



Statewatch Briefing

Veto, Opt-outs and EU Immigration and Asylum law

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1. Introduction

Recent articles in the British media have focussed on the extent to which the draft of the planned 'Hague Programme' would change the current system for vetoes and opt-outs from EU immigration and asylum law, particularly for the UK.

The purpose of this briefing is to outline:

- a) the current extent of Member States' national vetoes over EU immigration and asylum law;
- b) the extent to which the UK (along with Ireland and Denmark) can 'opt-out' of EU immigration and asylum law;
- c) the links between (a) and (b), especially for the UK, Ireland and Denmark;
- d) the extent to which the planned 'Hague Programme' would affect the current position; and
- e) the impact of the proposed EU Constitution on these issues.

2. Analysis of the current position and the proposed Hague Programme

a) Current extent of national vetoes

National vetoes over EU immigration, asylum and civil law have been reduced gradually over the years, to be replaced by 'qualified majority voting' (QMV) in the EU's Council (made up of Member States' ministers) as follows:

- i) uniform visa format: QMV in Council from 1 Nov. 1993
- ii) visa lists [which non-EU States' nationals need visas to cross the external borders of EU Member States for a three-month period]: QMV from 1 Jan. 1996
- iii) civil law (except for family law): QMV from 1 Feb. 2003

- iv) rules on a **uniform short-term visa**, and on **conditions and procedures** for obtaining short-term visas: QMV from **1 May 2004**
- v) rules on **administrative cooperation** between Member States' administrations, and between those administrations and the Commission: QMV from **1 May 2004**
- vi) rules on most **asylum** issues (concerning: the definition of 'refugee'; asylum procedures; treatment of asylum-seekers [ie, housing, welfare, health care, education]; which Member State is responsible for considering an asylum-seeker's claim for asylum; temporary protection; and subsidiary protection [a system for protecting individuals who need protection for reasons not set out in the UN's Geneva Convention on Refugees]), QMV as soon as EC legislation sets out '**common rules and basic principles**' on these issues

Adoption of legislation in the areas listed in points (iii), (iv) and (vi) is subject to **co-decision** with the European Parliament (EP), which gives the EP equal powers with the Council to decide on the legislation. In the other three areas (points (i), (ii) and (v)), the EP has only a right to be **consulted**, which gives it at best a marginal influence in practice.

It is not entirely clear how the test for changing the decision-making on **asylum issues** works. For example, does it apply only when legislation setting out common rules and basic principles on **all** these asylum issues has been adopted, or following the adoption of legislation setting out common rules and basic principles in each area? The distinction is important because the EC has adopted legislation in all of the areas listed above except for asylum procedures, which appears to set out common rules and basic principles in each of the other areas of asylum law. A Directive on asylum procedures was agreed in principle by EU ministers in April 2004, but has not yet been formally adopted (and will not be until late 2004 or early 2005 at the earliest). So can EU asylum measures be adopted already by QMV in all areas except asylum procedures, or in no areas at all until the asylum procedures directive is adopted? The answer is uncertain.

The changes in voting rules resulted from: the Maastricht Treaty (points (i) and (ii)); the Treaty of Amsterdam (point (iv)) and the Treaty of Nice (points (iii), (v) and (vi)).

Unanimous voting (which entails national vetoes) has been retained for now in the following areas:

- i) abolition of internal border controls between EU Member States;
- ii) standards on external border controls between EU Member States and non-EU countries;
- iii) freedom to travel within the EU for non-EU citizens for up to three months;
- iv) legal long-term migration of non-EU citizens, including movement of migrants between EU Member States;
- v) measures on illegal migration;
- vi) 'burden-sharing' regarding asylum; and
- vii) family law aspects of civil law.

In each of these cases, the European Parliament is only **consulted**.

As noted above, unanimous voting is also retained for now for some or all aspects of other asylum law issues, depending on the interpretation of the EC Treaty, but this will end at the latest when the asylum procedures directive is adopted formally by the Council.

Article 67(2) of the EC Treaty states that the Council [of Member States' ministers] 'shall', by 1 May 2004, vote to change the decision-making rules in some or all of the areas mentioned above so that the Council votes by a qualified majority, including co-decision of the European Parliament.

The vote to change the decision-making procedure has to be unanimous in the Council; the EP has to be consulted.

The same Article of the EC Treaty also requires the Council, by the same date and by the same procedure, to 'adapt' the rules relating to the European Court of Justice's jurisdiction over these issues. At the moment, the Court's jurisdiction is highly limited (but not non-existent).

The requirement to change the decision-making procedures and the rules on the Court's jurisdiction appears to be a legal obligation, which could be enforced by the European Parliament, the European Commission or one or more EU Member States taking the Council to the European Court of Justice for its 'failure to act'. So far no proceedings have been brought.

b) Opt-outs

The UK, Ireland and Denmark have opt-outs from EU immigration, asylum and civil law, set out in a Protocol to the Treaty of Amsterdam (which took effect 1 May 1999). The British and Irish opt-outs are identical; the rather different Danish opt-out is not considered further here.

The opt-out rules provide for the following:

- i) once a proposal for legislation in this area is presented, the UK and Ireland have **three months to decide** whether to participate in discussions;
- ii) if either the UK or Ireland (or both) **do not wish** to participate, discussion then continues between the other Member States, which can adopt the proposal with UK and/or Irish participation;
- iii) if the UK or Ireland (or both) **do wish** to participate, discussion goes ahead with their full participation; but if British and/or Irish **objections hold up** adoption of the proposal, then it could ultimately be adopted by the other Member States **without their participation**;
- iv) **after adoption** of legislation in this area **without** UK and/or Irish participation, the UK and/or Ireland could **opt-in** to that legislation **later** if it changed its mind, with the approval of the European Commission.

