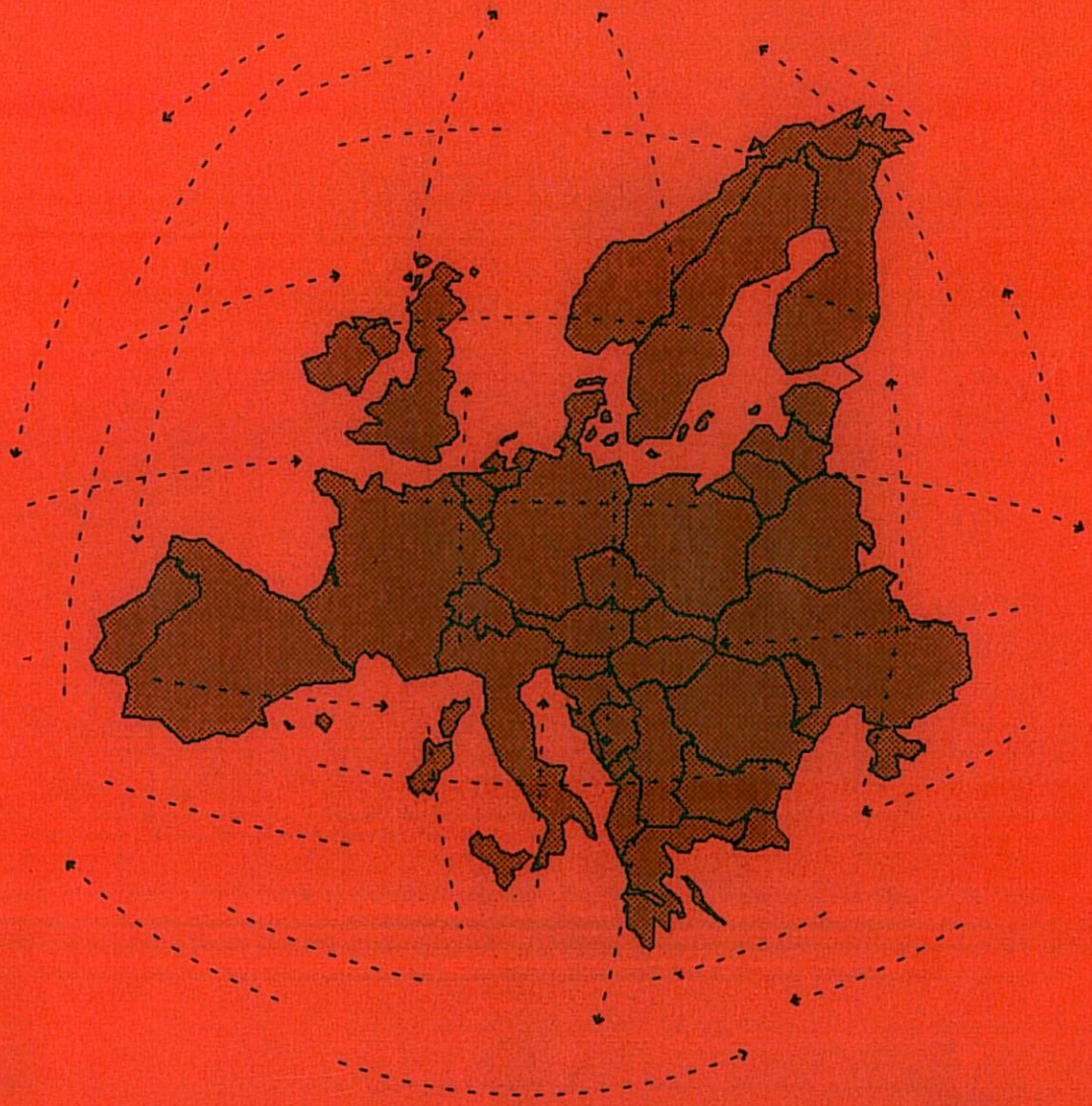
THE 1996 INTERGOVERNEMENTAL CONFERENCE AND THE FUTURE OF THE THIRD PILLAR

by Simon Hix



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INTRODUCTION

In 1996 the fifteen member states of the European Union will convene an intergovernmental conference on the revision of the Treaty on European Union (1993). This Treaty established the three pillar structure of the European Union: a supranational pillar of the institutions of the European Community (the first pillar) and two parallel intergovernmental pillars for co-operation between the member states on Common Foreign and Security Policy (the second pillar) and on Justice and Home Affairs (the third pillar).

Under the third pillar the member states are working together on, among other fields, asylum, external border control, (clandestine) immigration and entry and residence of third country nationals. CCME's Briefing Paper no. 19 presented an overview and summary of the measures taken in these fields since the entry into force of the Treaty on European Union. This Briefing Paper will explain the phenomenon of intergovernmental conferences (Chapter I), give insight into how the third pillar was constructed and what it meant for immigration and asylum policy making (Chapters II and III), and who is involved in the preparations of the 1996 intergovernmental conferences (Chapter IV). Some conclusions will be drawn concerning effectiveness and accountability (Chapter V).

The forthcoming intergovernmental conference (1996 IGC) will review this pillar structure by making an assessment of its effectiveness and possibly by proposing measures to improve or change the structure. In the run up to the conference reports are being prepared by national governments and parliaments on the one hand, and the European institutions on the other. As to the latter, both the European Parliament and the Committee of Permanent Representatives of the Member States (COREPER) have produced preliminary reports which express dissatisfaction with the way the third pillar has functioned.

The Annex to this Briefing Paper contains five concrete proposals for amendments to the Treaty on European Union. The first concerns the extension of Community competence on matters related to the elimination of racial discrimination. This proposal is known as the Starting Point and is prepared by the Starting Line Group. The second proposal, prepared by the Immigration and Nationality Research and Information Charity argues for the granting of European citizenship to legally residing third country nationals. The three others, prepared by the Standing

Committee of Experts on International Migration, Refugee and Criminal Law, concern such matters as openness in European government, jurisdiction of the Court of Justice and parliamentary control.

This Briefing Paper, a joint publication of CCME and the Starting Line Group, intends to contribute to the debate on the 1996 IGC. Without necessarily endorsing all five proposals, the publishers are of the opinion that discussions between NGOs and governmental and other officials can be deepened by focusing on concrete proposals for amendments to the Treaty on European Union.

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CCME

CHAPTER I
TOWARDS THE 1996 INTERGOVERNMENTAL CONFERENCE

Since the start of the process of European integration in the Treaties of Paris and Rome, Intergovernmental Conferences (IGCs) have been used to prepare and negotiate major institutional and treaty changes. Once convened, an IGC is a monthly meeting of the Foreign Ministers (and in some cases the Finance Ministers) of the European Community (EC) Member States, and the preparations for these meetings are prepared in weekly working groups of senior civil servants. The general agenda of an IGC is decided by the Heads of Government of the EC Member States, who meet at least twice a year in the European Council.

In the formative years of the European Communities, IGCs led to the European Coal and Steel Community (1950-51), the European Economic Community (1956-57), the Merger Treaty (1964) and the two Budgetary Treaties (1969-70 and 1974-75). Moreover, the institution of the IGC was resurrected in the mid-1980s to renew the process of economic and political integration in Europe: firstly, in the IGC that led to the Single European Act (1985-86); and, secondly, in the IGCs that led to the Treaty on European Union (the Maastricht Treaty) (1990-92).

