed and the Amsterdam Treaty asked for a simple majority in the Council only.

In contrast to the role of the Council and also the Commission, Parliament's capabilities regarding its impact on decisions in the CFSP are severely restricted (Grunert 1997). Article 21 TEU provides for a 'consultation' and an 'information' of Parliament in this area. However, since these institutional rights are not enforceable, Parliament cannot use the second pillar consultation mechanism in the same way as is the case for consultation in the first pillar.⁷³ Therefore, Parliament's involvement in the decision making process of the second pillar depends upon the goodwill of the member states and the Commission to keep it informed about decisions which are awaiting adoption in the Council.⁷⁴ However, members of the European Parliament (MEP) usually were missing such a goodwill and one Parliamentarian criticised 'that

⁷² Interview 11, Desk officer, Commission, Brussels, June 2000. Note that 'initiatives' in the second pillar differ from those in the first (and third) pillar due to differences between the requirement for flexibility in foreign policies and the need for codification in other areas. Most foreign policy issues do not involve legislation as such. This is but one reason why parliamentary scrutiny is difficult in this field. Taking note of this remark, initiatives are referred to here in the more narrow (codified) sense as those second pillar measures that are published as legal acts in the Official Journal.

⁷³ Consider again the ability of Parliament to use its power of delay under the first pillar. When Parliament had to adopt a bilateral agreement which established scientific cooperation between the EU and Israel under the 5th Framework Programme for Research and Development, a group of parliamentarians suggested (unsuccessfully) to delay the vote on this agreement until the outcome of the elections in Israel some three months afterwards had been known. (Agence Europe, 12 February 1999, No 7403: 13).

⁷⁴ In order to make up for this dependence on the Council and the Commission, Parliament tried to establish close links with the Commission's Delegations in Israel and Palestine in order to receive inside information from the region. Moreover, Parliament profited from the regular exchange with the Special Representative to the Middle East peace process. One parliamentarian stated that the EU Special Representative to the Middle East peace process provided Parliament regularly with 'detailed briefings' and kept a 'very good communication with Parliament'. Interview 10, Desk officer, Commission, Brussels, June 2000 and Interview 18, Member of the European Parliament, Brussels, June 2000.

the Council always informed us after taking decisions', thus undermining the already weak control function of Parliament in the second pillar.⁷⁵

Turning now towards the legislative capabilities of EU actors in interior policies, a similar distribution of powers can be observed. While the Commission has been delegated within all institutional arenas the right of initiative, this right has to be shared with the member states in the third pillar as well as for most migration policy issues in Title IV of the Amsterdam Treaty. While the Council decides by qualified majority in those institutional regimes which have been communitarised with the Maastricht Treaty, most decisions in migration policies do still require unanimous consent. Parliament, finally, is a weak actor on the legislative dimension in interior policies in most institutional regimes. Even the transfer of migration policies from the third pillar to the EC Treaty has changed little with regard to Parliament's legislative powers. On most issues Parliament can, thus far, neither amend nor prevent legislation.

Both the Commission and Parliament have been delegated considerable capabilities in 'classical' first pillar fields of interior policies, such as free movement and visa issues. However, when comparing the capabilities of these two actors, Parliament has profited less from primary delegation. Thus, the Commission enjoys the sole right of initiative in all of these policy fields, whereas Parliament's powers are somewhat more restricted. In fact, the capabilities of Parliament range from institutional regimes in which it is not at all present in the legislative process to regimes in which it acts as a powerful colegislator in the framework of the codecision procedure. With one exception the Council always decides by qualified majority.

Codecision is the standard operating procedure for legislative acts related to the freedom of movement of workers, save social security issues before the Amsterdam Treaty. Thus, on freedom of movement issues the Commission has the sole right of initiative and a parliamentary majority is required for every legislative act,

⁷⁵ Interview 18, MEP, Brussels, June 2000.

while the Council decides by qualified majority.⁷⁶ Social security decisions related to the freedom of movement did already in the Maastricht Treaty require a qualified majority in the Council on the basis of a Commission proposal. However, prior to the Amsterdam Treaty, which introduced the codecision procedure also on these issues, Parliament was excluded from the decision making process. In the field of freedom to provide services, which in the past has often been linked with migration policy issues, Article 49 defines the decision making procedure. Thus, the Council acts by a qualified majority on the basis of a Commission proposal, while Parliament had not been delegated any legislative capabilities.

With regard to those interior policy issues, which have since the Maastricht Treaty been part of the first pillar and which are directly linked to migration policies, the powers of both Commission and Parliament are more limited. Thus, in the field of visa policies, ex-Article 100c, on the one hand, delegated to the Commission the sole right of initiative. On the other hand, however, this clause was somewhat ambiguously curtailed by ex-Article 100c(4), which introduced a kind of 'voluntarily shared right of initiative', and which stated that 'the Commission shall examine any request made by a member state that it submit a proposal to the Council'. This provision reflects the caution of member states to communitarise interior policies even when they are legally part of the first pillar. This reluctance is also visible in the Maastricht Treaty's two stage model for Council decisions on visa policies. During the first stage, until the end of 1995, the Council, thus, decided by unanimity in the framework of the consultation procedure, in which Parliament only has a power of delay. It was only in the second stage, i.e. three years after the Maastricht Treaty had finally entered into force, that qualified majority had automatically been introduced. No changes, however, were made regarding the involvement of Parliament. Finally, the reluctance of some member states to delegate capabilities to EU actors in interior

⁷⁶ When in 1996 the Commission initiated legislation on three directives aiming to establish free movement of persons, the governments of the United Kingdom and Portugal initially opposed these measures arguing that these matters fell under the third pillar (Agence Europe, 28/29 May 1996, No 6736: 7).

policies can be observed when looking at the provisions of Article 14, which deals with the abolition of internal border controls. Thus, there is until today no parliamentary involvement. In spite of this exclusion of Parliament, the Commission has the sole right of initiative while the Council acts with a qualified majority.

Notwithstanding certain limitations to the powers of the Commission and Parliament in 'classical' first pillar fields of interior policies, a look at their capabilities in both the third pillar and the migration policy chapter of the Amsterdam Treaty, reveals much greater constraints upon their legislative roles. In fact, the provisions of the Maastricht Treaty on JHA closely resembled those on the CFSP. According to ex-Articles K.2 and K.9 TEU, the Commission shared the right of initiative with the member states on both migration policy issues as well as on a possible *passarelle* of migration policies to the EC-Treaty. Moreover, following ex-Article K.4(3) TEU unanimity was required for all decisions, except for implementation measures for joint actions and conventions. In the former case a qualified majority was required while in the latter case the Treaty demanded a two-thirds majority. The provisions on the rights of Parliament, which were set out by ex-Article K.6 TEU, mirrored exactly the wording on Parliament's powers in the second pillar. Consequently, Parliament had a right of 'information' and 'consultation', but was not able to enforce the Council or the Commission to do so. Thus, Parliament had to rely on good personal contacts with the double executive. As one official from Parliament explained: 'We receive a lot of documents informally through good contacts with colleagues in the Commission and Council. Officially, we receive them only after their adoption'.⁷⁷ These limitations of Parliament's role can be interpreted as the result of a strategic alliance of national and European administrations, namely the Commission, being

⁷⁷ One of the provisions of ex-Article K.6 TEU was that Parliament holds a yearly debate on progress in the third pillar. However, from 1993 until 1997 Parliament only received in 1995 a prior report by the Council on the progress achieved in this area pointing to the problems related to non-enforceable 'information rights' (Agence Europe, 3/4 June 1997, No 6740: 8). Moreover, when finally receiving reports, they often contained only a list of adopted decisions but not a detailed description of the Council's activities as wished by Parliament. Interview 41, Administrator, European Parliament, Brussels, July 2000.

both part of the same transgovernmental network in this area, at the expense of Parliament and also non-governmental organisations (Guiraudon 2000: 268).

As has already been pointed out in the previous chapter, the transfer of migration policies to the first pillar with the Amsterdam Treaty did not result in a communitarisation of this policy area. It is, therefore, not surprising that the provisions of Title IV on the legislative powers of Parliament and the Commission introduce only minor changes when compared to the institutional regime of the Maastricht Treaty. It is only after the end of the transitory period in May 2004 that a complete communitarisation might take place. The legislative procedure in migration policies is set out by Article 67. It stipulates that during the transitory period the right of initiative is shared between member states and the Commission, while the Council continues to decide on most issues by unanimity. Parliament has only been delegated powers under the consultation procedure.⁷⁸ It is only after this transitory period that the Commission will be delegated the sole right of initiative, however, with similar limitations as they were outlined above in the case of *ex-Article 100c*. Thus, even when it will have the sole right of initiative, the Commission 'shall examine any request made by a member state that it submit a proposal to the Council'.⁷⁹ While this 'voluntarily shared right of initiative' will be introduced automatically, a complete shift towards a communitarised regime requires the consent of all member states. Consequently, Article 67 introduced a 'new *passarellé*' which foresees a unanimous decision of the Council in order to bring about the codecision procedure - thus

⁷⁸ Even after the entry into force of the Amsterdam Treaty, Parliament has not been consulted by the Council and the Commission on important decisions to be taken. Thus, prior to the Tampere Special European Council, Parliament has been unsatisfied with information it received from the Finnish Presidency (Agence Europe, 14 October 1999, No 7572: 12). Also with regard to the aforementioned 'progress reports' Title IV did not lead to major changes. Thus, when drafting the progress report on this issue for the year 2000, an MEP was struck by the little amount of information received from the Council and the Commission. Interview 29, MEP, Brussels, June 2000.

⁷⁹ Member states usually make use of their right of initiative, in particular when they hold the Presidency. Against this background it is interesting to note that the Swedish Presidency of 2001 has made clear that it will not make use of its right of initiative under Title IV and rather coordinate its activities beforehand with the Commission. Interview 44, Head of Unit, Council Secretariat, Brussels, July 2000.

greater parliamentary involvement as well as qualified majority voting – on all migration policy issues.

The only exception to these provisions of Title IV are visa policies, an issue which had to a large extent been already part of the first pillar since the Maastricht Treaty. The Amsterdam Treaty thus established a specific regime for those visa policy issues which were dealt with by ex-Article 100c, these being the positive and negative visa lists, on the one hand, and the uniform format for visas, on the other. On these two issues the Commission has the sole right of initiative, while the Council acts with a qualified majority. Parliament had been delegated the power of delay under the consultation procedure. The remaining parts of visa policies, namely ‘procedures and conditions for issuing visas’ and ‘rules on uniform format’, which became part of the first pillar with the Amsterdam Treaty, are subject to yet another legislative procedure. While these two issues will also be initially governed by the consultation procedure, the codecision procedure will be introduced automatically after the end of the transitory period. It is striking that this automatic *passarelle* does not cover the ‘Article 100’ visa issues which, seemingly, will be dealt with under the consultation procedure even after May 2004 although they had been part of the first pillar since the Maastricht Treaty.

Some minor modifications towards increased communitarisation of legislative decisions have, finally, been introduced by the Nice Treaty. Thus, the new Article 67(5) stipulates, that if the Council has already agreed – by unanimity - on ‘common rules’ and ‘basic principles’ in the areas of ‘asylum policies’ and ‘minimum standards for temporary protection of refugees and displaced persons’, that all further decision will be taken on the basis of the codecision procedure.

The results of this analysis on legislative capabilities of EU actors are summarised in Table 4.2. It focuses in particular upon the powers of Parliament and the Commission in legislative politics in foreign and interior affairs. Note that the Council is pivotal in every single legislative regime. The table shows the four different institutional constellations under which the Commission participates in the legislative process (x-axis), as well as the six different legislative procedures which

relate to Parliament's involvement (y-axis). The table, therefore, includes all three dimensions on which the analysis of this chapter has been based. Thus, it incorporates the voting rules in the Council, the design of the right of initiative and the six legislative procedure. The table does also suggest that there is a qualitative difference with regard to the role of Parliament and the Commission under the various legislative regimes. Thus, on the y-axis Parliament's impact decreases in descending order, whereas the Commission's powers, which are represented on the x-axis, decrease from left to right.⁸⁰ A combination of these three dimensions brings up 24 possible legislative regimes out of which ten have been used in foreign and interior policies between Maastricht and Nice. The table, moreover, reveals that there has been a minor simplification of legislative provisions with the Amsterdam Treaty. The total number of legislative regimes in both areas has been reduced from eight in Maastricht to seven with the Amsterdam version.

Table 4.2 illustrates further that when comparing the capabilities of the Commission and Parliament, the former has been delegated greater powers in both policy areas. Most institutional regimes are, thus, located on left hand side of the x-axis on which the Commission can make greater use of its role as an agenda setter due to predominance of qualified majority voting in the Council.⁸¹ Parliament, in contrast, acts mainly in institutional arenas that appear on the lower side of the y-axis, thus in the framework of those procedures in which its role as a colegislator is severely curtailed.

⁸⁰ With regard to the ranking of the Commission's capabilities, more weight is given to 'qualified majority voting' than to 'right of initiative'. This is based on the assumption that unanimity automatically undermines the impact of the right of initiative since the Commission's ability to form alliances within the Council is severely undermined. In contrast, when there is a shared right of initiative, it has in several cases not been used by member states which tend to rely on the Commission to propose legislation (see the following chapter). This has also been confirmed by the empirical research presented in this chapter.

⁸¹ If the Commission decides to do so. However, often it remains cautious to come up with proposals. See chapter 6 which discusses the Commission's preferences in migration policies.

Table 4.2: The legislative regimes in foreign and interior policies

		Commission: right of initiative / voting provisions in the Council			
		Sole / qualified majority	Shared / qualified majority	Sole / Unanimity	Shared / Unanimity
Parliament: legislative procedure	Codecision	<ul style="list-style-type: none"> All development assistance *Most free movement, except services <i>Parts of visa policies after 2004 (automatically)</i>	<i>All/some Title IV after 2004 / after prior Council decision (unanimity required)</i>		
	Cooperation	All Development assistance			
	Assent			<ul style="list-style-type: none"> *Most Association Agreement 	
	Consultation	<ul style="list-style-type: none"> All visa policies 	All visa policies after 1995	<ul style="list-style-type: none"> Some Common Commercial Policy: Article 133(5) 	<ul style="list-style-type: none"> Most Title IV (<i>voluntarily shared right of initiative after 2004</i>) All visa policies before 1995
	Information		<ul style="list-style-type: none"> Some CFSP: prior Common Strategy, implementation of Joint Action or Common Position (Simple majority for procedure) Some CFSP: Procedure / prior Joint Action Some JHA: implementation of Joint Action, Conventions (2/3 majority) 		<ul style="list-style-type: none"> *Most CFSP Most JHA
	No Parliament	<ul style="list-style-type: none"> *Most Common Commercial Policy: Articles 132(1) 133(2) *Some Association Agreements: Article 301 *Some Free movement: providing services: Article 49 *Internal Borders: Article 14 Some free movement: Social Security			

NOTE: Bold letters / bullet points: Amsterdam Treaty; normal letters: Maastricht Treaty; italic letters: Nice Treaty and automatic/possible changes to Amsterdam Treaty; asterisk: those provisions of Amsterdam Treaty which existed already in the Maastricht version.

In Table 4.3 this observation is taken a step further. It provides data on the way in which the capabilities of the Commission and Parliament in foreign and interior policies have developed since the Maastricht Treaty and proposes a quantification of their respective powers.⁸² Consider, for example the twelve different bullet point entries in Table 4.2 which represent each legislative regime in foreign and interior policies of the Amsterdam Treaty. The 'capability index' presented in Table 4.3 shows that the Commission has profited to a greater extent from delegation of legislative capabilities when compared with Parliament. In fact, when looking at the Amsterdam Treaty, the 'capability index' of the Commission is 77.1 per cent of its maximum score, whereas Parliament only has 35.0 per cent of its maximum powers. Both actors, however, have profited from the reform of the Maastricht Treaty and have been delegated more capabilities with the Treaty reforms in Amsterdam. Yet, there is only a minimal increase in the Commission's capabilities of .2 per cent. The increase in powers of Parliament has been greater from Maastricht to Amsterdam, but it has to be considered that Parliament is still a far cry from its maximum 'score'.⁸³ Notwithstanding this remark, Parliament had been delegated with the Amsterdam Treaty new powers that significantly increased its 'capability index' from 28.6 per cent to 35.0 per cent, thus a growth rate of 6.4 per cent.⁸⁴

Moreover, what has to be considered when analysing the results in Table 4.3 is how the powers of the Commission relate to specific legislative procedures. This

⁸² There are always problem with indices and quantifying 'power'. Static figures can hardly bundle a dynamic process such as legislative politics in the EU. Therefore, the figures in table 4.3 aim to provide an indication about the diversity of the hybrid institutional regimes of EU foreign and interior policies and to point to general paths of how the capabilities of the Commission and Parliament have developed rather than claiming to establish an exact statistical relationship.

⁸³ Note that the codecision procedure has been significantly changed with the Amsterdam Treaty. 'The reforms increased the powers of the EP' (Hix 1999: 66). In contrast, the role of the Commission in the reformed codecision procedure is weaker than before. Since the indices in table 4.3 do not relate to the six legislative procedures as far as the Commission is concerned, this (assumed) decrease in powers is not included but should be considered when interpreting the indices of Parliament *vis-à-vis* those of the Commission. Also the increase of Parliament's capabilities from Maastricht to Amsterdam as indicated by the figures in table 4.3 should be interpreted alongside the strengthening of Parliament's role in relation to the Commission in the codecision procedure.

⁸⁴ The Capability Indices are similar when looking at foreign and interior policies separately, thus indicating the similar functional logic of macro political stabilisation which relates to both policy areas and which translated into similar institutional rules, thus supporting the key propositions made in chapter 2.

applies in particular for those parts of foreign and interior policies governed by the codecision procedure. Here, the powers of the Commission are much weaker than under the other types of procedure since the Commission 'is structurally unable to affect the decisions of Parliament' and the Council due to the ability of these two actors to come up, within the Conciliation Committee, with their own legislative amendments which do not need to take account of the original preferences of the Commission (Garrett 1995: 303). Thus, the right of initiative of the Commission under the codecision procedure is considerably weaker when compared with other legislative procedures. Turning to Table 4.3, these remarks apply, however, to only a small number of legislative domains. Under the Maastricht Treaty only one legislative domain, namely parts of free movement of person provisions were governed by the codecision procedure. This changed only slightly with the Amsterdam Treaty which extended the application of the codecision procedure to cover developmental assistance policies as well. However, this is a policy area in which the Commission traditionally holds important executive powers. Therefore, the minor increase of the Commission's capability index must be read in conjunction with the relative weakening of its sole right of initiative in developmental assistance policies since the Amsterdam Treaty following the introduction of the codecision procedure.

Two main conclusion can be drawn from this analysis on primary capabilities of EU actors in foreign and interior policies. First, there are three actors at the EU level which participate in the legislative process and their powers vary considerably. Thus, the Council is the only institution that has a strong position in each of the various institutional regimes. There is no piece of legislation in EU foreign and interior policies that does not require a majority of votes in the Council. The Council's role in both areas is, moreover, characterised by the prevalence of unanimous majorities required to pass a piece of legislation. Notwithstanding this general pattern of Council dominance, however, in many institutional regimes the Council has to cooperate closely with the Commission and Parliament. Moreover, in all legislative regimes the Commission has a right of initiative. Nevertheless, it often has to share the right of initiative with the member states. Parliament participates in

the legislative process as the second chamber. Its powers, however, are until today weak when compared to the capabilities of both the Council and the Commission.⁸⁵

Table 4.3: Legislative domains of Parliament and Commission and Capability Indices

<i>Legislative Procedure</i>	<i>Parliament</i>		<i>Commission</i>		<i>Right of initiative / voting in Council</i>
	<i>Maastricht Treaty</i>	<i>Amsterdam Treaty</i>	<i>Maastricht Treaty</i>	<i>Amsterdam Treaty</i>	
Codecision	1	2	6	7	Sole / qualified
Cooperation	1	0	3	1	Shared / qualified
Assent	1	1			
Consultation	2	3	2	2	Sole / Unanimity
Information	4	2	3	2	Shared / Unanimity
No Parliament	5	4	-	-	No involvement
Total number of legislative domains	14	12	14	12	Total number of legislative domains
Capability Index Parliament	28.6	35.0	76.9	77.1	Capability Index Commission

NOTE: own calculations, based on table 4.2. The indices have been calculated as follows: for Parliament the amount of entries in each legislative domain has been multiplied with a 'legislative procedure score' (codecision = 5; cooperation = 4; assent = 3; consultation = 2; information = 1; no Parliament = 0), for the Commission each entry has been multiplied with a 'right of initiative / voting in Council score' (sole/qualified = 4; shared/qualified = 3; sole/unanimity = 2; shared/unanimity = 1). The 'capability index' is the total sum of these scores divided by the maximum score possible (if all domains would be codecision for Parliament or sole right of initiative/qualified majority for the Commission). In other words, the index is 100 if Parliament had been delegated codecision in all legislative domains, or if the Commission could act with a sole right of initiative and qualified majority voting rules in the Council in all legislative domains.

Second, the distribution of powers between these three actors still reflects the logic of the pillar division. Thus, as a general picture, Parliament and the Commission are stronger in the first pillar whereas their capabilities in the second and third pillars as well as in the post Amsterdam migration policy regime remain more limited.

⁸⁵ As Cameron notes this limitation with regard to the capabilities of Parliament in the area of foreign policies is not a unique characteristic of the EU political system. Thus, Parliament's rights in the second pillar 'are akin to those of most national EU parliaments' (1998: 65). Moreover, in interior policies the 1990s led to a similar executive bias at the expense not only of the EP but also of member states' parliaments. Seen from that perspective the EU level allowed governments to circumvent their national parliaments in legislation on interior policies by turning to the EU level where parliamentary involvement has been low from the outset. Thus, since Maastricht also 'many of the Member States' parliaments encounter serious problems in exercising effective control' over interior policy at the EU level (Monar 1995: 249).

Moreover, the Council often decides by qualified majority in the first pillar, whereas unanimity predominates in all other institutional arenas and also in some first pillar fields. Thus, the pillar division is still underlying the legislative dimension in foreign and interior policies. As a rule, primary delegation to the Commission and Parliament has been less pronounced in the sovereignty related regimes of foreign diplomatic relations and migration policies than on those regimes which are directly related to economic issues. Notwithstanding this general pattern, the capabilities of Parliament and the Commission have overall been strengthened from Maastricht to Nice thus pointing to an increasing centralisation of foreign and interior policies at the EU level.

Primary delegation in the executive domains of foreign and interior policies

When looking at the Treaty provisions on the executive dimension of EU foreign and interior policies, similar conclusions as those on legislative issues come to the fore. Thus, EU actors have been delegated executive capabilities in both areas across all three pillars. On the executive dimension, it was the Commission and the Council Secretariat that were the recipients of this delegation. However, in spite of various cross pillar linkages, the dividing line between the two types of pillars is also characteristic of the institutional structure of EU executive politics in foreign and interior affairs.

Member states have delegated executive powers in foreign and interior policies across the three pillars to both the Commission and the Council Secretariat. When compared with legislative politics, the institutional structure of executive relations is less complex. Thus, in all regimes which are part of the TEC the Commission acts as the main executive, whereas in the second pillar as well as in interior policies before the Amsterdam Treaty, the 'executive core' at the EU level was located in the Council and its Secretariat. Notwithstanding this division of executive powers, both the Commission and the Council Secretariat have been delegated additional powers that allow them to encroach into institutional regimes beyond the narrow pillar confines. Thus, despite these divided executive capabilities

neither the Commission nor the Council can act independently of each other in foreign and interior policies. Under the surface loom various bonds between these two actors, which install a system of power sharing between the Council and the Commission within all institutional arenas of foreign and interior policies. Due to the functional indivisibility of both policy areas this 'tandem' relationship between the Commission and the Council shapes foreign and interior policies across the institutional pillar divide (Hayes-Renshaw and Wallace 1997: 179).

In a sense, the EU executive system in the two areas functions like two aeroplanes whose movements have to be coordinated. Based on the aforementioned pillar division, executive capabilities have been delegated to one of the two actors – either the Commission or the Council – which then steers the 'EU aircraft'. At the same time, however, the second actor sits right next to this captain, thus sharing overall responsibility for the manoeuvres of the aircraft. While in 'classical' first pillar arenas there is only one plane in the skies, the two pillar dimension of both foreign and interior policies leads to rather heavy air traffic. There are two planes whose cruises have to be coordinated above the EU air space. In one plane, the Commission is the captain while the Council acts as a deputy. The powers of the Council, then, stem from the comitology system which establishes a control system over the Commission's decisions on direction and speed (Wessels 1998). The second plane, which was initially constructed for the second and the third pillars, is – following the Amsterdam Treaty – limited to the area of the CFSP and non-migration related areas of interior policies in the remaining third pillar. Here, the Council is the captain, with the Commission acting as a deputy who might not control the direction and speed but who is permanently informed about the course of the aircraft. 'As for the two new pillars of the TEU, here the Council Secretariat and the Council presidency have functions that, under the Community pillar, are the responsibility of the Commission' (Hayes-Renshaw and Wallace 1997: 185). As a result of these linkages between the Council and the Commission, the cross pillar design of foreign and interior policies binds both actors to coordinate actions within their respective executive prerogatives if they do not want to risk a crash of the two planes. Thus, a

need for close executive cooperation between the Council and the Commission is an inherent characteristic of the EU's foreign and interior policy system, notwithstanding the more limited 'deputy function' of the Commission in the second and third pillars, when compared with the role of member states in the first pillar.

Primary delegation of executive capabilities in foreign and interior policies has, thus, led to a system in which the capabilities of EU actors must be viewed against the background of 'the interface of the EU dual-executive' (Hix 1999: 41). While some parts of this interface are regulated by secondary decisions, which are analysed in the following chapter, important provisions have also been made directly by the Treaties. The interface consists of two elements which are a complex committee system, on the one hand, and a joint responsibility of both actors *vis-à-vis* both other EU institutions and states outside of the EU, on the other. Comitology is an institutional mechanism that allows both the Commission and the member states to be involved in all stages of policy making at the EU level (Ballmann, Epstein and O'Halloran 2002; Franchino 2000).⁸⁶ However, it is important to stress that comitology functions in a different way when looking at the two types of pillars. Thus, in the first pillar the Commission is the main actor for the execution of policies, while the member states are involved at all stages of policy making via specialised committees. In the second and third pillars, however, the main responsibility for executive policy making lies with the Council, while the Commission participates within the various Committees as a '16th member state', albeit without any voting rights and much more reduced powers than member states have in first pillar committees. Consequently, the structure of executive relations between the Commission and the Council in foreign and interior policies can be described by an x-structure, as exemplified by figure 4.1. It is important to note again that the member states possess across the pillars greater capabilities when compared with the Commission. Thus, member states have in many first pillar Committees a veto power on decisions by the Commission, while the Commission has no such

⁸⁶ Comitology will be addressed in greater detail in chapters 5 and 7.

powers *vis-à-vis* the Council in the second and third pillars (Hayes-Renshaw and Wallace 1997).

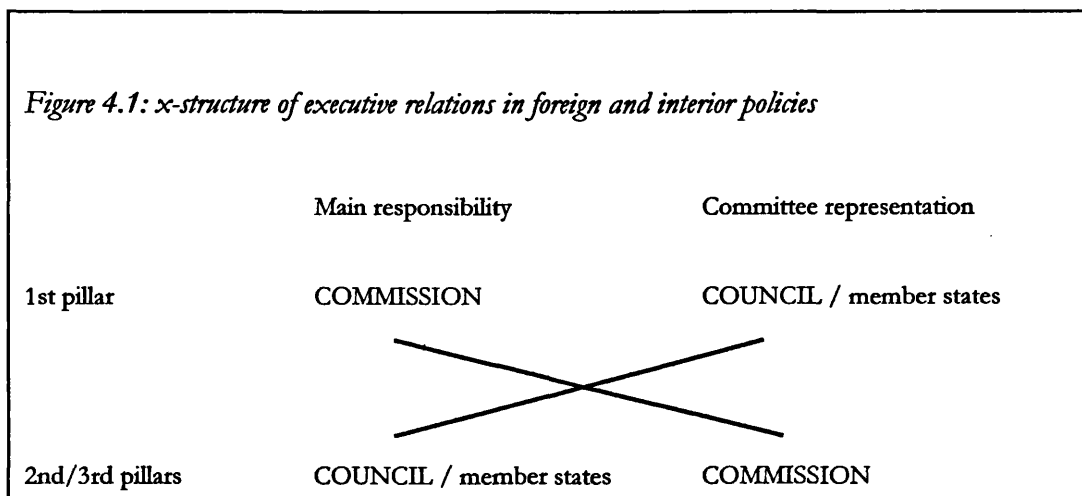
However, empirical evidence in foreign and interior policies supports the notion of such an x-structure of executive relations despite the obviously more circumscribed powers of the Commission in the second and the remaining third pillars. For example, in foreign policies the second pillar foresees a joint responsibility for the Council (and the Presidency) and the Commission in the external representation of the EU in third countries. Indeed, as far as Middle East policies are concerned, such a joint approach to external representation has been developed between the Presidencies, the Special Representative and the Commission Delegations in the region.⁸⁷ This corresponds with the observation that it is ‘on a day-to-day basis [that] the Commission and the Council have to find operating procedures to handle external representation’ (*ibid.*: 191). Moreover, despite its formally more reduced role in second pillar decision making, the Common Strategy on the Mediterranean Region of July 2000 was jointly drawn up by Council and member state officials together with officials from DG Relex, thus pointing to the considerable overlap of powers between these two institutions which must be constantly coordinated in the decision making process.⁸⁸ Thus, the need for this coordination does not primarily stem from formal Treaty provisions but rather from the requirements of the functional unity of foreign policies.

In interior policies a similar structure of first and third pillar executive relations can be observed, although the unity between interior policy issues across the pillars is not as firm as in foreign affairs. However, what matters here is that due to an increase of institutional capabilities in the various Treaty reforms and a parallel increase in personnel resources, the Commission has consolidated its representational role in interior policies across the pillar divide (Peers 2000: 43). This has been the case with the Amsterdam Treaty reforms for the remaining third pillar but, of course, also for the shift of migration policies to their current semi-

⁸⁷ Interview 9, Head of Delegation, Commission, Tel Aviv, May 2000.

⁸⁸ Interview 10, Desk Officer, Commission, Brussels, June 2000.

communitarised framework. Given these clarifying remarks on a formally weaker role of the Commission in committee representation in the second and third pillars when compared with the role of member states in first pillar committees, the x-structure nevertheless describes well the day-to-day operation of cross pillar cooperation within the dual executive in the areas of foreign and interior affairs. From an institutional perspective constant cooperation – rather than competitive battling over formal powers - between the two institutions is required for effective policy making. Thus, despite an obvious imbalance in the cross pillar distribution of executive powers, the Commission and the Council ‘need to be peddling in the same direction for movement to be sustained. If either brakes hard, movement is virtually impossible. There is a kind of division of labour between the two institutions, but there is also an interweaving and overlapping of functions’, not least in the areas of foreign and interior policies (Hayes-Renshaw and Wallace 1997: 179).



The Treaties do not specify the comitology relations between the Council and the Commission with regard to every single institutional regime in foreign and interior policies. Hence, in first pillar arenas of foreign policies, comitology provisions are explicitly outlined only with regard to external economic relations. In the field of developmental assistance secondary provisions on comitology apply.⁸⁹ The executive relations between the Commission and the Council in external economic relations are

⁸⁹ See chapter 5 for more details on these secondary comitology provisions.

identical for both the Common Commercial Policy and for Association Agreements. In both cases it is the Commission which makes recommendations to the Council on the opening of negotiations with third countries and which then negotiates these agreements. These rules are laid down in Articles 133 and 300. Both articles, then, refer to a 'Special Committee' which consists of representatives of the Commission and the member states. This committee has to be consulted by the Commission when negotiating international agreements. The Nice Treaty has added two new elements to Article 133. First, as a result of previous tensions between Commission and Council over the interpretation of the relationship between certain provisions of international agreements, on the one hand, and internal EC rules, on the other, the Treaty now stipulates that compatibility with the Community must be ensured by the Commission and the Council.⁹⁰ Second, this consolidation of Community prerogatives in trade policies has been accompanied by a tightening of the control exercised by the member states over the Commission's actions in the negotiating process on international agreements. Consequently, the Treaty now requires the Commission to 'report regularly to the special committee on the progress of negotiations'.

The aforementioned relationship between the executive powers of the Commission and the Council is reversed in the second pillar. The CFSP is characterised by the executive dominance of member states, in general, and the Presidency as well as the Council Secretariat, in particular. It is Article 18 TEU that sets out the powers of the Presidency as the key institution in the framework of the CFSP. Thus, the Presidency, first, represents the EU on the international stage and, second, is responsible for the implementation of decisions in the framework of the second pillar. It was the Amsterdam Treaty that, then, provided for strengthened capabilities of EU actors in that arena. Delegation, nevertheless, only led to a reshaping of capabilities within the Council and it was, subsequently, the Council

⁹⁰ These reforms of the Nice Treaty further limit the Commission's autonomy in trade policies and foster the linkages within the double executive. This follows the pattern which already characterised the trade policy provisions in the Amsterdam Treaty (Meunier and Nicolaïdis 1999).

Secretariat and not the Commission that had been delegated a considerable amount of new powers. Accordingly, Article 18(3) TEU delegated executive functions to the Secretary General of the Council, who acts as a High Representative for the CFSP. The specific tasks of the High Representative were further specified by Article 26 TEU which states that the High Representative 'shall assist the Council in matters coming within the scope of the common foreign and security policy, in particular through contributing to the formulation, preparation and implementation of policy decisions, and, when appropriate and acting on behalf of the Council at the request of the Presidency, through conducting political dialogue with third parties.' It should be kept in mind that prior to the Amsterdam Treaty the Council Secretariat under the guidance of its Secretary General has been a central, yet mainly administrative body (Hayes-Renshaw and Wallace 1997: 105-109).

The differentiation of an autonomous Secretariat alongside member state based Council structures can be dated back in the area of foreign policies to the SEA of 1986 and the subsequent establishment of the EPC Secretariat. As Smith has pointed out, discussions on a strictly administrative secretariat emerged already in the early 1970s and were mainly led by the German and Italian and, later, the British governments. Thus, it was already the London report of 1981 that called for the establishment of a small, permanent administrative EPC Secretariat. It was, however, due to French resistance, mainly about the location of this secretariat, that its establishment was deferred until the SEA, when France ultimately accepted that the EPC Secretariat was to be based in Brussels, rather than Paris. However, there was no autonomous role for the EPC Secretariat, neither from an administrative let alone a political perspective. The main task of the EPC Secretariat was to assist the rotating Presidencies and, consequently, its political responsibility was directed towards the Presidencies. The EPC Secretariat also remained small in staff and its personnel was seconded from national ministries. Moreover, member states were careful in separating the tasks of the EPC Secretariat from EC activities into which the Council Secretariat was involved, thereby attempting to prevent any spill over from EC practices into the operation of EPC (*cf.* M E Smith 2003: 166-170).

This situation changed with the Maastricht Treaty which can, therefore, be rightfully regarded 'as a critical juncture' for the EU's foreign policy (Lewis 2000: 275). Thus, the EPC Secretariat was transformed into the CFSP Secretariat which was now formally integrated into the infrastructure of the Council Secretariat. While the strong linkage between the Council Secretariat in the area of CFSP with the rotating Presidencies was upheld, the Maastricht Treaty nevertheless provided for some incremental, yet highly significant changes towards a greater autonomy of the Council Secretariat in foreign policies. Thus, the formal responsibility of the CFSP Secretariat was no longer primarily directed towards the Presidency (a member state) but towards the CFSP as a whole (thus a policy area of the EU). Moreover, the staff of the CFSP Secretariat was almost doubled when compared with the size of the EPC Secretariat and officials from the Council Secretariat were added to officials seconded from national ministries. Hence, the provisions of the Maastricht Treaty on the primary capabilities of the Council Secretariat provided for limited, yet significant provisions which fostered the autonomous role of the Council Secretariat as an EU actor rather than an intergovernmental body of member states. Notwithstanding the significance of this development, the linkages of the Secretariat with member states and other actors within the Council's operating structures remain much stronger than those of other EU actors. However, 'the new CFSP Secretariat was an improvement over the previous EPC unit' and by delegating primary capabilities to the Secretariat, member states fostered the centralisation of EU foreign policies without delegating considerable powers in the CFSP to the Commission (M E Smith 2003: 188).

It was then the merging of the two offices of the Secretary General and the High Representative with the Amsterdam Treaty, which provided the Secretariat for the first time with a Treaty base that established an explicit political function within the EU system.⁹¹ An official from the Council Secretariat has confirmed such a conclusion when suggesting that, when compared with his 'invisible' predecessor,

⁹¹ According to a foreign policy analyst from the Bertelsmann Foundation the role of the Council Secretariat is often underestimated. She emphasised that the Foundation would concentrate its lobbying efforts in foreign policies across all pillars within the Council Secretariat. Interview 5, Bertelsmann Foundation, Gütersloh, November 1999.

