Institut Européen
d'Administration Publique

European Institute
of Public Administration

# EIPASCOPE

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# Building Capacities for Integration: The Future Role of the Commission*

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* Lecture given at the Schuman-Seminar: 'Maastricht in Maastricht, the Treaty Revisited', held at the Provincial Government House, Maastricht (NL) on 13 May 1996

The Maastricht Treaty contained a commitment to convene an Inter-Governmental Conference in 1996. The stated purpose of the 1996 IGC, (Maastricht II), is to examine 'the extent to which the policies and forms of cooperation introduced by this Treaty may need to be revised with the aim of ensuring the effectiveness of the mechanisms and the institutions of the Community'. Such an initiative is long overdue. A thorough examination of the requirements of effective performance in the EU is urgently needed as part of the general process of institutional reform. Inadequate administration and 'Eurobureaucracy' have always provided easy targets for opponents and critics of European integration. The organizational deficiencies of the Commission as well as fraud and misuse of Community funds regularly attract adverse comment and public criticism. In addition, the EU has set itself enormous challenges. Aside from its existing commitments, it is embarking on major new policy initiatives and opening up the prospect of a significant and difficult round of enlargement.

While reform is urgently needed, past experience suggests that the need to build capacities to match new demands will be treated superficially. Political debate about institutional reform typically centres on the desirability of alternative models of integration without an in-depth analysis of what is needed to ensure their effectiveness. There is extensive discussion of the EU's democratic deficit, but little serious consideration of its management deficit. Consequently there is a widening gap between increasing responsibilities and the limited capacities available for fulfilling them. None of the three pillars of the Maastricht Treaty has sufficient institutional strength to bear the loads it is supposed to carry. Even in the core area of economic integration the tasks often outrun the capacities available. Initiatives such as the completion of the Internal Market, Monetary Union, police cooperation in dealing with drugs and terrorism, or the incorporation of Central and East European countries require innovative institutional and management solutions.

There is a further, and less obvious, aspect of the management deficit. Aside from ensuring that the new institutional architecture works when completed, the design and development of these new systems of governance involves extraordinarily difficult problems of managing change. European integration is not just reprogramming established administrative machines with new European policies. It involves major reorganizations and significant institutional development. Large numbers of organizations in the administrations of the Member States have to learn to work together with each other and with the European institutions. European integration involves the management of change on a grand scale. There are no real precedents or blueprints to work from. Making European policies work effectively involves designing and constructing organizational networks capable of functioning across all the existing Member States and flexible enough to incorporate a dozen or more additional countries in the future. New thinking is required to design and implement appropriate solutions.

## Effectiveness or Efficiency?

The obligation of Maastricht II to address the question of effectiveness might seem to guarantee that the management deficit would be a central issue on the agenda. But, it is far from obvious that this is so. There are worrying signs that the intended focus on effectiveness is being lost. The Turin meeting of the European Council at the end of March, which launched

the IGC, was distracted by the competing claims of problems as different as structural unemployment and 'mad cow' disease. Of course, institutional reform always has to compete for political attention with substantive problems. But even allowing for this, there are clear indications of a retreat to a limited and inadequate diagnosis of the management deficit. The conclusions of the Presidency after Turin set out an agenda which stresses 'the need to look for the best means to ensure that (the EU institutions) function with greater efficiency, coherence and legitimacy.' Along with reforms of the Parliament, the Court and the Council of Ministers, the 'Conference will have to examine how the Commission can fulfil its fundamental functions with greater efficiency, having regard also to its composition and taking account of its representativity'.

At first glance this may seem quite consistent with the Treaty commitment to evaluate the effectiveness of the system. But, on further consideration, two important restrictions are apparent. The first is the shift in terminology from effectiveness to efficiency. These terms are often used interchangeably, but in public management reform there is a fundamental distinction between them. Efficiency is largely a matter of how well an existing system works. Effectiveness is a much more complex matter of redefining objectives in the light of changing needs and conditions and the development of new systems and structures appropriate to new tasks. Efficiency-oriented reforms focus on operational management within an established framework of objectives and policies. Effectiveness-oriented reforms address strategic management issues involving the adaptation and development of organizational structures and management capacities to serve new objectives.

The second restriction is the concentration on the Commission (along with the other EU institutions) as the object of reform. While the Commission is the main institution responsible for managing European policies, it does not have an exclusive competence and usually has to work with and through national administrations. The Commission alone can never 'manage Europe'. European public management is very much a matter of getting things done through networks of other organizations rather than centralizing everything within the Commission itself. A major factor contributing to the EU's management deficit is that these multilevel, multinational networks of organizations are often fragmented and inadequately developed. The effectiveness of the European policy process as a whole depends on designing and developing networks of organizations capable of working together in the formulation and implementation of European policies.

If the IGC only examines 'how the Commission can fulfil its fundamental functions with greater efficiency', the results will be disappointing. Minor adjustments to the number of Commissioners or tinkering with the internal structure of the organization might achieve marginal improvements in efficiency but will make little impact on the effectiveness of the system. Merely making the Commission more efficient at doing what it currently does will not reduce the EU's management deficit. Indeed, it might have the perverse effect of increasing it.

**Reinventing the Commission as a Network Organization**

My purpose in this paper is to argue that to reduce the management deficit the Commission needs to be reinvented as a network organization. Surprisingly, the Commission has never undergone a major overhaul since its creation. It was designed in the 1950s to serve the needs of a relatively homogeneous group of six countries just embarking on a limited programme of economic integration in what turned out to be a period of stable and rapid economic growth. Yet, basically the same organization is expected to serve the needs of 15 much more diverse countries engaged in an advanced process of integration in a far less benign economic environment.

The term network organization is currently used in two different ways in business and

government. The most common usage denotes a flexible, adaptive form of business organization which can accommodate rapid change and exploit the opportunities that change in the environment presents. This micro-management concept of a network organization gives businesses a competitive advantage over their rivals. The fashion for network organizations is part of a search for forms of organization that are able to adapt to change because they have greater internal flexibility or because they are better at managing external networks of suppliers, subcontractors and distributors. Regarding the Commission as a network organization builds on a different tradition concerned with developing macro-management capacities for cooperation among organizations involved in managing public policies (Metcalfe; 1976, 1992). With this second usage of the term, the focus is on the functioning and effectiveness of a whole network of organizations. The role of a network organization, in this sense, is not to direct change or centralize power, but to ensure that the organizations in a network develop capacities for working together effectively as well as carrying out their specific operational management tasks. Since European public management depends on 'getting things done through other organizations' the issue is whether the Commission can diagnose obstacles to effective collaboration and instigate action to remedy them.

Before explaining further what is involved in reinventing the Commission as a network organization it is useful to establish two reference points. One is the existing functions of the Commission; the responsibilities that have been assigned to it under the Treaties. In large part these have remained unchanged since the creation of the Commission though, of course, the workload has increased over the years. The other is a diagnosis of the EU's management deficit. The sources of the management deficit are only partly attributable to the weaknesses and deficiencies of the Commission as such. In the main they are structural features of the European policy system as a whole and correcting them will require changes in the whole process of European policy management.

**The Functions of the European Commission**

The striking feature of the Commission as a supranational organization is the combination of important functions it performs. A standard analysis distinguishes five functions: policy initiation, mediation, external representation, management of European policies and guardian of the Treaties (Coombes (1970); Edwards and Spence (1994)). For present purposes, these functions can be subsumed under the headings of the leadership role and the management role. The leadership role of the Commission as the 'engine of integration' or the EU's policy entrepreneur, is the more prominent of the two. It embraces the Commission's almost exclusive right of policy initiative, buttressed by the mediation and representation functions. Most of the achievements of the Delors era depended on exploiting the possibilities and opportunities of the Commission's leadership role. The '1992' programme, the Single European Act, the accession of Spain and Portugal and, subsequently, Austria, Finland and Sweden, together with the Maastricht Treaty commitments to monetary union and further political union represent substantial advances which would not have been achieved without effective leadership.

If the Commission's strengths come to the fore when it acts as the engine of integration, its weaknesses are most evident when its management role is considered. The management role includes the functions of managing European policies and acting as guardian of the Treaties. Difficulties are immediately apparent. Resources are limited and power is dispersed. Contrary to the frequent criticisms of a huge, unaccountable and ever-growing 'Brussels bureaucracy' the Commission is a small organization by governmental standards. It has a total staff of about 15,000 of which about 4,000 are engaged in translation work among the eleven official languages and some in scientific research. The operational staff are distributed across 24 Directorates General (DGs) plus specialist and common services. Most DGs only have a few hundred staff. Furthermore, the Commission does not have exclusive responsibility for the

management of European policies in the way that it has the independent right of policy initiative. Responsibilities for managing European policies are shared in two ways with the Member States; through the structures of comitology which link the Commission and the Council of Ministers in policy management and second, through reliance on national administrations in the formation as well as implementation of policies.

Thus the Commission has very little direct operational management responsibility. In large part it must work through networks of organizations. However, the Commission is inhibited from building up more effective networks and strengthening relationships with and among national administrations. First, there is a conflict between its responsibilities for policy management and for acting as guardian of the Treaties. The former requires a willingness to develop close working relationships based on mutual trust and involving the sharing of responsibility for effectiveness. The latter predisposes the Commission towards maintaining an arms-length relationship with national governments and an attitude of watchfulness if not mistrust towards their behaviour. Mistrust is often reciprocated. Furthermore, the Commission is hesitant about building networks and developing intergovernmental capacities because it has no legal authority to do so.

