CL 21 December 93 - January 94

SCHENGEN COUNTRIES

THE LONG MARCH TOWARDS THE IMPLEMENTATION OF THE SCHENGEN AGREEMENT

At its first constitutive meeting on 18 October, the Executive Committee of the Schengen Group announced that the application of the 1990 Schengen Implementing Agreement had once again been postponed until 1 February 1993.
The decision was justified with problems regarding the control of external borders, the combat against drugs, the setting up of the SIS (Schengen Information System) and the necessity of a constitutional amendment in France with regard to the Schengen countries' common asylum policy. According to most recent information, even the February limit might be further postponed.
Indeed, it seems, that many more obstacles are preventing the rapid application of the Schengen Agreement by all signatory states.
Italy and Portugal must still deposit their instruments of ratification and some of the founder-countries of Schengen are expressing doubts on the organisational and technical capability of these two countries and Greece to effectively implement the agreement's far-reaching regulations in the field of policing and external border control. In any case, Italy, Portugal and Greece will not be able to implement the agreement on at the same date as the five founding member-states (Germany, France, Belgium, Luxemburg and the Netherlands) and Spain.
As for the SIS, technical problems regarding the compatibility of the various national SIS-databases, even among the five founding Schengen-member states, remain to be solved.
While the decision to postpone the application of the Schengen Agreement once again, has been mainly attributed to continued French reluctance (see CL No.16, p.1), it becomes ever more obvious that most other member states are not or not fully ready. Thus, for example, among the major international airports within the Schengen Area, only Frankfurt Airport can be ready by December to suppress passport checks for passengers travelling within the Schengen territory.

Source: Migration Newssheet, Brussels, No.128/93-11, November 1993, No.129/93-12, December.

AMENDMENT OF THE FRENCH CONSTITUTION PROVIDES FOR THE APPLICATION THE SCHENGEN AGREEMENT

In August, the French Constitutional Council annulled provisions of the "Pasqua bill" on immigration authorizing the police to vet asylum applications before they are considered by the refugee board (OFPRA).
The provisions aimed at making it possible for France to return asylum seekers entering into France from another Schengen-Member State without further examination.
But the Constitutional Council found that such a practice would breach against French constitutional law that guaranteed every asylum seeker the right of access to due process in France, including the right to stay pending a decision.
In the view of the French government, the Schengen Agreement became inapplicable to France, as a result of the Council's decision. Interior Minister Charles Pasqua, publicly expressed fears that thousands of "false refugees" rejected by other Schengen countries would now poor into France (see CL No.18, p.5) and called for a speedy amendment of the constitution.
On 15 November both chambers of the French parliament united in the Congress adopted the amendment against the votes of the Socialists and the Communists.

The new supplementary provision of the constitution states that France may make agreements on asylum with other countries that recognise the same fundamental rights. The provision maintains the right for

France to grant asylum to foreigners.
As a matter of fact this right of any Member State to grant asylum to a refugee whose application has been turned down in another member state is clearly stated in the Schengen Agreement. Considering this, some experts question the necessity of the constitutional amendment. Indeed, it is not the amendment as a such, but a particular law on its implementation that will most affect the right of foreigners to seek asylum in France. According to this law, asylum seekers no longer have an automatic right of stay in France, pending the procedure.
As a consequence, France can return undesirable asylum seekers to Schengen-Member States and other "safe countries" at once, pending a decision within a procedure that is likely to be very summary. Thus, the "danger" stressed by Interior Minister Pasuqa of a massive influx of asylum seekers into France via neighbour countries appears to be effectively eliminated.

Source: Neue Zürcher Zeitung 21/22.11.93; our sources.

SCHENGEN'S "EXECUTIVE COMMITTEE": SECRECY AND LACK OF CONTROL

The Netherlands based "Standing Committee of Experts on International Immigration, Refugee and Criminal Law" has presented a paper commenting on the draft rules of procedure for the Schengen "Executive Committee" (SEC).
Although the members of the SEC are named exclusively by the governments of the member states, it will have broad law-making and law-interpreting powers.
Under the Schengen Implementing Agreement of 1990 the Executive Committee will have broad powers, the Dutch experts note and they warn against a body with "sweeping powers" which "avoids 'open' administration and rather operates under secrecy" and evades "international parliamentary and judicial control".