‘Solana [the High Representative; SS] is something completely new’.⁹² This is further exemplified by the establishment of a nucleus political staff, comparable to the cabinets of individual Commissioners, at the disposal of the High Representative. Thus, the PPEWU, which was established through a Declaration attached to the Amsterdam Treaty, has – in contrast to the Council Secretariat’s traditionally mainly administrative focus – ‘clear policy responsibilities (monitoring, assessments, early warning, and policy options)’ (M E Smith 2003: 229). Comprising around twenty officials (thus more than the initially seventeen officials which worked for the EPC Secretariat in 1986), it was ‘expected that this Unit [...] would establish greater cooperation among the Commission and EU member states to help ensure the coherence of the EU’s external policy’ as well as to support the High Representative in building up a political capacity in foreign policies separate from the Commission which could make use both of its several DGs dealing with foreign policies and of its web of delegations in third countries (*ibid.*). Indeed, the PPEWU played an important role in strengthening the position of the High Representative in EU foreign policies *vis-à-vis* the Commission and it was staff from the Unit which jointly with the Commission (and member states’ officials) drafted the Common Strategy for the Mediterranean Region which was then presented to the European Council in Feira (*cf.* Heusgen 2003).⁹³

This trend towards both delegation of foreign policy capabilities in the second pillar to EU actors and a simultaneous limitation of the Commission’s say in this arena, is also exemplified by Article 18(5) TEU which provides the Council with a Treaty base on the appointment of a special representative ‘with a mandate in relation to particular policy issues’.⁹⁴

While the Commission is participating alongside the Council on the operative dimension of the CFSP, it does not yield comparable powers as, for example,

⁹² Interview 14, Desk officer, Council Secretariat, Brussels, June 2000.

⁹³ Interview 10, Desk Officer, Commission, Brussels, June 2000.

⁹⁴ An official from the Israeli Foreign Ministry stated that Israel is ‘putting a lot of emphasis on meetings with Solana’ based on the observation that the new office of the High Representative is quite central to EU foreign policy making. Interview 7, EU Desk officer, Israeli Foreign Ministry, Jerusalem, May 2000.

member states do in the first pillar. Executive powers of the Commission at the EU level, which were originally set out by the Maastricht Treaty, are mentioned in Articles 18 and 27 TEU. Both articles provide for a 'full association' of the Commission in this field. Article 18 TEU additionally provides for a strengthened role of the Commission when compared to the Maastricht Treaty. Thus, it not only associated the Commission with the work done by the Presidency, but also rendered the Commission part of the EU Troika.⁹⁵ Article 27 TEU, then, associated the Commission with all 'work carried out in the common foreign and security policy field', thus, for example, the work in the second pillar Committees. It is, finally, Article 25 TEU that established such a special committee, the so-called 'Political Committee' (Kiso 1997).⁹⁶

As mentioned above the role of the Commission in these second pillar committees is weaker than the role of member states in the first pillar. In addition to this general pattern of member states' dominance, the Amsterdam Treaty added the conclusion of international agreements, which previously were only mentioned in the TEC, to the second pillar. It is interesting to note that Article 24 TEU, which sets out the rules on these second pillar agreements, duplicates the provisions of Articles 133 and 300, however, with reversed competencies. Thus, in contrast to the first pillar, the central role in the second pillar has been delegated to the Presidency. 'Article 24 agreements' can be initiated by the Council and they do not require a prior recommendation of the Commission. It is also the Presidency and not the

⁹⁵ Prior to the Amsterdam Treaty there was no clear Treaty base on the Troika. At this time, the Troika consisted of the Presidency as well as the preceding and the following Presidency. An inclusion of the Commission in Troika or Presidency activities depended on the goodwill of the member states, which sometimes led to tensions between the two institutions. For example, a visit of Council President Dick Spring to the Middle East in 1996 without any Commission involvement provoked an outcry within the Commission that such a move 'was in contradiction with the practice of visits by EU Troikas, in which the Commission also participates'. The reforms of the Amsterdam Treaty thus provided for a mechanisms that attempts to avoid 'institutional battles over this issue' (Agence Europe, 9 October 1996, No 6828: 3).

⁹⁶ The work of the Political Committee and the Committee of Permanent Representatives (COREPER) often leads to a 'doubling of activities, which is not always easy'. Thus, in the practice of foreign policy making, both Committees can demand from Council working groups proposals on specific issues. Interview 14, Council Secretariat, Brussels, June 2000.

Commission that opens and negotiates these agreements with third countries. The Commission can only assist 'as appropriate' the Presidency in this task.

To conclude, the role of the Commission in the Comitology system of the common foreign and security policy is largely limited, as the Treaty repeatedly reiterates, to a 'full association' and the Commission lacks any direct influence over the decisions taken within committees or the Council. There is, however, one issue in the second pillar on which the Commission had been delegated stronger capabilities, this being the EU's role abroad. In this field, the Treaty establishes a system of cooperation between the executive branches which fosters the x-structure of executive relations in foreign policies depicted in figure 4.1. It is Article 20 TEU which deals with the relationship between member states' embassies and Commission delegations in third countries and which stipulates that they jointly ensure the implementation of second pillar decisions on the ground as well as exchange 'information, carrying out joint assessments'. It is noteworthy that Commission Delegations are not at all mentioned in the TEC. Their role has until today only been specified within the framework of the second pillar. Since the actual capabilities of Commission Delegations relate mainly to trade matters, developmental cooperation and other first pillar issues, Article 20 TEU is, thus, not only an interesting example for the actual legal linkages between the pillars but also of delegation of capabilities to EU actors, such as the Commission, beyond the classical Community sphere.⁹⁷ As Allen notes on the role of the Commission and the Council in foreign policies, 'the TEU allowed both institutions legitimately to claim a certain competence over *all* aspects of the Union's external activities' (Allen 1998: 51).

The executive relations between Commission and Council in interior policies follow similar patterns as regards foreign policies. In those arenas which are part of the TEC, the Commission is the actor with the main executive capabilities. This is

⁹⁷ This linkage became visible when Council President Jacques Poos wrote a letter to Palestinian Authority Chairman Yasser Arafat stating that 'the European Union has decided to ask its representative in Tel Aviv to approach [Israeli] foreign Secretary Mr. Levy' in order to issue the protest of the EU against certain action of the Israeli government. Note that Poos, a representative of a member state and the Council, refers to the head of the Commission Delegation in Israel as the EU's regional representative (Agence Europe, 9 August 1997, No 7034: 1).

the case, for example, in the field of free movement of persons. As in foreign policies, however, the autonomy of the Commission is constrained by comitology provisions in secondary legislation. This relationship within the EU dual executive is reversed when looking at the provisions of the third pillar. Within this institutional regime, which came to an end for the area of migration policies with the Amsterdam Treaty, member states were bearing the main responsibility for executive politics while the Commission has been linked to the activities of the Council. In Amsterdam the role of the Commission was strengthened. While the Maastricht Treaty still referred to the Presidency as the main actor for executive politics in the third pillar, the Amsterdam Treaty provided for increased delegation of powers to the Commission. Due to the shift of migration policies to the first pillar, the Commission was the main recipient of primary capabilities in executive politics in interior affairs. Notwithstanding this development, the institutional rules on migration policies continue to embody key elements of the decision making structure of the third pillar. Thus, while the Commission has been strengthened as the core executive of the EU migration policy regime, its powers are not comparable to 'classical' first pillar areas. It is, therefore, reasonable to apply, even after the reforms of the Amsterdam Treaty, the basic x-structure of executive relations also to interior policies.

The only interior policy committee which was referred to within the Treaties, has been the 'Coordinating Committee' for third pillar issues according to ex-Article K.4 TEU (Niemeier 1995). This so-called 'K.4-Committee' is comparable in its tasks with the Political Committee of the second pillar. As regards the role of EU actors, ex-Article K.4(2) TEU stipulated, thus reiterating the wording of the parallel provisions in the second pillar, that 'the Commission shall be fully associated with the work in the areas referred to in this Title'.

The distinction between executive powers of EU actors in the first and third pillars has, however, never been categorical. As was the case with foreign policies, also interior policy provisions from the Maastricht Treaty onwards contained rules on overlapping capabilities of EU actors. It is, thus, quite noteworthy that the

Maastricht Treaty set the powers of the Coordinating Committee beyond the confines of the third pillar. This linkage between the pillars was based on ex-Article 100d which extended the powers of the committee to cover also those parts of visa policies, which were already then incorporated into the first pillar. This cross pillar extension of the K.4 Committee's mandate has been an encroachment into the capabilities of the Commission – and also COREPER - which, for policies referred to in the EC Treaty, usually deals with member states in first pillar Committees (Lewis 2000).

An important change regards the capabilities of EU actors in interior policies has been the abolition of the K.4 Committee's responsibility for those parts of interior policies that have in Amsterdam been transferred to the first pillar. Due to this reform, executive policy making in migration policies has become part of the Commission's executive competencies comparable to other fields, such as free movement, external economic relations or developmental assistance. There is, however, a reservation within the migration policy chapter regarding this transfer of executive capabilities to the Commission which is otherwise atypical of the first pillar. Somewhat recalling the provisions on the relations of member states' embassies and Commission Delegations in foreign policies, Article 66 calls for a joint executive approach in migration policies of member states, on the one hand, and the Commission, on the other. Thus, the national ministries responsible for migration policies as well the Commission should 'take measures to ensure co-operation' between them in this area, thus again pointing to the importance of the epistemic community of transgovernmental experts in this area. This provision is a reminder that member states continue to keep a watchful eye on how the Commission makes use of its new executive powers on migration policies.

In sum, the Treaties established a cross pillar system of executive relations in foreign and interior policies. The two bodies which manage the executive dimension are the Commission, on the one hand, and the Council and its Secretariat, on the other. Unlike in 'classical' first pillar areas, this double executive operates on the basis of pillarised capabilities. In the first pillar the Commission has the main executive

capabilities while in the second and third pillars the Presidency or the Council Secretariat bear the main role. Both sides are linked in their executive tasks, namely the implementation of policies, through the comitology system. However, while the Council occupies a central space in those first pillar Committees mentioned in the Treaties, the Commission only has a weak role both in the Political Committee as well as in the former K.4 Committee. Thus, the pillar division still underlies the institutional structure of executive relations in foreign and interior policies. However, the two Treaty reforms in Amsterdam and Nice have led to a further centralisation process on the executive dimension of both areas, thus adapting to the functional dynamics of macro political stabilisation policies outlined in the previous chapter. While member states maintain the key role, EU actors, such as the Council Secretariat in foreign policies and the Commission in migration policies, have been delegated considerable capabilities in both areas.

Other provisions on primary delegation: budgetary powers and judicial remedy

In both foreign and interior policies EU actors have been delegated additional capabilities that add to their executive and legislative powers. These additional capabilities are judicial remedy, on the one hand, and powers in the budgetary process, on the other. In a similar way as regards executive and legislative politics, it is also in these two domains that the Treaties establish a pillarised distribution of capabilities. Thus, in classical first pillar arenas, EU actors have the full right of judicial remedy, thus rendering the Court of Justice a key actor in these parts of foreign and interior policies. In contrast, the provisions on the second and third pillars, as well as those on migration policies following the Amsterdam Treaty, exclude or severely restrict the ability of EU actors to seek judicial remedy. It is only with regard to the budgetary dimension of EU politics that the pillarised division of capabilities between member states, on the one hand, and EU actors, on the other, is less pronounced. Here, the usual first pillar interplay between the Commission, the Council and Parliament extends to almost all institutional arenas of foreign and

interior policies. This renders the budgetary dimension the only playing field on which classical communitarised rules apply almost exclusively in both areas. Furthermore, the budgetary provisions equip in particular Parliament with additional capabilities, thus, at least to some extent, balancing the overall marginalisation of Parliament in both the second and third pillars as well as the Amsterdam migration policy regime.⁹⁸

In foreign economic relations and developmental assistance, the Commission and Parliament enjoy the complete range of judicial remedy which is offered to them by the TEC according to Articles 226 and 230. The former article allows the Commission to start an infringement procedure against a member state at the Court of Justice, to 'ensure that they comply with their obligations under the EU Treaties and under EU legislation' (Hix 1999: 106). The latter article endows the Commission and Parliament with the right to seek a judgement of the Court of Justice on the legality of legislative acts. While the Commission can bring all cases to the Court, Parliament – and also the Court of Auditors – can only bring those cases forwards in which they want to protect their own institutional prerogatives. The third procedure is laid down by Article 234 which enables national courts to ask for a preliminary ruling of the Court of Justice.

In contrast to the powers of Parliament, Commission and the Court of Justice in first pillar foreign policy regimes, the provisions on the CFSP exclude the Court of Justice from making any judgements in this institutional arena.⁹⁹ Neither Parliament, the Commission nor national courts can seek judicial remedy on second pillar issues. Until the entry into force of the Nice Treaty, however, there remains

⁹⁸ It can be debated to what extent budgetary matters. But in the perspective of various participants in the policy making process it does. This has been confirmed in several interviews with officials from the Council Secretariat, the Commission and Parliament. There are several concrete examples for Parliament's capabilities in the budgetary process (Monar 1997). To mention just some, during the 1994 budget readings Parliament succeeded in including into the budget a heading of € 50 million on development projects in Palestine against the wish of the Council to have a token entry only (Agence Europe, 13 November 1993, No 6106: 3). Also the inclusion of human rights' projects between Israel and Palestine in the framework of the EMP has been the result of pressure from Parliament on the Commission and Council. Interview 46, Commission, Brussels, July 2000.

⁹⁹ It should be noted that executive dominance also characterises foreign policies at the national level where usually the competencies of parliaments and courts are also less developed.

one important exception to this pillarised structure of judicial remedy. Thus, Article 300, on the basis of which the EU has concluded its Association Agreements with the Mediterranean countries, stipulates that ‘the Council, the Commission or a Member State may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the provisions of this Treaty.’ Parliament, thus, was excluded from judicial remedy in a key first pillar field of EU foreign policies. It is only with the Nice Treaty that this ‘executive bias’ has been rectified.¹⁰⁰ The new Article 300 of the Nice Treaty states that also Parliament, alongside the aforementioned actors, can make recourse to the Court of Justice on legal issues related to Association Agreements.¹⁰¹

The cross pillar ‘judicialisation’ of interior policies has always been a main demand from both Parliament and the Commission (Stetter 2000). They have based this claim on the strong relationship between interior policy issues, on the one hand, and individual rights of EU citizens and third country nationals, on the other. Notwithstanding this demand, the Treaties until today reflect a pillarised division of capabilities with regard to judicial remedy. Only in those interior policy fields, which have already with the Maastricht Treaty been part of the first pillar, all EU actors enjoy judicial remedy without any reservations.¹⁰²

There was, however, no judicial remedy whatsoever for EU actors in the third pillar, save ex-Article K.2(3) TEU (Drücke 1995; Neuwahl 1995). This article allowed member states to include, by a two-thirds majority in the Council, jurisdiction of the Court of Justice in the provisions of third pillar conventions. Note

¹⁰⁰ Peers, however, has cited the *Chernobyl* case of 1990 in which the Court of Justice accepted an appeal of Parliament on an alleged breach of its prerogatives although such an appeal has been excluded by the Treaties (2000: 47).

¹⁰¹ Due to this provision, Parliament’s response to an alleged breach of its prerogatives on Association Agreements remained in the past declaratory. Thus, in 1995 the chair of the parliamentary committee on External Economic Relations accused the Commission of not consulting Parliament over the new Agreement with Israel (Agence Europe, 27/28 November 1995, No 6614: 11). The same problems were raised by Parliament on the lack of prior consultation on the Interim Association Agreement with the PLO (Agence Europe, 10 April 1997, No 6951: 3). These accusations resemble complaints of MEPs in the second pillar. As in the common foreign and security, judicial remedy on Association Agreements is not possible for Parliament until the entry into force of the Nice Treaty.

¹⁰² On developments in the case law of the Court of Justice in first pillar areas related to the free movement of persons see Moore 2002.

that this jurisdiction of the Court of Justice on third pillar Conventions has, however, not been mandatory. Also the scope of the Court of Justice's possible jurisdiction should not be equated with its first pillar prerogatives. In fact, ex-Article K.2(3) TEU stipulated that the Court of Justice has jurisdiction only 'in accordance with such arrangements as they [i.e. the member states, SS] may lay down.'

The reform of judicial remedy in interior policies has been a key issue during the 1996 IGC. Notwithstanding the subsequent transfer of migration policies into the TEC, the provisions on the role of the Court of Justice in the Amsterdam Treaty still reveal the significant difference between Title IV, on the one hand, and classical first pillar areas, on the other. Thus, Article 68 lays down the rules on judicial remedy in migration policies, thereby limiting the role of EU actors on that issue. Firstly, while Article 68(1) allows, for the first time, for preliminary rulings according to Article 234 on migration policy disputes, this right is severely curtailed. Thus, it is only national courts of last resort that can request a preliminary ruling of the Court of Justice on the application of Title IV. Therefore, contrary to all other first pillar areas, the well documented 'alliance' between the Court of Justice, on the one hand, and lower national courts, on the other, cannot materialise with regard to migration policies (Alter 1998). Second, Article 68(2) rules out any jurisdiction of the Court of Justice on issues related to Article 14, which deals with the abolishment of internal border controls.¹⁰³ Finally, Article 68(3) limits the capabilities of EU actors as they are usually provided for by the aforementioned Article 230. Thus, similar to the pre Nice Treaty provisions on Article 300, only the Commission and not Parliament can request a judgement of the Court of Justice on the legality of acts in migration

¹⁰³ In fact, prior to the Amsterdam Treaty, issues related to internal borders were brought to the Court of Justice and were hotly disputed within the EU. A famous case has been settled with the *Wijsenbeek* judgement of the Court of Justice. *Wijsenbeek*, a Dutch national, argued that the deadline for the abolishment of internal border controls as provided for by the Maastricht Treaty had direct effect. This perspective was also strongly advocated by Parliament. However, the Court of Justice argued that direct effect did not relate to this issue. The Court of Justice stressed that the deadline has a political but not a legal meaning, thus supporting the point of view of member states as well as the Commission's 'diplomatic attitude' towards this issue (Agence Europe, 26 May 1993, No 5987: 11 and 22 September 1999, No 7556: 10). The judgement of the Court of Justice on *Wijsenbeek* was given after the entry into force of the Amsterdam Treaty and, therefore, one can only speculate on the extent to which the Court of Justice has considered the provisions of Article 68(2), although this article was not mentioned in the judgement (Case C-378/97).

policies.¹⁰⁴ It is quite interesting to note that the provisions of Title IV even revoke some of the rights of EU actors for judicial remedy which existed prior to the Amsterdam Treaty. Thus, the provisions of Article 68 apply to all parts of migration policies including visa issues. In this field the Maastricht Treaty originally provided for the complete applicability of Articles 226, 230 and 234. Therefore, the provisions on judicial remedy on visa policies shifted from a system of complete communitarisation towards the more limited system which is now characteristic of Title IV.

Another domain in which EU actors have been the recipients of primary capabilities in foreign and interior policies are the rules on the adoption of the EU budget. Indeed, budgetary powers are an important institutional resource for EU actors in both areas. As Laffan explains, 'historically, budgets have been of immense importance in the evolution of the modern state and they remain fundamental to contemporary government' (Laffan 1996: 71). The same conclusions can be reached when analysing the budgetary provisions on foreign and interior policies, although the overall limited size of the budget of macro political stabilisation policies, which has been analysed in chapter 3, should be kept in mind. In fact, it was already from the Maastricht Treaty onwards that the three pillars were interlinked by the budgetary provisions in the Treaties and that EU actors had been delegated capabilities in that domain.

The budgetary procedure of Articles 268 to 280 of the TEC is the only direct reference to the first pillar which appears in the provisions on both the common foreign and security policy as well as justice and home affairs. Thus, ex-Articles J.11(2) (now Article 28(4) TEU) and K.8(2) of the TEU defined the conditions under which the regular budgetary procedure of the EU applies to the second and third pillars. The wording of these articles has been identical for both arenas. In the

¹⁰⁴ Article 68(3) limits the Court of Justice's right to cases which do not have become *res judicata*. According to two legal experts at the Council Secretariat this means that the Court of Justice 'can only act on concrete situations and not on theoretical questions' in migration policies, thus further limiting the scope of its judgements. Interviews 27 and 28, Legal Service, Council Secretariat, Brussels, June 2000.

Maastricht version, the Treaty stipulates that all administrative expenditure is charged to the EC budget. Moreover, for each operational expenditure the Council can decide by unanimity that these expenses are charged to the EC budget as well. Without such a decision, operational expenditure had to be charged to the budgets of the member states.

Due to the transfer of migration policies to the first pillar with the Amsterdam Treaty, all kinds of expenditure in this field now fall under the EC budget. It was, however, also in the second pillar that some reforms on the budgetary provisions were decided, thereby bringing also operational expenditure into the realm of the EC budget. As opposed to the aforementioned provisions of the Maastricht Treaty, the Amsterdam Treaty now makes the EC budget the automatic budgetary basis for all kinds of expenditure. The only exceptions are military expenditure and those cases in which the Council decides by unanimity not to do so. Moreover, Article 28(4) TEU states *expressis verbis* that for all expenditure, which is charged to the EC budget, the first pillar provisions of Articles 268 to 280 apply. This provision irons out some of the confusion about the unclear wording of the Maastricht Treaty on this issue, where the direct reference to the EU budgetary procedure was only made with regard to operational expenditure but not for administrative expenses. The rules on the budgetary process for expenditure in foreign and interior policies are, thus, a prime example of the 'explicit interconnectedness' of the pillars (Regelsberger 1997: 81). From that perspective, it is also interesting to note that Article 268(1) on the budgetary provisions is the only direct reference in the TEC to the second and third pillars.

It is not necessary to embark upon the precise capabilities of EU actors in the budgetary process which would require a detailed analysis on its own.¹⁰⁵ What matters here is that due to their capabilities in the budgetary process, EU actors have indirectly been delegated additional capabilities in foreign and interior policies. This empowerment through the budgetary process strengthens the role of Parliament and

¹⁰⁵ For more details see Laffan and Shackleton 2000 and Neunreither 1999.

the Commission on the legislative, executive and judicial dimensions of foreign and interior policies. Thus, first, with regard to the legislative dimension, the applicability of the budgetary procedure for parts of the expenditure in all three pillars fosters the standing of Parliament as the second chamber in the bicameral EU system. This allowed Parliament to encroach into those institutional arenas of both areas in which it has otherwise, due to the provisions of the second and third pillars, been marginalised. The importance of the budget for Parliament's role in all three pillar was thus regularly emphasised in interviews with parliamentarians and was also acknowledged by representatives of other EU institutions.¹⁰⁶

Second, the budgetary provisions fostered the role of the Commission in the executive dimension. Due to the Commission's overall responsibility for the implementation of the EU budget, this cross pillar design of the EU budget provides the Commission with a significant leverage *vis-à-vis* the Council in the framework of the double EU executive.¹⁰⁷ Finally, the general applicability of these first pillar provisions allows for greater control of the acts of EU institutions in all institutional arenas of foreign and interior policies. Thus, both the Court of Justice as well as the Court of Auditors can make use of their powers under the first pillar when dealing with second and third pillar issues which directly relate to Articles 268 to 280. As has been seen, the budgetary provisions provide the means for both a centralisation of foreign and interior policies at the EU level and a stronger involvement of EU actors than originally provided for by the executive, legislative and judicial provisions of the second and third pillars.

¹⁰⁶ Interview 33, Chair of committee, MEP and interview 41, Administrator, European Parliament, Brussels, July 2000. According to a Commission official 'many projects in migration policies were put on us by Parliament' which made use of its budgetary powers. Interview 45, Deputy Head of Unit, Commission, Brussels, July 2000.

¹⁰⁷ In this context one former Head of Delegation to the Palestinian Territories criticised the tendency of the Commission to rely mainly on its 'money spending culture' in relations with third parties. Such an approach is accompanied by a reluctance to act politically, for example by making greater use of the Commission's right of initiative in all the pillars. Therefore, he argued that the 'budget functions as an alternative to politics.' Interview 32, Deputy Head of Cabinet, Commission, Brussels, July 2000.

Conclusion

The pillarised design of the Treaties with regard to foreign and interior policies, is an indication of the hesitancy by some member states to delegate capabilities in these two areas to EU actors. On the one hand, it was the intention of some member states, when drafting the Maastricht Treaty, to establish a pillarised system of governance, in which the regulation of both policy areas was split into two distinct institutional arenas. While existing Community powers in both policy areas remained within the already established communitarised framework, these member states attempted to retain tight control over those parts of foreign and interior policies, which they regarded as intrinsically linked with national sovereignty and which became part of the Treaty structure at Maastricht. And indeed, this pillarised structure of the Treaties is still central to a proper understanding of EU foreign and interior policies. As a consequence, this pillarisation of both areas has also affected the primary capabilities of EU actors whose role outside of the first pillar remains limited. The centralisation of foreign and interior policies at the EU level was, therefore, accompanied by the attempt of member states 'to expand and strengthen the Brussels-based machinery [...] but to try to contain this expansion and strengthening within the Council structure' (Allen 1998: 55).

On the other hand, however, a more detailed glance on foreign and interior policies reveals that behind this pillar structure looms a complex system which is characterised by multiple linkages between the pillars. The analysis of this chapter on primary capabilities provides evidence for this observation by exposing the degree of authority delegation to EU actors across the pillars. Thus, it is argued that the role of Parliament, the Commission, the Council Secretariat, the Court of Justice and the Court of Auditors can best be understood when looking at the manifold institutional regimes which come to the surface when looking behind the pillar structure. Within these institutional regimes, the capabilities of EU actors can then be differentiated according to the domains of legislative, executive, judicial and budgetary politics. Such an excursion into the labyrinth of EU actors' capabilities in foreign and interior policies does not only disclose the existence of many cross pillar linkages but also

casts some more general doubts over the allegedly sharp demarcation brought about by the pillar structure in both areas.

Along these lines, this chapter suggests that the main differentiation in EU foreign and interior affairs is not along the 'pillar dimension' - thus the often assumed 'supranational'-'intergovernmental' divide - but rather on an actor dimension that cross cuts the supranational-intergovernmentalist divide (Branch and Øhrgaard 1999; Sandholtz and Stone Sweet 1999). It is argued, that the centralisation of foreign and interior policies at the EU level, which has already been analysed in the previous chapter, has resulted in a strengthening of the executive dimension of the EU political system at the expense of the legislative and judicial branches. Consequently, the Commission and also the Council Secretariat have emerged as central actors in all institutional regimes of both policy areas alongside member states, which, nevertheless, continue to hold the key political resources within the EU executive. On the other hand, Parliament and the Court of Justice have not been delegated capabilities which are comparable to their role in those policy areas, that are entirely rooted in the first pillar.

Developments in EU foreign and interior policies from Maastricht to Nice, as exemplified in this chapter by an analysis of primary capabilities of EU actors, reveal the emergence of a new 'hybrid institutional setting'. With this hybrid institutional setting member states have attempted to accommodate for the functional requirements stemming from the centralisation process of macro political stabilisation policies at the EU level, as outlined in chapter 3. Torn between the need to have a joint European approach on foreign and interior affairs, on the one hand, and the unwillingness of some member states to give up on their traditional national prerogatives in these two areas, this process has led to the emergence of an institutional regime that for the time being remains open to both communitarisation and on-going national predominance.¹⁰⁸ While the developments in both areas since

¹⁰⁸ While this hybrid institutional setting provides for manifold linkages within the areas of foreign and interior policies, it is rather weak in linking the two 'intergovernmental' pillars with each other. Problems stemming from this division are discussed in chapters 6 and 7.

the Maastricht Treaty point into the direction of a more centralised approach to EU foreign and interior policies, the way is long and cumbersome. Incremental reforms will likely dominate the regulation of both areas also in the future. An official from the Council Secretariat has, therefore, asked for patience and stated that ‘the Community method is the only way to get somewhere [...] But let us not build Rome in one decade. This is too much’.¹⁰⁹

¹⁰⁹ Interview 26, Director, Legal Service, Council Secretariat, Brussels, June 2000.

CHAPTER 5

Cross Pillar Institutions II Secondary Capabilities

Introduction

Secondary capabilities are defined in this thesis as those capabilities that EU actors derive from legislative acts which are decided by the Council in between Treaty reforms. Together with the primary capabilities discussed in the previous chapter they constitute the institutional dimension of cross pillar politics, as suggested by figure 2.2 in chapter 2. This chapter analyses the secondary capabilities of the Commission, the Council Secretariat, Parliament, the Court of Justice and the Court of Auditors in foreign and interior affairs by looking in greater detail at the two case studies of Middle East and migration policies. The rationale to distinguish between primary and secondary capabilities of EU actors is based on the observation that these two kinds of capabilities differ significantly with regard to the institutional rules from which they originate. While the delegation of primary capabilities requires the unanimous consent both of all member states' governments and of all national parliaments and even, for some member states, of a popular majority in national referenda, the delegation of secondary capabilities faces much less institutional hurdles. Thus, secondary delegation does not depend upon recourse to the national level but solely on the adoption of legislation, either by unanimity or by qualified majority, at the EU centre, namely within the Council.

This chapter seeks to provide answers to the following questions. How do the provisions of the Treaties on the capabilities of EU actors in foreign and interior policies relate to the evolving secondary capabilities of these actors in Middle East and migration policies? What kind of capabilities do EU actors precisely have on the two issues and are there differences between them? And, how do these secondary capabilities actually affect the overall pillar design of the Treaties? Finally, how do

secondary capabilities relate to the functional dynamics of macro political stabilisation policies?

In an attempt to provide answers to these questions, this chapter argues that the relationship between primary and secondary capabilities of EU actors in foreign and interior policies is twofold. On the one hand, secondary legislation has 'given flesh' to the provisions of the Treaties, thereby equipping EU actors with concrete institutional resources across the three pillars on the basis of prior Treaty provisions. On the other hand, secondary legislation has also brought to the fore new capabilities that do not explicitly appear in the Treaties. This is where, from the perspective of the Council, the value added of secondary delegation comes in, since day-to-day decision making allows member states to delegate authority without the formal requirements relating to overall Treaty changes. In the two cases on Middle East and migration policies, secondary capabilities do, thus, both *sustain and enhance* the centralisation process of foreign and interior policies which has been analysed in chapter 3. Seen from that perspective, the delegation of capabilities to EU actors through secondary legislation allows to 'repair' some of the mismatches between the formally pillarised institutional provisions on the Treaty level, on the one hand, and the functional dynamics stemming from the centralisation of macro political stabilisation policies, on the other. Moreover, secondary capabilities also serve the purpose, on a practical level, to establish bridges between the pillars. In conjunction with the insights of the previous chapter, it can thus be argued that the delegation of bounded authority has been a key response of the Council to meet the dilemmas inherent in any (international) community that aims to undertake collective action (Kiewiet and McCubbins 1991). However, the need for delegation has also a more EU specific background. Thus, the delegation of capabilities to 'supranational' agents across the three pillars can be understood as part of a process of 'institutional gaming' in order to accommodate for the need to shift between 'a maze of multiple institutions serving separate and perhaps incompatible purposes' (Goodin 2000: 531). While the primary capabilities of 'supranational' agents, as the previous chapter has shown, are strongly affected by the pillar structure of the Treaties in foreign and

interior policies, secondary capabilities often served the purpose to bridge these quite strict demarcation lines between the pillars. Secondary decisions, thus, often provided for ‘procedural, institutional and functional connections’ between the two sides of the ‘unbalanced and lopsided’ structure of foreign and interior policies (Geddes 2000: 92-93). Somewhat ironically, these bridges stabilise the current institutional equilibrium in EU foreign and interior policies since they allow to communicate more easily across the pillars, while this very pillar structure continues at the same time to be characterised by two ‘different internal “logics of appropriateness”’ (Goodin 2000: 530).¹¹⁰

But why is the Council interested to equip specific EU actors such as the Commission, the Council Secretariat, Parliament, the Court of Justice or the Court of Auditors with certain capabilities in the two areas? It is argued here that the reason for this particular kind of delegation is that the second and third pillars were not created within an institutional void. They are, as has been shown in the previous chapter, due to the functional indivisibility of foreign and interior policies subject to multiple linkages with an entrenched institutionalised structure, namely the EC. Most importantly, this linkage exists on an organisational level and, therefore, delegation to already ‘established actors’ is less costly than the creation of an entirely new institutional regime with new collective actors (Bogdandy 1999). Moreover, this ‘competition’ between those parts of foreign and interior policies belonging to the first pillar with those parts related to the second and third pillars often led to greater emphasis in day-to-day policy making on the former. This is due to the simple explanation that deciding and implementing concrete policies – in particular those based on expenses from the EU budget - is much easier in the institutional setting of the first pillar when compared to the rules governing the adoption of policies in the

¹¹⁰ Seen from that perspective, the political system of the EU, probably more than other political systems, must be seen as an ‘institutional experiment’. As H Wallace has noted, ‘when looking at the system of European governance we cannot talk of a stable equilibrium neither before nor after Maastricht. On the contrary: both because of the functioning of the formal rules of the Treaties and because of the experiences made in practice, the integration process has always been characterised by a constant testing of institutions and interinstitutional relations’ (1996a: 143; translation SS). These arguments closely relate with a more theoretical debate on institutional emergence and change (Knight and Sened 1995; Carey 2000; Clemens and Cook 1999).

two ‘intergovernmental’ pillars (Monar 1997). This did also have the result that EU actors were able to make use of their capabilities in the first pillar within the wider cross pillar foreign and interior policy setting.

This chapter thus provides further evidence for the argument that EU foreign and interior policies are characterised by the emergence of a hybrid cross pillar institutional regime, which responds to the functional dynamics stemming from the centralisation of macro political stabilisation policies at the EU level. However, while this hybrid institutional regime facilitates a moderate yet significant delegation of capabilities to EU actors through secondary legislation it provides at the same time for an exceptionally strong control and guidance function of member states, acting as a *collective* unit in the Council, in the policy making process and, in particular, regarding the implementation of policies (W Wallace 2000).

Secondary capabilities of EU Actors in Middle East and migration policies

This chapter analyses all secondary decisions in Middle East and migration policies since the Maastricht Treaty with regard to the way in which they have equipped EU actors with new capabilities. In migration policies a total of 132 secondary acts has been concluded in the Council, whereas in Middle East policies 29 such decisions were made.¹¹¹ The main argument is that secondary decisions have both further strengthened the primary capabilities of EU actors and also enhanced the cross pillar characteristics of foreign and interior policies.

The structure of this chapter copies the design of the previous chapter, thus focusing upon the different institutional domains in which EU actors have received secondary capabilities. Consequently, the first section analyses the capabilities of the Commission within the executive domain of Middle East and migration policies. The second part then takes a closer look at the capabilities of the Council Secretariat and does also analyse the committee control mechanisms deployed by member states to

¹¹¹ The decisions in migration policies comprise the legislative acts directly related to EU migration policies as well as those provisions of the Schengen *acquis*, which deal with migration policy issues, and which following the Amsterdam Treaty have become part of the European Union’s migration policy *acquis*.

control executive policy making by the Commission. The third part then looks at the powers of EU actors such as Parliament, the Court of Justice or the Court of Auditors.

The main arguments put forward here are threefold. First, the delegation of capabilities has been a significant element of secondary decisions in EU foreign and interior policies. Moreover, the specific design of these capabilities adds up to and often extends the powers which EU actors have already received through prior Treaty reforms. This insight spurs further scepticism regarding the argument of intergovernmentalist approaches to European integration which view the time in between IGCs as a mere 'intervening period of consolidation' (Moravcsik 1993: 473). In contrast with such approaches, this thesis holds that these 'intervening periods' are rather characterised by the need to accommodate the functional requirements on the policy dimension with the (imperfect) institutional provisions of prior Treaty reforms, *inter alia* through additional, albeit cautious delegation of capabilities to EU actors. Second, however, the degree to which EU actors profit from their secondary capabilities varies considerably *between* them. Thus, particularly the Commission and the Council Secretariat have received a wide array of new powers. This development has even widened, when compared with the 'Treaties' provisions, the power gap between the executive centre of foreign and interior policies, on the one hand, and the legislative and judicial branches of government, on the other. Moreover, the legislative acts, which are analysed in this chapter, do also show that the specific shape of secondary capabilities has fostered the linkages between the Commission and the Council in both areas. As opposed to these two actors, the capabilities of Parliament are more limited and mainly indirect, such as those resulting from the moderate increase of budgetary resources in the two areas. This process allows Parliament to make use of its capabilities as one of the budgetary authorities of the EU. The Court of Auditors has also profited from this 'budgetisation' of EU foreign and interior policies and financial auditing has over time become an integral part of all secondary acts which set up projects financed from the EU budget.

Third, differences do also exist between the two policy areas. For example, secondary capabilities in Middle East policies have since the Maastricht Treaty been delegated to EU actors both within the first and within the second pillars, whereas migration policies are characterised by the wholesale transfer of this issue to the first pillar with the Amsterdam Treaty. This relates to the observation that the *two pillar* structure in foreign policies is part of an institutional equilibrium whereas the original cross pillar design in interior policies of the Maastricht Treaty had to be replaced with a structure that integrates strong cross pillar features into a *single* institutional structure, somewhat half way between the classical Community model and the previous JHA approach.¹¹²

Notwithstanding the different institutional designs of the two areas, both are today regulated by hybrid institutional regimes which contain both strong Community and strong member states' components (W Wallace 2000). In the case of Middle East policies this hybrid institutional regime is part of an explicit cross pillar institutional design, whereas in migration policies the cross pillar logic is still implicitly embedded within the institutional provisions of Title IV of the Amsterdam Treaty.