**Sources of the Management Deficit**

Three structural factors create a built-in bias towards widening the management deficit. The first is the legal orientation of the EU policy process. Legal thinking tends to equate advances in integration with transfers of *legal competences* to the European level. This may lead to the false assumption that there are *management capacities* to give effect to new competences. Even worse, it may lead to the assumption that centralized capacities are appropriate. Regulatory policy-making is an important example of the way that a gap between competences and capacities adversely affects effectiveness. Regulation appears to require strong central capacities at the European level. But, as Majone observed, the capacities required for managing regulatory policies are much more decentralized; 'the real costs of most regulatory programmes are borne directly by the firms and individuals who have to comply with them. Compared with these costs, the resources needed to produce regulations are trivial...not only the economic, but also the political and administrative costs of enforcing regulations are borne by the Member States.' (Majone 1991,96).

A second structural source of the management deficit is the priority accorded to policy *invention* rather than *innovation* in the EU policy process. Invention, as the initiation of new policies, is valued much more in the Commission culture than innovation, as the development of capacities to implement them. As the foregoing discussion of the Commission's functions has shown leadership is more valued than management. The Commission is a remarkable vehicle for policy invention. But making European policies work effectively also involves a deliberately managed process of institutional innovation to create Europe-wide administrative systems, by adapting existing organizations to new tasks, forming new organizations and developing new interorganizational regimes.

A third important source of the management deficit is that the *negative integration* benefits of new policies are played up and the *positive integration* costs are played down. The '1992' programme was presented and packaged as a deregulatory process of negative integration designed to eradicate the 'costs of non-Europe'. The emphasis was on the removal of national non-tariff barriers, the elimination of the delays and obstacles to trade caused by national customs controls and the savings to industry of no longer having to comply with different, inconsistent, national regulatory regimes. But negative integration only achieves its widely proclaimed benefits if the removal of national obstacles to the free movement of goods, services capital and people is accompanied by measures of positive integration to build a firm institutional framework at the European level. The 'costs of Europe', such as the construction

of new European regulatory regimes have to be included in the account.

## The Trajectory of Integration

The proposition that the Commission should be reinvented as a network organization makes an assumption about the trajectory of integration that conflicts with conventional thinking. In a nutshell, the effectiveness of European policies depends on interorganizational management through networks rather than control through a unified hierarchy with the Commission as a strong central authority. However, the orthodox assumption is that European integration is set on a trajectory leading to the eventual formation of something like a European federal state. The second and third pillars of the Maastricht Treaty are typically regarded as inferior and weaker forms of intergovernmental integration in comparison with the supranational character of the first pillar. Stronger and more effective integration is equated with enhanced central authority at the European level.

There are two things wrong with this. First, it assumes that the trajectory of integration is geared towards the amalgamation and merger of existing (and future) Member States into a unified government. It is this fixed view of the eventual goal of European integration which does so much to excite 'fear of federalism' among opponents of integration. As the difficulties over the ratification of the Maastricht treaty showed, there is considerable political resistance to change in this direction in several countries. More recently, the economic policy measures necessary to meet the Maastricht criteria for monetary union have also met opposition, most dramatically in France. But even if the obstacles and opposition could be overcome, it is by no means certain that the resulting system would be the most effective possible. The scale and diversity of the EU with its present fifteen Member States and even more if there is a significant enlargement seems to require a more imaginative response than merely reconstituting the nation state at the European level.

An alternative view is that European integration is set on a pluralistic trajectory (Deutsch, et al, 1968). Rather than merging into a European federal state, the Member States will retain their separate identities and find alternative ways of coping with interdependence. Arguably, this is more in accord with the actual evolution of European integration than amalgamation and merger. The founding fathers were more concerned with supporting the nation state than supplanting it. And, the hybrid structure of the European institutions gives national governments a strong influence on decisions at the European level. The challenge that a pluralistic trajectory presents is to develop new forms of organization and models of management that enable European policies to be implemented effectively without depending on a unitary management structure. This calls for new thinking about forms of federation among nations and the effectiveness of different institutional configurations (Burgess and Gagnon, 1993). Paradoxically this would require more rather than less of national administrations as integration progresses.

## The Core Competences of the Commission: Regimes, Partnerships and Coordination

The Commission is involved in organizational networks in virtually all phases of its work in the formulation and implementation of European policies. But it is not a network organization. It does not have an acknowledged role in developing the interorganizational management capacities required to cope with the workloads generated by integration. Nor is it equipped to do so. Although it has been at the forefront of policy initiatives which require major structural transformations of immensely complex economic and social systems, it has never acquired or built up a body of expertise in developing governance capacities.

Acting as a network organization at the European level implies a radically new reform strategy. The difference can be highlighted by pointing first to a sea change in business

management thinking from slimming down established organizations to developing *core competences* (Hamel and Prahalad, 1994). Successful businesses have recognized that the organizational capacities and management systems required to sustain long-term effectiveness are different from those that suffice to achieve short-term cost reduction and operational efficiency. Long-term effectiveness requires the development of core competences in the key areas of knowledge and generic expertise that enable organizations to meet emerging challenges. These core competences provide the organizational learning capacities to cope flexibly and effectively with change, steering rather than reacting. In a business context their key contribution is to strengthen *competitive advantage*.

In the European policy context, the objective is quite different. Reducing the EU's management deficit depends on building *collaborative advantage*. This means creating conditions in which the organizations responsible for managing particular policies are able to work together effectively (Huxham, 1989). Developing collaborative advantage involves promoting cooperation and identifying areas of interdependence and common interest. This does not preclude competition, but it does represent a deliberate commitment to strengthening cooperation. In broad terms, the development of collaborative advantage requires the Commission to develop expertise in ensuring the coherence and reliability of European management networks. The following sections review three strategically important ways in which the Commission as a network organization can develop core competence to build collaborative advantage: (1) the construction of policy regimes; (2) the design of administrative partnerships; and (3) the development of coordination capacities to ensure that the partnerships constituting a regime function effectively.

**Regimes as Organizational Networks**

The mission of the Commission as a network organization might be defined as transforming intergovernmental networks into European management regimes. The patchworks of existing governmental organizations and intergovernmental relations have to be shaped into effective regimes. The effectiveness of the Commission as a network organization should be judged by how well the organizations constituting specific European regimes understand their own roles and how well they work together. The term 'regime' is already in common currency in many fields of European policy to describe, for instance, the public procurement regime, the telecommunications regime, the social policy regime or even, in the CAP, the sheep-meat regime. More precisely and fully, a regime is a set of values, norms, principles and practices which guide and govern the behaviour of a network of actors. Regimes, in this sense, do not depend primarily on hierarchical controls. Instead, they provide 'governance without government' (Rosenau and Czempiel, 1992).

If they are to work effectively and reliably across fifteen or more countries, regimes must be more than just disembodied systems of rules and norms. Ensuring the effectiveness of a regime in a political system as large and complex as the EU depends on establishing a foundation of credibility and mutual trust among decision-makers in different countries. Will product standards set in Germany be readily accepted in Portugal and vice versa? Will decisions made in Greece and Finland achieve mutual recognition and be equally likely to secure compliance in other countries? In order to achieve this degree of credibility, a regime must be embodied in a defined network of organizations in which it is clear who is responsible for what.

Defining regimes as organizational networks provides a common factor around which the Commission can develop a core competence. No matter whether integration proceeds on the basis of a single-speed, two-speed, variable geometry or an à la carte approach, decisions have to be made about the differentiation and integration of organizational roles within purpose-designed regimes. All regimes involve a set of organizations and the network of links among

them. The variety of tasks in which the EU is engaged means that different forms of governance are needed. Rather than relying on an obsolete 'one-best-way' model of management the regime concept offers a flexible way of generating design options and acquiring skills in managing the construction of a variety of tailor-made administrative networks.

**Designing Administrative Partnerships**

Regimes are institutional frameworks for managing European policies through interorganizational cooperation. Their integrity and effectiveness depends on good working relationships at the micro level among their constituent organizations. In the absence of an all-inclusive hierarchy, individual organizations must develop and manage relationships with each other to serve their own objectives and to make the regime as a whole function effectively. This is much easier said than done. Good working relationships among organizations do not develop spontaneously in any context. In European policy management there are particular difficulties in managing interdependence. Because they are embedded in different national institutional contexts with disparate administrative traditions and capacity it is often difficult for the organizations in a regime to know what to expect of each other. As with the better-understood and less difficult problems of managing multinational corporations, deliberate efforts are needed to overcome mistrust among counterpart organizations in different countries and build relationships which ensure that simple misunderstandings do not flare up into diplomatic incidents. Typically, too little effort goes into developing sound working relationships, with the result that gaps and weaknesses are overlooked, overlap and duplication cause confusion and conflict, and performance suffers.

The idea of partnership has been invoked as a means of meeting the challenges of managing interdependence without resorting to centralized hierarchical structures. Partnership is a recurrent theme in public administration and it is not new in European public management. In the EU, the administration of the Structural Funds is based on partnerships between the Commission and national administrations. The concept of partnership was a theme of the Sutherland Report (1992) on the implementation of the Internal Market. Administrative partnerships have had to be formed among tax authorities, immigration authorities, police services and government statistical organizations as well as customs services at the national level. Aside from arousing strong political reactions, any attempt by the Commission to centralize all of these functions would overload its very limited capacities.

