

Justice and Home Affairs in the EU

Liberty and Security Issues after Enlargement

Edited by Joanna Apap

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*Head of Unit and Research Fellow on
Justice and Home Affairs,
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Preface

This book analyses the main difficulties facing the European Union (EU) and the candidate countries of Central and Eastern Europe in the area of Justice and Home Affairs on the eve of enlargement. It represents a detailed compendium of constructive policy recommendations in the principal areas of policy, which we hope will be of interest to a very wide audience – policy-makers, scholars and the practitioners of Justice and Home Affairs cooperation in the Member States and in the EU Institutions. The policy recommendations have been framed on the basis of 21 chapters which reflect both the richness and depth of the debate on sensitive issues of security, liberty and justice. The book's over-arching theme is to raise the question whether a desirable balance has been struck between security, liberty and justice in the EU.

The different chapters contain contributions by leading analysts and practitioners who represent the views of both insiders and outsiders in the policy process. Their contributions have been grouped under three main headings, which are preceded by an overview of the progress and obstacles in the area of Justice and Home Affairs: The first focuses on what should be the fundamentals of Justice and Home Affairs policies in a post-enlargement EU. The second, 'Scenarios for crime, law and justice in an enlarged European Union', and the third, 'Towards an immigration and asylum policy for Europe', explores in great depth how policy-makers in the twin fields of criminal justice cooperation and the creation of a common immigration and asylum policy have gone about trying to meet the Tampere targets (as modified somewhat by subsequent European summits).

Close attention is given throughout the book to the difficulties faced by the EU in developing legislative and institutional systems that can be regarded as both effective in security terms while at the same time guaranteeing adequate protection of civil liberties and fundamental rights. At a minimum, we hope that the tensions between the goals of freedom, security and justice have been highlighted. The book tries to be innovative in analysing these elements holistically.

In the concluding chapter a practical set of recommendations in each of the following five areas is presented: Consequences of enlargement on Justice and Home Affairs; Fundamentals of EU Justice and Home Affairs

Policy post-enlargement; Scenarios of crime, law and justice in an enlarged EU; Towards an immigration and asylum policy for Europe; and future of Justice and Home Affairs policies and processes. These were the five key themes of the conference run jointly by the Academy of European Law in Trier and the Centre for European Policy Studies (CEPS) in Brussels from 4–6 July in Trier, which provided the inspiration for this book.

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1. Progress and Obstacles in the Area of Justice and Home Affairs in an Enlarging Europe: An Overview

Joanna Apap and Sergio Carrera

1.1 INTRODUCTION

Justice and Home Affairs (JHA) has been the most dynamic policy domain in the European Union (EU) since the Treaty of Amsterdam came into force on 1 May 1999. The policies grouped under the heading of JHA are numerous, as well as diverse. They are also characterised as being the most difficult and 'sensitive' areas for the EU because of the great divide between elites in Member States, European Institutions and large populations throughout the EU. In the Amsterdam Treaty, these areas were grouped together under the new Heading IV of the European Community Treaties (TEC) and enshrined under three dimensions: Freedom, Security and Justice (FSJ) and judicial cooperation in penal matters – the vestiges of the old third pillar which is found under Heading VI of the Treaty on European Union (TEU). The EU adopted an ambitious work programme at the Tampere European Council of 15–16 October 1999, which aimed at crystallising a proper balance between freedom, security and justice. It also outlined a timetable – the Tampere scoreboard – which set objectives as well as deadlines and gave structure to the agenda in this area.

This introductory chapter assesses the achievements made so far in the objectives set by the Amsterdam Treaty and the Tampere European Council. Some policy areas have experienced a greater degree of development or convergence than others. We will also evaluate the reasons why certain policies have not achieved the expected outcome, as well as the practical consequences of existing frictions and strains between Member States.

1.2 TO WHAT EXTENT HAS CONVERGENCE BEEN ACHIEVED IN THE JHA AREA?

This section analyses the key measures for achievements in the Area of Freedom, Security and Justice (AFSJ), and their development so far based on the Commission's biannual update of the scoreboard to review progress on the creation of an AFSJ in the EU, during the first half of 2003.