The two IGCs at the beginning of the 1990s, on Economic and Monetary Union and Political Union, thus established the three-pillar structure of the European Union (EU): a 'supranational' pillar of the institutions of the European Community (the European Commission, the European Parliament, the Council of Ministers, the European Court of Justice, and the Court of Auditors); and two parallel 'intergovernmental' pillars outside the EC institutional system, for co-operation between the EU governments on Common Foreign and Security Policy (CFSP) and in the field of Justice and Home Affairs (JHA). The CFSP provisions were an extension of the intergovernmental arrangements for European Political Co-operation (EPC) - that was set up in 1970 and had been extended and formalised by the Single European Act. However, under the competence of the third-pillar, on Justice and Home Affairs, immigration and asylum policies became a competence of the EU system for the first time. The Treaty on European Union thus extended the practice of 'intergovernmental co-operation' on EU external affairs, that had steadily evolved for more than twenty years, to the area of internal affairs.

However, when the Treaty on European Union was signed in February 1992, the EU governments committed themselves to a new

Intergovernmental Conference in 1996, to prepare the next stage of institutional reform. Article N of the Treaty on European Union states that: "A conference of the representatives of the governments of the Member States shall be convened in 1996 to examine those provisions of this Treaty for which revision is provided"[1]. In June 1994, the European Council of EU Heads of Government, in Corfu, further decided that a Reflection Group should be set up in June 1995, under the Spanish Presidency of the EU Council of Ministers, to prepare the agenda for the 1996 IGC; and that the Reflection Group would involve representatives from the European Commission and the European Parliament in addition to the Foreign Ministers of the EU Member States[2]. Reports to be submitted to the Reflection Group are being drafted by the member states' governments, in the European Commission, and in the various Committees of the European Parliament.

The IGC will be launched at the end of 1995. As yet, however, no plans have been made as to when the IGC should finish. The lesson from the previous two IGCs is that what-ever deadline is set, the process is likely to over-run by at least six months. The Single European Act came into force six months after it was originally planned, and the entry into force of the Treaty on European Union was delayed by nearly ten months. Moreover, when the Treaty on European Union was signed, a new IGC was called for 1996 with the specific intention of reviewing the operation of the Treaty on European Union after three years from the original implementation date of January 1993. However, because the implementation of the Treaty was delayed until November 1993, only just over two years will have passed when the IGC begins (and only 18 months when the Reflection Group starts). This implementation delay thus further implies that the 1996 IGC is likely to over-run.

The Treaty on European Union further specifies that the 1996 IGC will review the pillar structure. Article B of the Treaty on European Union states that: "the policies and forms of co-operation introduced by this Treaty may need to be revised with the aim of ensuring the effectiveness of the mechanisms and the institutions of the Community"[3]. Moreover, Article C states that: "The Union shall be served by a *single institutional framework*"[4]. The IGC will thus consider whether to integrate the third pillar (or at least parts of the pillar) into the main body of the EC Treaty, or to leave internal affairs issues to be dealt with under separate intergovernmental arrangements. When a new EU Treaty finally comes

into force, which is likely to be some time in 1997 or 1998, there is a possibility that the European Commission, the European Parliament and the European Court of Justice will become further involved in the development of an EU immigration and asylum policy. If this change is not made, however, the question of immigration and asylum will remain lumped together with 'crime' issues, such as drug trafficking and terrorism, under the ineffective and unaccountable provisions of the intergovernmental pillar.

CHAPTER II
IMMIGRATION AND ASYLUM POLICY IN THE BUILD UP TO MAASTRICHT

The Intergovernmental Conference that led to the adoption of the Single European Act (SEA) was held between June 1985 and February 1986. In the IGC on the SEA, the member states agreed to establish "an area without internal frontiers in which the free movement of goods, services, persons and capital is ensured" (Article 8a) by 31 December 1992[5]. Although the Dooge Committee, that had prepared the IGC, had mentioned that this 'Single Market' programme would have political implications on the movement of persons into and out of the EC, the Single European Act made no provisions for common policies in this area. In the SEA itself, legislation in the field of free movement of third country nationals was explicitly excluded from being adopted by a qualified majority. (Article 18, para. 2). Moreover, in appendix to the SEA, it was stated that: "Nothing in these provisions shall effect the right of Member States to take measures as they conceive necessary for the purpose of controlling immigration from third countries, and to combat terrorism, crime, the traffic of drugs and illicit trading in works of art and antiques". The new intergovernmental arrangements in the SEA for European Political Co-operation (EPC), outside the competence of the EC institutions, were thus reserved for issues of foreign and security policy.

However, in parallel to the preparations for the Single European Act, co-operation between the European governments in the area of immigration and asylum policy began to develop through a series of multi-lateral intergovernmental agreements outside the European Community framework. In 1986, under the UK Presidency of the Council of Ministers, the '*Ad Hoc* Group on Immigration' was set up; which is composed of senior officials from the Interior and Justice Ministries of the Member States, and a representative from the European Commission. In 1989, under the Spanish Presidency of the Council of Ministers, it was agreed that Ministers responsible for immigration would meet every six months. Again, the Commission participated as an observer. From 1986 to the present, these groups have adopted a number of Conventions, Resolutions and Recommendations[6].

Another example of intergovernmental co-operation, but this time only between a limited number of Member States, is the Schengen Group. In June 1985, the Schengen Accord was signed by Belgium,

France, Germany, Luxembourg and The Netherlands; and has subsequently been ratified by Italy, Spain, Portugal, Greece and Austria[7]. The Schengen process has always been completely separate to the institutions and laws of the European Union. The Schengen Accord was primarily to facilitate the complete removal of all internal barriers against the free movement of people and goods between the states. A consequence of this aim, however, was the emergence of procedures for the adoption of certain common immigration and asylum policies. From the beginning, the EC Commission participated as an observer in the meetings of the Schengen Group, but the European Parliament and the domestic parliaments have been excluded from scrutinising the activities of the Group.

Whereas the Schengen Group interpreted the new Article 8a of the EC Treaty to imply a single external frontier for an area completely free of internal borders, the other Member States were less concerned with the more politically dangerous question of the movement of persons than the removal of barriers to capital, goods and services[8]. This potentially damaging division led the European Council meeting in Rhodes in December 1988 to create a new intergovernmental body to co-ordinate the activities of the member states in this area: the Group of Co-ordinators on the Free Movement of Persons (known as the 'Rhodes Group'). The Rhodes Group, composed of officials from the Interior Ministries of all the Member States and with the unofficial participation of the European Commission, was responsible for co-ordinating the activities of an array of groups tackling several different areas relating to the free movement of persons, such as: the ad-hoc Immigration Group, the TREVI Groups, the Mutual Assistance Group, the European Committee to Combat Drugs and the Horizontal Group.

When the IGC on Political Union was launched in December 1990, the European Parliament and the European Commission argued that this web of intergovernmental agencies should: firstly, be made more accountable to elected bodies; and, secondly, that the best way to achieve this was to bring these policy areas into the competence of the EC institution. In response to these demands, in a Working Paper in January 1991, the Luxembourg Presidency proposed four options:

1. to continue co-operation in this area outside the European Union framework;
2. to make reference in the EC Treaty to co-operation in this area, leaving it to the Council to work out the precise details at a latter date;
3. to elaborate a set of Treaty provisions, defining the fields to be covered

and the various decision-making procedures to be used under each provision; or

4. full integration of this policy area into the EC Treaties, using the standard Community procedures and within the EC legal framework.

