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Justice and Home Affairs aspects of the European Neighbourhood Policy¹

Abstract

*The domain of Justice and Home Affairs (JHA) plays a key role in the European Union's European Neighbourhood Policy (ENP). This reflects the desire of the Member States to regulate the movement of persons from the eastern neighbouring countries, and to cooperate with the Union's new neighbours in the fight against organised crime. This chapter argues that for ENP to be a success, three basic conditions must be met. First, ENP must be targeted at the populations of the EU's new neighbours for them to derive maximum benefit. Second, the visa regime with the EU must be transparent and make crossing the border into the EU as comfortable as possible. Third, the EU's new neighbours should not be expected to implement blindly the body of the *acquis communautaire*, since these laws were designed for states far more economically and politically advanced than the EU's new neighbours.*

Introduction

Justice and Home Affairs (JHA) issues was one of the most important incentives behind the creation of the European Neighbourhood Policy (ENP).² In the future, the eastern external border will lie between eight EU Member States and four neighbouring countries. It will run from the Barents Sea in the north to the Black Sea in the south, stretching over 5,000 km. Poland alone will be responsible for almost 1,150 km, the second longest stretch of land external border guarded by a single Member State.³

This chapter examines the role that Justice and Home Affairs plays in European Neighbourhood Policy. First, it looks at the origins of the ENP and its structure within the Commission. Second, it investigates its reception amongst the new neighbours, and examines the problems and disagreements with the EU. Third, it discusses the guiding principal of joint ownership of the ENP Action Plans, and what this means in practice with regard to visa policy. It also makes some suggestions for policies to overcome these problems.

I.

The domain of Justice and Home Affairs has, right from the beginning of the co-operation between the European Union and its immediate neighbourhood, been a central dimension. European Neighbourhood Policy's approach to JHA concerns has been two-fold: addressing both movement of persons, and security factors. These two

¹ This contribution is based on the current work in the context of a PhD thesis, forthcoming at the Sussex European Institute.

² Also known as 'Wider Europe' policy. See respectively: Commission of the European Communities (2003a) Communication from the Commission to the Council and the European Parliament: Wider Europe – Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours, COM(2003) 0104 final; and, Commission of the European Communities (2004a) *Communication from the Commission: European Neighbourhood Policy Strategy Paper*, COM(2004) 0373 final.

³ Apart from Finland, also Romania after its accession will have a longer land external border.

issues are evident in the Wider Europe Communication from the Commission of March 2003. The rationale behind this is the interdependence of the Union with its neighbourhood. Closer geographical proximity means that the enlarged Union and the new neighbourhood are going to have shared interests in working together to tackle trans-boundary threats, from organized crime to terrorism.

An analysis of the annexed statistics also reveals the migration anxieties that are partially responsible for the launch of this new Union policy. Data referring to immigration of Russian nationals and nationals of Western Newly Independent States⁴ to the European Union as percentages of all non-EU immigrants is contrasted with respective figures for the then acceding countries. Whereas in 2000, Russian nationals constituted 3.2% of all non-EU immigrants in the Union, they amounted to 8% in the acceding countries. The data appear even more disparate as far as Belarus, Moldova and Ukraine are concerned. While their nationals made up 2.2% of all non-EU immigrants in the EU-15, the figure rises to as much as 15% in the (at that time) acceding countries.⁵

Moreover, it is worth noting that effective co-operation in the field of Justice and Home Affairs between the European Union and Russia started from a preventive perspective, with the signature of the EU-Russia Action Plan against organized crime.⁶ Similarly, the Justice and Home Affairs Action Plan for Ukraine of 2001 focused on improving readmission practices and strengthening border management.⁷ In the same way, the Wider Europe Communication emphasizes aspects such as the need to conclude readmission agreements with all the neighbours, to start with (amongst others) Russia, Ukraine and Belarus.

Although much less accentuated, movement of persons is put forward as well. Simultaneously with preventing new common security risks, efforts should be made not to discourage or delay people from crossing borders for legitimate purposes. While the free movement of persons and labour shall remain the long-term objective, the Communication suggests several recommendations for the short- and medium-term. To begin with, valuable additional opportunities for cultural and technical interchange could be facilitated by a long-stay visa policy on the part of the EU Member States. More importantly, an efficient and user-friendly system for small border traffic is considered a principal part of any regional development policy.

