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LEGAL SERVICE OPINION

Subject: Standard Readmission Agreement between the Member States of the European Union, of the one part, and a third country, of the other part

– Impact of the entry into force of the Treaty of Amsterdam

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A. Questions put to the Legal Service

1. At its meeting on 12 January 1999, the Migration Working Party (Expulsion) asked the Council Legal Service for its opinion on the impact of the entry into force of the Treaty of Amsterdam on the above standard Agreement. This is a standard Readmission Agreement which could be used to conclude an agreement which is binding on the Member States of the European Union, of the one part, and a third country, of the other part.

The Working Party also asked the Legal Service for its opinion on the impact of the entry into force of the Treaty of Amsterdam on existing bilateral Readmission Agreements concluded between one or more Member States, of the one part, and a third country, of the other part.

B. Content and aim of the standard Readmission Agreement

2. It is necessary to examine firstly the content and the aim of the standard Readmission Agreement.

Section I (Article 1) *defines the terms* used in the text of the draft.

Section II lays down the principle of *readmission of own nationals*, stipulating (in Article 2) that the third country concerned shall readmit at the request of a Member State and a Member State shall readmit at the request of the third country without further formalities all persons who do not, or who no longer, fulfil the conditions in force for entry to or residence in the territory of the requesting State provided that it is proved or may be validly assumed that they possess the nationality of the requested State.

Section III extends the readmission obligation to *persons other than nationals of the requested State*, stipulating that that State must readmit such persons where they entered the territory of the requesting State after residing in the territory of the requested State (Article 3) or are in possession of a valid visa or other valid residence permit issued by that State (Article 4).

Section IV concerns the *transit* of such other persons, by providing that the Contracting States must allow the transit of such persons with a view to their readmission to another State (Article 5).

Section V lays down the rules of the readmission *procedure* (Article 6) and provides for defrayal of *transport costs* (Article 7).

Section VI provides (Article 8) that the rules necessary for implementation of the Agreement shall be adopted in a *Protocol on the implementation of the Agreement*.

Section VII contains (Article 9) provisions concerning protection of *personal data* in the context of its transfer and processing; it also states (Article 10) that the Agreement is without prejudice to certain *other Conventions*, including the Geneva Convention of 28 July 1951 on the Status of Refugees.

Section VIII (Article 11) sets up a *Committee of Experts* to monitor application of this Agreement.

Section IX contains *final provisions* concerning:

- *ratification* and *entry into force* of the Agreement (Article 12);
- the procedure for *amending* the Agreement (Article 13);
- the possibility of *suspending* and *terminating* the Agreement (Article 14);
- the circumstances under which the Agreement is *automatically terminated* (Article 15);
- prohibition of the entering of *reservations* (Article 16);
- *accession* to the Agreement by countries which become Member States of the Union (Article 17).

3. It can therefore be noted that it emerges from the content of this standard Agreement that the aim of agreements modelled on it would be to combat illegal immigration by facilitating the removal of nationals of the third country concerned who are unlawfully resident in the territory of a Member State and *vice versa*.
4. In view of the present situation with regard to the Treaties, this is a matter of common interest falling within the scope of Title VI of the Treaty on European Union. Article K.1(3) of the Treaty on European Union mentions "*immigration policy and policy regarding nationals of third countries*" including, in (c) "*combating unauthorised immigration, residence and work by nationals of third countries on the territory of Member States*".

However, when the Treaty of Amsterdam enters into force, this matter will no longer fall within the scope of Title VI of the Treaty on European Union (TEU)¹ but of the Treaty establishing the European Community (TEC).

¹ The scope of new Title VI of the TEU will in future be reduced, as indicated by its new heading, to "*provisions on police and judicial cooperation in criminal matters*". However, the scope of the TEC will be widened.