In response to these proposals, The Netherlands, Belgium, Italy and Spain preferred option 4. France and Germany preferred option 3, in the short term, with the eventual transition to option 4 at the next stage of institutional reform. Portugal preferred option 3, the United Kingdom, Ireland and Greece preferred option 2, and Denmark was prepared to accept only option 1 or 2. In the Draft Treaty of April 1991, the Luxembourg Presidency hence proposed a mix of options 2 and 3: where these intergovernmental arrangements would be brought into the European Union framework, but would be kept wholly separate from the EC institutional and legal system[9].

When The Netherlands took over the Presidency of the Council of the European Communities in July 1991, however, the Luxembourg Draft Treaty was abandoned in favour of a more integrated structure. Whereas the Luxembourg plan implied a temple model of the European Union, where several intergovernmental pillars would exist alongside the European Community pillar, the new Dutch Draft Treaty envisaged a "tree" model", where the different branches of policy-making would all stem from the central EC institutional framework. The Dutch plan for the European Union Treaty thus proposed a new section on "home and judicial affairs" within the existing EC Treaty, where policy initiatives could be made by the European Commission, the European Parliament would be able to scrutinise every stage of the process, and the legal recourse for the implementation of policy and arbitration of disputes would rest with the European Court of Justice[10].

However, this more supranational Dutch proposal was destined to fail. Firstly, although a majority of Member States openly favoured the "tree" structure, a vocal minority (which included Denmark, France and the United Kingdom) refused to consider any plans that would go beyond intergovernmental co-operation on the two issues of common foreign and security policy and justice and home affairs. Secondly, the Dutch draft was not presented until the September 1991, and by this time even the more federalist governments thought it was too late to introduce a brand new Treaty. Consequently, in an infamous meeting of Foreign Ministers on 30 September 1991, dubbed "Black Monday" by

the press, the Dutch plan was abandoned in favour of returning to the Luxembourg text.

The Dutch Presidency subsequently proceeded by proposing a series of minor amendments to the Luxembourg draft. Consequently, the only significant changes made to the section on co-operation in the field of justice and home affairs were: the addition of the proposed European Police Office; the addition of the reference to compliance with the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Convention relating to the Status of Refugees; making optional rather than mandatory the use of majority voting for implementing measures; making optional the granting of powers to the European Court of Justice to rule on disputes regarding the implementation of conventions; providing the EP to be consulted; moving visa policy into the main body of the Treaty, within the Community framework; and providing that asylum policy might also be moved there by the end of 1993.

After the 1984-85 and 1990-92 IGCs, therefore, some important changes were made to the structure of European level policy-making on immigration and asylum issues. The Single European Act introduced the goal of the complete freedom of movement of persons between EC Member States, and the Treaty on European Union brought some of the multi-lateral arrangements that had been set up to implement this goal into the framework of the European Union.

CHAPTER III
IMMIGRATION AND ASYLUM POLICY IN THE EUROPEAN UNION SYSTEM

Title VI of the European Union Treaty, on 'Co-operation in the Field of Justice and Home Affairs' (JHA), sets out the following provisions for "the purposes of achieving ... the free movement of persons"[11]. The Member States will regard the following areas as matters of common interest:

1. asylum policy;
2. rules governing the crossing by persons of the external borders of the EU;
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 the Member States,
    b. conditions of residence by nationals of third countries on the territory of the Member States, including family reunion and access to employment, and
    c. combating unauthorised immigration, residence and work by nationals of third countries on the territory of the Member States;
4. combating drug addiction;
5. combating fraud on an international scale;
6. judicial co-operation on civil matters;
7. judicial co-operation on criminal matters;
8. customs co-operation; and
9. policy co-operation for the purposes of combating terrorism, drug trafficking and other serious forms of international crime, including the exchange of information within a European Police Office (Europol).

The Member States agree, moreover, that all these matters will be dealt with in compliance with the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, and the 1951 Convention relating to the Status of Refugees.

A policy initiative can be made by any EU Member State *or* the European Commission in any of the areas from 1 to 6. On the issues covered by 7 to 9, policy initiatives can only be made by the Member States. Once an initiative has been made, the Member States (acting in the Council of Ministers of the Interior) can adopt policies by unanimity agreement, or by unanimously agreeing that in a particular area a qualified majority should be used to make legislation. Moreover, in a

recommendation to the Member States, the Council can stipulate that the European Court of Justice has jurisdiction to interpret the recommendation, and to rule on any disputes arising from it. Acting unanimously on the initiative of the Commission or any Member State, the Council can also decide to transfer any of the competences under areas 1 to 6 to the supranational system of decision-making within the EC framework. Such a decision would lead to the application of Article 100c (on the establishment of a common EU visa) to these other policy areas: where a decision shall initially be taken by unanimity, but after a certain time period (1 January 1996 in the case of visa policy) a decision shall be reached by a qualified majority. In addition, the Member State holding the Presidency of the Council of Ministers is responsible for consulting the European Parliament, and replying to MEPs questions, on any issue covered under these provisions.

The Treaty articles also established a "Co-ordinating Committee" (or 'K4 Committee') of senior civil servants from the national Interior Ministries and representatives from the European Commission. The Committee is responsible for preparing the Council of Ministers' discussions and decisions in all the areas mentioned above, and can issue opinions to the Council, either at the Council's request or on its own initiative.

The Member States also agreed that when acting in international conferences or organisations (such as in the United Nations) in any of the areas covered in this Title of the Treaty on European Union, they will stand by the common positions adopted under these provisions. However, the provisions would not prevent the development of 'deeper' co-operation in this area between two or more EU Member States - as in the Schengen Group.

Consequently, the final compromise reached in the IGC on Political Union on co-operation in Justice and Home Affairs went further towards the establishment of supranational policy-making in this area than the original Luxembourg draft had envisaged. The European Commission has limited powers to initiative legislation; the European Parliament must be consulted and has the right to ask probing questions; the European Court of Justice may be called upon to implement policies and resolve disputes; and certain areas can be transferred to the supranational pillar at a later date. Moreover, although formally outside the EC institutional system, placing this policy area within the general EU framework means that common positions are presented in international conferences.

Despite these changes, however, the new provisions are still fundamentally 'intergovernmentalist', and thus closer in spirit to the type of policy-making in the Schengen and Rhodes Groups than the EC institutional framework. Unanimity is needed before any policy is adopted. Immigration and asylum policies are still be dealt with alongside 'crime' issues. In effect, the Co-ordinating Committee has simply replaced the Rhodes Group - where the European Commission already had some input. Moreover, the Schengen Group is allowed to carry on its work, as long as it does not clash with the JHA provisions. Overall, therefore, the JHA provisions established in the IGC on Political Union do not satisfy the original demands for more openness and accountability of European level decision-making on immigration and asylum policy, and are thus a target for reform in the 1996 IGC[12].

CHAPTER IV
PREPARATIONS FOR THE 1996 INTERGOVERNMENTAL CONFERENCE

The 1996 Intergovernmental Conference will either lead to a fundamental revision of the Treaty on European Union, or will simply tie up the loose ends left by the Maastricht agreement. At the present time, the level of reforms that will take place is unclear. In either case, however, the provisions for making immigration and asylum policy may be changed. The aim of a fundamental revision would be a "constitutionalisation" of the Treaty on European Union. This implies the establishment of a Economic and Monetary Union (with a Single Currency and a European Central Bank); and the creation of a "unitary institutional structure", based on the present EC institutional framework rather than the intergovernmental pillars. This unitary structure would thus mean adding the competences under the JHA pillar to the main body of the Treaty.