⁴ The Wider Europe Communication uses this term referring to Ukraine, Moldova and Belarus.

⁵ For details, see Charts 8 and 9 in the Wider Europe Communication.

⁶ Interestingly, co-operation between the Union and the then applicant countries commenced with the 1998 Pre-accession pact on organized crime between the Member States of the European Union and the applicant countries of Central and Eastern Europe and Cyprus. On Russia's engagement with Justice and Home Affairs, see: Potemkina, O. (2002) *Russia's engagement with Justice and Home Affairs: a question of mutual trust*, Brussels: Centre for European Policy Studies.

⁷ On Justice and Home Affairs issues in the context of relations between the EU and Ukraine, see: Pidluska, I. (2002) 'Justice and Home Affairs Beyond Enlargement. What Kind of Border?', pp. 241-252 in A. Lewis et al., *The EU and Ukraine. Neighbours, Friends, Partners?*, London: The Federal Trust; and, Piorko, I. and K. Wolczuk (2001) 'Beyond the External Border: JHA in the Context of Relations Between Poland, Ukraine and the EU', *Challenge Europe*, Issue 5 – Building a European Area of Freedom, Security and Justice, Brussels: European Policy Centre.

In July 2003, the Commission proposed a New Neighbourhood Instrument to finance policies devoted to the Union's immediate neighbourhood.⁸ A separate Task Force on Wider Europe has been established within the Commission. However, an authentic breakthrough has by some been expected to materialize with the Communication on European Neighbourhood Policy (ENP) Strategy Paper of May 2004. Among main objectives of the ENP are: to share the benefits of enlargement, including those linked to the Area of Freedom, Security and Justice, as well as to enhance security. The latter aim is confirmed in the Strategy Paper that affirms the ENP shall also support efforts to realize the goals of the European Security Strategy.⁹

Thus, the European Neighbourhood Policy displays a strong Justice and Home Affairs dimension. Imperative priorities for most of the countries involved comprise border management, creation and training of professional border guard services, making travel documents more secure, but also solutions on local border traffic. As for the movement of persons and the contentious issue of visa requirement, the wording is very careful. The Communication states only that the European Union 'may also consider possibilities for visa facilitation'.

II.

It is worth noting that reception of the ENP in the eastern neighbouring countries has been rather prudent. The reasons seem complex and could include the fact that the ENP fails to fully differentiate among the neighbouring countries in terms of their diverging intentions and ambitions towards the Union. Even though differentiation is supposed to form one of the characteristic principles of the ENP, the Communication does not appear to distinguish sufficiently between the former Soviet Union countries and the Mediterranean states, nor between the Eastern neighbouring countries that aspire to become a Member State in the future (Moldova and Ukraine) and those that do not (Russia and Belarus for the moment).¹⁰

The EU has already encountered a number of problems with the ENP, before it comes into practice as the principal regulator of its interaction with its new neighbours:

First, ENP appears to assume that the neighbouring countries should be interested in voluntarily adopting the European Union's *acquis communautaire*.¹¹ This, for a whole series of reasons, is *per se* a fairly ambitious assumption. Apart from the problem of motivation or incentives, the question to be posed is whether such methodology is actually optimal. As rightly pointed out by Grabbe, the body of laws and policies that make up the *acquis communautaire* has been designed for countries more advanced

⁸ Commission of the European Communities (2003b), *Communication from the Commission: Paving the way for a New Neighbourhood Instrument*, COM(2003) 0393 final.

⁹ 'A Secure Europe in a Better World' – a European Security Strategy, adopted by the European Council on 12 December 2003.

¹⁰ On the other hand, the broader concept of European Neighbourhood Policy enables to engage a more important number of EU Member States in active policy building. This argument was suggested by several speakers at the Wider Europe Seminar, Sussex European Institute, 4-5 June 2004.

