

**Churches Committee for
Migrants in Europe**

**European migration policies
for the nineties
after the Maastricht Summit**

by

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CCME Briefing Paper no.7

INTRODUCTION

In December 1991 the Heads of State or Government of the twelve Member States of the European Community, the so-called European Council, met for three days in Maastricht (NL) and reached an agreement on the text of the Treaty on European Union. It contains various provisions related to migration. In addition, the Council approved a report on immigration and asylum policies which was drawn up by the ministers responsible for immigration at the request of the European Council held in Luxembourg earlier that year.

A week after the Maastricht Summit three association agreements were signed between the European Community and Hungary, Czechoslovakia and Poland respectively. They contain provisions related to the movement of workers, services and capital. The Agreements were signed one year after the negotiations had begun and it is envisaged that similar agreements will be concluded in the near future with other Central and East European countries.

Another important event took place a couple of weeks before the Summit. After years of negotiations the European Community and the the EFTA States reached an accord on the text of the "Agreement Creating the European Economic Area". As soon as this Agreement takes effect (probably in January 1993), there will be an area of nineteen European countries with free movement of persons, services and capital. The countries included are the twelve Member States of the European Community and the EFTA countries Austria, Finland, Iceland, Norway, Sweden and Switzerland (and Liechtenstein being an observer to the EFTA).

Three conclusions can be drawn from these developments. Firstly, the twelve Member States of the European Community are going to intensify their cooperation in matters related to migration. Secondly, in this cooperation process the intergovernmental approach prevails over a community approach and democratic control over the decision-making processes is still not satisfactory arranged for. Thirdly, the EC Member States are extending their cooperation to States that are not member of the European Community and this would mean that for the years to come migration policies in Europe will, to a great extent, be determined by the European Community and its Member States.

Once signed, the Treaty and the Agreements are subject to procedures of ratification by the parliaments of the countries involved. In some countries constitutional modifications are needed (Belgium, Germany and France) whereas in Denmark and Ireland ratification will be preceded by referenda.

This briefing paper gives extracts of the text of the various Treaties and Agreements, followed by explanatory notes and comments. It may be of help to those who will be involved in the public debates which will, hopefully in all countries involved, precede and accompany parliamentary debates.

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Brussels, February 1992

I THE TREATY OF THE UNION

In Maastricht on the 11th of December 1991 the European Council adopted the text of the Treaty on European Union¹.

This chapter gives first a general overview of the structure and contents of the Treaty. In the three following paragraphs more details are given on Union Citizenship, third country nationals and admission and asylum policies. Special attention is given to how decisions in these areas will be taken in the newly formed European Union. The last paragraph deals with Community law and the role of the Court of Justice of the European Communities.

1. Structure and contents of the Treaty of the Union

a. Preamble-

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

The articles of this Title set out the objectives of the Union and gives general principles on how these will be achieved. According to Article B the newly formed 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 assert its identity on the international scene, in particular through the implementation of a common foreign and security policy which shall include 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,*
- *to develop close cooperation 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 cooperation 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.*

1 Treaty on European Union (CONF-UP-UEM 2002/92)

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)².*

In other words, another structure is being created next to and building upon the already 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."

As will be shown, the Treaty does not extend substantially neither the powers of the European Parliament nor the jurisdiction of the Court of Justice in matters related to migration.

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

In one article quite a number of changes have been introduced to the Treaty establishing the European Economic Community also known as the Treaty of Rome. This Treaty has been amended before, for example, in 1987 by the European Single Act. The first amendment is the change of name of the Treaty which from now on will be called the Treaty establishing the European Community (EC Treaty).

As far as migration and asylum policies are concerned the following changes are made:

- The introduction of the citizenship of the Union. This citizenship is enshrined in the EC Treaty and it establishes, among other rights, the right to move and reside freely within the territory of the Member States and the right to vote and stand for elections on the local and European level.

² The apparently not translatable term *acquis communautaire* refers to rights guaranteed by the Treaties, Community secondary legislation, Association and cooperation Agreements and Community jurisprudence.

- The articles in the EC Treaty dealing with the right of establishment and the free movement of workers and services are changed in such a way that the powers of the European Parliament are somewhat increased.
- Two new articles are inserted in the EC Treaty. According to the new Article 100c the Council "shall determine the third countries whose nationals must be in possession of a visa when crossing the external borders of the Member States". Moreover a provision is made on how the Community can react :

"in the event of an emergency situation in a third countries posing a threat of a sudden inflow of nationals from that country to the Community".