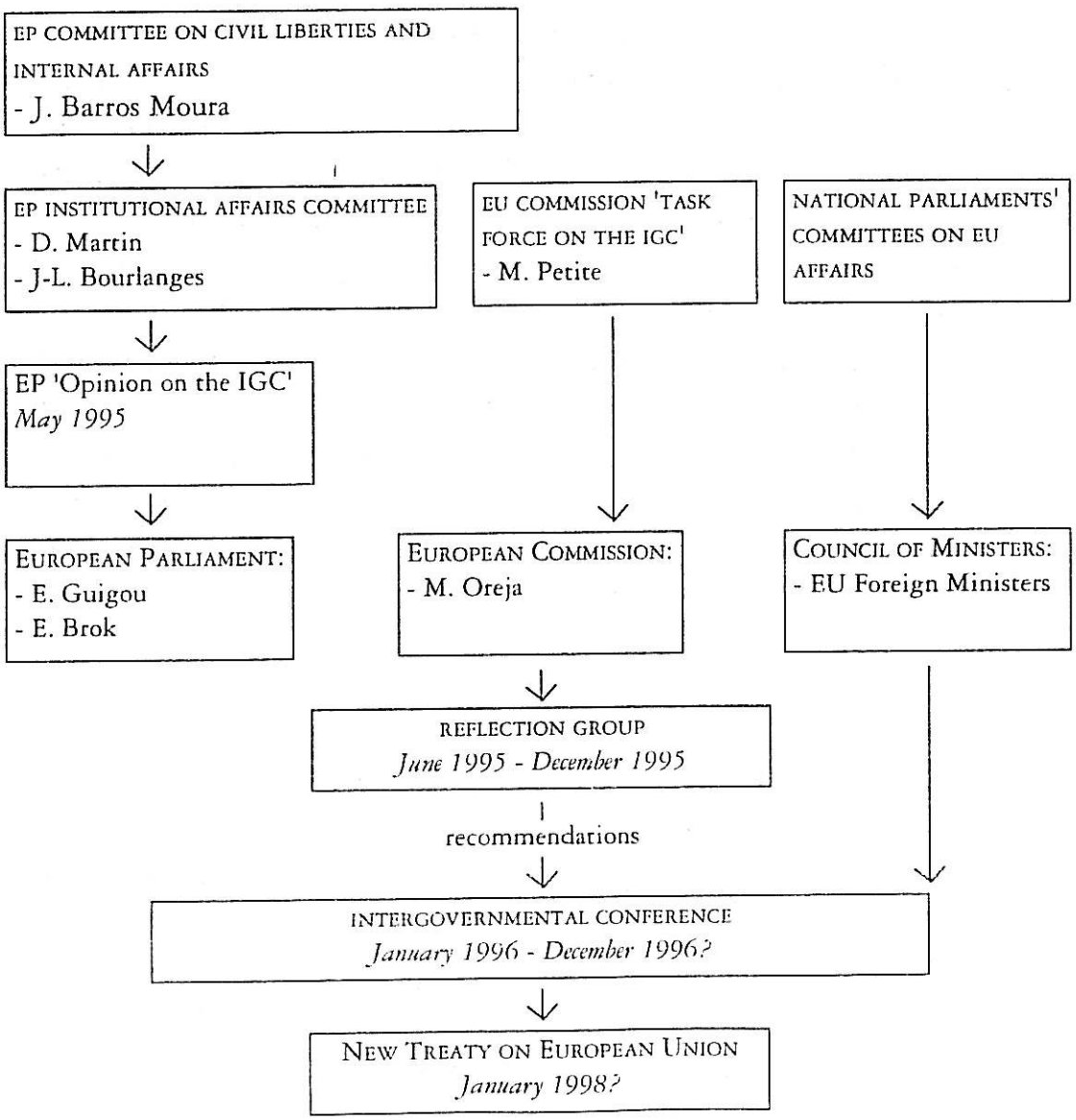
Even if the less fundamental reform takes place, however, the section on JHA will probably be amended. The agenda for this more limited reform is the list of 'loose ends' that the Treaty on European Union specifies will need to be tied up in the 1996 IGC. Among other things, this list includes changing the following provisions: 1) Article B of the Common Provisions, on the status of the "pillar" structure of the European Union; 2) Article 189B of the EC Treaty, on the scope of policy areas where the European Parliament has a role of "co-decision" with the Council of Ministers; and 3) the establishment of a classification or hierarchy of EC and EU acts. On the first of these issues, re-opening the question of the "pillar structure" (under Article B) would at least question the viability of keeping immigration and asylum policy outside the main EC Treaty provisions. On the second of these issues, the discussions on Article 189B would address the possibility of extending full European Parliament authority to immigration and asylum policies, even if the JHA pillar is not dissolved. Finally, on the third of these issues, the general debate on the establishment of a 'hierarchy of EC acts' would involve defining the division of authority between the national and European levels, and within the European institutions, in the area of immigration and asylum policy.

The participants in the Reflection Group of the IGC - the European Parliament, the European Commission and the Foreign Ministries of the EU Member States - are already drafting preliminary positions on the

IGC. The development of these proposals, the various actors involved, and the timetable for the Reflection Group and the IGC are illustrated in Diagram 1, below.

The EU Commissioner responsible for the IGC is Marcelino Oreja (Spain), and the Director of the Commission Task Force on the IGC is Michel Pettite. Either Oreja or Pettite will attend the Reflection Group. As yet, however, the Commission has not made any public statements about the position Oreja or Pettite will take in the Reflection Group on the question of co-operation in the field of justice and home affairs. Nevertheless, the positions of some of the Member States' governments and the European Parliament have begun to emerge from various speeches, draft reports and opinions.

Diagram 1: Preparation, Participants, and Timetable of the 1996 IGC



One of the first EU government positions on the future of the Third Pillar was set out in the 'Coalition Agreement' of the German Christian Democrats (CDU) and Liberals (FDP)[13]. The German government argues that because of the absence of border controls, the increase in international crime, and the pressure for free movement of people, the EU will need to strengthen the provisions for co-operation on the justice and home policy. The main features of this co-operation should be: the establishment of the European Police Office (EUROPOL); a common asylum law; a common refugee policy; and a fair distribution of refugees between the EU Member States. Moreover, to achieve these objectives, the CDU-FDP coalition agreement explicitly advocates bringing the existing arrangements into the "community framework" (the institutions of the European Community) and abolishing the intergovernmental 'pillar' structure. This is thus likely not only to be the German Government's position in the IGC, but also of Elmar Brok, who is one of the European Parliament's representatives in the Reflection Group and is a leading member of the CDU.

The European Parliament takes a similar position to the German government; but has also begun to outline more detailed proposals for decision-making on immigration and asylum policies. In 1984 the EP had proposed a 'European Union Treaty', but it was almost completely ignored in the IGC on the Single European Act. In the build up to the Treaty on European Union, the EP had also proposed a series of reports, which advocated much more fundamental reforms than were eventually undertaken in the two IGCs. This time, however, the EP is determined the situation will be different. Firstly, with two participants in the Reflection Group, the EP will formally participate in an IGC for the first time in the history of the EC. Secondly, the EP has decided to pursue a fundamentally different strategy to the last IGCs: to propose a short-list of precise demands (as opposed to its own version of a completely new EU Treaty).