Administrative partnerships are the building blocks of regimes. Designing administrative partnerships can become a core competence of the Commission only if the options are clearly identified. Political rhetoric gives a misleading impression that all partnerships are voluntary, user-friendly arrangements. To be reliable building blocks in the construction of European policy regimes, partnerships need to be firmly specified. Reliability in a European policy context means that the division of labour and the sharing of responsibilities between partners has to be worked out carefully with reference to the capacities of the organizations concerned and the needs of the regime as a whole. Carefully designed networks of interlocking administrative partnerships can ensure that regimes are robust enough to cope with a wide range of cross-national differences and also sufficiently flexible to be able to adjust to change over time. Partnerships are governance frameworks, which define the terms of cooperation among organizations in areas of interdependence and common interest without prescribing in detail how they all should act under all circumstances.

Regimes do not just involve a substitution of partnerships for hierarchical controls. One of the reasons they can contribute to effectiveness is that they are not all of a kind. Different types of partnerships provide design options and choices that can be combined in different ways in different regimes (Metcalfe, 1981). Some familiar forms of partnership, applicable to the

construction of European policy regimes include purchaser-provider, customer-contractor and principal-agent relations. Partnerships between professionals involved in the same policy field but working in different national contexts have a particularly important role in EU policy process. These partnerships, based on common interests and similar responsibilities rather than an organizational division of labour are important both in the formative stage of policy making where expert groups are formed and in policy implementation where consistent responses to common problems are needed.

If regimes are viewed as interlocking networks of organizational partnerships, it is important that the Commission develops a core competence in designing administrative partnerships. This aspect of the network organization role would involve advising on the choice of partnership framework from a range of options and assisting in their implementation at the micro level and ensuring that the combinations of bilateral and multilateral partnerships forming a particular regime make up a coherent and effective whole. With a wealth of experience to draw on, the Commission could develop a unique core competence in both the substance and process of designing administrative partnerships.

**Developing Coordination Capacities**

If partnerships are the building blocks of management regimes, it is coordination that bonds them together. Coordination makes an indispensable contribution to collaborative advantage and hence to effectiveness. Inadequate development of capacities for interorganizational coordination is a major factor in the EU's management deficit. Either there are gaps because no-one accepts responsibility or there are unresolved conflicts because of disagreements about overlapping jurisdictions and misunderstandings over policies. In many European policy fields, significant institutional, cultural and linguistic obstacles have to be overcome before organizations can work together effectively. But what form should coordination take? Coordination is often equated with central control. This casts the Commission in the role of coordinator. But even if it were politically acceptable for the Commission to develop a hierarchical coordination role, it would not be an efficient or effective way of managing regimes characterized by high organizational interdependence.

The core competence of the Commission needs to be defined in terms of developing coordination capacities in organizational networks rather than attempting to provide them directly; teamwork rather than central control. An approach developed in a comparative study of European policy coordination in national administrations offers useful guidance (Metcalfe, 1994). Rather than viewing coordination in the customary top-down way this approach starts from the assumption is that individual organizations act independently and evolve means of managing coordination in response to increasing interdependence. The organizational division of labour determines what is to be coordinated within organizations and what tasks remain for interorganizational coordination. The coordination capacities required for managing progressively more complex interdependence can be visualized as a series of qualitatively distinct steps on a Policy Coordination Scale as set out in the following diagram.

**POLICY COORDINATION SCALE** (Adapted from Metcalfe, 1994)

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9. Unified Strategy

8. Setting Common Priorities

7. Establishing Common Parameters

6. Arbitration of Organizational Conflicts

5. Search for Policy Consensus (Conflict Management)

4. Avoiding Policy Divergences (Speaking with One Voice)

3. Consultation among Organizations (Feedback)

2. Exchange of Information among Organizations (Communication)

1. Organizations Manage Independently within their Jurisdictions

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The effectiveness of higher levels of coordination such as establishing common priorities and parameters depends on the effectiveness of lower level processes such as communication and consultation and a willingness on the part of organizations to ensure that open divergences of policy are avoided, and conflicts are resolved directly or by arbitration. If organizations cannot, at least, avoid overt conflict and speak with one voice in public (level 4) it is very difficult for them to confront and resolve the conflicts that arise in formulating common policies. Strengthening lower level capacities not only solves simpler coordination problems but also develops habits and practices of teamwork which make it easier to deal with more difficult problems when they arise. The development of coordination capacities along these lines is in accord with a pluralistic trajectory of integration. Strengthening collaborative advantage by enabling the organizations participating in European policy regimes to manage coordination with each other should become a core competence of the Commission.

**Conclusions**

The future development of the European Union depends on how the 1996 IGC addresses the question of effectiveness and whether it leads to action to reduce the EU's management deficit. It is far from certain that it will do either. Disputes and disagreements among the Member States over the pace of integration and future shape of Europe may deflect Maastricht II from its intended focus on effectiveness. Even if these political obstacles are overcome, there is still a danger that the need to develop new methods of governance and models of management will be underestimated and misunderstood. Maastricht II will almost certainly begin considering institutional reforms from the reassuring standpoint of well-worn proposals that have never been acted on. Since they take for granted the existing functions of the Commission and the established priorities among them, they would reinforce its strengths without correcting its weaknesses. The management deficit would widen because the existing system is geared to policy invention rather than organizational innovation and expanding legal competences rather than building management capacities.

This paper has argued that dealing with the management deficit and ensuring the effectiveness of European integration in an unpredictable and evolving environment requires a more flexible contingency approach, centred on developing capacities. To this end, the Commission should be reinvented as a network organization to prompt and guide the development of the capacities for managing the organizational networks. This presumes that European integration is set on a pluralistic trajectory which is leading towards federation among countries rather than merger into a single federal state. The primary task of the Commission as a network organization is to strengthen collaborative advantage. Rather than acquiring capacities for managing European policies itself, the Commission should develop core competences in constructing decentralized management regimes, designing administrative partnerships and developing coordination capacities for managing European policies.

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## BIBLIOGRAPHY AND REFERENCES


Burgess, Michael and Gagnon, Alain-G. (1993), *Comparative Federalism and Federation Competing traditions and future directions*, Harvester Wheatsheaf, Hertfordshire.

Coombes, David (1970), *Politics and Bureaucracy in the European Community*, George Allen and Unwin, London.

Deutsch, Karl W., Sidney A. Burrell, Robert A. Kann, Maurice Lee Jr., Martin Lichterman, Raymond E. Lindgren, Francis L. Loewenheim, Richard W. van Wagenen (1968), *Political Community and the North Atlantic Area*, Princeton University Press, Princeton, New Jersey.

Edwards, Geoffrey, and Spence, David (eds) (1994), *The European Commission*, Longman Group Ltd, Harlow, Essex.

Elazar, Daniel J. (1987), *Exploring Federalism*, University of Alabama Press, Tusca-loosa.

Hamel, Gary and Prahalad, C.K. (1994), *Competing for the Future*, Harvard Business School Press, Boston, Massachusetts.

Huxham, Chris (1991), 'Pursuing Collaborative Advantage', *Journal of the Operational Research Society*, 44,6.

Majone, Giandomenico (1991), 'Cross-National Sources of Regulatory Policymaking in Europe and the United States', *Journal of Public Policy*, 11, 1, 79-106.

Metcalfe, Les (1976), 'Organizational Strategies and Interorganizational Networks', *Human Relations*, Vol. 29 (4), 327-343.

Metcalfe, Les (1981), 'Designing Precarious Partnerships', in Paul C. Nystrom and William H. Starbuck (eds), *Handbook of Organizational Design*, Oxford University Press, Vol. 1, 503-530.

Metcalfe, Les (1992), 'After 1992: Can the Commission Manage Europe?', *Australian Journal of Public Administration*, 51(1), March, 117-130.

Metcalfe, Les (1994), 'International Policy Co-ordination and Public Management Reform', *International Review of Administrative Sciences*, Sage, London, Thousand Oaks and New Delhi, Vol. 60, 271-290.

Rosenau, James N. and Czempiel, Ernst Otto (eds) (1992), *Governance without Government: Order and Change in World Politics*, Cambridge University Press.

Sutherland, Peter (1992), *The Internal Market after 1992: Meeting the Challenge*, Report to the EEC Commission by the High Level Group on the Operation of the Internal Market.

# Mission, Commitment and Loyalty*

***Isabel Corte-Real***
*Director-General of EIPA*

* Address to all EIPA staff on officially taking up her function on 15 April 1996.

It is a pleasure and an honour to be here with you today on assuming my function as Director-General of the European Institute of Public Administration.

Without making this a formal ceremony, I would like to say a few words to you all and to set out the three key elements which I feel should always be borne in mind when taking office. These are:

* a sense of mission as regards the tasks we are to accomplish;

* a sense of commitment in performing efficiently and effectively;

* a sense of loyalty towards those who have appointed us and towards those with whom we are to work.

These three key elements *mission, commitment and loyalty* already constitute a working programme which requires no further explanation, although indeed something is to be said for each of these elements.

We are united by a *sense of mission*, and this mission is the task and vocation of the European Institute of Public Administration, which are well-defined in its statutes as follows:

'...The objective of the Institute is:

a) to provide public servants and other interested parties with training of a European character and relating to public administration within the Community;

b) to gather and develop knowledge on public administration within the European Community or relating to the Community....'

The simplicity of these words, however, does not conceal the highly influential dimension of the Institute. Europe is, in itself, a concept and a motivating ideal. Those who have visited the five continents know how the message of progress, solidarity and peace is associated with the European Project.

This message is and will continue to be a way to achieve balance and harmony within and outside Europe.

