

A Frontier-free EU — Fiction or Reality?

—The Single Market and Constraints to the
So-called Four Freedoms—

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1. Introduction

On 25 March 1957, the six founding members of the European Economic Community (EEC) signed the Treaty of Rome (Treaty on the Euro-

pean Economic Community)¹⁾, stipulating the so-called 'four freedoms': Its provisions demand in the first title of part two the "free movement of goods" through a customs union (Article 9). The third title of part two ("Free movement of persons, services and capital") calls for the abolishment of restrictions on the "freedom of movements of workers" (Article 48), on the "freedom of establishment"²⁾ (Article 52), on the "freedom to provide services" (Article 59) and on the "movement of capital" (Article 67) during a transitional period.

The movement of goods was liberalized, when quantitative restrictions ("quotas") between Member States – according to Article 30 – were eliminated by 1961, and further, when the EEC members introduced the Customs Union in 1968.

The Single European Act (SEA) of 28 February 1986 incorporated the goal of the four freedoms into the new Article 7 a of the EC treaty. The Act's wording on this matter was based on a White Paper on completing the internal market that aimed at eliminating controls at internal borders, approved on 14 June 1985 by the European Commission. Article 7 a SEA stipulates as follows :

"The Community shall adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992, The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty." Whereas

1) cit. Ralph H. Folsom (1993): 1–86.

2) Free movement of workers and the freedom of establishment are now considered as free movement of persons and therefore regarded to comprise just 'one' freedom.

by now the freedom of movement is officially widely granted for goods, services and capital, the freedom of movement for persons is still lacking behind. Therefore, the Preamble of the Maastricht Treaty on European Union is explicitly reaffirming the "objective to facilitate the free movement of persons".

European Commission and European Parliament take a critical stance towards the achievements. According to the opinion of the Commission, "the frontier area is a part of national territory which does not have a particular status justifying the permanent operation of controls or, on the contrary, prohibiting any form of control."³⁾ Even now, many exemptions from the four freedoms apply: Regular border checks still exist between EU countries other than the so-called Schengen States⁴⁾, and in certain cases, EU States continue to treat citizens and residents from other EU States as foreigners. This paper is to deal with the question to what extent EU legislation as well as national legislation have already introduced the four freedoms and in which regard and for what reasons the free movement of individuals is even officially not yet fully granted. It does not intend to focus on practical barriers that may still exist in some regards.

3) "Europe Without Frontiers. Questions and Answers. I. Free movement of individuals. A. Identity, customs and tax controls at internal frontiers."

4) Explanation follows in the chapter 3.2.

2. Freedom of Movement of Goods, Capital and Services⁵⁾

2.1 Goods

The introduction of the Customs Union in 1968 did not necessarily include a harmonisation of the legal and administrative rules in respect to production, use and sales of goods. It did not lead to the abolishment of customs controls, either. These checks of goods at the internal borders continued mainly due to the fact that only jurisdiction on external tariffs was transferred from national governments to the EC, but excise duties and value-added tax (VAT) remained within the sphere of duty of national governments. By now, rates of both still differ widely between the EU Member States. Free trade within the EU continues to be legally restricted in the following areas : tobacco, alcohol, drugs, weapons and cultural assets. Tobacco, alcohol and perfumes are subject to national excise taxes, laws on sales and ownership of drugs and weapons differ from country to country, and there is also a consensus that cultural assets have to be protected from being taken out of their country of origin.

VAT

Different VAT rates permit traders to gain benefits not through the competition of the suppliers of goods, but through the differences of national tax policies : A buyer can enjoy a better buy, if he makes his purchase in the country with the lowest VAT rate. Therefore it can be assumed that different VAT rates within a Single Market may cause a trade distortion.

5) basic information cf. Note 3.

