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Delegations will find attached the declassified version of the above document.

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OPINION OF THE LEGAL SERVICE

Subject : Recommendation for a Council Decision authorising the Commission to negotiate the Draft Protocols on Smuggling of Migrants by Land, Air and Sea and to Prevent, Suppress and Punish Trafficking in Persons, especially women and children (doc. 9866/99 CRIMORG 93 ASIM 30) (RESTREINT)

1. In its contribution to the proceedings of the Multidisciplinary Group on Organised Crime (8813/99 JUR 201 CRIMORG 64), the Legal Service of the Council indicated that the draft Protocols to the United Nations Convention against Organised Crime mentioned under the heading of the present note constituted mixed agreements, i.e. agreements to which the European Community and the Member States could become Parties because they contain some elements which fall within the Community competence and others which fall within the competence of the Member States.

2. As negotiations in respect of matters involving Community competence are conducted on behalf of the Community by the Commission (Article 300 TEC) [1], the latter should seek an authorisation from the Council to negotiate matters falling within Community competence and negotiate the participation of the Community to the Convention. The Council may address directives of negotiation to the Commission.

[1] When the arrangements of the forum in which an agreement is negotiated do not allow for the formal participation of a representative of the Commission, the representative of the Member State holding the office of President of the Council may speak for the Community.

3. On 7 July 1999, the Commission submitted a Recommendation for a Council Decision authorising the Commission to negotiate the Draft Protocols on Smuggling of Migrants by Land, Air and Sea and to Prevent, Suppress and Punish Trafficking in Persons, especially women and children (9866/99 CRIMORG 93 ASIM 30) (RESTREINT). In its Recommendation, the Commission identified a number of provisions in the Protocols, which fell under Community competence. A discussion paper on the Commission's recommendation for a Council decision was issued by the Presidency in doc. 11802/99 MIGR 63 CRIMORG 148. At its meeting on 9 and 10 November 1999, the Article 36 Committee requested the Legal Service of the Council to indicate whether in respect to the provisions proposed by the Commission in the Recommendation there is a Community competence or not.

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The present Opinion constitutes a response to this request. [1]

4. According to the Commission, the following provisions of the Smuggling protocol (A/AC.254/4/ADD.1/REV.1, 13 May 1999) fall within Community competence:

- Article 9 (Additional legislative and administrative measures on controls operated by commercial carriers and on sanctions against carriers)
- Article10 (Information programmes, prevention campaigns, information exchange between Parties on travel documents/embarkation and destination points)
- Article11 (Strengthening of controls at the external border, checks of persons and travel or identity documents, co-operation amongst border control agencies)
- Article12 (High technical production standard of travel documents in order to minimise the phenomenon of forged or false documents)
- Article13 (Control of legitimacy and validity of travel or identity documents)
- Article14 (Specialised training for border guards and immigration officials)
- Article 15 (Return of smuggled migrants).

[1] In its contribution, the Legal Service only examines the provisions referred to by the Commission in its Recommendation.

In relation to the Trafficking Protocol (A/AC.254/4/ADD.3/REV 2, 18 May 1999), the Commission has indicated the following Articles as falling within Community competence:

- Article 5 (Temporary residence status of the victim in the receiving State)
- Article 6 (Return of victims of trafficking in persons)
  - (new Article 6 paragraphs 1, 2 and 4) [1]
- Article 8 (Exchange of immigration-related information among States Parties)
  - (new Article 7 paragraph 1) (see footnote n° 1)
- Article 9 (Strengthening of controls at the external border, checks of persons and travel or identity documents, co-operation amongst border control agencies)
  - (new Article 8 paragraph 1) (see footnote n° 1)
- Article 10 (High technical production standard of travel documents in order to minimise the phenomenon of forged of false documents)
  - (new Article 9) (see footnote n° 1)
- Article 11 (Control of legitimacy and validity of travel or identity documents)
  - (new Article 6 paragraph 3) (see footnote n° 1)
- Article 12 (Social policies to prevent trafficking and information campaigns)
  - (new Article 10) (see footnote n° 1)
- Article 14 (2) (Controls carried out by commercial carriers and sanctions against carriers)
  - (new Article 8 paragraph 2) (see footnote n° 1)
- Article 14 (3) (Revocation and denial of visa)
  - (new Article 8 paragraph 3) (see footnote n° 1).