The Dutch experts note that the SEC which will function as the administrative body of 'Schengen', "can issue European legislation necessary for the application of the Implementing Agreement, and thus establish the body of a European aliens law and of large parts of European criminal law".
Furthermore, "it can interpret and supplement European alien laws and criminal law, and at the highest instance".
"To what extent is [the SEC] competent to operate under secrecy and without control?" is the central question asked by the Standing Committee of Experts.
The paper's findings are disquieting.

Competence

The SEC has powers unique in the field of international organisations, because they are sweeping in three ways, namely: the nature and extent of the subject matter on which it can make binding decisions; the absence of international parliamentary and judicial control; and the kind of people to which those decisions can be addressed: individuals, mainly aliens and persons subject to criminal law.
The Implementing Agreement can entail all matters related to the "free circulation of goods, persons, services and capital" (article 8a, EC-Treaty), in as far as they are not regulated by Community law. As the circulation of goods, services and capital is already embodied in EC-law, the Schengen Implementing agreement Agreement chiefly concerns persons.
According to the Schengen Implementing Agreement, The SEC is empowered with "the implementation of this Convention". It can make binding decisions as to the entire subject matter covered by the agreement, i.e. it can make binding rules that are law for the Schengen-States.
According to prevailing texts neither the EC Court of justice, nor any other international judge is competent to judge the lawfulness of the agreement's application by one of the Schengen-States or the SEC itself. The European Parlaiment has no powers to control the Executive Committee.
The Standing Committee of Experts underlines that "the agreement in the first place addresses the rights and duties of individuals and not the rights and duties of states which perhaps have less need of protection by an international parliament and an international court". Everywhere else in Europe where

similar structures were made to some extent, the application of the rules was placed under the control of an international court and an international parliament (e.g. the European Court of Human Rights and the Parliamentary Assembly of the Council of Europe).
According to the text of the draft Rules of Procedure of the SEC, an interna tional organisation is created with bodies, by means of those rules, and powers are assigned to those bodies. "That is very remarkable indeed", it says in the Dutch paper. "Usually, international organisations are constructed by a treaty, not only as to their establishment itself, but also as to the establishment of their bodies. Thereby parliamentary control of that construction is possible. That construction cannot be changed without a change of treaty. However, according to these draft rules [regulating the SEC] this will be possible now.

According to the draft, the SEC will be composed of
- the Executive Committee of ministers;
- a secretariat;
- a "Central Group";
- a president.

According to article 11 of the draft rules "The Central Group, composed of high-ranking officers of the Contracting Parties, prepares the work of the Executive Committee...". As for the latter, it consists of the ministers "responsible for the implementation of this Convention", according to article 132 of the Schengen Implementing Agreement.
The SEC shall make its decisions unanimously , but it is the Central Group, i.e. the "high-ranking officers" who decide on the submission of draft decisions to the Executive Committee.
As the Dutch experts very accurately underline "the drafters of the draft rules" [presumably the "high-ranking officers" themselves] thereby "casually grant the Central Group a competence which is essential in any international organisation: the competence to decide on submitting or not submitting certain draft decisions to the highest authority (in this case the Executive Committee) of the organisation".
This also implies the choice of the moment at which a draft decision will be presented to the SEC, i.e. the ministers.
This draws harsh criticism from the Standing Committee of Experts: "It seems undesirable to grant a body, composed of persons from the administration of the Contracting Parties who are politically unaccountable to any parliament (the "Central Group") such fundamental powers.

