# COMMISSION OF THE EUROPEAN COMMUNITIES

SEC(93) 1687 final

Brussels, 4 November 1993

Corrigendum SEC(93) 1687 final/3

## Report to the Council on the possibility of applying Article K.9 of the Treaty on European Union to asylum policy

**(presented by the Commission)**

The text of the Council's conclusions on the report are attached as Annex II

# Report to the Council on the possibility of applying Article K.9 of the Treaty on European Union to asylum policy

## INTRODUCTION

1. Article K.9 of the Treaty on European Union provides that "the Council, acting unanimously on the initiative of the Commission or a Member State, may decide to apply Article 100 C of the Treaty establishing the European Community to action in areas referred to in Article K.1(1) to (6), and at the same time determine the relevant voting conditions relating to it. It shall recommend the Member States to adopt that decision in accordance with their respective constitutional requirements". The declaration on asylum attached to the Final Act of the Treaty states in its second paragraph that "the Council will also consider, by the end of 1993, on the basis of a report, the possibility of applying Article K.9 to such matters" (i.e. asylum policy).

2. The end-1993 deadline was admittedly chosen at a moment when the TEU was expected to enter into force on 1 January rather than 1 November 1993. Nevertheless, the considerations which might lead the Union to pursue its future action in the field of asylum policy on the basis of Article 100 C rather than the provisions of Title VI of the Treaty, need not be limited to an assessment, based on practical experience, of how well or badly the Title VI procedures meet the needs of a sensitive area such as asylum. The Member States have been working together on asylum issues for long enough already, effectively since 1989 when the first draft of the "Dublin Convention"(1) was tabled by the then French Presidency, for it to be possible to make a valid assessment of the difference it would make if the procedures set out in Article 100 C (the only Title II

---

(1) Dublin Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Community.

Article mentioned as a possibility in Article K.9) were to be adopted in future.

3. This report, therefore, draws attention to the changes which would undoubtedly result from an effective application of Article K.9 to move asylum policy from Title VI to Article 100 C of the EC Treaty. It does not go into legal arguments about competence on which it is well known that opinions differ and which in the final analysis can only be settled by the European Court of Justice. It notes however that nothing that has happened up to now in this policy area prejudges that competence issue: the Commission made it clear in its communication of December 1988 (COM(88) 640 final) that its willingness to work with Member States in an intergovernmental forum on asylum and other frontier-related issues was without prejudice to the question of competence; and the wording of Article K.1, which lists asylum policy as the first of nine subjects which Member States shall regard as matters of common interest, also makes clear that this is "without prejudice to the powers of the European Community".

## BACKGROUND

4. Although all Member States from the beginning have shared a commitment to respect the obligations flowing from the 1951 "Geneva Convention"[1], as amended by the 1967 New York Protocol, it was only after the signature of the Single European Act, with its Article 7A EC (ex-8A EEC) commitment to the creation of an area without internal frontiers, that they turned their minds to cooperation in the field of asylum policy in ways particularly tailored to their needs as the Member States of the European Community. In this they followed the example of the founding partners of the Schengen Agreement and, like them, limited their cooperative ambitions to the strict procedural minimum needed to make workable the area without internal frontiers. The decision to achieve this through a binding legislative instrument led to the

(1) Convention relating to the status of refugees.

successful negotiation of the Dublin Convention, signed by eleven Member States in June 1990 and by Denmark one year later, but as yet ratified by only six Member States. It should be noted that already in 1989 opinions were divided among the Member States on whether a Community instrument or an intergovernmental convention would be the more appropriate instrument for this purpose.

5. The further dramatic increase after 1989 in the numbers of people seeking asylum in Western Europe which affected virtually all Member States, particularly the Federal Republic of Germany, led the European Council in Luxembourg in June 1991 to look beyond the procedural cooperation set out in the Dublin Convention towards more substantive forms of harmonised asylum policies. This led to the adoption six months later at the Maastricht European Council of a comprehensive work programme covering many aspects of asylum policy not touched on in the Dublin Convention. The endorsement by the Maastricht European Council of this programme, tabled by the Dutch Presidency, to which the Commission contributed through its communication to the Council and Parliament of 11 October 1991, reflected the unanimous agreement among Member States that asylum issues had taken on such proportions that they could not be addressed by Member States acting individually but needed to be tackled jointly and cooperatively. In pursuit of this work programme, Ministers have since taken a number of significant steps, including in particular resolutions on manifestly unfounded asylum applications and on third host countries; common assessments on the situation in some relevant countries of origin have been commissioned and received; and a "clearing house" on asylum (CIREA) has been set up.