The European Communities' Economic and Social Committee (ESC) notes in a controversial Opinion of 21 December 1995, entitled "Direct and Indirect Taxation"⁶⁾, that there are big differences between current VAT rates in the Member States. As a first step towards the harmonisation of VAT rates, minimum rates that the member countries will have to levy are under discussion. They could be 15% for the standard rate and 5% for reduced rates. With the implementation of the Single Market, the EC introduced a transitional scheme that bases taxation on the country-of-destination principle to allow for the eradication of border checks: Buyers have pay VAT in their country of residence. Though this system was difficult to effectuate, it prevented the unwanted market distortion. In 1996, the EU introduced the principle of taxation in the country of origin as the easier-to-handle definitive scheme. It means, buyers have to pay the VAT in the country of the purchase. This system could give rise to problems of competitiveness between Member States and lead to a shifting of jobs from one country to another, as long as VAT rates are not harmonized yet.

*Excise Taxes*⁷⁾

Though quantitative restrictions for cigarettes and spirits are phased out for intra-Community trade, the Member States are still entitled to impose excise taxes of their own on these commodities, if the quantities taken across an internal border are not for personal use. To this end, the national authorities can check if the products are for resale or for private

6) European Commission Directorate General for Information, Communication, Culture and Audiovisual Media (ed.)(1996) *Frontier-free Europe*, No. 6, Supplement.

7) cf. note 6.

use, using certain quantities as guide levels. They may request any person transporting more than 800 cigarettes, 400 cigarillos, 200 cigars, one kilogram of tobacco, 90 litres of wine, 110 litres of beer, 20 litres of aperitifs and 10 litres of spirits to prove that the products in question are indeed intended for his personal consumption and not for commercial purposes. Denmark, Sweden and Finland are permitted to maintain quantitative restrictions on alcohol and tobacco imports until 31 December 1996.

Article 36 of the EC Treaty

Article 36 of the EEC treaty allows Member States to make exemptions from the principle of free movement of goods in specific cases. It reads :

"The provisions of Articles 30 to 34⁸⁾ shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security ; the protection of health and life of humans, animals or plants ; the protection of national treasures possessing artistic, historic or archaeological value ; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States." Therefore weapons, drugs, obscene material and cultural treasures can be excluded from free trade across internal borders. Member countries can also base their objections to the import of hazardous goods (e.g. BSE-infected beef) on this provision. Since this rule is to be applied in a very restrictive sense, e. g. it must not to be used as a pretext for trade barriers, it requires further law harmonisation.

To ensure transparency of exceptions to the principle of free movement

8) i.e. the Articles dealing with the prohibition of quantitative restrictions on imports.

of goods, the Internal Market Council adopted a Decision on 23 November 1995. This Decision will directly (i.e. without the need for national implementing legislation) establish a procedure from 1 January 1997 on, regulating how Member States will have to notify the Commission of projected measures to exempt certain goods from free sales or use in that state, though they are made or sold legally in another Member State. Such exemptions can include a general ban, a refusal to grant authorisation, a requirement to modify the product or a withdrawal from the market.⁹⁾ According to Commissioner Mario Monti, who heads Directorate General XV (Internal Market and Financial Services) and is responsible for the realisation of the Single Market, the goal of this procedure is to make Member States "think twice before making any such exceptions", because they are required to justify their decisions. This measure is supposed to achieve a de facto mutual recognition of (national) regulations and technical standards without requiring their over-all harmonisation on EU level.

Weapons and Drugs

Because of their liberal laws as to soft drugs, the Netherlands have to restrict their sales to other EU residents.