The new Article 100d mandates the Co-ordinating Committee of senior officials (set up under Article K of the Treaty of the Union) to contribute to the preparation of the proceedings of the Council in the fields referred to in Article 100c.

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

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 J.11)

g. Title VI Provisions on Cooperation in the fields of Justice and Home Affairs (Article K)

In this Title no amendments have been made to the EC Treaty but cooperation between the Member States is established in the fields of Justice and Home Affairs. First it defines matters of common interest, including asylum and immigration policies, residence and movements of third country nationals on the territory of the Member States, judicial cooperation in civil and criminal matters and police cooperation to combat terrorism and drug trafficking. Subsequently it defines what kind of actions and measures can be taken and how they will come about.

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

i. Protocols

Seventeen Protocols are attached to the Treaty. None of them have 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 the 7th of February 1992 which means that the Treaty is now open for ratification by the Member States.

The Final Act contains Declarations of which two are directly relevant for 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 has been signed on the 7th of February 1992. The reason may be that this Declaration did not say anything more than already has 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).

2. 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. This right has always been restricted to workers who were nationals of Member States but in 1990 three Directives were adopted extending this right to EC nationals who do not take up a gainful activity in an EC Member State other than their own³.

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 because until now the cooperation or consultation procedure was applied in matters related to free movement and establishment.

³ The relevant Directives No. 90/366, 90/365 and 90/364 concerning students, pensioners, and other non-salaried persons respectively, should be introduced into national legislations before 30 June 1992.

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.

Although this is an important step forward, it must be borne in mind that all migrants irrespective their nationality have voting rights in Denmark, Ireland and the Netherlands and in Spain on the basis of reciprocity.

c. Citizens 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. In fact these rights do not offer more than what is already provided for in 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 to add to the rights of the citizens of the Union. In matters related to the rights of citizens, the European Parliament could have been given the maximum possible influence (co-decision).

As soon as the citizenship of the Union is established persons 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.

3. Third country nationals

In Article K(1) of the Treaty of the Union nine matters of common interest have been identified and among them are those 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 explicit references have been made to the movement and residence of third country nationals legally residing in the Member States.

The Member States have always been extremely cautious to maintain as much as possible their sovereignty in matters related to third country nationals⁴. Proposals made in preparation of the Maastricht Summit to give the Community somewhat more competence in this field failed to receive the support of most Member States. As will be shown in more detail in the next paragraph, Article K gives a firm and more formal basis to the already existing intergovernmental cooperation in migration matters.

In the report of the Ministers responsible for immigration to the European Council meeting in Maastricht a few paragraphs are devoted to the movement of third country nationals between Member States. One proposal is to allow third country nationals who are legally residing in a Member State to move but not reside freely within the Community.

4. Admission and asylum policies

a. Changes in the EC Treaty

Article G of the Treaty of 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]).

⁴ Cf. Antonio Cruz, Community competence over third country nationals residing in an EC Member State. CCME Briefing Paper no. 5. Jan Niessen, European migration policies. The Member States against the Commission. In: *Migrantenrecht 1992* - no 1.

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 related to uniform format for visas.

Article 100d refers to the Co-ordination 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 articles mark the very carefully phrased beginning of bringing under Community legislation the admission of third country nationals. here, the role of the European Parliament is weak (consultation only, but not in "emergency situations") and the Co-ordinating Committee of senior officials is given a prominent place. Although Article 100c (6) offers the possibility that the Member States apply Article 100c to other matters related to cooperation 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]).

The question can be asked as to what other measures are left to be taken as soon as the signed Dublin Convention, the not yet signed Convention on the crossing of external borders and the Schengen Agreements are in force? Is it realistic to expect that the Community will start legislation in a field that is already covered by several international Conventions? In other words, the opening which these two Articles give for Community action is not only limited but also rather theoretical. However, governments may come to the conclusion that the advantages of the inter-governmental cooperation (e.g. relatively short drafting process) are outweighed by the disadvantages (e.g. lengthy ratification procedures). They may then take recourse to community legislation because once an agreement is reached on the text of a directive, it can take effect fairly quickly.

b. Intergovernmental cooperation

Title VI of the Treaty on the Union establishes inter-governmental cooperation in the fields of Justice and Home Affairs. Article K.1 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. combating drug addiction insofar as this is not covered by 7 to 9 below;

5. combating fraud on an international scale insofar as this is not covered by 7 to 9 below;

6. judicial cooperation in civil matters;

7. judicial cooperation in criminal matters;

8. customs cooperation;

9. police cooperation for the purposes of preventing and combating terrorism, unlawful drug trafficking and other serious forms of international crime, including, if necessary, certain aspects of customs cooperation in connection with the organization 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.3[1]). The cooperation between the Member States of the European Union shall not prevent cooperation 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 K.7).