5. With the coming into force of the Amsterdam Treaty on 1 May1999, measures concerning the entry and free movement of third country nationals, for which there was not already a Community competence, fall –pursuant to the new Title IV of Part Three of the TEC, Articles 61 to 69- within the sphere of competence of the European Community.

[1] As renumbered in doc. A/AC.254/5/ADD.13.

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Consequently, in the view of the Legal Service, all provisions listed above with the possible exception of Article 12 (new Article 10) of the Trafficking Protocol (to the extent that it relates to prevention measures against trafficking) fall within the terms of Title IV TEC.

Although the provisions of Title IV TEC do not explicitly provide for an external competence of the Community, such external competence can, according to the established case law of the Court of Justice, also arise implicitly from the other provisions of the Treaty.

The Court of Justice has ruled that "whenever Community law has created for the institutions of the Community powers within its internal system for the purpose of obtaining a specific objective, the Community has authority to enter into international commitments necessary for the attainment of that objective even in the absence of an express provision in that connection. [1]

With particular reference to Title IV TEC, the Council Legal Service has already observed in an opinion dated 10 May 1999 that there is nothing to prevent the Community from concluding international agreements concerning areas covered by that Title. [2] Consequently, Title IV TEC can be used as a basis for external Community competence, which would cover the provisions of the Draft Protocols as proposed by the Commission. It remains to be seen to what extent in these cases the competence given by the Treaty to the EC is an exclusive or a potential one. If the competence is exclusive, Member States no longer have the right to enter into obligations with third Countries. In the case of potential competence, the Council has the choice between exercising the Community's external competence directly or not doing so. In the latter case, the relevant provisions of the Protocols will have to be concluded by the Member States.

6. In order to assess whether there is an exclusive Community competence in the present case, it should be recalled that exclusive external Community competence may come from three sources:

(1) It may result explicitly from the Treaty itself.

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1 Opinion 1/76 ECR 1977.

2 See Legal Service opinion of 10 May 1999 (doc. 6658/99).

(2) It may result from the content of measures in secondary legislation already adopted, which satisfy the criteria developed in the AETR case law [1] or contain provisions explicitly empowering the Community to negotiate with Third States.

(3) Finally, in the absence of explicit provisions in the Treaty or of internal measures on the subject, the Community is competent to conclude an international agreement, which is necessary in order to achieve Treaty objectives, which cannot be attained by the adoption of autonomous rules [2].

As there are no explicit provisions on external competence in the Treaty concerning the matters in question in the present case, an exclusive external competence of the Community may derive from any of the other two sources.

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Smuggling Protocol

7. In relation to the text of the Draft Smuggling Protocol of 24 September 1999 as contained in A/AC.254/4/ADD.1/REV 2 and basing itself on the criteria developed in the AETR case law, the Legal Service is of the opinion that there is an exclusive Community competence in respect of the following provisions of the Smuggling Protocol.

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1 In the AETR case (ECJ case 27/70 ECR [1971] p. 263), the Court of Justice ruled that, once the Community has exercised its internal competence by adopting provision laying down common rules, the Community acquires exclusive external competence in the sense that Member States have no longer the right acting individually or even collectively to undertake obligations which affect those rules. This principle was further developed, in particular in Opinion 2/91 (ECR [1993] p. I-1063), where the Court of Justice ruled that the competence of the Community was based on the fact that commitments arising from a convention to be concluded with third countries fell within an area which was already covered to a large extent by Community rules and that such commitments would therefore be of such a kind as to affect the Community rules. It follows from this Opinion that, even in the absence of a direct conflict between the terms of an international agreement and the terms of the internal Community rules, the Community is exclusively competent to conclude that agreement, if the commitments resulting from the agreement contain rules capable of affecting the international commitments already taken by the Community or of altering their scope.

2 Cf. In this context Cases 3, 4 and 6/76 *Cornelis Kramer and Others* [1976] ECR 1279, paragraphs 30/33; Opinion 1/76 [1977] ECR 741, paragraphs 3 and 4; Opinion 1/94 [1994] ECR I-5267, paragraphs 85 and 86; Opinion 2/92 [1995] ECR I-521, paragraph 32.

