

E U R O P E A N E C O N O M I C A R E A

M/20/R/023.R-PE 291.017

2 May 2000

Brussels

JOINT PARLIAMENTARY COMMITTEE

REPORT

on

Justice and Home Affairs and the EEA

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I INTRODUCTION

1. Over the last fifty years the European countries have increased cooperation in the field of justice and home affairs at various levels: bilaterally, regionally (within the Council of Europe for example) and globally (e.g. Interpol and the United Nations). Cooperation within the EU is a recent development. Although the EC Treaty of 1957 included as one of its objectives the free movement of persons, it did not deal with border controls, immigration and visa policy. Freedom of movement was seen in purely economic terms and concerned only workers. In the early seventies, the desire to extend this freedom to everyone and the growing importance of certain problems, such as cross-border organised crime, drug trafficking, illegal immigration and terrorism, encouraged EU Member States to increase ad hoc cooperation in the field of justice and home affairs. The Treaties of Maastricht and Amsterdam gave substance to this cooperation.

II RECENT DEVELOPMENTS IN THE EU ON JUSTICE AND HOME AFFAIRS

2. The Maastricht Treaty (1993), added a new dimension to the European Union: cooperation in the field of Justice and Home Affairs (JHA). It entailed dialogue, mutual assistance and cooperation between the police, customs and justice departments of the Member States of the European Union. Thus the field of JHA was added to the structure of the European Union as the so-called third pillar, the first pillar being the European Community and the second pillar covering cooperation in the field of defense and security policy. The new form of cooperation in the area of JHA covered nine areas considered to be of common interest:

- asylum policy
- crossing of external borders
- immigration
- combating drug addiction
- combating international fraud
- judicial cooperation in civil matters
- judicial cooperation in criminal matters
- customs cooperation
- police cooperation.

3. However, the third pillar as constructed by Maastricht gave the Union only a limited role and no real opportunity to control decisions taken by Member States as the cooperation in the field of JHA was intergovernmental in nature.

4. The Treaty of Amsterdam (1999) changed the nature of cooperation in the field of JHA by defining the area of freedom, security and justice in more ambitious and precise terms, and by establishing a better balance between the roles of the various institutions. The aim was to establish the free movement of EU citizens and non-EU

citizens throughout the Union within the next five years, while guaranteeing public security by combating all forms of organised crime:

- trafficking in human beings
- sexual exploitation of children
- vehicle, arms and drug trafficking
- corruption
- fraud
- terrorism.

5. With the Amsterdam Treaty the JHA matters increased in number and were divided into two categories – pillar one (Title IV of the EC Treaty) and pillar three (Title VI of the Union Treaty). The **first** pillar includes: Visas, asylum, immigration (Schengen acquis) and other policies related to the free movement of persons. It also covers measures concerning cooperation in civil matters. These issues can therefore be subject to Community directives, regulations, decisions, recommendations and opinions (and subject to infringements procedures).

6. Police and judicial cooperation in criminal matters continue to fall under the **third** pillar of the EU (intergovernmental cooperation) to which the Treaty of Amsterdam added the:

- prevention and combating of racism and xenophobia.

7. Moreover, the Vienna European Council (1998) stressed the need for a European law-enforcement area, improved cooperation between national and judicial and police authorities, a more effective Europol and an overall strategy on migration, asylum and the reception of refugees. The Cologne European Council (1999) decided to draw up a Charter of fundamental rights of EU citizens by end 2000. The Tampere Summit (1999) devoted solely to JHA, considered that the establishment of an area of freedom, justice and security was as important as the establishment of the single market in its day. The objective of creating an area of freedom, security and justice aims to ensure the free movement of persons whilst guaranteeing their security by combating crime. The area of *freedom* not only means ensuring the free movement of persons, but also aims at protecting fundamental rights. The area of *security* includes combating crime and terrorism and the area of *justice* aims to guarantee European citizens equal access to justice and to promote cooperation between the judicial authorities. The area is to be established within five years (end of 2003), according to the Council and Commission Action Plan adopted at the Vienna European Council (1998).

