Chapter 7

'An area of freedom, security and justice'

Ernest Bevin, the great Foreign Secretary in the first post-war Labour government, said that the aim of his foreign policy 'really was ... to grapple with the whole problem of passports and visas', so that he could 'go down to Victoria Station', where trains departed for the Continent, 'get a railway ticket, and go where the Hell I liked without a passport or anything else'. The old trade unionist retained his vision of the brotherhood of man. But the foreign minister found himself defending the sovereignty of states; and he rejected the idea of British membership of the emergent Community, which was eventually to make the realization of his vision feasible.

Already in 1958 the Rome Treaty included 'persons', along with goods, services, and capital, in the four freedoms of movement across the frontiers between the member states. For 'persons' this was limited to the right to cross them for purposes of work. A quarter of a century later, the Single European Act defined the internal market as 'an area without internal frontiers'. Mrs Thatcher's government held that these words implied no change, because they were qualified by the addition 'in accordance with the Treaty', which in relevant respects still stood. But governments of the more federalist states intended to take the words literally: to abolish controls at their mutual borders and thus make movement across them free for all.

This idea was given legal expression in the Schengen Agreements of 1985 and 1990, Schengen being the small town in Luxembourg, symbolically alongside the frontiers with both France and Germany, where these three states, together with Belgium and the Netherlands, signed the agreements. The number of signatories has since grown until what has often been called Schengenland has been signed up to by all the EU states save Britain and Ireland, as well as Efta members.

Schengen had two main aims. The first concerned border controls: to eliminate those internal to Schengenland; establish controls round its external frontier; and set rules to deal with asylum, immigration, and the movement or residence of other countries' nationals within the area. The second was to cooperate in combating crime.

Cross-border criminal activity grows for reasons similar to those that drive cross-border economic activity: advancing technology, particularly in transport and communications. As with trade, cross-border cooperation is needed if the rule of law is to keep abreast of it. With the intense relationship engendered by their economic integration, the member states have a special need for such cooperation. A first step was taken in 1974 with the 'Trevi' agreement to exchange information about terrorism; and the ministers and officials involved soon found it useful to include other forms of crime. This was a precursor of Schengen, which forged closer cooperation among law enforcement agencies of the states that were ready to go further together, and which has led to an extensive 'acquis' of legal texts, applying to the very large majority of EU member states.

Maastricht and the third pillar

Cross-border aspects of crime and the movement of people affect all member states, not just those of Schengenland. It was agreed that the Maastricht Treaty should provide for cooperation in these

fields. Terrorism, drugs, fraud, and 'other serious forms of crime' were listed in the Treaty, along with external border controls, asylum, immigration, and movement across the internal borders by nationals from states outside the Union. The member states' judicial, administrative, police, and customs authorities were to cooperate in order to deal with them.

Some states, such as Germany, wanted this to be done within the Community institutions, with the Commission, Court, and Parliament as well as the Council playing their normal parts. Others, such as Britain, defending their sovereignty, wanted to exclude as far as possible the institutions other than the Council. The upshot was the new 'third pillar' for Cooperation in Justice and Home Affairs (CJHA), set up alongside the Community 'first pillar'. The institutions for the CJHA were intergovernmental, with the unanimity procedure in the Council, only consultative roles for the Parliament and Commission, and none at all for the Court. The policy instruments were to be joint positions and actions determined by the Council, and conventions ratified by all the member states. One of the conventions was to establish the new policing body, Europol.

Not surprisingly, given the requirement of unanimous agreement among the then 15 governments before a decision could be taken, there had not been much progress by the time the Amsterdam Treaty was negotiated. No convention had yet entered into force and action in other respects was slow. But concern about cross-border crime and illegal immigration continued to grow; and the Eastern enlargement, expected to bring new problems, was approaching. So most member states wanted a stronger system.

Amsterdam and the first pillar too

The Amsterdam Treaty affirmed the intention to establish what it rather grandly called 'an area of freedom, security and

justice' (AFSJ). While conditions in the Union are, in a general sense, notably free, secure, and just when compared with almost all other parts of the world, the words are used in the treaty in a more specific sense: freedom refers to free movement across internal borders; security, to protection against cross-border crime; and justice, mainly to judicial cooperation in civil as well as criminal matters. It still remains to be seen whether it was wise to appropriate words that have such wide and noble significance for such particular ends. The answer may depend on how far and how soon they are achieved.

As regards *freedom* of movement, almost all the Schengen acquis has already been transferred from the third to the first pillar. Thus the right of people to move freely throughout Schengenland is guaranteed by the Community institutions, though some member states have had to restore border checks temporarily in order to deal with influxes from other member states of non-EU nationals with false visas. The external border controls are not yet satisfactory. Nor is the common policy on immigration and asylum complete. Nor will there be freedom of movement without border checks throughout the Union while Britain, Denmark, and Ireland retain their controls.

