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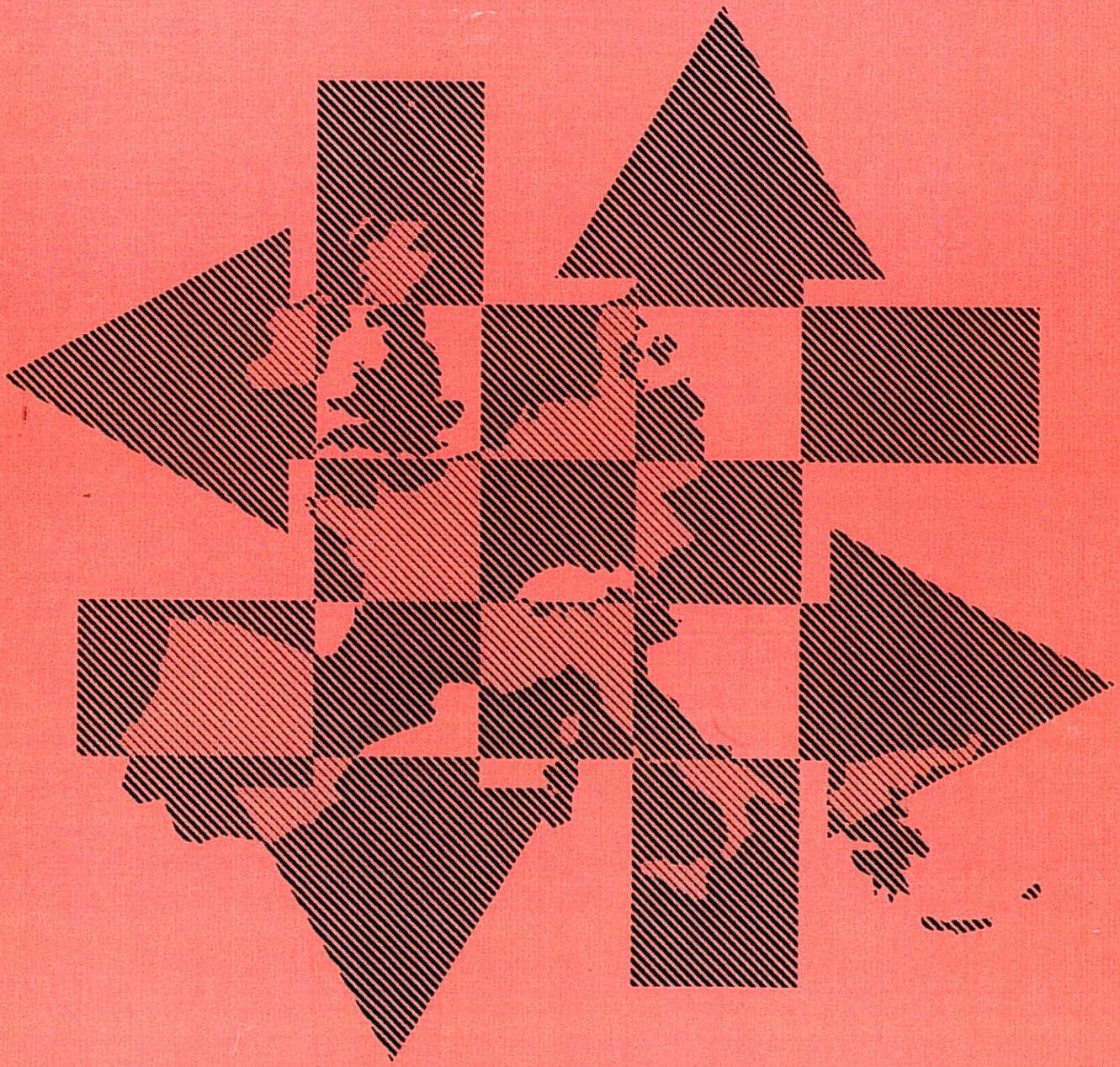
BY ANN DUMMETT AND JAN NIESSEN



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NOTE

This publication has been produced jointly by the Churches Commission for Migrants in Europe and the Commission for Racial Equality (CRE). The views expressed are those of the authors and not necessarily those of the CRE.

INTRODUCTION

On 1 November 1993, the Maastricht Treaty – or, to give it its correct name, the Treaty on European Union – came into force. In the two years that have elapsed since it was agreed in December 1991, there has been much public discussion in the member states of the European Community of 'Maastricht' and its implications: yet, even now, few people are aware of what it will mean to would-be migrants from outside the Community or to third-country nationals already residing in member states.