III DIFFERENCES BETWEEN THE EU AND EFTA COUNTRIES WITH REGARD TO JHA

Title IV of the EC Treaty and Title VI of the EU Treaty and the EEA Agreement

8. The EEA Agreement makes no provisions for cooperation in the area of JHA (i.e. Title IV of the EC Treaty or Title VI of the Union Treaty). Arrangements between the EEA EFTA States and the EU must thus be found beyond the framework of the EEA Agreement if cooperation on any of these issues is to increase.

9. Free movement of persons is part of the EEA Agreement. Free movement of persons in the EEA context was, when the Agreement was signed, synonymous with free movement of workers. The scope has later been extended to include free movement of the self-employed, students, retired workers and persons who can document that they will not pose an economic burden to the host country. The Agreement makes no provisions for incorporating legislation concerning third-country nationals who legally reside in an EU Member State (Title IV of the EC Treaty), as it does not entail the broader sense of the concept of persons as it has been developed in the EU. Even though free movement of persons and JHA are clearly two separate issues in the EEA context, they are closely linked in the EU after the entry into force of the Amsterdam Treaty. Both issues could be seen as having effects on the development of the Internal Market and thus the functioning of the EEA Agreement.

New EC legislation concerning JHA and free movement of persons and its relevance to the EEA Agreement.

10. In December 1999, the Commission adopted a proposal for a Council Directive on the right of family unification. This was the first Commission initiative relating to immigration since the entry into force of the Amsterdam Treaty. The proposal provides a set of rules to offer protection for the family life of third-country nationals, and recognizes a right to family reunification for third-country nationals who reside lawfully in an EU Member States. The proposal has been deemed not EEA relevant as it falls under Title IV of the EC Treaty. The proposal for a Council Directive extending the free movement to provide cross-border services to third-country nationals established within the Community has equally been deemed not EEA relevant. This also falls under Title IV of the EC Treaty.

11. Concerning the proposal for a Directive of the EP and of the Council on the posting of workers who are third-country nationals for the provision of cross-border services on a temporary basis, the Commission has earmarked this as EEA relevant. EEA EFTA States consider in their preliminary comment to the Commission that some aspects of the proposal might be EEA relevant. This proposal could be seen as EEA relevant as it includes the free movement of services, which in practice means that the right to hire a third-country national is given to the company, and not to the person. Thus it would not fall within the provisions of Title IV of the EC Treaty but under the EEA Agreement related to services.

12. The EFTA EEA States will participate in the newly established DAPHNE Programme set up by a Decision of the Council and the European Parliament, to fight violence against women and children. The programme falls under the responsibility of the Directorate General for JHA, but EEA participation is possible, as the EEA Agreement makes provisions for the participation of EEA EFTA States in Community programmes.

Other arrangements beyond the scope of the EEA Agreement between the EFTA countries and the EU in the field of JHA

13. Strengthened cooperation between the EEA EFTA States and the EU on JHA has taken place whilst cooperation in other areas are under negotiation. It should be noted that negotiations are of a bilateral nature. The most extensive arrangement has been reached between the European Council and Norway and Iceland regarding the Schengen cooperation.

Schengen

14. Together with Sweden, Finland and Denmark, Norway and Iceland belong to the Nordic passport union, where the countries abolished their internal border checks. Iceland and Norway have been associated with the development of the Schengen agreements since 19 December 1996. Although they did not have voting rights on the Schengen Executive Committee, they were able to express opinions and formulate proposals. An agreement between Norway, Iceland and the EU was signed on 18 May 1999 in order to extend the association and to include Norway and Iceland to the Schengen area once the Schengen acquis became part of Community law (first pillar). The two EEA EFTA States continue to participate in the drafting of new legal instruments building on the Schengen acquis. While these acts are adopted by the EU Member States alone, they do however apply to Iceland and Norway as well. A single external border has been created, where immigration checks for the Schengen are carried out in accordance with a common set of rules, including rules regarding visas and asylum rights. Negotiations with Norway and Iceland have begun with a view to reaching an agreement paralleling the Dublin Convention on asylum. Agreements are to be reached on criteria and arrangements for determining the state responsible for considering an asylum application lodged in a EU Member State or in Norway or Iceland.

