



Statewatch briefing

Vetoes, Opt-outs and EU Immigration and Asylum law

Prepared for Statewatch
by Professor Steve Peers, University of Essex
revised version: 23 December 2004

1) Introduction

The 'Hague Programme', the multi-annual programme for Justice and Home Affairs (JHA) law and policy approved by the EU summit meeting (European Council) on 5 November 2004, included a commitment to change the decision-making system for most EC immigration and asylum law no later than 1 April 2005, to increase qualified majority voting in the Council and the use of the 'co-decision' procedure with the European Parliament. This political commitment was implemented by a Council Decision, adopted December 22 2004 and taking effect early, on 1 January 2005 (Council doc. 15226/04, 15 Dec. 2004).

The British media in particular have focussed on the effect which this change will have upon the previous 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 previous 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 new Decision, implementing the agreement made as part of the 'Hague Programme' has affected the previous position; and
- e) the impact of the proposed EU Constitution on these issues.

An **Annex** to this briefing sets out the possible practical implications of the change in decision-making agreed as part of the Hague Programme for specific pieces of legislation.

2) Analysis of the previous position

a) Previous 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 formally adopted until 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) still existed at the end of 2004 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 was only **consulted**.

As noted above, unanimous voting was also retained 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', after the end of a five-year transitional period which ended on 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 had to be unanimous in the Council; the EP had 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'. 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 a single 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. An argument has sometimes been made that the UK will inevitably be pressured to drop its opt-out in practice; but based on the evidence to date, this argument is clearly wholly mistaken.

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 final Hague Programme contained a commitment to abolish the requirement of unanimous voting in the Council on all EU immigration and asylum law except legal immigration. This also entailed co-decision powers for the European Parliament. Family law aspects of civil law still remain subject to unanimous voting with consultation of the European Parliament.

The Programme itself did 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 required, as described above, the adoption of a Council decision by unanimous vote following consultation of the European Parliament. The Hague Programme called for the Council to adopt this decision by 1 April 2005 at the latest.

A draft decision implementing the decision-making changes was tabled in November 2004 by the Dutch Presidency of the Council of the EU. As noted above, it was adopted formally by the Council on 22 December 2004, following a vote in favour of the proposal by the European Parliament on 16 December 2004, and the Decision takes effect from 1 January 2005. This means that the decision-making rules have already changed before the next British election.

The change in decision-making rules will affect all relevant EC immigration or asylum legislation adopted after 1 January 2005, including legislation that was proposed beforehand, but not yet adopted.

The change also affects Council decisions on amendments to the Common Consular Instructions on visas and the Common Manual on controls at external borders, shifting decision-making from unanimity to QMV (the EP has no role). This change may be short-lived, because the Commission is suing the Council to annul the legislation giving this decision-making power to the Council, instead of the Commission; the judgment of the Court of Justice in this case has been announced for January 18 2005. The Commission has pointed out that it still reserves its position on the validity of this legislation (see Council doc. 16081/04, 16 Dec. 2004).

Voting in the Council will be weighted in accordance with the voting rules agreed in the Treaty of Nice, which took effect on 1 November 2004, giving more relative weight to the larger and mid-size Member States than the previous rules. All MEPs will 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 Programme did 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 Programme also does not 'adapt' the rules relating to jurisdiction of the Court of Justice, despite the apparent legal obligation on the Council to do so after 1 May 2004. This was criticised by the Commission (see Council doc. 16081/04, 16 Dec. 2004), as well as the EP in its vote on the proposal.

e) The draft EU constitution

The draft EU Constitution signed on 29 October 2004 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 amount to the same thing, except for legal migration, where the Constitution would extend QMV and co-decision for the first time. However, there are several important differences.

First of all, the new decision to change the voting rules on EU immigration and asylum matters (except for legal migration) will definitely take effect from 1 January 2005, regardless of the possibility that the Constitution might not be ratified.

Also, the decision to change the voting rules from 1 January 2005 means that new voting rules apply to all the legislation affected by that decision adopted from that point until November 2006, when the Constitution is due to enter into force. So for a period of nearly two years, the political dynamic of discussions on legislation will be different already.

The decision to change the voting rules also means 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, except for legal migration, since that decision has taken place already.