This is partly because public discussion has been focussed on economic and monetary matters and on the conflict between two opposed views of what the Community's role should be: those who want greater competence for the Community's own institutions and those who want as many powers as possible to be in the hands of member states' own systems of government. Furthermore, matters have become greatly confused because the future of migration policy is being affected by agreements and negotiations between member states and other European countries, or between member states acting outside the Community framework. We have attempted to clarify this complicated picture. EC legislation can be produced only if there is a basis for it in the Treaty of Rome, as amended up to date. There is a clear basis there for legislating on migration across national borders within Community territory, but not for legislating on entry from so-called third countries. The governments of the 12 EC countries have therefore for some years been negotiating with each other *outside* the Community procedures and institutions on common approaches to immigration. It was decided at the Maastricht summit meeting to formalise these inter-governmental negotiations, and connect them loosely to the EC structure rather than to give the Community itself responsibility for a common immigration policy.

This Briefing Paper, an updated version of CCME Briefing Paper No 7, is being published by the Churches' Commission for Migrants in Europe, (CCME) based in Brussels, and the Commission for Racial Equality (CRE) in Britain, as a contribution to better understanding of the Treaty's implications for immigration, citizenship and community relations. Readers will find here extracts from the relevant texts, with some explanation and

commentary. It must be emphasised that the views of the authors are not necessarily those of the CCME or the CRE.

The authors wish to thank CCME and the CRE for making this publication possible, and hope it will clear up some of the widespread doubts and uncertainties about 'Maastricht'.

1. COMMUNITY POLICY-MAKING IN THE FIELD OF MIGRATION AND COMMUNITY RELATIONS

BEFORE MAASTRICHT

In becoming members of the EC, all the 12 European states which belong to it agreed to give up some of their sovereignty to EC institutions: the Council of Ministers (which takes the final decisions in the legislative process); the Commission (which has sole right of initiative in legislation and monitors its application: the Commission is the guardian of the Community Treaties); the European Parliament (directly elected by nationals of the member countries, but with few powers of its own) and the Court of Justice (with judges from all member states: the Court ensures that the implementation of the treaties and EC legislation correctly observes EC law, and is the final court of appeal on matters of Community law; its judgements are directly applicable in member countries).

Though *some* sovereignty had to be given up under the original Treaty of Rome, of 1957, the governments of member countries have retained large powers separately over their own affairs. The aims of the Treaty of Rome included: ensuring economic and social progress by common action to eliminate the barriers which divide Europe; improving living and working conditions; strengthening economies; abandoning restrictions on international trade and confirming solidarity between Europe and overseas countries in accordance with the principles of the United Nations Charter. Community law therefore deals with economic and social cohesion. Other areas of policy are affected only in so far as they serve the purpose of such cohesion. So, for example, while vocational training and recognition of qualifications may be matters for Community action, a general education in schools is more obviously a matter for each nation, region or locality. Criminal law has been almost entirely a matter for member states and not for the Community.

Migration law has been directly affected when it concerns the movement of workers (including self-employed persons) and their families between member countries. Articles 48 to 58 of the Treaty of Rome, certain provisions of the Single European Act which amended that Treaty in 1986

and EC Regulations and Directives have, together with judgements of the Court of Justice, established a system of free movement, allied to protection of workers' rights. The equality of treatment thus provided is, however, enjoyed almost exclusively by EC nationals and their families (the latter may be of any nationality). In 1992 the right of free movement was extended to students, pensioners and other non-salaried persons. This liberalisation of internal migration policy has meant that member states have abandoned a *part* of their former complete control of immigration. But towards other persons from non-EC countries, that is, third-country nationals, member states have retained their sovereign right to admit or refuse whom they please. An Argentinian admitted to Spain has no right, except through an EC spouse, child or parent, to move to another EC country for work, but will be admitted only according to a particular state's law regarding non-EC migrants. The same applies to Commonwealth-country citizens settled in Britain. The British situation is complicated by the fact that there are six different categories of British nationality, and the British government has designated only British citizens, Gibraltarians and a handful of others as EC nationals: other kinds of British are excluded from free movement. It is for each state to define its own nationals for EC purposes[1].

Broadly speaking, then, before the Maastricht Treaty came into force, member states' immigration policies were fairly clearly divided into two parts: one coming under Community competence and one coming under national authority.

However, steady progress towards economic and social cohesion within the Community had already for sometime exerted pressure on member states to co-operate with each other in their measures on immigration from the outside world. Member states were unwilling to give up national powers over immigration policy to the Community's institutions[2]. In the mid-eighties, therefore, a significant number of member states intensified their co-operation on immigration matters, but did so outside the Community structures. They revitalised existing intergovernmental working groups like Trevi, and created new ones[3].

THE SINGLE EUROPEAN ACT

The Single European Act is a set of amendments to the Treaty of Rome, agreed in 1986. It provided the legal basis for implementing the White Paper 'Completing the internal market' (1985). The aim was to remove obstacles to free movement between member states of goods, persons, services and capital by the end of 1992. Over 200 pieces of legislation to implement these new Articles have been passed.

