Justice and Home Affairs in a Wider Europe: The Dynamics of Inclusion and Exclusion

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Introduction

The development of justice and home affairs as a new policy-making arm of the European Union has been one of the most relevant and also astonishing developments of the 1990s. At the end of the 1980s the Member States had only set up some badly coordinated intergovernmental groups with no decision-making powers and even the Schengen system was still in its infancy. By the end of 1998 the Schengen system had built up a legal *acquis* of over 3000 pages, the EU had adopted several important conventions and over one hundred non-binding and binding texts. With the entry into force of the Treaty of Amsterdam on 1 May 1999 the development of EU policies in justice and home affairs were transformed into a fundamental Treaty objective, Article 2 TEU providing for the maintenance and the development of the European Union as an ‘area of freedom, security and justice’. This new integration objective was at the same time strengthened through the introduction of a range of new policy objectives, the communitarisation of large parts of the former ‘Third Pillar’, the incorporation of the Schengen *acquis*, new and more appropriate legal instruments and improved judicial control. This was followed by the finalisation of new and more effective working structures within the Council of the European Union, the decision of the Commission to set up a new Directorate-general for justice and home affairs and—most importantly—the special European Council in Tampere in October 1999 which provided for a significant set of new guidelines for the areas of asylum and migration, judicial cooperation and the fight against cross-border crime.

All this had made EU justice and home affairs one of the most rapidly growing EU policy-making areas, based on specific institutional structures and decision-making procedures and a specific mixture of intergovernmental and supranational features which justify its consideration as a special ‘regime’ within the context of the European Union. Although primarily focussed on questions linked to ‘internal security’ (in the broadest possible sense) this EU regime in justice
and home affairs has also major implications for the ‘outside’, especially for those European
countries not fully or partially participating in it and for non-EU nationals who want to work and
live within the EU or only want to cross its external borders. It has in fact already generated a
dynamic of inclusion and exclusion which is likely to have a major impact on developments in
the wider Europe for many years to come. With the rapid development of the EU’s justice and
home affairs regime this dynamic is likely to increase, creating new opportunities for integration
but also new risks of division and exclusion.

In the following we will first analyse the rationale of the Union’s new ‘area of freedom,
security and justice’ and then look more in detail at the dynamics of inclusion and exclusion it
is generating in the wider Europe, focussing on the inclusion and exclusion of EU Member
States, European third-countries and third-country nationals.

**The rationale of the ‘area of freedom, security and justice’**

The inclusion of the aim of maintaining and developing the Union as an ‘area of freedom,
security and justice’ (hereinafter AFSJ) among the basic Treaty objectives of Article 2 TEU is
one of the most remarkable innovations of the Amsterdam Treaty. Yet as regards the substance
of this objective Article 2 only refers rather vaguely to the assurance of the free movement of
persons and ‘appropriate measures’ with respect to external border controls, asylum,
immigration and the prevention and combating of crime. Fortunately the Commission and the
Member States felt that further clarification on the nature and rationale of the AFSJ was needed.
So far there have been two texts which—although far from being precise and comprehensive—
have shed some further light on what the AFSJ is intended to be. One is the ‘Action Plan on how
best to implement the provisions of the Treaty of Amsterdam on an Area of Freedom, Security
and Justice’\textsuperscript{1} of December 1998 which was adopted on the basis of a Commission Communication\textsuperscript{2}. The other is the text of the ‘Presidency Conclusions’ of the Tampere European Council.\textsuperscript{3}

For the purposes of establishing the inclusion/exclusion potential of the AFSJ the key concepts are ‘freedom’ and ‘security’ and their interrelationship. As regards the concept of ‘freedom’ the Action Plan emphasises that the new Treaty opens the way to giving freedom ‘a meaning beyond free movement of persons across internal borders’ and that includes the ‘freedom to live in a law-abiding environment’ protected by effective action of public authorities at the national and European level.\textsuperscript{4} The Tampere Conclusions continue this line of thought by describing it as the ‘challenge’ of the Treaty of Amsterdam ‘to ensure that freedom, which includes the right to move freely throughout the Union, can be enjoyed in conditions of security and justice accessible to all’, a project of which it said that it corresponds to ‘frequently expressed concerns of citizens’.\textsuperscript{5} The main emphasis here is obviously on a concept of freedom based on internal security provided through effective law enforcement and access to justice. This is very much in line with the new EU Treaty objective of Article 29 TEU that the Union shall ‘provide citizens with a high level of safety’ within the AFSJ. The underlying idea of guaranteeing citizens’ freedom through a high level of safety has clearly major implications: It implies a fundamental distinction between a ‘safe(r) inside’ and an ‘unsafe(r) outside’ with the EU’s frontiers as the dividing line and law enforcement as the key instrument to maintain and

\textsuperscript{1} OJ No. C 19/1 of 23.1.1999.
\textsuperscript{2} COM (1998) 459.
\textsuperscript{3} Council document SN 200/99.
\textsuperscript{4} Vienna Action Plan, paragraph 6.
\textsuperscript{5} Tampere Presidency Conclusions, paragraph 2.
further enhance this distinction. The reference to European citizens’ ‘concerns’ adds a powerful claim to legitimacy to this distinction and its full implementation. The Tampere Conclusions develop this even further—and with a slightly populist undertone—by stating that ‘people have the right to expect the Union to address the threat to their freedom and legal rights posed by serious crime’. The dynamic of exclusion which such an approach and its claim to supreme legitimacy can generate is quite obvious: People from the ‘outside’ which actually or potentially endanger the ‘safe inside’ must be kept outside or brought under appropriate control and enforcement action. ‘Fortress Europe’ is looming at the horizon.