¹¹ Already the Wider Europe Communication talked of 'progress demonstrating shared values and effective implementation of political, economic and institutional reforms, including aligning legislation with the *acquis*'. See: Commission of the European Communities (2003a) *Communication from the Commission to the Council and the European Parliament: Wider Europe – Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours*, COM(2003) 0104 final.

economically and developed politically.¹² Its successful implementation necessitates certain levels of institutional and societal maturity that the neighbouring states are far from achieving. If the Union is to recommend the countries of its immediate neighbourhood models drawing directly from the *acquis*, it must consider cautiously what parts would be mutually beneficial. That holds true particularly strongly for border controls, visa regime and migration *acquis*, as policies in these fields are only being developed. Lessons should be indeed taken from the experience of the (till recently) candidate countries, and a good balance between Freedom, Security and Justice priorities aimed for.

Second, the EU seems ambiguous as regards the key matters that are really of interest to the neighbouring countries, such as simpler and less demanding rules for crossing the Union's borders. This is for them particularly difficult to accept, as the EU is not granting or suggesting the impatiently awaited perspective of membership, in any case not for the moment. It is instead attempting to propose alternatives to membership that could assist its neighbours in becoming more successful and secure. Nevertheless, unless the EU offers powerful incentives, its policy risks to have little bearing, like the Partnership and Co-operation Agreements (PCA) that the Union has concluded up to now.¹³

Third, the Commission has been limited by the state and nature of the Union's current policies, and hence it has not been in a position to promise the prospect of the visa-free travel that the Eastern neighbouring countries would strongly wish. Policies of the Area of Freedom, Security and Justice are tremendously vulnerable for the Member States. Granting larger freedom of movement for the citizens of neighbouring countries is often opposed due to fears of illegal immigration. Moreover, it is not seldom predicted that this approach may actually become increasingly restrictive. For instance, the visa practices of (some of) the new Member States have been criticized for being too liberal. At the same time there are serious problems of consistency on the part of the EU Member States. While the Commission is endeavouring to introduce strict but fair conditionality into the framework of its neighbourhood policy, the incentives it can offer are far from satisfactory guarantees. One of the reasons is the EU's internal political incoherence that considerably weakens its external influence. The neighbouring states, instead of receiving coherent and firm messages from the Union, are being sent diverging signals and assurances from various Member State governments. Certain Member States promise extra concessions to Russia, including the offer of visa-free access to the Schengen area, setting up double standards.

III.

These problems are not insurmountable. Of particular relevance to this is the 'joint ownership' rule. The Strategy Paper states noticeably that: 'The EU does not seek to

¹² Grabbe, H. (2004) *How the EU should help its neighbours*, London: Centre for European Reform, pp. 5-6.

¹³ See: Grabbe, H. (2004) *How the EU should help its neighbours*, London: Centre for European Reform. The Partnership and Co-operation Agreement with Russia entered into force in 1997, and the one with Ukraine in 1998. For their detailed analysis, see: Hillion, Ch. (2000) 'Institutional aspects of the partnership between the EU and the newly independent states of the former Soviet Union - case studies of Russia and Ukraine', *Common Market Law Review*, 37: 1211-1235.

impose priorities or conditions on its partners. The Action Plans depend, for their success, on the clear recognition of mutual interests in addressing a set of priority issues. There can be no question of asking partners to accept a pre-determined set of priorities'.¹⁴ This should be offset by Marise Cremona's assertion that 'there is no doubt that the agenda is being set by the Union and focuses on Union priorities, including border security, regional stability and the rule of law'.¹⁵

Therefore, joint ownership is not sufficient in itself, it must also be supported by a robust policy framework that operates in the interests of both parties.

Key to this strategy is the recommendation of Kasia and Roman Wolczuk that the European Neighbourhood Policy needs to appeal to the population of the neighbouring countries. If the Union is to have any influence, it has to prove itself to be a political, not merely economic, project. The ENP must advance its political and societal sides, liberalizing the visa policy towards citizens of the neighbouring states, as it has an immediate and tangible impact.¹⁶ Even for those who have never travelled abroad, knowing that such possibility exists for them and their children is very much valued. It fundamentally and deeply shapes their view of the European Union.¹⁷ A more user-friendly visa policy is the most straightforward means of appealing directly to the citizens of the Union's new neighbours; a policy that will in the long-term help to improve the image of the EU amongst the populations of the states on its eastern border.