The intention was that all persons within EC territory would be able to move freely, and that internal border controls would be abolished so that they could do so. This obviously had enormous implications for immigration law and practice. Although the Single European Act provided for the free movement of persons across borders, it did not give third-country nationals the right to settle or work in states other than the one which had already granted them legal settlement.

The full implementation of these measures has been delayed, although they were supposed to come into effect on 1 January 1993. Free movement of goods, services and capital is now possible, but not yet free movement of persons. In October 1993 the European Parliament decided to file a complaint against the European Commission for failing to ensure the free movement of persons within the Community.

A COMMON IMMIGRATION POLICY

The abolition of internal border controls in the European Community, provided in the Single European Act of 1986, was intended to be accompanied by a common policy towards the world outside the EC. Agreement had to be reached between member states about how external border controls would be operated. This required a common policy on asylum and on visas. It also required co-operation between the immigration authorities of all the countries concerned in dealing with refugees and migrants from outside. These states do not need to have identical immigration laws and regulations: their internal laws and controls are supposed to deal with varying conditions on residence and work. But they need to know about each other's rules and also, once internal borders are down, to co-operate in tackling international crime, drug trafficking and terrorism. The question, which country shall examine a claim for asylum from someone who arrives on EC territory is dealt with separately in the

international Dublin Convention, which has been signed by all member countries but is not yet in force.

An external border was supposed to be provided for, well before the Maastricht Treaty was signed, in the international Convention on the Crossing of External Borders which was drawn up ready for signing in 1991. The signing has been delayed by disagreement between Britain and Spain over the status of Gibraltar airport. At the time of writing, the matter is still unresolved. However, some of the administrative arrangements for implementing the Convention are being developed.

SCHENGEN

Another set of parallel negotiations, designed to create an area without internal borders, has produced the Schengen Agreements. The Schengen Group now includes nine EC countries. Those who do not belong are Britain, Ireland and Denmark. The date for implementing the border-free area has been several times delayed: at the time of writing it is expected on 1 February 1994. Schengen, together with other inter-governmental agreements and structures, is described in full in CCME Briefing Paper No 12 (See Note 3).

THE TREATY ON EUROPEAN UNION

The Maastricht Treaty was drafted at a time when rapid moves towards closer union looked politically possible. Its preamble speaks of a resolution to mark a new stage in the process of European integration, and to establish a common citizenship, together with a desire to enhance the democratic and efficient functioning of the EC institutions to enable them to carry out their tasks within a single institutional framework.

However the EC institutions are only a *part* of the framework of the new European Union. The Union is to be built on three pillars. The first pillar is the Community's institutions, which are to deal with monetary, economic and social matters. The other two pillars are: first, foreign and defence policy; second, justice and home affairs. These two pillars are to be upheld by inter-governmental co-operation outside the main Community framework. Immigration and asylum belong to the third pillar.

The Community's institutions are not completely excluded from the inter-governmental process. Rules have been laid down in the Maastricht

Treaty for the conduct of inter-governmental negotiations: for example that certain decisions must be unanimous. The European Commission has a right of initiative in some areas. The European Parliament is to be informed of discussions and may make recommendations. Agreements concluded by inter-governmental procedures *may* be brought under the jurisdiction of the Court of Justice, but do not have to be. Provision is made for the transfer of immigration and asylum policy to the EC's institutions provided there is unanimous agreement among member states' governments that this should be done.

However, the main effect of Maastricht, where immigration policies are concerned, is formally to place large powers in the hand of national Ministers and their officials, without effective control by the institutions of the Community.

Of course national Ministers and officials already had large powers under the national laws and constitutions of their respective states. But at national level, democratic control can be exerted by national Parliaments and other institutions and monitored by the national Press. In theory, this democratic control remains in place over the inter-governmental process. However, in practice, national Parliaments vary in their efforts to discover and question what the inter-governmental committees are doing. Decisions can be reached privately by these bodies and then presented as *faits accomplis*: the chance of amending or rejecting them is much lower than when the process is a purely national one.

The Ministers who ultimately approve decisions wear different hats on different occasions. Sitting as the European Community's Council of Ministers, they are responsible under the Maastricht Treaty for visa policy, which in this sense is a Community responsibility. But all other aspects of immigration policy are dealt with by Ministers as co-operating parties to the inter-governmental process.

Naturally there has been some confusion in the public mind about which elements in this complex situation are European Community elements are which are not.

IMMIGRATION AND INTEGRATION

Immigration policy, at Community and inter-governmental level, is considered to include policies on the integration of immigrants who already

reside on Community territory. And integration is now generally considered to be a matter of providing rights for resident migrants and their families, as well as promoting social policies and educational plans which will assist them.