Yet there are two factors which mitigate this powerful link between freedom and internal security. One is the continuing reluctance of some Member States to relinquish control over national internal security instruments. The Vienna Action Plan explicitly states that the Amsterdam Treaty, —although aimed at developing common action in the fields of police and criminal justice cooperation and offering enhanced security to Union citizens—does not pursue the intention to create a ‘European security area’ in the sense of uniform detection and investigation procedures. The Action Plan also—rather restrictively—provides that the Member States responsibilities to maintain law and order should not be affected by the new provisions. This means that a ‘fortress Europe’ may well emerge, with higher and more homogeneous external walls, but internally it will continue to be a system of interlocking but separate national security zones. The exclusive effects of the ‘fortress’ are therefore likely to continue to vary from one zone to the other in spite of the common rationale.

The second factor is that during the last few years the EU and its Schengen sub-system have been exposed to a barrage of criticism precisely because of the perception by third

[6 Tampere Presidency Conclusions, paragraph 6.]
[7 Vienna Action Plan, paragraph 10.]
countries (especially applicant countries), the UNHCR and many NGOs and human rights groups that the Union has been drifting more and more towards a ‘fortress’ rationale. Some of these concerns have not been lost on the Commission, the European Parliament and also some of the EU governments. As a result the Tampere Conclusions include a statement to the effect that this freedom (enjoyed by the EU citizens within the AFSJ) should ‘not be regarded as the exclusive preserve of the Union’s own citizens’ and that ‘it would be in contradiction with Europe’s traditions to deny such freedom to those whose circumstances lead them to justifiably to seek access to our territory’ (note the use of the singular instead of ‘territories’!).\(^8\) This—together with later explicit references to the Union’s commitments under the Geneva Convention—is clearly intended to alleviate the worst fears about the exclusive effects of the AFSJ and it marks, indeed, a quite significant change in tone in comparison with earlier statements. Yet the ‘circumstances’ leading third-country nationals to ‘justifiably’ to seek access to the Union can, of course, be defined in many different ways, and the ‘fortress’ rationale reappears quite strongly in the following sentence in which it is said that ‘common policies’ on asylum and immigration will need to take into account ‘the need for a consistent control of external borders’. The tension between a more open concept of ‘freedom’ and the omnipresent emphasis on ‘security’ therefore remains, ultimately, unresolved. This is reflected in the somewhat helpless affirmation of the Tampere Conclusions that the aim is ‘an open and secure European Union’.

As a fundamental treaty objective the AFSJ should, in principle, comprise the whole of the Union, meaning all the members states. Yet the dynamics of inclusion and exclusion generated by an emerging internal security zone based on common standards and mechanisms

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\(^8\) Tampere Presidency Conclusions, paragraph 3.

\(^9\) Tampere Presidency Conclusions, paragraph 4 (emphasis added).
for control and law enforcement have so far found their widest range of applications among the members states themselves. It makes sense, therefore, to look at the inclusion and exclusion of current Member States before passing on to those of non-member states and persons.

**Inclusion and exclusion of Member States**

The massive usage of ‘flexibility’ within the AFSJ is undoubtedly one of the most significant elements of justice and home affairs as a new major policy-making area of the EU. Most of the literature discusses ‘flexibility’ mainly from the point of view of its actual and potential advantages and disadvantages for the European integration process. Yet it can also be seen as an instrument of voluntary or forced inclusion and exclusion of Member States in parts or all of the developing justice and home affairs *acquis*.

The most substantial case of post-Amsterdam ‘flexibility’ is clearly that of the incorporation of the Schengen system into the EC/EU framework. Schengen—one should not be mistaken about that—has led in all but name to the establishment of a common internal security zone of the participating Member States. Originally focussed on the abolition of internal border controls most of its structures and *acquis* are now dealing with questions of control, law enforcement and restriction of access to this internal security zone which has been nicknamed—rather poetically—‘Schengenland’. Since the original aim of the abolition of internal border controls was largely achieved in 1995 (at least among the fully participating members) the main emphasis is on what were formerly the ‘compensatory measures’, that is, measures which should only offset any internal security risks actually or potentially arising from the abolition of controls at internal borders. These have so much developed their own dynamic of growth that the measures have become a system in itself, still limited in its scope—there are no comprehensive ‘common’ Schengen ‘policies’—but fully functional and on a healthy expansion
course. The core elements of the system, the common external border control standards, information and data exchange inside and outside of the SIS, the common visa arrangements and the police cooperation mechanisms have reached a degree of intensity and sophistication which comes now close to that of state internal security systems.

With its growing emphasis on protecting ‘Schengenland’ against actual or potential threats to its internal security stemming from the loss of control over internal borders the Schengen system has inevitably followed the logic of ‘safe(r) inside’ versus ‘unsafe(r) outside’. This has generated powerful effects of inclusion and exclusion. Those EU countries intending to join the system (or to stay in it once they are in) have had to comply with increasingly comprehensive and demanding set of principles and standards regarding border and territorial controls, data collection, storage and exchange and cross-border cooperation between law enforcement authorities. The ‘ins’ have come to see any failure to meet Schengen standards as a potential threat to the internal security of all of them, therefore vigorously imposing these principles and standards as conditions of membership. One can clearly distinguish between the ‘inclusive’ and ‘exclusive’ effects of this system:

As the system developed most of the EU members ‘outside’ became not only worried about being excluded from the political dynamic of the ‘core’ which Schengen claimed to be but also about becoming a sort of buffer zone for unwanted aliens and criminal activities outside of the new ‘security wall’ erected by the Schengen members. Italy’s decision, for instance, to join Schengen in 1992 was very much motivated by these considerations. As a result most of the EU ‘outs’ struggled hard to meet the standards set by the ‘ins’, and the more former ‘outs’ joined the stronger this dynamic of inclusion became. Only the UK remained for a long time largely immune to this inclusive effect because of its strict insistence on maintaining full national control over border controls.
Yet this inclusive effect had its exclusive counterpart. The ‘safe inside’ versus ‘safe outside’ rationale meant that those EU countries willing but not yet capable of meeting all the ‘safe’ Schengen standards had to be kept in a waiting position, formally accepted as members but excluded from the core elements of the system. In the case of Italy and Greece this waiting period lasted seven years each.\(^\text{10}\) This caused some frustration and led even—in the Italian case—to political friction with some of the full Schengen members.

Since the Treaty of Amsterdam a new variant of Schengen’s exclusive effect has appeared. During the Amsterdam negotiations the Spanish government insisted against British and Irish resistance successfully on that a decision on admitting the UK and Ireland to parts or all of the Schengen *acquis* can only be taken by an unanimous vote of the Schengen members.\(^\text{11}\) As it could have been predicted Spain is currently using this provision to block the United Kingdom’s (and *ipso facto* also Ireland’s) request to join substantial parts of the Schengen *acquis* in order to put pressure on the British government in the dispute over Gibraltar. Arguably, this constitutes a violation at least of the spirit of Article 43(1)(g) TEU which provides that ‘closer cooperation’\(^\text{12}\) should be ‘open to all Member States’ and allow them to become parties to the cooperation ‘at any time’. It shows how easily the politics of ‘inside’ and ‘outside’ can be abused for political purposes which have nothing to do with specific justice and home affairs issues, with potentially serious negative consequences for the Union’s political cohesion.

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\(^\text{11}\) Article 4 of the Protocol integrating the Schengen acquis.

\(^\text{12}\) By virtue of Article 1 of the Schengen Protocol the incorporated Schengen system has the status of a ‘closer cooperation’.
Apart from the Schengen system the Treaty of Amsterdam has also brought a variety of forms of voluntary self-exclusion in the justice and home affairs field which can, in principle, be terminated simply by a unilateral decision of the respective Member States. The most significant of these is the ‘Protocol on the position of the United Kingdom and Ireland’\(^{13}\) which guarantees the UK and Ireland a complete ‘opt-out’ (the term is of course not used) from new Title IV TEC. Yet Article 3 of the Protocol offers both Member States an opt-in possibility for the adoption and application of any measure proposed under this Title at the latest three month after the proposal has been made. Article 8 of the same Protocol gives Ireland a possibility to ‘opt-out’ from this ‘opt-out/opt-in’ protocol if it no longer wishes to be covered by it. Both Ireland and the United Kingdom have thereby secured an ‘opt-out’ combined with a selective ‘opt-in’ possibility which grants them a higher degree of ‘flexibility’ than any previous forms of differentiation (such as EMU or the British ‘Social chapter’ opt-out) within the context of the Treaties. It should be noted, however, that in a Declaration to the Final Act, Ireland declared that it intends to take part in the adoption of measures pursuant to Title IV TEC ‘to the maximum extent compatible’ with the maintenance of the Common Travel Area with the United Kingdom. Both provisions show to what extent the Irish voluntary self-exclusion under strain, torn between its commitment to maintain the Common Travel Area and its wish to participate in deeper integration in EU justice and home affairs.

Article 1 of the ‘Protocol on the application of certain aspects of Article 14 of the Treaty establishing the European Community’\(^{14}\) guarantees the United Kingdom the continuation of its right to exercise at its frontiers with other Member States controls on persons. To this one has to add the derogation given to the United Kingdom and Ireland in Article 2 of the same Protocol

\(^{13}\) Protocol No. 4.

\(^{14}\) Protocol No. 3.
to continue to make between themselves the necessary arrangements for maintaining the ‘Common Travel Area’.

The ‘Protocol on the Position of Denmark’—probably the most peculiar of all current voluntary self-exclusions—grants Denmark an ‘opt-out’ from Title IV TEC which is in substance largely identical to the British and Irish ‘opt-outs’. However, the Danish case is obviously more complicated because Denmark is a member of Schengen. Article 5 deals with this problem by providing that Denmark has six months to decide whether it will implement any Council decision building on the Schengen *acquis* in its national law. If Denmark does so, this decision will only create an obligation under international law between Denmark and the other Member States. This is one of the most peculiar arrangements under the new Treaty because it effectively gives Denmark an ‘opt-out’ from the specific obligations of the EC legal order although the measure in question is a legal act of the EC. The special arrangements for Denmark are completed by an ‘opt-in’ possibility, similar to the Irish, if Denmark no longer wishes to avail itself of this Protocol.

The final case of voluntary self-exclusion is the declaration attached to the Protocol on asylum for nationals of EU Member States in which Belgium declares that in accordance with relevant international conventions it will carry out an individual examination of any asylum request made by a national of another Member State. This constitutes a self-exclusion of Belgium from the common approach of the EU members to regard themselves as safe countries of origin in respect of each other in relation to asylum matters.