In November 1990, the EP agreed that its two participants in the IGC would be from each of the largest EP Party Groups: the European People's Party (EPP), the Christian Democrats; and the Party of European Socialists (PES). The EPP Group subsequently chose Elmar Brok as its representative, while the PES Group chose Elisabeth Guigou, the French Socialist Party former Minister for European Affairs (and thus one of the negotiators of the Maastricht Treaty). These two will be responsible for presenting and advocating the Final Position of the EP on the 1996 IGC,

which will be voted on in the May 1995 EP Plenary Session. The final position of EP will bring together a series of reports on the 1996 IGC from each of the main EP Committees, co-ordinated by the EP Institutional Affairs Committee (IAC). The two main rapporteurs for the IAC responsible for combining the sub-reports and drafting the final position are Jean-Louis Bourlanges (of the French UDF, and EPP Group), on 'implementation of the Treaty on the Union', and David Martin (of the British Labour Party, and the PES Group), on 'development of the Union'.

Two of the sub-reports will relate directly to the reform of the provisions for co-operation in the field of Justice and Home Affairs. Firstly, in the Institutional Affairs Committee, Laurens Brinkhorst (a Dutch member of D'66, who sits in the European Liberal, Democrat and Reform Group in the EP) is responsible for drafting proposals on the JHA pillar to be included in the final Bourlanges and Martin Reports. Although Brinkhorst's final proposals are not yet complete, he presented a preliminary discussion paper to the IAC at the end of December 1995[14]. In this paper he argued the following points:

1. ideally, the third pillar should be dissolved, and that the competences covered under the JHA provisions should be brought into the EC framework;
2. or the provisions of the pillar should be reformed to
   - give the Commission the right to initiate legislation in all policy areas covered by the existing JHA provisions,
   - increase the consultation powers of the European Parliament,
   - give the European Court of Justice jurisdiction without the need for a unanimous vote by the Member States, and
   - allow the EC Court of Auditors to monitor the expenditure under these Treaty provisions.

Secondly, José Barros Moura (from the Portuguese Socialist Party, and member of the PES) is responsible for drafting a parallel report on the JHA pillar for the EP Committee on Civil Liberties and Internal Affairs. This is the EP Committee that is responsible for monitoring the work of the Council of Ministers in the field of Justice and Home Affairs. In January 1995, the Committee on Civil Liberties and Internal Affairs adopted a 'Draft Opinion' prepared by Barros Moura, which pointed out that the Justice and Home Affairs Council meetings under the new provisions have operated almost exactly like the pre-Maastricht multi-lateral arrangements[15]. In other words, policy has been adopted without consultation of the European or national parliaments, and the Commission has

not been encouraged to use its limited rights of initiative. The Draft Opinion consequently argued that "the third pillar is not functioning satisfactorily", and that to remedy this situation the following changes should be made:

1. the 'subsidiarity principle' should be applied, and that only those topics were common action is necessary should be tackled at the European level;
2. the topics that are decided to be worthy of European level action should be immediately brought within the ambit of the EC Treaty;
3. new 'positive' policies against racism and xenophobia should be a central part of policy-making in this field;
4. a binding timetable for action in all the areas covered by the JHA provisions should be incorporated into the Treaty, with a deadline of 2000;
5. a clear boundary should be drawn between the activities of the Schengen Group and EU action in this area;
6. the EP should be involved at every stage of policy-making in this field, including consultation in the full EP plenary session, and scrutiny powers of the specific EP Committee involved;
7. national parliaments should be given new powers to monitor inter-governmental action in this area; and
8. the Commission's right of initiative should be extended to all JHA policy areas.

Finally, on the question of IGC provisions on human rights, in April 1994 the Council of Ministers for Justice and Interior Affairs asked the European Court of Justice to deliver an opinion on whether the accession of the Community to the Council of Europe's Convention on Human Rights and Fundamental Freedoms (ECHR) would be compatible with the EC Treaty. The response of the EC Court will be taken into consideration in the IGC. In this area the IGC is thus likely to consider whether it is necessary to amend the Treaty in order for the Community to accede to the ECHR, or whether the Union should adopt its own declaration of rights. In either of these cases, rather than simply requiring the EU governments to act according to the ECHR when acting under the JHA provisions, the Union would be given powers to oversee the protection of human rights among the Member States.

In addition to these general human rights provisions, the IGC is also likely to propose that other more special provisions against racism and xenophobia should be incorporated into the EC Treaty. In June 1986, the

Commission, the European Parliament, and the Council adopted a 'Joint Declaration Against Racism and Xenophobia'. Despite the European Parliament including this declaration in its submissions to the IGCs on Political Union, it had no impact on the final provisions contained in the Treaty on European Union. In contrast with the last Treaty revision, however, the European Parliament will be able to present the same position in the Reflection Group for the 1996 IGC.

Moreover, the Member States' governments have committed themselves to a more pro-active anti-race discrimination policy. At the European Council meeting in Corfu in June 1994, the EU Heads of Government backed a Franco-German initiative, and set up a 'Consultative Commission' charged with drafting a series of proposals in the various areas of education and training, information and media, and police and justice. The interim report of the Consultative Commission was discussed at the European Council of EU Heads of Government in Essen, in December 1994. The final report of the Consultative Commission, which will "elaborate an overall Union strategy against racism and xenophobia", will be adopted at the June 1995 European Council in Cannes[16]. The report states that the European Union "should ensure that those members of minorities within the member states who have been legally resident for five years should enjoy the same rights/duties and freedom of movement as citizens of the European Union". Moreover, the report favours "the inclusion in the Treaty on European Union of articles aimed at extending Community competence to cover the elimination of all forms of discrimination based on race, ethnic origin or religion"[17]. The Cannes meeting of the EU Heads of Government will also launch the Reflection Group for the 1996 IGC. Elisabeth Guigou, one of the European Parliament representatives in the Reflection Group, advocates linking the proposals of the Consultative Commission to the 1996 IGC, in an attempt to establish European level decision-making powers to intervene in domestic government programmes to combat racism and xenophobia[18].

CHAPTER V
CONCLUSION:
IN SEARCH OF EFFECTIVENESS *AND* ACCOUNTABILITY

The making of immigration and asylum policy at the European level may thus be significantly changed in the 1996 Intergovernmental Conference. The present structure, where policies are made by intergovernmental agreements between the EU Interior Ministers under the third pillar of the Treaty on European Union, suffers from the same criticisms as the Schengen and Rhodes Groups. Firstly, the goal of freedom of movement of persons between the EU Member States has not been significantly advanced by the provisions established by the Treaty on European Union. This is a question of policy *effectiveness* - which the Treaty on European Union specifies must be tackled in the IGC. Secondly, the problem of national and/or European parliamentary and legal scrutiny of policy-making remains. This is a question of policy *accountability* - which national and European parliamentarians demand must also be addressed in the IGC.

Consequently, the reform of the Justice and Home Affairs pillar of the European Union will be one of the issues tackled in the Reflection Group for the IGC, which begins its deliberations in June 1995. The European Commission and European Parliament representatives in the Reflection Group are likely to advocate the abolition of the third-pillar and the wholesale transfer of the JHA competences to the general EC framework. Some Member State governments, however, may propose a "variable geometry" solution; whereby immigration and asylum policy is adopted jointly through the EC framework for several 'core' Member States, and through a parallel intergovernmental arrangement (somewhat similar to the existing JHA provisions) for the rest of the Union. Moreover, a minority of Member States, such as Britain and Denmark, will be reluctant to allow the transfer of any immigration or asylum competences to the EC institutions.