Executive dominance I – the role of the Commission

Secondary capabilities in Middle East and migration policies have in particular been delegated to the executive centre at the EU level. Thus, both the Commission and the Council Secretariat have received powers that strengthen and add to their capabilities stemming from the Treaties' provisions. Paying tribute to the centralisation process of both areas, member states devised a central management and coordination role for each of these two actors across the three pillars. This process, combined with the establishment of a complex 'comitology system', has also reinforced the x-structure of executive relations in foreign and interior policies (see

¹¹² In an interview with officials from the Council's Legal Service the argument was put forward that the Maastricht Treaty still had many open theoretical questions, while after Amsterdam 'the institutional balance is OK', Interviews 27 and 28, Legal Service, Council Secretariat, Brussels, June 2000.

table 4.1), thus putting in place a system of checks and balances between these two executive agents, on the one hand, and between the Commission and the member states, on the other (Holland 1999; Uçarer 1999).

While in first pillar areas the Commission has been the main recipient of secondary capabilities, the Council Secretariat's capabilities can be found in the second and third pillars as well as on those parts of migration policies that originally belonged to the Schengen regime. Due to the transfer with the Amsterdam Treaty of migration policies, including previous Schengen provisions, to the first pillar, the Commission has emerged in that policy area as the main executive actor in the implementation of policies, however, tightly controlled by member states through the committee system and other control provisions contained in secondary legislation. Middle East policies, on the other hand, are characterised by a rivalry of the Commission and the Council Secretariat with regard to the execution of policies since both actors have considerable secondary capabilities without a clear distinction between their respective spheres of competence. However, the politicisation of the Council Secretariat in foreign policies, highlighted by the establishment of the offices of the Special Representative for the Middle East peace process and the High Representative for the CFSP, does not only bear the potential for competition over scarce executive resources between the Secretariat and the Commission but also for tensions between the Secretariat and the member states (Behrendt and Hanelt 2000).¹¹³ In other words, capability delegation to the High Representative or the Special Representative can hardly be understood as a continuation of the previously intergovernmental approach to second pillar policies but is part of the overall centralisation process observed in EU foreign affairs. It reveals the inherent dilemma of this policy area in which member states' principals try to establish a balance between the functional process of centralising macro political stabilisation policies,

¹¹³ The official title of the Special Representative for the Middle East peace process has been, prior to the Amsterdam Treaty, Special Envoy. This thesis usually sticks with the term 'Special Representative' except for quotations from official documents or secondary literature and for those references which relate to the mandate prior to 1999.

on the one hand, and the legacy of intergovernmental foundations of the EU's external relations, on the other.

The secondary capabilities of the Commission in Middle East and migration policies can be distinguished along four main dimensions. First, in an early period secondary capabilities comprised only certain administrative tasks in the second and third pillars, such as the collection of information, the writing of evaluation reports or the organisation of administrative contacts with the member states' ministries or embassies. These *administrative capabilities* had the task to give meaning to the 'full association' concept of the second and third pillars. Second, in all secondary acts in Middle East and migration policies, in which a major new budget line was created, the Commission has become responsible for the organisation and implementation of these measures. These *budgetary capabilities* are the main new area in which the Commission received capabilities which have not been explicitly foreseen by the Treaties. Third, also *legislative capabilities* are a recurrent theme of secondary decisions. Thus, on several occasions Council decisions demand from the Commission to propose new legislation even in those areas in which, according to the Treaties, its right of initiative should be shared with the member states. Finally, *organisational capabilities* appear in those cases in which new data bases or organisational units were located within the Commission.

The capabilities of the Commission in migration policies

It was already prior to the Amsterdam Treaty that the capabilities of the Commission have been strengthened through secondary decisions. On the one hand, the Commission's capabilities as a '16th member state', yet without voting rights, as they appear in the Treaty provisions on Justice and Home Affairs, were reconfirmed by various legislative acts (Myers 1995). On the other hand, the Commission has also acquired capabilities that were not explicitly outlined by the Treaties. Most importantly, the Commission has had, from the entry into force of the Maastricht Treaty onwards, the main role in the management of the financial basket of EU migration policies. Thus, prior to the Amsterdam Treaty seven individual measures

with an overall budget of € 62.5 million have entered into force and although all of these measures were third pillar decisions the Commission had the main administrative role for dealing with these funds (Peers 2000).

When on 20 June 1994 the Justice and Home Affairs Council took its first three decisions on migration policies in the framework of the third pillar, two of these measures directly referred to prior reports of the Commission, thus emphasising the attention which the Council was willing to give to the Commission's activities in this policy area. First, in its conclusions on the Commission's communication on immigration and asylum policies, the Council publicly signalled that it was willing to accept the Commission's involvement in all institutional arenas of migration policies (Council 1994d). This stands in contrast with the way in which the Council dealt with attempts of the Commission to get heard on migration policy issues prior to the Maastricht Treaty. Thus, the 1991 communications of the Commission on migration were never discussed in the Council.¹¹⁴ Nevertheless, the welcoming of the Commission as a 'somewhat awkward junior partner [...] envisioned as one of 16 actors in the third pillar to take initiative in JHA matters' contained some implicit warnings (Uçarer 1999: 251). While the Council accepted that the cross pillar approach suggested by the Commission for migration policies 'has the great merit of encompassing the various aspects of these policies', it did not make any suggestions of how to translate the Commission's proposals into law but rather proposed to concentrate on those issues which have been outlined by the Council itself as the work programme in this area and to focus upon action in the third pillar only rather than adopting a cross pillar approach as suggested by the Commission (Council 1994d).¹¹⁵ Second, the Council supported the suggestions made in a report by the Commission in which the possible transfer of asylum policies to the first pillar according to the *passarelle* provision of ex-Article K.9 TEU, heavily

¹¹⁴ Statement of Commission President Jacques Delors reported by Agence Europe, No 5972, 1.5.1993: 13.

¹¹⁵ An informal Council meeting in Thessaloniki in May 1994 discussed all aspects of the Communication but made the suggestion to concentrate upon the third pillar elements therein in actual decision making, Agence Europe, No 6224, 5 May 1994: 7.

advocated by Parliament, was rejected (Council 1994c). While also the Commission would have profited from a transfer of asylum policies to the TEC, several member states signalled that they were at this stage, only half a year after the entry into force of the Maastricht Treaty, not willing to consider this issue. Due to the unanimity requirements in the Council the Commission, therefore, choose to adopt a cautious approach and to refrain from proposing any institutional innovation (Fortescue 1995).

Both measures showed that, on the one hand, the Commission's policy perspectives on migration policies were taken into consideration by the Council but that, on the other hand, the Commission had to be careful when making concrete suggestions, thereby taking into account the reluctance among some member states to go beyond the institutional and policy design of the Maastricht Treaty. Against this background it is not surprising that only one legal measure directly referred to the aforementioned communication from the Commission as a stimulus for a subsequent legislative act, namely a Council decision of 1997 on voluntary repatriation (Council 1997c).

Secondary decisions in migration policies prior to the Amsterdam Treaty did not increase the Commission's capabilities as a strong actor alongside the Council but rather provided for a stepwise integration of the Commission into the Council's operations on a working level, thereby devising a more bureaucratic and less political role to the Commission (den Boer 1996). Consequently, explicit cross pillar links with Commission prerogatives in the first pillar remained the exception and only appeared in two legal measures during that period.¹¹⁶ Most measures between 1993 and 1999 which entailed provisions on secondary capabilities of the Commission consequently had rather the purpose to give flesh to the 'full association' provision of the Maastricht Treaty, thereby showing that this term had more than a mere rhetorical meaning. The concept of 'full association' comprised mainly administrative

¹¹⁶ In a Council Resolution of 1994 on the admission of third-country nationals direct reference is made to a Regulation on the freedom of movement for workers, while a decision of 1996 on burden sharing calls for a coordination of measures under this decision with the Commission's action in the area of humanitarian aid (Council 1994b; 1996a).

tasks which, nevertheless, for the first time involved the Commission in an active way with regard to policy making in the third pillar. These provisions provided for the Commission the administrative role to gather information relating to migration policies at the EU level. Thus, first, the Commission had the task to collect information on the implementation of migration policies at the national level. It is not surprising that this role was delegated to the Commission with regard to first pillar issues such as visa policies (Council 1999a). However, the collection and coordination of information was not only taking place in the framework of the TEC but comprised third pillar issues such as residence permits, voluntary repatriation and asylum policies as well (Council 1996a; 1997b and 1997c).

Second, the Commission had the role to oversee the implementation of legislative acts and to publish, either solely or jointly with the Presidency, reports on the implementation of these policies on the ground (Franchino 2000: 68). Such a role appeared in the aforementioned Council Regulation on a common visa list of 1999, but also in all third pillar acts relating to asylum policies as well as on provisions on burden sharing for displaced persons and on unaccompanied minors (Council 1995b; 1996f; 1997c and 1997d). Third, the 'full association' of the Commission covered also some new institutional arenas. This has been the case after the entry into force of the Dublin Convention, which provides for rules on determining which member state is responsible for dealing with asylum requests (Convention 1997). Article 14 of the Declaration states that the Commission receives from the Council Secretariat statistical data on national asylum figures. Moreover, Article 18 provides for an integration of the Commission into the work of the committee and the working parties which have been set up under the framework of the Dublin Convention. While all these decisions are documenting the stepwise integration of the Commission into the Council's working structure in migration policies in the framework of the third pillar, they can nevertheless all be interpreted as a logical consequence of the 'full association' foreseen in ex-Article K.4(2) TEU.¹¹⁷

¹¹⁷ For example, the concept of full association did also comprise the integration of the Commission in multilateral meetings at the ministerial level. Thus, from 1993 onwards the Commissioner

However, there have also been two areas in which the capabilities of the Commission exceeded its pre-existing rights under ex-Title VI TEU. Firstly, the aforementioned decision on burden sharing for displaced persons equipped the Commission with a shared right of initiative to call for an 'urgent meeting' of the K.4 committee which then would have to decide on 'whether a situation exists which requires concerted action by the European Union for the admission and residence of displaced persons on a temporary basis' (Council 1996f). No such right was originally included in the Maastricht Treaty. It is, however, quite striking that there has been a similar provision relating to primary capabilities of the Commission in the second pillar already since the Maastricht Treaty. Thus, ex-Article J.4 TEU established such a shared right of initiative with regard to extraordinary meetings of the Council, in particular in emergency situations.

Moreover, the greatest amount of secondary capabilities of the Commission in migration policies prior to the Amsterdam Treaty can be found within the aforementioned seven decisions which set up a financial framework for EU migration policies. It can be argued that this development is comparable with an observation made by Kiewiet and McCubbins with regard to the delegation phenomenon in US politics. They have argued that 'nowhere is the logic of delegation more compelling than in the appropriation of funds for the myriad programs and activities of the federal government' (1991: 12). This seems to be equally true for EU politics, although on a much smaller scale.

Thus, in 1997 the Council set up two one year programmes for support of displaced persons seeking temporary protection as well as a programme in favour of asylum seekers and refugees (Koser and Black 1999). The former programme had a budget of € 10 million, the latter of € 3.75 million (Council 1997f; 1997g). These programmes were renewed one year afterwards with a budget of € 13 million and €

responsible for migration policies attended meeting of the so-called Berlin Group (later Budapest Group) of West and East European migration ministers (Agence Europe, No 5922, 18.02.1993: 15). However, in most international organisations dealing with migration policies issues the Commission is not represented alongside member states and also the Council Secretariat participates in more such international fora than the Commission (Guiraudon 2000: 255).

3.75 million respectively (Council 1998b; 1998c). The three other programmes are multiannual programmes addressing the exchange of officials dealing with the issue of identity documents ('Sherlock'), the issues of asylum, immigration and external borders ('Odysseus') and, finally, the support for reception and voluntary repatriation of Kosovo-refugees (Council 1996c; 1998a and 1999b). These three programmes, which add up to a rather tiny sum within the EU budget, comprised funds of € 5 million, € 12 million and € 15 million respectively.

The main role of the Commission in the management of these programmes has been to administer the funds, evaluate and choose project proposals, monitor the implementation of these projects and to inform the Council on the results. In all the measures the Commission is, however, not entirely free in choosing how the budget is allocated. Its autonomy is limited by the establishment of member states' committees which scrutinise the action of the Commission in the management of these funds.¹¹⁸ It is only below a financial ceiling of either € 50,000 or € 200,000 that the Commission has been delegated the right to administer these funds autonomously, whereas for all measures above that ceiling the Commission has to seek the support of a majority of member states in the committee. The three measures which set up multiannual programmes, have more detailed provisions on financial management. Thus, the Sherlock and Odysseus programmes ask the Commission to write prior to every financial year a draft annual programme which has to be submitted to the committee and be accepted by unanimity. Only after receiving this consensual mandate can the Commission proceed in allocating the funds and in managing their implementation. Moreover, these two measures and also the Kosovo fund ask the Commission to write each year an evaluation report which has then to be submitted to the Council and Parliament. It must be noted that the legislative proposals for the three multiannual programmes have been made by the Commission itself, which thus made use of its right of initiative in the third pillar. In fact, the only Commission proposals which led to secondary legislative acts in this

¹¹⁸ See further below in this chapter on more details on these committees.

area were those on funding programmes and not on ‘normative third pillar rules’ (Peers 2000: 21). This supports the view that member states accepted a participation of the Commission in migration policies on an administrative level, but also showed reluctance to allow the Commission to have a more political or agenda setting role in this area.

Following the entry into force of the Amsterdam Treaty this reluctance to accept a more active involvement of the Commission changed and subsequently, as a result of the transfer of migration policies to the first pillar, more provisions on the Commission’s capabilities in migration policies appear in secondary legislation. This new approach has become visible during the European Council’s special meeting during the Finnish Presidency in Tampere of 15 and 16 October 1999. This meeting dealt with the future objectives in the newly established ‘area of freedom, security and justice’ (European Council 1999b). The conclusions of the Tampere Summit entailed *inter alia* a detailed report on the precise measures to be taken in order to develop EU migration policies. Secondary capabilities of the Commission appear as a recurrent theme in the Presidency’s conclusions and, for example, these conclusions provide for the sole right of initiative for the Commission with regard to various migration policy decision. Note, that the Amsterdam Treaty did foresee only a shared right of initiative for most of these issues. Table 5.1. compares the suggestions made in the Tampere Conclusions on the Commission’s right of initiative with the original provisions of Title IV which, of course, from a legal perspective enjoyed supremacy over the Tampere provisions.

Table 5.1: The Commission’s right of initiative: primary and secondary capabilities

Issue	Title IV EC Treaty	Tampere Conclusions
Developing a scoreboard	-	Sole right of initiative
Asylum applications and subsidiary protection	Shared right of initiative	Sole right of initiative
Common asylum procedure and uniform status	Shared right of initiative	Sole right of initiative
Admission and residence of third-country nationals	Shared right of initiative	Sole right of initiative
Fight against illegal immigration	Shared right of initiative	Sole right of initiative

Thus, following the Tampere meeting, the capabilities of the Commission with regard to its role in the legislative process were increased when compared with its shared right of initiative as it appeared in the Amsterdam Treaty. Note, that on the issue of visa policies the Amsterdam Treaty did already delegate to the Commission the sole right of initiative. Another important institutional innovation, which resulted from the Tampere Summit, has been the decision to delegate to the Commission the task of proposing a 'scoreboard' on measures to be taken *inter alia* in migration policies in the years ahead.¹¹⁹ This entrusted the Commission with the right to come up – in cooperation with the Council and on basis of the Vienna Action Plan and the Tampere Conclusions - with a time table and a set of issues with which the EU would develop its asylum policy *acquis* (European Council 1998; van Krieken 2000). Additional to these explicitly mentioned new capabilities, the Tampere Conclusions also talk of some other areas in which the Commission is mentioned as a central actor in EU migration policies. Thus, point 12 of the Conclusions entrusts both the Council and the Commission to report to the European Council of December 2000 on the work in the High Level Working Group on Asylum and Migration.¹²⁰ Also, point 16 asks the Commission to explore the potential to establish a system of burden sharing for displaced persons, 'on the basis of solidarity between Member States'

The Tampere Conclusions, in conjunction with the provisions of the Amsterdam Treaty, pointed to a qualitative shift in the way migration policies were dealt with at the EU level. The Commission profited from this change and fostered its role on both the administrative and the political dimension of this policy area. Out of the ten legislative acts concluded in migration policies between May 1999 and July 2002, eight were based on Commission initiatives, while two measures were based on

¹¹⁹ The first scoreboard was published by the Commission in April 2000 and from then onwards biannually. The orientations and preferences of the Commission, as they appear in the six scoreboards until December 2002 will be analysed in detail in the following chapter.

¹²⁰ The High Level Working Group is an interesting example for linkages between EU interior and foreign affairs settings. While cross pillar linkages are omnipresent within these two areas, linkages between the two settings are considerably less developed. The High Level Working is a noteworthy exemption to this rule.

proposals from France and Germany. Out of these eight decisions, in which the Commission made the proposal, only two related to visa policies, in which the Commission enjoyed the sole right of initiative anyway. In all these legislative acts new capabilities of the Commission appear that further strengthened its role as a key actor in EU migration policies alongside the member states.

Thus, first, the Commission consolidated its administrative role and was delegated the task to collect statistical information from member states on their measures in visa policies or on temporary protection for displaced persons (Council 2000a; 2001a). However, stretching beyond this role as information collector, which has already been a characteristic capability prior to the Amsterdam Treaty, the aforementioned legislative acts provide for some steps towards an administrative Europeanisation at the national level. In that process the Commission is foreseen by several measures as being responsible for managing new European units in national interior ministries (Wessels and Rometsch 1996). Thus, the Joint Supervisory Authority of national ministries deals jointly with the Commission on the implementation of the EURODAC Regulation (Council 2000f). The Directive on minimum standards for giving temporary protection stipulates that ‘for the purposes of administrative cooperation required to implement temporary protection, the Member States shall each appoint a national contact point’ (Council 2001a). The Commission and the member states are responsible for ensuring the coordination of their respective activities. Most importantly, in order to give substance to Article 66, which calls for intense administrative cooperation between the Commission and member states, the Council adopted in June 2002 a Decision on a cooperation programme for all Title IV activities, the so-called ARGO Programme. ARGO, which is managed by the Commission, should *inter alia* explore whether it is useful to found ‘a common training institution’ for national civil servants working on EU migration policies, thus further institutionalising the cooperation within the epistemic community of European and national migration policy experts (Council 2002c). The decision on the ERF even establishes a hierarchical relationship between the Commission and national administrations by allowing the Commission to pursue on

the spot checks on the implementation of ERF programmes at the national level (Council 2000d).¹²¹

Second, the Commission is responsible for the implementation of all major decisions in migration policies after the Amsterdam Treaty which had budgetary effect. The budget, which the Commission has to administer comprises, for ERF and ARGO alone, € 241 million, thus four times as much as all funds administered by the Commission in the years between 1993 and 1999 combined. In the case of the ERF the Commission decides, on proposals from member states, which projects at the national level are supported by the fund.¹²² Five per cent, i.e. € 10.8 million, can be allocated by the Commission on projects which are of a 'common interest' to all member states. The EURODAC Regulation sets up a Central Unit which is responsible for collecting and managing the fingerprints of those third country nationals whose data can be stored for that purpose. The Central Unit has been established within the Commission, thereby providing it with another administrative unit within the emerging EU migration policy space (Guiraudon 2000). A similar case of access to expert information has been regulated in the provisions on the uniform format for residence permits for third-country nationals. The secret specifications are known only to the Commission and the responsible member states' institutions (Council 2002b).

Third, the secondary capabilities of the Commission following the Amsterdam Treaty do also comprise the task to evaluate the implementation of these various legislative measures and to come up with regular reports which are then passed forward to both the Council and Parliament. Such provisions can be found with regard to the ERF, EURODAC, the common visa list, minimum standards for temporary protection and the ARGO programme. Fourth, three of the aforementioned measures provide for further legislative action and in all of these

¹²¹ From the project initiation perspective, however, the ERF is characterised by a hierarchical relationship from the side of member states, which propose to the Commission the projects to be funded, leaving small room of manoeuvring for the Commission.

¹²² Note that the ERF allocates a fixed amount to each member state each year and the Commission's leverage to choose projects applies only to allocating funds *within* each member state.

cases the Commission has received the sole right of initiative. This is the case with regard to the ERF Decision, which allows for allocation of additional funds in emergency situations, following a Commission proposal with a qualified majority in the Council. In the measures on the common visa list and minimum standards for temporary protection, only the Commission can initiate new legislation, i.e. for adding or removing countries from the visa list or for subsidiary legislation on specific temporary protection schemes. However, in both cases the legislative acts stipulate that member states can request the Commission to consider a legislative proposal, thus providing for a form of the 'voluntarily shared right of initiative' similar to the provisions of Title IV TEC.

Additional to these provisions in the third and first pillars, an important element of EU migration policies have also been those decisions which form part of the Schengen *acquis* and which were integrated into the EU framework following the Amsterdam Treaty. Also in this institutional setting the Commission has some capabilities. Thus, the Commission had been guaranteed in a Council Resolution a third pillar style 'full association' with the Presidency in the process of integrating the Schengen *acquis* into the EU framework (Council 1997h). This full association certainly had a practical necessity given the overlap between Schengen provisions, for example in the fields of administrative cooperation, visa policies or carrier sanctions, and Title IV provisions on similar issues on which the Commission already had quite considerable capabilities (Collinson 1996). For that reason the Commission was also granted the status as an observer in the Schengen Standing committee, the Schengen Central Group and the various working groups responsible for the implementation of the Schengen *acquis* (Schengen Executive Committee 1998).

It has, however, to be noted that the Commission was quite anxious to avoid a 'Schengenisation' of its newly acquired primary capabilities in migration policies after the entry into force of the Amsterdam Treaty, i.e. to avoid a penetration of the intergovernmental set up of Schengen cooperation upon the EU migration policy regime (den Boer and Wallace 2000). Thus, as part of a Council decisions on the rules for the allocation of the entire Schengen *acquis* to the first or the third pillar, the

Commission issued a statement in which it stipulated that the provisions on the integration of Schengen rules into the EU framework do not encroach upon its traditional executive prerogatives as well as its role as the guardian of the Treaties. Against this background, it is interesting to note that in two important fields regarding the implementation of the Schengen *acquis* the Commission has received secondary capabilities. First, the Commission has taken the lead for the EU in negotiating with Iceland and Norway the rules on the participation of these two states in the Schengen cooperation and it is also the Commission which represents the EU in the Joint Committee set up to discuss bilateral issues between Iceland or Norway, on the one hand, and the Union, on the other (Agreement 2001).¹²³ Second, the Commission has the task to develop the second generation of the Schengen Information System (SIS) and, once it becomes operative, to manage SIS II. A management of this data base within the Commission goes thus hand in hand with the placement – in the framework of Title IV - of other data bases, such as EURODAC, within the Commission.

The capabilities of the Commission in Middle East and Mediterranean Policies

When compared with migration issues, the secondary capabilities of the Commission in Middle East policies exhibit the greater emphasis on the pillar division in EU foreign affairs. Consequently, in those areas of EU foreign policies which belong to the first pillar, such as trade and developmental issues, the Commission appears as the actor with the main executive capabilities. In turn, executive capabilities in the framework of the second pillar have primarily been delegated to the Council Secretariat, namely the Special Representative and the High Representative. Therefore, with regard to the Commission's powers, secondary capabilities did reinforce existing powers rather than adding new ones. Notwithstanding this general division between the pillars, the capabilities of the Commission are not entirely

¹²³ Note, that the actual negotiating mandate has been transferred to the Commission by the Council voting under the unanimity requirement, Agence Europe, No 7287, 27 August 1998: 2-3.

limited to classical first pillar arenas. In fact, out of the 14 Joint Actions on the Middle East between 1993 and 2002, 13 Joint Actions made direct reference to the Commission and its executive role in the context of these decisions. While these functions do not go far beyond the primary capabilities of the Commission, namely its 'full association' in the CFSP, their purpose is to define more precisely what the Treaty concept of 'full association' actually entails. Some of these Joint Actions do, in addition, directly refer to the first pillar and demand from the Commission to make use of its foreign policy capabilities in these areas, thus establishing additional cross pillar linkages to those already foreseen by the Treaties.

As discussed in chapter 3, the pillarised division of EU foreign policies has to some extent been modified by the EMP, which is also the wider institutional framework of the EU's relations with Israel and Palestine. The objective of the EMP is to establish a 'comprehensive' EU policy towards the region, i.e. a policy that aims to combine all areas of EU foreign policies under one strategic umbrella. Secondary decisions on the EMP, such as the Common Strategy on the Mediterranean Region, consequently demand from the Commission to make use of its first pillar capabilities in the framework of the CFSP. While the Common Strategy itself is a second pillar instrument based on Art. 13(2) TEU, most policy measures which the Common Strategy proposes actually belong to the first pillar.¹²⁴ This development can be studied with regard to EU relations with Middle Eastern countries. Thus, relations between the EU and Israel have traditionally been based on trade cooperation given Israel's economically Western outlook (Ahiram and Tovias 1995). Relations with Palestine, on the other hand, have mainly been based on significant financial assistance in an attempt to sustain and stabilise the weak economic and political structures of this nascent state (Stetter 2003).

In both areas, namely trade cooperation and financial assistance, the Commission has had since the 1970s the main responsibility at the European level

¹²⁴ Such a linkage between EC measures and 'intergovernmental' settings has already been established in some areas of foreign policies during the EPC period. The Euro-Arab dialogue could be mentioned as an example (Rhein 1999: 692).

for the implementation of policies. Thus, the EMP allows the Commission to combine these entrenched economic powers with the political objectives of the EU's second pillar. The strong preferences of the Commission in sustaining the institutional framework of the EMP, which will be further discussed in chapter 6, thus become obvious. First, the EMP has strengthened the first pillar policies towards Middle Eastern countries, since both trade and developmental assistance policies have been widened in scope when compared with the protocol period which pre dated the EMP. Since in both areas it is the Commission that is responsible for executive policy making the EMP has, consequently, also increased the Commission's capabilities in Middle East policies. Second, since the EMP is a second pillar instrument, and given the heavy reliance of EMP on first pillar policies, the Commission did also foster its role as a key actor in the EU's overall foreign policy. Seen from that perspective, the debate who has been responsible for the actual establishment of the EMP becomes somewhat subordinate. While some authors argue that EMP originates from within the Commission (Rhein 1999), some suggest that the actual driving force have been the governments of Spain and France (Barbé 1998) while others see the Commission and Southern EU member states equally responsible in a process of broad interest convergence (Gomez 1998).¹²⁵ Yet, another question seems to be at least equally important, namely how EU actors perceive their own role within the EMP. The strong support which EMP receives from within the Commission and which is discussed in greater detail in chapter 6, seems to support the argument that the institutional design of the EMP is particularly well suited to fit the Commission's policy preferences.

Notwithstanding the predominance of capabilities of the Commission in first pillar areas, some of its capabilities do also derive from second pillar legal measures. As has been mentioned before, out of the 14 second pillar acts that dealt with the

¹²⁵ The view that it has been the Commission that was the main actor behind the creation of EMP has in particular been raised by Commission officials in various interviews conducted for this thesis.

Middle East, only one did not refer to the Commission at all.¹²⁶ Although it has to be noted that most of these Joint Actions do not establish a direct transfer of authority to the Commission but rather delegate authority to the Council Secretariat, the question remains why the Council regularly pointed to the Commission in its second pillar decisions. It is argued here that, similar to migration policies prior to the Amsterdam Treaty, provisions on secondary capabilities of the Commission had the purpose to 'give flesh' to a rather unspecified provision of the EU Treaty, namely the concept of 'full association'. Moreover, the inclusion of the Commission into these Joint Actions resulted in the establishment of cross pillar linkages of the EU's foreign policy, thereby facilitating the combination of first and second pillar instruments in day-to-day policy making (M Smith 1998).

It was already the first Joint Action on the Middle East that contained a reference to the role of the Commission in the framework of the CFSP. Thus, Article 2 of the Joint Action 'in support of the Middle East peace process' encouraged the Commission to submit first pillar legislative proposals to the Council on the 'rapid implementation of programmes of assistance' for the newly established Palestinian Authority as well as 'to provide aid in the framework of existing guidelines' to other Middle Eastern countries which are party to the peace process (Council 1994a). The Joint Action also set up support measures for the creation of a Palestinian Police Force. While the main responsibility for implementing this policy has been delegated to the Presidency, the Joint Action demands a 'close coordination' of the Presidency with the Commission, in order to ensure that European and member states' financial assistance to the Palestinians on this issue is coordinated.

These two kinds of references to the Commission in second pillar instruments, namely linkages to its first pillar capabilities and its responsibility for coordination of aid with member states, do also form the backbone of the provisions on the Commission's role in other Joint Actions. There are four main dimension in

¹²⁶ Only the Joint Action of April 2002 on temporary reception of some Palestinians, who were involved in the siege of the Church of the Nativity in Bethlehem, in the member states contains no reference to the Commission (Council 2002a).

the Commission's capabilities in these second pillar acts and it is interesting to note that most of these provisions are similar to the capabilities of the Commission in the third pillar prior to the Amsterdam Treaty. First, the secondary capabilities of the Commission comprise the task to submit proposals for further legislation or executive measures to the Council. This has been the case in the aforementioned Joint Action in support for the peace process. Moreover, also the two Joint Actions which lay down the rules for the EU's observer role in the Palestinian elections of 1996, provide for such an initiative role to the Commission (Council 1995a; 1995c). Thus, the Council Decision in support of the Palestinian Elections asks the Commission to draw up a list of observers for participation in the European Electoral Unit and submit this list to the Presidency which has the main role in deciding on the final composition of the Electoral Unit.

The main feature with regard to the role of the Commission in the various Joint Actions is that they establish parameters for what the concept of 'full association' entails and, therefore, specify the precise role of the Commission in the execution of policies. Thus, full association does comprise the right of the Commission to be involved by the Presidency in the implementation of concrete second pillar policies such as the creation of a Palestinian Police Force (Council 1994a). This involvement into the Presidency's activities did also relate to the decision on the final composition of the Electoral Unit and the guidelines determining its operational capacities (Council 1995c). The various Joint Actions on the mandate of the Special Representative or the EU Adviser to the Palestinian Authority on security issues also demand such a coordination with the Commission (Council 1996d; 1997a; 1997e; 1998d; 1999c; 1999e; 1999g; 2000c; 2000g; 2001b). Full association, finally, does also entail the right of the Commission to participate in the second pillar 'Anti-terrorism Committee' (Council 2000c).

Third, all the Joint Actions which relate to the Special Representative and the EU Adviser, but also the decisions on the Palestinian elections mention the role of the Commission Delegations in the region. Their task is to provide for 'logistical support' for the activities of the European Electoral Unit, the Special Representative

or the EU Adviser.¹²⁷ Fourth, following the entry into force of the Amsterdam Treaty, the two Joint Actions on the Special Representative's mandate do also contain more detailed provisions on the financing of his activities. It is stipulated in these documents that the budget of the Special Representative is subject to a 'contract' between the Commission and the Council Secretariat. As an emphasis of the linkage between the Council Secretariat and the Commission in Middle East policies – and fostering the bicephalous representative functions of the Secretary General of the Council and the External Relations Commissioner - the two Joint Actions since the Amsterdam Treaty also state that reports by the Special Representative are submitted both to the High Representative and the Commission.

To summarise, secondary capabilities of the Commission in EU Middle East policies which are based on second pillar instruments have brought some more clarity to the question what 'full association' actually entails but, on the other hand, did not lead to a major increase of the overall executive capabilities of the Commission. The bulk of executive capabilities, as the following section will elaborate in greater detail, has been delegated to other supranational agents, namely those located within the Council Secretariat. However, almost all Joint Actions make direct reference to the Commission and set out the requirement for either the Presidency, the Special Representative or the EU Adviser to include the Commission into executive policy making and do also demand from the Commission to make use of its first pillar powers. Moreover, as already emphasised in chapter 4, the Commission profits from its diplomatic presence in the region where it is represented by delegations in Tel Aviv and East Jerusalem. On various issues, such as the Palestinian elections, the mandate of the Special Representative or the activities of the EU Adviser, Joint Actions particularly refer to the need of the Presidency or Council actors to coordinate their work with the delegations in the region.

¹²⁷ Also the organisation of visits of members of the European Parliament to the region belongs to the 'logistical support tasks' of the Commission Delegations. Interview 10, European Commission, Brussels, June 2000.

Among second pillar instruments it has been the 'Common Strategy on the Mediterranean Region' of June 2000 that sets out the biggest amount of secondary capabilities of the Commission (European Council 2000). In particular, the Common Strategy documents the interrelationship of and overlap between the first and second pillars and, thereby, the need to link the capabilities of the Commission, on the one hand, with those of other executive actors, on the other. Thus, in the section of the Common Strategy on 'Instruments and Means' the Commission is called upon to make use of its first pillar powers in the framework of the CFSP, while Article 25 of the Common Strategy reiterates that the Commission will 'be fully associated in accordance with Articles 18 and 27 of the EU Treaty' for all second pillar acts decided on the basis of the Common Strategy. In the policy related sections, the common strategy does then not separate anymore between first and second pillar areas, but rather treats them as functionally indivisible. Accordingly, all executive actors, the Commission, the Secretariat, the Council and the member states are referred to in the Common Strategy as responsible for implementing these policies. The Commission is called upon to actively engage itself according to its 'competencies and capacities' in the implementation of EU Mediterranean and Middle East policies. Article 34 asks the Commission to submit for each incoming Presidency its proposals for priority action, to contribute to the evaluation of progress, to evaluate the contribution of the Mediterranean partner countries, and if need be to submit proposals for changes to this Common Strategy to the European Council. In none of these tasks does the Common Strategy differentiate between the first and the second pillars. Moreover, the agenda setting role of the Commission is also strengthened by the decision making rules in the Council, since subsequent second pillar decisions pursuant to the Common Strategy are decided by qualified majority. Finally, along similar lines as the aforementioned Joint Actions, Article 31 of the Common Strategy calls for coordination between member states' embassies and Commission delegations on the ground.

The strong emphasis which the Common Strategy makes with regard to the role of the Commission must be seen against the background of its executive

EU has shown that the Commission can even use its first pillar trade competencies in order to pursue more political objectives.¹²⁹

All bilateral issues between the EU and the two Middle Eastern countries are dealt with in specialised Committees which are referred to within the Association Agreements. Israeli-EU relations were until 2000 institutionally embedded within the Cooperation Council, which was originally established by the EC-Israel Free Trade Agreement of 1975 (Giersch 1980). In this Cooperation Council only trade related matters were discussed, since its scope did only cover EC competencies. However, after the entry into force of the Association Agreement in June 2000 a two layered structure of bilateral relations has been put in place which consists of an Association Council and an Association Committee. The Association Council meets yearly at the ministerial level and comprises the members of the Council, the Commission and the government of Israel. The Association Council decides on the long term objectives relating to the implementation of the Agreement. It is then the role of the Association Committee to deal with the implementation of decisions of the Association Council or the problems arising from the implementation of the agreement (Association Council 2001).

With regard to the bilateral relations between the EU and Palestine on trade related matters a Joint Committee oversees implementation, which has been established by the Interim Association Agreement of 1997. In relations with Palestine, the agreement did only establish a one layered institutional structure since the agreement with Palestine has been concluded on the basis of Article 133 and does only cover EC policies. The cross pillar approach of the new EMP Association Agreements, which are Mixed Agreements on the basis of Article 300, has only been applied to agreements between the EU and recognised states in the Mediterranean

¹²⁹ EC-Israel: Cooperation Committee, Press Release: Brussels (28.11.1997), Press 370. The dispute has centred around false export certificates for Israeli oranges, which were, in fact, originating from Brazil. The government of Israel says that 'administrative cooperation' between Israel and the EU would have sufficed to settle the issue. The publication of a note to exporters within the Official Journals by the Commission was seen as a rather political step. Agence Europe, No 7107, 26.11.1997: 7. This interpretation has also been confirmed, off the record, in several interviews with EU officials.

(Paasivirta 1999). The Joint Committee comprises members of the Commission, on the one hand, and members of the Palestinian Authority, on the other.

These new agreements are an example of the hybrid institutional framework of EU foreign policies as it has been fostered in Middle East policies since the establishment of the EMP. While the Commission could consolidate its role in the second pillar, it had to relinquish its erstwhile exclusive executive competencies with regard to the implementation of bilateral agreements (Meunier and Nicolaïdis 1999). The EU-Israel Association Agreement delegates both political and economic capabilities to the EU centre, however, not exclusively to the Commission. Thus, it was the Council Secretariat that profited most from this new type of agreement. For example, it is an official of the Council Secretariat and not a Commission representative that acts as the secretary of the bilateral Association Council. Moreover, the Association Council is presided over alternately by the Presidency or Israel, and the same rules apply to the Association Committee. It is only within this Council dominated institutional framework that the Commission continues to be responsible for the implementation of bilateral relations on first pillar issues and, for example, chairs those committees related to the first pillar.¹³⁰ A different institutional structure applies to those fields of bilateral cooperation which are not covered by the Association Agreement. With regard to these agreements bilateral issues are discussed by the Commission, on the one hand, and members of the Israeli government, on the other. This does, for example, apply to the role of the Commission in the EC-Israel Research Committee established to oversee the participation of Israel as the only non European country in the fifth framework programme for research and development (Agreement 1999a).¹³¹

The main amount of executive capabilities of the Commission, finally, appear with regard to developmental assistance. This area constitutes, moreover, alongside

¹³⁰ Interview 12, Head of Unit, Commission, Brussels, June 2000.