Of less immediate consequence but of perhaps even greater political significance is obviously the possibility for new frameworks of ‘closer cooperation’. Such ‘closer cooperation’—which allows a majority of Member States to go ahead with deeper integration in

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15 Protocol No. 5.
certain areas making full use of EC/EU institutions and procedures—can be set up both under Title IV TEC and Title VI TEU. Different legal conditions and procedures apply to both frameworks (Articles 11 TEC and 40 TEU) which are both linked to a general clause on flexibility in Title VII TEU, Article 43. Many of the conditions have been clearly designed to minimise exclusion effects. Article 43(1)(f) TEU provides that a closer cooperation shall ‘not affect the competences, rights, obligations and interests of those Member States which do not participate therein and Article 43(1)(g) TEU that it should be ‘open to all Member States’ and allow theme to become parties to the cooperation ‘at any time’. Article 11 TEC establishes the condition that ‘closer cooperation’ shall not concern the citizenship of the Union ‘or discriminate between nationals of the Member States’. Yet these clauses leave open a broad margin of interpretation, and have not—as already mentioned—prevented the Spanish Government from using its position as a member of Schengen ‘closer cooperation’ to exclude the United Kingdom from joining parts of the Schengen acquis. Apart from the special case of the incorporation of Schengen the provisions on ‘closer cooperation’ have not been used so far. Yet a number of Member States have made it clear that they would like the current Intergovernmental Conference to ease the conditions for the use of ‘flexibility’. This could lead to new frameworks of differentiated integration in justice and home affairs with more fragmentation and new effects and mechanisms of exclusion.

Inclusion and exclusion of European third-countries

Security regimes have the tendency to be expansionist: They aim both at maximising control within their territory and at providing ‘added’ security by creating protective zones outside of their territory. There are examples galore both in past (such as the Roman Empire’s strategies in border regions) and present (such as Israel’s security zone in southern Lebanon). The
Union’s emerging AFSJ is no exception to that. During the last few years the Union has been quite successful in expanding substantial elements of its internal security regime beyond its own borders, either through partial inclusion or through the threat of exclusion in case of non-compliance with its own internal security standards and mechanisms.

‘Unequal’ inclusion: The cases of Norway, Iceland and Switzerland

Only three of the Western European countries have so far resisted the magnetic effect of the successful development of the European construction. Yet all three are bound by so many political, economic and geographical links to neighbours and partner countries which have already joined the EU that their voluntary exclusion can threaten the effectiveness and completion of the Union’s emerging internal security zone. The Union has responded to this problem with a strategy of expansion which tends to extend substantial elements of its internal security regime to these countries without giving them any major influence over its further development. Why should states agree to such ‘unequal’ inclusion arrangements? Simply because they find themselves caught between the political inability to join the EU on the one hand and potentially rapidly escalating costs of exclusion on the other.

For Norway and Iceland an abolition of the existing regime between the five Nordic States pursuant to the ‘Convention on the Abolition of Passport Controls at Intra-Nordic Borders’ would have been a high price to be paid, both politically and economically, for a continuing total exclusion from the Schengen system which their three Nordic partners had already joined. In addition it could not be excluded that Norway (Iceland—for obvious reasons—only to a lesser extent) would come into the position of an external buffer zone for the Schengen system once the other Nordic countries would have become a full part of it. Since joining the EU

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16 Signed in Copenhagen on 12 July 1957.
was not a political option, the incorporation of Schengen into the EU forced Iceland and Norway to look for a form of inclusion without membership. Especially because of the huge problem of the largely uncontrolled 1,650 kilometres of land border between Norway and Sweden the Schengen members and then—after the incorporation of the Schengen acquis—the EU was willing to offer such a form of inclusion. Yet they made it a condition that decision-making on the further development of the Schengen system would remain a prerogative for the EU members. The solution both sides agreed on was that Norway and Iceland would content themselves with ‘decision-shaping’ instead of ‘decision-making’. If, however, one looks at the text of the Agreement providing for the association of Iceland and Norway with the Schengen acquis\(^{17}\), which was concluded on 18 May 1999 and took the place of the first agreement between the Schengen members and Iceland and Norway, it becomes quickly apparent that it leaves little room for ‘decision-shaping’ and is actually a form of inclusion without participation:

By virtue of Article 2 of the Agreement Iceland and Norway are obliged to implement and apply most of the operational parts of the Schengen acquis,\(^{18}\) yet there possibilities to influence EU decision-making are limited to the possibility to ‘explain’ the problems they may encounter and to ‘express’ themselves on any questions of concern to them in the context of the Mixed Committee set up under the Agreement.\(^{19}\) Article 8(1) provides, however, that the adoption of acts or measures amending or building upon the Schengen acquis ‘shall be reserved to the competent institutions of the European Union’. Should Iceland or Norway decide not to accept the content of an EU act or measure building upon the Schengen or should they fail to make a

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18 With the exception of a number of specific areas such as, for instance, the provisions on transport and movement of goods which are closely linked to the EC customs union and the internal market.

19 This is complemented by an ‘Agreement in the form of exchanges of letters’ which provides that the Iceland and Norway will be ‘fully associated’ with the committees assisting the European
notification on the fulfilment of their constitutional requirements within a period of six months the
Agreement will be considered as terminated with respect to Iceland or Norway (Article 8[4]).
One can hardly envisage a more ‘unequal’ type of agreement or—if one looks at it from the EU-
Schengen side—a more successful extension of its regime beyond its borders. Iceland and
Norway have to take over the acquis as it stands, have to accept its further development without
participation in the decision-making and are, in addition, threatened with the termination of the
agreement if they fail to accept any new EU act or measure within the specified delays.