Nevertheless, sometimes discouraging voices are heard, voices that claim that the European Project is the exclusive domain of the intellectual and the bureaucratic elite. However, they could not be more wrong. Europe is, and must be, there for its citizens. In each Member State, public administrations are the realities which maintain the closest contact with the public. The European Institute of Public Administration is one of the most significant interlocutors within Europe as regards administrative realities and constitutes a vehicle of paramount importance in the pursuit of the European ideal. It therefore deserves to be supported in encouraging citizens to discover more about Europe and develop European answers to their problems elements which are essential to progress.

*Commitment* to performing tasks efficiently and effectively is the second key element.

But how is this commitment to be realized?

I will not attempt to propose a working programme here. Every institution has its own history and heritage, coupled with the expertise allowing it to evolve and learn from its successes and failures. The European Institute of Public Administration is no exception and becoming better acquainted with you in order to serve the organization better will be one of my aims. However, I can now at least share with you my own guiding principles:

* Firstly, to strengthen the statutory objectives of the European Institute of Public Administration in close cooperation with the Member States and the European Commission, the Board of Governors, and with the national institutions which are represented on the Institute's Scientific Council.;

* Secondly, to pay constant attention to the human element of this organization, that is to say all of you. I have always believed that, in speaking of an organization and its work, one is also speaking of mankind, for work and its organization are human prerogatives.

That is why special attention must be paid to the personal fulfilment of all those who commit themselves to organizations, and I will do my best to work with you in such a way that our team will be regarded as one of the best within European administration.

Finally, the third key element is that of *loyalty* towards those who have appointed us and towards those with whom we are to work.

I would now like to express my sincere thanks to the Chairman of EIPA's Board of Governors, Mr Peter Sutherland, and to the Members of the Board for the trust they have placed in me.

Furthermore, I would like to express my appreciation to the Secretary-General of the Board and EIPA's Director-General *ad interim*, Mr Jan Voskamp, and to the management team, who have dealt with the administration of the transition process with such competence and efficiency.

I would also like to reiterate my admiration and esteem for my predecessor, Mr Spyros Pappas, whom I have known and worked with for a number of years.

Ladies and Gentlemen, Dear Colleagues:

A new cycle is about to commence.

For my part, although I have left Portugal, my southern and sunny country, I have been greeted by the warm hospitality of the Netherlands, which has convinced me that I will be very happy here in Maastricht. I look forward to working with you all within a project which will require confidence, perseverance and determination, but which will be, I know, extremely rewarding. You will therefore understand when I say that it is a challenge, an honour and a pleasure to be with you here today.

Thank you.

# Mission, engagement et loyauté*

***Isabel Corte-Real***
*Directeur général de l'IEAP*

* Discours adressé à tout le personnel de l'IEAP à l'occasion de son entrée en fonctions le 15 avril 1996.

C'est pour moi un grand honneur et un plaisir particulier d'être ici aujourd'hui un mois après mon entrée en fonctions comme nouveau Directeur général de l'Institut européen d'administration publique.

Sans vouloir faire de ceci une cérémonie formelle, j'aimerais vous adresser quelques mots pour définir les trois éléments-clés qui, d'après moi, doivent toujours être présents à l'esprit lorsqu'on commence une nouvelle fonction: Il s'agit:

* d'un sens de *mission* en ce qui concerne les fonctions que l'on va accomplir;

* d'un sens d'*engagement* vis-à-vis d'un fonctionnement efficient et efficace;

* d'un sens de *loyauté* vis-à-vis de ceux qui vous ont nommé et de ceux avec qui on va travailler.

Ces trois éléments-clés: *mission, engagement et loyauté*, constituent déjà un programme de travail qui ne nécessite aucune autre explication, même s'il faut dire quelque chose de chacun d'eux.

Nous sommes unis par un sens de mission et cette mission est la tâche et la vocation de l'Institut européen d'administration publique qui sont bien définies dans ses statuts, comme suit:

"...L'Institut a pour but:

a) de fournir aux hauts fonctionnaires ou à d'autres personnes pour qui cela serait d'un grand intérêt, des cours de formation et de perfectionnement à caractère européen, se rapportant à l'administration publique dans la Communauté européenne;

b) de recueillir et développer la connaissance de l'administration publique dans la Communauté européenne ou ce qui s'y rattache...."

La simplicité de ces mots ne saurait cependant pas faire oublier la dimension très influente de l'Institut. L'Europe est en soi une idée et un idéal motivant. Tous ceux qui ont parcouru les cinq continents connaissent le message de progrès, de solidarité et de paix qui est associé au projet européen. Ce message est et continuera à être la voie à suivre pour parvenir à un équilibre et à une harmonie tant à l'intérieur qu'à l'extérieur de l'Europe.

Parfois des trouble-fête font entendre leur voix pour dire que le projet européen appartient aux élites intellectuelles et bureaucratiques. Rien n'est plus faux. L'Europe est et doit être au service de ses citoyens. Dans chaque Etat membre, les administrations publiques sont les réalités qui maintiennent le contact le plus étroit avec le public. L'Institut européen d'administration publique est l'un des interlocuteurs les plus importants en Europe en ce qui concerne les réalités administratives et il représente un véhicule d'une importance cardinale pour l'idéal européen. L'idéal européen mérite d'être soutenu afin d'encourager les citoyens à en savoir plus sur l'Europe et à trouver les réponses européennes à leurs problèmes  ce qui est essentiel au progrès.

Le deuxième élément est l'engagement à assumer ses fonctions de façon efficiente et efficace. Comment peut-on réaliser cet engagement?

Je n'essaierai pas ici de présenter un programme de travail. Toutes les institutions ont leur histoire et héritage propres ainsi que leur expertise qui leur permettent d'évoluer et de retirer des enseignements de leurs succès et de leurs échecs. L'Institut européen d'administration publique n'y fait pas exception et apprendre à mieux vous connaître pour mieux servir l'organisation sera l'un de mes objectifs; donc je puis maintenant au moins partager avec vous quelques-unes de mes lignes de conduite:

* En premier lieu, renforcer les objectifs statutaires de l'Institut européen d'administration publique en étroite collaboration avec les Etats membres et la Commission européenne, le Conseil d'administration, ainsi qu'avec les institutions nationales qui sont représentées au sein de son Conseil scientifique.

* En deuxième lieu, attacher une attention constante à l'élément humain de cette organisation, c'est-à-dire à vous tous. J'ai toujours pensé que parler d'une organisation et de son travail, c'est parler de l'humanité, car le travail et son organisation ne sont-ils pas des prérogatives humaines. C'est pourquoi, une attention toute spéciale doit aller à l'épanouissement personnel de tous ceux qui s'engagent vis-à-vis d'une organisation.

Je ferai de mon mieux pour travailler avec vous de façon à ce que notre équipe soit vue comme l'une des meilleures dans l'administration européenne.

Enfin, le troisième élément: *la loyauté* envers ceux qui vous ont nommé et ceux avec qui on va travailler.

Au Président, M. Peter Sutherland, et au Conseil d'administration, j'aimerais exprimer mes sincères remerciements pour la confiance qu'ils m'ont témoignée.

Au Secrétaire général et Directeur général faisant fonction, M. Jan Voskamp, et à l'équipe de direction qui ont assuré avec souplesse le processus de transition, je voudrais dire toute mon appréciation pour l'efficacité de leur administration.

Je souhaiterais aussi réitérer mon admiration et mon estime à mon prédécesseur, M. Spyros Pappas, que j'ai connu et avec qui j'ai travaillé pendant un certain nombre d'années.

Mesdames et Messieurs, chers Collègues:

Un nouveau cycle va commencer.

En ce qui me concerne, j'ai quitté le Portugal, mon pays ensoleillé du Sud, mais j'ai été accueillie par la chaleureuse hospitalité des Pays-Bas; je suis donc sûre que je serai heureuse ici à Maastricht. J'attends avec impatience de travailler avec vous tous sur un projet qui requiert de la confiance, de la persévérance et de la détermination, mais qui, je le sais, en vaut très certainement la peine. Vous me comprendrez donc lorsque je dis que c'est à la fois un défi, un honneur et un plaisir d'être ici avec vous aujourd'hui.

Merci.

# Important Judgments Delivered by the Court of Justice of the European Communities During the Period 1 January to 1 May 1996

***Imelda Higgins and Jesper Svenningsen****
*EIPA Antenna Luxembourg*

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* Respectively lecturer and senior lecturer.

## I

Very few judgments are as well known as that of the *Francovich* case (1991 [ECR] I-5357), in which the Court held that Member States are obliged to make good any loss or damage caused to individuals as a result of breaches of Community law for which the Member States are responsible. The scope of this ruling has been clarified by the Court, to some extent, in joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur* and *Factortame III*, of 5 March this year. Both of these cases concerned claims brought by individuals against Member States for damages caused by the Member State's failure to respect Community law. *Brasserie du Pêcheur* concerned a French brewery which had been unable to export to Germany between 1981 and 1987 due to the German beer purity laws (*Reinheitsgebot*). In 1987, the Court of Justice ruled that this legislation was incompatible with Article 30 of the EC Treaty. The brewery subsequently brought an action against the German State for reparation of the loss suffered between 1981 and 1987.

*Factortame III* was part of the ongoing affair concerning British law which laid down certain conditions relating to nationality and domicile which had to be fulfilled before a boat could be registered in Britain. In *Factortame I*, these provisions were held to be contrary to Article 52 of the EC Treaty. The plaintiff consequently sought damages for losses incurred as a result of the legislation. One of the applicants in *Factortame III* also sought damages for 'unconstitutional behaviour' on the part of the authorities.