However, the strongest argument of the European Commission and the EP is that only through supranational decision-making on immigration and asylum policies can both policy effectiveness and accountability be achieved. If the intergovernmental arrangements remain, the unanimity requirement will block any real progress towards the free movement of persons, and the national and European parliaments and courts will not be able to adequately scrutinise the work of the Interior Ministers. Moreover, if the competences are only partially transferred to the EC

institutions for a 'core' group of States, the different levels of policy integration will lead to an ever more complex structure of decision-making, and tempt the creation of a barrier to the movement of persons between the core and periphery States. In contrast, within the EC institutional framework, the initiation of policy by the Commission and the use of qualified majority decision-making in the Council of Ministers will lead to a more effective implementation of the freedom of movement goal, the European Parliament and the European Court of Justice will be able to oversee all policy-making in the area of Justice and Home Affairs, and a positive policy to combat racism and xenophobia can be co-ordinated at the European level.

(Note of the author: the manuscript was completed 1 May 1995)

NOTES

1. Council of the European Communities/Commission of the European Communities (1992) *Treaty on European Union,* Luxembourg: Office for Official Publications of the European Communities, p.138.

2. Council of Ministers of the European Union (1994) *European Council at Corfu, 24-25 June 1994: Presidency Conclusions.*

3. Council of the European Communities/Commission of the European Communities, op. cit., p. 8.

4. ibid., p. 8, emphasis added.

5. Official Journal of the European Communities (1987) *The single European Act,* No. L 169, 29 June 1987, Luxembourg: Office for Official Publications of the European Communities.

6. T. Bunyan & F. Webber (1995) *Intergovernmental Co-operation on Immigration and Asylum,* CCME Briefing Paper no.19 (Brussels, 1995).

7. The Schengen Accord came into force on 26 March 1995.

8. See A. Cruz, *Schengen, ad hoc Immigration Group and other European Intergovernmental bodies: in view of a Europe without internal borders*, CCME Briefing Paper no. 12 (Brussels, 1993).

9. Council of Ministers of the European Communities (1991a) *Luxembourg Presidency "Non-Paper" - Draft Treaty articles with a view to achieving political union,* 12 April 1991.

10. Council of Ministers of the European Communities (1991b) Dutch Presidency Draft Treaty "*Towards European Union*", 24 September 1991, Chapter 10, Article 220a.

11. Council of the European Communities/ Commission of the European Communities, op. cit., pp. 131-5. Also see A. Dummet & J. Niessen, *Immigration and citizenship in the European Union,* CCME Briefing Paper no. 14 (Brussels, 1993).

12. On the operation of the Justice and Home Affairs pillar, and a complete list of the resolutions and recommendations of the EU Justice and Interior Ministers under the 'third pillar' provisions, see the CCME Briefing Paper no. 19.

13. Christliche Demokratische Union/Freie Demokratische Partei (1994) *Koalitionsvertrag,* Bonn, p. 45.

14. *Agence Europe,* No. 6380, 16 December 1994.

15. European Parliament Committee on Civil Liberties and Affairs (1995) *Draft Opinion on the Treaty on European Union with a view to the 1996 Intergovernmental Conference*, 26 January 1995, PE 210.525, Brussels: European Parliament.

16. Council of Ministers of the European Union (1995) *European Council at Essen, 9-10 December 1994: Presidency Conclusions.*

17. Commission Consultative "Racisme et Xénophobie", Activités de la Commission consultative "Racisme et Xénophobie". Rapport Final (SN 2129/95).

18. Parliamentary Group of the Party of European Socialists (1995) *Reflection Document of Elisabeth Guigou, following discussions in the Working Group on the 1996 Intergovernmental Conference,* 31 January 1995.

ANNEX

PROPOSALS FOR AMENDMENTS TO THE TREATY ON EUROPEAN UNION

1. The Starting Point

The Starting Point is a proposal for amending the European Community Treaty in 1996, so as to remedy an obvious defect in the original Treaty of Rome, which says nothing about racism or xenophobia.

It is perhaps not surprising that, little more than a decade after the second world war, the drafters of the Rome Treaty should have thought it unnecessary to include any requirement not to discriminate on grounds of race, ethnicity or religion. The memory of the evils which racial and religious hatred can inflict was too recent. Unhappily, in recent years, racism and xenophobia have reappeared in ways which would have been unthinkable in 1957. Racial violence is commonly in the news. Certain individuals and organisations incite hatred of Jews, Muslims, black people, foreigners, asylum-seekers, Roma and Sinti and particular ethnic groups. These manifestations of hatred have been widely publicised, but there is an equally important problem to be resolved, namely, the everyday unjust discrimination which large numbers of people living in Europe suffer when they are denied access to employment, decent housing and other social goods and needs because of their race, colour, religion, or national, social or ethnic origin.

All the member states of the European Union have ratified the UN Convention on the Elimination of all forms of Racial Discrimination (except Ireland, which is committed to doing so). They have also ratified the European Convention on Human Rights and Fundamental Freedoms, in which Article 14 guarantees the enjoyment of all the other rights in that Convention without discrimination on grounds of sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status, while Article 9 states the rights to practise a religion. All the member states include in their laws or constitutions some form of condemnation of racism. In principle, there appears to be no obstacle to amending the Treaty in the way suggested.

Moreover, at Community level, all member states have agreed to the inclusion of non-discrimination clauses in Association Agreements with third countries. There are Community restrictions on the broadcasting of racist material. In 1986, all member states joined with the Community's

Council, Commission and Parliament in a Solemn Declaration against Racism and Xenophobia. In 1990 the Council of Ministers adopted a Resolution on the subject. The European Commission has for some years been concerned to assist the integration of settled migrants by improving their rights and opportunities. In its 1994 White Paper on Social Policy (COM(94)333) the Commission itself goes further implicitly, separating the issue of anti-discrimination law from immigration policy by proposing that "at the next opportunity to revise the Treaties, serious consideration must be given to the introduction of a specific reference to combatting discrimination on the grounds of race, religion, age and disability".

The Starting Point proposal is not intended to exclude the possibility of combatting other kinds of discrimination than those it mentions. The proposal was drafted early in 1994 by a group of independent experts, concerned principally with the urgent need to combat racism and xenophobia. In the text of the suggested amendment, Part One A would place the elimination of discrimination among the guiding aims and principles of the Community. Article 3(u) would include it in the defined activities of the Community. The present situation in Europe urgently requires that the Union should make this unequivocal statement of principle, and should take powers for the Community institutions to combat discrimination.

It can be argued that the principle and the powers are already implicit in the Treaty; indeed the draft proposal known as the Starting Line, in the form of a draft Community directive, assumed that this was so and has gained wide support from the European Parliament and from some lawyers as well as the Migrants Forum and numerous organisations in members states. However, whether or not these powers exist, it is of vital importance that the opportunity to amend the Treaty so as to make its rejection of racism explicit in 1996 should not be missed. Failure to amend would be perceived as a setback for human rights rather than as maintenance of the status quo, now that the question has been raised by the European Commission itself.

Proposal for Amending the European Community Treaty

a. Article 3(u) to be added to the present Article 3
the elimination of discrimination against persons or groups of persons, whether citizens of the European Union or not, on the grounds of

race, colour, religion, or national, social or ethnic origin, and the promotion of harmonious relations between such persons or groups of persons.

b. A new Part-One A, entitled "Non-discrimination", to be added between Part One and Part Two

Art ....

The Council, acting in accordance with the procedure referred to in Article 189b, shall issue directives or make regulations setting out the measures required to eliminate discrimination against persons or groups of persons, whether citizens of the Union or not, on the grounds of race, colour, religion, or national, social or ethnic origin.