C. Future Community powers with regard to readmission

5. When the Treaty of Amsterdam enters into force, readmission will fall within the European Community's field of competence pursuant to the new provisions of future Title IV (renumbered Title IIIa) which will be included in Part Three of the future EC Treaty. Future Title IV is entitled "*Visas, asylum, immigration and other policies related to free movement of persons*" and includes in particular a new Article 63 (renumbered Article 73k), paragraph 3 of which refers to "*measures on immigration policy*" and point (b) of which refers to "*illegal immigration and illegal residence, including **repatriation** of illegal residents*".²
6. Readmission agreements play a primordial role among measures aimed at allowing or facilitating the repatriation of illegal residents. The aim of such agreements is not only to determine the procedure to be followed for the repatriation of illegal residents but also to get the third country concerned to accept the principle of readmitting its own nationals. As the Legal Service has already indicated in the past³, it is doubtful that in the absence of a specific agreement to this effect between the States concerned, a general principle of international law exists which would oblige those States to readmit their own nationals if they do not wish to return to their country of origin.
7. The Legal Service also observes that nothing in the future EC Treaty legally prevents the Community from concluding international agreements in the field of immigration as referred to in future Title IV of Part Three of the EC Treaty.

In general terms, the provision that "The Community shall have legal personality" pursuant to future Article 281 (present Article 210) of the Treaty enables it to conclude international agreements; and future Article 300 (present Article 228) lays down procedures to be followed

² Our bold passim.

³ See the Legal Service's contribution to the proceedings of the Working Party on External Relations (8494/95 JUR 169 ASIM 202). However, there exists a well-established obligation under international law for each State to readmit its own nationals *if the latter wish to return*. For example, Article 12(4) of the International Covenant on Civil and Political Rights provides that "*No one may be arbitrarily deprived of the right to enter his own country*".

by the Institutions for negotiating and concluding such agreements. It is therefore established case law that: "*in its external relations the Community enjoys the capacity to enter into international commitments over the whole field of objectives defined in Part One of the Treaty*"⁴.

8. In accordance with the same case law, "*such authority arises not only from an express conferment by the Treaty, but may equally flow implicitly from other provisions of the Treaty*". In the opinion of the Legal Service, it is clear that the abovementioned new Article 63(3)(b) bestows powers upon the Community to conclude readmission agreements with a view to the "*repatriation of illegal residents*" as referred to by that provision.

Furthermore, explicit references to the possibility of an "*international agreement concluded by the Community pursuant to this title*" (i.e. future Title IV of Part Three of the Treaty), are found in Article 2 of the Protocol on the position of the United Kingdom and Ireland and Article 2 of the Protocol on the position of Denmark, which will be annexed by the Treaty of Amsterdam to the Treaty on European Union and the EC Treaty.

D. Scope of future Article 63(3)(b) of the Treaty

9. It is necessary to examine the scope of future Article 63(3)(b) of the Treaty to check whether that provision will form an adequate legal basis for all the provisions of a draft international agreement in accordance with the standard agreement.
10. The first phrase of this provision refers to the field of "*illegal immigration and illegal residence*" in general; "*repatriation of illegal residents*" is mentioned only by way of example in the second phrase "*including*". This provision therefore not only covers repatriation in the strict sense, i.e. the return of the persons concerned to the State of which they are **nationals**; it will also in particular make it possible to provide for inclusion in a readmission

⁴ Judgment of the Court of 14 July 1976 in joined cases 3, 4 and 6/76: Cornelis Kramer and others "Biological resources of the sea" [1976-II] ECR 1309.

agreement of clauses such as those found in Articles 3 and 4 of the standard Agreement, to ensure that persons are readmitted to a third country party to the Agreement if they entered the territory of a Member State after residing in the territory of the third country or are in possession of a visa or a residence permit issued by that third country.

11. The Legal Service further observes that the wording of future Article 63(3)(b) will make it possible to cover not only nationals of third countries but also nationals of Member States (citizens of the Union) illegally resident in third countries that are party to the readmission agreement, (the last phrase of the provision mentions "*illegal residents*"). It is, moreover, usual for a readmission agreement to be reciprocal, as is the case in Article 2 and in other provisions of the draft standard Readmission Agreement.