15. Liechtenstein does not belong to the Schengen cooperation. A recently concluded arrangement between the EU and Liechtenstein has found a viable solution on combining the issue of free movement of persons and the special geographic situation of Liechtenstein.

Northern Dimension

16. Turning to other developments in the area of JHA and the EEA EFTA States, it is noted that the Cologne European Council (1999) adopted guidelines for the Northern Dimension. Consolidating security with Norway and Iceland is one objective

particularly mentioned in the guidelines, and moving resolutely against dangers such as that posed by cross-border crime is also being pursued.

EMCDDA

17. In the area of combating drugs, Norway, following its 1995 application, was authorised in 1997, to take part in the anti-drug activities of the European Monitoring Centre for Drugs and Drugs Addiction (EMCDDA). Iceland began talks with the EU on a possible association.

Customs

18. In the area of customs duties, and agreement on cooperation was concluded 10 April 1997 at ambassadorial level between the European Community and Norway. It is noted that customs, although part of the Schengen acquis, is not part of the Schengen arrangement for Norway and Iceland (which in practice means that e.g. Norwegian police may perform random checks for drugs at Norwegian borders).

Europol

19. Unofficial talks with all three EEA EFTA States have been taking place for some time concerning Europol. There is as yet no cooperation arrangement between Europol and the EFTA States. Under the Amsterdam Treaty Europol is to evolve into the chief instrument for coordination between police forces in the EU.

The Lugano convention

20. In the field of judicial cooperation in civil matters, the idea of a European judicial area has been developed. The Amsterdam Treaty links judicial cooperation in civil matters to free movement of persons. The main objective of a European legal area is to simplify the legal environment, which exists in the EU. The Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters (the "Lugano Convention") was signed in Lugano on 16 September 1988; it applies between Iceland, Norway and Switzerland on the EFTA side and the EU Member States. The Lugano Convention is a parallel convention to the Brussels Convention which applies among the EU Member States on the same matter in order to ensure the "free movement of judgements" in Europe. However, as a result of the entry into force of the Amsterdam Treaty and the fact that the field of judicial cooperation is now a pillar one issue, the Commission has adopted an EU regulation that would supersede the Brussels Convention. The work of modernising the Brussels Convention and thus the Lugano Convention has therefore been frozen for the time being. The work on the modernisation of the Lugano Convention on the "free movement of judgements" can only resume after the EU has concluded its internal procedures on the Brussels Convention.

IV HOW COULD JHA AFFECT THE INTERNAL MARKET?

21. One of the prime objectives of the European Community was to create a large, single European economic market. By doing away with the frontiers between the Member States a market without internal frontiers was to be achieved. In that area, goods, capital and services were to move freely without obstacles. However, the free movement of persons gave rise to different problems compared to those caused by the free movement of goods: e.g. problems of the internal security of each Member State and of different rights and legal and administrative practices for citizens. The means to alleviate or remedy the challenges can no longer be found at national level. By dismantling internal frontiers between Member States, the respective countries were deprived of an important national instrument for controlling and filtering the entry and identity of persons within their territory.

22. Thus the increased cooperation in the field of JHA can be seen to complement and strengthen the Internal Market by dealing with the challenges the extended free movement of persons entail. By increasing the cooperation also in judicial cooperation on civil matters, the free movement of persons is encouraged. Mobility in Europe is low and many obstacles still remain for the ordinary citizens. The enhanced cooperation in this field will deal with judicial civil and commercial matters, including personal issues like divorce, property settlements and insolvency procedures. Measures are taken to facilitate mobility by dismantling existing obstacles.