In practice, the UK has opted into to all proposals concerning asylum and civil law and nearly all proposals concerning illegal migration. It has opted out of nearly all proposals concerning visas, borders, and legal migration. The Irish practice has been nearly (but not quite) identical to the UK's.

There have therefore been many examples in practice where other Member States have gone ahead without UK and/or Irish participation to adopt EC legislation.

There has never been a case as set out in point (iii) above, when the other Member States sought to go ahead after the UK and/or Ireland had opted into discussions, but where the UK and/or Ireland were holding up adoption of the legislation.

There has never been any case of the UK opting into legislation which it had earlier decided not to participate in, after the adoption of that legislation (point (iv) above). There has been one case of Ireland doing so.

c) Links between opt-outs and vetoes

If the opt-out rules are examined closely, it can be seen that legally speaking, **the UK and Ireland do not have a veto** over the adoption of EC immigration and asylum legislation. They

cannot stop other Member States going ahead and adopting proposals for legislation, whether they choose to participate in the discussions or not. The UK and Ireland therefore have **an opt-out instead of a veto**. Any reference to the 'loss' of a British (or Irish) veto over immigration, asylum or civil law is therefore legally inaccurate.

There is no British veto to lose.

In practice, however, once the UK and Ireland have opted into discussions in the past, the other Member States have treated them as if they have a veto. As noted above, there has been no case of the other Member States going ahead without the UK and Ireland once the latter participated in discussions on proposed legislation.

It is not clear whether the combination of QMV in Council and the opt-out rules would mean that once the UK or Ireland opt into discussions on a proposal subject to QMV, it will no longer be possible for them to avoid being subject to the legislation if a qualified majority in support of that proposal exists in the Council. In other words, the opt-out rules could be interpreted to mean that the UK or Ireland **could be bound against their consent if they opt in to discussions** on proposals subject to qualified majority voting. But there are also potential arguments for the opposite interpretations: the idea that the UK and Ireland could be bound by EU immigration or asylum legislation against their will would seem to violate the object, context and purpose of the Protocol providing for their opt-out.

However, it is clear that the UK and Ireland could certainly **not be forced to opt in to discussions** in the first place. And if they do not opt into the discussions, they could not possibly be bound by the final adopted legislation against their consent, on any possible interpretation of the opt-out rules.

d) The Hague Programme

The draft Hague Programme contains a commitment to abolish the requirement of unanimous voting in the Council on all EU immigration and asylum law. This would also mean co-decision powers for the European Parliament. Family law aspects of civil law would still remain subject to unanimous voting with consultation of the European Parliament.

The Programme itself would not abolish the voting requirements, as the Programme is not legally binding, but only a political commitment to act. A change in the decision-making rules will require, as described above, the adoption of a Council decision by unanimous vote following consultation of the European Parliament.

The change in decision-making rules would affect all EC immigration or asylum legislation adopted after the rule change took effect (even legislation that had been proposed beforehand, but not yet adopted).

Voting in the Council would be weighted in accordance with the voting rules agreed in the Treaty of Nice, which take effect on 1 November 2004, giving more relative weight to the larger and mid-size Member States than the previous rules. All MEPs would have the power to vote, not just those elected from Member States participating in legislation; so it would be possible for a close vote to be swung by the votes of British, Irish and Danish MEPs, even where those Member States would not be bound by the legislation.

The draft Programme would not abolish the UK or Irish (or Danish) opt-out. It is impossible for the Council to abolish these opt-outs; only a Treaty amendment ratified by national parliaments and/or the public in each Member State could do that (it is also possible for Ireland or Denmark, but not the UK, to renounce their opt-outs unilaterally).

The draft Programme would also not 'adapt' the rules relating to jurisdiction of the Court of Justice, despite the legal obligation on the Council to do so as of 1 May 2004.

e) The draft EU constitution

The draft EU Constitution would, if ratified, specify that all EU measures on immigration and asylum were subject to voting by a qualified majority vote in the Council, along with co-decision of the European Parliament.

It seems at first glance, in this area, that the provisions of the Constitution and the commitment in the Hague Programme (if agreed) amount to the same thing. However, there are several important differences.

First of all, if a decision is indeed taken to change the voting rules on EU immigration and asylum matters, the new voting rules will definitely take effect, regardless of the possibility that the Constitution might not be ratified.

Also, a decision to change the voting rules from spring 2005 would mean that new voting rules apply to all legislation adopted from that point until November 2006, when the Constitution is due to enter into force. So for a period of over 18 months, the political dynamic of discussions on legislation would be different already.

A decision to change the voting rules next year would also mean that when national parliaments and the public vote on the Constitution, they will **not** be voting on whether to give up national vetoes on immigration and asylum law, since that decision would have taken place already.

Having said that, the Constitution (if it enters into force) would have an impact on EU immigration and asylum law, even if the decision-making rules have been changed in advance. The draft Constitution would clarify and enlarge the EU's powers in this area, particularly as regards asylum and immigration (although the EU would not have the power to harmonise the numbers of non-EU citizens coming from outside the EU to take up jobs in EU Member States). It would also widen the jurisdiction of the European Court of Justice, applying the 'normal' rules fully to this area of law.

The Constitution would **NOT**, however, abolish or reduce the scope of the British or Irish opt-out in this area. In fact, the scope of the opt-out would be slightly wider, applying to certain areas of police and criminal law. The Danish opt-out would be altered, but a possible reduction in its scope would be subject to consent of Denmark (likely by means of a referendum).