6. It is also noteworthy that the programme submitted to the European Council by the Ministers responsible was careful not to express any opinion on the institutional framework for addressing asylum issues since this was being examined in parallel in the negotiations which led to the TEU. In other words, the question was still open at the time when the Maastricht work programme was being drawn up, of whether asylum issues should best be handled through "First Pillar"

or "Third Pillar" procedures. Article K.9, with its procedure for passing subjects from the latter to the former pillar and its associated declaration singling out asylum as the first and possible early candidate for such a transfer, reflected a recognition by all Member States that it would be right to examine by the end of 1993 the possibility of treating asylum policy under Article 100 C.

THE EFFECT OF A TRANSFER TO ARTICLE 100 C

7. Given the commitment by all Member States of the Union both to the principle of treating asylum as a matter of common interest within the meaning of Title VI of the TEU, and to a comprehensive work programme for pursuing their cooperation, does the Title VI or the Article 100 C procedure offer the better way of advancing this common interest? In particular, if the establishment of an area without internal frontiers indicates a need for more binding instruments than resolutions or recommendations, which procedure offers the better prospect of achieving it? The analysis presented in the annex to this report seeks to address these questions by pointing up the main differences between the two procedures in terms of the instruments available under each, procedures for producing and adopting proposals, democratic control/transparency, effective implementation and judicial review.

It indicates that the main changes would be:

(a) the process would be transparent from an early stage as proposals could only come from the Commission which makes its proposals public;

(b) the European Parliament would be more fully involved and be able to give its opinion on the basis of a detailed text in all circumstances;

(c) national parliaments would not ratify legislative instruments, but would continue to have the possibility of exercising their

surveillance, for example through dialogue with their national governments during the Council negotiations and in the transposition of directives into national law;

(d) the Commission would have exclusive as opposed to shared right of initiative; but would be required to "examine any request made by a Member State that it submit a proposal to the Council";

(e) implementation of legislative instruments would be more quickly achieved, at least if past experience of the time it takes to ratify conventions, which usually requires the approval of national Parliaments, is any guide;

(f) the competence of the European Court of Justice to give a uniform interpretation on the measures taken would no longer depend on a decision of the Council to introduce this right into an Article K.3 Convention.

8. Applying this analysis to asylum policy in particular, and without prejudice to any asylum-related questions which may already be covered by Community competence, would there be added value in the early transfer of asylum policy to Article 100 C? The Commission believes that the gains in terms of transparency, the full involvement of the European Parliament and potentially speedier decision-making speak for themselves.

9. An examination of the progress made in implementing the work programme approved by the Maastricht European Council shows that the approach favoured by the majority of Member States so far has been of a non-binding nature, with a preponderance of resolutions and recommendations rather than, with the exception of the Dublin Convention, legally binding texts. The effectiveness of this approach will only be fully tested when it is seen how far Member States are in practice willing to go to bring their national legislation into line with these resolutions and recommendations, for example that on manifestly unfounded asylum applications or third host countries. The Commission believes that the type of

approach adopted to date may not prove to be the most appropriate for introducing the sort of harmonisation envisaged by the Maastricht European Council and needed in an area without internal frontiers. Although Title VI and Article 100 C both offer the possibility of legally binding or non-binding instruments, the Commission notes that Article 100 C would provide a wider range of possible instruments (regulations, directives, decisions) than Title VI and an environment of greater legal certainty and interpretation. This would further reinforce the case for making use of the possibilities offered by Article 100 C. In this context, the Commission intends to submit to the Council and Parliament a follow-up communication on immigration and asylum policy in general. It hopes that this will provide additional elements for any subsequent examination by the Council of the particular question raised by Article K.9 if the Council takes the view that it is too early to take a decision on this matter so soon after the entry into force of the Treaty on European Union.

10. The Commission also notes that the European Council, meeting in Brussels on 29 October, has asked the Justice and Home Affairs Council to prepare a precise action plan for its December meeting covering, inter alia, "common action in the field of asylum laws in accordance with the Declaration annexed to the Treaty".