At this point, there is an overlap between the inter-governmental groups' responsibilities and those of the EC's institutions. The EC is concerned with social policies. It also has *some* competence where third-country nationals are concerned. For example, the Equal Opportunities directives concerning equality between men and women apply to *all* workers and not only to workers who are EC nationals. The Treaty prohibits discrimination on grounds of nationality only where EC nationals are concerned. There is no *clear* competence for EC legislation against discrimination on grounds of race, colour, ethnic origin, or non-EC nationality. However, if the political will were there, it might be possible to include anti-discrimination measures under the heading of the social and economic policy of the Community.

Elements of a common immigration policy are being developed under Article K of the Maastricht Treaty. So is a common policy on asylum.

2. THE STRUCTURE OF THE TREATY OF UNION

As a whole, the Treaty on European Union is a compromise between conflicting views of the Community's proper role. The Treaty formalises, and connects loosely to the Community structure, the inter-governmental negotiations that have already been taking place for some years in the Trevi Group, the Ad Hoc Committee and other groups. It makes no substantial increase in the powers of the European Parliament or in the jurisdiction of the Court of Justice over migration.

This chapter outlines the structure of the Treaty, so that readers can refer easily to those parts of the original text they wish to study in detail. The single most important Article is Article K. Please note that Title numbers in Roman numerals and Article letters refer to the treaty on Union: number like '100c' refer to amendments made at Maastricht to the European Community Treaty.

In the following chapter, we describe and comment on the new provisions affecting migration.

The structure of the Treaty is as follows:

a) Preamble

b) Title I Common Provisions (Articles A to F)

The articles of this Title set out the objectives and principles of the Union and indicate how these will be achieved. According to Article B the European Union aims:

- to promote economic and social progress which is balanced and sustainable, in particular through the creation of an area without internal frontiers, through the strengthening of economic and social cohesion and the establishment of economic and monetary unity ultimately including a single currency in accordance with the provisions of this Treaty;
- to assist its identity on the international scene, in particular through the implementation of a common foreign and security policy including the eventual framing of a common defence policy ...;
- to strengthen the protection of the rights and interests of the nationals of its member states through the introduction of a citizenship of the Union;
- to develop close co-operation on justice and home affairs;

- to maintain in full the *acquis communautaire** and build on it with a view to considering ... to what extent the policies and forms of co-operation introduced in this Treaty may need to be revised with the aim of ensuring the effectiveness of the mechanisms and the Institutions of the Community.

The objectives shall be achieved as provided in the Treaty while respecting the principle of subsidiarity. Furthermore:

> the Union shall be served by a single institutional framework which shall ensure the consistency and the continuity of the actions carried out in order to attain its objectives while observing and building upon the acquis communautaire (Article C).

In other words, a new structure is being built upon the existing Community structure. For this institutional framework other procedural rules may apply than those for the European Community. According to Article E:

> The European Parliament, the Council, the Commission and the Court of Justice shall exercise their powers under the conditions and for the purpose provided for, on the one hand, by provisions of the Treaty establishing the European Communities, the subsequent Treaties and Acts modifying and supplementing them and, on the other hand, by the other provisions of this Treaty.

c) Title II Provisions amending the EEC Treaty with a view to establishing the European Community (Article G)

Here the European Economic Community is formally re-named the European Community.

On citizenship, migration and asylum policies, the following changes are made:

- The introduction of citizenship of the Union. This citizenship is enshrined in the EC Treaty.
- The articles in the EC treaty dealing with the right of establishment and the free movement of workers and services are changed so that the powers of the European Parliament are somewhat increased.

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*The untranslatable term, *acquis communautaire*, refers to rights guaranteed by the Treaties, Community secondary legislation, Association and co-operation Agreements and Community jurisprudence.

- Two new articles concerning visas and sudden large inflows of migrants are inserted in the EC Treaty.

d) Title III Provisions amending the Treaty establishing the European Coal and Steel Community (Article II)

e) Title IV Provisions amending the Treaty establishing the European Atomic Energy Community (Article I)

f) Title V Provisions on a Common Foreign and Security Policy (Articles J.1 to J11)

g) Title IV Provisions on Co-operation in the field of Justice and Home Affairs (Article K)

In this Title no amendments have been made to the EC treaty but co-operation between the member states is established in the field of Justice and Home Affairs.

h) Title VII Final Provisions (Articles L to S)

i) Protocols

Seventeen Protocols are attached to the Treaty. None of them has a direct bearing on migration policies. The Protocol on Social Policy contains an Agreement on the social policies of the Community. All member States, with the exception of the United Kingdom, wish to implement the Community Charter on the Fundamental Social Rights of Workers (1989) on the basis of the "acquis communautaire".

THE FINAL ACT

The member states signed the Treaty in Maastricht on 7th of February 1992.