1.2.1 Immigration

Based on the Amsterdam Treaty, the policy orientations established in the Tampere European Council of 15–16 October 1999 and the Seville Conclusions of 21–22 June 2002, the Commission has formulated the main elements needed to create a 'common policy on migration'. In the Laeken European Council in December 2001, the objective to establish a common EU policy in this area was reaffirmed. Thus, since that time the Commission has increased its authority and is becoming a prominent actor. The activity of the Commission to date has been positive and forward-looking. It merits more recognition and greater support than it has so far received. Yet these areas of policy remain governed by the unanimity rule until 1st May 2004 (Art. 67, EC Treaty) and agreement is not easy on many measures, with Member States seeking to preserve as much of their authority as possible. Consensus on the general strategy for dealing with illegal immigrants has not been easy, as was demonstrated by the weak compromise reached at the June 2002 Seville Council. Thus, even though the European Commission has already made proposals in a wide number of areas that provide the first elements for a common legislative framework, the Council has not followed up with sufficient support. This is exemplified by two Commission Communications, on a community immigration policy and on an open method of coordination for the policy. There has not been a concrete response by the Council in relation to either communication, even though their adoption would represent a key step towards the achievement of a 'common immigration policy' at EU level. This raises questions of whether or not national governments are genuinely committed to cooperate in this field.

The June 2002 meeting of the European Council in Seville highlighted the need to speed up the implementation of all aspects of the programme presented at Tampere and to develop a 'common policy on immigration'. It welcomed the comprehensive plan to combat illegal immigration and trafficking of human beings in the EU that was adopted by the Council on 28 February 2002. The plan aimed at defining a common and integrated approach to these issues and identified seven areas where action was

considered necessary.¹ Consequently, a high priority was given to the fight against illegal immigration and the trafficking/smuggling of human beings. Regarding relations with countries of origin, the idea of placing sanctions on them for failing to control illegal immigration was presented as a real option. Thankfully, this proposal to sanction poor countries was not considered practical, because it was recognised as virtually impossible for any non-totalitarian regime to effectively control exit from its territory. It was agreed instead that migration diplomacy (to reach agreements on legal immigration to the EU) and co-development programmes (to reduce migratory pressures) should be actively pursued. The Seville European Council asked for the conclusion of these agreements to be speeded up and for new negotiating mandates to be approved. This has been developed in the Communication from the Commission to the Council and the European Parliament, integrating migration issues in the European Union's relations with third countries, COM(2002)703 final, of 3 December 2002. The Commission is in the process of negotiating several readmission agreements between the European Community and third countries, in which both parties agree to accept the return of illegal migrants into their territory.²

Indeed, an area of increasing concern for the Member States is the prevention and fight against illegal immigration, which is essential to a common asylum policy of the EU. This is a point where the first and third EU pillars come together. A major trend towards convergence at EU level can be seen in this area since the Seville Conclusions were presented in June. Among others, the following legal instruments need special consideration:

- Proposal for a Council Directive on the short-term residence permit issued to those victims of illegal immigration or trafficking in human beings who cooperate with the competent authorities COM(2002)0071 final - CNS(2002)0043, 11 February 2002;
- Council Directive on the mutual recognition of decisions about the expulsion of third-country nationals. The Directive was adopted by the Council on the initiative of the French presidency on 28 May 2001.

¹ These seven areas include: visa policy, the exchange of information, readmission and repatriation policies, the monitoring of borders and measures to take when borders are crossed, Europol and penalties, and the adoption of measures aimed at combating immigration and trafficking in human beings more effectively.

² The first EC Readmission Agreement to enter into force was signed with Hong Kong on 27 November 2002. Agreements with Macao and Sri Lanka were initiated on 30 May 2002 and 18 October 2002 respectively, and are in the process of being ratified. Moreover, the Council has adopted decisions authorising the Commission to negotiate readmission agreements between the EC and Russia, Pakistan, Morocco and Ukraine. Negotiations started in November with Ukraine and informal discussions are continuing with Morocco. Further proposals to negotiate such agreements with Albania, Algeria, China and Turkey were submitted to the Council in October 2002.