¹³¹ When providing the Commission with a negotiating mandate in the Research Council, some member states such as Belgium, France, Italy and Spain had preferred a 'case-by-case' participation of Israel rather than a 'member state like' integration of Israel into the programme. Agence Europe, No 6316, 16.9.1994: 6.

economic relations, the main element of bilateral relations of the EU with the Mediterranean region. As one official from the Commission stated, 'we have projects and budgets and that is why everybody looks at the Commission'.¹³² As part of the EMP, aid to the region has been particularly increased when compared to the protocol period. As has been mentioned before, Israel does not receive funds from the MEDA budget, except for some joint Israeli-Palestinian projects. Palestine, however, is a major recipient of EU aid. Indeed, there is no other country in the world which has received a similar amount of assistance from the EU as Palestine. From 1994 to 1998 the EU has committed € 653 million grants from the EU budget and Investment Bank loans to Palestine. In 1999 the assistance amounted to € 93 million. The Palestinians receive a per capita support of € 258.7 compared to € 11.2 for the entire Mediterranean region (West Bank and Gaza 2000).

The Commission is, according to the 1996 MEDA I Regulation, responsible for the implementation of these assistance measures (Council 1996b). Moreover, Article 6 of the Regulation stipulates that 'supervision and financial control' can be exercised by the Commission on the spot. The regulation also states that the Commission has the sole right of initiative to submit to the Council, voting by a qualified majority, the national and regional indicative programmes, i.e. those programmes which outline the precise scope of assistance measures for Palestine and for joint Israeli-Palestinian projects. The Commission has been delegated the task to write these National and Regional Indicative Programmes, thereby taking the Council guidelines on these programmes into consideration. Yet, these guidelines leave the Commission a rather large autonomy since they do not specify in greater detail how the programmes should be precisely designed (Council 1996e).

The specialised committee of member states, the so-called MED Committee, must be involved for all financing decisions exceeding € 2 million. Amending decisions of less than 20 per cent difference to the original commitment can be made by the Commission without reconsulting the committee. Implementation by the

¹³² Interview 11, European Commission, Desk officer, Brussels, June 2000.

Commission includes tasks such as the issuing of tenders for specific projects and the conclusion of project contracts with partners in the region. Moreover, the Commission is also responsible for coordinating the allocation of MEDA funds with loans by the European Investment Bank to the region. The Commission advises, according to Article 12 of the regulation, the Bank in its decisions. With regard to risk capital operations, the Commission is responsible for taking the financing decisions on the implementation of projects suggested by the Bank.¹³³ Finally, the regulation demands from the Commission to submit a yearly report to Parliament and the Council on the operation of MEDA and to produce all three years an 'overall assessment report'. An evaluation on each concrete project must be submitted by the Commission every two years to the MED Committee. The MEDA II Regulation of the year 2000 did not add major new elements to these implementing powers of the Commission but did emphasise on several occasions the need for a better coordination between the Commission and member states and quicker disbursement of funds in the region (Council 2000e).¹³⁴ Following criticism with regard to the goal consistency of implementation the major innovation of MEDA II is that the Commission's capabilities now also comprise the task to write country strategy papers which will form the basis for future allocation of funds.¹³⁵

Executive dominance II – the role of the Secretariat and the Council Committees in migration and Middle East policies

Secondary capabilities of the Council Secretariat are greater in the area of Middle East policies than in migration policies. It is argued here, that the reason for the quite uneven distribution of capabilities to the Council Secretariat relates to the differences with regard to the structure of the hybrid institutional setting in the two areas. Thus, the two pillar design of foreign policies has supported the division of executive

¹³³ Although there are regular meetings between Commission and EIB, the Commission was unsatisfied in particular about the coordination of policies by the EIB. 'They had problems to stick to the plans. MEDA II does also provide for changes to that'. Interview 17, European Commission, Brussels, June 2000.

¹³⁴ See further below in this chapter on the new committee rules in MEDA II.

¹³⁵ See chapter 7 on the actual implementation problems of MEDA.

capabilities at the EU level – both on an administrative and a political dimension – between the two actors, thus *inter alia* putting in place a system of checks-and-balances between them. In migration policies, on the other hand, the formal two pillar approach has ceased to exist with the Amsterdam Treaty. As a result of the transfer of the entire policy area to the first pillar, also the main executive capacities at the EU level have been transferred to the Commission. The following section will look both at the role of the Council Secretariat and at the committee control systems established in both areas by member states in an attempt to control executive policy making by the Commission.

The capabilities of the Council Secretariat

The capabilities of the Council Secretariat in migration policies, which derive from secondary legislation, are significantly smaller than those of the Commission. Moreover, the few references made to the Council Secretariat mainly stem from the period prior to the entry into force of the Amsterdam Treaty. It has, however, to be emphasised that a major institutional resource of the Council Secretariat does not relate to capabilities enlisted in secondary legislation, but rather relate to the day-to-day operations of the Council. Thus, the Council Secretariat has, in both areas, a central role due to its task as a ‘provider of agenda and drafts’ in this area (den Boer and Wallace 2000: 504). This role does also correlate with the perception of officials from the Secretariat on their role in EU policy making. Thus, officials from DG H on Justice and Home Affairs have underlined this perspective and an official from DG E on foreign policies has described the Secretariat’s role as an institutional memory of the CFSP as the main source of influence. The tasks of the Secretariat, thus, comprise the writing of Presidency conclusions, the cochairing of working group meetings and the writing of agenda notes, i.e. the policy history related to a specific issue, moreover, the writing of drafts for Joint Actions and the tabling of informal recommendations to the Presidency on compromise proposals. In the

words of the official from the Secretariat, 'we ensure consistence between Presidencies'.¹³⁶

The secondary capabilities of the Secretariat in migration policies are mainly its role as an information provider and collector of statistics. On this dimension an inverse relationship between the capabilities of the Secretariat and the Commission can be observed. In an initial period, which lasted from 1993 until the Amsterdam Summit of May 1997, it was the Secretariat and not the Commission that received on several occasions the right to collect information on member states' policies and to write reports on specific issues. In the second period the Secretariat was no longer responsible for providing this kind of information, and consequently this task was taken over by the Commission. A similar development can be observed with regard to the role of the Secretariat as a management office for data bases. The two main data bases prior to the Amsterdam Treaty, namely CIREA and CIREFI, were managed by the Secretariat (Council 1994e). Due to its intergovernmental nature, the Secretariat of the Article 18 Committee of the Dublin Convention was also located in the Council Secretariat (Convention 1997).

This development has also affected the role of the Secretariat with regard to Schengen cooperation. While before the entry into force of the Amsterdam Treaty, the capabilities of the Secretariat as defined by secondary decisions have included the collection of information, this has come to a sudden end in 1999.¹³⁷ As the previous section has shown, it was also in this area that the Commission took over the information gathering role. A noteworthy case is the SIS. As mentioned before, the

¹³⁶ Interview 14, Desk officer, Council Secretariat, Brussels, June 2000.

¹³⁷ It should also be emphasised that the Schengen Secretariat has been integrated into the Council Secretariat and not into the Commission, Agence Europe, No 7202, 17 April 1998: 4-5. The decision to integrate the Schengen personnel into the Council Secretariat has been made by the Council voting with qualified majority with a negative vote from France which insisted that the number of posts exceeded the actual needs of the Secretariat (Agence Europe, No 7458, 4/5.5.1999: 15.) The integration has not only led to tensions between the Commission and Parliament both preferring an integration of the Secretariat into the Commission, on the one hand, and the Council on the other. It has also led to tensions between the Council Secretariat and the Council since the Council's Staff Committee feared that the new personnel would undermine the position of long standing Council Secretariat officials. The Secretary General of the Council Secretariat even suggested to let this row be decided by the Court of Justice. In order to avoid such recourse to the Court of Justice, the Schengen personnel was then integrated into the Council Secretariat as trainees only and not as officials. (Agence Europe, 12/13.4.1999: 16).

second generation SIS is managed by the Commission. However, the initial decision of the Schengen Executive Committee to award contracts for the study of establishing SIS II stems from April 1997, thus from a period prior to the entry into force of the Amsterdam Treaty. At this time, it was the Council Secretariat that administered the implementation of SIS II (Schengen Executive Committee 1997). It is only with regard to the SIRENE network, which sets up the communication infrastructure between national governments in the Schengen framework, that secondary decisions after the Amsterdam Treaty provide for explicit capabilities of the Secretariat. In two Council decisions of December 1999 and March 2000, the Deputy Secretary General of the Council is appointed to negotiate on behalf of the Schengen states the contracts leading to a second generation SIRENE network and to administer the financial aspects of the tender procedures (Council 1999f; 2000b).

In the area of Middle East policies, the secondary capabilities of the Council Secretariat have played a greater role than in migration policies. This is due to the explicit 'two pillar structure' which characterises EU foreign policies. Examples for these capabilities are the establishment of three foreign policy units within the Secretariat. First, in 1996 the office of the EU Special Envoy for the Middle East peace process has been created, second, an EU Adviser for security issues has been appointed in 1997 and, third, with the Amsterdam Treaty of 1999, the office of the High Representative for the CFSP has been created.

It is quite noteworthy that secondary legislation in Middle East policies has mainly had the purpose of providing for such new capabilities of the Secretariat. Thus, all Joint Actions on the Middle East between 1995 and 2001 deal exclusively with this issue. As a result, there has been a further institutionalisation of policy making capacities at the EU centre beyond the first pillar Community sphere and the establishment of two parallel executive centres for EU foreign policies in Brussels, the one being located in the Commission the other in the Council Secretariat (Forster and Wallace 2000).¹³⁸ The rationale behind this approach to strengthen the executive

¹³⁸ It is on the one hand a 'member states based structure' (Interview 5, Bertelsmann Foundation, Gütersloh, November 1999.). On the other hand, the new units 'make a difference'. After all, the

capabilities of the Secretariat in the second pillar can be understood when it is contrasted with the capabilities of the Commission in Middle East policies. Thus, the Commission is a collective actor separate from the Council and is equipped with a mandate to operate as the 'guardian of the Treaties'. The Commission enjoys more autonomy than other agents, such as the Special Representative or the High Representative, who are politically responsible to the Presidency and institutionally located within the Council. Moreover, the yearly mandates of the Special Representative provide for much closer control of his activities than for the hypothetical case that the Special Representative's office had been attached to the Commission.

The first Joint Action which provided for the creation of capabilities at the EU level dealt with the creation of the European Electoral Unit which had the task to observe the first Palestinian elections in January 1996. Notwithstanding the significance of this decision, the Electoral Unit has been a 'one issue agent' only and its mandate expired after the elections. In an attempt to permanently strengthen the political weight of the second pillar as a counterweight to the Commission's executive powers under the TEC, the Council then decided in November 1996 upon the creation of the office of an EU Special Envoy for the Middle East peace process. His mandate has been limited to one year and has since then been prolonged five times, the last time being 2001. From an institutional perspective, the mandate of the Special Representative is interesting for two reasons. First, it underlines the importance of secondary delegation in EU policy making. Consider that no such office has been foreseen by the Maastricht Treaty, which in fact has been very cautious with regard to the centralisation of the CFSP. The creation of the office of the Special Representative was, in comparison with the creation of a Treaty base, less costly. As mentioned before, the institutional requirements for a Joint Action are significantly less than those for Treaty changes. As a result, Joint Actions are also under less public scrutiny and member states, which at Maastricht might have

Special Representative is 'not a member state figure' (Interview 6, MP, House of Commons, London, May 2000).

resisted such a move could enter more easily into institutional experiments. In any way, if need be, the mandate could also more easily be revoked than a much more solid Treaty base. Overall, the experiment seems to have worked satisfactorily from the perspective of member states since it was, finally, the Amsterdam Treaty that provided for an explicit Treaty base for the appointment of a Special Representative (Peters 2000).

The capabilities of the Special Representative were gradually increased. Initially, he has had a mandate to establish links with the various 'parties to the peace process' in the region and on the international level.¹³⁹ His mandate did also comprise the task to directly report to 'Council's bodies' on his activities and the results of his work. This close linkage with the Council is also highlighted by the institutional anchoring of his office, which has since 1996 been permanently located within the Council Secretariat, although this has not been explicitly outlined in the various Joint Actions. Moreover, the Special Representative is politically responsible to the Presidency. While the mandate remained unchanged in 1997, a Joint Action of October 1998 provided for some widening in the scope of his responsibilities. Thus, the Special Representative should now also participate in the 'EU-Palestinian Security Committee', which was created in early 1998. Following the entry into force of the Amsterdam Treaty, the mandate of the Special Representative underwent a reorientation with regard to political responsibility. While Article 3 of the Joint Action of December 1999 does still render the Special Representative responsible to the Presidency, it also establishes an indirect responsibility to the High Representative via the latter's role in assisting the Presidency. This new hierarchy within the Secretariat is further highlighted by Article 5 of the Joint Action which stipulates that reports by the Special Representative will only be distributed to the Presidency or the Commission after they have been channelled through the office of the High Representative. Finally, the Joint Actions on the Special Representative's

¹³⁹ According to a member of staff of the Special Representative, it was easier to get accepted by Israeli and Palestinian officials than by Americans. 'It is difficult to deal with them, they never call'. Interview 19, Council Secretariat, Brussels, July 2000.

mandate do also provide for institutionalised linkages with the Commission, thus documenting the close cooperation between both actors on the ground.¹⁴⁰ Thus, all Joint Actions on the mandate since 2000 state that ‘the management of the operational expenditure shall be subject to a contract between the Special Representative and the Commission’, thereby formalising the informal practice between both institutions which existed since 1996.

The second agent who has been equipped with executive capabilities is the EU Adviser on counter terrorism in the Palestinian Territories, whose mandate dates back to a Joint Action of April 1997, which since then has been regularly renewed. Also the EU Adviser is politically responsible to the Presidency and his main task has been to advise the Palestinian Police Force on counter terrorist measures and, since 1998, to participate in the EU-Palestinian Security Committee. Following the entry into force of the Amsterdam Treaty, the EU Adviser has, moreover, the chance to make recourse to an increased budget since a multiannual assistance programme of the EU for counter terrorist measures has been introduced with a total volume of € 10 million. The mandate of the EU Adviser, furthermore, calls for a coordination of his activities with the Special Representative as well as with the High Representative.

The High Representative has not been subject to an individual Middle East Joint Action but is mentioned, as has been shown, in the various Joint Actions since 1999 as hierarchically superior to the Special Representative and the EU Adviser, thus providing for new communication channels within the Secretariat. This new relationship is well documented by the Common Strategy on the Mediterranean Region in which the role of the High Representative in the second pillar is referred to on equal terms as the Commission’s role in the first pillar. However, the Common Strategy does also document the somewhat experimental structure of the Secretariat. Thus, Article 25 of the Common Strategy does not – opposed to the wording of the Joint Actions – render the Special Representative politically responsible to the Council or the Presidency but rather provide for political responsibility to the High

¹⁴⁰ See chapter 7.

Representative. Consider the different wording of both second pillar instruments. The Common Strategy states that 'for the aspects of this Common Strategy falling within the CFSP ... the High Representative for the CFSP, supported by the Special Envoy shall assist the Council and the Presidency'. In contrast, the Joint Actions on the mandate of the Special Representative usually have the following provision: 'The Special Representative shall be responsible for implementing his mandate ... in consultation with the Presidency, assisted by the ... High Representative'. Thus, both documents state that the High Representative 'assists' the Presidency, yet there is a somewhat blurred institutional anchoring of the Special Representative. According to the Common Strategy his role is to support the High Representative, whereas according to the Joint Action his political responsibility is primarily directed towards the Presidency which he has to 'consult'.

Provisions on committee control

All secondary decisions after the Amsterdam Treaty which provide for executive capabilities of the Commission with regard to the implementation of migration policies contain provisions on committees which oversee the implementation. Given the reluctance of some member states to wholly communitarise migration policies, this seems to support Franchino's argument that 'the establishment of control procedures is also the result of substantive issue-specific conflict' (2000: 66). Therefore, he concludes, 'more conflictual policy issues are invariably linked to their [i.e. control committees; SS] establishment' (*ibid.*: 86).

Prior to the entry into force of the Amsterdam Treaty, such committees were only put in place for those seven third pillar decisions in which the Commission managed the budget for specific programmes in migration policies. Two kinds of committee procedures have been set out for these financial decisions. In both cases the Commission has an autonomy for minor expenses, whereas above a certain ceiling the committee has a veto power on Commission proposals. Thus, first, those programmes which established administrative cooperation between the Commission and national ministries, namely the Sherlock and Odysseus programmes, require

from the Commission to submit a draft annual programme to the committee which has to adopt this programme by unanimity. In case the committee rejects the draft annual programme the Commission must either withdraw it or present it to the Council where, however, unanimity is required for its adoption. In the Sherlock and Odysseus programmes, as well as for those funds earmarked for repatriation of refugees two committee procedures apply. On the one hand, for projects of less than € 50,000 the Commission must only take 'full account' of the committee's decision taken by qualified majority, i.e. the Commission is not bound by the vote. On the other hand, projects above that sum require a positive vote of the committee by qualified majority. Otherwise the project must either be withdrawn or presented to the Council which then decides by qualified majority.

With regard to the four other programmes, which establish EU funds for displaced persons, asylum seekers and refugees for the years 1997 to 1999 as well as the Kosovo emergency funds, three committee procedures are set out. For programmes which comprise expenses of less than € 200,000 the Commission does not need to submit proposals to the committee and can implement these measures immediately. For those programmes which require a budget between € 200,000 and € 1 million the committee votes with qualified majority on the Commission's proposal. The vote of the committee does nevertheless not have any binding effect upon the Commission's decisions and the Commission does only need to take 'full account' of the committee's vote. Lastly, for projects which require a budget of more than € 1 million, the Commission needs the support by a qualified majority of the committee. If it fails to gain that support, the Commission must either withdraw its proposal or submit it to the Council which then decides by qualified majority. As opposed to first pillar comitology provisions, these decisions do not specify what happens if the Council fails to take a decision within the time limits set out by the secondary acts. In the first pillar, however, it is practice that the Commission can then start to implement the measure in question.

Since after the entry into force of the Amsterdam Treaty migration policy has shifted to the first pillar, the five decisions which have been adopted since 1 May

1999 and which refer to committee procedures all make direct reference to the new Comitology Regulation of June 1999 (Council 1999d). Table 5.2 summarises those comitology procedures which have since then been applied to the areas of migration and Middle East policies. There is a significant variation with regard to the 'degree of freedom' the Commission enjoys under these three procedures (Hix 1999: 42). Thus under the advisory procedure, the Commission is not bound by the opinion of the committee. In the management procedure member states' representatives have greater influence on the activities of the Commission but they need to gather a qualified majority in order to reject Commission proposals, i.e. a *negative majority* has to be formed. Member states have the greatest say over the Commission's proposals in the case of the regulatory committee. Here, Commission projects need the support of a qualified majority in the committee in order for the Commission to proceed with implementation. If there is no such *positive majority* in the committee, the Commission can only hope that the Council fails in forming a qualified majority against the project. In that case the Commission can implement the project. Note, that with regard to the aforementioned financing decisions prior to the Amsterdam Treaty, the committee procedures closely resembled the provisions of the advisory committee for minor expenses, on the one hand, and the regulatory committee for all expenditure above a certain ceiling, thus a tighter form of committee control (Ballmann, Epstein and O'Halloran 2002).

Table 5.2: Committee procedures in migration policies after the Amsterdam Treaty

Procedure	Decision making process
Advisory (Article 3)	<ol style="list-style-type: none"> 1. Commission submits draft measures to committee; 2. Committee gives opinion (within time-limit) to Commission, formal vote not necessarily required; 3. Member states can ask to have their opinion recorded in the minutes 4. Commission should take 'utmost account' of the decision. It should inform committee on how it has taken the opinion into account.
Management (Article 4)	<ol style="list-style-type: none"> 1. Commission submits draft measures to committee; 2. Committee gives opinion (within time-limit) to Commission by a qualified majority; 3. Commission can implement immediately if committee supports the measure <i>or fails to adopt an opinion</i>; 4. Commission has to refer the measure for a maximum of three months if the committee does not support the measure and in that case submit the measure to the Council; 5. Council can take a different decision within this three month period. If there is no decision the Commission can implement the measure.
Regulatory (Article 5)	<ol style="list-style-type: none"> 1. Commission submits draft measures to committee; 2. Committee gives opinion (within time-limit) to Commission by a qualified majority; 3. Commission can implement immediately if committee supports the measure. 4. Commission must submit measure to the Council (and inform Parliament) if the committee does not support the measure <i>or fails to adopt an opinion</i>. 5. Council can reject the proposal within three months. Then Commission has to present new proposal. If there is no decision the Commission can implement the measure.

Source: Council 1999d

For first pillar decision in migration policies, the advisory committee had been put in place for the ERF and those decision of the ARGO programme on which there has been prior agreement between the Commission and the committee in the process of discussions on the annual work programme and concrete actions to be taken. However, these very decisions are overseen by a management committee, which can thus be described as the dominant committee procedure for issues relating to the ARGO programme. The regulatory procedure, at last, applies to EURODAC decisions and the execution of policies by the Commission with regard to the uniform format for visas, on the one hand, and residence permits, on the other.

Finally, it has also been in the context of the Schengen cooperation that comitology procedures have been used to define the relationship between the Commission and the member states in the execution of policies. This has been the case with regard to the SIS II which is developed by the Commission. Article 4 of the Council Regulation contains a detailed list of issues for the implementation of which the member states have reserved an oversight role in the framework of the regulatory

committee. For all those decisions taken by the Commission which do not appear on that list, the management procedure will apply (Council 2001c).

The establishment of committee control mechanism does also characterise secondary decisions in Middle East policies across the pillars. With regard to the second pillar, the aforementioned Joint Actions on the establishment of an EU assistance programme to counter terrorism in Palestine, provided for the establishment of a specialised committee of member states' anti-terrorism experts – and Commission representatives – which has the task to advise the Presidency. The Presidency, however, according to Article 3 of the Joint Action has the final say over 'specific implementing decisions'. This procedure could, thus, be described as a 'light advisory committee' since the Presidency must consult the committee but is not bound by the vote nor does it have to take 'utmost account' of the opinion of the committee, such as is the case for the Commission in regular first pillar advisory committees.

The major area in the framework of the first pillar in which committee control applies, is the area of developmental assistance. When implementing MEDA, the Commission has to consult a specialised committee of member states' experts. The MEDA I Regulation of 1996 establishes such a specialised committee, the so-called MED Committee.¹⁴¹ The Regulation provides for a regulatory committee type procedure (ex-procedure IIIa), thus a relatively tight control system. Accordingly, the MED Committee decides by qualified majority on proposals by the Commission. If the committee supports the measure, the Commission can implement it. However, if there is no qualified majority or if the committee fails to vote, then the measure has to be submitted to the Council, which must decide by qualified majority in order to allow for implementation. The Commission can implement the measure, if the Council supports the measure or has not acted within a period of three months. As is discussed at length in chapter 7, this tight control has led to various problems regards the implementation of MEDA funds. Against this background, the MEDA II

¹⁴¹ See Chapter 7.

Regulation of 2000 provides for the replacement of the regulatory committee by a management committee, in which the Commission's degrees of freedom, as can be seen in Table 5.2, are higher. However, this relaxation of committee provisions must also be seen against the background of the intensity by which the MED Committee must be involved by the Commission in the implementation of MEDA assistance. Thus, the so-called 'project circle' comprises six institutional layers out of which the MED Committee is directly involved in five of them, thus ensuring that member states keep track of executive policy making by the Commission in all stages of the implementation process.¹⁴²

On the sidelines – the role of Parliament, the Court of Justice and the Court of Auditors

The executive bias, which has already been quite pronounced with regard to the primary capabilities of EU actors, is even stronger when secondary capabilities are considered. Provisions on secondary capabilities of Parliament or the Court of Justice are rare and, consequently, most capabilities of these two actor stem from the provisions of the Treaties. With regard to secondary decisions on Middle East and migration policies it should, however, be noted that secondary decisions on several occasions provide for an oversight and control function of the Court of Auditors for those decisions in which the Commission has to operate with the EU budget.

Parliament has not received any new capabilities as a result of secondary decisions in migration policies.¹⁴³ References to Parliament in the various measures do only emphasise its 'right of information'. Thus, prior to the entry into force of the Amsterdam Treaty three out of the seven financial measures, namely the Sherlock, Odysseus and Kosovo programmes, state that the Commission must forward its yearly evaluation of these programmes to both the Council and Parliament. Additional to that, the Odysseus programme goes a step further than Sherlock and

¹⁴² See chapter 7.

¹⁴³ Of course, Parliament has been involved in the decision making process in all first pillar secondary decisions in migration and Middle East policies due to its role as one of the two legislative chambers of the EU. See chapters 6 and 7 on Parliament's role in legislation.

demands from the Commission to inform Parliament also about the decisions taken within the committee which oversees the functioning of Odysseus and to report back to the Council on Parliament's view. Since the entry into force of the Amsterdam Treaty the right of information appears on a regular basis in most secondary decisions both with regard to migration policies and Schengen cooperation. Thus, mid term reports or evaluation reports by the Commission are forwarded to Council and Parliament with regard to the ERF, EURODAC, minimum guarantees for temporary protection, the ARGO interministerial cooperation programme as well as the development of SIS II. Moreover, with regard to the activities of the Central Unit of EURODAC, Parliament is also kept informed about the way in which the Commission aims to ensure data protection with regard to the information stored in the Unit.

In Middle East policies Parliament has some minor additional capabilities both in the first and second pillars. There have been references to Parliament in the first two Joint Actions on Middle East policies. In 1994, the Joint Action in support of the peace process announced that if there will be Palestinian elections, as foreseen by the Declaration of Principles between Israel and the PLO, that 'Parliament will be invited to participate in those arrangements'. This has been the case one year later when the Council decided in a Joint Action that out of the 300 members of the European Electoral Unit 30 will be members of the European Parliament. With regard to the first pillar, it has been one of the side effects of the new generation of Association Agreements that, for the first time, Parliament has been acknowledged as an institutionalised actor in bilateral relations. Thus, Article 74 demands from the Association Council to facilitate 'cooperation and contact between the European Parliament and the Knesset'. This interparliamentary dialogue does also exist at the multilateral level of the EMP and already four interparliamentary forums were held, in which representatives of all 27 national parliaments and the European Parliament participated. Against the background of this institutional arrangement it is quite telling that interparliamentary cooperation in the framework of the EMP is not at all mentioned in secondary Council acts but only in the conclusions of the various

Barcelona follow up conferences. For example, the Common Strategy on the Mediterranean Region does not contain a single reference to the European Parliament or to interparliamentary cooperation.

Finally, secondary decision in Middle East policies provide for the right of Parliament to be informed about implementing decision of the Commission in developmental assistance measures. Thus, the MEDA Regulations stipulate that Parliament must be regularly informed by the Commission about the implementation of assistance and that Parliament, together with the Council, does also receive the yearly implementation reports by the Commission.

Even more meagre are the references to the Court of Justice. As Guiraudon has argued, this 'circumscribed role of the ECJ is testament to its influence in other areas of European integration and its expansive jurisprudence on the free movement of workers' (2000: 262). In the entire migration policy *acquis* since the Maastricht Treaty both with regard to EU and Schengen cooperation there is no single reference to the Court of Justice, save the Association Agreement for Iceland and Norway to the Schengen *acquis*. Articles 9 and 10 of this agreement lay down the rules for the involvement of the Court of Justice. Thus, if a request for a preliminary ruling reaches the Court of Justice regarding the application of the Schengen *acquis* in the member states, the governments of Iceland and Norway are allowed to submit written opinions to the Court of Justice on the pending issue. In secondary acts of the Council in Middle East policies there is no reference to the Court of Justice.

While Parliament and the Court of Justice did, thus, not gain much from secondary decisions, this is not true for the Court of Auditors. While there is no direct reference to the Court of Auditors in the Treaties' provisions on foreign and interior policies, several secondary decisions provide for additional capabilities of the Court of Auditors. Thus, the Court of Auditors has been entitled to implement audits on the management of the EU budget by the Commission in the case of the Sherlock and Odysseus programmes, the Kosovo emergency funds as well as the ARGO programme. Also with regard to the Schengen cooperation financial audits have been established with regard to the management by the Deputy General of the

Council Secretariat of the SISNET project. Articles 47 and 48 of the Council Regulation provide for the auditing of the account, which is managed by the Secretariat, by the Court of Auditors.

The Court of Auditors does also have capabilities in foreign policies. Consequently, it has been referred to in the Joint Action on support for the Palestinian elections, where it was given the right to control the expenditure of the European Electoral Unit. Also, in the framework of Israeli-EU scientific and technical cooperation, the Court of Auditors was given the right to pursue financial audits in Israeli research organisations which participate in the Fifth Framework Programme. Finally, the MEDA Regulations provide for an auditing of the aid projects implemented by the Commission and do also encourage the Commission to take the findings of reports by the Court of Auditors into consideration when implementing its policies.¹⁴⁴

Conclusion

The insights of this chapter on secondary capabilities of EU actors build upon the prior analysis on their primary capabilities. Responding to the functional dynamics stemming from the centralisation of macro political stabilisation policies, both foreign and interior policies are subject to a 'partial Communautarization', the former policy area with an explicit emphasis on the pillar structure, the latter, since the Amsterdam Treaty, with a mixture of first and third pillar rules under one institutional umbrella (Kostakopoulou 2000). This hybrid institutional design of both areas has also affected the secondary capabilities of EU actors. On the basis of this observation, the leading questions, which have been introduced at the very beginning of this chapter, can now be tackled with some tentative conclusions.

First, what is the relationship between primary and secondary capabilities? Secondary decisions on Middle East and migration policies have, as a general rule, contributed to foster and, on some occasions, even to increase the capabilities of EU actors in both areas which stem from primary delegation. Applying a demand and

¹⁴⁴ See chapter 7.

supply perspective can only partially help in understanding why this has been the case (Pollack 1997). This is, because the question arises why member states' principals have not already in the Treaties delegated these additional capabilities to EU actors. It is argued here, that the different majority requirements relating to Treaty reforms, on the one hand, and secondary Council acts – both by unanimity and by qualified majority - on the other, account for this variation. A second reason for the delegation of additional capabilities to EU actors, however, pertains to the manifold linkages between the pillars in the implementation of concrete legislative acts in Middle East and migration policies. Due to these overlaps and due to the emphasis on first pillar policies and instruments in both areas, the capabilities of EU actors within the two hybrid institutional regimes were fostered by secondary decisions.

Second, what kind of secondary capabilities do EU actors have and are there differences between them? Here, a pattern, which has already been observed in the previous chapter, becomes again visible. Thus, when looking at secondary capabilities of EU actors, the power gap between the EU executive and the other branches of government becomes even more obvious. An interesting exception to this rule, however, are the references to the Court of Auditors in secondary decisions. In a sense, this follows Pollack's verdict that 'almost every EC institution besides the Commission plays a role in monitoring and checking the Commission's behaviour' (*ibid.*: 116). The advantage, from the perspective of the executive, with a delegation of capabilities to the Court of Auditors and not to Parliament or the Court of Justice is that the Court of Auditors is much less subject to 'shirking' than these two other institutions. Nevertheless, the bulk of secondary capabilities which have been delegated in both areas were directed towards the Commission and the Council Secretariat. The Commission is tightly controlled by member states' committees in those areas in which it has taken over the main role with regard to the implementation of policies. Yet, it has to be noted that both in Middle East and migration policies committee control has slightly decreased over time, with greater emphasis on management committees, whereas prior to the Amsterdam Treaty regulatory committees did prevail.

All this suggests, third, that the pillar structure continues to shape the overall capabilities of EU actors but it is doing so under the pressure emanating from the functional frame emerging from the centralisation of macro political stabilisation policies. This is the background against which the approach by member states to use secondary legislation in an attempt to iron out the major problems stemming from the two pillar structure of foreign and interior policies can be understood. Thus, the secondary decisions analysed in this chapter do indicate that the distinction between the pillars has decreased in between Treaty reforms as a result of regular legislative acts, thereby challenging intergovernmentalist assumptions on these intervening periods in between IGCs. Notwithstanding this development, the nature of change in EU foreign and interior policies continues to be incremental and only gradually might the 'pillarised' structure of the Maastricht Treaty merge into a single institutional arrangement in better fit with the functional indivisibility of macro political stabilisation policies.

This chapter has also shown that in both areas there has been a huge amount of secondary decisions. Ten years after the integration of foreign and interior into the EU framework, these two areas have become an integral part of the EU polity and legislation has given substance to the functional frame which structures policy making in the two areas.¹⁴⁵ However, this should not avert attention from the shortcomings relating to both policy areas. Decision making still suffers from a lack of political leadership and a subsequently strong emphasis on first pillar areas in the case of foreign policies and on budgetary programmes and projects in both areas. Overall, this lack of leadership has until today prevented the emergence of comprehensive foreign and interior policies at the EU level that would set out a strategic direction, comparable to a governmental programme. As W Wallace notes, 'incremental policy-making, learning by doing rather than strategic choice, marks both these major policy domains' (2000: 535). The primary and secondary capabilities

¹⁴⁵ A Council officials has, during an interview for this thesis, presented a table with data on all documents with which the Council Secretariat had dealt with from the Maastricht to the Amsterdam Treaty. 21 per cent related to the third pillar and 15 per cent to the second pillar. Interview 26, Director, Legal Service, Council Secretariat, Brussels, June 2000.

of EU actors appear in a different light when confronted with this lack of strategic underpinning. Indeed, as this chapter has shown, EU (executive) actors certainly do have capabilities, but the question remains, what for? 'Given the fact that there is no common vision, civil servants are deprived of clear direction' (Niessen 1996: 62).

To conclude, for the time being a key characteristic of EU foreign and interior policies is that the institutional equilibrium in both areas has somewhat stabilised in relation to the functional indivisibility of macro political stabilisation policies and that the system is flexible enough to accommodate gradual reforms through day-to-day legislation. With the integration of foreign and interior policies into its political system the EU has nevertheless entered into new territory. For Europhils, the good message ten years after the Maastricht Treaty, thus, is that the costs of reversal have become very high (Pierson 2000). This is, however, also true with regard to radical changes in the other direction, which might calm those who prefer both areas to be tightly linked with national institutions. However, the precedent has been set, the EU has its own foreign and interior policies and EU actors have taken over considerable capabilities with regard to policy making in these two areas. By drawing from historical examples of US politics, Kiewiet and McCubbins have shown convincingly what unforeseeable consequences the delegation to new actors of seemingly piecemeal powers might entail. Thus, events which 'present no serious problems [...] until long after the precedent had been set' have finally unfolded when 'times changed' (1991: 10). We do not know when times will change and, certainly, the future shape of EU foreign and interior policies remains open. But the analysis of the primary and secondary capabilities of EU actors provides some indication that the process of centralisation of EU macro political stabilisation policies, albeit with slow speed, is already well under way.

CHAPTER 6

The Policy Preferences of EU Actors

The Divergence of Preferences

Introduction

EU actors are more than passive recipients of primary and secondary capabilities which have been delegated to them by member states' governments. Making use of these capabilities they did not only develop specific preferences on the two areas but also actively channelled these very preferences, as part of their day-to-day involvement in EU foreign and interior policies, into the policy making process. This chapter sets out to account for the way in which the preferences of the Commission, Parliament, the Court of Justice, the Court of Auditors and the Council Secretariat have developed with regard to foreign and interior policies, in general, and Middle East and migration policies, in particular. This chapter *inter alia* tackles the following questions.

How can the emergence and shape of preferences of EU actors in the two areas be explained? What is the relationship between these preferences with both the functional frame of macro political stabilisation policies and the specific capabilities of each actor? Moreover, are preferences a stable or a rather dynamic phenomenon? To what extent do they converge or differ between the various actors? And, why should that be the case?

This analysis is based on two key propositions which both challenge those conceptualisations that implicitly assume self interested, (bounded) rational actors with fixed preferences (Moravcsik 1998; Dowding 2000). Thus, in this thesis preferences are not regarded as exogenously given. Instead, it will be shown that the preferences of EU actors can best be understood against the background of the functional characteristics of the specific policies they relate to. In other words, preferences are analysed as relational to a complex environment of which actors

constantly have to make sense of. Moreover, preferences, as will be shown, are thus based not so much on rational choices but rather on functionally induced and contingent perceptions which actors hold on the two areas. Hence, this chapter also challenges the understanding of preferences as being fixed. The empirical data analysed reveals that the preferences of EU actors are quite dynamic, often unstable, and subject to changes over time.¹⁴⁶ This does not exclude the appearance of lock-in effects regarding these preferences. Yet, lock-in effects should rather be studied as the result of a temporary accommodation with the functional and institutional environment rather than as a permanent feature.

This chapter elaborates on the actor related dimension of the model presented in figure 2.2. Accordingly, macro political stabilisation policies set the frame within which both cross pillar institutions and actor preferences evolve. The preferences of EU actors in the two areas, which are constantly fed into the policy making process are, thus, in a much more dynamic relationship with the institutional surrounding than assumed by many institutionalist approaches. The patterns of interaction between national and European actors, which emerge out of the interplay between these three dimension, will then be discussed in chapter 7. One of the key results stemming from the analysis of this chapter is, however, that the preferences of EU actors in the two areas do not fit into a simple intergovernmental-supranational dichotomy. As much as EU actors perform quite different institutional roles, they also developed divergent preferences which cannot be subsumed under one integrationist heading.