Having said that, the Constitution (if it enters into force) would have an impact on EU immigration and asylum law besides legal migration, even though the decision-making rules have been changed in advance as set out in the Hague Programme. The draft Constitution would clarify and enlarge the EU's powers in this area, particularly as regards asylum. It would also enlarge the EU's powers regarding legal migration, on top of changing the decision-making rules on legal migration to QMV and co-decision, although the EU would not have the power to harmonise the numbers of non-EU citizens coming from outside the EU to seek jobs or self-employment 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, which apparently will be held after the Danish referendum on whether to ratify the Constitution).

Annex

Practical impact on decision-making

The following table lists outstanding proposals as of 1 January 2005 in various areas of EU immigration and asylum law, indicating the decision-making rules applicable to those areas and whether or not those rules would change by virtue of the Hague Programme. The current status of these proposals in the EP and Council is also indicated. The table refers to the legal bases for that legislation proposed by the Commission; it is possible that some of these 'legal bases' might be disputed.

The table also indicates whether or not the UK and Ireland have opted into discussions on each proposal.

The table also lists likely forthcoming proposals for legislation in this area. The extent to which forthcoming proposals would be affected (or not affected) by the upcoming decision to change the decision-making rules will depend upon the 'legal base' of those proposals.

Outstanding proposals

a) Internal and external border controls (Art. 62(1) and 62(2)(a) EC)

- **changed** from unanimity/consultation to QMV/co-decision under Hague Programme

- 1) Two Regulations on border traffic (COM (2003) 502)
- 2) Regulation establishing a borders code (COM (2004) 391)

All are under discussion in the Council; the EP plenary has delivered an opinion on the border traffic proposals, but not the borders code proposal.

The UK has opted out of these proposals.

b) Visa list and visa format (Art. 62(2)(b)(i) and (iii) EC)

- did **not change** from QMV/consultation

- 1) Regulation inserting biometrics into EU visa format (COM (2003) 558)
- 2) Regulation on reciprocity rules in EU visa list Regulation (COM (2004) 427)

Both are under discussion in the Council; the EP plenary has not delivered an opinion on either proposal. The Council reached a 'political agreement' on the first proposal back in November 2003, but it will have to re-examine the text because of technical difficulties in putting into effect its original plans. The UK has opted out of both proposals.

c) Conditions and procedures for visas and rules on a uniform visa (Art. 62(2)(b)(ii) and (iv) EC)

- did **not change** from QMV/co-decision

1) Two Regulations on border traffic (COM (2003) 502)

As noted above, the UK has opted out of these proposals, and the EP has delivered an opinion on them already.

For these proposals, the decision following the Hague Programme has resolved the problems that resulted from having different legal bases (visas and border controls) subject to different decision-making procedures.

d) Freedom to travel for third-country nationals (Art. 62(3) EC)

- ***changed*** from unanimity/consultation to QMV/co-decision under Hague Programme

1) Directive on freedom to travel/specific travel authorisation (COM (2001) 388)

The UK has opted out of this proposal, and the EP has delivered an opinion on it already. The Council stopped discussing it in 2002, but it remains on the table.

The proposal also has the legal base of Article 63(3) EC. In this case, the decision implementing the Hague Programme has created a problem because the two legal bases are now subject to different decision-making procedures.

e) Asylum issues (Article 63(1) and 63(2)(a) EC)

- did ***not change*** from previous position, which provides for an automatic move to QMV/co-decision once legislation setting out 'common rules and basic principles' has been adopted by unanimity.

1) Directive on asylum procedures (revised version in COM (2002) 326)

2) treaty with Denmark on asylum responsibility (COM (2004) 594)

2) treaty with Switzerland on asylum responsibility (COM (2004) 593)

The UK and Ireland have opted into the asylum procedures proposal, and the EP has delivered an opinion on it. The Council reached a 'political agreement' in March 2004, amending it in November 2004, and has now 'reconsulted' the EP on the proposal. The Hague programme refers to adoption of the Directive 'as soon as possible' by unanimity.