2. Third Country Nationals

a. Unequal treatment: the current problem

Nationals from non-member states who are lawfully resident in the European Union (third-country nationals) do not enjoy the full rights accorded under Community law to citizens of the Union. Community law gives them:

- no right to move or reside freely in the Union;
- no right to vote or stand as a candidate in municipal or European parliament elections.

In other words the Union treats them as second class citizens. This undermines the Union's expressed commitment to the elimination of racial discrimination, racism and xenophobia, and the integration of settled immigrants.

In the White Paper on European Social Policy (COM (94) 333 of 27 July 1994) the European Commission stresses "that action in the area of integration policy remains an essential element of the wider need to promote solidarity and integration in the Union. To achieve this, integration policies must be directed in a meaningful way towards improving the situation of third-country nationals legally resident within the Union by taking steps which will go further towards strengthening their rights relative to those of citizens of the Member States".

The White Paper recognises that: "An internal market without frontiers in which the free movement of persons is ensured logically implies

the free movement of all legally resident third country nationals for the purpose of engaging in economic activities".

The population in the European Economic Area (EEA, which includes the fifteen member states of the European Union and Iceland, Liechtenstein and Norway) numbers around 370 million people, of whom 344 million are living in the European Union. On 1 January 1992, sixteen million or 4% of those living in the EEA were citizens of a country other than the one in which they lived (also 4%, which is almost 15 million, in the EU). Two thirds of these non-nationals were citizens of countries outside the EEA (Eurostat Rapid Reports on Population and Social Conditions - 1994/7).

Equality could be achieved by:

- liberalising naturalisation laws across the Union, or
- granting Union Citizenship to third-country nationals.

b. Naturalisation policy

One answer to the problem of lawfully present third-country nationals acquiring the same rights as nationals of Member States of the European Union is for such individuals to acquire citizenship of the country in which they are living.

In international law states have the right to determine who are their nationals. In a Declaration attached to the Treaty on European Union, the Union affirmed its adherence to that principle, stating that "the question whether an individual possesses the nationality of a Member State shall be settled solely by reference to the national law of the Member State concerned".

The criteria for granting citizenship vary considerably from one member state to another. Some member states permit admitted immigrants to become naturalised after five years residence. Others require double this number of years of residence as a minimum and impose additional stringent requirements.

Most member states are understandably reluctant to relinquish their national sovereignty and to bring these matters within Community competence on an issue which arouses such strong feelings.

For these reasons it may not be realistic to hope that equal rights for third-country nationals can be achieved across the Union by easier access to naturalisation in individual member states.

c. European citizenship

The Treaty on European Union introduced a new concept, namely that of Union citizenship. One of its key features is that it complements rather than replaces the individual's existing nationality. Therefore Union citizenship could easily embrace third country nationals resident in the Union without requiring them to possess nationality of an individual member state.

Union citizenship includes three rights and it would mean that the Union's third country nationals would have these rights, namely:

- the right to move and reside freely within the territory of the Member States;
- the right to vote and to stand as a candidate at municipal and European elections;
- the right to be protected by the diplomatic or consular authorities of any Member State.

d. The 1996 Intergovernmental Conferences

Third country nationals have, since the inception of the European Community, made a significant contribution to its prosperity. Justice demands that they are no longer treated as second class citizens.

The 1996 Intergovernmental Conference on the revision of the Treaty establishing the European Community provides the ideal opportunity to include an amendment which will grant Union citizenship to third-country nationals on completion of five years lawful residence in one or more Member states.

3. Amendments for the promotion of openness in European government

At the 1992 Maastricht Intergovernmental Conference, the Heads of government of the 12 Member States of the European Community adopted the "Declaration relating to the right of access to information". It was stated in that Declaration that "openness in the decision-making process reinforces the democratic character of the institutions as well as public confidence in the administration". The Preamble as well as Article A of the Union Treaty reiterates the need for decisions to be "taken as closely as possible to the citizen".

Without the promotion of "openness in decision-making", that is to say without striving to ensure that decisions are made as much in the open as possible, the citizens will never be able to participate in the decision-making process.

a. A new paragraph should be inserted after Article 8E of Title II, which reads as follows:

"8F. The citizens of the Union shall have a right of access to information at the disposal of the institutions. The Council shall, in accordance with the procedure established in Article 189B, specify the categories of information to which the citizen shall not have access and the grounds upon which such access may be denied."

Explanation

Amendment A.I implements the principle of open government to the extent that it ensures that the citizens gain access to information which the institutions have at their disposal. By virtue of Article 8 of the EC Treaty, the citizens of the Union possess "citizenship"; under Article 8 (2), they enjoy "the rights conferred by this Treaty and shall be subject to the duties imposed thereby". Citizens of the Union should be entitled to access to information at the disposal of the institutions so that citizens may acquaint themselves directly with the rights and duties incumbent upon them by virtue of Article 8 (2). They should also be entitled to receive this information so that they may both follow and participate in the development of Union law. This additional clause (8F) is therefore meant to serve these twin purposes. Article 8F seeks to operationalise an essential aspect of public access to European government. Such an important principle should be enshrined in the Treaty itself and not be relegated to the realm of internal rule-making by the institutions, as is currently the case with the Rules of Procedure of the Council and the Commission.

The public interest of the European Union nevertheless mandates, in addition to the general rule of access to information, exceptions which protect certain categories of information. All national regimes regulating access to government documents contain some form of derogations from public access. These exceptions generally relate to public security, protection of industrial and commercial secrets and privacy of the citizens. The exceptions ought to be carefully and precisely specified in accordance with the procedure laid down in Article 189B of the Treaty.

b. A third paragraph should be added to Article K.3, which would read as follows:

"Proposals for the adoption of a joint position or joint action as well as measures in pursuance thereof and the draft of a convention as well as measures implementing it, as provided for in paragraphs 2 and 3 of this Article, shall be published in the Official Journal, three months before the Council adopts a decision thereon. Upon adoption by the Council, the decision shall be published in the Official Journal."

Explanation

The amendment under A.I relates to public access in the Community whereas the amendment under A.II deals with openness of the issues regulated in Title VI of the Union Treaty.

The first sentence of this amendment ensures that the citizens of the Member States are informed of the decisions the Council intends to take. Where appropriate the citizens may then initiate public debate or make their views known to national or European parliamentarians. The second sentence should ensure that the Council's decision as adopted is made accessible to citizens.

For the sake of brevity, the Standing Committee limits its proposals tō these two amendments on public access. However, in addition, it may be considered useful to reinforce the principle of open government by inserting further amendments in the text of the Treaty. For instance, in the penultimate preambular recital, the clause "in which openness in the decision-making process is stimulated and" could be inserted between "Europe" and "in". Article A could also be supplemented as follows: "This Treaty marks a new stage in the process of an ever closer union among the peoples of Europe, whereby the decision-making takes place, as much as possible, in the open and in which decisions are taken as closely as possible to the citizen".

Openness can also be inserted as one of the aims of the Union by adding the following clause to the text of Article F (1): "and promote openness in decision-making". This is in conformity with the second paragraph of Article F which states that "the constitutional traditions common to the Member States" shall be respected. It is indisputably the case that these constitutional traditions are founded on the principle that legislation and decision making are to the greatest degree possible elaborated pursuant to a process of public debate and consultation, a process

which is both accessible to the citizen and permits him or her to participate (directly or indirectly) in the decisions which will affect his or her destiny.

The European Ombudsman can also play a role in the promotion of administrative openness within the Union through decisions taken pursuant to the complaints of interested citizens.