The Council shall act unanimously, except on matters of procedure and where otherwise is provided (Article K.4 [3]). It may, on the initiative of any Member State or of the Commission as regards the areas 1 to 6, and on the initiative of any Member State as regards the areas 7 to 9, adopt joint positions and promote cooperation, 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 K.3).

A Co-ordinating Committee of senior officials shall be set up that has a co-ordinating role and should give opinions to the Council at the Council's request or on its own initiative (Article K.4 [1]). Another task is assigned to this Committee under Article 100c (see para. 3).

The Commission shall be fully associated with the work (Article K.4 [2]) and it has the right of initiative in areas where it never had such 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 hold a debate on the progress made in the implementation of the areas referred to in this Title (Article K.6). The operating expenditure involved in the implementation of the provisions of Article K may be charged to the budget of the European Community. In that event the budgetary powers of the Parliament apply⁵.

This Title of the Treaty provides for a formal and strong basis for intergovernmental cooperation in the field of Justice and Home Affairs. Article K.9 leaves the possibility open that some of the areas of common interest are 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 this matters under Article 100c.

The role of the Member States and the Council in the decision-making process is predominant (interdepartmental co-operation, Co-ordination Committee, voting conditions).

The Commission has a limited role to play. In some areas it has the right of initiative. Article K.8 (1) declares various articles of the EC Treaty, giving the European Parliament and the Commission certain powers, applicable to this Title of the Treaty on Union. However, Article 155 of the EC Treaty is excluded and exactly that Article gives the Commission powers to ensure that Treaties and measures taken by European institutions are applied, to formulate recommendations and to take decisions.

The European Parliament has not been given any real power. It will be informed and may give opinions which are duly taken into consideration⁶.

5 Administration expenditure which the provisions under Article K entail for the European Institutions shall be charged to the budget of the European Community (Article K.8[2]).

6 See for the first assessment of the Treaty made by the Committee on Institutional Affairs of the European Parliament the Committee's notice to its members (doc-en/cm/121541)

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).

5. Community law

In the Common Provisions (Title I) 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 the intergovernmental cooperation in the field of Justice and Home Affairs (Title VI) shall be dealt with in compliance with this Convention as well⁷. This could be interpreted as meaning that the European Human Rights Convention has precedence over other Conventions which are or will be concluded between the Member States. The same applies for the International Convention relating to the Status of Refugees to which reference is made as well (Article K.2.). In 1990 the Commission made a strong plea for adherence as European Union to the Human Rights Convention. The Commission considered that this was necessary because the powers of the EEC are extending to more areas affecting the lives of the citizens of the Member States. This makes a supervision by the Human Rights organs of the Council of Europe necessary⁸. The Council of Ministers have not taken a decision on the Commission's proposal. Besides, the Maastricht Summit could have made the decision to adhere as the Union to the Convention, in addition to the introduction of the Union's citizenship.

The Conventions Members 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 K.3 [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 in both the Schengen Agreements and the Dublin Convention.

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 and other pieces do not. It is confusing and

⁷ The European Convention on Human Rights has been signed and ratified by almost all Member States of the Council of Europe including all Member States of the European Community.

⁸ Cf. the Commission's Communication on this matter (SEC(90) 2087 final).

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 other Treaties of the European Communities (see for example, Articles 164, 171-188 EC Treaty). This may well create lacunas in the protection of citizens, migrants and refugees.

II THE ASSOCIATION AGREEMENTS

On 16 December 1991 association agreements were signed with Hungary, Czechoslovakia and Poland. They are so-called mixed agreements meaning that they have to be signed and ratified by the European Community and its Member States and by the three countries with which the Community concluded the agreements. To anticipate their implementation interim agreements have been signed.