Switzerland has remained a ‘blank spot’ right in the middle of the emerging EU internal
security zone. Although its border control and policing systems are of a very high standard
Switzerland’s exclusion from the common EU and Schengen cooperation and data exchange
mechanisms has given rise to some concern among practitioners on the EU side. Further
concerns a linked to Swiss rules on bank secrecy and the importance of the Swiss banking
system in financial transactions linked to organised crime and illegal arms trafficking.
Switzerland has been under less immediate pressure than Iceland and Norway to decide on its
inclusion or exclusion from the Schengen system. Yet the Swiss government has seen the costs
of non-membership of the EU rising during the 1990s and has therefore signed a package of
seven agreements with the EU on a wide range of matters from free movement over road and
air transport to public procurement and research.\footnote{COM (1999) 229 final.} None of these agreements cover specifically
questions of internal security. Yet there are elements in this package which can pave the way
towards a gradual inclusion of Switzerland into the EU security zone. The agreement on the free
movement of persons between the EU and Switzerland will entail the need to engage in close
cooperation on border control and residence permit issues and the agreement on land transport

\footnote{Commission in its implementing powers (OJ No. L 176/ 53 of 10.7.1999).}
necessitates an upgrading of cooperation between customs and police authorities on both sides. Both agreements are aligned on established rules of the EC acquis which means that whatever degree of practical involvement of Switzerland in the EU/Schengen internal security zone might result from these agreements it will be firmly based on the principles and mechanisms established by the EU. It difficult not to see here at least the beginnings of another case of ‘unequal’ inclusion.

Exclusion as a threat and instrument: The Central and Eastern European countries

The Central and Eastern European countries constitute not only the immediate backyard of the EU’s emerging internal security zone but also an area of primary concern to the EU security regime. Serious structural weaknesses in the policing and border control systems, long and in large parts rather permeable land borders, lack of modern equipment and training, a high incidence of corruption in some countries and the CEEC’s exposure to organised crime and migratory flows from the CIS countries have all added to the perception on the EU side that enlargement will be a big and potentially even dangerous challenge in the area of internal security. Because of their higher degree of integration in internal security matters and because of their higher geographical exposure to potential security risks from the CEECs the Schengen members are particularly concerned about these risks. As a result they have made—in the context of the Schengen Protocol of the Amsterdam Treaty—the entirety of the Schengen acquis an obligatory part of the EU acquis which the applicants will have to accept for admission.22

This step taken by the Schengen members (the UK and Ireland are less sanguine about the JHA enlargement issues) has created a new dynamic of inclusion and exclusion. Full

21 Switzerland is fully ‘surrounded’ by the Schengen zone.

22 Article 8 of the Protocol integrating the Schengen acquis.
inclusion of the CEECs upon accession remains well the final political objective. Yet in case these are not able to take on the entire Schengen acquis either their accession to the EU could be delayed or—the politically less costly option— border controls between the Schengen zone and the applicants could be maintained after accession. Even the second possibility, however, might be extremely difficult to accept for the applicants because they would continue to see themselves ‘physically’ excluded from the Union.\textsuperscript{23} Exclusion therefore becomes a potential threat—exclusion in case of non-compliance with the acquis of the Western European security regime—and at the same time an instrument to help imposing this acquis on the CEECs preparing for accession. For the CEECs this entails not only major practical challenges—extensive changes are needed to legislation, administrative and judicial structures, training and procedures, and enormous investments in equipment, personnel and border control facilities—but also a set of difficult political issues such as the need to accept the EU’s restrictive visa regime (which is to disrupt longstanding cross-border links with some of their Eastern neighbours) and to adopt much more restrictive or interventionist EU/EC approaches in a number of JHA policy areas (such as immigration or police cooperation, for instance).

The fact that the threat of exclusion has to be taken seriously is demonstrated by the very significant upgrading on the EU side of mechanisms monitoring the implementation of the Union \textit{acquis} in justice and home affairs by the applicant countries. Both the Member States and (after an initially more ‘relaxed’ approach) the Commission have adopted the view that the formal legal enactment of the Union \textit{acquis} by the applicant countries will not adequately guarantee also an effective implementation, the absence of which could have serious negative implications for the

\textsuperscript{23} Most British citizens might not resent the fact that they continue to be subject to passport controls when entering the Schengen zone. But citizens of the CEECs which had the experience of the ‘iron curtain’ may understandably expect a different treatment after they have finally become members of the EU.
internal security situation of the ‘old’ Member States after accession. On 29 June 1998 the Council adopted a Joint Action establishing a mechanism for collective evaluation of the enactment, application and effective implementation by the applicant countries of the EU *acquis* in justice and home affairs.\(^{24}\) It has led to the establishment of a group of experts (‘Collective Evaluation Group’) under the supervision of the COREPER and in close cooperation with the Article 36 Committee which has the task of preparing and keeping up-to-date collective evaluations of the situation in the candidate countries on the enactment, application and effective implementation of the Union *acquis*. The Member States have undertaken to make available to this group all relevant material on these issues compiled by national authorities, including information on their direct experience of working with the candidate countries, Schengen material, reports from Embassies and Commission delegations in the applicant countries, reports from PHARE missions and reports from the Council of Europe on the implementation by the applicants of Council of Europe Conventions. The Member States have also agreed to form, whenever considered necessary, *ad hoc* teams of representatives and experts of Member States and the Commission which would carry out further missions on specific aspects. The Collective Evaluation Group reports on its evaluations to the Council, and the Commission has to take its results into account in its proposals for significant adjustments of the priorities and objectives of the accession partnerships. This is a hardly veiled threat to the applicants that non-compliance with the EU and Schengen acquis can quickly become a major issue in the accession negotiations.