Finally, future Article 63(3)(b) will make it possible to also cover persons who *were* permitted to stay provisionally in a Member State but *no longer* have the right to remain there: such would be the case, for example, of a person who lodged an application for asylum and whose application was rejected.

E. Implementation of the Community's future powers to conclude agreements in this field

12. It follows from the above that, when the Treaty of Amsterdam enters into force, all the substantive provisions of the standard Readmission Agreement will fall within the Community's field of competence pursuant to future Article 63(3)(b) of the EC Treaty. It will therefore be for the Community to conclude in future agreements such as that provided for in the standard Agreement.
13. The procedure for negotiation and conclusion by the Community of an international agreement is provided for in future Article 300 (present Article 228) of the EC Treaty. It should therefore be followed for concluding an international readmission agreement which is binding on the Community⁵. This will apply not only in the case of a Community agreement

⁵ Subject to the observations in paragraph 20 below concerning the position of the United Kingdom, Ireland and Denmark.

but also for the Community part of a mixed agreement also covering fields falling within Member States' field of competence.

14. The fact that readmission agreements have to be negotiated and concluded by the Community will not, of course, prevent them from making reference to Member States, e.g. in stipulating that a readmission procedure begins with a request from a Member State to a third country or vice versa.
15. Since such an agreement is concluded by the Community alone, the Member States will not be contracting parties. They will, however, be bound by the terms of the agreement. For, under future Article 300(7) (current Article 228(7)) of the Treaty: "*Agreements concluded under the conditions set out in this Article shall be binding on the institutions of the Community and on Member States.*".
16. It will be necessary, for the purposes of implementing a readmission agreement concluded by the Community, for Member States to make arrangements coming within their sphere of responsibility, e.g. for the organisation of administrative cooperation between their immigration services and that of the third country concerned and for calculating and reimbursing costs incurred in connection with readmission. This point, which has always applied for the purposes of any Community agreement, does not affect the Community nature of the agreements. The Legal Service would point out here that, according to the first paragraph of the future Article 10 (current Article 5) of the EC Treaty:

"Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks."

F. Possibility of Member States, collectively or individually, concluding readmission agreements with third countries

17. There remains the question of whether Member States may, collectively or individually, conclude readmission agreements with third countries, **insofar as the Community has not (yet) exercised its power to do so.**

18. Clearly, were all Member States **collectively** to conclude such an agreement after the entry into force of the Amsterdam Treaty, that would constitute a procedural abuse designed to evade essential procedural requirements laid down by the Treaties, thereby undermining them. Those requirements include conduct of negotiations for a Community agreement by the Commission and consultation of the European Parliament before concluding an agreement ⁶.
19. A reminder should be give of declaration No 18 made at the Amsterdam Intergovernmental Conference, on Article 73k(3)(a) [renumbered Article 63(3)(a)] of the Treaty. That declaration reads as follows:

"The Conference agrees that Member States may negotiate and conclude agreements with third countries in the domains covered by Article 73k(3)(a) of the Treaty establishing the European Community as long as such agreements respect Community law."

The declaration confirms, by a process of converse reasoning, should there be any need to, that the (new) Treaty does not leave Member States sole power to negotiate and conclude agreements with third countries in future in the areas covered by Article 63(3)(b) ⁷.

20. Note here that, since Community powers will stem from future Article 63(3) of the Treaty, it has to be borne in mind that, under the Protocols on the position of the United Kingdom and Ireland and on the position of Denmark respectively, those three Member States will in principle not be affected by such agreements (barring a statement by the United Kingdom and/or Ireland that they intend to accept them). They will therefore remain empowered to conclude readmission agreements with third countries with which the Community has already established relevant relations in which they are not involved.

⁶ See future Article 300(1) and (3) (current Article 228(1) and (3)) of the Treaty.

⁷ Subparagraph (a) refers to "*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*".

21. If, however, after the entry into force of the Treaty of Amsterdam, the other twelve Member States were collectively to conclude readmission agreements with third countries, the Court of Justice could rule against the conclusion of such agreements on account of a breach of essential procedural requirements laid down by the Treaty.