France and Belgium have to register residents from other EU countries buying weapons there and to notify the authorities of the respective countries of residence. For legal gun owners, a firearms pass that will allow them to carry their guns across internal borders is introduced in 10 of the 12 former EC countries (not yet in France and Italy). This was initiated by

9) Internal Market Council 23 Nov. 1995 : "Proposed Directives on the rights of non-EU nationals to travel within the Community and on the elimination of controls on people at internal frontiers" (COR 23/96, COM(95)346 and COM(95)347).

a Commission Recommendation of 25 February 1993 providing for the introduction of the European firearms pass with a uniform format, in order to ease administrative arrangements relating to the Community firearms legislation (Directive¹⁰⁾ 91/477/EEC).¹¹⁾

Cultural Treasures

Another kind of goods Article 36 can exempt from the freedom of the import, export or transit within the Community is national treasures having an artistic, historic or archaeological value. The reason for this possible exclusion is that both rights – freedom of movement and protection of a country's cultural heritage and national treasures – are regarded as competing values. Member States may do so in the manner they have chosen and according to its scale of values. But the decision cannot be arbitrary, it has to be limited to the major principles enumerated in Community law, is to be controlled by Community institutions and must be limited to a reasonable level, taking the right of the freedom of movement into account.¹²⁾

Tax-free Shops

The logic of the Single Market makes tax-free shops at internal borders (and at the parts of air- and seaports serving intra-Community travel) obsolete, but for pragmatic reasons, the elimination of tax-free shops is post-

10) An EU Directive is EU legislation that is not binding by itself, but has to be transformed into national law within a certain period. On the contrary, an EU Regulation is directly binding EU law.

11) Single Market News 2/96.

12) European Commission Directorate General for Information, Communication, Culture and Audiovisual Media. 1st report on the consideration of cultural aspects in European Community action. "Part 1, chapter V: Cultural Assets in the Internal Market".

poned until 30 June 1999, while restricting the quantities of perfumes, alcohol and cigarettes such shops are entitled to sell to travellers.¹³⁾

2.2 Capital

In principle, capital transactions by individuals and firms across internal borders are not subject to restrictions any more, neither for investment nor for consumption nor for borrowing. To a large extent, liberalization of capital movements within the community was completed, when in May 1994 Greece joined the other members in eliminating the last restrictions. However, Member States may require that capital movements be declared to the authorities for statistical or administrative reasons, in respect of amounts above a certain limit when crossing the border. They also keep the right to make certain checks on nationals of one member country who carry out banking transactions in another, e.g. on deposits made, with a view to combating money laundering. Volatile currency exchange rates, high commissions for bank transfers and not fully compatible payment systems still put practical restrictions on this freedom.

2.3 Services

In principle, free movement of services was also accomplished. It means providers, recipients and even the services themselves (e.g. information) are permitted to cross the border without hindrance. Where a service is provided on permanent basis (the provider emigrates to another Member

13) European Commission Directorate General for Information, Communication, Culture and Audiovisual Media (ed.) (1996) *Frontier-free Europe*, No. 6, Supplement.

State), it is the rules on freedom of establishment which apply. In other words, a service provider from another Member State must be able to carry on his business under the same conditions as nationals. A service provider lawfully established in one Member State can temporarily (e.g. during building works) operate in another state without restriction. Public interest, e.g. related to public policy, public health or public safety can put restrictions on foreign service providers as long as these are not of discriminatory nature.

If a certain profession (e.g. business consultancy) is regulated in one Member State, but not in the other, the first Member State must not prevent an individual or firm established in the second state to provide this service. In such a case, the first state must take account of the conditions under which the profession is carried out in the home country of the service provider and may require him to comply not with all its own rules, but only with those which are lacking in the second state.

3. Freedom of Movement of Persons¹⁴⁾

3.1 Realisation Gap

None of the so-called four freedoms is as little accomplished by now as the freedom of movement of persons. The right of EU nationals to reside and work in other EU countries for more than three months is still subject to a permit which may be refused in certain cases "for public order, public

14) basic information cf. European Commission, DG X (1995): "Free Movement of Persons within the European Union: Europe without Frontiers, Questions and Answers".

security or public health reasons". Non-working people can be rejected if they are not health-insured or do not have sufficient financial means. Working of EU nationals in other EU countries can even be restricted in the case "of posts which involve the exercise of public authority or duties, the purpose of which is to safeguard the overall interests of the State (police, army, judiciary, legislature, etc.)".

