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THE EUROPEAN UNION**

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OPINION OF THE LEGAL SERVICE

Subject : **Proposal for a Council Directive laying down minimum standards for the reception of applicants for asylum in Member States**
Document n° 8351/00 ASILE 26 - COM(2001)181 final
Provisions on access to employment - Legal basis

A. Introduction

1. The above-mentioned Commission proposal, which was transmitted to the Council on 18 May 2000, is based on Article 63(1)(b) EC. On 25 April 2002, the Council defined a general approach on this proposal. In a draft statement to the Council minutes relating to Article 11 of the proposed directive, one Council Member declared that it *"can agree to this clause, provided that the EC has powers regarding access to the labour market"*. The Legal Service has been requested to give an opinion on this point. This note responds to this request.

B. Legal analysis

2. The Legal Service has already implicitly addressed the above question in an opinion relating to the Commission proposal for a Council Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and to promote a balance of efforts between Member States in receiving such persons and bearing the

consequences thereof¹ are applied. In this context, the Asylum Working Party had asked the Legal Service to give an opinion on whether inter alia the question of access to employment and the conditions of employment of persons enjoying temporary protection may be dealt with in this directive and if it should not also be based on Article 137(3) EC.

3. As set out in point 4 of the above-mentioned opinion, the former Article K.1(3)(b) TEU explicitly provided that *"for the purpose of achieving the objectives of the Union, in particular the free movement of persons, and without prejudice to the powers of the European Community, Member States shall regard"* as a matter of common interest *"immigration policy and policy regarding nationals of third countries"* as regards the *"conditions of residence by nationals of third countries on the territory of Member States, including family reunion and access to employment"* (underlined by the author)". On the other hand, the former Article 118 EC did not explicitly provide for any Community action in respect of the working conditions of third country nationals.
4. With the entry into force of the Treaty of Amsterdam, the matters formerly covered by Article K.1(3) points (a), (b) and (c) TEU were essentially integrated into the EC Treaty. Article 63(1)(b) EC now provides the legal basis for the adoption of *"minimum standards on the reception of asylum seekers in Member States"*, and on the basis of Article 63(3) EC, the Council shall adopt *"measures on immigration policy within the following areas :*
 - (a) *conditions of entry and residence, and standards on procedures for the issue by Member States of long term visas and residence permits, including those for the purpose of family reunion* (underlined by the author)"

On the other hand, pursuant to Article 137(3), fourth indent EC, the Council *"shall act unanimously on a proposal from the Commission, after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions in the following areas :*

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conditions of employment for third-country nationals legally residing in Community territory (underlined by the author);"

¹ Document 6736/01 (+ COR 1 + COR 2) JUR 74 ASILE 23 SOC 94 of 1 March 2001.

5. However, as neither the new provisions in Title IV nor Article 137(3) EC explicitly mention the aspect of access to employment, it could be argued that the Council would only be competent to adopt rules governing the conditions of employment for third-country nationals once they are admitted to employment in the Member States, whereas the Member States would remain competent to regulate if and under which conditions third-country nationals have access to the labour market.
6. The Legal Service cannot follow this interpretation.
7. Firstly, it would not be in line with the objective of establishing progressively an area of freedom, security and justice which underlies Title IV of the EC Treaty (see Article 61 EC) to conclude that the absence of a specific mention of access to employment means that there is no Community competence in this area under Title IV. If this interpretation were to be followed, the new provisions introduced by the Treaty of Amsterdam would be a step backwards as compared to the previous legal situation based on the Maastricht Treaty, under which the need to adopt common rules concerning access to employment was clearly recognized.
8. Indeed, it may be argued that, as part of the conditions of residence for third country nationals, certain aspects of conditions of employment may be regulated on the basis of Article 63 EC, and notably paragraph 4 thereof, which allows the adoption of measures aimed at ensuring the free movement of persons². It may equally well be argued that the minimum standards for the reception of asylum seekers which are to be adopted under Article 63(1)(b) EC have to include a certain degree of harmonization as regards access to the labour market, as disparities between the Member States' laws relating to the question of whether and under which conditions applicants for asylum have access to the labour market may create pull-factors and trigger secondary movements, which should be avoided by the harmonization foreseen in Article 63(1)(b) EC.

² See the Legal Service's opinion of 1 July 1999 (doc. 9745/99), according to which Article 63(4) EC empowers the Community to adopt measures defining the social security rights and conditions of third country nationals.

9. Secondly, also as regards Article 137(3), fourth indent, EC, the logic of this provision rather supports the conclusion that the Community is competent to adopt rules concerning access to employment on this basis : if the Community has competence to adopt rules governing the conditions of employment for third-country nationals, there must *a fortiori* also be a Community competence to regulate the aspect of access to the labour market for third country nationals, which is a pre-condition of employment. Indeed, pursuant to Article 136 ECT, "*the Community and the Member States ... shall have as their objectives the promotion of employment, improved living and working conditions, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion*", and the measures foreseen in Article 137 shall be taken "*with a view to achieving those objectives*" (Article 137, paragraph 1). Rules concerning access to employment for third country nationals are certainly appropriate measures to this effect.
10. In the light of the foregoing, the Legal Service is of the opinion that the Community is competent to adopt rules relating to the question of whether and under which conditions applicants for asylum have access to the labour market.
11. As regards the choice between the articles of the EC Treaty on the basis of which such rules can be adopted (see above, points 8 and 9), the Legal Service recalls the conclusions in points 11 to 13 of its opinion relating to the Commission proposal for a Council Directive on minimum standards for temporary protection (see above, point 2). However, the Council did not follow those conclusions. The said directive³, including its provisions relating to access to employment, was adopted on the basis of Article 63(2)(a) and (b) EC.
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³ Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (OJ L 212 of 8.8.2001, p. 12)