The Court of Justice sees to it that acts adopted by all Member States or by the Council on the basis of the Treaty on European Union do not affect the Community's powers. The Treaty on European Union stipulates in its future Article 47 (ex-Article M) that: "*nothing in this Treaty shall affect the Treaties establishing the European Communities*". Under the future Article 46 (ex-Article L) of the TEU, moreover, the Court of Justice has jurisdiction to review compliance with that provision.

22. The Court of Justice has held that: "*It is therefore the task of the Court to ensure that acts which, according to the Council, fall within the scope of Article K.3(2) of the Treaty on European Union do not encroach upon the powers conferred by the EC Treaty on the Community It follows that the Court has jurisdiction to review the content of the Act ... in order to ascertain whether the Act affects the powers of the Community ... and to annul the Act if it appears that it should have been based on ... the EC Treaty*"⁸.
23. The same applies to acts adopted by Member States' Governments. The Court of Justice ruled in *Bangladesh* that it can reclassify an act and then annul it if the provisions of the Treaty have not been complied with⁹. The Court held that: "*it is not enough that an act should be described as a "decision of the Member States" for it to be excluded from review under Article 173 of the Treaty. In order for such an act to be excluded from review, it must still be determined whether, having regard to its content and all the circumstances in which it was adopted, the act in question is not in reality a decision of the Council*" (in which case it would have had to be adopted on the basis of the relevant provisions of the Treaty).

⁸ Judgment of 12 May 1998 in Case C-170/96, Commission supported by the European Parliament v. Council (Joint Action regarding airport transit visas), [1998-5] ECR I-2788.

⁹ Joined Cases C-181/91 and C-284/91, European Parliament v. Council and Commission, [1993-6] ECR I-3718.

24. There remains the question of whether a **Member State** to be bound by acts adopted under the future Title IV of Part Three of the Treaty may still **individually** conclude a readmission agreement with a third country with which the Community has not yet established relevant agreement-based relations. This question has to be examined on the basis of two factors:
1. firstly, assessment by the Council (and if need be by the Court of Justice) of whether readmission agreements are inseparably bound up with the achievement of the Community's immigration policy objectives, so that it should not be possible for one or more Member States alone to continue to conclude such agreements with third countries, on account of the potential resulting distortions for other Member States in the context of an area without internal border controls;
 2. secondly, whether or not there are any internal Community rules on repatriation which might be affected by a Member State's conclusion of a readmission agreement with a third country ¹⁰.

On the first point, the Legal Service sees no need to give its views at this stage; it will largely be a matter for the Council's political judgment.

On the second point, the Legal Service would point out that the Community has not yet adopted any act on readmission, between Member States, of persons present unlawfully, but a provision of that kind is included in Article 23 of the 1990 Convention implementing the Schengen Agreement on the gradual abolition of checks at common borders, paragraph 2 of which reads as follows:

"Aliens who hold a valid residence permit or temporary residence permit issued by another Contracting Party shall be required to enter the territory of that Contracting Party immediately."

¹⁰ See the judgment of 31 March 1971 in Case 22/70 (AETR), [1971] ECR 274, paragraph 17, where the Court of Justice ruled that: *"each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right ... to undertake obligations with third countries which affect those rules"*.

Paragraphs 3 and 4 of that Article contain provisions on the conditions for the expulsion of such aliens when they do not leave the territory voluntarily; reference is made to readmission agreements concluded by (in the German version: "z...") the Contracting Parties. With the integration of this provision into the European Union framework ¹¹ and the likelihood of new Article 63 of the EC Treaty being determined as the legal basis ¹², rules of Community law will exist on this subject.

However, it is not clear at first blush to the Legal Service how the conclusion by one or more Member States of a readmission agreement with a third country could infringe Article 23 of the Schengen Convention. If a Member State was obliged to readmit a third-country national by reason of that provision, the person concerned would still have the right to enter, despite the fact that the Member State in which is was unlawfully resident had concluded a readmission agreement with the third country in question.