The two central questions which the Court dealt with in its judgment concern, firstly, the conditions under which the State may incur liability for acts and omissions of the national legislature contrary to Community law and, secondly, whether it is possible to make reparations conditional upon the existence of fault. In answer to the first question, the Court pointed out that the conditions under which State liability gives rise to reparations depend on the nature of the breach of Community law in question. Taking into account the fact that, in both cases, the German and UK legislatures had acted in a field in which they had wide discretion, the Court adopted a restrictive approach to the issue of determining liability in such circumstances. The Court laid down three conditions which must be fulfilled before damages may be claimed: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach and the damage. The Court, in the application of these conditions, held that both Article 30 and Article 52 of the EC Treaty are intended to confer rights on individuals, and that it was for the national courts to decide in relation to the two other conditions.

With respect to the second question, the Court refused to admit that liability could be subject to an additional requirement of proof of fault. In the view of the Court, the imposition of such a condition would result in the calling into question of the right to reparation founded in the Community legal order.

The Court refused to limit the temporal effect of the judgment. (Case C-212/94 *FMC* of 8 February contains a brief summary of the Court's case law on its power to limit the temporal

effect of its judgments.)

It is clear from the Court's ruling that the compensation must be commensurate with the loss or damage sustained, as it is only in this way that effective protection can be ensured. In the absence of relevant Community provisions, it is up to the domestic legal systems to determine the extent of compensation available. However, this freedom is subject to certain minimum requirements imposed by Community law. It is worth noting that exemplary damages cannot be ruled out if such damage can be awarded in relation to a similar claim based on national law.

*Brasserie du Pêcheur* and *Factortame III* should be read in connection with the judgment in Case C-392/93 of 26 March, in which *British Telecommunications* requested compensation for loss resulting from the UK's incorrect implementation of a directive on procurement in the utilities sector. The Court stated that the conditions for liability in the case of incorrect implementation were the same as for the situation in which a State legislator is acting in an area in which it has wide discretion (see the three conditions mentioned above). Even though it is, in principle, up to the national courts to decide whether or not the conditions have been fulfilled, in this case the Court itself held that no damages should be awarded as the breach in relation to the implementation of the directive in question was not 'sufficiently serious'. Further clarification on the issues of State liability and judicial protection will hopefully be forthcoming in two pending cases: Case C-5/94 *Hedley Lomas* and C-178/94 *Dillenkofer*.

**II**

The principle according to which a directive cannot have **horizontal direct effect** was reiterated in Case C-192/94 *El Corte Inglés SA* of 7 March. The judgment is a confirmation of the famous *Faccini Dori* case (1994 [ECR] I-3325). The background to the case was that Ms Rivero had bought a package holiday from a travel agency and was not satisfied with it. The purchase was financed by a loan from the finance company 'Cortes Ingles SA' ,which had an exclusive right to grant loans to the agency's clients. Ms Rivero complained against the agency and, after a certain amount of time, stopped paying off the loan. The Court stated that Ms Rivero could not rely on Directive 87/102/EEC on consumer credit against the financing company as directives did not have horizontal direct effect. The insertion of Article 129a on consumer protection into the EC Treaty could not provide the basis for horizontal direct effect.

**III**

With respect to **the free movement of persons**, the full Court delivered an interesting judgment in Case C-193/94 *Skanavi* of 29 February. Ms Skanavi, a Greek national, had been resident in Germany for more than one year when she was stopped by the German police. At the time, Ms Skanavi still had her Greek driving licence, despite the fact that she was legally required to have exchanged it for a German licence as she had been resident in the country for over a year. Consequently, she was fined DEM 3,000. Ms Skanavi contested the fine and the national court sent a preliminary reference to the Court of Justice concerning the legality of the fine. Under German law, any persons failing to exchange their driving licence within a year of taking up residence were treated in the same way as persons driving without a licence. The Court considered that this was disproportionate and that it infringed Community law. As the Court pointed out, a criminal conviction may have consequences for the exercise of a trade or profession by an employee which would further constitute lasting restriction on freedom of movement. On this basis, the Court stated that Article 52 of the EC Treaty precluded a Member State from punishing Mrs Skanavi by imprisonment or fine.

## IV

As regards **freedom of establishment and freedom to provide services**, the Court gave a preliminary ruling in Case C-177/94 *Perfili* of 1 February. Mr Perfili took out an insurance policy with the insurance company Lloyd's against theft. Two years later, Mr Perfili declared the theft of some jewellery to Lloyd's. The Italian authorities called Mr Perfili to appear before the court in Rome on charges of attempted fraud. Lloyd's could not bring a civil action against Mr Perfili since the general power of attorney conferred on its general representative for Italy did not confer a special power to bring such an action in the criminal proceedings against Mr Perfili. Under English law, such a general power of attorney may implicitly signify an intention to grant such a power. The Court held that Article 6 of the EC Treaty in conjunction with Articles 52 and 59, laying down the principle of non-discrimination on grounds of nationality, must be interpreted as not precluding national legislation from requiring a victim of a criminal offence, who wishes to bring suit as a civil party in criminal proceedings, to grant his/her representative a special power of attorney. While the Court's judgment is, to some extent, surprising, it is nevertheless understandable in view of the fact that neither the legal points nor facts in the national court's order enabled the Court to examine whether the Italian legislation could constitute an unjustifiable obstacle to the freedom of establishment or the freedom to provide services.

## V

The Court has handed down a number of decisions concerning **direct and indirect discrimination**. In Case C-342/93 *Gillespie* of 13 February, the Court upheld the right of a woman absent on maternity leave to receive a pay rise granted to working colleagues. The Court pointed out that payments made to a woman who is on maternity leave constitute pay within the definition of Article 119 of the EC Treaty and the directive on equal pay. While the Court considered that these provisions do not require that women should receive full pay during maternity leave, it nevertheless considered that the amount of benefit payable must not be so low as to undermine the purpose of the leave. The Court stated that, in assessing the adequacy of the payment made, the national court should take into account the length of the maternity leave as well as other forms of social protection afforded by national law in the case of justified absence from work. In this respect, it is worth noting that the Court did not deal with Council Directive 92/85 on workers who have recently given birth or are breast feeding, as it had not yet come into force when the facts of the *Gillespie* case arose.

Case C-13/94 *P and S and Cornwall County Council* of 30 April concerned the dismissal of a **transsexual** as a result of gender reassignment. The plaintiff, P, claimed that this constituted sexual discrimination and the national court referred a question concerning the scope of Directive 76/207 on equal treatment for men and women as regards access to employment. What the national court essentially wished to know was whether dismissal of a transsexual for a reason related to gender reassignment constitutes a breach of the directive. Both the UK and the Commission argued that dismissing a person under such circumstances did not constitute sexual discrimination as the employer would also have dismissed P if he had been a woman and had undergone an operation to become a man. The Court rejected this contention, pointing out that the scope of the directive cannot be confined simply to discrimination based on the fact that a person is either one sex or another. In the view of the Court, if a person is dismissed as a result of a change in their gender, this constitutes discrimination based essentially on the sex of the person concerned. The person undergoing the reassignment is being treated unfavourably in comparison to persons of the sex to which he/she was deemed to belong before undergoing the reassignment. The Court considered that to tolerate such discrimination would be tantamount to the failure to respect the dignity and freedom to which the person concerned is entitled, and that the discrimination fell within the scope of Directive 76/207.

## VI

Two other cases dealt with **indirect discrimination and the issue of justification**. Both Case C-457/93 *Lewark* of 6 February and Case C-278/93 *Freers* of 7 March concerned part-time workers who had not been compensated for time which they had spent on a training course having taken place outside their normal working hours. Both Ms Lewark and Ms Freers were staff council members and it had been generally agreed that attendance of the training course was necessary for the performance of their council functions. Similarly, it was clear that, in both cases, had the two female plaintiffs been full-time employees, they would have received compensation. In both cases, the vast majority of part-time employees were female. The Court upheld the claim of indirect discrimination in both instances, noting that unequal treatment can be deemed to exist whenever the overall pay of full-time employees is higher than that of part-time employees for the same number of hours worked.

Having determined the existence of a *prima facie* case of discrimination, the Court then went on to deal with the issue of justification. The German government argued that the difference in treatment was justified by the fact that staff council members are not paid in order to ensure their independence. This was also an aim of German social policy. As the Court considered that such an objective was not related to any discrimination on the grounds of sex, it accepted that, if Germany was able to demonstrate that the measures chosen reflected a legitimate aim of its social policy, were appropriate to achieving that aim and were necessary for doing so, then the legislation did not infringe Article 119 EC.

## VII

In the joined Cases C-171/94 and C-172/94 *Merckx* and *Neuhuys* of 7 March this year, the Court had to consider whether the transfer of a dealership in motor vehicles from one undertaking to another can constitute a transfer which falls within the scope of the **directive on transfers of undertakings**, and whether the directive precludes an employee from objecting to the transfer of his/her contract of employment to the transferee. In reply to the first issue, the Court reiterated previous case law in which it had emphasized that the decisive criterion for establishing whether or not a transfer had taken place in the meaning of the directive was whether or not the body in question had retained its economic identity. In determining this issue, a number of factors were relevant, and these included: the type of undertaking or business concerned; whether or not the tangible assets of the business had been transferred; the value of the intangible assets at the time of the transfer; whether or not the majority of the employees of the business had been taken over by the new employer; whether or not the customers had been transferred; and the degree of similarity between the activities performed before and after the transfer and the period, if any, for which these activities had been suspended. In the case, the Court considered that a transfer had taken place within the meaning of the directive, despite the fact that there had been no transfer of tangible assets, the structure and organization of the undertaking had not been preserved and the transferor had definitively ceased trading and gone into liquidation. Similarly, the fact that the majority of the staff had been dismissed upon the transfer of the dealership was not sufficient to bring the transaction outside the scope of the directive; nor was the fact that there was no contractual link between the transferor and the transferee.