The right of third-countries' citizens residing in an EU country to travel to other EU countries is still subject to visa regulations. A businessman or traveller from a third country who is not an EU resident still needs to obtain a visa for each EU country he wishes to travel to (unless there is no visa requirement), except for the "Schengen States" which issue a joint short time visa.

Commissioner Mario Monti stated : "The internal market is not yet a reality for citizens. It is high time we dealt with this shortcoming, which undermines the European Union's political credibility. For the vast majority of Community citizens, implementation of a crucial treaty objective such as free movement of persons cannot be postponed any longer."¹⁵⁾

Since the European Union has not yet solved the problem of the freedom of movement of persons, Member States have to rely on their own initiative. Intergovernmentalism had to take over the pioneer role of tackling this task on a smaller scale. To this end, a group of member countries concluded the Schengen Agreement.

15) Free Movement of Persons within the European Union. The Commission adopts proposals for free movement of persons at the end of 1996.

3.2 Schengen Agreement and Schengen Convention

On 14 June 1985, on initiative of French President François Mitterand and German Chancellor Helmut Kohl, five Member States of the European Community prepared the realisation of the freedom of movement of persons by signing the Schengen Agreement on the gradual reduction of checks at the joint borders. The three Benelux countries, France and Germany were later joined by Italy (27 Nov. 1990), Portugal (25 June 1991), Spain (25 June 1991), Greece (6 Nov. 1992) and Austria (28 April 1995). Further details were settled in a "Convention Applying the Schengen Agreement" of 19 June 1990. This Convention came into force on 1 September 1993 for the original signatories, and on 1 March 1994 for Spain and Portugal. Its implementation was originally scheduled for 1 January 1993, but was delayed several times because of the formerly liberal German asylum rules, difficulties in adapting airport immigration control arrangements and in launching a centralized computer system to police the movements of third country nationals. Therefore, the founding members together with Spain and Portugal had to delay implementation until 26 March 1995, whereas it is still pending in Italy, Greece and Austria.

*Contents of Schengen Agreement and Schengen Convention*¹⁶⁾

The basic principle of Schengen Agreement and Schengen Convention is that "all persons shall be able to cross internal frontiers at any point,

16) Presse- und Informationsamt der Bundesregierung (1996): Das Schengener Abkommen. Dokumentation des Bundesministeriums des Innern zum Schengener Durchführungsübereinkommen (SDÜ) anlässlich des ersten Jahrestages der Inkraftsetzung. Bonn; Pressereferat des Bundesministeriums des Innern (1995): Das Bundesministerium des Innern teilt mit: Was bedeutet Schengen für Bürger und Reisende? Das Schengener Durchführungsübereinkommen im Rahmen der gesamt-europäischen Sicherheitslandschaft.

without any frontier control" (Article 2 (1) Schengen Convention). Exemptions from this clause are confined to cases of danger and suspicion. Border controls can be re-introduced only temporarily in the interest of public order and national security (Article 2 (1) Schengen Convention). With its implementation, members had to harmonize the visa issuing policy and to introduce a new short-stay joint visa that allows travellers to move freely within the Schengen countries. Residential permits of one Schengen country qualify for an up-to-three months stay in the others. After the implementation of the Convention, only France temporarily preserved her right to continue some border checks for fear of illegal immigration, of Islamic terrorism, of drug trafficking, and because of the failure of other Schengen States to report stolen identity cards and stolen cars.¹⁷⁾ To compensate for a possible loss of security, counterbalancing measures were taken: A computerized 'Schengen Information System' (SIS) holds data on entry denials and wanted persons and can be accessed by all Member States. Borders towards third countries are now subject to stricter checks, and police co-operation across internal borders is intensified.¹⁸⁾ Hereby, the intensity of checks on persons is to depend on their citizenship: Citizens of the European Economic Area (EEA: EU citizens and citizens of Norway, Iceland and Liechtenstein) and in some cases their family members are to be checked less rigidly (only passport or ID card), whereas citizens of third countries are subject to the following checks: Whether they hold a visa (if

17) Emma Tucker: "French deal blow to EU plans for border-free zone." *Financial Times*, 30 June 1995; Susan Bell: "French border ploy." *The Times*, 30 June 1995.