The Final Act of 1992 contains Declarations of which two are relevant to migration policies. The Declaration on Nationality of a Member State declares that the question whether an individual possesses that nationality shall be settled solely by reference to the national law of the Member State concerned. The Declaration on Asylum declares asylum policies to be a matter of priority.

The Declaration on racism in Europe that was adopted at the Summit in Maastricht in December 1991 does not appear in the Final Act of the Treaty as signed on the 7th of February 1992. The reason may be that this

Declaration did not say anything more than already had been said in the Joint Declaration of the Council of Ministers, the Commission and the European Parliament against Racism and Xenophobia (1986) and the Council's Resolution on the fight against racism and xenophobia (1990).

3. ANALYSIS OF THE PROVISIONS

1. UNION CITIZENSHIP

Every person holding the nationality of a Member State shall be a citizen of the Union. It entails four rights:

a) The right to move and reside freely within the territory of the member states, subject to the limitations and conditions laid down in the EC treaty and by the measures adopted to give it effect.

   The Council may adopt provisions with a view to facilitating this right, acting unanimously on a proposal from the Commission and after obtaining the assent of the European Parliament. This means some increase in the power of the European Parliament.

b) The right to vote and to stand as a candidate at municipal and European elections in the member states in which she/he resides. The Council of Ministers, acting unanimously on a proposal from the Commission and after consulting the European Parliament, shall adopt arrangements for the municipal elections before 31 December 1994 and for the European elections before 31 December 1993.

c) A citizen of the Union shall in the territory of a third country in which the Member State of which he is a national is not represented, be entitled to protection by diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State.

d) Every citizen of the Union shall have the right to petition the European Parliament and may make complaints to the Ombudsman of the European Parliament. (See the new Articles 138c and 138d of the EC Treaty. There it is stated that any citizen of the Union and any natural or legal person residing or having its registered office in a Member State shall have the right to petition and to make complaints). It should be noted that this clause includes third country nationals.

The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may adopt provisions to

strengthen or add to the rights of citizens of the Union.

As soon as the citizenship of the Union is established, EC nationals working in a Member State other than their own will no longer be considered as migrant workers. This will have consequences, for the traditional groups of migrant workers from countries such as Italy, Greece, Spain and Portugal. They will enjoy the rights attached to Union citizenship but may no longer be entitled to benefit from social and welfare programmes for migrant workers and their families.

2. THIRD COUNTRY NATIONALS

In Article K(1) of the Treaty on the Union nine matters of common interest have been identified (See below under "Inter-governmental co-operation). Some are related to conditions of movement and residence by nationals of third countries on the territory of member states, including family reunion and access to employment. Nowhere else in the Treaty have explicit references been made to the movement and residence of third country nationals legally residing in the member states.

The report of the Ministers responsible for immigration to the European Council meeting in Maastricht considered the movement of third country nationals between member states. One proposal was to allow third country nationals who are legally residing in a Member State to move but not reside freely within the Community.

This proposal has not been adopted by the EC's Council of Ministers, but a similar proposal has been agreed by the Schengen countries. Third-country nationals in the Schengen countries will therefore be able to cross borders between those countries freely, but third-country nationals resident in Britain, Ireland and Denmark will not benefit.

However, in the Protocol on Social Policies, it has been acknowledged that the Community has competence in the area of conditions of employment for third-country nationals legally residing in Community territory.

3. ADMISSION AND ASYLUM POLICIES

Changes in the EC Treaty

Article G of the Treaty on the Union inserts the new articles 100c and 100d

in the EC Treaty under part III (Policy of the Community), chapter 3 (Approximation of laws).

According to Article 100c (1):

> The Council, acting by unanimity on a proposal from the Commission and after consulting the European Parliament, shall determine the third countries whose nationals must be in possession of a visa when crossing the external borders of the member states.

As from 1 January 1996 the decisions will be taken by a qualified majority. Moreover,

> in the event of an emergency in a third country posing a threat of a sudden inflow of nationals from that country into the Community, the Council may, acting by a qualified majority on a recommendation from the Commission, for a period not exceeding six months, introduce a visa requirement for nationals from the country in question.

This requirement can be extended but then the procedure as described under Article 100c (1) must be respected (Article 100c (2)).

Before 1 January 1996, the Council shall, acting by a qualified majority and on a proposal from the Commission and after consulting the European Parliament adopt measures on a uniform format for visas.

Article 100d refers to the Co-ordinating Committee of senior officials set up under Article K of the Treaty on European Union, allowing the Committee to prepare Council meetings on matters covered by Article 100c.

These carefully phrased Articles mark a first move to bring under Community legislation the admission of third country nationals. The role of the European Parliament here is weak (consultation only, but not in an "emergency situation") and the Co-ordinating Committee of senior officials is given a prominent place. Article 100c (6) allows member states to apply Article 100c to other matters related to co-operation in the field of Justice and Home Affairs,

> the provisions of the conventions in force between the member states governing issues covered by this Article shall remain in force until their content has been replaced by directives or measures adopted pursuant thereto (Article 100c (7)).