The main purpose of the Directive is to ensure that once an individual is expelled by one Member State, s/he becomes a *persona non grata* in the whole Schengen area. Trust in the national administration of other Member States for enforcing a restrictive measure does not seem to pose a problem in this field;

- Communication from the Commission to the Council and the European Parliament on a common policy on illegal immigration COM(2001)0672 final, 15 November 2001;
- Council Decision adopting an action programme for administrative cooperation in the fields of external borders, visas, asylum and immigration (ARGO programme), 2002/463/EC, OJ L 161, 19 June 2003;
- Framework Decision of 19 July 2002 on combating trafficking in human beings, 2002/629/JHA;
- Framework Decision on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence, 2002/946, 28 November 2002; and
- Council Directive defining the facilitation of unauthorised entry, transit and residence, 2002/90, 28 November 2002.³

1.2.2 Third-country nationals

Regarding non-EU citizens or so-called third-country nationals, the Treaty of Amsterdam neither framed a coherent strategy nor a comprehensive approach to them in Articles 61, 62 and 63 TEC. After the first few years of applying these provisions, the European Commission forwarded proposals to the Council for various Directives to integrate these policy issues further. Yet once again, the response by the Council has been insufficient.

Among the legislative agenda, the following legal instruments that pertain to third-country nationals should be highlighted:

- One of the first post-Amsterdam initiatives proposed by the Commission in the area of immigration is the draft Directive on the right to family reunification, submitted to the Council on 1 December 1999. The Commission presented an amended proposal, COM(2002)225 to the Council of Ministers on 2 May 2002, that has been finally adopted by the Council of Ministers of the European Union on 22 September 2003, 2003/86/EC (OJ L 251/12). Although

³ These three last measures have been adopted by the Council on the initiative of France.

this represents an important step, the promise of equal treatment for third-country nationals is still far from achieved;⁴

- In March 2001, the Commission proposed a Directive to the Council concerning the status of resident third-country nationals who are long-term residents to extend their free movement rights, on the basis of Art. 63(4), COM(2001)127 final. The proposed Directive has now been politically agreed upon by the JHA Council on 24 July 2003;
- Council Regulation to extend the provisions of Regulation EEC No. 1408/71 to nationals of third countries who are not already covered by these provisions solely on the grounds of their nationality COM(2003)859, 14 May 2003;
- The Commission proposed a Council Directive on the conditions of entry and residence of third-country nationals for the purpose of studies, vocational training or voluntary service COM(2002)548, 7 October 2002; and
- The Commission's Proposal for a Council Directive, COM(2001)0386 final, of 11 July 2001, on conditions of entry and residence of third-country nationals for the purposes of paid employment and self-employed economic activity is another move forward in the same direction.

The adoption by the Council of some of the Commission's proposals, such as the Proposal for a Council Directive COM(2002)0071 final, of 11 February 2002 (on the short-term residence permit issued to those victims of illegal immigration or trafficking who cooperate with the authorities) and the Proposal for a Council Framework Decision (on combating racism and xenophobia), COM(2001)0664 final, as well as the others mentioned above, would represent a positive step towards the goal of harmonisation.

1.2.3 Asylum

The European Commission proposed a Council Decision for a European Refugee Fund on 14 December 1999. The objective was a framework for 'structural measures' to facilitate the reception and voluntary repatriation of asylum seekers. Emergency aid was also included to help Member States face the financial burden in the event of an unexpected arrival of large numbers of refugees or displaced persons – the first attempt at burden-sharing and common responsibility for refugees by the EU Member States. The proposal

⁴ While the Commission's Explanatory Memorandum for the proposal explains that several provisions in the proposal are based on Community law, it is important to recall that none of these instruments is expressly mentioned in the legal measure itself, with the exception of Regulation 1612/68/EEC (which concerns the abolition of reverse discrimination between member state nationals and EU citizens who are using their freedom of movement).