Having established that a transfer of undertakings had taken place within the meaning of Article 1 of the directive, the Court went on to consider the extent to which an employee can prevent the transfer of his/her contract or the employment relationship. The Court firstly pointed out that the directive does not oblige the employee to continue his/her employment relationship with the transferee, as such an obligation would jeopardize the fundamental rights of the employee, who must be free to choose his/her employer and cannot be obliged to work for an employer who he/she has not freely chosen. Consequently, if an employee decides not to continue the employment relationship with the transferee, it is up to the Member States to determine the future of the contract of employment or employment relationship. On the other

hand, according to Article 4(2) of the directive, in situations in which there is a substantial change in the working conditions to the detriment of the employee, the employer is to be regarded as having been responsible for the termination of employment. In this respect, a change in the level of remuneration awarded to the employee is to be regarded as a substantial change. As a result, in situations in which the contract of employment is terminated due to the fact that the transfer involves such a change, the employer must be regarded as having been responsible for the termination of employment.

**VIII**

Various decisions have also dealt with Council **Regulation (EEC) No 1408/71 on the application of social security** schemes to employed persons and their families moving within the Community. In *Paletta II* (C-206/94 of 2 May), the Court of Justice recognized that an employer has the right to dispute a medical certificate produced by an employee taken ill abroad while on his/her annual holiday. The case concerned the family Paletta, the members of which had reported ill while on holiday in Italy. The German company refused to pay their wages for the first six weeks following the onset of the sickness as the firm did not consider itself bound by the medical findings in Italy. From the case, it appears that the firm had good reason to doubt the veracity of the medical findings as the Court of Justice considered that, notwithstanding the existence of a medical certificate, an employer may adduce evidence supporting the view that a worker was in fact not ill. In such circumstances, the regulation will not apply and entitlement to the continued payment of wages will be forfeited .

In *Cabanis Issarte* (Case C-308/93 of 30 April), the Court recognized the right of a surviving spouse of a migrant worker to rely on Articles 2 and 3 of Regulation 1408/71 for the purpose of determining the level of contribution relating to a period of voluntary insurance completed under an old-age pension scheme of the Member State in which the worker was employed. The significance of the case lies in the fact that, in previous cases the Court had ruled that members of a migrant worker's family could not rely on the same articles in order to claim, on the grounds of being entitled to treatment equal to that granted to nationals of the host State, a social security benefit provided for by the legislation of that State. In the view of the Court, this resulted from the fact that the benefit in question was granted as a right in personam and not by reason of the beneficiary's status as a member of the worker's family. In this case, the Court departed from its previous case law as, if the plaintiff had been unable to rely on the relevant articles, it would have been impossible for her to enforce her right to equal treatment in relation to the granting of benefit, and the Court considered that this was contrary to the spirit and the purposes of the equal treatment rule. Furthermore, the Court considered that the distinction between rights in personam and derived rights could undermine the uniformity of Community law in so far as the applicability of Community rules depended on national law.

In its judgment in Case C-208 /94 *Posthuma-van Damne* of 1 February, the Court held that national rules which make benefits for the incapacity to work conditional upon the receipt of some income over the year immediately preceding the incapacity, and thereby excluding more women than men, pursued a legitimate social policy aim and were therefore compatible with Community law. Another aspect of interest was the fact that the Court recognized the right of the applicant to rely on Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security on the grounds that a person who failed to earn 'some income' over the year preceding his/her incapacity did not necessarily fall outside the broad concept of the term 'working population' contained in Article 2 of the directive.

## IX

In the field of **public procurement**, the Court has handed down two interesting judgments, one against Germany in Case C-318/94 of 28 March, and the other against Belgium in Case C-87/94 of 25 April. Germany was found guilty of having awarded a contract by negotiated procedure without prior publication of a tender notice. This award procedure may only be used for reasons of extreme urgency brought about by events which could not have been foreseen. The German Government considered that this condition had been fulfilled as the regional authority which was to approve the project had not done so. This had obliged the town of Papenburg to amend the project before the regional authority could give its final approval. Due to the fact that this procedure was so lengthy, the town was unable to follow the usual publication procedures. The Court stated, not surprisingly, that the possibility that an authority which must approve a project might raise objections was something which was foreseeable and, consequently, the situation did not fulfil the conditions for the application of the award procedure.

The Belgian case produced a very significant judgment in the field of public procurement, second in importance to perhaps only the Danish *Storebælt* case (1993 [ECR] I-3353). The Court held that, during the procedure for the award of a large contract relating to buses, by taking into account important supplementary technical information relating to buses after the opening of tenders, and awarding the contract on the basis of this information, the Walloon authorities had failed to fulfil their obligations under the first utilities directive (90/531), which has since been replaced by Directive 93/38.

## X

In Case C-441/93 *Panagis Pafitis* of 12 March, the full Court interpreted Articles 25 and 29 of the Second Council Directive (77/91/EEC) of 13 December 1976 concerning coordination of safeguards required of companies in respect of the formation of public limited liability companies and the maintenance and alteration of their capital. The Court held that the directive was applicable to banks in the form of public limited liability companies and that it precluded national legislation under which the capital of a bank existing in this form is, in exceptional circumstances, increased by an administrative measure without the resolution of a general meeting. In relation to the more technical issue of whether the publication of an offer of subscription in the daily newspapers can constitute information given in writing to the holder of registered shares within the meaning of the directive, the Court found that this was not the case.

## XI

In its Opinion 2/94 of 28 March, the full Court ruled that the EC Treaty, and more precisely Article 235 EC, did not contain the necessary legal basis for the Community's accession to the **European Convention on Human Rights**. The major importance of this Opinion is that it states that, in the event of accession, an amendment to the EC Treaty would firstly be required. This may be discussed during the Intergovernmental Conference but, in the light of this Opinion, it appears unlikely that unanimity among the Member States could be reached within the Council on the issue of accession to the Convention.

# Lever de rideau sur les actions-pilotes Asile et Migration

***Clotilde Marinho***
*Chargée de recherche et responsable du projet, IEAP*

Les actions-pilotes Asile et Migration sont des programmes de formation et d'échange entre fonctionnaires des administrations nationales des Etats membres de l'Union européenne dans le domaine de la migration et de l'asile. Lancées et financées par la Commission européenne, ces actions sont en cours et profitent respectivement à 34 (Migration) et 45 (Asile) stagiaires au total[1].

L'IEAP est heureux de prendre part à la mise en oeuvre de ces programmes, en étroite collaboration avec la Task-force Justice et Affaires intérieures de la Commission européenne. Cet article vise à donner un aperçu des actions-pilotes et à les placer dans la famille de programmes similaires, notamment en tentant une comparaison avec "l'oncle Karolus".

L'idée à l'origine du projet n'est pas neuve. L'on avait déjà lancé auparavant au niveau communautaire des programmes de formation pour l'échange de fonctionnaires dans des administrations équivalentes et ces programmes avaient recueilli un succès considérable. Lors de la conception des programmes de formation actuels, l'on a tenu compte de programmes plus anciens tels que Mattheus[2] et, plus spécialement, Karolus[3]. La Commission européenne n'était donc pas dépourvue d'expérience préalable en concevant ce projet, ni l'IEAP d'ailleurs qui s'est vu confier la réalisation du programme Karolus depuis le tout début.

Les objectifs généraux des programmes sont relativement semblables  renforcer la coopération administrative et la confiance mutuelle entre les administrations nationales en favorisant une meilleure connaissance des organisations homologues et de leurs méthodes de travail, des problèmes et exigences auxquels elles doivent faire face ainsi que la façon dont elles traitent des questions similaires. Les programmes comprennent une partie échange  déjà mentionnée dans une administration qui effectue des tâches analogues à celles de l'administration d'origine du participant, et une partie séminaire-forum de discussion au cours de laquelle les experts peuvent échanger leurs expériences, leurs connaissances et leurs points de vue. Ainsi le décor idéal est planté pour réaliser les ambitieux objectifs des programmes.

Cependant, si les objectifs ultimes de ces actions-pilotes sont les mêmes que ceux de Karolus et qu'il existe de nombreux traits communs entre ces programmes, les actions-pilotes Asile et Migration ne sont en aucun cas de simples reproductions de ce modèle original et suivent une approche très différente, chaque programme ayant sa spécificité propre. Mon intention n'est pas de dresser ici une comparaison exhaustive entre les actions-pilotes et Karolus, étant donné que ces actions n'ont pas encore acquis leur forme définitive. En réalité, à l'heure où j'écris cet article, les actions Asile et Migration en sont encore dans la phase-pilote et pourraient subir d'importantes modifications à l'avenir.

Le suivi dépend de la réussite de cette phase et de l'évaluation qui en est faite par les personnes concernées, à savoir les stagiaires, les personnes de contact dans chaque Etat membre, la Commission européenne et, dans une certaine mesure, l'IEAP.