18) Presse- und Informationsamt der Bundesregierung (1996): *Das Schengener Abkommen. Dokumentation des Bundesministeriums des Innern zum Schengener Durchführungsübereinkommen (SDÜ) anlässlich des ersten Jahrestages der Inkraftsetzung*. Bonn.

required), whether there is an arrest warrant or entry refusal registered in the SIS, and whether they have sufficient financial means to support their stay.¹⁹⁾

Extension of the Schengen Agreement

A preliminary way to improve the freedom of movement of persons would be an extension of the Schengen Agreement to other EU States, if the European Union's action is further delayed. After its conclusion, the Schengen Agreement was joined by Portugal and Spain, who have already implemented it, and by Italy, Greece and Austria who have signed it and are likely to be the next to enforce it. The three Nordic members Denmark, Sweden²⁰⁾ and Finland show interest in joining, which would bring the number of members to thirteen, leaving the UK and Ireland behind. But the Nordic members have been linked to Norway and Iceland in the North European Passport Zone and do not intend to abandon this system. Therefore negotiations are under way to bring the whole North European Passport Zone into the Schengen system. The future role of the Nordic countries is to be further discussed by the Schengen group on 17 October 1996. A success of these negotiations would actually merge Iceland and Norway into the so-called third pillar²¹⁾ of the EU without EU member-

19) Pressereferat des Bundesministeriums des Innern (1995): Das Bundesministerium des Innern teilt mit: Was bedeutet Schengen für Bürger und Reisende? Das Schengener Durchführungsübereinkommen im Rahmen der gesamteuropäischen Sicherheitslandschaft. Pressereferat des Bundesministeriums des Innern (1995?): Das Bundesministerium des Innern teilt mit: Was bedeutet Schengen für Bürger und Reisende? Das Schengener Durchführungsübereinkommen im Rahmen der gesamteuropäischen Sicherheitslandschaft.

20) Suède. Communication écrite du gouvernement suédois au "Riksdag" sur la CIG 96 (Résumé), Task Force CIG 96 – Commission Européenne – 30 November, 1995.

ship. By May 1996, the five Nordic countries were to enter an association-like agreement with the Schengen States.²²⁾ Thus new borderlines within Europe may come into existence, different from the external borders of the EU.

3.3 Initiatives on the EU level

The European Communities had partly liberalized the movement of persons since the 1960 s. In 1968, Directive 68/360/EEC abolished the "restrictions on movement and residence within the Community for workers of Member States and their families" and in 1973 Directive 73/148/EEC did the same with regard to the self-employed ("establishment and the provision of services").

The European Parliament

On 19 November 1992, the European Parliament welcomed the action of the Schengen States in a resolution²³⁾, regarding it as "an excellent testing ground for Community settlement of the matters dealt with in the agreement and an opportunity to make the European Parliament and na-

21) The third pillar refers to Justice and Home Affairs: "To achieve the objectives of the Union, in particular the free movement of persons, Member States will regard the following areas as matters of common interest. First, border-related issues such as policy on asylum, immigration, conditions of entry and movement, residence, illegal immigration and work. Second, cross-border criminal issues such as drugs, terrorism, fraud, and legal co-operation on civil law, criminal law and customs. ... This does not affect Member States' maintenance of law and order and internal security." (The Directorate General for Research of the European Parliament (ed.) Fact sheet: The new institutional framework after Maastricht: the European Union (1.1.3).

22) Die Welt, 14 March 1996.