26. Consequently, if readmission agreements are not regarded as being indissolubly linked to the achievement of the Community's immigration-policy objectives, each of the twelve Member States that would be bound by acts adopted under the future Title IV of Part Three of the Treaty would still be free to conclude a readmission agreement with a third country with which the Community has not yet established treaty relations on the subject, if and to the extent that internal Community rules would not be affected by such an agreement.

The second paragraph of the future Article 63 states: "*Measures adopted by the Council pursuant to points 3 and 4 shall not prevent any Member State from maintaining or introducing in the areas concerned national provisions which are compatible with this Treaty and with international agreements.*"

¹¹ In accordance with the Protocol incorporating the Schengen *acquis* into the framework of the European Union which was annexed by the Amsterdam Treaty to the TEU and the TEC.

¹² In accordance with the second sentence of the second subparagraph of Article 2(1) of the Schengen Protocol.

G. Existing bilateral readmission agreements with third countries

26. The first paragraph of future Article 307 (current Article 234) of the EC Treaty states:

"The rights and obligations arising from agreements concluded before between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty."

This provision reflects the rules of public international law as consolidated by Article 34 of the 1969 Vienna Convention on the Law of Treaties¹³. It applies not only to Conventions concluded before 1 January 1958 (date on which the EEC Treaty came into force) but also to those concluded before the entry into force of the Amsterdam Treaty, as regards areas covered by the future Title IV of Part Three of the EC Treaty.

27. However, under the established case law of the Court of Justice:

"the terms "rights and obligations" in Article 234 refer, as regards the "rights", to the rights of third countries and, as regards the "obligations", to the obligations of Member States".¹⁴

Thus there would nothing to prevent the Community from adopting new (internal) rules on the repatriation of persons residing without authorisation which could affect the rights that previously worked to the advantage of one or more Member States, under an earlier agreement with a third country; however, the rights of that third country would not thereby be affected. Under the same case law:

*"by virtue of the principles of international law, by assuming a new obligation which is incompatible with rights held under a prior treaty a State ipso facto gives up the **exercise of these rights** to the extent necessary for the performance of its **new obligations**".*

¹³ Article 34 of the Vienna Convention stipulates that "a treaty does not create either obligations or rights for a third State without its consent".

¹⁴ Judgment of 27 February 1962 in Case 10/61, Commission v. Italian Republic. ECR 1962, p. 22.

28. Where the Community concluded a future readmission agreement with a third country, the provisions of existing bilateral agreements would continue to apply only insofar as those provisions were compatible with the earlier Community agreement, unless the latter agreement provided otherwise.¹⁵

H. Conclusions

29. The Legal Service is of the opinion that, when the Amsterdam Treaty comes into force:

- (a) the Community will have to conclude readmission agreements with third countries using the specimen agreement;
- (b) the procedure to be followed by the Community when concluding a readmission agreement with a third country will be the one laid down in the future Article 300 (current Article 228) of the EC Treaty;
- (c) the Community agreement will be binding on the Member States (subject to the Protocol on the position of the United Kingdom and Ireland and the Protocol on the position of Denmark) and the Member States will have to take all necessary measures to implement it;
- (d) the conclusion of such an agreement by the *twelve Member States* which will be bound by acts adopted under the future Title IV of Part Three of the Treaty, *acting collectively*, could be penalised by the Court of Justice for not being in accordance with the Treaty (abuse of process);
- (e) until the Community concludes such an agreement and insofar as the readmission agreements are not regarded as being indissolubly linked to the achievement of the Community's immigration-policy objectives, *a Member State* will remain competent to conclude such an agreement, if and to the extent that internal Community rules would not be affected within the meaning of the *AETR* case law.

¹⁵ See Article 30(2) and (6) of the 1969 Vienna Convention on the Law of Treaties.

- (f) the existing bilateral readmission agreements between a Member State and a third country will continue to apply, in accordance with the case law of the Court of Justice, as regards the obligations of the Member State and the rights of the third country.