In the meantime the EU has already well started with the ‘export’ of its internal security regime. The Union has an obvious interest in expanding its regime already before the accession of the new Member States because this is likely to reduce the risks of the CEECs ‘importing’

specific internal security risks—such as organised crime from the CIS—into the Union.25 A significant step in this direction was taken with the conclusion on 28 May 1998 of the Pre-accession Pact on Organised Crime with the ten Central and Eastern European countries (CEECs) and Cyprus.26 This ‘Pact’ is aimed at intensifying cooperation and assistance measures in the fight against organised crime during the pre-accession period. Under the terms of the Pact the EU-15 and the eleven applicants have agreed to develop, with the assistance of Europol, a common annual strategy in order to identify the most significant common threats in relation to organised crime, increased exchange of law-enforcement intelligence and mutual practical support as regards training and equipment assistance, joint investigative activities and special operations, facilitating trans-boundary law enforcement cooperation and judicial cooperation, and mutual exchange of law enforcement officers and judicial authorities for traineeships. One of the primary aims the Union pursues with the Pact is the gradual integration of the CEECs and Cyprus into the system of central law enforcement responsible for the fight against organised crime which it has been establishing since the 1997 Action Plan on Organised Crime which consist of central national coordinating bodies, central national contact points for the exchange of information and the European Judicial Network. In the context of the Pre-accession Pact the CEECs and Cyprus have accepted to take the EU’s 1997 Action Plan as a starting point for cooperation with the EU, to ‘consider’ (a notable understatement) the establishment of similar national bodies, to make as soon as possible the necessary preparations enabling them to accede to the Europol Convention at the time of accession, to make the ‘statements of good practice’ provided for by the Joint Action on good practices in mutual legal assistance on criminal matters (see above) and to make progress towards enacting the legislation enabling

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25 Confidential EU reports indicate, for instance, that several hundreds of organized crime groups from Russia and the CIS which operate in Poland have as their primary target EU countries.
them to accede to the 1995 and 1996 EU Extradition Conventions by the time of accession. The ‘regime export’ could hardly have been put into more concrete terms and - with the threat of exclusion looming in the background - the CEECs and Cyprus accepted these terms without making any major difficulty. The EU added a ‘sweetener’ in form of a promise of funding some measures through several existing EC programmes.

**Inclusion and exclusion of non-EU nationals**

While states continue to be the primary actors and objects of the dynamics of inclusion and exclusion in the sphere of justice and home affairs non-EU nationals remain those who are most likely to feel the effect—and often enough to be the ‘victims’—of inclusion and exclusion. This is, of course, nothing specific to the EU. All European countries have their own systems of inclusion and exclusion of foreign nationals, many of which are far more sophisticated and extensive than those in the emerging EU regime. Yet there are some effects which have already resulted specifically from EU measures, the most important of which are to be found in the areas of asylum, visa and migration policy.

*Asylum policy*

At least until the Tampere European Council of October 1999 the EU’s measures in the area of asylum policy have been mainly constructed around a restrictive rationale aimed at excluding as much as possible ‘bogus’ asylum seekers and reducing the administrative burden upon the EU Member States. Basic elements of the Union’s approach to asylum were defined in three texts adopted on 30 November 1992, commonly referred to as the ‘London resolutions’, which are still in force and a marked by a very clear tendency towards exclusion. The first of these

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texts establishes—in the form of ‘Conclusions’—rules on the identification of countries in which there is generally no serious risk of persecutions.\textsuperscript{27} The criteria include lack of threat to life or freedom, lack of exposure to torture on inhuman or degrading treatment and full application of the principle of non-refoulement. Applicants from countries meeting these criteria can be subject to ‘accelerated’ procedures which—according to the UNHCR and a number of human rights groups—increase the risk of superficial examinations of individual cases and even summary rejections. The second text, a Resolution, deals with ‘manifestly unfounded asylum applications’.\textsuperscript{28} It establishes a number of criteria for determining whether or not an application is to be considered as ‘manifestly unfounded’, such as reasons for persecution not covered by the Geneva Convention, deliberate deception or abuse and a ‘safe’ country of origin. Procedural limitations include a maximum of one month for the examination of merits, limited or no examination on appeal and possible removal from the country pending an appeal. This Resolution is among the most restrictive texts adopted so far at the EU level. It has attracted criticism mainly because of the very broad and general nature of the criteria it establishes which leave a broad margin of discretion to the Member States. The third text, again a Resolution, is on a ‘harmonised approach to questions concerning host third countries’.\textsuperscript{29} It establishes the principle that Member States should determine generally whether or not a third host country is considered to be ‘safe’ and then to apply this decision to all applicants without regard to individual circumstances. Applicants can be immediately sent to ‘safe’ host countries unless a Member State prefers not to do so for humanitarian reasons.

Some of the elements contained in the London Resolutions were and (in some cases) still are

\textsuperscript{27} Council document WG 1281

\textsuperscript{28} Council document WGI 1282 REV 1.

\textsuperscript{29} Council document WGI 1283.
more restrictive than the asylum law and practices of some of the EU Member States. As a result concerns have been expressed (in the Netherlands, for instance) that the emergence of a common asylum system at EU level may be based on a least common denominator approach as regards admission criteria and procedural guarantees for asylum seekers. Although the London Resolutions are not legally binding—some Member States continue not to apply the ‘safe country of origin’ principle and some don’t use ‘accelerated procedures’—the fact that these texts were adopted by unanimity and never revoked shows that national governments may be willing to engage in a common EU approach towards asylum which can be more restrictive than the one some of them have been traditionally applying at the national level.