– Article 9 (Additional legislative and administrative measures on controls operated by commercial carriers and on sanctions against carriers). This Article contains rules capable of affecting the provision of Article 26 of the 1990 Schengen Convention. In its decision of 20 May 1999 determining the legal basis for each of the provisions or decisions, which constitute the Schengen Acquis, the Council designated Article 63 (3) TEC as the legal base for Article 26 of the Schengen Convention. As a result, the Community is deemed to have adopted internal rules on the basis of this provision of the Treaty.

– Article 11 (Strengthening of controls of the external border, checks of persons and travel or identity documents, co-operation amongst border control agencies). This Article contains rules capable of affecting the Common Manual and the Common Consular Instructions. In its decision of 20 May 1999, the Council designated Articles 62 - 63 TEC as the legal base for those instruments. The Legal Service also believes that Article 11 of the Protocol is capable of affecting the provisions of Articles 5-7 of the 1990 Schengen Convention. In its decision of 20 May 1999, the Council designated Article 62 paragraph 2 point a) and Article 66 as the EU legal base for Articles 5-7 of the Schengen Convention.

– Article 12 (Control of documents). This Article could affect the provisions of the Decision of the Executive Committee of 15 December 1997 on implementation of the Joint Action concerning a uniform format of residence permits (SCH/Com-ex (97) 34 REV). In its decision of 28 May 1999, the Council designated Article 63 (3) (a) TEC as the legal base for this decision.

– Article 13 (Legitimacy and validity of travel or identity documents). Like Article 11 of the Protocol, this Article is capable of affecting the provisions of Articles 5-7 of the Schengen Convention.

8. As regard Articles 10, 14 and 15, no legally binding Community rules concerning the specific matters dealt with by these Articles of the Protocol have been adopted or identified. There is therefore no existing exclusive competence for the Community in the sense of the AETR case law.

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An exclusive external Community competence in relation to these articles would therefore have to be based on the criteria mentioned under point 6 (3) above, i.e. its exercise would be necessary to the achievement of a Community objective. The Legal Service is of the view that the objectives of the Community which correspond to the contents of Articles 10, 14 and 15 of the Smuggling Protocol could be attained by other means. There is therefore no existing exclusive competence of the Community in respect of these Articles.

The Council has therefore the choice of exercising the Community's potential external competence or not.

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Trafficking Protocol

9. In relation to the text of the Trafficking Protocol as contained in A/AC.254/5/ADD.13 and basing itself on the criteria developed in the AETR case law, the Legal Service is of the opinion that an exclusive Community competence exists in relation to the following:

- Article 5 (Status of the victims in the receiving State). This Article could affect the provision of Article 5 paragraph 2 of the 1990 Schengen Convention for which the Council, in its decision of 20 May 1999, has identified Article 62 paragraph 2 point a) TEC as the legal base.

- Article 6 paragraph 3 and Article 8. The Legal Service would refer to the same remarks made in respect of Articles 11 and 13 of the Smuggling Protocol. In addition, it should be noted that paragraphs 2 and 3 of Article 8 could affect the provision of Article 26 of the 1990 Schengen Convention for which Article 63 paragraph 3 TEC has been identified as the legal base, as well as the Common Manual and the Common Consular Instructions in respect of which the Council, in its decision of 20 May 1999, has identified Articles 62, 63 TEC as the legal base.

- Article 9 (International travel documents). The Legal Service would refer to the remarks made in respect of Article 12 of the Smuggling Protocol.

10. As regards Article 6 paragraphs 1, 2 and 4, Article 7 and Article 10, no relevant Community rules have been adopted. The Legal Service is of the view that the objectives of the Treaty, with regard to the contents of those Protocol provisions, could be attained by other means. There is therefore no existing exclusive competence for the EC in respect of these Articles.

The Council has therefore the choice of exercising the potential competence of the EC or not.

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CONCLUSION:

11. In the opinion of the Legal Service, there is exclusive Community competence in relation to:

- Articles 9, 11, 12 and 13 of the Smuggling Protocol

- Articles 5, 6 paragraph 3, and Articles 8 and 9 of the Trafficking Protocol.

There is no exclusive Community competence in relation to Articles 10, 14 and 15 of the Smuggling Protocol and Article 6 paragraphs 1, 2 and 4 and Articles 7 and 10 of the Trafficking Protocol. The Council has therefore the choice between exercising the potential Community competence or not. Would it decide not to exercise such competence, the relevant provisions of the Protocols will have to be concluded by the Member States.