4. Amendments relating to the jurisdiction of the Court of Justice under Title VI

a. The last sentence of Article K.3 (2)c, should be replaced with: "Articles 169, 170 and 177 of the Treaty establishing the European Community shall be applicable to conventions and measures adopted to implement them".

Explanation

The Member States can, in accordance with Article K.3 (2)c, draw up conventions in the field of asylum, migration, justice and in criminal matters. The Council can adopt measures in implementation of those agreements. Those agreements and measures implementing them will necessarily include binding rules which may affect the legal position of individuals as well as of government institutions. Fundamental freedoms ofindividuals could also be affected.

The draft Europol Treaty and the draft External Frontier Convention are the first examples of agreements such as those contemplated in Article K.3 (2)c.

The last sentence of Article K.3 (2)c as it now stands states that the Member States may grant the Court of Justice jurisdiction to interpret and apply provisions of the agreement. Our proposed amendment would make the jurisdiction of the Court mandatory, as opposed to facilitative.

The attribution of competence to the Court in this manner is critical to ensuring that effective international legal guarantees are provided. The Commission could in accordance with Article 169 initiate supervision procedures. A dispute arising between Member States with respect to the interpretation or application of a Treaty concluded pursuant to Article K.3 (2)c could be resolved by the Court of Justice on the basis of Article 170 (EC). The individual citizen could by virtue of Article 177 (EC) seek to ensure that the interpretation of important rules incorporated in the

agreements entered into on the basis of Article K.3 (2)c is definitive. Through the medium of the Article 177 procedure a significant contribution could be made to the uniform interpretation of the international agreement in question as well as to the gradual harmonisation of national norms on asylum, aliens law, privacy, and criminal procedure, norms which currently vary greatly and consequently give rise to inequalities as between Member States of the Union.

The arguments raised by the German Federal government before the German Bundestag as grounds for the acceptance of the Protocols on the jurisdiction of the Court of Justice, in respect of the 1968 Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters (EEX Convention) and the 1980 Convention on the Law applicable to Contractual Obligations are equally applicable to the agreements drawn up in accordance with Title VI (Deutsche Bundestag, Drucksache VI/3294, p. 16 and Drucksache 12/7979, p 25).

An alternative amendment on the optional jurisdiction of the Court of Justice is also proposed:

b. The following sentence should be inserted after the last sentence of the third paragraph, of Article K.3 (2)c:

- "Such conventions may provide that the jurisdiction of the Court of Justice shall be limited to those Member States which have by means of a declaration made to the Secretary-General of the Council accepted such jurisdiction."

Explanation

This amendment can serve as an alternative to amendment B.I, should the latter prove too far reaching and hence (politically) unacceptable. The proposed alternative amendment would expressly permit some Member States to accept jurisdiction of the Court of Justice in respect of K3 (2)c conventions as regards actions relating to Member States accepting this jurisdiction. It could be used to break a dead-lock where the competence of the Court of Justice constitutes an issue preventing progress by reason only of the intransigence of one or a small number of Member States. Such a declaration regarding jurisdiction would be effective only as against Member States having made such a declaration.

This amendment creates the possibility that some Member States accept the jurisdiction of the Court of Justice in respect of such conventions.

The idea behind the amendment is that no single Member State should be deprived of the right to accept the jurisdiction of the Court solely because one or more Member States refuse to accept the jurisdiction of the Court.

The number of Parties which can make use of this possibility has been deliberately left open. It may be stipulated that a declaration by only one State is sufficient for the Court to have competence in respect of a preliminary reference from that State. Or it might be agreed that a specified minimum number of Member States must deposit a declaration in order for it to come into force. Effective protection of the citizen, however, requires at the very least competence as regards preliminary references under Article 177 EC. Jurisdiction limited to disputes between the Member States would probably have little effect. The corresponding procedure under Article 170 EC has rarely been invoked.

Such an optional declaration of jurisdiction of an international court for Contracting Parties wishing to take advantage of it is well established in international law; for example, the "optional clause" in Article 36 of the Statute of the International Court of Justice. The Council of Europe has a similar rule in Article 46 of the European Convention on Human Rights. Mention can also be made of the 1988 Jurisdiction Protocol to the "Convention on the Law applicable to Contractual Obligations", which provides in Article 6 that the Court of Justice shall have jurisdiction (inter alia, by way of preliminary references) to interpret the Convention, following the acceptance by seven Contracting Parties of the competence of the Court.

In order that the democratic character of a law making institution may properly be termed democratic, the existence of a judicial authority seised with the interpretation of its decisions is fundamental. Where the institution is supra-national or international, it is vital that the judicial authority is also supra national or international in the interests of uniformity. At present the opposition of just one Member State can block the jurisdiction of the Court of Justice (or the Court of First Instance) for all the others. Those States which recognise and desire proper judicial supervision are denied the opportunity of having it. It is felt that this current situation is unacceptable and requires a positive solution. At the very least this solution could be along the lines of optional ECJ jurisdiction with regard to conventions adopted under Article K3 (2)c, as proposed in the amendment at issue.

5. Amendments regarding parliamentary control of decision-making under Title VI

a. Paragraph 3 of article K.4 should be renumbered as paragraph 4. A (new) paragraph 3(a) should be inserted, which reads as follows:

"3a. A decision of the Council as referred to in this Title shall not be adopted until the European Parliament has been afforded the opportunity to formulate and notify the Council of its opinion on the draft decision of the Council, within a period of three months of its receipt."

Explanation

This amendment is intended to guarantee that the Council may not adopt any decision without taking into consideration the views of the European Parliament - now referred to in Article K.6. The duration of three months is borrowed from Article 189B EC. If this amendment is duly accepted, a provision would also have to be included in the text of every relevant decision indicating that the view of the European Parliament has been properly taken into consideration; this is not the case at the moment. For the European Union citizen, the acceptance of this new third paragraph of Article K.3 would constitute an effective guarantee that no decision will be taken by the Council without requisite consultation of the European Parliament.

b. Paragraph 3 of article K.4 should be renumbered as paragraph 4. A (new) paragraph 3(b) shall be inserted, which reads as follows:

"3b. Where, in acting in accordance with this Title, the Council proposes to adopt a decision intended to be binding on the Member States, that decision shall not be adopted within a period of three months after the proposal has been laid before the Council without the national parliament of each individual Member State having been afforded, in accordance with the procedures applicable in each Member State, the opportunity to express their views on that draft decision."

Explanation

This amendment will provide each national parliament the possibility of scrutinising any draft decisions pending before the Council, to the extent that the draft decision purports to establish binding rules. This amendment does not specify the purported legal effect of the opinion given by a

national parliament, this being a matter for the national law and practice of each Member State. The proposed amendment in no way affects the constitutionally determined relationships between governments and parliaments at the national level in the Member States.

The purpose of this putative addition to Title VI is to involve the national parliament, should it so wish, in law making by the Union in the highly sensitive areas of immigration and criminal law. If the Council decides, in accordance with Article K.9 to apply Article 100c of the Treaty establishing the European Community to certain areas referred to in Article K.1, such decision proposed to the Member States for adoption, "should be in accordance with their respective constitutional requirements". These requirements spell out a significant role for national parliaments. Our proposed amendment is more limited - it merely seeks, in accordance with national parliamentary

procedure to ensure that national parliaments have an opportunity to make their views known to their national representatives in the Council. In this manner, the citizens of the Member States (being citizens of the Union) can participate in the Union's legislative process through the efforts of their national parliamentarians.

Provisions with a similar purpose have been laid down in Article 132 (3) of the Schengen Implementation Agreement of 1990 and in Article 26 (5) of the draft External Frontier Convention.

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