Secret or public?
In most European states rule-making and policy making in the field covered by the Schengen Agreement is public. In obvious contrast to this presumption of open ness, the draft rules of procedure of the SEC state that the "meetings of the Executive Committeee are not public, except for a different decision of the Executive Committee" and that "deliberations of the Executive Committee fall under secrecy, except for a different decision of the executive Committee" (article 12.1 of the draft rules).
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(EU) EU/ASYLUM: EUROPEAN COMMISSION ADOPTS A WORKING DOCUMENT TO LAUNCH DEBATE ON A BINDING COMMUNITY LEGAL INSTRUMENT ON ASYLUM PROCEDURES, WITH A VIEW TO BRINGING IMMIGRATION AND ASYLUM INTO THE COMMUNITY SYSTEM FOLLOWING THE ENTRY INTO FORCE OF AMSTERDAM

Brussels, 03/03/1999 (Agence Europe) - The European Commission adopted on 3 March, on the initiative of Commissioner Anita Gradin, a working document entitled "Towards Common Standards on Asylum Procedures" which is designed as a "preparatory consultative measure" before the Executive brings forward a proposal for a binding Community legal instrument, following the entry into force of the Amsterdam Treaty. The Commission points out that the new Treaty requires the Council to adopt, within five years of its entry into force, measures on "minimum standards" on procedures in Member States for granting or withdrawing refugee status and that "the communitarisation of immigration and asylum under the Treaty of Amsterdam now offers the possibility of using an instrument based on the Treaty establishing the European Community". All these issues will be the focus of the special European Council in Tampere under Finnish Presidency next October, but the Commission hopes to launch a debate, with this working document, with the Council and European Parliament, and a dialogue with the United Nations High Commission for Refugees and non-governmental organisations. (See EUROPE of 13 February, pp. 7 and 8, for more on the informal meeting of Justice and Home Affairs Ministers in Berlin, during which Mrs Gradin announced that the Commission intended to bring forward regulations to replace existing conventions on the matters that will be communitarised, an announcement that gave rise to differing reactions by Ministers). The Commission's working document takes account of the priorities on asylum set out in both the Commission communication "Towards an Area of Freedom, Security and Justice" and the Council and Commission Action Plan on how best to implement the provisions of the Treaty of Amsterdam.

The Commission, commented Anita Gradin, intends to "work out an instrument that strikes the right balance between efficiency and fairness in asylum procedures and to find a common minimum level for all EU Member States". She is of the view that increased efficiency in handling asylum applications must not mean a "lowering of our ambitions when it comes to safeguarding fair and equal treatment for all".

The Commission states in the document that it has examined two possible methods, namely: (a) establishing certain procedural safeguards that all Member States would have to abide by, while leaving the States a margin of manoeuvre for determining the details of necessary administrative arrangements; (b) adopting a more prescriptive approach which would require Member States to apply exactly the same procedures. The Commission is already considering bringing forward a proposal in line with approach (a)

and points out that the Action Plan on the implementation of the Treaty of Amsterdam provides for: - the creation of an instrument on asylum procedures within two years of the treaty's entry into force; - the adoption, also within the two-year timeframe, of a study with a view to establishing the merits of a single European asylum procedure.
In its working document, the Commission examines the different possible options available as to the scope and content of a future legal instrument and raises questions on: - how a new binding proposal would relate to existing non-binding "soft law" and other forms of international protection than asylum; - issues related to the Dublin Convention and the responsibility for considering an asylum application as well as to the concept of safe third country; - measures to speed up procedures without weakening existing safeguards (the Commission raises the question of time limits for the duration of asylum procedures, simplification of the appeals system and how to deal with repeated asylum applications); - the standard of proof, to ensure that some Member States do not require a significantly higher standard of proof from asylum seekers than others; - the notion of the country of origin, since recent monitoring shows that Member States' practice in using this concept varies widely; - special attention being given to vulnerable groups such as women and children, victims of torture and victims of persecution of a sexual nature; - conditions for the withdrawal of refugee status.