Néanmoins, je souhaiterais mettre en avant les différences principales, en commençant par un aspect particulièrement frappant: on pourrait dire que les actions-pilotes Asile et Migration ont un caractère à la fois moins ambitieux et plus ambitieux que Karolus.

Le programme Karolus vise à ce que les participants soient pleinement intégrés dans l'administration d'accueil et appliquent la législation communautaire qu'ils sont chargés de mettre en oeuvre dans leur administration d'origine. De toute évidence, cela n'est pas possible dans des domaines qui constituent des aspects sensibles et fondamentaux de la souveraineté

nationale et dans lesquels les résultats de la coopération sont beaucoup moins tangibles que les progrès réalisés dans le domaine du marché intérieur. Karolus couvre un domaine où le stade d'harmonisation est très avancé et il essaie de promouvoir la mise en oeuvre uniforme de règles communes. En revanche, ces actions-pilotes s'aventurent elles sur un terrain où l'harmonisation a encore un long chemin à parcourir. Même dans le cas de l'asile, où l'UE a effectué des avancées plus concrètes et où l'on peut s'attendre à ce que la Convention de Dublin signée il y a longtemps déjà entre en vigueur dans un futur proche, la plupart des actes adoptés ne contiennent qu'un vague engagement de la part des Etats membres qui offrent certes un cadre de référence mais laissent une marge de manoeuvre considérable aux Etats membres en ce qui concerne leur application. De plus, quand des instruments contraignants sont adoptés, on peut se demander si tous les Etats membres ne seraient pas réticents à l'idée d'organiser des échanges axés sur le travail effectif dans les administrations d'accueil dans des domaines qui sont normalement la chasse gardée de l'Etat. La situation concernant les denrées alimentaires ou les produits pharmaceutiques est assez différente de celle de l'immigration et de l'asile, et cet aspect a été pris en considération. D'autre part, les actions Migration et Asile sont également plus ambitieuses dans le sens où l'échange englobe un large éventail d'objectifs: plutôt que de se concentrer surtout sur l'application d'une ou plusieurs directives bien spécifiques, ces actions ont pour but de permettre au stagiaire d'acquérir une vision globale de la politique, de la législation, des procédures, de la jurisprudence, des problèmes et des autorités compétentes au niveau national dans le domaine de l'asile ou de l'immigration.

Alors que Karolus couvre plusieurs domaines relatifs au programme du marché intérieur, les actions Asile et Migration se concentrent exclusivement sur deux domaines d'intérêt commun pour la coopération dans le cadre du troisième pilier du traité de Maastricht: migration et asile[4]. Chacun de ces domaines fait l'objet d'un programme séparé. Cela permet aux participants de se familiariser non seulement avec l'administration d'accueil au sein de laquelle ils ont été placés, mais aussi, en principe, avec toutes les autres administrations, car après les échanges tous les experts impliqués se rencontrent pour un séminaire d'évaluation au cours duquel ils ont l'occasion d'échanger leurs expériences réciproques et de comparer les politiques et procédures de chacun concernant l'administration d'origine et d'accueil.

Des stagiaires des 15 Etats membres participeront aux actions Asile et Migration et chaque Etat membre recevra des participants-stagiaires. La participation de tous les Etats membres constitue une innovation par rapport à Karolus et provient du fait que les exigences en matière d'aptitudes linguistiques sont moindres dans ces projets. Les participants ne sont pas tenus de parler la langue de l'administration d'accueil, en partie parce qu'ils ne doivent pas y travailler; par contre, une langue de travail doit être convenue entre le stagiaire et l'administration d'accueil. S'il est vrai que cela représente une charge plus lourde pour l'administration d'accueil, cela permet cependant aussi de placer les stagiaires dans tous les pays.

Le **but** de ces actions est, en dehors de celui de renforcer la coopération administrative et la confiance mutuelle déjà susmentionné, de dispenser une formation sur les dispositions relatives à l'asile (Convention de Dublin) et à la migration adoptées par l'Union européenne. Pour rester en prise directe sur les problèmes concrets rencontrés sur le terrain, l'action-pilote migration a été scindée en deux sous-programmes axés sur deux domaines sensibles: la migration en provenance de la zone Méditerranéenne et la migration en provenance ou en transit d'Europe centrale et orientale. Ces sous-programmes concernent les Etats membres suivants:

- la migration dans la zone Méditerranéenne: Espagne, France, Grèce, Italie, Portugal;

- la migration en provenance ou en transit d'Europe centrale et orientale: Allemagne, Autriche, Belgique, Danemark, Espagne, France, Finlande, Irlande, Luxembourg, Pays-Bas, Royaume-Uni et Suède.

Le **groupe-cible** des stagiaires se compose de fonctionnaires ou assimilés occupant un poste d'encadrement moyen/supérieur dans une administration publique des Etats membres, qui sont chargés de la mise en oeuvre de la politique dans le domaine de la migration ou de l'asile. Outre leur langue maternelle, les stagiaires doivent pouvoir comprendre l'une des langues de travail du séminaire (français, anglais, allemand) et, pour les visites d'échange, soit la langue de l'Etat membre où ils souhaitent se rendre, soit une langue de travail qui peut être décidée d'un commun accord par le stagiaire et l'administration du pays d'accueil. En principe, chaque Etat membre nomme deux stagiaires qui prendront part à chaque action et une troisième personne, qui est un représentant national, pour participer au séminaire organisé dans le cadre de l'action-pilote Asile.

Ces projets allient l'échange sur le terrain et une analyse théorique approfondie lors d'un séminaire d'évaluation et de formation. L'**échange** permet au stagiaire de se familiariser avec les politiques d'asile et de migration globales ainsi qu'avec les procédures et autorités impliquées. En outre, il donne au stagiaire une vue d'ensemble des tâches et des méthodes de travail utilisées dans l'administration d'accueil, il permet l'établissement de contacts avec des fonctionnaires et d'observer ces derniers sur le terrain. D'autre part, les stagiaires sont encouragés à présenter des informations sur leurs législation et pratiques nationales, sur leurs responsabilités et sur leur situation dans le cadre de l'administration nationale. L'échange a une durée d'une semaine et se fait dans une administration exerçant des tâches similaires à celles de l'administration d'origine. Les deux stagiaires de chaque pays sont affectés au sein de la même administration d'accueil. Cette affectation prend en compte plusieurs facteurs: les préférences exprimées par les participants; les compétences linguistiques; la distance entre le pays d'origine et le pays d'accueil; l'établissement de contacts entre le plus grand nombre de pays possible; la création de nouveaux liens entre les administrations; et la similarité des situations de fait auxquelles ces administrations doivent faire face. C'est pourquoi, les échanges ne sont pas réciproques entre administrations.

Afin d'aider les administrations d'accueil à organiser les échanges et garantir un certain niveau d'harmonisation entre les échanges  ce qui permet dans une certaine mesure de comparer les résultats des échanges  les grandes lignes du contenu et du programme de l'échange sont fournies. Les échanges dans le cadre de l'action Migration peuvent porter sur les sujets suivants:

- la politique nationale en matière de migration, la législation nationale en vigueur et les amendements imminents dans les lois nationales de migration en ce qui concerne les règles d'admission (aux fins de regroupement familial, travail, études, etc.) et d'expulsion;

- l'effet des actions conjointes, des résolutions de l'UE, etc., sur la politique et la législation nationales en matière de migration;

- les procédures de délivrance des permis de séjour, les décisions d'expulsion, les possibilités de recours;

- les mécanismes destinés à lutter contre l'immigration clandestine;

- les autorités nationales compétentes dans ce domaine (que ce soient des structures administratives ou judiciaires) et leurs compétences respectives;

- les problèmes rencontrés actuellement;

- les statistiques, recherche et systèmes d'information utilisés à des fins de migration;

- la jurisprudence.

Les échanges dans le cadre de l'action Asile peuvent porter sur les thèmes suivants:

- la politique nationale en matière d'asile, la législation nationale en vigueur et les amendements imminents dans les lois nationales en matière d'asile;

- l'effet de la Convention de Dublin et des règles de l'UE sur la politique et la législation nationales en matière d'asile;

- les procédures (y compris les procédures de préexamen et accélérées), les exigences et critères pour déterminer le statut des réfugiés, les possibilités de recours;

- les autorités nationales compétentes dans ce domaine (que ce soient des structures administratives ou judiciaires) et leurs compétences respectives;

- les problèmes rencontrés actuellement;

- les mesures légales et pratiques prises pour mettre en oeuvre la Convention de Dublin (y compris tout type de formation dispensée);

- les statistiques, recherche et systèmes d'information utilisés à des fins d'asile;

- la jurisprudence.

Dans tous les cas, au moins 50% du programme d'échange doit être consacré à l'acquisition d'une expérience pratique. A cette fin, outre les exposés, conférences et interviews, le programme prévoit des visites sur le terrain auprès des autorités qui traitent des questions en matière de migration (autorité chargée de délivrer les permis de séjour, l'autorité habilitée à ordonner l'expulsion, etc.) ou en matière d'asile (établissements auxquels sont adressées les demandes d'asile, y compris les centres de candidature aux frontières, les autorités responsables de l'examen des demandes d'asile, l'autorité chargée de garantir les conditions matérielles et sociales). Il est également possible d'inclure une visite au centre de placement provisoire ou auprès d'une autorité judiciaire ou toute autre autorité compétente en matière de recours, et éventuellement la participation à une audience sur une affaire concrète. Ces visites permettent d'avoir des contacts et des discussions avec les fonctionnaires et, si possible, d'observer ces fonctionnaires au travail.

