



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 22.11.1995
COM(95) 566 final

COMMUNICATION FROM THE COMMISSION
TO THE EUROPEAN PARLIAMENT AND THE COUNCIL

ON THE POSSIBLE APPLICATION OF ARTICLE K.9
OF THE TREATY ON EUROPEAN UNION

INTRODUCTION

1. At the request of the European Parliament, the Commission undertook, in the context of its 1995 programme, to produce a report on the possible implementation of Article K.9 of the Treaty on European Union. This article provides for the possibility of applying Article 100C EC Treaty to action in six of the nine areas referred to in Article K.1, thereby transferring some competences from the area of Cooperation in the fields of Justice and Home Affairs, governed by Title VI of the TEU ("the Third Pillar"), to the Community. The implementation of Article K.9 requires a unanimous decision of the Council, on the initiative of the Commission or a Member State, and the adoption of that decision by all Member States according to their respective constitutional requirements.

2. The Council has already examined this question once.

The declaration on asylum attached to the Final Act of the Treaty required it to do so, with particular and exclusive reference to asylum policy, "by the end of 1993" which meant, in practice, within two months of the entry into force of the Treaty.

That first examination was based on a report provided by the Commission (doc. SEC(93)1687 of 4 November 1993) drawing attention to the several advantages which it could be assumed would flow, in terms of effective decision-making, transparency and legal certainty, from transferring asylum policy to the Community "pillar" of the Treaty. The Commission's report suggested, however, that it probably would not make sense to think in terms of triggering the potentially long drawn-out procedures inherent in Article K.9 immediately after the entry into force of the Treaty and before the newly introduced provisions of Title VI had been given the chance to show what they could produce. The Council, in its conclusions of 20 June 1994, endorsed the Commission's approach and agreed that it might be advisable to reconsider this matter at a later date, in the light of experience, by the end of 1995 at the latest.

3. Unlike in the case of its first report, the Commission can now base this second report not only on theoretical considerations but also on two years practical experience of living with the provisions of the "Third Pillar" as a way of pursuing cooperation in the fields of justice and home affairs. For convenience the report is divided into two chapters :

- the objective underlying Article K.9
- the appropriateness of looking to Article K.9 as the best instrument for attaining that objective.

THE OBJECTIVE OF ARTICLE K.9

4. The objective of the article is clear. It is to transfer certain questions from the "Third Pillar" to the Community "Pillar" - and not only to the Community "Pillar" in general, but to the particular Article 100C which has a number of specific characteristics :
 - it is clearly situated in the chapter of the Treaty which deals in general with the approximation of laws with a view to facilitating the functioning of the common market, and in particular with the establishment of the internal market, defined as an area without internal frontiers;
 - although initially requiring decision-making by unanimity, it provides for the possibility of a transfer to qualified majority voting after a certain period. It should be noted however that Article K.9 specifies that such a transfer should not be automatic, but would require a determination to that effect in the Article K.9 decision itself, in other words by unanimity;
 - although conferring on the Commission the exclusive right of initiative which characterises the whole of the Community "Pillar", it also requires the Commission to examine any request from Member States that it submit a proposal to the Council;
 - while bringing the European Parliament systematically into the decision-making process, it does so under the least complete formula, i.e. that of simple consultation.

5. These characteristics would make it seem at least partially suited to addressing the obstacles to progress in the "Third Pillar" to which attention has been drawn by numerous commentators, including in the separate reports on the implementation of the TEU submitted by the Parliament, the Council and the Commission. In their different ways, these commentators have highlighted the following problems :
 - a) the slowness of the decision-making process with the omnipresent requirement for unanimity in the Council followed, in the case of "Third Pillar" Conventions, by the need for ratifications in all Member States;
 - b) the continued lack of transparency of the Council's work in this area which can in part be attributed to the reluctance of the Council to make known to the Parliament the proposals on which it is working until they are ready for adoption or even already adopted;