According to a press communication⁹ the agreements:

"aim at establishing close and lasting relations between the parties and at supporting the completion of the process towards market economy in the associated countries. To that end they are concluded for an unlimited period of time with a transitional period of maximum ten years and they contain a reference to accession. Their full implementation is linked to the actual accomplishment of political, economic and legal reforms. They are based on the principle of asymmetry with full reciprocity as an ultimate goal and create a separate institutional framework."

Compared with the clear provisions of the Agreement between the EC and EFTA (see below), the provisions in the three Association Agreements concerning establishment and the movement of workers and services are rather 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. However, the association partners are allowed transitional periods of up to ten years, inter alia, for financial services and self-employed persons, and certain activities, such as the acquisition of natural resources and agricultural land, are excluded altogether. Also, the association partners may derogate from national treatment during the

⁹ Press Communication of the Council of the European Communities of 16 December 1991. All quotations in this paragraph are taken from this communication.

transitional period for industries which are undergoing restructuring or facing serious difficulties and for newly emerging industries".

Furthermore,

"the partners will allow progressively the supply of cross border services. Special rules apply to transport services".

The agreements require also 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 in matters related 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 Member States are even encouraged:

"to favourably consider the possibility of concluding bilateral agreements on access to labour markets".

The many references to national legislations, the restrictions made to and the unfinished character of some of the provisions may be interpreted as an attempt to prevent too many provisions of the agreements from being capable of becoming part of Community law. The Member States seem to have been well aware of certain rulings of the Court of Justice. At more than one occasion the Court ruled that association and cooperation agreements have direct effect in all Member States and that decisions based on these agreements and taken by Association or Cooperation Councils are binding upon Member States if these decisions are clear and precise¹⁰.

The encouragement to conclude bilateral agreements on access to labour markets could work against the intention to have a common migration policy. For example, the EC Member States are about to decide to effectively remove the obstacles for third country nationals to move (but not reside) freely within the European Community (see above). In other words, they seem to be prepared to give up some of their sovereignty to determine who would be admitted on their territory, provided that this applies only to third country nationals already legally residing in one of the Member States, and not to newcomers. This means that it will become

¹⁰ For example: the Cooperation Agreement between Morocco and the EEC prohibits discrimination based on nationality regarding employment and social benefits for Moroccan migrants and their families. Mrs 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 Cooperation Agreement between the EEC and Morocco has a direct effect in all Member States (Kziber Case C 192/89).

possible for migrant workers who are recruited from one of the newly associated countries by one of the Member States, to travel freely to another. It seems unlikely that the Member States are ready to accept this¹¹ and therefore it could make them reluctant to carry out their plans to allow for the free movement of third country nationals. Another possibility is that for these workers work and residence permits will be issued which are limited in time and restricted geographically.

III THE EC-EFTA AGREEMENT

The Member States of the European Community and the European Free Trade Association reached an accord on the text of an Agreement on the so-called European Economic Area which aims at a system of free exchange and competition in economic and trade relations between the countries involved. It is expected that the Agreement will enter into force on 1st January 1993.

Part III and Annex V of the Agreement deals with the free movement of persons, services and capital. Article 28 provides the right of free movement for workers within EC Member and EFTA States which is almost identical to Article 48 of the EC Treaty. The freedom of movement entails the:

"abolition of any discrimination based on nationality between workers of EC Member States and EFTA States as regards employment, remuneration and other conditions of work and employment.

In Article 28 reference is made 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 well¹².

In the Member States of the European Community the nationals of EFTA States are still being considered as foreigners. Consequently, the Directives taking 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 of the Union on European citizenship. Notwithstanding these facts, the rights and obligation of workers are very well defined and apply to all workers and members

11 Although the Member States are obliged to inform each other on the drawing up of such agreements, they cannot prevent these agreements from being concluded.

12 In protocol 15 transitional periods are foreseen for Switzerland and Liechtenstein.

of their families irrespective whether they are nationals of a EC Member State or of an EFTA State. That is, of course a striking difference with provisions in the Association Agreements with Hungary, Czechoslovakia and Poland.

The EEA Agreement has yet not been signed because the Court of Justice cannot accept certain provisions in the Agreement related to the system of judicial supervision to be set up (an EEA Court of Justice and EEA Court of First Instance). In an Opinion, the Court declared that the creating of an EEA Court is incompatible with the EC Treaty. The aim of the European Community is to achieve an economic integration leading to an internal market and economic and monetary union, whereas the EEA aims at a system of free exchange in economic and trade relations. This would mean that emerging rules of law cannot be uniform. Moreover, there is no guarantee under this Agreement that rulings of the EEA Court are binding in the EFTA States. Finally, the jurisdiction given to the EEA Court would undermine the autonomy of the Community legal order. The Commission has been charged with finding a solution for this problem that will ensure the greatest homogeneity possible¹³.