23) Resolution A 3-0336/92 of the European Parliament on the entry into force of the Schengen Agreement (Official Journal of the European Communities, 1992 C 337/214), cit. Pollard/Ross (1994): 96-99.

tional parliaments aware of these matters” and explicitly reserved the right to bring an action against the Commission and the Council for failure to act, according to Article 175 of the EC Treaty. At the same time, it criticized the Schengen Convention for creating new borders between citizens of Schengen and non-Schengen EU Members States (“discrimination between EC citizens on nationality grounds”) and for lacking awareness of problems related to human rights and fundamental freedoms. When the European Parliament eventually launched a case against the Commission in the European Court of Justice for its alleged failure to force Member States to honour their Treaty obligations regarding the free movement of people,²⁴⁾ the Commission was compelled to take further steps.²⁵⁾

Regulations by the Council

According to the logic of open internal borders, visa issued by one Member State are to be mutually recognized by all others. Therefore visa rules have to be unified. To this end, the Council adopted a Regulation establishing a model type of visa (Regulation of 29 May 1995 (EC) 1683/95*), another one determining the list of third countries whose nationals must have a visa to enter Community territory (Regulation of 25 September 1995 (EC) 2317/95*) and a Decision relative to persons crossing the external frontiers of the Union.

24) “Free Movement of Persons within the European Union. The Commission adopts proposals for free movement of persons at the end of 1996.”

25) according to MEP Glyn Ford, Party of European Socialist from Greater Manchester East (Session News. Directorate for Press and Audiovisual Services. The Week 15–19 July 1996, p. 8).

Draft Directives of the European Commission

The legal action brought by the Parliament prompted the Commission to take further initiatives. On initiative of Mario Monti, the Commission adopted three proposals for Directives aiming at the abolition of controls on people when crossing internal borders throughout the European Union as a whole on 12 July 1995. In principle, the European Commission takes the rules of the Schengen Agreement as a model for all of the EU, what it explicitly emphasized in the respective introductions, when it presented these three drafts.²⁶⁾ They are to be discussed in the European Parliament in October 1996. If passed by the Council of Ministers, these Directives would require national legislation to enact laws within the framework of each Directive.

In the opinion of the Commission, the internal market must function under the same conditions as a national market, where intra-Community journeys should be undertaken just like journeys between regions or provinces of a Member State. According to these plans, European Union citizens and legal EU residents of the 15 Member States could travel

26) Commission of the European Communities : "Proposal for a Council Directive on the elimination of controls on persons crossing internal frontiers (presented by the Commission) COM(95) 347 final", p.2 ; "Proposal for a Council Directive on the right of third country nationals to travel in the Community (presented by the Commission) COM(95) 346 final", p. 2 ; "Proposal for a European Parliament and Council Directive amending Directive 68/360/EEC on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families and Directive 73/148/EEC on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services (presented by the Commission) COM(95) 348 final", p. 2 (cf. The Official Journal of the European Communities. No. C 289, C 306, C 307) ; Single Market News Nov. 1995, Dossier Spécial.

throughout the bloc without showing their passports from the end of 1996. Not affected are arrangements applicable to the right of residence proper (the procedures and issuing conditions of residence permits). Therefore it can be said that even if these Directives are adopted, they will continue to limit residential rights of third-countries' nationals to a single Member State.

The original date for implementation of these Directives was set at 31 December 1996, but the Commission is prepared to change this date, if implementation turns out to be impossible within this time range. Since the European Parliament has not yet completed deliberations by October 1996, there is little chance to meet the original time frame. Major obstacles on the way towards a Directive are the link to the implementation of measures strengthening external borders as well as the fact that unanimity is required in the Council, where the UK government is indicating opposition.²⁷⁾

The first Directive²⁸⁾ is to prohibit identity checks and other formalities between all EU countries (and not just those party to the Schengen agreement). It must be unanimously adopted by the 15 Member States. It includes the abolition of passport controls at airports and seaports inside the Single Market. On the other hand, the right of EU Member States to conduct checks on individuals other than in connection with the crossing

27) "Britain under pressure to scrap border controls." Xinhua, 26 April 1995 ; "Britain to veto EU plan on borders." Xinhua, 13 July 1995 ; Session News. Directorate for Press and Audiovisual Services. The Week 15-19 July 1996, p. 8.