¹⁴⁶ The same applies to the preferences of national governments, which are not analysed in this thesis. However, the same epistemology on contingent and dynamic preferences, which cannot be understood from a rational choice perspective, relates not only to EU actors but, of course, also to other actors, including national governments. Thus, it is argued that also the preferences of national governments in EU foreign and interior policies must be understood against the background of the functional environment of macro political stabilisation policies within which they are embedded. Indeed, the literature which focuses on the preferences of member states in both areas reports regularly on such 'embedded preferences' of national governments in both areas (Wallace and Wallace 2000). This empirical observation is also integrated in propositions 1 and 2 as well as figure 2.2 in chapter 2. Thus, the functional features of EU macro political stabilisation policies apply equally to EU and national actors engaged in policy making at the EU level.

Divergent preferences of EU actors

The preferences of EU actors in Middle East and migration policies can be understood in their relation with the functional characteristics of foreign and interior policies. Thus, preferences are not given but are constructed against the background of the emerging functional frame of EU macro political stabilisation policies (Checkel 1999; Checkel and Moravcsik 2001). This argument does not, however, imply that preferences are completely dependent upon policy functions. Yet, these functions render certain sets of preferences more likely than others and help to identify the individual and often divergent nature of preferences of EU actors rather than implicitly assuming an allegedly institutionally determined division between 'intergovernmental' and 'supranational' preferences (Moravcsik 1998).

The analysis of preferences of EU actors in foreign and interior policies reveals four main insights. First, all actors share the characteristic that they had to develop their individual preferences on the two areas against the background of the formative period of EU foreign and interior policies following the Maastricht Treaty. With little institutional and policy history on stock, this early period can, therefore, also be understood as a period of *preferences formation* in which EU actors had to draw for themselves a 'picture' of the two fields.¹⁴⁷ Lacking both solid 'institutional data' and organisational experience, preferences in this period were primarily shaped by the functional requirements of providing macro political stabilisation for the EU polity. This explains the initially quite similar preferences of most EU actors. This observation directly lends attention towards the second main argument which relates to the dynamic nature of preferences. Learning processes as part of day-to-day policy making as well as constant adaptation to the emerging functional frame of both areas, required from EU actors to regularly adjust their preferences. This adaptation went hand in hand with a lock-in effect. Thus, the preferences of EU actors

¹⁴⁷ There is, of course, an EC history for both areas prior to the Maastricht Treaty. However, only in 1993 were both areas formally integrated into the 'single institutional setting'. Thus, while EU actors had already developed specific perceptions on the two areas prior to the Maastricht Treaty, the Treaty allowed these perceptions to unfold within and become directed towards a functionally unified setting, albeit an institutionally highly fragmented one.

stabilised as a result of constant interaction with both EU and national actors in the policy making process, an accommodation with the own institutional role as well as the establishment of internal organisational structures. Due to the quite different institutional roles and experiences in the policy making process it can, finally, be shown that the orientations of EU actors vary considerably between them. It is this divergence of orientations which will particularly be emphasised throughout this chapter.

Preferences in the two areas are much less driven by a supranational-intergovernmental divide, that would put EU actors in collective opposition to national governments, but rather by a complex accommodation process during which EU actors – and also national governments - develop and constantly adapt their specific orientations (Tallberg 2002: 33-36). This does not exclude a shared interest of EU actors in supranational policies and institutions in foreign and interior policies but does also emphasise the divergence which often prevails over these integrationist tendencies when looking at specific policy areas. Therefore, the dominant executive-control dimension of foreign and interior policies, which has already been identified in the previous chapters, also leaves its mark upon the preferences of EU actors. Consequently, the preferences of the Commission and the Council Secretariat are strongly related to the executive roles performed by both actors. Being part of the same ‘epistemic community’, subject to similar and shared learning exercises and in constant professional exchange with each other and member states’ governments, the preferences of both actors reveal important similarities (Richardson 1996b; Sebenius 1992).¹⁴⁸ These *executive preferences* can then be differentiated from the *control preferences* of Parliament, the Court of Justice and the Court of Auditors, without ignoring that in both subgroups each actor has again developed individual preferences which are closely linked to its respective capabilities.

¹⁴⁸ Officials from the Council Secretariat and the Commission confirmed in various interviews that they have a regular and permanent exchange. They also know each other personally. Officials from both institutions, however, confirmed that they hardly ever meet their counterparts in Parliament.

In sum, this chapter argues that the preferences of EU actors have to be understood against the background of the functional characteristics of macro political stabilisation policies and it is within this context that EU actors developed their individual orientations. While the shared preferences in favour of further communitarisation of both areas do indeed lead to some convergence, this trend is at the same time countered by a divergence of preferences between EU actors on the basis of their divergent capabilities brought about by the specific functional features of macro political stabilisation policies.

This chapter breaks down the analysis of preferences into three main categories. It firstly looks at the *policy orientations* of EU actors in Middle East and migration policies, thereby exploring how these actors have developed specific 'lenses' with the help of which they observe the two areas. It will be asked what kind of objectives they have in both areas, what kind of action they propose for pursuing these objectives and how these objectives are subject to change and adaptation. In a second step these orientations are then put in context with their wider *normative orientations* in foreign and interior policies and, in particular, the long term perspectives held by EU actors on these two areas. Therefore, the proposals of EU actors for institutional reform, as they were tabled during the 1996 and 2000 Intergovernmental Conferences as well as during the current Convention, are analysed. Finally, this chapter looks at the *internal structures* of each actor in foreign and interior policies in an attempt to detect how they have responded to the organisational requirements stemming from the centralisation of macro political stabilisation policies. The first part analyses the preferences of executive actors, starting with the Commission, followed by a study on the preferences of the Council Secretariat. Accordingly, the second part accounts for preferences of executive 'control actors', namely Parliament, the Court of Auditors in Middle East policies and, finally, the Court of Justice in migration policies.

Formation, adaptation and stabilisation of preferences

The considerable degree of variation in the preferences of EU actors towards foreign and interior policies, in general, and Middle East and migration policies, in particular, has been shaped by the different roles performed by EU actors in macro political stabilisation policies. These differences between executive actors, on the one hand, and actors, which are controlling executive policy making, on the other, should, however, not lead to the conclusion that within these two constituent groups orientations would be the same. As this chapter shows, the orientations of the Commission are different from those of the Council Secretariat, while Parliament, the Court of Justice and the Court of Auditors have also each developed unique orientations. Somewhat balancing this divergence, the functional dimension of macro political stabilisation has fostered convergence among EU actors regarding the shared long term objective of further centralisation of foreign and interior policies at the EU level. These similarities in orientations have, in particular, been visible in the early period after the Maastricht Treaty as well as in the proposals of EU actors for Treaty reforms.

When in 1993 the Maastricht Treaty entered into force, EU actors already had developed orientations regarding both areas as part of their integration into policy making in EC foreign and interior policies at the Community level as well as their (marginal) roles in the intergovernmental EPC and Trevi cooperation. The Maastricht Treaty introduced an element of change, since EU actors – as well as member states - had to adjust these old orientations to the new functional and institutional environment of macro political stabilisation policies. In this early formative period, preferences on Middle East and migration policies were shaped by shared perspectives of EU actors on the functional need to establish ‘comprehensive frameworks’ for both areas at the EU level. As a result of adaptation to the their quite different capabilities, however, divergent orientations soon counterbalanced this partial convergence and led to a stabilisation of different orientations, thus promoting the emergence of specific and individual identities. This accommodation process with the cross pillar institutions of foreign and interior policies is in

particular reflected in the reform of internal organisational structures in both areas. With these reforms each actor responded to its own role in policy making, thus providing further mechanisms for a stabilisation of orientations.

The Commission's orientations in Middle East and migration policies have shifted from an initially quite ambitious, political and unified perspective on both areas to a more technical and managerial approach. The Commission's orientations reveal a strong focus on its entrenched first pillar capabilities and those policies, which it regards as being largely consensual among member states. Notwithstanding this accommodation of the Commission with the cross pillar design of both areas, its proposals for Treaty reforms reveal a tension between its short and long term orientations. The Council Secretariat's preferences are a different matter and have to some extent be separated from those of other EU actors, since the Secretariat has not as autonomous a position in the policy making process as the other four actors. Its traditional function as an apolitical secretariat has, thus, characterised the Secretariat's orientations from the outset. Notwithstanding the persistence of these orientations, the politicisation of the Secretariat following the establishment of the offices of the Special Representative and the High Representative, has led to an emergence of more independent orientations that no longer can be defined as being, in a sense, the mere reflection of the joint will of all 15 member states.

Parliament's orientations reveal its high degree of autonomy from member states and from the implementation of policies by the executive, Commission and Secretariat alike. Consequently, the formulation of alternative policy agendas as well as fundamental criticism about the institutional features of cross pillar politics, has been the prime characteristic of Parliament's orientations, although a gradual decrease of opposition to the policy agenda of EU foreign and interior policies can be attested. Moreover, Parliament has in both areas developed a specific expertise of providing a platform for representing the interests of those affected by EU foreign and interior policies, namely third countries and third country nationals. The Court of Justice issued two important judgements in the area of migration policies in the years under consideration and these judgements bring to the fore orientations that

emphasise the comprehensive, functionally unified policy dimension of both areas. The Court of Auditors, finally, has been active in the area of foreign policies and scrutinised the administration in this area of EU funds by the Commission and member states. The orientations of the Court of Auditors do, as those of the other 'control actors', reflect a much more comprehensive perception of the two areas than is the case for the Commission and the Council Secretariat.

The Commission

The orientations of the Commission in Middle East and migration policy are linked to its executive powers. As a result of the x-structure of executive relations in these areas (see figure 4.1), the Commission's orientations reflect the shared perspective on these policies within the executive 'epistemic community' of member states, Commission and Council Secretariat (Haas 1992). The precise shape of these orientations, however, differ and has been the result of a dynamic process characterised by a formation, adaptation and (dynamic) stabilisation of orientations (Luhmann 1984). Thus, also the orientations of the Commission in both areas were subject to significant changes. In the formative period following the entry into force of the Maastricht Treaty, the orientations of the Commission in Middle East and migration policies were primarily based on a *functionally unified understanding* of what the concept of the single institutional framework entailed. Orientations revealed a quite ambitious and political approach based on the assumption that the single institutional framework would lead to comprehensive policies that stretch beyond the pillar confines and at the same time ensure a dominance of first pillar policies. This orientation, however, soon gave way to a more managerial and cautious approach. The Commission's orientations shifted to a more pragmatic understanding which recognised that the cross pillar institutional setting implied significant limitations to its own executive capabilities. In this adaptation period the Commission's orientations shifted to a more moderate focus on its entrenched first pillar powers, whereas in the second and third pillars emphasis was put on fostering its role as an 'associated member' within the Council dominated working structures of these two

pillars, thus acknowledging the lead taken in these institutional settings by member states. Notwithstanding this development, an uneasiness regarding the overall institutional design of EU foreign and interior policies has been expressed by the Commission in the various Treaty reforms. This reveals an underlying tension between the long term normative orientations, on the one hand, and policy orientations, on the other. In sum, in both areas the Commission has developed individual orientations that can best be described as a preliminary acceptance of the political primacy of the Council and member states combined with a cooperative, administrative approach regarding its own role in the policy making process rather than political assertion.

Coinciding with the entry into force of the Maastricht Treaty in November 1993, the Commission published, in September of that year, two communications in which it outlined its agenda for EU Middle East policies. The Commission advocated an ambitious political perspective for EU foreign policies in the region, while the suggested instruments were mainly directed towards the 'economic front', thus those areas in which the Commission possessed considerable capabilities and prior experience (Commission 1993b: 1). As part of this political assertion, the Commission claimed to set out the guidelines for a 'longer term approach' of Middle East policies (Commission 1993a: 1). It suggested to centre EU Middle East policies on the promotion of 'economic integration' in the region, thereby developing 'regional cooperation and institutions (for example water and energy management)' (Commission 1993a: 4). Against the background of the EU's own history, the Commission proposed a 'progressive institutionalisation' of the Middle East (Peres 1996: 104-111, d'Alancon 1994).¹⁴⁹ It considered the Regional Economic Development Working Group, which includes officials from Israel, Palestine, Jordan and Egypt and whose permanent secretariat is based in Amman and which was

¹⁴⁹ There are, of course, very different readings to European history, in general, and European integration, in particular. Among these, the perspective of the Commission is but one of many contending views. This thesis does not elaborate on this interesting debate on regional integration. However, a few of these intriguing accounts on European integration – old and new - should be mentioned on this occasion (Milward 1992; Caporaso 1998; Cram 1996; Lindberg and Scheingold 1971; Mazey 1996; Schmitter 1971).

initially directed by a Commission official, as the nucleus for such a creation of supranational working methods in the Middle East (Commission 1993a: 3; Peters 1996).¹⁵⁰ The focus on economic policies has been further emphasised by the Commission's proposal to establish a huge financial assistance programme to the nascent Palestinian Authority, consisting of € 500 million aid measures for the period 1994-98. With regard to the Union's relations with Israel, the Commission suggested to give priority to an upgrading of the 1975 Free Trade Agreement and to equip the Commission with a negotiating mandate that covers 'a wide range of sectors' (Commission 1993b: 5). This linkage between regional institutionalisation, trade policies and financial assistance also characterises the Commission's suggestions for a new design of Mediterranean policies, with which the EU should pursue its strategic interests in the region. Thus, a network of Association Agreements that links the EU with all non member states in the Mediterranean both on a political and an economic level, the establishment of a Euro-Mediterranean Free Trade Area by the year 2010, an assistance package of € 5.5 billion and support for regional integration are the main policies proposed by the Commission (Commission 1994b). In an attempt to foster its own central role in relations with the Palestinian Authority, the Commission stressed the need that the 'Commission's representative in the territories should take up his position shortly' (Commission 1993b: 3). Indeed, the Commission, for political reasons, considered the opening of this office as a key objective and engaged in month long negotiations with the Israeli authorities until the opening of a representative office of the Commission in East Jerusalem, with the main administrative task being to oversee the allocation and implementation of aid, was finally accepted.¹⁵¹

¹⁵⁰ In the early years of the peace process the Commission has regarded the multilateral track and its own impact on the Regional Economic Development Working Group as a key inroad for EU influence. Expectations on REDWG were high. Thus, the Commission was quite enthusiastic about the relaunch of REDWG at a multilateral Steering Group meeting in Moscow in February 2000 (European Union 2000). However, these expectations did not materialise and although REDWG formally exists until today it has not moved from institutionalisation to concrete joint action by Israel, Palestine, Jordan and Egypt (Agence Europe, No 6055, 2 September 1993: 5-6)

¹⁵¹ Agence Europe, No 6095, 28 October 1993: 7.

The political ambitions of the Commission were, however, soon challenged by both external as well as internal developments. While the political crisis of the Middle East peace process rendered the link between economic support and political influence less strong as has been assumed, the impact of cross pillar institutions within the EU foreign affairs system brought to the fore the limits which the Commission faced in defining the overall direction of EU policies (Monar 1998 and 2000). As a result of this learning process, the Commission adapted its orientations and developed a more cautious assessment of its own role in policy making. The Commission acknowledged that trade and assistance measures are not a replacement for diplomatic foreign policies, thus an institutional arena of EU politics in which member states continued to take the lead. The Commission, consequently, concluded that although the Union's economic involvement in the region 'had a very important political result' such as the political survival of the Palestinian Authority or the 'decisive [financial] support for modernisation' in the Arab world, it nevertheless 'seems to have failed to achieve its original goals' (Commission 1998b: 7). The vulnerability of its own ambitious agenda for Middle East policies from external developments also affected the Commission's orientations on Mediterranean policies when it argued that the EMP 'has increasingly faltered since it was based on the implicit assumption that the peace process would at least remain on track' (*ibid.*: 14). While the Commission mainly blamed external factors, such as Israeli closures as 'preventing the success' of its policies, the modification of orientations was also the result of an adaptation to EU internal developments (*ibid.*: 16). While somewhat defiantly arguing that economic policies were the main policy of the EU whereas only 'in parallel [...] the Union maintained its *supportive complementary* role' on the political level, the Commission's preferences in the area adapted to the recognition of an internal division of powers which foresaw political guidance of the Council and the pursuit of diplomatic activities by the Special Representative and, later, the High Representative (*ibid.*: 3; *emphasis added*). Thus, 'diplomatically and politically', the Union should – 'complementary [...] to the US' – be represented by the 'Ministerial level and through its Special Envoy' (*ibid.*: 22-23).

The adaptation of orientations was mitigated by the Commission's experiences within the executive system of EU foreign relations. On the one hand, this system guaranteed a permanent involvement of the Commission in policy making, for example in the working groups of the Council or the specialised Middle East working groups of the Special Representative.¹⁵² On the other hand, the Commission realised that the political dimension of foreign policies and the definition of overall objectives would not be its own task (Gomez 1998). This adaptation with its own cross pillar capabilities in foreign policies can be exemplified by the way in which the Commission was involved in the drafting of the Common Strategy on the Mediterranean region. Thus, the Common Strategy was drafted jointly by officials from the Council Secretariat and the Commission, the Commission taking the lead for those aspects related to the first pillar while the Secretariat was responsible for those devoted to the second pillar *and* the overall objectives.¹⁵³ The Commission thus had a seat at the table but had to pay the price of accepting political guidance by the Council. This adaptation has also affected the orientations of the Commission with regard to the EMP. Not forgetting to emphasise its own pivotal role within the institutional structures of the EMP, the Commission reluctantly consented with the political leadership of the Council in this cross pillar institutional setting. 'The Common Strategy of the European Union on the Mediterranean region was adopted to *guide* the policies and activities of the Union' (Commission 2000d: 5; *emphasis added*). This statement documents the adaptation of orientations to the functional and institutional features of macro political stabilisation policies. Whereas in the early period the Commission has viewed policies almost exclusively from the economic, first pillar perspective and has attempted to define a political agenda for EU Middle East policies, learning experiences within the cross pillar institutional setting of the double executive as well as an accommodation with the prerogatives of the member states and the Council

¹⁵² Interview 19, Advisor to Special Representative, Council Secretariat, Brussels, June 2000.

¹⁵³ While conducting the interviews for this thesis, several interviewees from the Commission and the Secretariat were in a permanent shuttle between the offices of both institutions in order to prepare the last bits of the draft Common Strategy.

Secretariat on both the wider cross pillar political dimension of EU foreign policies and the more narrow second pillar policies, led to an adaptation of orientations towards a more cautious stance which devises for the Commission a rather administrative role mainly on the economic dimension.¹⁵⁴

It is around this new understanding that the reforms of the internal organisational structures of the Commission must be understood. It was already in 1996 that the Commission started a major restructuring process of its internal organisation in foreign policies in an attempt to foster its capabilities in this area. The suggested reforms relate to several layers. First, 'the internal structures of the External Relations DG were reformed and adapted to comply with those of the second pillar, *inter alia* via the creation of a separate CFSP Directorate and a Conflict Prevention and Crisis Management Division' (European Parliament 2001f: 17). Second, in 1999 the Commission has merged the previously three foreign policy DGs into one foreign policy DG (Allen 1998). Third, it has set up a cross-DG unit, named EuropeAid, that has the task to improve the implementation of assistance measures, thus the Commission's main foreign policy instrument (Santiso 2002). Fourth, the Commission initiated a long term process of reforming the entire external service structures with the objective of establishing an 'integrated External Service' (Commission 2000c: 2). These new structures should guarantee that the Commission's organisational structures, which initially were set up to 'represent the Commission in trade negotiations and in some industrialised countries', respond better to the 'broad scope of EU external relations as well as the new profile and potential of CFSP' (Commission 2001a: 2-3). The reform of the external service, which focuses mainly on an improvement in the coordination of policies between the Brussels headquarter and the more than 120 Commission delegations in third countries, in particular regarding aid management, documents both the adaptation to the cross pillar institutional setting as well as a shift of orientation towards a stronger focus on its traditional first pillar capabilities. Thus, reform is defined as enabling 'the

¹⁵⁴ See further below on the preference of the Commission to include the office of the High Representative within the Commission.

Commission to contribute at all levels to the CFSP. It also enables it to tailor its actions under the First Pillar so as to be coherent with the EU's wider political objectives' which, however, are set by the European Council (Commission 2000c: 6). The reform of the external service includes, finally, a professionalisation of internal structures. The Commission plans to establish structures for career planning within the Commission's external service, regular alteration of staff between headquarter and delegations and the establishment of specialised training structures. While the reform proposals provide evidence for a stabilisation of orientations regarding its own role in EU foreign policies, they also indicate that the Commission concentrates on fostering its main capabilities in the first pillar rather than building up a political counterweight to the Council.

While it is true that on the dimension of executive policy making the Commission has adapted to the cross pillar institutional setting, it did not entirely refrain from proposing far reaching changes to the very structure of the Union's foreign relations. Leaving its day-to-day orientations largely unaffected, the Commission proposals during Treaty reforms reveal an underlying tension of these orientations with the normative orientations held on the long term design of EU foreign affairs. Thus, during the 1996 IGC the Commission fundamentally criticised the cross pillar setting.

The very fact that two different working methods - the Community approach and the intergovernmental approach - coexist in the same Treaty is a source of incoherence. Experience has confirmed the fears previously expressed on this subject. The single institutional framework which was supposed to ensure harmony between the various "pillars" of the Treaty has not functioned satisfactorily. The proper lessons have to be drawn (Commission 1995b: 2)

The reform proposal of the Commission did, however, not amount to a complete communitarisation of foreign policies. Rather than directly proposing institutional reforms, the Commission focused on the functional dimension of policies. It urged to tackle the 'disappointing' performance of the common foreign policy which was described as being 'inherent in the existence of separate "pillars"' (*ibid.*: 69). Accordingly, the Commission and member states should foster the linkages between

the pillars in an attempt to assure a better management of the two pillar architecture within the single institutional framework. By doing so, they should then concentrate on improving the effectiveness of policies. Thus, while emphasising the objective that 'the Union must be able to present a united front', the Commission did not propose major institutional changes, besides greater recourse to qualified majority voting and providing the Union with legal personality (Commission 1996). A similar reform perspective was then again put forward by the Commission in the 2000 IGC. It explicitly stated that all proposals work 'on the assumption that the pillar structure will be kept' (Commission 2000b: 4). It was only in the framework of the current Convention, that the Commission became more explicit about its general criticism of the pillar architecture of EU foreign policies and called for an abolition of the cross pillar institutional setting. Somewhat intricately, the Commission argued that in 'certain relatively new policy fields', such as foreign affairs, 'we need to create systems to agree and implement policy which reflect the effectiveness and legitimacy of the Community method' (Commission 2002a: 4). Regarding foreign policies, the Commission suggested a 'stepwise institutional change' that, ultimately would result in an exclusive usage of the Community method of decision making. The Commission proposed to introduce not only qualified majority voting in foreign policies but also to, gradually, provide the Commission with the sole right of initiative.¹⁵⁵ As a first step in that direction, the Commission supported the idea to merge the offices of the High Representative and the external relations Commissioner into the office of a 'Secretary of the European Union' and proposed to institutionally locate the Secretary within the Commission. For that purpose the foreign policy services of the Council Secretariat, the Commission and the delegations should merge into a 'single administration'. The Secretary should be appointed jointly by the Council and the President-designate of the Commission. The right of initiative would rest with the Secretary, shared with member states

¹⁵⁵ For Parliament's role, the Commission was less concerned and pleaded for the introduction of consultation only. It should be noted, however, that in the area of foreign policies also national parliaments are generally weaker than in other policy areas.

during the transitory period, and at the end of this period solely with the Secretary - after a vote of the Council with an enhanced qualified majority. Moreover, the Secretary would also be responsible for representing the Union abroad and implementing common decisions (Commission 2002a).

The formulation, adaptation and stabilisation of the Commission's orientations in interior policies reveal many parallels to the aforementioned developments in foreign affairs. Thus, a similar adaptation process from an initially ambitious and political agenda, which was based on a functionally unified approach to migration policies, was replaced by a more managerial, issue-oriented attitude. This adaptation has been triggered by an accommodation with the constraints posed by the cross pillar institutional setting (Myers 1995). Notwithstanding the stabilisation of these orientations, the Commission continues to uphold its long term normative orientations for a complete communitarisation of this area.

In the immediate aftermath of the Maastricht Treaty, the Commission's orientations were guided by its ambition to develop a functionally coherent model with the help of which migration policies could become embedded within 'a European area without internal borders' (Commission 1994a: 23). Elaborating on a quite assertive understanding of its role in policy making, the Commission deliberately looked 'beyond the existing work programme of the Union', set by the European Council (*ibid.*: foreword). And, indeed, its political ambitions were reflected in the objective of 'providing a general framework within which a European immigration and Asylum policy can be developed' (*ibid.*: 5). This, 'comprehensive approach' was only marginally affected by considerations about the impact which the cross pillar institutional setting might exert on policies (*ibid.*: foreword). Quite to the contrary, the framework has been based on 'the wisdom of a comprehensive multi-disciplinary approach', that combined three main policies which, if implemented, would have stretched across all three pillars (*ibid.*: 11). Thus, the Commission's approach consisted of reducing migration pressure through first and second pillar policies, controlling migration flows through first and third pillar measures and, finally, integration policies for legal immigrants through a combination of first and

third pillar policies. The Commission recognised that the realisation of this ‘combination of policies [...] requires the co-ordination of traditional areas of activity, such as social policy, aspects of common foreign and security policy and trade, co-operation and development instruments as well as migration and migration management policies’ (*ibid.*: 5). Nevertheless, the Commission was optimistic with regard to prospects of rapid implementation and argued that ‘the TEU brings all of these policies within a single institutional framework and therefore creates new possibilities for the development of the comprehensive approach which is now required’ (*ibid.*: 5). Possible obstacles were not addressed and hence the Commission was also confident that the pre Maastricht approach of ‘approximation rather than harmonisation’ could be overcome (*ibid.*: 9). Suggesting a far reaching transfer of first pillar methodologies and concepts to this new EU policy area, the Commission argued that the overall objective now would be to ‘harmonise immigration and asylum policies’ (*ibid.*: 20). In this early period after the entry into force of the Maastricht Treaty, the orientations of the Commission on migration policies showed little concern for the impact of the cross pillar institutional setting and were rather based on the assumption of a ‘Treaty *obligation* to co-operate within a single institutional structure’ (*ibid.*: 2; *emphasis added*).

The political ambition to set out a ‘comprehensive’ agenda for migration policies was, however, soon confronted with the complexities of policy making in the area.¹⁵⁶ In a process of adaptation to the cross pillar institutional setting of macro political stabilisation policies, the Commission adjusted its orientations and shifted to a more narrow focus on those parts of asylum and immigration policies which promised a realistic chance of being adopted at the Council level (den Boer and Wallace 2000: 508).¹⁵⁷ This adaptation is well documented in the way in which the Commission dealt with the application of ex-Article K.9 TEU, which provided for a

¹⁵⁶ Note that the Council issued an official statement on the Commission communication. This is a difference to the two 1991 proposals of the Commission on migration policies, which were not even discussed in the Council. This points to the argument that over time the Commission was gradually accepted within the previously intergovernmental club, Agence Europe, No 5972, 1 May 1993: 13.

¹⁵⁷ It was already with the Maastricht Treaty that the Commission announced that it will only make cautious use of its (shared) right of initiative in this area. Agence Europe, No 6018, 9 July 1993: 5.

transfer of parts of migration policies from the third to the first pillar. Whereas in 1994 the Commission regarded a transfer of migration policies matters quite positively and proposed to consider the application of Article K.9 'to asylum policies [...] in the light of experience', the Commission shifted subsequently to a more cautious approach (Commission 1994a: 6). Thus, when readdressing the question of a transfer, the Commission concluded that the 'article did not at present seem [...] to be the most appropriate instrument, not to say an impossible one' (Commission 1995a). In particular, the Commission referred to the complex decision making procedures in the Council with regard to an application of ex-Article K.9. 'The procedure laid down is cumbersome and requires the Member States' unanimous approval and ratification in accordance with their respective national constitutional provisions. In one Member State this means that a national referendum will inevitably be triggered if Article K.9 is invoked' (*ibid.*). This adaptation to the incremental decision making procedures of cross pillar politics as well as of the political dominance of member states in this area led the Commission to readjust its orientations in migration policies towards a managerial, issue-oriented approach. The Commission ultimately acknowledged that 'the JHA acquis [...] is different in nature from other parts of the Union's acquis' (Commission 1998a: 4). On the issue of policy making, the Commission stressed the need of 'interinstitutional cooperation', since in the area of migration policies 'more than in others it will therefore be necessary to continue a constructive dialogue between the Member States and the Commission' (*ibid.*: 3). It also qualified its own approach to making use of its right of initiative. Thus, the Commission 'will, of course, make use of its right of initiative, but in doing so it will set priorities which take account of the timetable fixed by the Treaty itself' rather than suggesting, as previously announced, a 'comprehensive' framework (*ibid.*: 6). No longer, finally, is harmonisation of migration policies described as the objective but rather the goal 'to develop more similar approaches and closer co-operation' of member states (*ibid.*: 6). The Commission, thus, became aware of the 'admittedly real difficulties of adjusting national approaches to these sensitive issues' (Commission 2001b: 5). Self restraint and increased awareness of the

constraints posed by the cross pillar institutional setting for autonomous action are the main characteristics of this adaptation period. Hence, 'the Commission regards the design and implementation' of migration policies as a 'joint effort with the Council' and will only make use of its 'existing know-how, before developing specific know-how in areas in which hitherto the Commission had no formal powers' (Commission 1998a: 10).

The stabilisation of these orientations can be exemplified by looking at the Commission's approach to policy making in the aftermath of the Amsterdam Treaty. The Commission no longer pursued an ambitious political agenda but rather had accommodated with a more managerial role within the dual executive. The political guidance of the Council for the policy agenda in migration policies was accepted and the Commission pointed out that that in policy making 'the starting point has to be the elements already endorsed by the European Council' (Commission 2000a: 4). The shift towards a more managerial and less political definition of its own role is well documented by the Commission's focus on the scoreboard. Thus, the Commission defined its own role in this process as one of 'implementing the necessary measures and meeting the deadlines' (Commission 2000e: 3). It refrained, for the time being, from developing a 'comprehensive' agenda for migration policies. Indeed, by prioritising the management of the scoreboard, it does 'not attempt any comprehensive coverage of the potentially vast area of legislation' as it was, for example, outlined in the 1994 communication on asylum and immigration (Commission 2000a: 6). The narrowing down of its executive activities into predefined – and together with member states consensually agreed – bits and pieces, as they are entailed in the scoreboard, has shifted the Commission's focus towards the mechanisms that would guarantee the proper functioning of the various initiatives contained therein.¹⁵⁸ This shift towards a greater emphasis on the short term perspective nurtured the Commission's demand that the scoreboard, at least,

¹⁵⁸ This is underlined by the importance the Commission attached to studying national interests prior to publishing the first scoreboard. In a tour to all national capitals the responsible Commissioner thus explored the possibilities and constraints and only then did the Commission publish its own approach.

'must be sufficiently detailed and structured that precise targets to be reached by the end of each calendar year are clearly identified and visible', thus reflecting the hope that proper technical management would trigger off political dynamics at the Council level (Commission 2000a: 5). Yet, actual experiences with the implementation of the scoreboard made way to disillusion.

It would be satisfying to report to the European Council that the "pillar switch" has led to a greater sense of urgency and flexibility than was the case before the Amsterdam Treaty came into force, particularly in the light of the clear deadlines set at the highest political level. Unfortunately, that is not yet the case (Commission 2001b: 6).

It should be mentioned that the Commission has not entirely abandoned its ambition to develop a 'comprehensive' approach to migration policies. However, it has adjusted these orientations to the constraints posed by the cross pillar institutional setting of macro political stabilisation policies. Thus, for all measures, which go beyond the initiatives enlisted in the scoreboard and which entail a combination of policies beyond the narrow legislative agenda of the scoreboard, the Commission came up with the concept of an 'open method of co-ordination' (Tallberg 2002; Hodson and Maher 2001). The Commission envisaged that the open method of coordination, as it was suggested for both asylum and immigration policies, would be managed by the Commission itself and, essentially, provide for the removal of certain (cross pillar) policies from legislation in order to establish, in the long run, non-legislative, administrative 'flanking measures and techniques for convergence' (Commission 2001c: 3; Commission 2001b). This method, which documents again the adaptation to more managerial orientations, should, by providing for administrative cooperation between the Commission and member states and regular exchange of information and reports, 'provide the necessary policy mix to achieve a gradual approach to the development of an EU policy, based [...] on the identification and development of common objectives to which it is agreed that a common European response is necessary' (Commission 2001a: 5).

The Commission's internal organisation in migration policies has changed fundamentally since the Maastricht Treaty and has gone hand in hand with the

overall centralisation process in this area. Thus, in 1992 the Commission established a nucleus administrative unit on Justice and Home Affairs that was located within the Commission President's office. This unit consisted of three officials only and was later slightly upgraded to a total staff number of five. Following the entry into force of the Amsterdam Treaty a DG for Justice and Home Affairs was established. Small staff numbers were, however, also in this new setting perceived by the Commission as a major hindrance for efficient action. Thus, the two units dealing with migration issues comprised a staff of ten officials with regard to free movement and borders, on the one hand, and 16 in the area of immigration and asylum, on the other. While the semi-communitarisation of migration policies, as provided for by the Amsterdam Treaty, was perceived as 'positive for us', the personnel situation was depicted as putting the Commission in 'an awkward position'.¹⁵⁹ The almost exclusive concentration of the Commission on ensuring progress in the implementation of the narrow, albeit extensive legislative horizon sketched out by the scoreboard corresponds with the small number of officials working within the Commission on this agenda.

Despite the current accommodation of the Commission with its managerial role in migration policies, an entire communitarisation of this area and, thus, the abolishment of the current semi-communitarised institutional setting, continues to be the long term preference of the Commission. Seen from that perspective, the Amsterdam Treaty reforms were only a first step away from the heavily criticised policy making processes under the Maastricht Treaty. During the 1996 IGC, the third pillar was described as being based on 'outdated methods and resources'. The Commission criticised in particular the 'ineffectiveness and the absence of democratic and judicial review' and argued 'that the best way of attaining all these objectives would be to transfer justice and home affairs to the Community framework' (Commission 1996). There were, thus, three main demands from the Commission. Since 'the unanimity requirement is probably the main reason why Title

¹⁵⁹ Interview 45, Deputy Head of Unit, Commission, Brussels, July 2000 and interview 25, Head of Unit, Commission, Brussels, June 2000.

VI has proved ineffective' the Commission proposed the introduction of qualified majority voting for all migration policy issue. Moreover, since legislation in this area 'directly affects individual rights' it also requires – in opposition to foreign policies which 'has to deal with fluid situations' – the transfer of jurisdiction to the Court of Justice. Finally, communitarisation is also deemed necessary because 'in complete contrast to foreign policy, where the same arrangements apply, the option of charging expenditure to the Community budget has not been exercised as it has proved impossible to secure unanimous agreement of the very principle of using the Community budget in this area' (Commission 1995b). During the 2000 IGC as well as in the current Convention, the Commission has been even more precise regarding its normative orientations. It proposes the introduction of an entirely communitarised institutional setting in this area, thus the sole right of initiative for the Commission, qualified majority voting in the Council on all decisions as well as across the board introduction of the codecision procedure (Commission 2000a; 2002a).

The Commission has undergone a noteworthy adaptation of its orientations in Middle East and migration policies. As part of this process the Commission had to adjust its political ambitions to the limitations posed by the cross pillar institutional setting upon its actual impact on policy making. It should, however, also be noted that the incorporation of the Commission into executive policy making across the pillars provides the Commission with the opportunity to develop skills and knowledge beyond the narrow confines of its main responsibilities. It is against this background, that the Commission's approach to develop specific 'labels' for EU policies can be understood. Thus, the Commission attempted to develop 'cultural frames' for both Middle East and migration policies in a similar way as it has happened in the framework of the Single Market Programme (Fligstein and Mara-Drita 1996; Fligstein and Stone Sweet 2002). If successful, the European dimension of particular policy area will be identified with these 'cultural frames' and *inter alia* foster the role of the Commission as an 'indispensable' actor within the institutional setting established for implementing these frames. Indeed, in both areas there exist

strongly institutionalised, executive biased structures, which are built around such 'cultural frames' and which are strongly promoted by the Commission. In foreign policies, for example, the Commission reveals a strong focus on the frame of 'Barcelona'. In that context, the debate about who could rightly claim 'ownership' on the EMP is an intriguing example for the Commission's approach to become associated with such institutionalised frameworks. While some argue that the Barcelona process has initially been designed by the Spanish and French governments, in an attempt to establish a counterweight to the effects from Eastern enlargement, Commission officials are strongly insisting that the origins of 'Barcelona' come from within its own ranks (Barbé 1998; Gomez 1998; Rhein 1999).¹⁶⁰ In a similar way, the Commission has associated itself with the concept of an 'area of freedom, security and justice'.

Council Secretariat

It is not apparent to analyse the preferences of the Council Secretariat as an autonomous variable. Given the traditional public invisibility of the Secretariat, 'it might be tempting to view the General Secretariat as nothing more than the notary of the Council'. However, 'this rather limited view would belie the reality of the situation' (Hayes-Renshaw and Wallace 1997: 102). Indeed, also in Middle East and migration policies, the orientations of the Secretariat cannot be simply derived from knowledge about the interests of member states (Christiansen 2002). This section emphasises two features which structure the Secretariat's orientations. First, it looks at those orientations which are derived from the 'traditional' role of being a professionalised, facilitating secretariat of the Council. Second, it discusses the increase of autonomy of orientations which accompanied the centralisation process of macro political stabilisation policies and the subsequent establishment of two new offices in the Secretariat in the area of foreign policies, namely the offices of the Special Representative and the High Representative.