The removal of border controls within Schengenland is nevertheless a major achievement, as is the transfer of these competences to the Community, with the Court of Justice fulfilling its normal functions – except in the fields of internal security and law and order, which remain under the control of the member states. Since 2004, qualified majority voting, co-decision, and the Commission's sole right of initiative have applied in parts of this field, allowing for further integration of Schengen into the Community.

Determined to keep its border controls, Britain opted out of the Amsterdam Treaty's provisions on freedom of movement; and Ireland, enjoying open frontiers with the UK, had to do the same.

But both have the right to opt into specific measures, provided the other governments agree unanimously in each case. The British government has said it intends eventually to participate fully in the Schengen acquis, apart from the aspects relating to border controls, while Denmark, which had signed up to the Schengen Agreements, has opted out of their transfer into the Community.

As regards *security*, the fight against cross-border crime remains mainly in the intergovernmental third pillar, whose designation, since competence regarding free movement has been transferred to the Community, has been reduced to 'Police and Judicial Cooperation in Criminal Matters'. In line with ever-growing concern about crime, the Amsterdam Treaty extended the list to include trafficking in persons, offences against children, and corruption; and money-laundering, forging money, and 'cyber-crime' have been added since. The Nice Treaty gave the Commission a right of initiative in the pillar, further strengthening its integration into the Community.

Police cooperation has developed significantly, resulting for example in big seizures of drugs on their way to Britain. Europol has made a useful contribution, though it could not become fully operational until its convention was fully ratified by all member states in July 1999, over five years after the Maastricht Treaty had provided for it. While the third pillar remains predominantly intergovernmental, with the unanimity procedure prevailing in the Council, the Amsterdam Treaty did provide that conventions, when ratified by half the member states, would enter into force in those states. There is also a role for the Court of Justice, which was given authority to rule on the interpretation of Union laws and on disputes between member states or between them and the Commission.

However, it is in the field of counter-terrorism that most significant progress has been made. After the September 2001

attacks on the US, the Union quickly pushed to develop its own abilities to act. A European arrest warrant that had been in limbo for several years was agreed in 2002, alongside an action plan that targets aspects of the prevention and prosecution of terrorist acts, as well as coordinating responses by member states. While these failed to prevent the attacks in Madrid in May 2004 and London in July 2005, they have demonstrated that the Union does have a potential role to play in one of the most visible issues in the international system.

In order to give free movement and the fight against crime a lift in the Union's political priorities, the European Council held a special meeting on the subject at Tampere under Finnish Presidency in October 1999. It decided among other things to establish a high-level European Police College and a body called Eurojust, bringing together member states' prosecutors, magistrates, and police officers to cooperate in criminal investigation and prosecution.

In the narrow definition of *justice* as judicial cooperation, some specific steps have been taken for member states to assist each other in cross-border problems relating to the recognition and enforcement of judgments, though not much has been done about the rights of victims of crime. The path chosen by the Union has been one of mutual recognition, rather than harmonization; but there has been agreement on several joint policies, most notably the European arrest warrant, which address some of the problems of cross-border crime.

In a broader definition of the word, distributive justice has been an issue in this field since Germany, with a much larger number of asylum-seekers than other member states, wanted measures to share the cost. This resulted in the creation of a European asylum policy that has coordinated national policies and allowed for an improved management of the significant population flows of the past ten years.

In a yet broader sense of justice, the Amsterdam Treaty responded to criticism that the Union had emphasized restrictions on immigration and asylum at the expense of concern about the treatment of the human beings involved. In the face of widespread public backlash against them, the treaty provided for measures to safeguard their rights, together with action more generally to combat racism and xenophobia. Coupled to the 2000 Charter on Fundamental Rights, the Union has now articulated a fairly substantial human rights protection programme, although the degree to which it can enforce this remains moot.

What's in the name?

Freedom of movement within Schengenland is an almost complete reality. If Bevin were able to go to the Gare du Nord or the Gare de Lyon today, he could buy a ticket and go without a passport wherever he liked within Schengenland, though not, unfortunately, to Victoria Station.

It is far from certain, however, that police and judicial cooperation under the third pillar will deliver enough security from cross-border crime. Such crime continues to proliferate and it is doubtful whether the EU institutions as they stand at present are strong enough to win the battle against it. Judicial cooperation is good as far as it goes. But, again owing to institutional weaknesses, it does not yet go far enough.

The persisting divisions of competences between the first and third pillars, as well as the differential memberships of the EU and Schengenland, result in confused lines of control, limited scope for action and a system that few members of the public either know or understand. In many ways, the Area of Freedom, Security and Justice is a classic example of the Union's wider problem:

it is a potentially useful means for tackling problems that are beyond the scope of individual member states, but it is hampered by the political compromises, abstruse jargon, and occasionally counter-intuitive policies that result from trying to bring together such a large number of actors without adequate institutional reform.