


The area of freedom, justice and security

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The area of freedom, justice and security

The European Common Market was established to permit the free movement of goods, persons, services and capital through the abolition of internal borders. An Economic Community was gradually formed, but, in the fields of security, policing and justice, Member States continued to work independently. Accordingly, the need arose for cooperation at European level in order to protect citizens and safeguard their freedoms. Within the European Union, Member States would have to break down barriers and ignore disparities between them with regard to internal security, the fight against crime, and the legal certainty of both people and money moving from one country to another. Vis-à-vis the rest of the world, the Union would have to protect its citizens against non-member countries by developing a common asylum and immigration policy, in addition to the existing customs union.

Viable solutions were pragmatically sought by developing intergovernmental cooperation in these fields of national sovereignty, before adopting a more global approach within an increasingly Community-oriented context.

Police cooperation, an absolute necessity in the fight against terrorism and drug abuse, began in 1976 with the establishment of the Trevi Group, a working party consisting of the Member States' senior police officials and Justice and Home Affairs Ministers, which later had its remit extended to cover terrorism, the exchange of information and organised crime.

Judicial cooperation was enshrined in Article 220 of the Treaty of Rome establishing the European Economic Community, essentially in matters of civil law for the protection of persons and businesses. This led to the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters. No provision was made for cooperation in criminal matters. Accordingly, in December 1977, the French President, Valéry Giscard d'Estaing, proposed the establishment of a 'European judicial area', starting with a convention on automatic extradition. Two Conventions were then signed on the suppression of terrorism and extradition but could not be implemented throughout the European Community because of the refusal of several Member States to ratify them. In October 1982, the French Minister for Justice, Robert Badinter, proposed the establishment of a European Criminal Court, but this was not approved.

Intergovernmental cooperation in judicial and police matters became better organised with the implementation of the European single market, as laid down by the Single European Act (SEA) adopted on 17 and 28 February 1986, which aimed to establish 'an area without internal frontiers' before 31 December 1992. The abolition of border checks posed the problem of the movement of persons and called for new measures to be drawn up in the fields of security and justice.

The SEA institutionalised political cooperation in a purely intergovernmental context, essentially on matters of foreign policy, but it was also used to give a new impetus to police and judicial cooperation. The Trevi Group's workload increased, and an anti-terrorism action plan was adopted in Dublin in 1990. A judicial cooperation group was created in 1986, and seven Agreements and Conventions were signed between 1987 and 1991, including those on extradition, the transfer of proceedings in criminal matters, the enforcement of foreign criminal sentences and the recovery of maintenance claims. However, these did not enter into force as they were not ratified by all Member States. The Dublin Convention of June 1990, on determining the State responsible for examining applications for asylum, did not enter into force until 1 September 1997 because of the delay in the ratification procedure.

The convention on 'external borders', drafted in 1991, which was intended to define the limits of the European Community's land, air and maritime external borders, to specify the nature of the border checks that would be carried out and to establish rules on entry visas applicable to all Member States could not be signed as Spain raised the issue of the territorial status of Gibraltar.

The difficulties of working together as a Community of 12 led some Member States to forge ahead without waiting for the others. The German Chancellor, Helmut Kohl, and the French President, François

Mitterrand, took the initiative with the Franco-German Agreement of 13 July 1984 gradually to eliminate border controls between France and Germany. The Benelux countries expressed their desire to join them and this led the Commission to propose that the Franco-German Agreement be extended to cover the whole of the Community, but the Council refused. Accordingly, a five-way agreement was signed in Schengen, Luxembourg, on 15 June 1985. This created the 'Schengen area', which was progressively enlarged to include the other Member States, excluding the United Kingdom and Ireland, and allowed progress to be made in the fields of police and judicial cooperation, leading to the free movement of persons which came into effect in March 1995.

As the Schengen system began to take shape, an important step forward was taken with a move from simple police and judicial cooperation to the introduction of Community authority in these fields.

Germany advocated this new approach during the European Council meeting of 28 and 29 June 1991. Following the collapse of the Communist regimes in Eastern Europe, the increase in the number of asylum seekers created a problem for Germany which, alone, received half of the refugees accommodated in the Community. The Ministers of the "Länder, obliged to assume responsibility for the refugees, exerted pressure on the Federal Government and called for the Community to take responsibility for the situation. Accordingly, Chancellor Kohl proposed, on the one hand, that the issues of asylum and immigration be considered with a view to this matter becoming a Community responsibility and, on the other, that the first steps be taken towards the establishment of a European police office, in particular to combat drug trafficking.

Whilst the Intergovernmental Conference (IGC) was debating the future of the European Union, the Council's working parties were considering these two issues. The Trevi Group considered the issues surrounding the establishment of a European police office, whilst the Immigration and Asylum Group went beyond the issue of the free movement of persons and envisaged cooperation in the field of justice and home affairs.

However, moving from national legal systems, each steeped in its country's own cultural traditions and forming an integral element of its national sovereignty, towards a Community-based system had to be a gradual process, as was made apparent by the Maastricht Treaty and, later, the Treaty of Amsterdam.