Perhaps governments may come to the conclusion that the advantages of inter-governmental co-operation (e.g. relatively short drafting process) are outweighed by the disadvantages (e.g. lengthy ratification procedures).

They may then have recourse to Community legislation because once an agreement is reached on the text of a directive, it can take effect fairly quickly.

Intergovernmental co-operation

Title VI of the Treaty on the Union establishes inter-governmental co-operation in the fields of Justice and Home Affairs. Article K1 identifies nine matters of common interest between the member states:

1. asylum policy
2. rules governing the crossing by persons of the external borders of the member states and the exercise of control thereon;
3. immigration policy and policy regarding nationals of third countries:
   a) conditions of entry and movement by nationals of third countries on the territory of member states;
   b) conditions of residence by nationals of third countries on the territory of member states, including family reunion and access to employment;
   c) combatting unauthorized immigration, residence and work by nationals of third countries on the territory of member states;
4. combatting drug addiction insofar as this is not covered by 7 to 9 below;
5. combatting fraud on an international scale insofar as this is not covered by 7 to 9 below;
6. judicial co-operation in civil matters;
7 judicial co-operation in criminal matters;
8. customs co-operation;
9. police co-operation for the purposes of preventing and combatting terrorism, unlawful drug trafficking and other serious forms of international crime, including, if necessary, certain aspects of customs co-operation in connection with the organisation of a Union-wide system for exchanging information within a European Police Office (Europol).

In these areas member states shall inform and consult one another within the Council of Ministers with a view to co-ordinating their action. Furthermore, they shall establish collaboration between the relevant departments of their administrations (Article K.(1)). Co-operation between the member states of the European Union shall not prevent co-operation between two or more member states but this may not conflict with or impede that which is provided for in this Title of the Treaty (Article K7).

The Council shall act unanimously, except on matters of procedure and where otherwise provided (Article K4 (3)). It may, on the initiative of any Member State or the Commission regarding the areas 1 to 6, and on the initiative of any Member State regarding the areas 7 to 9, adopt joint positions and promote co-operation, adopt and implement joint action and conclude conventions. The Council may decide to adopt and implement joint action with a qualified majority. Conventions must be adopted by a majority of two-thirds unless otherwise provided by these conventions (Article K3).

A Co-ordinating Committee of senior officials shall be set up. It shall give opinions to the Council at the Council's request or on its own initiative (Article K4(1)). Another task is assigned to this Committee under Article 100c (para 3).

The European Commission shall be fully associated with the work (Article K4(2)) and it has the right of initiative in areas where it never had such a right before.

The Presidency and the Commission shall regularly inform the European Parliament and the former shall consult the Parliament on the principal aspects of activities in the areas referred to in this Title and shall ensure that the views of the Parliament are duly taken into consideration. The Parliament may ask questions of the Council or make recommendations to it. Each year, it shall held a debate on the progress made in the implementation of the areas referred to in this Title (Article K6). The operating expenditure for implementing the provisions of Article K may be charged to the budget of the European Community. In that event the budgetary powers of the Parliament apply[4].

This Title of the Treaty provides a strong formal basis for intergovernmental co-operation in the field of Justice and Home Affairs. Article K9 leaves the possibility open that some of the areas of common interest may be brought under Article 100c. For that to happen unanimity

is required and different voting conditions may be set. In the Declaration on Asylum it is stated that the Council will consider, by the end of 1993, on the basis of a report, the possibility of bringing these matters under Article 100c. At the time of writing, the Commission is preparing a report.

The role of the member states and the Council in the decision-making process is predominant. Since the Maastricht Treaty came into force, the old inter-governmental committees have been replaced by three new Steering Committees, but the people serving on these groups are the same as those on the old inter-governmental groups mentioned above in this paper. Steering Committee 1 (replacing the Ad Hoc Group) deals with immigration and asylum; No. 2 (replacing Trevi) with policing; and No. 3 with judicial co-operation.

These three Steering Committees will prepare statements and proposals. A new feature of their work is that they will send these documents to the new Co-ordinating Committee (which replaces the old Rhodes Group). Now that all these inter-governmental meetings have been formalised in the Union structure, COREPER (the forum of national delegations to the EC) will be involved.

The Commission formerly had no part in inter-governmental procedures, but now has a limited role to play. In some areas it has the right of initiative. Article K8(1) declares that some Articles of the EC Treaty, giving the European Parliament and the Commission certain powers, are applicable to this Title of the Treaty on Union. However, Article 155 of the EC treaty (which gives the Commission powers to ensure that Treaties and measures taken by European institutions are applied, to formulate recommendations and to take decisions) is excluded.