The debate on the nature of the relationship that the EU should establish with the third countries of its immediate neighbourhood in the sphere of border controls, migration and asylum has been growing in importance over the years. Recently in particular, the external dimension of asylum has attracted increasing interest. In its Communication 'Improving access to durable solutions', the Commission has recommended that the Union address the question of enhancing protection in the regions by setting up EU Regional Protection Programmes, with the aim of enabling the countries in the region of origin to grant effective aid to persons in need of international protection as quickly as possible and as closely as possible to the countries of turmoil.¹⁸ Furthermore, the Durable Solutions Communication suggests the ways in which the Union might help to approach the mixed migratory movements with which countries of origin and/or of transit are challenged. In particular, the Mediterranean region states, that are steadily transforming from countries of emigration into major countries of transit, could need assistance. The deep human tragedy repeatedly taking place on the Mediterranean shores, where boats with people trying to reach Italy or Spain sink, has led the Informal Justice and Home Affairs Council of October 2004 to take decisions in this

¹⁴ Commission of the European Communities (2004a) Communication from the Commission: European Neighbourhood Policy Strategy Paper, COM(2004) 0373 final.

¹⁵ Cremona, M. (2004) *The European Neighbourhood Policy: Legal and Institutional Issues*, Stanford: Center on Democracy, Development, and the Rule of Law.

¹⁶ Wolczuk, K. and R. Wolczuk (2004) 'The ENP and EU's Eastern Neighbours: Prospects for Success', *Challenge Europe*, Issue 12 – Europe: How wide? How deep?, Brussels: European Policy Centre.

¹⁷ Grabbe, H. (2004) *How the EU should help its neighbours*, London: Centre for European Reform.

¹⁸ Commission of the European Communities (2004b) Communication from the Commission to the Council and the European Parliament on the managed entry in the EU of persons in need of international protection and the enhancement of the protection capacity of the regions of origin 'Improving access to durable solutions', COM(2004) 0410 final.

matter. In the short term, the Commission agreed to explore the possibility of establishing ‘humanitarian reception centres’ in the countries bordering the Mediterranean, both in the EU Member States as well as in the North African states. The Commission undertook first to finance a project (predecessor of the newly established AENEAS programme¹⁹) on institution and capacity building in five North African countries, supposed to assist in improving their national asylum systems.²⁰

It is worth noting that the actual number of asylum applications is on the decrease in the Member States of the former EU-15. Meanwhile, according to data of the United Nations High Commissioner for Refugees, analogous figures for the new Member States have confirmed a distinct growth since the moment of accession.²¹ Many of asylum applicants come from Afghanistan and Chechnya. In this context, Ministers of Interior of Austria, Estonia, Lithuania and Latvia, at the Austro-Baltic Summit held in September 2004 in Vienna, called for setting up similar centres at the Eastern border, and Lithuania’s Minister Virgilijus Bulovas proposed Ukraine as a possible location. Ukrainian authorities have angrily rejected the idea describing it as absurd.²² A remarkable reaction has been expressed by some of Ukrainian experts. They have seen this initiative as ‘nonsensical, clumsy and harmful’, particularly at the time of presidential elections, where closer relations with the EU were one of the most heated subjects. They have deplored the fact that such ideas result in engaging the anti-European electorate convinced that Ukraine is treated like a ‘scrap-heap, settling tank, some kind of filter’. Interestingly, however, suggestions that such centres could be ‘traded-off’ for visa-free access for Ukrainian citizens have also been articulated.²³

While the abolition of visa obligations for all citizens will most likely be a lengthy and cumbersome process, certain visa facilitation for inhabitants of border areas is envisaged in the short term. As mentioned above, one of the important priorities of the European Neighbourhood Policy is making it possible for border area populations to maintain traditional contacts without encountering excessive administrative hurdles. In this sense, lessons from the experience of the until lately candidate countries have been drawn. Particularly, the arrangements existing prior to the accession at the Polish Eastern border could have served as a useful and constructive model. In order to fill in the void created after Poland had to terminate the 1985 agreement on local border traffic, the Commission has attempted to offer an EU-wide solution. In August 2003, it has come up with the Proposal for a Council Regulation on the establishment of a regime of local border traffic at the external land borders of the Member States.²⁴