23. By increasing mobility, the functioning of the labour market might be improved and bottle-necks might be easier to remedy. Thus the internal market may function smoother and become more competitive. It is recalled that there is one common EEA labour market and that measures taken in this field might influence the Internal Market and the functioning of the EEA Agreement.

V POSSIBLE IMPACTS ON THE EEA

24. The EEA Agreement has been successful in terms of safeguarding equal access to the internal market. The pace of integration and the accelerated rate of decision making in the last few years has as its main objective to ensure legal homogeneity in the EEA and to make sure that EEA EFTA businesses and citizens are treated on an equal basis.

25. The EEA Agreement has not been expanded to include new legislation in JHA field, but some EEA EFTA States seek their own cooperation with the EU in some of these areas. There is a risk of a legal gap between EU and EEA legislation in the field of free movement of persons and judicial cooperation in civil matters (pillar one issues). The EU citizens of the internal market might enjoy more comprehensive rights than their counterparts in the EEA EFTA States, i.e. in access to justice and judicial civil matters. EU citizens might find it easier to move within the EU15 compared to the whole EEA area. Discrepancies could especially arise with regard to non-EEA nationals who legally reside in the EU. In many EU Member States, the number of legally

residing third-country nationals is significant. With the new proposals for legislation in the EU, a non-EU national legally residing in one EU country might move to another EU country and enjoy the same rights, but not to an EEA EFTA State. As a result the common EEA labour market could be distorted.

26. The provisions of the EEA Agreement and the free movement of persons are clear. However, it may appear that in the area of freedom, justice and security there seems to be a grey zone if JHA is seen as an extension or follow-up to the more comprehensive concept of free movement of persons, which is wider than the concept of worker on which the EEA Agreement was founded. Thus there might be a discontinuation of the homogeneity of the EEA labour market and the Internal Market, if EU citizens and non-EU citizens may move more freely with fewer restrictions and enjoying rights to which they are not entitled to in the EEA EFTA States.

27. It is furthermore noted that legislation in the area of freedom, justice and security will apply to all new member states of the EU (although transition periods might be negotiated). In an enlarged internal market, existing legal gaps between the EU 15 and the EEA EFTA States would only be reinforced.

28. In the case of Schengen, a comprehensive agreement between the EU and Norway and Iceland, new structures were found for cooperation. It should be noted that this agreement could be seen as special case due to the well-established Nordic passport Union, and might not have seen the light of day otherwise. The procedures for decision-making and decision-shaping are different than those that apply for transposing EU legislation into EEA legislation.

29. With the increased focus on “mainstreaming” of one Community policy into all other Community policies and the new comprehensive strategy for the Internal Market, community policies are more closely linked or “blurred” than ever. Ultimately, the intertwined policies aim to make the EU’s Internal Market more competitive. Measures taken in the fields of JHA and free movement originate from various DGs of the Commission – JHA, Employment and Social Affairs and Internal Market, and have different legal basis in the Treaties. This has in practice little effect for the EU Member States. The EEA Agreement could be seen to incorporate some legal acts in one “mainstreamed” policy area, whilst omitting others. The Agreement might appear fragmented in the area of free movement of persons if it is seen in the JHA context.

VI FUTURE DEVELOPMENTS

30. If the creation of a European area of freedom, justice and security emerges on schedule in 2003, it may be seen as complementary to the good functioning of the internal market. In its efforts to facilitate and regulate the free movement of goods, capital and services, the focus is today on the free movement of persons in the broadest sense of the term. Thus the European Community has been given powers to legislate in many new areas, where as other areas of cooperation such as increased police cooperation still remain within the third pillar. However, with new technology more and

more information is exchanged across Europe and the setting up of several European databases give also this kind of cooperation a strongly coherent profile.