The European Parliament has not been given any real power. It will be informed and may give opinions which are duly taken into consideration. Papers will be sent by the new Committees to national Parliaments also.

Finally, the juridical character of the measures which can be taken jointly is far from clear and the Court of Justice of the European Communities has not been given jurisdiction (see next paragraph).

4. COMMUNITY LAW

In the Common Provisions (Title 1) it is stated that the Union shall respect fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms. Measures to be

taken within the framework of intergovernmental co-operation in the field of Justice and Home Affairs (Title VI) shall be dealt with in compliance with this Convention as well. This could be interpreted as meaning that the European Human Rights Convention has precedence over the Conventions which are or will be concluded between the member states. The same applies to the International Convention relating to the Status of Refugees to which reference is made as well (Article K2). The Commission and Parliament have more than once made a strong plea for adherence by the European Union to the Human Rights Convention. They considered this necessary because the powers of the EEC are extending to more areas affecting the lives of citizens of the member states. The Council of Ministers has not taken a decision on the Commission's proposal. The Maastricht Summit could have made the decision to adhere as the Union to the Convention, but did not. The Belgian Presidency, at the time of writing, is again pressing for adherence.

The Conventions which member states may draw up under Title VI of the Treaty:

> may stipulate that the Court of Justice shall have jurisdiction to interpret their provisions and to rule on any disputes regarding their application, in accordance with such arrangements as they may lay down (Article K3(2c)).

Apparently, the member states decided against a clause making the Court's jurisdiction obligatory. It remains to be seen whether such a provision will be made in the future. It is absent from the Schengen Agreements and the Dublin Convention.

In ruling whether Germany could ratify the Maastricht Treaty, the German Constitutional Court implied that the lack of democratic and judicial control over Article K provisions was a matter for concern.

The situation in the member states of the European Community/Union has become very complicated. Some pieces of European legislation may fall within the jurisdiction of the Court of Justice while others do not. It is confusing and not consistent to create a new Union, built upon the European Community and the *acquis communautaire*, without giving competence to the Court of Justice in the same way as is done in other Treaties of the European Communities (see for example, Articles 164, 171-188 EC Treaty). This may well create lacunae in the protection of citizens, migrants and refugees.

6. OTHER INTERNATIONAL AGREEMENTS AFFECTING MIGRATION IN EUROPE

THE EC-EFTA AGREEMENT

The member states of the EC and the seven countries belonging to the European Free Trade Area (EFTA) agreed some time ago on a text which provided for free exchange and competition between their respective nations. Switzerland has now opted out of the arrangement, but the other EFTA countries (Finland, Sweden, Norway, Iceland, Austria and Liechtenstein) will, as soon as the agreement comes into force, be part of a European Economic Area, together with the EC, in which there will be freedom of movement for workers who are nationals of these 18 countries. The date provisionally set is 1 January 1994.

Article 28 of the Agreement refers to Annex V where it is stated that Regulations 1612/68 (on the freedom of movement for workers in the Community) and 1251/70 (on the right of workers to remain in the territory of a Member State after having been employed in that State) and various Directives (on education of the children of migrant workers and on applications of the right of free movement) are binding within the European Economic Area as well.

In the member states of the European Community the nationals of EFTA States are still considered as foreigners. Consequently, the Directives which took effect in June 1992 on the free movement and residence of non-economically active persons, will not apply to EFTA citizens, neither will the provisions in the treaty on Union on European citizenship.

However, it must be borne in mind that most EFTA countries have already applied for full membership of the EC.

The State Parties wanted to include in the Agreement provisions for judicial supervision. At the time of writing, it is not yet clear what form this will take.

On matters relating to migration and refugee policies there is already intensive co-operation between Austria and Sweden and the twelve member states (for example, the former two sent observers to ministerial conferences and intergovernmental working groups).

THE ASSOCIATION AGREEMENTS

For some years, the EC has had an association agreement with Turkey, and co-operation agreements with Morocco, Algeria and Tunisia. These agreements include provisions on equal treatment of migrant workers admitted from these countries[5].

In December 1991 association agreements were signed with Hungary, Czechoslovakia and Poland. (In October 1993 two separate agreements were signed with the new Czech and Slovak republics.) These are so-called "mixed" agreements and have to be signed and ratified both by the European Community and separately by its member states. To anticipate their implementation interim agreements have been signed.

The provisions in the Association Agreements concerning establishment and the movement of workers and services are weak. The Parties agreed, in principle, to grant each other national treatment in the establishment and operations of their companies and nationals from the entry into force of the agreement but under very restricted conditions.