¹⁹ See Regulation (EC) No 491/2004 of the European Parliament and of the Council of 10 March 2004 establishing a programme for financial and technical assistance to third countries in the areas of migration and asylum (AENEAS). *Official Journal L 080, 18/03/2004 P. 0001-0005*

²⁰ These decisions have met with strong criticisms and fears that in the future projects could include the processing of asylum claims outside the EU, which would break Union’s legal and humanitarian obligations. For a detailed comment of clarification, see speech of Antonio Vitorino, Commissioner responsible for Justice and Home Affairs, at the conference ‘The Future of the European Union Agenda on Asylum, Migration and Borders’, European Policy Centre and King Baudouin Foundation, Brussels, 4 October 2004.

²¹ An illustration of this trend may be the example of Poland, where in the second quarter of 2004, the number of asylum applications has increased 34%. For statistics, see www.unhcr.ch

²² See reaction of Hennadii Moskal, chairman of Ukraine’s State Committee for Nationalities and Migration, *EUobserver*, 24 September 2004.

²³ See *Gazeta Wyborcza*, 17 September 2004.

²⁴ Proposal for a Council Regulation on the establishment of a regime of local border traffic at the external land borders of the Member States, Commission of the European Communities, Brussels, 14

The aim of the Proposal for a Council Regulation is to set down rules concerning the criteria and conditions for setting up a regime of local border traffic at the external land border of the EU Member States. Local border traffic is defined as the regular crossing of the external land border of a Member State by persons lawfully resident in the border area of a neighbouring third country, in order to stay in the border area of that Member State for a limited period.

For border area inhabitants who do not require a visa, the Proposal recommends the facilitation as regards the travel documents necessary to cross the border. In this respect, an identity card or a specific border crossing permit would suffice. For those border area residents who do require a visa, this obligation would not be waived. Instead, a special visa L (Local) is put forward. Its territorial validity would be limited exclusively to the border area of the issuing EU Member State. It is suggested that the maximum length of the stay should be seven consecutive days and should not, at any rate, exceed three months within any half-year period. Such visa would give its holder the right to multiple crossings of the border of the Member State concerned. Its minimum validity would be one year, and the visa fees might be waived or reduced. Moreover, the possibility of allowing the crossing of the external border at special border crossing points or lanes and/or outside authorized border crossing points and hours is envisaged.

The Regulation Proposal foresees a Community regime on local border traffic. Nonetheless, the diversity of local geographical, social, political or economic circumstances at various stretches of the Union's external land border has been taken into consideration. The specific character of a local border traffic regime has led the Commission to advise that the individual EU Member States should implement such regime through respective bilateral agreements. Hence, the Proposal entitles the Member States to negotiate on a bilateral basis with the neighbouring countries the particular arrangements (complying with the Regulation) to put in place at their common land borders.

Recommendations

To summarise therefore, for the ENP to be a success, three basic conditions must be met:

First, ENP must be a political project, targeted at the populations of the EU's new neighbours. Tangible benefits must accrue to citizens living in the states that border the Union.

Second, the border with the Union should not form a major obstacle for citizens living in the new neighbourhood.

August 2003. *COM(2003) 502 final, 2003/0193 (CNS)*. In addition, the Commission has considered it appropriate - until the full implementation of the Schengen *acquis* by the new Member States, when internal border controls will be lifted – to propose to apply the facilitated border crossing regime envisaged for border residents also to temporary external borders. See Proposal for a Council Regulation on the establishment of a regime of local border traffic at the temporary external land borders between Member States, Commission of the European Communities, Brussels, 14 August 2003. *COM(2003) 502 final, 2003/0194 (CNS)*

Third, the new neighbourhood states should not be asked to implement blindly the body of the *acquis communautaire* before necessary changes resulting from closer cooperation with the Union have been felt. This body of EC/EU law was designed for considerably more advanced states, both economically and politically.