CONCLUSION

11. The Commission considers that, despite the advantages offered by Article 100 C as mentioned in paragraphs 8 and 9 above, the time is not yet right to propose the application of Article K.9 so soon after the entry into force of the Treaty on European Union, but also believes that those advantages demonstrate that the question of the possible application of Article K.9 to asylum policy should be examined again in the light of experience.

ANNEX

# LEGISLATIVE PROCESS UNDER TITLE VI OR ARTICLE 100 C

## Instruments available

| Title VI | Article 100 C |
|---|---|
| Common positions, common actions, conventions; any co-operation using the appropriate form (Article K.3). | Full panoply of Community instruments with binding force (regulations, directives, decisions). Community can also adopt instruments which have no binding force. |

## Procedure for producing and adopting proposals

### 1. Right of initiative

| Title VI | Article 100 C |
|---|---|
| "any Member State or the Commission" (Article K.3). Successive Presidencies will be able to call on support of strengthened Council Secretariat. | Exclusive Commission right of initiative; but 100 C.4 requires Commission to "examine any request made by a Member State that it submit a proposal to the Council". |

### 2. Decision-making procedure

| | |
|---|---|
| Proposal examined through Council working groups under auspices of Article K.4 Committee and COREPER. Decisions taken by Council acting unanimously "except on matters of procedure and in cases where Article K.3 provides for other voting rules". | Obligatory opinion of the European Parliament. Proposal examined through Council working groups under auspices of Article K.4 (Article 100D) Committee and COREPER. Voting rules in the Council to be determined on case by case basis in each individual K.9 procedure. |

## Democratic control/transparency

| Title VI | Article 100 C |
|---|---|
| No obligation to make proposals public before final adoption. European Parliament kept "regularly informed of discussions". Presidency "consults" Parliament on "principal aspects of activities in the areas" of Title VI, and ensures that its views are "duly taken into consideration" (Article K.6). Parliamenary control exercised by national Parliaments in the ratification procedure of conventions after signature. Opportunity but no obligation for informal consultations with interested outside bodies, eg UNHCR. | Commission proposal sent by Council to European Parliament for its opinion. Open debate in Parliament. Interested outside bodies can express opinions on basis of published text. Single reading in Parliament. |

## Effective implementation of legislative instruments

| Title VI | Article 100 C |
|---|---|
| Council recommends agreed Conventions to Member States "for adoption in accordance with their respective constitutional requirements" - no time limit. | Any legislative instrument will contain its own date of implementation whether through direct application (regulations) or for transposition into national law (directives). |

## Judicial review

| Title VI | |
|---|---|
| National courts. Uniform interpretation of conventions (and ruling on disputes regarding their application) by the Court of Justice if so provided in individual conventions. | National courts. Uniform interpretation by the Court of Justice. All other procedures relating to judicial review and enforcement of Community law by Court of Justice. |

8

20.VI.94

**1771ST COUNCIL MEETING –**

**JUSTICE AND HOME AFFAIRS –**

**LUXEMBOURG, 20 JUNE 1994 –**

**PRESIDENTS: MR STELIOS PAPATHEMELIS,**

**MINISTER FOR PUBLIC ORDER OF THE HELLENIC REPUBLIC**

7760/94 (Presse 128 – G)

**OTHER JHA DECISIONS**

(adopted unanimously, without discussion, save otherwise indicated)

Asylum policy - application of Article K.9 of the Treaty

The Council recorded final agreement (*) on the following conclusions concerning the possible application of Article K.9 of the Treaty on European Union to asylum policy:

"The Council noted the progress made in asylum policy co-operation in recent years on the basis, in particular, of the programme approved by the Maastricht European Council.

Aware of the need to intensify such co-operation, it agreed to implement as soon as possible the new instruments available to it under the Treaty on European Union. They will make it possible to improve the effectiveness of the measures adopted in the framework of the Union in implementation of the priority programmes to be drawn up.

The Council took cognizance of the Commission report on the application of Article K.9 to asylum policy, as provided for in paragraph 2 of the declaration contained in the Final Act of the Treaty on European Union.

The Council noted that, in the Commission's view, application of Article K.9 would offer certain advantages. It considers, however, like the Commission, that the time is not yet right to propose such application so soon after the entry into force of the TEU. Nevertheless, it believes that it might be advisable to reconsider this matter at a later date in the light of experience and by the end of 1995 at the latest."

(*) Agreed on in principle at the JHA meeting on 29 and 30 November 1993, but still subject then to reservations since withdrawn.