¹⁶⁰ Interview 34, former Head of Unit, Commission, Brussels, July 2000.

The traditional public invisibility of the Council Secretariat has, at least in the area of foreign policies, given way to a particular visibility. Media coverage of the activities of the Special Representative for the Middle East peace process since 1996 and, after 1999, of the High Representative for the Common Foreign and Security Policy has intensified significantly.¹⁶¹ But it was also within the Secretariat itself, that the establishment of these two offices was perceived as a significant change. An official dealing with the CFSP compared the new General Secretary of the Council with his predecessor and argued that ‘Solana is something completely new. Trumpf was invisible’. What was perceived as new was not only the personalisation in the EU foreign affairs systems as a result of this institutional innovation as such, but also changes to the operating structures of the Secretariat in foreign policies. Thus, several officials from the Secretariat noted that there has been an increase of autonomy of the Secretariat. One official from the Special Representative’s staff concluded that she was ‘not sure that member states understood this consequence of their decision’ to establish these two offices.¹⁶² Overall, the internal perception was that, due to these changes, the ‘role of Secretariat is in flux’.¹⁶³

These new features must, however, be distinguished from the continuity regarding the way in which the Secretariat still deals with many of its traditional functions such as writing agenda notes, assisting the Presidency, suggesting compromise proposals, drafting Joint Decisions or cochairing working group meetings without attempting to acquire an autonomous role in the decision making process. These long established features guarantee a great degree of continuity and, consequently, foster the solidity of the linkage between the Secretariat and member states (Forster and Wallace 2000).

Nevertheless, institutional innovation has also led to the emergence of more autonomous orientations of the Secretariat in EU foreign policies. Yet, unlike the

¹⁶¹ Take, for example, the data base of the *Frankfurter Allgemeine Zeitung*. The High Representative is cited from 1 May 1999 until the end of 2002 in 642 articles. The Special Representative is referred to from 1996 until 2002 in 85 articles.

¹⁶² Interview 19, Advisor to Special Representative, Council Secretariat, Brussels, June 2000.

¹⁶³ Interview 14, Desk officer CFSP, Council Secretariat, Brussels, June 2000.

Commission, the Secretariat does not put in question the cross pillar design of the EU foreign affairs system but rather works on the assumption that it is the 'advantage' of the EU that the Commission is responsible for the first pillar and the Secretariat for the CFSP.¹⁶⁴ The pillar division is, thus, not perceived as an obstacle for 'coherent' policies but as a guarantor of the Secretariat's newly acquired capabilities. It is against this background that the Secretariat, on a normative dimension, does not seek entirely harmonised foreign policies. The High Representative could, therefore, argue 'that ours is a common foreign policy, not a single one' (Council Secretariat 2002a: 3).

This cautious approach is nurtured by sometimes painstaking experiences of both the Special Representative and the High Representative in developing jointly with the member states common positions. The Special Representative, for example, must take these practical difficulties into consideration although they might hamper the effectiveness of his mandate. In the words of one adviser, 'the main problem is: what messages he has to present. He cannot move without full support of member states, this reduces his speed'.¹⁶⁵ While there is, thus, criticism about the cumbersome procedures of the CFSP, this view is balanced by the interest of the Secretariat to maintain the two pillar design of foreign policies, which in turn allows the Special Representative and the High Representative to perform executive tasks independent from the Commission. This also explains why the Secretariat did not come up with proposals for overall Treaty changes in foreign policies. During the 2000 IGC, the Council Secretariat made suggestions for reforms but 'none of them requiring an amendment of the Treaties' (Council Secretariat 2002b: 2).

It is, however, not only with regard to Treaty provisions but also on the dimension of concrete policies, that the Secretariat puts less emphasis on institutional architecture than does the Commission. In Middle East policies this has, for example, supported the formation of quite divergent preferences of the Secretariat

¹⁶⁴ Interview 38, Desk officer CFSP, Council Secretariat, Brussels, July 2000. The interviewee was adding that the main actor within the Council, as far as Middle East policies were concerned, was the Special Representative.

¹⁶⁵ Interview 19, Advisor Special Representative, Council Secretariat, June 2000.

and the Commission about the priorities of action. While the Commission attempted to keep the EMP separated from current problems in the peace process hoping that the Palestinian-Israeli conflict would not lead to a blockage of the Barcelona structures, in which the Commission had invested considerable resources, the Secretariat was less concerned with such considerations. During the second EMP meeting of foreign ministers in Malta in 1997 the Special Envoy brokered a meeting between the Israeli Foreign Minister David Levy and PA chairman Yasser Arafat. This meeting was perceived by the Secretariat as a signal both for the increased diplomatic importance of the EU and as a step to overcome the 'artificial separation of Barcelona and the peace process', the Commission considered this event as an infringement upon its own institutional terrain and 'since then tries to keep the Special Envoy out of Euro-med'.¹⁶⁶ This 'protectionisation' by the Commission of the EMP has met harsh criticism by officials from the Secretariat and was regarded as being detrimental to the overall strategic objectives of the EU while serving the institutional interests of the Commission only (Peters 1998).¹⁶⁷ Since the Secretariat shows little interest either in sustaining a particular institutional frame of EU Middle East policies or in entrenching into Commission prerogatives in the first pillar, its orientations are mainly directed towards the diplomatic arena. Both the Special Representative and the High Representative regard their role as an open 'talking mandate' rather than as being embedded in a particular institutionalised setting.¹⁶⁸ The diplomatic initiatives of the Special Representative and the High Representative have affected the EU internal equilibrium in foreign policies. While both emphasised their close relationship with the member states and accepted the latter's prerogatives in the second pillar, a diplomatic assertion from within the Council Secretariat can also be observed. Thus, an official from the Secretariat pointed out that some 'member states do not push for a political role of the EU' in foreign policies. Yet, it is this political role which the Special Representative and the High Representative

¹⁶⁶ Interview 31, Advisor Special Representative, Council Secretariat, July 2000.

¹⁶⁷ Interview 31, Advisor Special Representative, Council Secretariat, July 2000.

¹⁶⁸ Interview 31, Advisor Special Representative, Council Secretariat, July 2000.

repeatedly claimed to represent.¹⁶⁹ Both the Special Representative and the High Representative have on several occasions referred to themselves as the people behind the single EU telephone extension Henry Kissinger always asked for: 'The EU now has a phone number' (Council Secretariat 1998). Even more than that, only one person picks up the phone and the EU now speaks with 'one voice' (Council Secretariat 2002a: 3).

The orientations of the Secretariat regarding its own role in international politics complemented this 'one voice' perspective. Thus, visible acts of diplomacy as well as formal and informal contacts with third parties are perceived by Secretariat officials as the key elements of EU Middle East policies pursued by the Special Representative or the High Representative. The acceptance by Palestinians, and surprisingly, by Israel and the US, of the Special Envoy to be actively involved in the 1997 Wye River Agreement was repeatedly cited as one of these diplomatic successes which documented the 'advantages of complementarity' of US and EU approaches to Middle East policies (Perthes 2002b: 52).¹⁷⁰ Similarly, the participation of the High Representative in the Mitchell Commission or the Middle East quartet could be cited as such examples of diplomatic assertion. Being represented with 'one voice' also allowed the Special Representative and the High Representative to develop personal relations with actors from the US and the Middle East. Officials from the Secretariat perceive this as an important value added of their own activities and contributing to the overall effectiveness of EU policies. In Middle East policies, they highlighted the intense contacts with the Palestinian Authority. Thus, an advisor to the Special Representative pointed out that – prior to the Al Aqsa intifada – 'every second week he [the Special Representative; SS] meets Arafat. Our asset is access to Arafat' and we 'get a lot of information from the PA'.¹⁷¹

Less visible than these meetings between Middle Eastern politicians and the Special Representative, but not necessarily less efficient, are the diplomatic initiatives

¹⁶⁹ Interview 19, Advisor Special Representative, Council Secretariat, June 2000.

¹⁷⁰ Interview 31, Advisor Special Representative, Council Secretariat, July 2000.

¹⁷¹ Interview 19, Advisor Special Representative, Council Secretariat, June 2000.

of the EU Special Advisor who is responsible for security relations with the Israeli army and the Palestinian security forces. Regular personal contacts between the Security Advisor, who has a professional army background, with his Israeli and Palestinian counterparts and mediation efforts, have paved the way for an 'informal EU involvement' on the security dimension of the conflict. This is noteworthy, since, in public statements by the Israeli government such an involvement of the EU is rejected (Economic Cooperation Foundation 2002: 22). The professional, issue oriented approach of the Special Advisor has convinced an initially quite sceptical Israeli army establishment of the usefulness of EU involvement. This approach has been contrasted with – in the Israeli perspective – less successful public shuttle diplomacy of the Special Representative.¹⁷² A vivid description of this secretive approach was given by the Special Advisor himself, when referring to his contribution to the implementation of a cease fire after a Palestinian suicide attack in Israel.

It was a process that we did on a daily basis. I went down to see the [Palestinian] security leaders in order to deal with particular security problems, then went back to Arafat every night with a list of problems, and then returned to the field with Arafat's endorsements/instructions. Was a very time-consuming effort' (*ibid.*: 2)

The establishment of the offices of the Special Advisor, the Special Representative and the High Representative has not only led to an adaptation of the orientations of the Secretariat but has also triggered organisational adjustment. Prior to this institutional change, Middle East policies were, on the Council level, exclusively dealt with by the Middle East and Maghreb-Mashrek working groups, in which officials from the Secretariat performed their 'traditional' administrative tasks (Regelsberger 1997). Parallel to these working groups, the Special Representative has set up two autonomous task forces on Middle East issues. These task forces, on water issues and refugees, are chaired by an official from the Special Representative's unit and

¹⁷² Interview 47, former Israeli army official, Berlin, November 2002. See also about the EU Special Advisor, a British national, the article 'Our man's lonely search for a Middle East ceasefire: MI6 agent uses skills honed in Belfast to woo Palestinians', Ewen MacAskill, Tuesday September 3, 2002, *The Guardian*.

cochaired by the Commission (Peters 2000). They have the objective to develop proposals for post conflict concepts on these two issues, but, in practice, serve the purpose of providing a 'think thank' for the Special Representative on Middle East policies at large. The bulk of the budget of these task forces is spent on expert briefings and consultants' reports.¹⁷³ According to officials from Directorate General E (CFSP), the Special Representative has been successful in shifting the agenda setting power within the Council away from the 'traditional' CFSP working groups into these task forces.¹⁷⁴ The considerable size of his unit has been jealously referred to by officials from other (CFSP) units.¹⁷⁵

In addition to this internal reorganisation of the Council Secretariat's structures, three other new institutional structures, on the bilateral level, are worth mentioning. Thus, the EU-Israel Forum in Tel Aviv, its first chairman being an advisor to the former Prime Minister Netanjahu, has the task to provide information about the EU in Israel and to initiate debates about bilateral relations.¹⁷⁶ Largely unrecognised in Europe, this debate has gained momentum in recent years and led to intense discussions in the Israeli media, academia and politics – with the active participation of the EU-Israel Forum - about the future relationship between Israel and the EU, *inter alia* discussing the issue of a possible membership (Schael 2002).¹⁷⁷

¹⁷³ Interview 31, Advisor Special Representative, Council Secretariat, July 2000 and Interview 19, Advisor Special Representative, Council Secretariat, June 2000. The work of the task forces is covered from the CFSP budget. It is a small budget of approximately € 60,000 which is mainly spent on reports.

¹⁷⁴ Interview 38, Desk officer CFSP, Council Secretariat, July 2000.

¹⁷⁵ Interview 14, Desk officer CFSP, Council Secretariat, June 2000.

¹⁷⁶ The non acceptance of the EU as a 'player' in Middle East politics by the Israeli government is often referred to as a major hindrance for a greater role of the EU in the peace process. Yet, the story of the EU Special Advisor seems to tell another story. While it is true that the current Israeli government has been very critical of the EU, reflected in Prime Minister Sharon's dismissal of the usefulness of the Quartet, previous governments have been more open towards EU involvement. Moreover, even in the current government alternative voices can be heard. Thus, the former Israeli foreign minister Netanjahu has surprised the EU by discussing with Italian officials a possible EU membership of Israel. In a briefing in the German foreign ministry the author of this thesis has been asked about his opinion on this issue and what 'the Israelis have in mind with the Italians'. Largely unobserved from European officials, a lively debate has emerged in the last two years in Israel discussing the pros and cons of a closer alliance with the EU, even debating pros and cons of membership. This debate does not fit into the simple picture of Israeli opposition to the EU (Tovias 2003). For more on this debate see also Friedrich-Ebert-Stiftung 2002a; 2002b and 2003.

¹⁷⁷ Already in 1993 the Israeli Foreign Minister Peres suggested an associate membership of Israel in the EU, Agence Europe, no 6116.

Second, the EU Special Advisor directs the aforementioned European-Palestinian Security Committee. Lastly, four European-Israeli working groups have been established by the Special Representative which address the economic needs of the Palestinian population in the Occupied Territories. They deal with passage of goods and people, fiscal issues, labour issues and the long term economic development of Palestine. These working groups meet in Israel and bring together officials from the Special Representative's staff, from member states' embassies, the Commission delegation and officials from the respective Israeli ministries.

In migration policies the capabilities of the Council Secretariat are more limited than in foreign affairs. Its tasks are mainly based on the traditional function of being the Council's bureaucracy. These capabilities also shape the orientations of the Secretariat in migration policies (den Boer and Wallace 2000: 504). Therefore, political assertion is not sought by the staff of DG H, the SIS unit and the legal service, which comprise together approximately 15 officials. They describe their role as being 'a service provider for Council meetings', whereas on the political dimension, 'there is no Secretariat agenda'.¹⁷⁸ Assessments of their own impact on migration policies is modest. Thus, an official concluded that 'an influence is there, but it is not enormous and works mostly through [assisting] Presidencies'.¹⁷⁹

These cautious political orientations do, however, not impede upon the development of specific norm orientations on migration policies, which are not necessarily consensual with all member states. Thus, the Secretariat has quickly adapted to the semi-communitarised institutional setting of migration policies. An interesting institutional explanation for this adaptation was offered by a Council official who argued that when compared with the Commission 'the Council Legal Service is even more progressive [on migration issues]. We can do that since we not need to be so careful'.¹⁸⁰ Thus, when discussing new approaches to migration policies following the Amsterdam Summit of 1997, it was the Secretariat that has 'told

¹⁷⁸ Interview 26, Head of Unit, Legal Service, Council Secretariat, June 2000.

¹⁷⁹ Interview 44, Head of Unit, Council Secretariat, July 2000.

¹⁸⁰ Interview 26, Head of Unit, Legal Service, Council Secretariat, June 2000.

member states that they should not continue pre Amsterdam Conventions' ratification. But the Commission did not dare saying that'.¹⁸¹ Somewhat transcending the role of a mere neutral service provider is, therefore, the self set objective of the Secretariat to explain member states what kind of consequences the shift of migration policies to the first pillar had. As one official pointed out, 'member states are slow in understanding EC competence' in migration policies.¹⁸² While being convinced that 'the Community method is in the end the only way to get somewhere' a pragmatic and patient strategy was preferred over a more active one. Since the path of integration has already been entered, there was no perception of a particular hurry. It was rather suggested to slowly 'let the Community law develop'. On this path of integration the role of the Secretariat would then be one of a scout or a sign post. 'We make member states accustomed with that', an official concluded.¹⁸³

There are marked differences with regard to the orientations of the Council Secretariat when the two areas of migration and Middle East policies are compared. In the former area, the Secretariat continues mainly to perform the classical, administrative function of a bureaucracy. In contrast, the latter is characterised not only by the emergence of new institutional structures but, in the wake of these, a change of preferences towards a more political and autonomous understanding. Note, however, that this change of preferences is stronger for those officials directly attached to the offices of the Special Representative or the High Representative than for those working on foreign policies in DG E where much of the traditional close working relationship with the member states, in general, and the Presidency, in particular, continues to shape preferences. The Secretariat has to shift between these two kinds of orientations. While in both areas the dominant role of the Council and member states is generally accepted – this also shields the Secretariat from executive competition by the Commission – the adaptation of orientations to new institutions, as far as foreign policies are concerned, resulted in the emergence of new kinds of

¹⁸¹ Interview 26, Head of Unit, Legal Service, Council Secretariat, June 2000.

¹⁸² Interview 44, Head of Unit, Council Secretariat, July 2000.

¹⁸³ Interview 26, Head of Unit, Legal Service, Council Secretariat, June 2000.

orientations which are based on a more active understanding than previously known about its role in the policy making process.

Parliament

The orientations of Parliament in Middle East and migration policies are shaped by its rather weak position *vis-à-vis* the EU executive within the cross pillar institutional setting of macro political stabilisation policies. As a result of its marginal role, Parliament has focused on voicing harsh criticism about the substance of EU policies in both areas and, consequently, on developing alternative policy agendas. Since this critical approach is related to both Council and Commission it has fostered the dominant executive-control divide in EU foreign and interior policies. The focus on alternative agendas can be observed on three dimensions. First, by laying emphasis on the issues of democracy and human rights, Parliament combined its alternative policy agenda with an underlying normative frame.¹⁸⁴ Second, Parliament gave a particular voice to the way in which it perceived the interests and demands of those affected by EU policies, be it the southern Mediterranean countries in the EMP, in general, and Israel and Palestine, in particular, with regard to foreign policies, be it migrants and third country nationals in the area of migration policies. Third, Parliament did not stop at criticising the content of policies but proposed an alternative institutional setting and – also in its day-to-day operations – demands a complete abolition of the pillar structure in both areas. Parliament legitimised this demand arguing that the need for efficiency, coherence and strategic outlook of EU policies requires such an overall communitarisation.

The scepticism of Parliament in the area of Middle East policies relates to the perceived lack of political results in the framework of both the EMP and the EU's efforts in the Palestinian-Israeli conflict. Moreover, the strong focus of official EU

¹⁸⁴ Parliament started with the entry into force of the Maastricht Treaty to publish annual human rights' reports, Agence Europe, No 5936, 10 March 1993: 5. When looking at all reports dealt with in the foreign affairs committee another interesting observation comes to the fore. Thus, Parliament has after the Maastricht Treaty laid greater emphasis on scrutiny of policy making in the first pillar than on the second pillar. Most reports adopted in this committee have thus dealt with either first pillar or cross pillar issues, such as Association Agreements, accession treaties or financial assistance rather than mere second pillar areas.

policies on trade and assistance measures meets certain reservations and Parliament emphasises the shortcomings of this narrow economic focus of policies.¹⁸⁵ Against this background, Parliament criticises the results of the EMP and argues that ‘the progress achieved to date and described by the Commission [...] is in actual fact much less obvious than the Commission appears to believe’ (European Parliament 2001c: 16). Parliament links this critique regarding the substance of policies with an analysis of what it considers to be weak instruments of EU foreign politics which are then, in turn, leading to a lack of political strategy. Accordingly, it argues that shortcomings are the result of ‘Member States’ inability to give practical effect to the common foreign and security policy’. This inability then translates into the shape of actual policies. For example, the Common Strategy on the Mediterranean region is criticised because it only ‘reproduces’ the Barcelona Declaration while ‘nothing is said about how the measures and instruments to be set in motion under the new strategy will be financed [and] strangely, the long list of specific initiatives to be launched under the Common Strategy is followed merely by a scanty set of provisions relating to instruments and institutions’ (European Parliament 2001b). These inefficiencies are, according to Parliament, the main factor which accounts for the secondary role which the EU plays in international politics. This becomes in particular obvious in the Middle East where ‘the European Union is not involved in the discussions on the political future of the region’ while all it ‘has done is to inject money without having any clear strategy and without drawing adequate benefits therefrom, such as the recognition of the fact that it has a special role to play in this area’ (European Parliament 1999a).

As a result of this scepticism regarding the substance of current EU policies in the Middle East and the wider Mediterranean area, Parliament has focused on developing alternative policy agendas which are not dealt with as extensively by other EU actors. A main focus of this alternative agenda has been the area of democracy

¹⁸⁵ Also in the academic discourse there is some scepticism whether the EMP has embarked on the right agenda to develop, through economic and security policies, a stable Middle East. See on this debate, among others, Al-Khoury 2000; Bertelsmann Group 1999 and 2000; Erzan 1999; Halbach 1995; Kienle 1998; Steinberg 1996 and Vasconcelos and Joffé 2000.

promotion and human rights (Gillespie and Youngs 2002; Youngs 2002). In these areas Parliament was able to make use of its capabilities in the budgetary process and has, for example, succeeded in 1994 in including the 'European Initiative for Democracy and Human Rights' into the EU budget out of which, for example, MEDA Democracy projects had been funded (Stetter 2003).¹⁸⁶ Less successful was the attempt to establish, within the Commission, a European Centre for Democracy and Human Rights, which would bundle all human rights' related activities, previously spread over 19 different units and DGs (European Parliament 1997e). While Parliament introduced already in 1995 a specific budget heading referring to this centre, it has subsequently not been set up. The focus on democracy and human rights is furthermore reflected in Parliament's follow up activities to the implementation of the Association Agreements with Israel and Palestine. In a resolution of April 2002 Parliament called for sanctions against Israel and a suspension of the EU-Israel Association Agreement due to Israeli military action in Palestine and the human rights situation there (European Parliament 2002a). Although this resolution was not binding and the call for sanctions had later been rejected by the Council and, albeit with some hesitation, by the Commission, Parliament's decision was widely covered both in the Arab world and in Israel. In the former case the decision was praised as providing a counter agenda to US policies, in the case of the latter the decision was largely rejected and portrayed as being a proof for traditionally anti Israeli or even anti Semitic policies of the Europeans. Indeed, in many reports the resolution was presented as the new policy of the EU, thus confirming the observation made by one parliamentarian that often 'abroad they do not differentiate between Parliament, the Commission and member states'.¹⁸⁷

The focus on alternative policy agendas has rendered Parliament also more receptive to those demands from third countries which are not covered by official EU policies. Thus, Parliament combines its criticism of the EMP with an emphasis on those items which are regarded by Southern Mediterranean countries to be

¹⁸⁶ MEDA Democracy has now been integrated into the MEDA budget line.

¹⁸⁷ Interview 40, MEP, European Parliament, July 2000.

neglected within the Barcelona framework. This is particularly true for Parliament's approach to the economic provisions on free trade, which apply mainly to industrial products, and which are perceived as being biased in favour of the EU. Indeed, there is widespread critique by Southern Mediterranean governments of the exclusion of agricultural products from free trade arrangements, thus, one of the few areas in which these countries could provide considerable exports to the EU, is serving European interests only. This critique has been taken up by Parliament which demands 'the rapid liberalization of trade in agricultural products' (European Parliament 1997b). Reflecting an even greater opposition to the official priorities of the EU executive in the Barcelona process, Parliament called for a more liberal approach to migratory movements, blatantly termed 'organised free movement of persons' (European Parliament 2001b; Hakura 1998). Regarding relations with Palestine, Parliament argued following the entry into force of the 1997 Interim Association Agreement that there is 'still a need to extend the scope of trade concessions for agricultural products of which the Palestinians have special requirements' (European Parliament 1996e). Also in other areas Parliament has provided a platform for policy demands from Middle Eastern countries. Thus, calls for Palestinian statehood have become since the mid 1990s a regular feature of Parliament's Middle East policies, whereas the Council, much more cautiously, adopted this position at the Berlin European Council of May 1999 only (European Parliament 1996a; Peters 2000). Largely unobserved from EU media, but widely covered in Israel, an initiative of some MEPs has brought up the issue of possible Israeli membership in the EU.¹⁸⁸ A petition in support of this issue has been signed by more than 50 MEPs, thus around 10 per cent of all member of Parliament as well as several members of the Israeli Knesset (Tovias 2003).

It was not only with regard to policies that Parliament has been a forum for alternative agendas. Also on the issue of the institutional design of EU foreign

¹⁸⁸ Those who stop short of proposing membership could, nevertheless envision a closer relationship between Israel and the EU to be built, for example, on the lines of the relations between the EU and the European Economic Area or the EU and Turkey (Inbar 1998; Sadeh 1998). For EU-Israeli Relations see Matern 1997.

policies Parliament has maintained a sceptical stance. It views the institutional setting in foreign policies as being largely insufficient and argues that EU decision making is blocked by 'the intergovernmental nature of its foreign policy' which is why 'the Union has not yet succeeded in playing a credible role in the Middle East' (European Parliament 1996e). Indeed, Parliament argues that the 'intergovernmental method [...] threatens to paralyse totally the operations of the CFSP' (European Parliament 1997d). These efficiency related arguments are then linked with a normative argument, namely that the main problems faced by EU foreign politics is the democratic deficit caused by the intergovernmental setting. Against this background, Parliament calls for the introduction of 'Community procedures' in all areas of foreign policies (European Parliament 2001d). This demand comprises the introduction of qualified majority voting in the Council, exclusive use of the EC budget and the consultation of Parliament on all issues (European Parliament 1997d). With regard to the Commission, Parliament suggested the creation of a 'common diplomacy', *inter alia* supported by the establishment of a College of European Diplomacy and the transformation of Commission Delegations into 'Community delegations' (European Parliament 2001d). Parliament is explicit about its main objective in this institutional reform and, therefore, pledges for 'at least in the long term [...] overcoming the three pillar structure' (European Parliament 2002d). With regard to more immediate reforms, as they were proposed during the 2000 IGC, Parliament came up with separate proposals for the first and second pillars, yet expressed its hope that these reforms would 'progressively diminish' the pillar divide. Thus, in the area of external economic relations, in which Parliament's capabilities are much less developed than in developmental assistance, the introduction of the codecision procedure as well as an involvement of Parliament during trade negotiations between the Commission and third countries is demanded.¹⁸⁹ As a major reform for the entire area of foreign affairs, Parliament suggested that the Commission be delegated implementing powers for all non military decisions, while

¹⁸⁹ See chapter 4.

the office of the High Representative should be fully integrated into the Commission, rendering the appointment procedure the same as the one for the election of the Commission President (European Parliament 2000c). These reforms were meant to pave the way for even further integration, ultimately resulting in the ‘integration of all “pillars” into the Community structure’ and the creation of a ‘European Foreign Office’ (European Parliament 2000b).

Turning, finally, to the internal organisation of Parliament in Middle East policies. Two main features characterise Parliament’s organisational responses. First, Parliament has developed organisational structures with a strong focus on interparliamentary cooperation both in the EMP as well as in relations with Israel and Palestine. The lack of inclusion in the set up of the Barcelona conference was heavily criticised and Parliament demanded from the Commission and the member states to provide for a stronger involvement of Parliament into these frameworks (European Parliament 1999d). While Parliament was initially quite optimistic that the establishment of the Euro-Mediterranean Parliamentary Forum, which held four meetings - 1998, 1999 and 2001 in Brussels and 2002 in Bari - would provide a counter-weight to the executive dominance in the EMP, these hopes did ultimately not materialise (Stavridis 2001). Consequently, the agenda of these meeting has shifted from a general focus on the entire Barcelona process to a more narrow issue oriented approach in which the EP and the southern Mediterranean Parliaments mainly focus on issues related to the aforementioned alternative policy agenda.

Regarding its internal organisation in Middle East policies, two parallel structures have been established, namely parliamentary delegations, on the one hand, and the so-called Inter Groups, on the other. Delegations deal with the official relations between Parliament and parliaments in third countries. Only for ‘important countries’ – and Israel and Palestine are considered by Parliament as such – is there a single delegation, whereas most delegations cover wider regions.¹⁹⁰ Inter Groups, on the other hand, are lobby groups in favour of a particular issue or country and are set

¹⁹⁰ Interview 16, MEP, Vice-President, European Parliament, June 2000.

up by parliamentarians out of their own initiative. Doubling the already established relationship of the delegations with Israel and Palestine, the Israel Inter Group was founded in 1992. This step was described as being a response to the existence of the Inter Group for Peace, which was set up in the 1980s and which supported the cause of the Kurdish People Party (PKK) and the PLO. While the delegations, except for yearly visits with their counter parts from the Knesset or the Palestinian Legislative Council, 'do not work very strongly', the Inter Groups do take a 'more proactive approach'.¹⁹¹ They reveal strong orientations on 'defending' the interests of Israel, on the one hand, or Palestine, on the other. Hardly surprising, therefore, that the establishment of the Israel Inter Group was based on a joint initiative of several MEPs and the former ambassador of Israel to the EU. Occasionally, the quite divergent orientations between these two Inter Groups get carried into the plenary. An initiative of the Inter Group for Peace to agree on a parliamentary resolution condemning Israeli policies on the rules of origin provisions for Israeli products originating from settlements in Palestine has failed to gain the necessary support 'due to pressure from the Israel lobby' in the Israel Inter Group.¹⁹² Membership numbers in both Inter Groups are similar. The Inter Group for Peace comprises some 60 members, whereas the Israel Inter Group consists of around 80 MEPs.¹⁹³ The activities of these Inter Groups did, however, not only relate to external relations. Thus, the head of the Israel Inter Group referred to a successful motion for a resolution on establishing a European day for remembrance of the Holocaust, as the most noteworthy initiative from the Inter Group. Another member of the Israel Inter Group stressed the usefulness of Inter Groups for information gathering. He referred in particular to several expert briefings prior to the conclusion of the Science and Technology agreement between Israel and the EU. Being a member of the Committee on Industry, External Trade, Research and Energy, he acknowledged the quality of three meetings organised by the Inter Group in which MEPs were briefed

¹⁹¹ Interview 15, MEP, Head of Inter Group, European Parliament, June 2000.

¹⁹² Interview 15, MEP, Head of Inter Group, European Parliament, June 2000.

¹⁹³ Interview 15, MEP, Head of Inter Group, European Parliament, June 2000 and Interview 33, MEP, Head of Inter Group, European Parliament, July 2000.

on these agreements. He pointed out that, when compared to the information received in the Inter Group meetings, the 'Commission briefing was weaker'.¹⁹⁴

Turning to migration policies, Parliament's orientations show remarkable similarities with those outlined on foreign policies. The lack of direct influence over executive policy making has led Parliament to adopt a general scepticism with regard to the overall policy agenda in migration policies. Notwithstanding this remark, a certain shift in Parliament's orientations towards less fundamental opposition to the *policy* agenda of EU migration policies following the Amsterdam Treaty and a greater focus of its critique on the institutional structures in this area points to the integrative dynamics of the semi-communitarised institutional framework as well as to an anticipation of a possible introduction of the codecision procedure by May 2004.

Following the establishment of the third pillar, Parliament initially adopted a very sceptical stance towards the executive, member states and Commission alike (Monar 1995). The orientations of Parliament regarding policy making in migration policies related to two main dimensions. First, it opposed the policy agenda pursued in this area by criticising the priorities set which were regarded as one sidedly serving the security interests of national governments.¹⁹⁵ Arguing that 'Member States are far more interested in police cooperation and the exchange of information than in citizens' rights' has led, according to Parliament, to a biased design of policies (European Parliament 1997c). Member states, the prime decision-makers in the third pillar, are thus portrayed as 'overemphasizing [...] migration-limiting policies and the maintenance of order' (European Parliament 1997a). For example, the rights of asylum seekers and refugees are scrutinised and Parliament blames the Council of having adopted 'a restrictive interpretation' of rights (European Parliament 1998). This general critique about the content of policies was strongly interwoven with an opposition to the very decision making mechanisms in migration policies. Parliament,

¹⁹⁴ Interview 37, MEP, European Parliament, July 2000.

¹⁹⁵ This links up to the description of EU migration policies as serving the creation of a 'fortress Europe'. This notion has been in particular popular in the 1990s when positive integration was seen as being primarily focused on restrictive policies rather than a so-called 'comprehensive' approach to migration and integration policies (Geddes 2000; Huysmans 2000; Peers 1998; Morris 1997a)

thus, not only rejects that 'Member States are curtailing the right to asylum' but 'has been critical of the way in which decisions on asylum and immigration are taken behind closed doors'. Decisions are described by the chairwoman of the responsible committee as lacking 'any form of democratic accountability' due to the lack of parliamentary and judicial control mechanisms and termed as 'pseudo-legislation [being] unacceptable as forms of Union legislation' (European Parliament 1996c).

Following the entry into force of the Amsterdam Treaty, Parliament somewhat modified its stance and the content of legislative proposals from member states and the Commission became subject to a more constructive criticism. While parliamentarians still warned that some measures 'do not appear to strike the right balance between security and integration' it was acknowledged that Council and Commission have become more receptive to proposals from Parliament (European Parliament 2000a). While criticism regarding decision making structures continued to figure prominently, Parliament often put this critique in the form of a warning not to repeat the 'mistakes' of the pre Amsterdam period. Parliament could thus attack 'the illegal behaviour of the Council in the past' but emphasise that due to a more open attitude of Council and Commission it would now be 'prepared to pass over this' (European Parliament 1999c).

Notwithstanding these changes in the interinstitutional climate, Parliament still regarded the detection of those decision making modes, which reflect a 'thinking and working typically associated with intergovernmental cooperation', as one of its main responsibilities (European Parliament 2000e). While Parliament still, occasionally, referred to the perceived democratic deficit in EU migration policies, the focus of institutional critique shifted to more subtle observations. First, Parliament began to detect the implementation problems of EU migration policies rather than those directly related to decision taking. It pointed out that migration policies differ from other areas of the first pillar to the extent that the Council attempts as a rule to circumvent the implementing rules of Article 202. 'No convincing reason has been given by the Council for departing from this principle and reserving the most important implementing powers for itself' (European

Parliament 2000g). Second, Parliament criticised the ‘inchoate way of legislating’ in migration policies, the reasons for which were related to the piecemeal legislating strategy prescribed by the scoreboard approach (European Parliament 2002b). The reasons behind such an approach of ‘artificially dividing’ interrelated aspects of migration policies has, finally, been seen as being inherent in the institutional provisions of the Amsterdam Treaty institutional rules (European Parliament 2000h). It is against this background, that Parliament has been more receptive to legislative proposals from the Commission than to several proposals tabled by member states although it did not object the content of these proposals.

Regarding its own policy agenda, Parliament has focused on two main aspects, these being an emphasis on the cross pillar characteristics of migration policies, on the one hand, and – similar to the way in which Parliament provides a forum for views from third countries in foreign affairs – a representation of the interests of third country nationals *vis-à-vis* national and European executives. Prior to the Amsterdam Treaty, Parliament has stressed the cross pillar dimension of migration policies by linking third pillar policies with the free movement of people as it is provided for by the EC Treaty.¹⁹⁶ Arguing that ex-Article 7a would transfer a direct legal obligation on member states to abolish all internal border controls by the deadline of 1 January 1993, Parliament sought to speed up the parallel development of rules in migration policies. While noting ‘that measures required for the functioning of the internal market, comprising an area without internal frontiers, may not under any circumstances be dependent on a measure which has to be taken on the basis of Title VI’, it was clear to Parliament that prior to the attainment of this objective member states would insist on the establishment of flanking measures in the area of migration policies, such as external border controls, visa policies or

¹⁹⁶ On this issue has emerged a years long argument between Parliament and the Commission. Parliament accused the Commission of not taking action in this area. It even threatened to go to the Court of Justice. Ultimately, the Commission presented the three Directives on this issue. Agence Europe, No 6772, 17 July 1996: 11-12. The Commission was occasionally threatening member states to take legal action but refrained from doing so, Agence Europe No 5991, 2 June 1993: 5. The notion of most member states that there was no direct effect in free movement provisions of the TEC was supported by the Court of Justice in the *Wijzenbeek* judgement, Agence Europe, No 7556, 22 September 1999: 10.

asylum and refugee issues (European Parliament 1996b). Noting, however, that member states and the Commission were not willing to implement these internal border provisions without the establishment of prior legal measures on migratory issues, and recognising that there was no legal support from the Court of Justice on Parliament's interpretation of a direct effect of ex-Article 7a, its policy proposals consequently focused on demanding a 'comprehensive' and 'holistic' approach to migration policies (European Parliament 2000h and 2002c). Challenging the scoreboard approach of Commission and Council, Parliament suggested 'to seek overall solutions regarding immigration and asylum, thus avoiding piecemeal measures' (European Parliament 2000g). Such a 'comprehensive' setting would not only include cross pillar linkages with both first and second pillar foreign policies but also cover social or employment issues.¹⁹⁷ As far as migration policies in the narrower sense were concerned, Parliament expected the Commission and the Council to combine 'a future consolidated proposal, covering all the arrangements applying to the right of asylum, temporary protection, and subsidiary protection' into one single legal instrument laying down the rules of an EU migration policy regime (European Parliament 2000f).

Perceiving a shortcoming of executive policy making in migration policies regarding the rights' dimension of this area, Parliament has from the outset laid particular emphasis on providing a platform for the perspective and interests of migrants. It warned against creating 'new forms of discrimination between citizens of the Union [...] against citizens of third countries' by reminding of the personal situation of many migrants (European Parliament 1997a). Asylum seekers, for example, are subject to a 'shaky legal status' which renders their daily life very difficult (European Parliament 1996c). Authorities should also be more aware that for individual asylum seekers, 'the decision in question can be of great importance [and] can make the difference between life and death', and, therefore, to do everything to avoid that they 'fall victim to a game of ping-pong contemptuous of

¹⁹⁷ Interview 29, MEP, European Parliament, June 2000.

their humanity' (European Parliament 1997f and 1999b). Authorities should recognise that asylum seekers are 'invariably desperate people who have taken many risks in order to find safety' and that the European society should be prepared to ensure their 'integration into social and economic life' rather than keeping them separate from society (European Parliament 2001e and 1998).