Another major example of restrictive (‘exclusive’) action at the EU level is the ‘Dublin Convention’ of 15 September 1990 which—due to lengthy ratification procedures—entered into force only on 1 September 1997.\(^{30}\) This Convention, which continues to be the core piece of binding legal EU measures so far, establishes a comprehensive set of rules for determining the state responsible for examining asylum applications lodged in one of the Member States. Its main rationale is to prevent multiple applications for asylum in several Member States, simultaneously or successively, and an uncontrolled circulation of asylum seekers within the European Union. The Convention sets out the criteria for determining the Member State responsible for examining asylum application (place of application, family links, issuing of visa or residence permit, special ties with the applicant or humanitarian reasons) and establishes a number of obligations of the responsible Member State in taking charge of an applicant, examining the application and the expulsion of asylum seekers refused status. Since its entry into force in 1997 the Convention has slightly reduced the burden on the national asylum

\(^{30}\) Convention determining the State responsible for examining applications for asylum lodged in one of the Member States, OJ C 254, 19.08.97, OJ L 242, 04.09.97.
systems and their abuse by ‘asylum shoppers’. Yet it has also been widely criticised by human rights groups for providing asylum seekers with only one chance of obtaining asylum in any of the EU countries and for tightening expulsion procedures. It means, in fact, that an asylum seeker will normally only have one chance to apply for asylum in the entire EU and that, if he is rejected by the responsible Member State, the entire EU—not only the respective Member State—will normally become a ‘no go’ zone for this person.

It should be added that the Tampere European Council has to some extent re-balanced the purely restrictive approach of the above texts by placing a new emphasis on a ‘full and inclusive application of the Geneva Convention’\(^{31}\) and on adequate procedural guarantees. Yet it remains to be seen to what extent the ‘spirit of Tampere’ will prevail in this area. One has to remember that on 1 July 1998 the Austrian Presidency tabled a Strategy Paper on migration and asylum which suggested, inter alia, to move away from asylum as an individual right to asylum as a ‘political offer on the part of the host country’, a potential replacement of the Geneva Convention and measures against illegal entrants which should ensure that ‘the individual is put back on the other side of the border’ before the start of an asylum procedure.\(^{32}\) This paper was later substantially modified but some of its ideas continue to recur in the Council bodies.

**Visa policy**

Visa policy is a classic instrument of admission/exclusion of foreign nationals. The process of harmonisation of visa policies within the EU—which formally started with the Treaty of Maastricht—has led to two different visa regimes with different degrees of exclusion. On the one hand there is a ‘negative list’ based on EC Regulation 574/99 which contains 101 countries or

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\(^{31}\) Tampere Presidency Conclusion, paragraph 13.

\(^{32}\) Council document 9809/98.
territories whose nationals need to be in possession of a visa when crossing the external borders. On the other hand there is a Schengen list of 32 third countries not listed in the EC Regulation whose nationals are subject to a visa requirement in all Schengen countries which means that the Schengen ‘negative list’ contains 133 instead of 101 countries or territories. The difference between the two lists is explained mainly by the position of the United Kingdom which allows nationals of several Commonwealth countries to enter visa-free and which has refused the introduction of additional visa requirements for the sake of bringing its policy into line with that of the Schengen zone. The Schengen visa regime is therefore more ‘exclusive’ than the EU regime.

Within the EU context the Member States have so far only been able to agree on a common visa format. Visas issued under this common format continue to remain national visas and only give access to the territory of the issuing Member State. Yet in the Schengen context a common visa regime has actually been set up for visas with a validity of up to three months. This Schengen visa is ‘inclusive’ in the sense that it allows the person holding it to freely circulate within the entire Schengen zone. However, the Schengen visa regime has also its ‘exclusive’ dimension: A Schengen visa cannot be issued to any person which has been reported by any of the Schengen countries for the purpose of being refused entry. This means that a third-country national may be excluded from the entire Schengen zone if only a single Schengen country has reported him as ‘a person not to be permitted entry’. Another Schengen country may still grant a visa to this person ‘on humanitarian grounds or in the national interest or because of international obligations’, but in this case the visa is a purely national visa and

34 See COM(2000) 27 final, p. 3.
35 Article 5 of the Convention implementing the Schengen Agreement.
free movement is limited to the issuing Schengen country. Quite obviously the chances of a third-country national reported in the ‘Schengen Information System’ as an undesirable alien by one Schengen member has normally little prospect of being well received by the visa issuing authorities of another. For a person in this situation the whole Schengen zone can therefore quickly become an inaccessible fortress.

Migration policy

During the 1990s the Union has not made much progress towards the development of a common migration policy. Yet the main emphasis has been clearly on restricting immigration, and among the relatively few texts agreed on there are some where the tendency towards ‘exclusion’ is particularly obvious.

The Council Resolution on admission for employment of June 1994\textsuperscript{36} has as its central principle that admission for temporary employment has to be ‘purely exceptional’. Member States should refuse entry to their territory for employment, unless a vacancy cannot be filled by its own nationals, nationals of other EU countries or a third-country national lawfully resident on a permanent basis. Exceptions are limited to special circumstances such as the need for individual specialists, the initial maximum stay has to be limited to four years and extensions of stay should not be granted to certain categories of workers such as seasonal workers and service providers. These ‘soft law’ guidelines were more restrictive then many of the national rules in place at that time.