The agreements also require that there shall be no discrimination against workers who are legally employed. However, this non-discrimination clause is subject to the conditions and modalities applicable in each Member State. Moreover, it applies only to working conditions and not to social security. The Association Council set up under the Agreements may make recommendations on further ways of improving the movement of workers. The members states are even encouraged to consider favourably the possibility of concluding bilateral agreements on access to labour markets.

The many references to national legislation, the restrictions on some of the provisions, and their unfinished character, may be interpreted as an attempt to prevent these agreements from becoming part of Community law. The member states seem to have been well aware of certain rulings of the Court of Justice. On more than one occasion the Court has ruled that association and co-operation agreements have direct effect in member states and that decisions taken by Association or Co-operation Councils under the agreements are binding upon member states if these decisions are clear are precise[6].

The encouragement to conclude *bilateral* agreements on access to labour

markets could work against the intention to have a common migration policy.

It seems unlikely that the member states will accept that migrant workers recruited from one of the newly associated countries can travel between EC states. This consideration could affect plans for the free internal movement of third-country nationals in general. Possibly workers from the associated countries will be given work permits which limit their stay by both time and place.

5. SOME CONCLUDING REMARKS

The decision, in 1986, to lift internal border controls in the European Community required the member states to agree on a common immigration policy towards the outside world. However, such a common policy has not yet been agreed, and looks almost impossible to attain. There has been wide diversity between the laws and policies of the individual states since 1945, and governments are reluctant to abandon their own approaches. Germany and Portugal, for example, remain determined to recruit labour, the former from central and eastern Europe, the latter from African countries, while Britain does not want new migrants from these or any other sources. All member states are worried about large movements of asylum-seekers, but the situations which create refugees are impossible for them to foresee or regulate effectively. All want to reduce clandestine immigration, but in practice this goal is hard to reach. The minimum common programme agreed at Maastricht emphasises the restrictive aspects of policy, in an attempt to keep numbers under control. It does little to improve the social integration of migrants and their families or to accord them new rights. And it does not assert Community control, though this would appear to be necessary to the EC's internal policies.

The machinery now in place to deal with immigration is almost unbelievably complicated. The Maastricht Treaty, together with other recent international agreements, has created a situation in which there will be numerous different classes of person, governed by rules cutting across categories. The main categories will be: EC nationals; EFTA nationals; nationals of countries which are associated or have co-operation agreements, (between which rights differ); third-country nationals admitted for legal residence; and third-country nationals given temporary leave to remain in a member state. The new Union citizenship will be held only by EC nationals, and civic rights will be attainable by some migrants but not others, according to the several domestic laws and bilateral agreements of the states where they live.

The treaty on European Union is supposed to mark a new stage in the process of creating an ever closer union among the peoples of Europe, where decisions are taken as closely as possible to the citizens (Article A).

Yet the only directly elected body among the Community institutions, that is the European Parliament, is accorded no control over the European decision-making process, and the jurisdiction of the Court of Justice has not been extended to cover co-operation in Justice and Home Affairs. As a result, migration policy and asylum policy are effectively left in the hands of executive authorities on whom there is no control at European level.

Social policies are particularly important to minorities, but the Maastricht European Council meeting allowed one Member State to opt out of the further development of EC social policy, even though they believe the progress achieved in completing the Internal Market is not being matched by comparable progress in social policy.

There is a risk that third-country nationals will be permanently excluded from the advantages which the Internal Market offers to EC nationals.

Despite lobbying in recent years from many quarters, the Maastricht summit produced no proposals for Community-wide anti-discrimination legislation. But measures to ensure equality of treatment for all residents are urgently needed. Without them, and whatever new policies on entry are developed, we face the prospect of a permanent underclass in the European Union.

NOTES

1 See *Subjects, Citizens, Aliens and Others* by Ann Dummett and Andrew Nicol, Weidenfeld, London 1990, for full details.

2 See Jan Niessen, 'European Migration Policies: the member states against the Commission', *Migrantenrecht* 1992 No. 1.

3 See Antonio Cruz. 'Schengen, Ad Hoc Immigration Group and other inter-governmental bodies in view of Europe without internal borders'. *CCME Briefing Paper* No. 12 (May 1993).

4 Administrative expenditure which the provisions under Article K entail for the European institutions shall be charged to the budget of the European Community (Article K8(2)).

5 Note: See Elspeth Guild, 'Protecting Migrants' Rights: application of EC agreements with third countries' *CCME Briefing Paper* No. 10 (November 1992).

6 For example: the Co-operation Agreement between Morocco and the EEC prohibits discrimination based on nationality in the provision of employment and social benefits for Moroccan migrants and their families. Mr. Kziber was denied unemployment benefits for school leavers by the Belgian authorities in accordance with Belgian legislation which excludes foreign nationals from those benefits unless they are covered by a bi-lateral agreement. The Court decided that the Co-operation Agreement between the EEC and Morocco has a direct effect in all member states (Kziber Case C192/89).

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