As already mentioned, Parliament has been highly critical of the institutional setting of migration policies, not least because of its own marginal role with regard to policy making.¹⁹⁸ From the establishment of the third pillar onwards, Parliament has, therefore, called for steps helpful in 'attaining our ultimate objective, i.e. the "communitarisation" of the third pillar' (European Parliament 1996d). During the 1996 IGC, Parliament demanded that migration policies 'should no longer be artificially distinguished from closely-related policies within the full Community domain' and that, consequently, they 'must be progressively brought within the Community domain'.¹⁹⁹ This demand comprised the strengthening of rights of Parliament, the Court of Auditors and the Court of Justice as well as overcoming the unanimity requirement in the Council (European Parliament 1995). While noting that the Amsterdam Treaty has provided for some improvements, Parliament's main demands have not been subject to change. During the 2000 IGC it again called for steps to ensure that the institutional framework of migration policies 'be substantially simplified'. Its proposals included full jurisdiction of the Court of Justice 'by removing the limitations and restriction in force', abolishing the time limit on both parliamentary opinions and amendments in the framework of the codecision procedure, extending the scope of the (first pillar) Schengen provisions to all member states while renegotiating their current exemptions and, last but certainly not least, introduction of the codecision procedure as well as qualified majority voting in the Council for all legal measures to be taken in migration policies (European

¹⁹⁸ As one interviewee noted, the only 'influence we have' is the budget, where, for example, Parliament claims ownership for budget lines such as the ERF-budget or budget line B7-677 on support measures for third countries on migration matters. Interview 41, administrator, European Parliament, July 2000.

¹⁹⁹ On the 1996 IGC see also Bieber 1995 and van Ouirve 1995.

Parliament 2000b and 2000c). It was, finally, also in the framework of the current Convention that Parliament tabled proposals for a future EU migration policy regime, thereby demanding additional steps for a full communitarisation. Thus, within the catalogue of competencies drawn up by the Convention, Parliament foresees the free movement of persons as well as the 'legal basis for the common area of freedom' to be amongst the Union's exclusive fields of competence. According to Parliament's proposals, the focus for migration policy would, therefore, shift from the national to the EU level. 'Immigration policy and other policies linked to the free movement of persons' would, according to Parliament's proposal, be a shared area of competency, meaning that member states could only act within the 'limits defined by Union legislation' (European Parliament 2001a).

More so than in foreign policies, Parliament has been affected by the impact of the 1999 European elections and the shift of its majority towards the centre-right. This has also affected the composition of the Civil Liberties and Internal Affairs committee in which after the elections the European Peoples' Party (EPP) was the strongest party, replacing the Party of European Socialists (PES), which now came in second. This change in the balance of power has, according to MEPs, also influenced the policy agenda pursued by Parliament. Thus, while Parliament is united in claiming more rights in the policy making process *vis-à-vis* the executive, on a policy level an increase of divergence was perceived. As one liberal MEP argued, on 'content there are differences. They get more pronounced'.²⁰⁰ An official of Parliament consented with that view and suggested that the committee 'after '99 has become more conservative than ministers'.²⁰¹ Conservative MEPs argued, on the other hand, that the changes were necessary in order to be taken more serious by Council and Commission and, in this perspective, the 'Council expects more than exaggerated proposals which often could not be implemented'.²⁰² Another explanation has been offered by a Socialist MEP, who argued that the reason behind the more moderate

²⁰⁰ Interview 43, MEP, European Parliament, July 2000.

²⁰¹ Interview 41, administrator, European Parliament, July 2000.

²⁰² Interview 30, MEP, European Parliament, June 2000.

position of Parliament in the fifth legislature is that there has been a shift within the PES away from the aforementioned alternative policy agenda. 'More socialists [are] in government and Parliament gets more responsible', since a grand coalition of EPP and PES effectively dominates the committee. Hix reminds that 'even without a common EP interest vis-à-vis the Council, an oligopolistic relationship between the two largest groups is enforced by the absolute-majority requirement' when voting on legislative proposals. Therefore, 'the PES and EPP must cooperate to ensure legislative coherence and protect their partisan interests and policy goals' (1999: 84).²⁰³

The arguments presented in this chapter about a decrease in emphasis on an alternative policy agenda largely support the perception of a more moderate stance of Parliament on migration issues. It could, however, be argued that the main reason for the shift is not so much related to the issue of centre-left national governments and a loyalty of Socialist MEPs. It could rather be argued that the increase of legislative responsibilities of Parliament with the Amsterdam Treaty has made Parliament more receptive for the need to respond constructively to the official migration policy agenda. As far as the internal organisation is concerned, there seems to be no increase in internal fragmentation as suggested by the aforementioned parliamentarian. Table 6.1 presents data on all reports voted in the Civil Liberties committee during the 4th and 5th legislature. While there is a minor increase over time in the amount of 'no' votes on parliamentary reports, this increase has been small indeed. There is no indication that a majority-opposition pattern would replace Parliament's main orientation, namely to scrutinise executive policy making.

²⁰³ Interview 29, MEP, European Parliament, June 2000.

Table 6.1: Internal Fragmentation of the Civil Liberties and Internal Affairs Committee, 1996-2002

<i>Year</i>	<i>1996</i>	<i>1997</i>	<i>1998</i>	<i>1999a</i>	<i>1999b</i>	<i>2000</i>	<i>2001</i>	<i>2002</i>	<i>4th legislature</i>	<i>5th legislature</i>
<i>"No" votes (average)</i>	2.2	3.5	2.8	1.3	3.2	2.6	3.5	4.4	2.5	3.4
<i>Abstention (average)</i>	3.5	0.9	0.7	0.2	3.0	1.9	1.4	1.2	1.3	1.9
<i>N reports</i>	13	21	30	18	6	41	53	45	82	145

Data: own research; includes all reports, also those on non migration issues. This provides a picture of the degree of fragmentation in the committee. Usually around 25 to 30 members are present at votes. 1999a refers to reports of the 4th legislature prior to the 1999 European elections, 1999b for those of the 5th legislature after these elections. On this committee see also Esders 1995. On voting patterns in the foreign affairs committee see Viola 2000.

The orientations of Parliament in Middle East and migration policies are, as has been shown, significantly influenced by the cross pillar setting of EU macro political stabilisation policies. Parliament's orientations in both areas are, in particular, shaped by the executive-control dimension, which has been identified as the main institutional characteristic of these two areas. Accordingly, Parliament's often assumed closeness to the Commission has not materialised in the two cases analysed here. In both areas Parliament perceives its own role as being a provider for an alternative policy agendas to official EU policies as they are pursued by the dual executive. It is, however, true that Parliament and Commission do share some similarities regarding the long term objectives for both areas in which they both push for largely communitarised settings. Notwithstanding this element of convergence between EU actors, its impact on the overall actor constellations in this area remains rather small. Comparing Parliament's orientations on the two areas a striking difference comes to the fore. While in Middle East policies, Parliament's virtual exclusion from directly shaping the policy agenda, save developmental policies, has contributed to an ongoing focus on an alternative agenda, this is not to the same extent true in migration policies. The perspective of a wholesale introduction of the codecision procedure has contributed to a more positive attitude on official policies. As it seems, however, this process has not been one sided. While certainly Parliament has come closer to the executive agenda on migration policies, a greater acceptance

of Parliament's views on the side of the Council and the Commission can also be observed, thus underlining the highly dynamic nature in the formation, adaptation and stabilisation of actor preferences.²⁰⁴

'Courts': financial auditing and legal judgements

Both the Court of Justice and the Court of Auditors have made active use of their capabilities in foreign and interior policies. While the Court of Justice has issued two judgements on migration policies, which addressed the relationship between the pillars, the Court of Auditors has, in several reports, scrutinised EU policies in Middle East and foreign policies. These actions have not been marginal to policy making in both areas and underline the significance of the executive-control dimension in these areas. Moreover, the orientations of the Court of Justice and the Court of Auditors exhibit a strong scepticism of both actors regarding the pillar construction.

The Court of Auditors

The Court of Auditors has on several occasions scrutinised the implementation of those parts of foreign policies that involve expenditure from EU budgetary resources. While, over time, an improvement in the quality of implementation is acknowledged this progress has been slow and the Court of Auditors has pointed to various inefficiencies within the decision making structures of both the Commission and the Council. The strongest criticism was raised in 1996 in a report on the implementation by the Commission of the MED programmes on decentralised cooperation (Giammusso 1999). As mentioned in chapter 3, this report has contributed to the corruption charges against the responsible Commissioner and has aggravated tensions between Parliament and Commission, which ultimately resulted in the resignation of the college of Commissioners in 1999.²⁰⁵ In its report, the Court of Auditors accused the Commission of being responsible for a situation in which 'at

²⁰⁴ This has been confirmed by several interviewees from Parliament, the Commission and the Council Secretariat.

²⁰⁵ See chapter 7.

all levels of the financial management of the MED programmes there are serious shortcomings and irregularities'. The Court of Auditors was in particular bothered by 'insufficient analysis' by the Commission of the means and instruments for successful implementation and has argued that the 'structure and procedures of the Commission to oversee and monitor the implementation [...] were inadequate and deficient'. Therefore, the overall success of policies themselves was questioned since 'on the basis of the data currently available and its own observations in the field, the Court considers that the impact of the MED programmes remains to be proven'. However, the critique went even further and transcended a mere disapproval of decision making modes in the Commission. The Court of Auditors pointed the finger at a 'serious confusion of interest' which the Commission, although being aware of it 'from the outset', did not 'put an end to in a timely manner'. The Court of Auditors referred to the delegation by the Commission of almost the entire implementing powers for the MED programmes to a private contractor and that 'in spite of several warnings, this de facto delegation of powers was not revoked' (Court of Auditors 1996).²⁰⁶

While corruption charges were not repeated in other reports, the Court of Auditors, nevertheless, remained highly critical of the way in which the Commission implemented policies in foreign affairs. The argument put forward by the Commission, that the lack of staff or unfavourable external circumstances in third countries were the main reason behind implementation problems, was not accepted by the Court of Auditors. Quite on the contrary, the Court of Auditors argued that problems had to be searched in the way in which the dual executive worked. First, implementation problems in developmental assistance could generally be related to 'the very cautious approach adopted by the national authorities [of EU member states] in this field'. Second, as far as the EU level was concerned, 'the way in which humanitarian aid is organized by the institutions' had to be blamed (Court of

²⁰⁶ The case became even more problematic since a close personal relationship between the Commissioner, on the one hand, and the firm to which implementation had been delegated, on the other, has been disclosed.

Auditors 1997). Regarding this internal dimension the Court of Auditors emphasised organisational problems within the Commission which could not all be related to its precarious personnel situation. Thus, the Commission did not take the necessary steps to overcome the 'lack of clarity in the division of tasks between the departments and of competencies between the Commission's headquarter in Brussels and the Delegations' (Court of Auditors 1998). Adding up to these serious coordination problems between the DG and the Delegations, the Court of Auditors criticised the organisational structures of the Commission in Brussels. It pointed to the way in which the Joint Service (SCR) – which was established by the Commission to provide an organisational roof to all assistance measures – operated.²⁰⁷ Thus, while the 'implementation of projects is the responsibility of the SCR, [...] project preparation remains the responsibility of the various RELEX DGs' (Court of Auditors 2001a). According to the Court of Auditors, the Commission was not able to handle its internal organisations thus severely hampering the impact of EU policies.

This has also affected Middle East policies. A report on the implementation of assistance in Palestine, once more, emphasised that within the Commission 'decision-making is heavily centralised, slow and cumbersome'. While it was acknowledged that 'the Commission's implementation of assistance to Palestinian society has had positive results' such as the support for the peace process through funding the Palestinian Authority or the positive effects on educational and infrastructure programmes, the 'impact of these programmes has been reduced by structural weaknesses in the Commission's programming and management procedures and systems' (Court of Auditors 2000). Thus, contrary to consultancy reports sponsored by the Commission, which emphasised the heavy control by member states on the Commission's implementing powers as the main reason for these shortcomings, the Court of Auditors took a much more critical stance on the internal operations of the Commission (MEDA 1999; MEDA Democracy 1999). A

²⁰⁷ SCR was later renamed as EuropeAid.

divergence in the orientations of the Commission and the Court of Auditors did, therefore, prevent the emergence of a supranational alliance between these two institutions. This was only partly reduced by the shared orientation of both actors in overcoming the pillar divide in foreign affairs.

The Court of Auditors did not only scrutinise developmental assistance but also budgetary expenses from the second pillar and in one report dealt directly with the CFSP. While recognising that steps had already been taken by the Council towards an intensified application of first pillar budgetary rules such as the setting up of particular budget headings on CFSP expenses, 'the creation of a budget line for preparatory costs', the 'abandoning of budgetary reserve' as well as the setting up of employment conditions for Special Envoys, the Court of Auditors demanded additional changes.²⁰⁸ In particular, it criticised that 'the question of the definition of administrative and operational expenditure', thus whether expenses are covered by the EC budget or by member states, 'is still not resolved' (Court of Auditors 2001b). As far as the implementation of measures was concerned, the Court of Auditors, finally, pleaded for a stronger role of the Commission.

The Court of Justice: Constructing rights across the pillars

In spite of the letter of the Maastricht Treaty, which provided allegedly for an exclusion of the Court of Justice from having a role within the institutional setting of EU policy making in the third pillar, the Court, surprisingly, adopted a proactive approach on this issue and constructed rights across the pillars in a way not foreseen by member states in the Maastricht Treaty negotiations. While the ECJ already had ruled in the *Demirel* case on first pillar related aspects of migration policies, such as the rights conferred on third country nationals by Association Agreements, the Maastricht Treaty has sought to prevent the ECJ from developing legal doctrines for asylum and immigration policies.²⁰⁹ However, in its two judgements of 1997 and

²⁰⁸ It is in this context that the Joint Actions on the mandate of the Special Representative contain specific budgetary clauses since the year 2000 only.

²⁰⁹ Judgement of the Court of 9 July 1987, *Meryem Demirel v Stadt Schwäbisch Gmünd*, Case C-12/86.

1998 on the *Visa List* and *Airport Transit Visas* cases, the Court fostered the legal dimension of EU migration policies, thus providing yet another example for the 'legal autonomy approach' (Oliveiro 1999; Alter 1998; Mattli and Slaughter 1998).²¹⁰

In *Visa List*, the Court of Justice dealt with the interinstitutional balance between Commission, Council and Parliament in the decision making process. In this case, Parliament filed an annulment charge against a Regulation on a common visa list which was adopted by the Council of 25 September 1995 on the ground that Parliament was not re-consulted after the Council had introduced some amendments to the original proposal by the Commission, on which Parliament had been initially consulted (Peers 2000). The Court of Justice then indeed annulled the Regulation and fostered both the Community dimension of migration policies as well as the control of the executive in migration policies. The ECJ criticised that the Regulation 'departs from the aim of harmonization in the matters of visas' since the Council had excluded a time limit for the expiry of parallel national visa lists as it was originally provided for in the legislative proposal by the Commission. However, 'any discontinuity in the harmonization of national rules of visas' should be avoided. Based on this observation, the Court of Justice considered the changes by the Council to the original proposal as being substantial. Since 'the text finally adopted, taken as a whole, differs in essence from the text on which Parliament has already been consulted' a fresh consultation was seen as being 'essential to the maintenance of the institutional balance intended by the Treaties'. The argument by the Council that reconsultation would result in the tacit introduction of a second reading in the consultation procedure was rejected by the Court. 'To accept the Council's argument would result in seriously undermining that essential participation [...] and would

²¹⁰ Judgement of the Court of 10 June 1997, *European Parliament v Council of the European Union: Nationals of third countries – Visas – Legislative Procedure – Consultation of the European Parliament*, Case C-392/95 and opinion of Mr Advocate General Fennelly delivered on 20 March 1997 (Court of Justice 1997).

Judgement of the Court of 12 May 1998, *Commission of the European Communities v Council of the European Union: Act of the Council – Joint action regarding airport transit visas – Legal basis*, Case C-170/1996 and opinion of Mr Advocate General Fennelly delivered on 5 February 1998 (Court of Justice 1998).

amount to disregarding the influence that due consultation of Parliament can have on the adoption of the measure in question’.

Limiting the discretion of member states in the legislative process in migration policies was, however, not the only doctrine established by the Court of Justice. Thus, while visa issues were the only part of the migration policy *acquis*, which already with the Maastricht Treaty had been integrated into the first pillar, this judgement went beyond the narrow confines of the first pillar. The opinion of the Advocate General, although not repeated in the judgement, directly questioned the factual validity of the pillar divide in migration policies. The Advocate General hinted that the case brings up the issue of ‘the role of the Court in interpreting the Treaty on European Union’. Arguing that – in spite of the express exclusion of judicial review in the two ‘intergovernmental’ pillars by ex-Article M TEU - a ‘parallel reading’ of provisions from the first and the third pillar could become necessary. It was pointed out that for considering the ‘scope of Community competence under Article 100c [TEC], the Court of Justice will look at that provision in its Treaty context and cannot, in my view, qualify or restrict that interpretation by reference to a provision which it is expressly prohibited from interpreting’. Somewhat paradoxically, while being excluded from any interpretation of Title VI TEU, at the same time ‘the Court were entitled to have regard in a general way to the existence and content of Title VI’.

This opinion of the Advocate General, not rejected by the Court of Justice, sent out shock waves in some member states and was an invitation for EU actors to challenge, at the next opportunity, a third pillar measure. This happened only some months later when the Commission appealed against a Council Joint Action on Airport Transit Visas of 4 March 1996. The Commission announced, to the surprise of the Council, in a meeting of the permanent representatives, that it would challenge this third pillar act in court, arguing that the measure should rather have been adopted in the framework of the visa provisions of the first pillar. The Commission based its appeal on the arguments of the Advocate General, a former Commission official, as they were set out in *Visa Lists*. In an attempt to defend the separation of

the pillars, the national governments argued that 'by virtue of Article L [TEU] the Court does not have jurisdiction to hear and determine the Commission's application'. Indeed, the Court of Justice upheld the legality of the adoption of the Joint Action in the framework of the third pillar, arguing that Airport Transit Visas were not visas in the definition of ex-Article 100c, since they did not, in a legal sense, provide for the crossing of the EU's external borders. In contrast to regular visas, Airport Transit Visas did not bestow their holders with the right of movement in the internal market and were only meant for movement in the international areas of EU airport. Notwithstanding the rejection of the Commission's appeal on the case in question, the judgement itself resulted, in the view of officials in the legal service of the Council Secretariat, in a 'clear victory for the Commission'. This is, because the Court of Justice rejected the opinion by member states that it was not entitled to rule on the case due to the legal base of the Joint Action in the third pillar. Opposing this perception, the Court of Justice pointed out that it is its own task 'to ensure that acts which, according to the Council, fall within the scope of Article K.3(2) [TEU] do not encroach upon the powers conferred by the EC Treaty on the Community'. From that, 'it follows that the Court has jurisdiction'.²¹¹

In *Airport Transit Visas* the Court of Justice, thus, undermined the dominant legal opinion of a strict separation of the pillars. The provisions on judicial review on migration policies, as they appear in the Amsterdam Treaty, are from this perspective not merely an autonomous decision of national governments, but have to some extent already been autonomously codified by the case law of the Court of Justice, thereby challenging key intergovernmentalist assumptions. Moreover, *Airport Transit Visas* also tackles the institutional design of migration policies from another angle. The Court of Justice followed the argument of the Advocate General to apply the 'functional approach' of legal reasoning, thereby looking 'at content and effect rather than form'. This approach of an institutional division within a functionally defined

²¹¹ The Advocate General put it fairly clear. While Article M excluded jurisdiction, Article L reintroduced it. Hence, he argued that 'the power of judicial review which the Court enjoys under the jurisdictional clauses of each of the Community Treaties is extended by Article L'.

policy area such as migration policies has met criticism from the Court of Justice on other occasions as well. Thus, during the 1996 IGC the Court voiced criticism on the pillar structure arguing that the ‘sometimes artificial compartmentalization entailed by the system of three pillars [...] run[s] counter to the need for transparency and put citizens of the Union in an unsatisfactory position from the point of view of legal certainty’ (Court of Justice 1995a).

This argument, finally, points to the potential impact of *Airport Transit Visas* on the institutional design of EU foreign and interior policies at large. Thus, although not carried out until today, the Commission or Parliament would be able to challenge acts in the second and the (remaining) third pillar if they were able to show that, in the words of the Advocate General, certain ‘matters [would] more properly fall within the Community sphere’. Take, for example, a second pillar decision such as the Common Strategy on the Mediterranean Region which includes mainly policies and instruments from the first pillar. While the provisions on the common foreign and security policy indeed refer to the adoption of Common Strategies by the Council, it could be argued that – looking ‘at content and effect rather than form’ – this measure should rather have been adopted in the framework of the first pillar. This view was not contested by officials in the legal service of the Council Secretariat.²¹²

Conclusion

The preferences of EU actors in foreign and interior policies cannot adequately be described by reference to intergovernmental-supranational patterns. As this chapter has argued, the preferences of EU actors can rather be understood against the background of their different capabilities which in turn can be accounted for as being shaped by the specific functional features of macro political stabilisation policies. This has fostered rather than undermined the dominant executive-control dimension and has only occasionally been countered by shared preferences between EU actors, which all, to different degrees, perceive the pillar design as impeding on the

²¹² Interviews 27 and 28, Legal Service, Council Secretariat, Brussels, June 2000.

emergence of a 'comprehensive' approach to foreign and interior policies. Against the background of the analysis put forward in this chapter, the questions raised in the introduction can now be readdressed.

First, the emergence of preferences of EU actors in foreign and interior policies is mainly defined by the cross pillar institutional capabilities in macro political stabilisation policies which these actors hold rather than an *a priori* preference for overall communitarisation. While all EU actors consider the need for locating both areas firmly at the EU level as important, the precise shape of their individual orientations cannot be covered by such a supranational perspective. Instead, it is argued here that the preferences of EU actors in both areas respond to the characteristic features of macro political stabilisation policies, amongst them the cross pillar institutional framework. This explains why the preferences of the Commission and the Council Secretariat reveal some important similarities, whereas Parliament, but also the Court of Justice and the Court of Auditors have developed quite different preferences. The incorporation of the Commission into the Council's working structures and joint learning efforts therein, have fostered a managerial approach of the Commission to policy making. The Commission limits its activities to those areas in which it already holds executive powers and does only very cautiously challenge the overall political guidance by the Council. It is only outside of the daily policy making process, thus by submitting long term reform proposals during Treaty reforms, that the preferences for an overall communitarisation are clearly expressed by the Commission. The Council Secretariat has, in particular in the area of foreign policies, only started to develop somewhat autonomous preferences. The High Representative and the Special Representative, thus, not only provide an institutional counter weight at the EU level *vis-à-vis* the Commission, but also indicate the linkage between authority delegation and the emergence of autonomous orientations *vis-à-vis* the member states (Tallberg 2002).

There is a marked difference in the preferences of executive actors and those controlling the executive. This can be explained by the marginal position of these 'control actors' in most institutional settings of foreign and interior policies. The

pillar structure of both areas and the high degree of discretion of the executive have been heavily criticised by Parliament, the Court of Justice and the Court of Auditors. It is quite noteworthy that this criticism has not merely been directed towards the member states or the Council, but has covered the Commission's role in both areas as well. Although EU actors indeed share some preferences on further centralisation of macro political stabilisation policies at the EU level, this does not prevent the dominance of quite divergent preferences which appear mainly on the executive-control dimension.

CHAPTER 7

Patterns of Interaction

Executive-control Relations and Inner Executive Coordination

Introduction

As the previous chapters have shown, European integration in foreign and interior policies is a rather complex endeavour and so is an analysis on the role of EU actors in that process. Foreign and interior policies have been subject to quite contradictory developments between the poles of centralisation and incrementalism. Hence, centripetal dynamics stemming from the functional requirement of providing the Union with macro political stabilisation are constantly balanced by the incremental process of giving ‘policy flesh’ to the ‘skeleton’ of the emerging functional frame of macro political stabilisation policies. The cross pillar institutional setting reveals at the same time both the significance of centralisation at the EU level as well as the continuous constraints and often deadlocks to centralised policy making. And, while the preferences of EU actors, on the one hand, disclose their autonomous role in the policy making process, they do also highlight the manifold limitations to a more powerful role of EU actors in the policy making process.

The arguments of this thesis pertaining to the functional dynamics of macro political stabilisation policies, suggest that characterisations of ‘intergovernmental’ or ‘supranational’ EU politics are more often than not imprecise. From a functional perspective it can be argued that centralising foreign and interior policies is not a zero sum game in which gains regarding centralisation at the EU level necessarily translate into losses of the national level. Seen from that perspective, the hybrid cross pillar setting of both areas ensures an equilibrium between both the centre and the periphery of the EU political system.²¹³ Moreover, the preferences of EU actors

²¹³ The terms centre and periphery, dating back to Seymour Martin Lipset’s and Stein Rokkan’s seminal study on European party systems, do not contain any implicit normative judgement about the distribution of competencies between the centre and the periphery. In EU foreign and interior

show that the centralisation of macro political stabilisation policies is neither under the complete control of national governments, nor is it a plot by supranational agents to undermine traditional state authority in these areas. As the analysis of this thesis has shown, the 'European' and the 'national' are not antagonistic entities. Neither 'member states' nor 'EU actors' are homogenous blocs with quasi identical, fixed and mutually exclusive orientations.

As a result of these insights, any new categorisation of patterns of interaction in EU foreign and interior politics has to be aware of these complexities rather than trying to reduce them to a point of invisibility such as often inherent in ascriptions of 'supranational' or 'intergovernmental' logics of European integration (Moravcsik 1998; Stone Sweet and Sandholtz 1998). Having said this, is there, after all, any possibility left to categorise and systematise policy making in EU foreign and interior policies?

This chapter argues that the analysis of functions, institutions and actors of macro political stabilisation policies allows us to develop such a new typology of the main patterns of interaction in the policy making process. It proposes a categorisation of policy making in both areas based on the main characteristic features of interaction in EU foreign and interior policies as they have been identified in the previous chapters, namely executive-control relations, on the one hand, and inner executive coordination, on the other.

First, as the arguments put forward in the previous chapters have emphasised, the main dividing line of EU foreign and interior policies is not located on the intergovernmental-supranational dimension but rather on the executive-control dimension. Member states' government, the Council and its Secretariat as well as the Commission jointly hold the key institutional resources in the policy making process and their respective cross pillar capabilities often tend to overlap, thus inducing the necessity for a cooperative approach to policy making within the dual executive. The capabilities of Parliament, the Court of Justice and the Court of

policies, for example, the periphery continues to hold the major institutional resources (Lipset and Rokkan 1967).

Auditors to control policy making by the executive are limited. This combination between constraints to parliamentary and judicial control, on the one hand, and a high degree of autonomy of the executive has structured policy making in EU foreign and interior affairs. This chapter suggests to look at the policy making process in foreign (Middle East) and interior (migration) policies from the viewpoint of this dominant dichotomy.

Second, such an assertion does not imply that either of these two main blocs are in any way homogenous. Indeed, an analysis of inner executive coordination reveals not only the considerable degree of overlap between the capabilities of the Commission, the Council Secretariat and the member states. It also brings to the fore manifold coordination problems, divergent orientations as well as various deadlocks for decision making and implementation.

Two dominant patterns of policy making in EU foreign and interior policies

The identification of these two main patterns of interaction of policy making in EU foreign and interior affairs can be explained by the combined effect, within the functional frame set by the centralisation process of macro political stabilisation policies, of the various institutional and actor related variables discussed in the previous chapters. Thus, the analysis of the functional dimension of macro political stabilisation policies directs attention towards the relationship between the emergence of a distinct EU sovereignty and the parallel endurance of traditional national notions of sovereignty. These functional features not only rendered decisions on the substance of policies in both areas a highly incremental process but also explain the emergence of the complex institutional provisions of cross pillar politics and the quite divergent preferences of EU actors in both areas, which have been identified in chapters 4 to 6.

These functional dynamics of the centralisation process in macro political stabilisation policies also form the background against which the specific patterns of interaction between EU actors and national actors in the policy making process can be understood. In both areas, those actors that control the executive but often lack

any significant influence, such as Parliament, the Court of Justice and the Court of Auditors, have been highly critical of executive policy making. What is interesting is that this criticism was not only related towards the member states, the Council or the Council Secretariat. It included to the same extent criticism about executive policy making by the Commission. Even more than that, since the capabilities in particular of Parliament to put pressure on the Commission are higher than its ability to pressurise the Council, the Commission has actually been a preferred anchorage of parliamentary scrutiny.

Notwithstanding the dominance of the executive-control dimension, inner executive relations have not always been smooth. While there is a requirement for close executive coordination in both areas, the meshed capabilities within the dual executive have often resulted in coordination problems at all stages of the decision making process. Thus, the Commission often had to take into account the reluctance of some member states to use communitarised allays for policy making in foreign and interior affairs. Being aware of the sensitivity of both areas to national sovereignty, the Commission has developed a cautious, largely non confrontational approach to solve coordination problems and has only exceptionally referred to direct opposition such as seeking conflict resolution by the Court of Justice.

The relations between Parliament, the Court of Justice and Court of Auditors are not based on permanent coordination as is the case within the dual executive. Activities of these three actors remain only loosely coordinated. It is particularly Parliament which can strategically use reports from the Court of Auditors or file charges against the dual executive with the Court of Justice. These *ad hoc* alliances do, however, not amount to a somewhat institutionalised opposition from Parliament, the Court of Justice and the Court of Auditors *vis-à-vis* the executive, nor are they necessarily successful given divergent orientations between these 'control actors'.

Patterns of policy making I: executive-control relations

Interaction among EU actors is heavily shaped by the cross pillar institutional setting of macro political stabilisation policies. This setting sets the main dividing line in EU

foreign and interior policies not on the supranational-intergovernmental axis but cross cuts this dimension along the distinction between executive actors (Commission, Secretariat, Council and member states), on the one hand, and those actors controlling the executive (Parliament, Court of Justice and Court of Auditors), on the other. The distribution of power on the two sides of this executive-control dimension is, however, not balanced. While executive actors jointly hold the main institutional resources in the policy making process, the powers of Parliament, the Court of Justice and the Court of Auditors are, as has already been outlined in previous chapters, much less pronounced. This pattern has, in turn, impacted interaction between the two sides on four main dimensions.

First, in most institutional arenas of foreign and interior policies there is actually only very limited interaction between the two sides and this lack of joint decision making mechanisms enables both executive actors and 'control actors' to pursue quite different policy agendas. The effect of these 'different spheres', with the Commission and the Council, on the one side, and Parliament, the Court of Justice and the Court of Auditors, on the other, is threefold. Thus, both the dual executive and 'control actors' have been able to pursue their policy agendas with a considerable degree of autonomy. Moreover, actual policy making is characterised by a strong dominance of executive actors while the influence of 'control actors' on day-to-day decision making has been rather weak. Lastly, successful assertion by 'control actors' against the executive is rare and often takes the form of quite confrontational measures, such as referral to the Court of Justice or even threatening the Commission with a motion of censure. It is striking that in particular in those rare instances in which 'control actors' have jointly confronted the executive they have been able to exert some influence on policy making.

As far as the legislative process is concerned, Parliament's role in both foreign and interior policies remains limited. It is only with regard to budgetary issues that Parliament has been able to regularly assert its role in the policy making process. However, recourse to the budget cannot conceal the overall limited impact on the substance of EU policies, given the overall small size of the budget. Even more

limited is the role of the Court of Justice and the Court of Auditors. Their involvement in the policy making process largely depends upon recourse made to them by other actors, which has in practice mainly been the European Parliament. Yet, recourse to the Court of Justice is a costly weapon, the deployment of which has to be exercised cautiously since the 'hierarchical direction' of judgements by the Court renders this option a rather confrontational step (Scharpf 1997: 171-194). In migration policies, Parliament has on two occasions made use of this option. In the *Visa List* case Parliament has been successful in annulling a Council act after Parliament felt that its institutional prerogative of consultation in the legislative process has been neglected by the executive. Indeed, after this judgement has occurred, member states and the Commission have become much more willing to consult Parliament on legislative proposals.²¹⁴ The threat of making recourse to the Court of Justice on an alleged failure to act by the executive regarding the abolishment of internal border controls has led a hesitant Commission to finally make legislative proposals on that matter (Peers 2000: 75). A confrontational stance was also taken by Parliament in its motion of censure against the college of Commissioners in 1999 when Parliament accused the Commission of corruption following allegations made by the Court of Auditors.

It is quite noteworthy that on all these occasions in which Parliament adopted a confrontational stance it was not acting alone but based its action on support from other 'control actors'. Moreover, a look at policy making in foreign and interior policies reveals another approach of Parliament, namely to pressurise mainly the Commission in order to ensure its greater involvement in the decision making process. The reluctance of some member states to delegate further capabilities in the two areas to the Commission can *inter alia* be related to this susceptibility of the Commission to pressure from Parliament. This susceptibility is smaller for other executive actors, such as for example the Council Secretariat. This helps to explain why it was the Council Secretariat that has, in the area of foreign affairs, emerged

²¹⁴ Interviews 27 and 28, Legal Service, Council Secretariat, Brussels, June 2000.

following the Maastricht Treaty as the EU actor which has been delegated the greatest amount of new capabilities.

Notwithstanding these examples, direct interaction between executive actors and 'control actors' is, due to the institutional rules in both foreign and interior policies, limited. The small amount of joint decision making institutions between the executive, on the one hand, and 'control actors', on the other, has also left its mark on the policy preferences of these actors. Thus, not only are the capabilities within the dual executive often overlapping but so are the very preferences on concrete issues in the policy making process. These jointly derived assessments are, however, not developed jointly with Parliament, let alone the other 'control actors'. While these 'different spheres' of communication have met widespread criticism about the lack of parliamentary control in EU foreign and interior policies, they have also provided Parliament with the space to develop an alternative agenda of EU politics in both areas.

The small amount of interaction of Parliament, on the one hand, and the dual executive, on the other, has been emphasised by several officials.²¹⁵ Thus, a member of the Commission's legal service pointed out that by focusing on an alternative policy agenda in the area of Middle East policies, such as human rights and democracy issues, 'Parliament is leading a different life'.²¹⁶ These 'different lives' of Parliament, on the one hand, and the executive, on the other, did also affect relations between the two sides. A member of the Special Representative's team argued that 'Parliament is an outside actor', while a member of the Council Secretariat pointed out that 'with Parliament we have almost no contact'.²¹⁷ These limits to interaction posed by the different spheres in which both sides act, has been similarly pronounced in migration policies. An official from the Secretariat confirmed that

²¹⁵ The limited amount of interaction does also relate to relations between the executive with the Court of Justice and the Court of Auditors. It must, however, be considered that these two 'control actors' remain outside of the day-to-day political process regarding decision making. Their involvement is very much dependent upon recourse to their judgements or their reports made by other actors.

²¹⁶ Interview 12, Head of Unit, Commission, Brussels, June 2000.

²¹⁷ Interview 19, Advisor to Special Representative, Council Secretariat, Brussels, June 2000. Interview 35, Desk Officer, Commission, Brussels, July 2000.

'contacts with Parliament are sporadic and mainly one way, if Parliament needs something like documents or legal advice'.²¹⁸ This lack of interaction has to be contrasted with the regular, institutionally induced, day-to-day interaction between Council and Commission. Officials from the legal service of the Council Secretariat, dealing with migration policy issues, have thus held that 'the institutional interplay is closer with the Commission. With Parliament contact hardly exists. We do not know our counterparts [there]'.²¹⁹ Laconically, another official from the Secretariat added that 'there are many meetings with the Commission legal service. Parliament's legal service we only met in the Court of Justice' during the *Visa Lists* case.²²⁰

Second, these different spheres of action must, however, not be considered being synonymous with a somewhat equal division of powers to these two spheres. In fact, patterns of interaction between executive actors and 'control actors' in EU foreign and interior policies are characterised by an unequal distribution of powers regarding their capabilities in the policy making process. With most institutional arenas in foreign and interior policies exhibiting limited space for effective parliamentary or judicial control, the dominance of the dual executive looms as one of the most characteristic features of macro political stabilisation policies. It should, however, also be noted that executive dominance, at least as far as foreign policies are concerned, is a quite common feature also of national politics. Along these lines, a member of the British House of Commons has argued, while comparing the powers of the European Parliament with those of national parliaments, that also 'the influence of the House of Commons on foreign policies is small and only indirect'.²²¹ Within the cross pillar institutional setting of macro political stabilisation policies, the dominance of the executive reaches beyond foreign policies and covers interior affairs as well. An MEP, involved in the area of migration policies, blatantly

²¹⁸ Interview 44, Head of Unit, Council Secretariat, Brussels, July 2000.

²¹⁹ Interviews 27 and 28, Legal Service, Council Secretariat, Brussels, June 2000.

²²⁰ Interview 26, Director, Legal Service, Council Secretariat, Brussels, June 2000.