31. The EU Member States are currently engaged in a new Intergovernmental Conference, to prepare the Community for the forthcoming enlargement. A Treaty of Nice is expected to be signed in December 2000. A Charter of Fundamental Rights is also being elaborated. It is premature to predict how the Charter may affect the new Treaty and if new areas under the area of JHA will be part of the revised Treaty. However, in the future more areas under the umbrella of JHA might be transferred to pillar one of the European Community, thus meaning that arrangements under pillar three could have to be renegotiated.

32. The Internal Market is drawing to completion. One could argue that in the single European market, Member States have realised that citizens no longer only have roots; they have feet as well, and move more freely and frequently within the Internal Market. Thus new measures and legislation at EU level come into force. In order to ensure continued homogeneity in the Internal Market and the common EEA labour market, the EEA EFTA States might be faced with the necessity to find ways of expanding the cooperation with the EU in the area of freedom, justice and security.

RESOLUTION

On Justice and Home Affairs and the EEA

The Joint Parliamentary Committee of the European Economic Area:

- A. having regard to the EEA Agreement (OJ No L 001, 03/01/1994, pp. 3-36), which provides for no cooperation in the area of justice and home affairs other than that relating to free movement of persons,
- B. whereas strengthened cooperation between the EU and the EFTA States in the area of justice and home affairs takes place on the basis of bilateral agreements with particular EFTA States,
- C. having regard to the *Northern Dimension* guidelines adopted by the European Council in the course of its 4-5 June 1999 Cologne meeting,
- D. whereas important aspects of the area of justice and home affairs have been brought under Community responsibility with the entry into force of the Treaty of Amsterdam,
- E. having regard to the Schengen *acquis*, consisting of the agreements signed in Schengen on free cross-border movement in Europe (1985 and 1990), which provides the basis for the removal of internal borders, police cooperation, short-term residence by nationals of third-party states and the establishment of a uniform policy on visas in the Schengen States,
- F. having regard to the Protocol on incorporating the Schengen *acquis* into the European Union framework,
- G. having regard to the need, in the context of cross-border organised criminal activity and terrorism, high numbers of asylum seekers, refugees from civil wars and emigrants, progressively to establish an area of freedom, security and the rule of law, and to the inadequacy of existing agreement with the EFTA States,
 - 1. Recognises the need to continuously adapt agreements between the EEA EFTA States and the EU to the developments within the EU in justice and home affairs. The objective of these adaptations is to prevent the creation of barriers of free movement of persons in the EEA which could easily be unintended consequences of this development;
 - 2. Calls on the EEA EFTA States to consider carefully the new Commission proposals for legislation on third country nationals who are legally residing in the EU and the fact that they will not enjoy the same rights in the EEA EFTA States as in the EU States when these proposals are adopted and the distortion it could have on the common EEA labour market;

3. Welcomes the new agreement of 18 May 1999 between the European Council and Norway and Iceland on the association of Norway and Iceland with the implementation, application and development of the Schengen *acquis*;
4. Recognises the need to involve the European Parliament in the joint committee provided for in the agreement between the European Council and Norway and Iceland;
5. Welcomes the new arrangements with Liechtenstein in the area of freedom of movement;
6. Welcomes cooperation with Norway in the area of measures to combat drugs, and the possible association of Iceland;
7. Welcomes the review of the Brussels and Lugano agreements on judicial cooperation, but notes that the area of cooperation on jurisdiction in civil matters fall under the EC Treaty with the entry into force of the Treaty of Amsterdam;
8. Welcomes the intention to begin preparations and negotiations with Norway and Iceland on an agreement paralleling the Dublin Convention;
9. Welcomes the agreement on customs cooperation concluded at ambassadorial level between the European Community and Norway on 10 April 1997;
10. Recognises the need to work towards cooperation between Europol and the EFTA States;
11. Calls on the EEA EFTA States to closely monitor all initiatives taken by the EU in the field of justice and home affairs and to assess the impact on the EEA Agreement.