Another example of the ‘exclusive’ tendency of the EU’s measures in the area of immigration is

\textsuperscript{36} OJ No. C 274/3 of 19.9.1996.
the Council Resolution on marriages of convenience of December 1997.\textsuperscript{37} It establishes the principle that a person found to have contracted a marriage of convenience should lose his or her residence permit and establishes a number of criteria for checks after marriage. The Resolution is particularly interesting because it shows how much more restrictive EU measures tend to be if they are motivated by immigration policy purposes. Whereas it had since long been established under EC law that a third-country national separating from an EC national retains rights of residence under EC law,\textsuperscript{38} the 1997 Resolution identifies separation of a person from his or her spouse as a ground for finding a ‘marriage of convenience’ and ending the residence status without explicitly exempting spouses of EC nationals from its scope.

A further instrument of ‘exclusion’ used both for migration and asylum policy purposes is the conclusion of readmission agreements with third countries. It is clearly the most effective instrument to force (especially neighbouring) third countries to take back illegal immigrants and rejected asylum seekers. Already in 1994 the Council agreed on a model type readmission agreement.\textsuperscript{39} In 1995 it established guidelines for the negotiation of readmission protocols and in 1996 it agreed on the principles of readmission clauses to be inserted in future mixed agreements.\textsuperscript{40} A range of readmission agreements have been concluded between EU Member States and CEECs, and the CEECs have in turn started to conclude readmission agreements with their neighbours. As a result the Union’s readmission system is expanding further to the East and Southeast. The Union’s objective is to have readmission clauses automatically inserted in all new agreements with third countries, an intention which at the beginning of 2000


\textsuperscript{38} Case 267/83 Diatta [1985] ECR 567.

\textsuperscript{39} OJ No. C 274/20 of 19.9.1996.

\textsuperscript{40} OJ No. C 274/25 of 19.9.1996 and Council documents 4272/96 (ASIM 6) and 5457/96 (ASIM 37).
threatened the successful conclusion of the negotiations on the renewal of the Lomé Convention. A systematic and generalised readmission policy is likely to lead to a much expanded ‘buffer zone’ around the European Union.

Conclusions

This contribution has shown that EU integration in justice and home affairs is generating powerful effects of inclusion and exclusion throughout the wider Europe, with the latter being so far much stronger than the former. The EU’s ‘area of freedom, security and justice’ allows for inclusion of other European countries only if they are willing and capable of accepting its entire acquis of policies, structures and mechanisms in the internal security field. Participating non-EU countries may remain excluded from decision-making (the case of Norway and Iceland) and even EU Member States wanting to join the system may remain excluded, at least on a temporary basis (the cases of Italy, Greece and—currently—of the United Kingdom and Ireland). In addition the threat of exclusion is actively used to help with the expansion of the EU JHA regime to the CEECs which forces them to adopt—at least in some areas such as visa policy and border controls—much more restrictive approaches than they used to have. As regards the position of individuals the benefits of inclusion into the system are limited to EU nationals. Third-country nationals are in many ways increasingly confronted with the exclusive strength of a ‘fortress Europe’. Although it is the Union’s declared aim to arrive at ‘an open and secure European Union’ (Tampere Conclusions) the security imperative has so far clearly and by far prevailed over that of openness.

Yet one should not too easily condemn the European Union for the strong ‘exclusive’ tendencies of its ‘area of freedom, security and justice’, its most recent and very ambitious integration project. There is no example in history of an emerging political community which has not relied
at least to some extent on a distinction between ‘members’ and ‘non-members’, those ‘within’ and those ‘without’. Providing something for the ‘members’ which ‘non-members’ do not enjoy is—whether one likes it or not—and instrument of legitimacy and identity building. The provision of security to citizens has been one of the most fundamental traditional functions of states and governments. With the Union acquiring more and more functions traditionally reserved to governments—recent developments in the defence policy field are a case in point—and having now for the first time gained substantial possibilities to act in the internal security field it would be rather naive to expect it not to use these new possibilities for the build-up of a functioning internal security system at the European level. It would also mean to underestimate the strength and the dynamic of the process of political integration. The legitimacy of the European construction could in the long term be eroded in the eyes of its citizens if the EU would not respond to their concerns in the internal security sphere by the development of common policies and effective structures. Like those of any internal security system these will inevitably have their exclusive side.

This being said it is no less necessary for the Union to find the right balance between security and openness, between restrictive (‘exclusive’) action and the ‘inclusive’ values of a political system which remains open towards neighbours and third-country nationals. All too often politicians and senior officials use threat perceptions in the internal security sphere—often based on insufficient evidence—to justify more restrictive action at the European level. There is—in spite of some positive signals which came from the Tampere European Council—still a distinctive risk that the development of the EU’s regime in justice and home affairs continues to move towards a one-sided enforcement of its acquis on all its European partners and more and more exclusion of non-Member States and third country nationals. This risk can only be averted by a more critical and broader public debate on the nature and the strategic objectives of the
Union as an ‘area of freedom, security and justice’. So far the process has remained far too much dominated by negotiations behind closed doors of ministers and senior officials, often subject to only very limited parliamentary control. European integration in justice and home affairs is neither a matter for the ‘arcana imperii’ nor a purely technical affair which can be left to the specialists. Its dynamics of inclusion and exclusion will shape significantly the political and social environment in which European citizens live, their rights and their freedom. A much wider and more open political debate involving parliaments, the media and major interest groups is therefore needed, and the academic community should play a role in increasing awareness of the fundamental issues which are at stake.