²²¹ Interview 6, MP, House of Commons, London, May 2000.

conceded this lacking impact. 'Influence from Parliament? For God's sake there is none.'²²²

Only on those instances in which Parliament has been able to bring a certain issue onto the official (executive) EU agenda, a limited impact on policy making could be detected. According to another MEP this has been the case in migration policies with Parliament's years long insistence that the issue of the abolishment of internal border controls must be tackled more actively by the executive.²²³ While the SEA originally set the deadline for achieving the free movement of persons by 1 January 1993, this deadline passed without an abolishment of internal border controls. Subsequently, interaction between Parliament and the executive in the years 1993 to 1995 on interior policy issues was dominated by Parliament's repeated calls for action to be taken particularly in this area.²²⁴ Parliament specifically pressured the Commission to initiate legislation on that regard and ultimately brought an action on the Commission's alleged failure to act before the Court of Justice. It was only after the Commission had presented the three so-called 'Monti Directives' on an abolishment of internal border controls in March 1995, that the Court of Justice issued an opinion on Parliament's request in which the court stated that 'it had no need to rule on the EP's "failure to act" case' (*ibid.*: 75). Parliament subsequently continued to push for action in this area but refrained from filing another failure to act charge, although the Council did not vote on the Commission's three proposals. This once again points to the approach by Parliament to pressure in particular the Commission when demanding action from the executive.

This unequal distribution of powers also affected executive-control relations in EU foreign policies. As a Head of Unit from the Commission specified, 'Parliament's influence is small and its focus is on political projects. There is more cooperation between us and the Council.'²²⁵ Such as in interior policies, Parliament's

²²² Interview 30, MEP, European Parliament, June 2000.

²²³ 'There was a central role for Parliament around the Article 8a issue on which, through continuous insistence, there has been some limited influence.' Interview 20, MEP, Brussels, June 2000.

²²⁴ See Agence Europe, various issues.

²²⁵ Interview 12, Head of Unit, Commission, Brussels, June 2000.

impact on policy making remained mainly limited to voicing its alternative policy agenda hoping that some of its demands might be taken on board by the executive. An MEP confirmed that 'our influence is mainly through information and debates'. Yet, overall she had 'little belief in Parliament besides resolutions' which might convince, over time, the dual executive of the need to deal more intensively with a certain issue in the policy making process. As a concrete example of such continuous insistence could be mentioned Parliament's long standing record of focusing on issues such as the rules of origin provisions with regard to Israeli products originating from the Occupied Territories. 'Commission and Council seem to pay more attention to our views and we should [therefore] keep the pressure'.²²⁶ Another example for this emphasis on alternative issues is Parliament's pressure to openly deal with the allegations that EU funds, managed by the Commission, are used by the PA to sponsor terrorist activities. While the Commission has tried to keep this issue off the agenda, Parliament has organised several debates, supported by intense media coverage, in which it has questioned the allocation of funds by the Commission in Palestine. Once publicity on this case was installed, a further concealment by the Commission was no longer possible and the case is now formally investigated by the EU fraud office.

Third, a permanent, institutionally regulated interaction between executive actors and 'control actors' (in particular Parliament) with somewhat balanced powers of the two sides has been established with regard to budgetary issues. An official from the Middle East Unit of the Commission conceded that 'Parliament has in particular its budgetary powers. Concrete examples are the blocking of financial cooperation with Turkey. Parliament wants a say over every single operational decision of the CFSP'.²²⁷ Moreover, Parliament used its budgetary powers to create new budget lines, such as in 1994, when the MEDA Democracy funds were established following a proposal by Parliament. A committee chairman from Parliament supported this view and argued that 'our main role is the budget' and that

²²⁶ Interview 15, MEP, Head of Inter Group, European Parliament, June 2000.

²²⁷ Interview 10, Desk officer, Commission, Brussels, June 2000.

Parliament has been able to ensure greater consideration of funding, within the MEDA budget, of human rights related projects with NGOs in third countries without direct governmental involvement.²²⁸ Similarly, an official from the parliamentary Administrative Service on migration policies regarded the budget as the 'big force of Parliament' for example regarding the establishment of the ERF.²²⁹

The way in which this limited impact, which Parliament can exert through its role as one of the budgetary authorities of the EU, is used meets with mixed emotions on the side of the dual executive. Being otherwise largely unaffected by parliamentary involvement, not all officials feel that 'Parliament was correct in pressing us to include also financing of human rights' projects' since these projects were very difficult to implement.²³⁰ Commission officials hence criticised that Parliament's demands are often unrealistic. 'The Commission cannot deliver what Parliament wants in the human rights budget line', one official argued.²³¹ And in the area of migration policies a deputy Head of Unit from the Commission pointed out that 'many projects were put on us by Parliament' against the will of the executive.²³² Commission officials were particularly concerned of being trapped between non reconcilable expectations by member states, on the one hand, and by Parliament, on the other. 'The problem is that the Commission is often in the middle between Parliament and the Council'.²³³ Moreover, Commission officials criticised that Parliament uses its budgetary authority as a political tool against the EU executive, in general, and the Commission, in particular. Thus, one Commission official compared Parliament with other 'control actors' and considered that when compared with Parliament, 'the Court of Auditors is more balanced. We are not afraid to be under scrutiny but the way in which it is done matters'.²³⁴

²²⁸ Interview 33, MEP, Head of Inter Group, European Parliament, July 2000.

²²⁹ Interview 41, Administrator, European Parliament, Brussels, July 2000.

²³⁰ Interview 47, former Israeli army official, Berlin, November 2002.

²³¹ Interview 10, Desk officer, Commission, Brussels, June 2000.

²³² Interview 45, Deputy Head of Unit, Commission, Brussels, July 2000.

²³³ Interview 45, Deputy Head of Unit, Commission, Brussels, July 2000.

²³⁴ Interview 17, Desk Officer, Commission, Brussels, June 2000.

Fourth, the overall limited amount of direct impact on policy making in both areas has occasionally rendered attempts to use 'hierarchical direction', either through the Court of Justice or the Court of Auditors, Parliament's main instrument in executive-control interaction (Scharpf 1997: 47). The search for allies against executive dominance is based on Parliament's scepticism 'with the Commission's willingness' to seriously consider parliamentary demands and the perception that the Commission is 'member states' oriented'.²³⁵ It has already been pointed out that in the area of migration policies Parliament has brought up a charge against the Commission relating to the free movement of persons. Another example of this quest for hierarchical direction is the *Visa Lists* case of 1997, which has already been discussed in the previous chapter. It seems that Parliament has been able to foster its role in the policy making process as a result of its successful intervention with the court. Officials from the Council Secretariat confirmed that following this case 'we pay more attention to Parliament. We reconsult them generously on a couple of files'.²³⁶ This perception of a gradually increased interaction between executive actors, on the one hand, and Parliament, on the other, has also been shared by MEPs themselves. An official from Parliament, dealing with migration policies, argued that 'openness increases from the Council and member states', a perspective which also pertains to interaction on foreign policies.²³⁷

The use of 'threat' instruments did, overall, not increase trust between the two sides. The aforementioned failure to act charge of Parliament was seen by officials from the Council as 'a political decision of Parliament' lacking serious legal backing, thus rendering smaller their willingness to share powers with Parliament in the policy making process.²³⁸ Even more strained were relations in Middle East policies when Parliament has in 1999, supported by corruption charges against a Commissioner responsible for financing projects in the framework of the EMP brought up by a report of the Court of Auditors, called for the resignation of the

²³⁵ Interview 41, Administrator, European Parliament, Brussels, July 2000.

²³⁶ Interviews 27 and 28, Legal Service, Council Secretariat, Brussels, June 2000.

²³⁷ Interview 41, Administrator, European Parliament, Brussels, July 2000.

²³⁸ Interviews 27 and 28, Legal Service, Council Secretariat, Brussels, June 2000.

entire college of Commissioners. A Commission official accused Parliament that this was a politically inspired 'campaign' of Parliament. 'There was no corruption with EU money' he argued and maintained that 'Parliament acted irresponsible' with the only goal in mind to foster its role *vis-à-vis* the executive in the policy making process.²³⁹ This perspective, although not shared by parliamentarians, points nevertheless to an inherent dilemma of executive-control relations in EU foreign and interior policies. The overall impact of 'control actors' remains limited and often 'threat', such as repeatedly filing charges with the Court of Justice or threatening the Commission, remains the only option for Parliament to get heard by the executive. This option, however, is costly since it undermines the development of cooperative working relations between the two sides. Moreover, Parliament has to be cautious in using this option since future delegation of additional capabilities in both areas depends on the goodwill of member states which can, of course, only be assured if Parliament is considered 'responsible' - whatever that might entail.

To conclude, patterns of interaction between executive actors and 'control actors' are structured by the functionally induced unequal distribution of capabilities between these actors in the area of macro political stabilisation policies. Both sides often act within different spheres, the executive being involved in day-to-day decision making while Parliament focuses on an alternative policy agenda. Constant interaction remains mainly limited to the budgetary dimension of foreign and interior policies, where Parliament has some limited influence to establish budgetary headings for some of its alternative policy issues. The lack of significant parliamentary control in most institutional arenas of both areas has rendered the option of threat one of the few, albeit costly, fields of interaction. Due to these costs, however, this option has been only used by Parliament in small doses. While the willingness of Commission and Council to deal with parliamentary demands has, according to statements from both sides, slightly increased, the unequal distribution of capabilities

²³⁹ Interview 34, former Director, Commission, Brussels, July 2000.

within the policy making process remains the characterising feature of interaction in EU foreign and interior policies.

Patterns of interaction II: inner executive coordination

As has been outlined in the previous section, executive actors dominate the policy making process in EU foreign and interior policies. Notwithstanding their considerable capabilities for autonomously shaping policies in both areas, the competencies of each single executive actor are nevertheless constrained, affecting in particular the autonomy of the Commission. These constraints do, however, not mainly emanate from parliamentary or judicial control, but rather from a complex system of inner executive checks and balances between the Commission, the Council Secretariat and member states' governments. Policy making in most institutional arenas of EU foreign and interior affairs is highly dependent upon negotiated, consensual and often unanimous agreement within the dual executive.²⁴⁰ Inner executive coordination takes place at all levels of the policy making process and applies to the initiation of legislation, the adoption of legislative acts and the implementation of policies on the ground. There are two main rationales behind these often overlapping competencies. On the one hand, the strong joint decision making mechanisms serve a particular function for centralising an area as closely related to sovereignty as macro political stabilisation policies. This function is to ensure cautious and incremental policy making which would not as easily be assured if macro political stabilisation policies were governed across the board by qualified majority voting in the Council, a sole right of initiative for the Commission, codecision in the legislative process, and full jurisdiction of the Court of Justice. On the other hand, there is a less functionalist reading of these consensual institutions and such a perspective lends attention towards the manifold deadlocks and frictions in policy making caused by joint decision making mechanisms. It is hence argued here that inner executive coordination in macro political stabilisation policies is

²⁴⁰ The more the Council Secretariat takes on features of an autonomous actor, as for example in foreign policies, one could even talk of a triple EU executive consisting of Commission, Council (member states) and Council Secretariat.

characterised by intense patterns of consensual policy making, on the one hand, and deadlocks with regard to policy initiation, decision taking and implementation resulting from these joint decision making mechanisms, on the other. The remainder of this chapter looks at these deadlocks in greater detail. It should, however, be emphasised that often deadlocks in strong joint decision making system, such as in EU foreign and interior policies, serve a systemic function, namely to reinforce the functionalist features of the 'consensus principle [which] is to let all of the important parties share executive power in a broad coalition' (Lijphart 1984: 23).

There is a strong sense among executive actors about the need for such a consensual coordination and this understanding results not least from the assumption that without strong inner executive coordination an excess of deadlocks would ultimately block policy making. An official from the Council Secretariat pointed to the requirement for inner executive coordination by emphasising the extent of overlapping competencies in macro political stabilisation policies. Thus, while the Council is responsible for political foreign affairs, 'the Commission is a heavy actor in Middle East policies due to its knowledge and administration of funds' and these two tracks have constantly to be coordinated.²⁴¹ A less positive but nevertheless similarly intriguing assessment has been put forward by members of the Special Representative's staff. One official argued that 'the Commission is very important' but deplored that the 'Commission is not willing to share information with us and also the delegation do not. So the Special Envoy and the Secretariat are little informed', thus pointing to possible frictions in inner executive coordination.²⁴² Similar arguments have been expressed by officials in the area of migration policies. Members from the legal service of the Council Secretariat argued that 'the Commission has a lot of power' and that 'working parties are often dominated by Presidency and Commission'.²⁴³

²⁴¹ Interview 14, Desk officer, Council Secretariat, Brussels, June 2000.

²⁴² Interview 19, Advisor to Special Representative, Council Secretariat, Brussels, June 2000.

²⁴³ Interviews 27 and 28, Legal Service, Council Secretariat, Brussels, June 2000.

As far as the initiation of legislation by the dual executive is concerned, both areas are characterised by a cautious approach of the Commission to make use of its right of initiative. The main reason for this reluctance, obviously, relates to the difficulties of getting proposals adopted due to considerable divergence of member states' preferences which in most areas vote on legislative proposals by unanimity. These difficulties have given rise to an 'initiation deficit'. Moreover, the Commission has been extremely cautious in proposing new legislation fearing that some member states would oppose a too active use of the right of initiative. As has already been outlined in previous chapters, the main approach of the Commission was to become accepted by member states rather than to develop an assertive attitude regarding its own policy preferences. While the Commission did, for example, propose long term visions for the development of EU migration policies, such as in the 1994 communication, it usually refrained from suggesting controversial pieces of legislation. This cautious attitude did not fundamentally change after the Amsterdam Treaty entered into force. It is quite telling that the new Commissioner for Justice and Home Affairs, prior to the publication of the first scoreboard in December 1999, conducted a tour of capitals in which the concrete measures to be enlisted in the scoreboard were piece by piece hammered out between the Commission and each national interior ministry. Being aware that the shared right of initiative as well as the predominance of unanimous decision making modes could potentially provoke a stalemate of policy making in this area, the Commission's main focus was directed towards intense inner executive coordination prior to the initiation of (consensually agreed) legislation.

It should be noted that while the Commission is quite cautious in proposing new legislation, member states, in both areas, have been much less reluctant to make use of their right of initiative. It was in particular the changing Presidencies which sought to bring certain issues onto the EU agenda. In migration policies, these member states' proposals have not always been in consistence with the commonly agreed scoreboard priorities. A similar tendency can also be observed in foreign policies. A Commission official argued, while referring specifically to the Common

Strategy on the Mediterranean Region, that the 'Council tries to limit the Commission. More proposals come now from member states'. Being aware of this importance which member states attach to (diplomatic) foreign relations, 'the Commission plays a cautious role in political relations'.²⁴⁴

The joint decision making mechanism at the stage of initiating legislation are further exacerbated by the consensual patterns of concrete decision taking. This is, for example, underlined by the difficulties into which the actual translation of the scoreboard into concrete decision has run. Indeed, decision taking in migration policies has been a painstakingly slow process. About one year before the expiry, in May 2004, of the five year period for the adoption of all scoreboard measures, key legislative proposals in migration policies got stuck in the legislative pipeline due to continuing disagreement among member states. The scoreboard of December 2002 hence states that contrary to the dates of adoption originally set in 1999, 'only a few of the objectives defined for the establishment of a common asylum and immigration policy have been met' (Commission 2002b: 5). The Commission's hope that yet another call from a European Council to accelerate the speed of decision taking would cut the Gordian knot are decreasing. Disappointment is only scantily covered up when the Commission points out that 'the Seville European Council did endeavour to accentuate the dynamism flowing from the Laeken European Council (*ibid.*). In the very same document, however, the Commission expresses its scepticism about the significance of this 'flow of dynamism' much more openly and argues that 'the backlog referred to by the Laeken European Council has not been cleared in some areas, notably as regards the common policies on asylum and immigration, though the necessary proposals are all before the Council' (*ibid.*: 4).

The final stage on which the virtues and perils of strong inner executive coordination have become visible relates to the implementation of policies. They can well be exemplified when looking in greater detail at the implementation of developmental assistance by the Commission. Thus, several detailed reports from

²⁴⁴ Interview 11, Desk officer, Commission, Brussels, June 2000.

external consultants have scrutinised the implementation of EU developmental assistance in the Mediterranean region, in general, and Palestine, in particular. These reports mainly dealt with the responsibilities of the Commission but also touched upon the issue of coordination of assistance between the Commission and member states within specialised committees, such as the MED committee already referred to in chapter 5. Indeed, these reports highlight a multitude of implementation problems emanating from within the institutional structure of the EU foreign affairs system, mainly from cumbersome procedures regulating the relations between the Commission, on the one hand, and member states, on the other (Stetter 2003).

Such an analysis of a gap between the ambitious political goals of the EU as they were, for example, defined in the Common Strategy and the actual implementation of MEDA assistance measures by the EU on the ground should, however, not lead to the conclusion that problems of inner executive coordination could completely be avoided. Politics, after all, is a process of complex interaction and necessarily consumes time and this is particularly true for a sensitive area such as macro political stabilisation policies. Nevertheless, observations from the case of developmental assistance show that some of the problems in implementation could have been avoided without harming the inter-institutional balance between the European and the national levels. While the improvements of EU assistance in the framework of the EMP, when compared with the period prior to the Barcelona Conference, has been generally acknowledged by these reports, MEDA assistance was nevertheless severely hampered by a very slow disbursement of assistance in partner countries (MEDA 1999; COWI 1998: 42). Thus, in the period from 1995 to 1998 only 25 per cent of promised assistance has been disbursed to partner countries. Figures for Palestine were significantly higher, reflecting the priority the EU attached to Middle East policies, but did also not surmount 48 per cent. While some of the shortcomings in implementation can be related to deadlocks in bilateral negotiations or resistance from partner countries to engage in political and economic

reforms, EU internal features help to account for most of these implementation problems.²⁴⁵

Implementation of EU assistance had already been criticised for its disbursement of funds during the protocol period, which predated the EMP. Thus, it is striking that the much more demanding procedures for EU assistance under the new MEDA regime did not go hand in hand with a streamlining of inner executive coordination. On the contrary, more complex programmes were added to the Commission's workload without consideration of how this would affect the operation of projects. The MEDA Regulation stipulates three different levels at which the member states, within the MED Committee, are to be involved in the implementation of aid by the Commission. These levels are on the strategic level of annually updated Regional and National Indicative Programmes, the operational level of individual, country related Financing Decisions and Financing Protocols and, finally, the implementation level concerning concrete tendering procedures.

When deciding on National and Regional Indicative Programmes, the MED Committee approves, on the Commission's suggestion, 'sector priorities for a Project [as well as] portfolio according to country-specific and regional sector policy criteria' (MEDA 1999: 21). While the coordination between member states and the Commission at the strategic level is important to ensure the achievement of the overall objectives of EU developmental policies, this is not valid to the same extent for involvement of member states at the operational and implementation level. Thus, with regard to commitments of the Commission concerning individual projects, the specific involvement of the MED Committee created many significant delays in implementation (*ibid.*: 36).

Problems at the operational and implementation level are exacerbated by the lack of coordination between EU and member state developmental assistance to

²⁴⁵ It must be also be mentioned that the implementation of policies in the framework of the EMP was not only problematic regarding financial assistance. Also progress relating to other policies or other 'baskets' of the EMP was lacking behind schedule, such as, for example, on the EMP security charter, on the conclusion of some Association Agreements or on the establishment of a Euro-Mediterranean Free Trade Area, including flanking measures such as the rules of origin provisions.

partner countries (*ibid.*: 37). The demand from the MEDA Regulation to define priority sectors on a national or a regional basis does, moreover, just apply for the EU level and not to member states' policies, hence further decreasing effectiveness of policies.

Overall, the commitment procedures of the MEDA Regulations created a time consuming workload of information and communication exercises for both the Commission and the member states. The outcome of this communication process is questionable since member states were in practice only informed about the 'intermediary status' of projects but were not able or willing to really engage in discussion on 'substantial, policy-related issues' (*ibid.*). Nevertheless, this information exercise took the form of huge reports prepared by the Commission, which required a heavy input of human resources which were consequently not available for reducing the time delays in negotiating and implementing the necessary agreements for launching MEDA assistance.

Moreover, the involvement of the MED Committee has resulted in often inefficient 'extra operational work-load' for the Commission (*ibid.*: 39). This has actually hampered the effectiveness of inner executive coordination since the MED Committee was involved in micro financing decisions while losing track of ensuring the 'coherence and consistency of strategic programming' (*ibid.*: 39). A similar criticism was raised with regard to the time consuming control by the MED Committee at the implementation stage, for example when deciding on tender procedures for individual projects (MEDA 1999: 47). While the Commission was closely controlled in its decision making, the reverse did not happen, 'i.e. that Member States programmes be planned in co-ordination of complementarity with Commission programmes [...] It would perhaps appear to be an infringement on the Member States' highly sensitive foreign policies' (*ibid.*: 90).

It has been estimated that insufficient procedures within the MED Committee resulted in a delay of around one year with regard to the implementation of MEDA assistance (*ibid.*: 57). This figure points to a problematic emphasis in the workload of both the Commission (preparing interim reports for the MED

Committee) and the committee itself (dealing with too many details). A shift towards more cooperation on the strategic planning level seems the more justified since the rate of approval for projects suggested by the Commission is already high. Out of 87 projects throughout the Mediterranean region from 1995-97, the committee approved 38 projects unanimously and another 39 with some qualified suggestions. Only nine projects had to be redrafted but were then approved. Only one project was turned down (COWI 1998: 33).

The strict requirements for financing projects were another factor of implementation problems. The misuse and mal-administration of funds during the protocol period explains why such a complex system as the MEDA assistance had been established. The problem of the new procedures, however, was that the Commission now was confronted with an even greater workload – negotiating financing provision with partner countries and communicating these negotiations to the MED Committee – without a real change in human resources at its disposal. A former head of delegation in the Middle East cynically summarised his experience about the workload in delegations as follows. ‘There is an optimistic version that 95 per cent of our time was related to solving problems of implementation of the project cycle.’²⁴⁶

Besides the time delays and problems in coordination within the MED Committee, the work load of the Commission appears as a third issue related to implementation problems. The MEDA case actually shows that the Commission was faced with a dilemma resulting from the requirements of complex and time consuming procedures, on the one hand, and lack of human resources, on the other hand. These had to be balanced with expectations from partner countries in quick assistance, from member states in intense coordination and by Parliament in correct implementation.

The Commission was only able to employ additional staff for the implementation of the MEDA funds in 1998 when country based MEDA Teams

²⁴⁶ Interview 32, Deputy Head of Cabinet, Commission, Brussels, July 2000.

were formed (*ibid.*: 41). While the MEDA Teams were useful in improving facilitating work on the operational and implementation level they could not contribute to a more effective approach with regard to the strategic level of planning. Even after the launch of MEDA assistance the Commission did little for the development of proper 'strategic planning instruments' (MEDA 1999: 32). And also the delegations were cautious in adjusting projects to the new MEDA requirements. In the light of the complexities of inner executive coordination and the absence of a 'programming-and-monitoring unit of the Commission', 'Delegation staff [...] prefer to stick to what they know' (*ibid.*: 73). The multi annual programming of MEDA even supported these traditional working methods. Delegations felt under immense time pressure to inform the Directorate General about projects for fund commitments because 'otherwise, the funds earmarked for MEDA could be "lost" for "their Country" by the end of the Financial Year' (*ibid.*: 73).

To sum up, inner executive coordination in foreign and interior policies is characterised by a tight overlap of executive powers between the different branches of the EU executive. This pattern of interaction has affected all stages of the policy making process, namely the initiation of legislation, actual decision taking as well as implementation. It was not so much the speed or the scope of decisions that was attributed the greatest importance but rather the emphasis on upholding consensual patterns of interaction within the dual executive.

Conclusion

This chapter has elaborated in greater detail the way which the dominant executive-control divide in macro political stabilisation policies has affected patterns of interaction between national and EU actors in the policy making process. It has provided several examples of how this relationship is characterised by a remarkable dominance of executive actors at the expense of parliamentary or judicial control. 'Control actors', most prominently Parliament, have often only been able to use rather confrontational means for asserting their role in policy making. However, the use of these measures, such as frequent recourse to the Court of Justice or even

threats to seek the demise of the Commission, are costly for both sides and do not substitute for a permanent, balanced sharing of power between executive actors and 'control actors' in the policy making process. Executive dominance does, however, not imply that the executive remains completely uncontrolled. A striking feature of the EU foreign and interior affairs system is that the executive is, in a sense, controlling itself. A complex system of inner executive checks and balances ensures that action is usually only taken after a negotiated, consensual agreement among executive actors has been reached. While such patterns of interaction serve the functional requirement of ensuring a cautious approach to the centralisation of macro political stabilisation policies, in particular through tight control of the Commission, it also brings with it several institutionally induced shortcomings regarding executive policy making at all stages of the policy making process.

The problems in effective parliamentary and judicial control, on the one hand, and over complex inner executive coordination must, however, be balanced with the fundamental significance of integrating two areas as strongly linked to sovereignty such as foreign and interior policies. Anything but a highly incremental, often painstakingly slow policy making process in these areas would be surprising and possibly detrimental to integration. Such an acknowledgement of the systemic purpose, which the various institutional brakes to quick policy making serve, points directly to the characteristic functional features of macro political stabilisation policies, as they have been outlined in chapters 2 and 3. Such an argument should, however, not lower expectations to a point at which all deadlocks are justified by the functional requirement of intense inner executive coordination. What remains, however, interesting from a comparative perspective about the political system of the EU is not so much the existence of such patterns of a consensus democracy ubiquitous in semi-sovereign states (Katzenstein 1987). What is rather striking is that these patterns of policy making do not (only) relate to industrial relations, health issues or educational policies but to areas as closely linked with sovereignty such as foreign and interior affairs.

CHAPTER 8

Conclusion

This thesis has provided an explanation of policy making in EU foreign and interior affairs that focuses on the functional dynamics in these two areas and how these have affected the role of EU actors in this process. The focus of this thesis on EU actors had the purpose of bringing to the fore those features which reveal the emergence of a cross pillar institutional setting within a functionally unified policy space.

Detecting the main elements of such a functional setting, the thesis has argued that it is the *shared identity formation function* for the political system of the EU, which allows us to conceptualise foreign and interior policies as constituting a single policy type. Hence, in both areas the EU allocates, through decisions made at the central level, political rules which establish and sustain the distinction between an inside and an outside. Due to this shared policy function, which provides the EU with both identity and sovereignty, this policy type has been referred to as 'macro political stabilisation', thereby drawing analogies to the way in which monetary policies provide the framework for macro economic stabilisation within a political system. As this thesis has shown, in the course of the last ten years, these macro political stabilisation policies have indeed become an integral part of the EU political system.

As has been pointed out throughout this thesis, the focus on EU actors does neither explicitly nor implicitly imply that these actors would hold the main power resources in foreign and interior affairs. Thus, as a direct result of both areas' close linkage with traditionally national prerogatives, the price which EU actors had to pay for their systematic and permanent inclusion into policy making processes in macro political stabilisation policies was the acceptance by EU actors of the (cross pillar) leadership by the (European) Council, the rotating Presidencies or, occasionally, individual member states. However, notwithstanding the importance of these actors

in providing leadership and continuity of policies, policy making processes in both areas can no longer be understood from an (inter-)governmental perspective. As a result of the centralisation process of macro political stabilisation policies, EU actors have – to varying degrees - become increasingly involved in policy making in foreign and interior affairs.

Based on this observation of the emergence and consolidation of the policy type of macro political stabilisation policies at the EU level, the thesis has identified three main variables which account for the characteristic patterns of policy making in the two areas of foreign and interior policies. First, it has emphasised the crucial role of the *functional dimension* of macro political stabilisation policies. More specifically, the function of providing the EU with macro political stabilisation through the allocation of sovereignty, understood as the establishment of a distinction between insiders (EU/EU citizens) and outsiders (third countries/third country nationals) has led to the emergence of a functional frame to which both institutions and actor preferences relate. As has been argued in chapter 3, the tension emanating from the centralisation of macro political stabilisation policies at the EU level with the traditionally national context of this ‘insider-outsider dimension’ explains the incremental and slow process of integration on the policy dimension. Moreover, the functional focus supports the argument that both areas can most fruitfully be studied from a policy perspective rather than from a more narrow institutional focus on the second and third pillars only. What stems from this analysis on the functional dynamics of integrating foreign and interior policies at the EU level is that through the provision of public policies in both areas, the EU is acquiring both an internal and an external identity. As a result of this emerging internal and external identity, the EU is, moreover, developing political sovereignty in parallel with but autonomous from member states. And it is then this process which allows EU actors to shape policies – alongside member states – across the pillars.

In a second step, these functional characteristics of macro political stabilisation policies help to understand the *institutional dimension* which has been discussed in chapters 4 and 5. Thus, building upon Theodore Lowi’s famous

statement that *policies determine politics*, these shared functional features have led to the emergence of a cross pillar institutional setting of EU foreign and interior policies that is distinct from other areas of EU policy making. Notwithstanding the visibility of the pillar divide at the formal Treaty level, the role of EU actors is not restricted to first pillar policies but stretches across the three pillars. Moreover, the analysis of this thesis is able to account for the considerable variance in the capabilities which have been delegated to EU actors. Hence, a main feature of macro political stabilisation policies is that in particular the Council Secretariat and the Commission possess relatively balanced cross pillar capabilities, whereas Parliament, the Court of Justice and the Court of Auditors draw mainly from their capabilities set out in the first pillar. Finally, as has been analysed in chapter 6 the *preferences of EU actors* in the two areas vary considerably between them. Based on this observation, this thesis claims that assumptions of a somewhat shared interest of EU actors, as subtly suggested by the term 'supranational actors', does not reflect accurately the factual divergence of orientations.

Taken together, these characteristic features of macro political stabilisation policies help to account for the dominant patterns of interaction between EU and national actors in the policy making process of foreign and interior policies. Thus, the dominant characteristic of policy making is the functionally induced distinction between executive actors, such as the Commission, member states and the Council Secretariat, on the hand, and 'control actors', such as Parliament, the Court of Justice and the Court of Auditors, on the other. The relationship between executive actors and 'control actors' is subject to a remarkable dominance of the EU executive. However, both sides must also not be treated as somewhat unified blocs. A look at inner executive relations reveals not only mechanisms of a complex system of checks and balances but also brings to the fore deadlocks at all stages of the policy making process.

The theoretical arguments of this thesis are questioning the usefulness of those theoretical approaches that continue to centre around the distinction between 'supranational' and 'intergovernmental' conceptualisations of European integration in

order to account for policy outcomes. This thesis argues instead that the centralisation of policies renders the EU level the 'space' to which institutions and actors (both national and EU actors) primarily relate. Centralisation is thus an analytical concept that helps to account for the process of a vertical transfer of powers, in which the EU acquires authority for regulating foreign and interior policies in parallel but autonomous from member states. At the same time, 'centralisation' is not based on the assumption that such a transfer would necessarily result in a 'supranationalisation' of policies or a loss of power of member states as a collective unit. Hence, 'centralisation' leaves open the question of how the transfer of policy areas affects the horizontal distribution of powers at the EU level. An answer to this question requires empirical analysis on the basis of concrete case studies. Accordingly, this thesis has shown that both foreign and interior policies are indeed characterised by a functionally induced centralisation process in which member states (most often acting as a collective unit) keep control of the main resources in policy making, provide for political leadership and play an important role in ensuring continuity of policy making. Thus, the European Council, the Council of Ministers, the Presidencies and, occasionally, individual member states remain the most powerful actors in EU foreign and interior policies across the pillars. Notwithstanding this argument, this thesis has at the same time provided ample evidence that centralisation has not only led to an increasing blurring of the pillar structure, which originally divided both policy areas, but also enabled EU actors to consolidate their role in policy making in both areas across the pillars.

As far as foreign and interior policies are concerned, it is not the allegedly intergovernmental nature of the institutions in the second and third pillars nor the interests of member states alone, that can account for politics and policies in the two areas. Instead, institutions and preferences must be understood against the background of the specific functional features which macro political stabilisation policies have for the political system of the EU. The incremental centralisation process in both areas, thus, leads to the consolidation of a specific functional frame relating to this distinct policy type. As a consequence, the results of this thesis do not

only relate to cross pillar politics but also apply to the study of politics in the first pillar. Thus, institutions and preferences in macro political stabilisation policies as well as institutions and preferences in mere first pillar policies do both operate within the same 'space' of EU politics. Hence, differences in outcomes and patterns of interaction must primarily be accounted for by looking at the functional differences which are related to different policy areas or policy types.

It is, consequently, argued that policy outcomes in different policy areas can primarily be explained by focusing on the unique functional dynamics of distinct policy types and the way in which these set a frame for actors and institutions. As a word of caution, it must, once more, be emphasised that this argument on underlying functional dynamics in EU foreign and interior policies does not make the case for a quasi-deterministic model on European integration. Neither preferences nor institutions are fixed. Yet, in contrast to key assumptions of the aforementioned theoretical approaches on exogenously given preferences, the functional dynamics certainly create a framework to which both actors and institutions must relate when they engage in policy making in EU foreign and interior affairs – and, as far as macro political stabilisation policies are concerned, this framework cannot be fully understood from an 'intergovernmentalist' or 'supranational' perspective.

Having said this, it can be argued that EU foreign and interior policies have, some ten years after the entry force of the Maastricht Treaty, emerged as key areas of EU policy making. Moreover, both areas have been subject to a centralisation process, albeit a quite incremental one. Given the slow process of centralising foreign and interior policies at the EU level and the challenge this centralisation ultimately poses to traditional understandings of sovereignty, any prognosis on future developments becomes inherently difficult, if not impossible. To pick up the analogy with monetary policies suggested in chapter 1, we simply do not know where the snake heads to. Surely, the band of fluctuation in foreign and interior policies has been narrowed down in the last decade or so. Moreover, the institutional frameworks of EU foreign and interior policies, not least the participation of EU actors in this process, provides for a stable setting of repeated and permanent interaction.

However, until today this setting is far from providing the basis for somewhat single foreign and interior policies, while integration on issues of internal and external security remain even to a larger extent subject to national reservations. Having said this, a key insight from monetary union is also vital for macro political stabilisation policies. Notwithstanding the significance of functional dynamics for the incremental centralisation of sovereignty related policies at the EU level, a formal decision on creating a strong and, possibly, single EU framework for the regulation of foreign and interior affairs remains a decision that requires political will and societal backing that have until today not really been shown as far as these two policy areas are concerned.

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Annex: List of Interviews

Number / Date	Place	Institution	Expert's position
1. August 1998	Brussels	Commission	Director JHA
2. August 1998	Bonn	German Interior Ministry	Desk officer task force JHA
3. August 1998	Brussels	Council	Director (JHA)
4. August 1998	Brussels	Parliament	MEP (chairwoman civil liberties)
5. November 1999	Gütersloh	Bertelsmann Foundation	CFSP expert
6. May 2000	London	House of Commons	MP (foreign policies)
7. May 2000	Jerusalem	Israeli Foreign Ministry	EU desk officer
8. May 2000	Tel Aviv	Friedrich-Ebert-Foundation	Director Israel Office
9. May 2000	Tel Aviv	Commission	Head of Delegation
10. June 2000	Brussels	Commission	Desk officer (RELEX)
11. June 2000	Brussels	Commission	Desk officer (RELEX)
12. June 2000	Brussels	Commission	Head of Unit (RELEX)
13. June 2000	Brussels	Commission	Legal Service (Foreign affairs)
14. June 2000	Brussels	Council	Desk officer CFSP
15. June 2000	Brussels	Parliament	MEP (foreign policies)
16. June 2000	Brussels	Parliament	MEP (foreign policies)
17. June 2000	Brussels	Commission	Desk officer (Assistance)
18. June 2000	Brussels	Parliament	MEP (foreign policies)
19. June 2000	Brussels	Council	Advisor Special Representative
20. June 2000	Brussels	Parliament	MEP (civil liberties)
21. June 2000	Brussels	NGO	Director (migration policies)
22. June 2000	Brussels	Parliament	MEP (civil liberties)
23. June 2000	Brussels	Parliament	MEP (civil liberties)
24. June 2000	Brussels	Parliament	MEP (civil liberties)
25. June 2000	Brussels	Commission	Head of Unit (JHA)
26. June 2000	Brussels	Council	Director Legal Service
27. June 2000	Brussels	Council	Desk officer Legal Service
28. June 2000	Brussels	Council	Desk officer Legal Service
29. June 2000	Brussels	Parliament	MEP (civil liberties)
30. June 2000	Brussels	Parliament	MEP (civil liberties)
31. July 2000	Brussels	Council	Advisor Special Representative
32. July 2000	Brussels	Commission	Deputy Head of Cabinet (assistance)
33. July 2000	Brussels	Parliament	MEP (foreign policy, committee chairman)
34. July 2000	Brussels	Commission	former Director (foreign policies)
35. July 2000	Brussels	Commission	Desk officer (RELEX)
36. July 2000	Brussels	Council	Director (foreign policies)
37. July 2000	Brussels	Parliament	MEP (science and technology)
38. July 2000	Brussels	Council	Desk officer (CFSP)
39. July 2000	Brussels	Parliament	Administrator (foreign policies)
40. July 2000	Brussels	Parliament	MEP (foreign policies)
41. July 2000	Brussels	Parliament	Administrator (civil liberties)
42. July 2000	Brussels	Commission	Legal Service (interior)
43. July 2000	Brussels	Parliament	MEP
44. July 2000	Brussels	Council	Director (JHA)
45. July 2000	Brussels	Commission	Deputy Head of Unit (JHA)
46. July 2000	Brussels	Commission	Desk officer, represent WBGS
47. July 2002	Berlin	NGO	Former Israeli Army official