As for the treaties, according to Article 300 EC, the voting rule in the Council on negotiation, signature and conclusion of international treaties to which the EC will be a party follows the internal voting rule. The Council has already signed the treaty with Switzerland, but not yet concluded it; it has neither signed nor concluded the treaty with Denmark. In its explanatory memorandum for the latter proposal, the Commission has taken the view that the voting rule is already QMV on this issue. The EP must be consulted on these treaties, but it has not yet delivered its opinion. It is not yet known whether the UK and Ireland will opt in to these treaties.

f) Asylum burden-sharing (Article 63(2)(b) EC)

- has changed from unanimity/consultation to QMV/co-decision under Hague Programme decision

g) Legal migration (Articles 63(3)(a) and 63(4) EC)

- did not change from unanimity/consultation

- 1) Directive on migration for employment/self-employment (COM (2001) 386)
- 2) Directive on freedom to travel/specific travel authorisation (COM (2001) 388)
- 3) Regulation on biometrics in residence permits (COM (2003) 558)
- 4) Directive on admission of researchers (COM (2004) 178)

The Council has stopped any discussion on the first and second proposals. It agreed in principle on the third proposal in November 2003, and on the fourth proposal in November 2004.

The UK has opted into the third proposal, and Ireland opted into the first and fourth proposals.

The EP has delivered an opinion on the first two proposals, but not the other two.

As noted above, the Hague programme decision has created a 'legal base' problem with the second proposal.

h) Irregular (illegal) migration (Article 63(3)(b) EC)

- has changed from unanimity/consultation to QMV/co-decision under Hague Programme decision

- 1) Directive on freedom to travel/specific travel authorisation (COM (2001) 388)
- 2) treaty with Sri Lanka on readmission (SEC (2003) 255)
- 3) treaty with Albania on readmission (COM (2004) 92)

The proposed Directive on freedom to travel, et al, is listed here because the Commission proposed the legal base of 'Article 63(3)', presumably intending to refer to both Article 63(3)(a) and 63(3)(b), along with Article 62(3). As noted above, the decision implementing the Hague programme has created a legal base problem with this proposal.

According to Article 300 EC, the voting rule in the Council on negotiation, signature and conclusion of international treaties follows the internal voting rule. The Council has already signed the treaty with Sri Lanka, but not yet concluded it; it has neither signed nor concluded the treaty with Albania. The EP must be consulted on both, but has not yet given its opinion on the treaty with Albania. The UK has opted in to both treaties.

i) Administrative cooperation (Article 66 EC)

- has **not changed** from QMV/consultation

1) Decision on web-based information and coordination network (COM (2003) 727)

The Council's working parties agreed on this proposal in principle in spring 2004. The UK has opted in, and the EP has already delivered its opinion.

j) Miscellaneous (Articles 62, 63(3), 66 EC)

1) EC/Swiss treaty on Schengen (COM (2004) 593)

According to Article 300 EC, the voting rule in the Council on negotiation, signature and conclusion of international treaties to which the EC will be a party follows the internal voting rule. The Council has already signed this treaty, but it has not yet concluded the treaty. Before or after the decision called for in the Hague programme, the Council's decision will require a mixture of QMV and unanimous voting. It is not yet known whether the UK and Ireland will opt in. The EP will be consulted on this treaty.

Forthcoming proposals

From Commission's 2004 work programme:

- 2 visa proposals (concerning transit to Switzerland, transit to new Member States)
- proposal establishing details of Visa Information System
- proposal establishing second Schengen Information System
- Directive on minimum standards for expulsion
- proposal extending long-term residents' Directive to refugees and persons with subsidiary protection

From Hague programme (up to 2007):

- Council and Commission to establish in 2005 appropriate structures involving the national asylum services of the Member States with a view to facilitating practical co-operation
- proposals for second phase of Common European Asylum System, following 2007 review
- proposal submitted by the Commission in 2005 for the Council to designate existing Community funds to assist Member States in the processing of asylum applications and in the reception of categories of third-country nationals.
- pilot EU-Regional Protection Programmes in partnership with the third countries concerned and in close consultation and co-operation with UNHCR to be launched before the end of 2005, to include a joint resettlement programme.
- the establishment of a European Return Fund by 2007
- readmission/visa treaties
- proposal from Commission in 2005 on the appropriate powers and funding for teams of national experts that can provide rapid technical and operational assistance to Member States requesting it, following proper risk analysis by the Border Management Agency and acting within its framework
- Council and Commission to establish a Community border management fund by the end of 2006 at the latest
- Commission, as a first step, to propose necessary amendments to further enhance visa policies and to submit in 2005 a proposal on the establishment of common application centres focusing inter alia on possible synergies linked with the development of the VIS
- Commission to review the Common Consular Instructions and table the appropriate proposal by early 2006 at the latest
- legislation also likely to follow communications on economic migration, interoperability of databases