The intention of the State Parties concerned to include in the Agreement provisions for judicial supervision is to be praised, as is the concern of the Court of Justice to have a system that does not create contradictions and confusion.

All parties involved are determined to have this Agreement signed and ratified as soon as possible so that it can enter into force at the same date as the Internal Market is supposed to be completed (1 January 1993).

Austria and Sweden have applied for full membership of the European Community, and on matters related to migration and refugee policies there is already intensive cooperation between them and the twelve Member States (for example, observers are sent to ministers conferences and intergovernmental working groups).

IV SOME CONCLUDING REMARKS

The Member States of the European Community are faced with a great problem. On the one hand, national policies to regulate international phenomena are doomed to fail. On the other hand, the manifestation of these phenomena on the national level and national reaction is so varied that European-wide policies seem virtually impossible to reach let alone implement.

13 Cf. Europe of 16/17 December 1991 and 3/4 February 1992.

Migration is such a phenomenon. In the past the individual countries could decide who to let in to work or for humanitarian reason. However, the lifting of the internal border controls by the year 1993 necessitates a common policy because a person, once admitted into one country, can move freely to another (as things stand at the moment, after 1 January 1993 only *de facto* and not *de jure*). It would mean, for example, that liberal admission policies of one Member State undermines restrictive policies of another Member State. A common approach is, however, not so easy to achieve. The variety of post war migration patterns in the various European countries¹⁴ has led to wide diversity in national legislation and obligations towards the respective migrant communities and ethnic minorities. In addition, there is the determination of some Member States (Germany and Portugal, for example) to recruit labour from third countries (in Central and Eastern Europe and in Africa, respectively). Nevertheless, there is a Community wide consensus that none of the Member States are or will become countries of immigration. On the contrary, root causes of forced migration in third countries must be confronted and clandestine immigration combated. Finally, it is maintained that, as long as the international flux of migrants to the European Community is not brought under control, policies aiming at the social integration of migrants are bound to fail.

This paradox has resulted in a minimum common programme (Article 100c EC Treaty) and a more elaborated programme for intergovernmental cooperation (Article K Treaty of the Union and the adopted report of the Ministers responsible for immigration). The emphasis is very much on visa and admission policies, the control of migratory movements (especially in emergency situations) and the combat against clandestine migration.

There is another paradox. 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 Treaty on the Union).

It would mean that significantly more measures affecting the daily lives of people in Europe will be taken on the European level. At the same time the political framework of the European Community and European Union is out of balance. For example, that decisions are to be taken as closely as possible to the citizens does apparently not include measures to give sufficient powers to that body which is directly elected by citizens in order to exercise democratic control over the European decision making process. Furthermore, the jurisdiction of the Court is not extended to those sensitive areas of co-operation in Justice and Home Affairs. The Treaty on the Union proposes to delete the word Economic from the title of

¹⁴ The colonial history of countries such as Portugal, Spain, the Netherlands, Great-Britain and France has left its mark on this pattern, as is the case with Germany's age-old relationship with Central and Eastern European countries.

the Treaty establishing the European Economic Community. Nevertheless, the Maastricht Summit not only allows that one of the Member States continuously to refuse to participate in the further development of a common social policy, but also it does not change the situation in which:

*"the progress achieved in completing the Internal Market is not being matched by comparable progress in social policy"*¹⁵.

The lack of social policies is notably felt by migrants and ethnic minorities in the Community. No firm decisions have been taken on the right of free movement and residence of third country nationals. If this policy remains in force they will be permanently excluded from the advantages which the Internal Market offers to nationals of Member States¹⁶. The Declaration on racism did not bring any news. No concrete proposals were made, for example, to draw up Community wide anti-discrimination legislation. To introduce the citizenship of the Union is a good thing to do. This must, however, be followed by concrete steps leading to the equality of treatment of all those legally residing in the member States of the European Community/Union. If such measures are not taken an underclass of non or half citizens will be created.

15 These are European Council's own words (in: Europe of 7 December 1991).

16 Cf. R. Böhning and J. Werquin, The future status of third country nationals in the European Community. CCME Briefing Paper, no. 2.

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