- c) the absence of legal certainty which only the Court of Justice can provide. The faculty to give the Court of Justice competence in Title VI has resulted in repeated blockages of all the relevant major conventions currently under negotiation. Furthermore, the absence of clear views on the scope of the legal instruments, i.e. joint actions and joint positions, provided for by Article K.3, and the fact that the Commission has no role to play as guardian of the Treaty in this area, do not contribute to legal certainty;
 - d) the absence also of any clearly defined objectives to which the catalogue of areas for cooperation listed in Article K.1 can relate.
6. To a considerable extent, a transfer to Article 100C could eliminate these obstacles. It would at a stroke deal with the question of the involvement of the European Court of Justice and introduce obligatory consultation of the European Parliament (albeit in its least advanced form). By situating the areas of cooperation firmly in the context of the approximation of laws in the common market and in particular in the context of establishing the internal market, it would provide framework objectives currently missing in Title VI. By moving to article 100C and opening the possibility, provided the Council so decides, of introducing qualified majority voting, decision-making could be facilitated and encouraged.

IS ARTICLE K.9 THE MOST APPROPRIATE INSTRUMENT?

7. This report has been requested before the end of 1995, in other words just before the opening of the 1996 Intergovernmental Conference.

Although Title VI is not specifically mentioned in the Treaty among the areas which will have to be revisited in 1996, it seems nevertheless that, according to the fifth indent of Article B of the Treaty, the Conference will need to address institutional and practical questions related to the functioning of cooperation in the fields of justice and home affairs. That certainly appears to be the thrust of the discussions so far in the Reflexion Group set up by the Essen European Council. Any examination of the "Third Pillar" in the context of the I.G.C. is in turn bound to address the question of its possible "communitarisation", either total or partial.

8. For its part, the Commission has made public its clear conviction that "communitarisation" of 7 of the 9 areas listed in Article K.1 is the right solution for all the reasons mentioned above. Police cooperation and judicial cooperation in criminal matters represent the two exceptions. All the other areas, with their close interface with work done under the Community "Pillar", in particular with the objective of the free movement of persons, would benefit greatly from the early application of the Community method of decision-taking and the full and automatic involvement of the Community institutions. While accepting that police cooperation and judicial cooperation in penal matters are regarded by the Member States as too close to national sovereignty to be transferred in the short term to the Community "Pillar", the Commission nevertheless believes that a greater involvement of the institutions in these areas too should be sought at the I.G.C.

9. This then is the position which the Commission is committed to defending in the I.G.C. Its objective corresponds closely with the one underlying the *raison d'être* of Article K.9. The immediate question is, therefore, whether that objective would be helped or hindered by the early tabling of a K.9 initiative. This question should be examined bearing in mind the weaknesses of this provision which has not yet been enacted. Indeed as the Commission stated in its "Report on the Operation of the Treaty on European Union" (doc. SEC(95)731 final of 10 May 1995), "the procedure laid down is cumbersome: it 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.
10. Against that background, the Commission has concluded that the objective, which it shares with the Parliament, of "communitarisation" of major aspects of the Third Pillar would best and most effectively be pursued in the context of the Intergovernmental Conference rather than through an Article K.9 initiative. Without prejudice to the possibility of turning to Article K.9 at some future date if the circumstances warrant it, the Commission's reasoning is based on the following considerations:
- (a) the coincidence of timing between this report and the imminence of the opening of the Intergovernmental Conference means that any Article K.9 initiative taken in the Council now would soon be running in parallel with an examination of the same or similar questions in the I.G.C. itself. The Commission does not believe that there is room for such duplication, and that one forum is bound quickly to crowd out the other;
 - (b) faced with the choice, the Commission believes that the I.G.C. offers the more promising route. Not only does it provide a wider context, it also need not be bound by the limitations inherent in Article 100C to which attention is drawn above. It would be possible in the I.G.C. context to argue in favour of:
 - the involvement of the European Parliament going beyond simple consultation;
 - transfer to the Community "Pillar" of more than the six areas mentioned in Article K.9;
 - the introduction of qualified majority voting for certain aspects without the need for a separate unanimous decision to that effect by the Council at a later date;
 - (c) it would reinforce the case for a fundamental review of the Third Pillar in the I.G.C., rather than crediting, by the tabling of a K.9 initiative, the idea that the provisions of Title VI are already sufficient on the grounds that they provide an adequate mechanism for "communitarisation".

11. On balance, the Commission therefore believes that the wiser and more productive course would be to press the case for "communitarisation" in the context of the I.G.C., without first tabling a potentially distracting proposal based on Article K.9.