(EU) EU/AGENDA 2000/SPAIN: MR AZNAR PROPOSES TWO PROGRAMMES TO ASSIST BORDER REGIONS WITH CANDIDATE COUNTRIES AND TO EASE BURDEN DUE TO ARRIVAL OF REFUGEES IN SOME MEMBER STATES
Madrid, 04/03/1999 (Agence Europe) - As we pointed out earlier, Spanish Prime Minister Jos Maria Aznar, proposed during the informal Petersberg summit a programme in favour of EU Member States that host a particularly large number of refugees. This is first of all a gesture in Germany's favour (as it would allow it to lighten its net contribution to the EU budget - see EUROPE of 1/2 March, p.5). In a letter dated 3 March to the members of the European Council and President Santer, Mr Aznar specifies his proposal and trusts that it will be "considered as an element in all the decisions that the European Council will take in the context of Agenda 2000". "I believe this is a constructive proposal, guided by the desire to create 'more of Europe' and which may help to contribute to a consensus on a more general and satisfying package for all Member States", states the Spanish Prime Minister.
Mr Aznar, who stresses that "the examination of the details of this proposal, as well as its development, is up to the European Commission", bases his argument on the fact that: - one of the objectives of Agenda 2000 is to prepare enlargement, which will have undeniable advantages but which will also entail difficulties, above all for regions, "the less advantaged regions of the current border Member states with candidate countries". Article 63 of the Amsterdam Treaty provides for measures aimed at ensuring a balance between the efforts granted by Member States to receive refugees and displaced persons (see EUROPE of 12 February, pages 7 and 8, on the subject of the discussion on the question of burden sharing during the informal meeting of the justice and home affairs ministers in Berlin). According to Mr Aznar, in order to face up to these two problems it would be necessary to envisage a Community initiative which would be implemented during the whole period of validity of the future financial perspectives, and which would entail additional spending compared to the proposals made by the European Commission in Agenda 2000. The aim of the initiative, which should be in two different programmes and would have a financial allocation of EUR 3 billion annually, would be to:
- help the Objective 1 border regions of the candidate countries. According to Mr Aznar, this programme could take into account the criteria of regional prosperity and the rate of unemployment.
- lighten the financial burden entailed by the presence of refugees and displaced persons, by giving Community aid in relation to the number of refugees or displaced persons accepted in the various Member States. According to Mr Aznar, one might envisage a first initiative "geared on the most serious case, the war in former Yugoslavia", an initiative that would therefore take account of the number of refugees coming from this region.
Mr Aznar stresses that: - such an initiative abides by the principles that should be the inspirational basis for Agenda 2000 negotiations, namely the need to seek solutions conform to the Treaty, the cost of which would respect the decision on own resources and would not discriminate against any Member State; - there is a precedent to such a solution, that of the Integrated Mediterranean Programmes which, at the time when Spain and Portugal joined the EU, helped some member States to face up to the consequences of this enlargement. "I believe that this kind of Community solution is the only one that is

valid for resolving the problems raised by some Member States", concluded Mr Aznar (who made a direct reference to the problem of the net contribution to the EU budget that some Member States consider excessive).

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(EU) EU/AMSTERDAM TREATY: The Treaty that took effect Saturday brings goals dear to citizens within the Union's framework, like fundamental rights, establishment of an area of freedom, security and justice, jobs - Schengen Acquis integrated in Treaty
Brussels, 30/04/1999 (Agence Europe) - The Amsterdam Treaty took effect on Saturday 1 May 1999. The main changes it provides concern the setting up of an area of freedom, security and justice (as Council President Joschka Fischer pointed out: see EUROPE of 29 April, p.3), with a series of policies like that on asylum and immigration moving from the third to the first pillar, and the integration of the Schengen Agreement in the Union framework. After forty years of trying, Europe has finally managed to provide itself with a single currency, and the qualitative leap that the Amsterdam Treaty means for justice and home affairs now opens the possibility of establishing a genuine "area of law" in Europe, one of the Treaty's negotiators commented, hoping that it would not take another forty years to do so. You may recalls that a first important step on this path will be the extraordinary European Council on these issues in Tampere in October.
As for the integration of the Schengen Acquis (which thus moves from the intergovernmental to the realm of the Community) in the Treaty, the EU bodies will be working on it practically right up to the last minute to settle issues in suspense before 1 May, which they succeeded in doing politically at the General Affairs Council (even if some details still need finalising, like certain operational aspects of the Schengen Information System which, for now, remain within the third pillar - see EUROPE of 24 April, p.4 and 28 April, p.4). The most difficult issues were providing legal bases for each of the decisions or positions constituting the Acquis (which, in the jargon, is called the "ventilation" of the Acquis) and associating Norway and Iceland in implementing the Schengen Acquis now integrated in the Treaty (these two countries, which have no controls at their borders with Scandinavian countries, had already concluded an agreement with the Schengen countries in 1996).
The intergovernmental conference that led to the Amsterdam Treaty was marked by greater "visibility" in the eyes of the public than in previous revisions of the Treaty, and negotiators tried to take account of the main concerns of Europeans. This concern is reflected in the provisions on:

- The protection of fundamental rights: for the first time, the Treaty provides possibility of taking measures should a Member State seriously and persistently violate these rights (the European Council of Cologne should go further on this, launching work in view of a Charter on Fundamental Rights of Citizens of the EU: Ed.);
- Non-discrimination and gender equality
- Employment (with a new chapter on employment and inclusion of a high level of employment among the goals of the Union); social exclusion and a high level of protection for public health.

High Representative for Cfsp, cooperation with WEU, "enhanced cooperation"

Another concern of citizens, and especially these past few years marked by the conflicts in Europe's back garden, is to see the European Union act more swiftly and more effectively for peace and stability and to be more visible on the international stage. This visibility is assured by the provisions of the Treaty on the creation of the post of High Representative for Cfsp, who will also be the Secretary General of the EU Council and who will head a future early warning and planning unit. This "Mr or Mrs. Cfsp" will, according to the European Council's wishes (which will make its choice early-June in Cologne; see below), be a prominent politician. As for the early warning and planning unit, it will be made up essentially of 20 senior officials (fifteen for the Member states, one for the Commission, one for WEU and to for the EU Council's Secretariat); the Secretary General of the Council, Jurgen Trumpf has made proposals on its composition and tasks, but we shall have to wait for the arrival of the High Representative for things to take shape.
This Cfsp unit will, notably, be an example of closer cooperation between the European Union and the WEU Treaty that the Amsterdam Treaty provides for (see EUROPE of 29 April, p.4, for the agreement in principle reached in Council on the modalities of this cooperation, including on participation in Petersberg tasks). May we also recall that the Treaty also provides for the possibility of WEU integrating the European Union, and, in Article 17, envisages the "gradual" definition of a common defence policy that could lead to common defence, should the Council so decide ("when the time comes", according to the Maastricht Treaty).
Finally, the Amsterdam Treaty comprises another major novelty, that concerning the implementation of enhanced cooperation between countries that would like to go further in any one field while remaining within the EU framework. (In the Union, in fact, the possibility of a certain "flexibility" already exists (the most significant case being that of economic and monetary union) but, with Amsterdam, the conditions of exercise were specified, to such an extent say some observers that it will be very difficult to implement enhanced cooperation *

Mr Trumpf may remain Deputy High Representative

Speaking to the press on Friday, in answer to questions on his intentions for the future, Jrgen Trumpf, Secretary General of the EU Council, said he is not a "political personality" and does not therefore have the "profile" to be High Representative CFSP/Secretary General of the Council. He added that he has always believed it would be a good thing to have a "former colleague of foreign ministers" as High Representative so that the former would treat him as an "equal". Also, to the question of knowing whether he would accept the post of Deputy Secretary General, Mr Trumpf replied that he is not candidater for a five-year mandate but that, if he were asked to remain for, say, two years, then he would be available.. He noted that the presence of someone who "knows the house well" could be useful to the High Representative, mainly in the beginning.

(EU) EU/EUROPOL: Appointment of Director and Deputy Director
Brussels, 30/04/1999 (Agence Europe) - The Council has appointed a Director and Deputy Director for Europol. These appointments will take effect when Europol begins operations (in early July at the latest). Jurgen Storbeck has been chosen as Director for a period of five years. The Deputy Directors are Willi Bruggeman, Gilles Leclair and David Lawrence Valls Russel for five years and Emanuele Marotta and Georges Rauchs for three years.
The Council also approved the rules of procedure for the Joint Supervisory Body. Only two steps remain to be carried out before Europol begins its activities, namely the ratification of the protocol on the privileges and immunities of Europol's staff and the conclusion by all the Member States of bilateral

agreements with the Netherlands - where Europol will be headquartered - concerning national liaison officers. The Joint Body will monitor Europol's activities to ensure that individual rights are not being violated by the collection, processing and transmission of data originating from Europol.

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