The Treaty on European Union, signed in Maastricht on 7 February 1992, included judicial and police proceedings in its competences as 'matters of mutual interest', but, as with the common foreign and security policy (CFSP), it provided for an essentially intergovernmental decision-making procedure. The third 'pillar' of the European Union, justice and home affairs (JHA), grouped together and organised the various forms of cooperation that had been developing piecemeal, henceforth considered to be of mutual interest, although they would still be subject to the rule of unanimity. With regard to police cooperation, the Maastricht European Council limited itself to establishing a 'Drugs Unit' within the Trevi Group, in anticipation of the creation of Europol.

A decisive step forward was made with the revision of the Maastricht Treaty by the Treaty of Amsterdam on 2 October 1997, as the most important elements of the third Community pillar (except criminal law) were transferred to the first pillar, and an 'area of freedom, security and justice' was established, irrespective of the institutional structure to which it belonged (first or third pillar). A comprehensive approach was therefore adopted towards the issues surrounding the movement of persons. Safeguarding internal security became the primary objective of the European Union. This was itself a new legal concept, which again called into question the conventional notion of national sovereignty. The complexity of the provisions laid down for the institutions arose as Member States searched for an acceptable balance between the Community and the intergovernmental method. This was made all the more difficult as not only were the objectives already defined but deadlines for the completion of the task had also been set.

The first 'European Community' pillar received additional competences (visa policy, asylum, immigration and judicial cooperation on civil matters), which had hitherto fallen under the third pillar of intergovernmental cooperation. However, these matters were not placed entirely within the Community

domain, as Member States wanted to retain control of the decision-making procedure by circumscribing the role given to the Commission and, in particular, at the request of Germany and Austria, by requiring unanimity in the Council with regard to refugees and nationals from non-member countries seeking entry and residence within the Union.

The third pillar was henceforth restricted to police and judicial cooperation in criminal matters which, it was decided, could not be transferred to the Community domain, but could not be left either under intergovernmental management as this had proven to be insufficient. Accordingly, the determination to make headway was demonstrated by the establishment of clear objectives requiring coordinated action on the part of Member States. The Treaty took account of the Europol Convention, due to enter into force, and established the general framework for police cooperation. Judicial cooperation on criminal matters was more clearly defined. Provisions were laid down for the adoption of common elements in Member States' legislation on organised crime, terrorism and drug trafficking. The legislative decision-making procedure on police and criminal matters was no longer strictly intergovernmental. The Council of Ministers continued to act by unanimity, it is true, but the Commission secured the right of initiative, equal to that of Member States, and the European Parliament would henceforth be consulted.

The area of freedom, security and justice defined by the Treaty of Amsterdam represented a major step forward, but the territory it covered was not exactly the same as that of the European Union.

The Schengen Agreement, an intergovernmental convention, was incorporated into the Treaty on European Union, with its provisions being allocated between the first pillar, the European Community, and the third, justice and home affairs (JHA). However, the United Kingdom and Ireland — already having their own agreement, the 'common travel area' — refused to become signatory countries to the Schengen Agreement so that they might retain their border controls. A Protocol annexed to the Treaty of Amsterdam granted them the right to retain their border controls and to opt out of the new Community policies forming part of the first pillar of the Union (on visas, asylum, immigration and other policies relating to the free movement of persons). They are not required to implement any Community policies in this field unless they wish to do so. It was clearly stated, however, that any future participation of the two countries in these Community policies would not grant them the right to veto. Denmark, which joined the Schengen area and abolished its own border checks, accepted the inclusion of the agreement within the third intergovernmental pillar, but, in order to retain its sovereignty, refused to participate in the Community policies of the first pillar, this being set down in a Protocol to the Treaty.

On the other hand, the Schengen area was enlarged to include two countries which did not form part of the European Union. On 19 December 1996, in order to preserve the Nordic Passport Union, Norway and Iceland signed an association agreement that was included in the Treaty of Amsterdam.

With regard to the future Member States of the European Union, in order to avoid an increase in the number of countries with special status, the Treaty laid down that the Schengen *acquis* must be accepted in its entirety by all countries applying for accession to the Union.

The establishment of the area of freedom, security and justice was the result of genuine political will. At the October 1998 European Council, the Spanish Prime Minister, José María Aznar, proposed the convening of a European Council devoted primarily to internal security. In preparation for this, the European Commission submitted proposals, the European Parliament adopted resolutions, and the December 1998 Vienna European Council established an action plan listing the measures to be adopted within two to five years of the entry into force of the Treaty of Amsterdam. The Tampere (Finland) European Council, held on 15 and 16 October 1999, made internal security one of the Union's main priorities, as had been the customs union, the common agricultural policy and economic and monetary union. It determined the 'full and immediate' implementation the Treaty of Amsterdam. To that end, it conferred a more prominent role on the Commission, instructing it to draw up legislative proposals and to review progress by preparing a schedule and compiling a 'scoreboard' every six months.

The Tampere European Council undertook to 'develop a common European policy on asylum and

immigration' and to establish a genuine European area of justice, by ensuring mutual recognition of civil and criminal legislation and easier access to justice for European citizens, by stepping up the Union-wide fight against crime through Europol and the establishment of Eurojust (an organisation comprising judges and law enforcement officers responsible for coordinating investigations into organised crime) and by harmonising the criminal law of the Member States.