En vue d'assurer le suivi des échanges, deux séminaires sont organisés à l'IEAP respectivement du 17 au 19 juin (séminaire Asile) et du 24 au 28 juin (séminaire Migration). Les langues de travail de ces séminaires sont le français, l'anglais et l'allemand. Ces séminaires donnent aux stagiaires l'occasion de comparer et d'analyser les expériences et résultats de l'échange. Une attention particulière va à la coopération dans le domaine de la Justice et des Affaires intérieures, et plus particulièrement aux efforts relatifs à l'harmonisation des politiques d'asile et de migration dans l'Union européenne. Dans le cas du séminaire Migration, la politique et la législation de migration de Etats membres sont présentées sous un angle comparatif et l'on donne un aperçu des relations de l'UE avec l'Europe centrale et orientale ainsi qu'avec les pays Méditerranéens. Par ailleurs, les stagiaires sont confrontés à un scénario de crise  un exercice de simulation visant à souligner le besoin de coopération dans ces domaines et à développer les capacités et aptitudes des participants à faire face à ce genre de situation. Dans le cadre du séminaire Asile, les stagiaires bénéficient d'une formation sur la Convention de Dublin et de ses mesures d'accompagnement, y compris la discussion d'études de cas pour illustrer les cas possibles à résoudre à la lumière de la Convention de Dublin. Enfin, les besoins de formation sont discutés dans le cadre des deux séminaires et l'on élabore des propositions de formation.

Avant le séminaire, les stagiaires ont préparé un rapport contenant les informations qu'ils ont rassemblées ainsi que les observations et conclusions qu'ils ont dégagées de l'échange. Ce rapport reflète également le jugement de chaque participant quant à la valeur de cette expérience. Sur la base de ces rapports individuels, l'IEAP rédige un rapport final à soumettre à la Commission européenne.

Un cadre organisationnel très détaillé a été mis en place afin d'assurer le bon fonctionnement du projet. L'IEAP s'appuie sur un réseau de contacts dans chaque Etat membre, appelés "Correspondants", qui ont fait preuve d'un grand enthousiasme et n'ont ménagé aucun effort pour remplir la difficile tâche de sélectionner les stagiaires et les administrations d'accueil, de fixer les dates des échanges et d'élaborer les programmes d'échange tout en servant de canaux d'information en général entre l'IEAP et les participants. Enfin, dernier élément mais non des moindres, les coûts de ces échanges sont entièrement couverts par la Commission européenne.

Comme déjà mentionné, les actions Asile et Migration sont toujours en cours, bien que la plupart des échanges soient à présent terminés. Les tableaux 1, 2 et 3 indiquent la planification réelle des échanges. Nous avons reçu de nombreux rapports et les réactions sont positives jusqu'ici. Cependant, avant d'émettre un jugement définitif quant à la faisabilité et l'utilité de ces programmes, nous estimons qu'il est préférable d'attendre de pouvoir disposer de tous les rapports et des résultats des séminaires et discussions avec les Correspondants et la Commission européenne. Nous espérons sincèrement qu'ils nous apporteront un outil efficace pour améliorer les connaissances techniques des participants, élargir leur horizon et leur permettre de prendre conscience de la dimension européenne de leur travail. Ceux d'entre nous qui ont participé aux deux projets et n'ont épargné aucun effort pour en assurer le succès nourrissent de grandes attentes. Nous espérons que les programmes Asile et Migration apporteront une importante contribution au processus d'intégration européenne, processus qui repose sur la confiance mutuelle entre les Etats membres, fortement tributaire de la connaissance et compréhension mutuelles, et qui permet d'abolir les préjugés qui sont la plupart du temps non fondés. Nous souhaitons donc que l'odyssée continue.

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**NOTES**

[1] Il fut décidé initialement que chaque Etat membre désignerait deux stagiaires pour chaque projet. Cependant, dans le cas de l'action-pilote Migration qui est scindée en deux sous-programmes, l'Espagne et la France ont exprimé le souhait de prendre part aux deux sous-programmes et ont dès lors désigné quatre stagiaires.

L'action-pilote Asile comprend deux types de participants: ceux qui participent à la fois à l'échange et au séminaire (deux par Etat membre) et un participant (par Etat membre) qui assume des responsabilités en matière de formation dans sa propre administration et qui assiste au séminaire uniquement.

L'on sait déjà que le nombre de participants impliqués sera légèrement inférieur aux prévisions, quelques pays n'ayant désigné qu'un seul stagiaire.

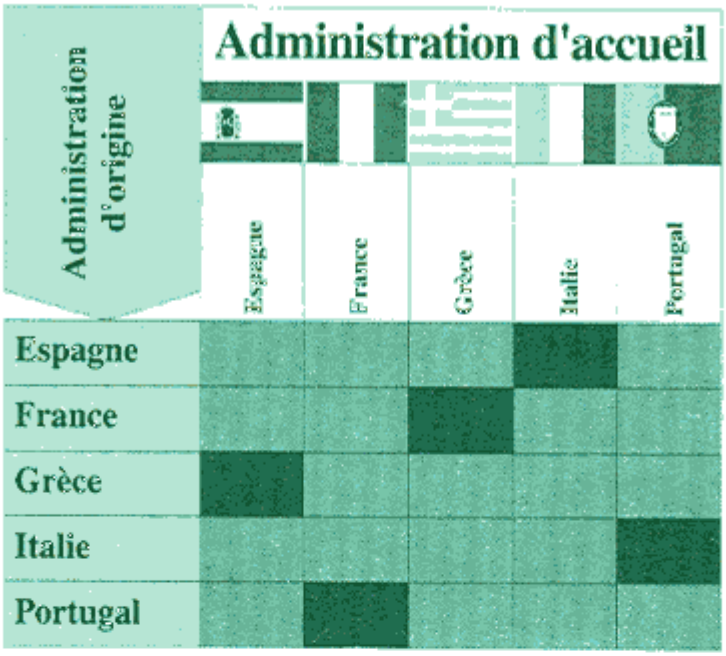
[2] Programme d'action communautaire sur la formation professionnelle des fonctionnaires des douanes, portant sur le traitement interne, l'admission temporaire et le transit. Ce programme inclut également des échanges de fonctionnaires.

[3] Plan d'action communautaire pour l'organisation d'échanges et la formation de fonctionnaires impliqués dans la mise en oeuvre de la législation relative au marché intérieur. Après avoir

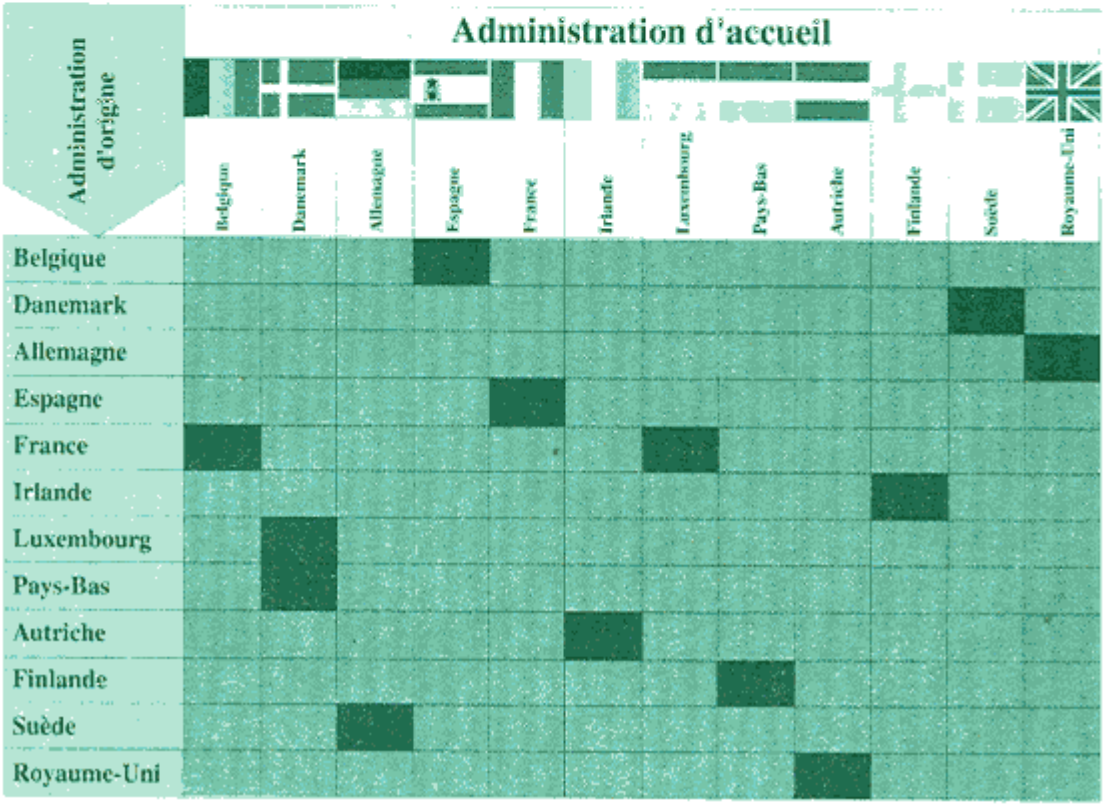
connu une phase-pilote de deux ans, le programme fut établi en 1992 pour une période de cinq ans.

[4] Il y a une troisième action sur les "frontières extérieures" qui est organisée par le Centre des études européennes à Strasbourg.

# Zone Méditerranéenne




# Europe centrale et orientale



# AFFECTATION ASILE