28) Commission of the European Communities "Proposal for a Council Directive on the elimination of controls on persons crossing internal frontiers (95/C 289/10) COM(95) 347 final-95/0201 (CNS)".

of internal frontiers will not be affected. All persons, whatever their nationality, will be the beneficiaries of the abolition of internal frontier controls. A "safeguard clause" is envisaged for a situation when a Member State is confronted with a serious threat to public order or safety.

The second Directive²⁹⁾ proposes to grant nationals of non-EU countries the right to travel within the whole of the EU for a short period, provided they are in possession of a visa or a residence permit issued by one Member State. This is to supplement the proposals submitted by the Commission in December 1993 regarding the crossing of external borders, by envisaging equivalence between a residence permit and a visa delivered by a Member State, as well as the mutual recognition of visa. The social aspect of this measure cannot be underestimated. Several million foreign residents, including members of Union citizens' families, will be able to visit other Member States without undergoing any formalities. And foreign tourists and businessmen will be able to enter all EU States with a single visa. This will encourage tourism, cross-frontier purchases of goods and services and awareness of European culture. Its passing will also require unanimous endorsement by the Council.

The third proposed Directive³⁰⁾ serves a more formalistic purpose : It is supposed to amend two previous Directives by deleting any reference to the production of identity documents for the purpose of crossing an internal frontier. It will need approval by both Council and Parliament.

29) Commission of the European Communities : "Proposal for a Council Directive on the elimination of controls on persons crossing internal frontiers (presented by the Commission) COM(95) 347 final", p.2 ; "Proposal for a Council Directive on the right of third country nationals to travel in the Community (presented by the Commission) COM(95) 346 final".

*The High-Level Working Party*³¹⁾

On 24 January 1996, the Commission set up a high-level working party chaired by former European Parliament President Simone Veill for deliberating the problem of free movement of persons. Its task is to analyze practical and administrative problems encountered by the working population (employed, self-employed, looking-for-work) as well as by the non-working population (students, retired people or the family members of working or non-working migrants) who want to exercise their right to free movement. Special consideration is to be given to third-country citizens residing in the EU. A report is to be submitted to the Commission by February 1997.

The European Council

In response to the drafts by the Commission, the new Council Presidency (Ireland) proposed a Draft Joint Action Plan in July 1996. According to it, EU States would have the right to deny entry to a resident of another EU State, if he poses a threat to national security or appears on a list of undesirables. Such a person would not even have the right of appeal. Commissioner Monti suspects that such a provision could serve as an excuse for EU States to maintain border checks. The European Parliament harshly criticized the Council's plan as a "scandalous slap in the face for Parliament and Commission" (MEP³²⁾ Martin Schulz, Party of

30) "Proposal for a European Parliament and Council Directive amending Directive 68/360/EEC on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families and Directive 73/148/EEC on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and and the provision of services (presented by the Commission) COM(95) 348 final".

31) IP/96/338.

European Socialists, from Germany).³³⁾

3.4 The Position of the UK³⁴⁾

Britain tries to preserve national border controls. This is partly for historic reasons based on her island mentality and her tradition of independence. For now, this stance of the UK government, asserted by most government officials including Prime Minister John Major, is preventing the adoption of EU Directives on the free movement of persons. The UK argues that border-free Europe would increase illegal immigration and criminal activities. The United Kingdom government has made it clear that it does not intend to abandon its own border controls on travellers from other Union countries. Besides, a dispute about the list of countries, for whose nationals the EU will require visa in the future, is not yet settled: The EU proposed the list used by the Schengen States, whereas the UK would like to maintain visa exemptions for nationals of most Commonwealth Countries.³⁵⁾

In a proposal to the Intergovernmental Conference (IGC), the UK even

32) MEP = Member of European Parliament

33) Session News. Directorate for Press and Audiovisual Services. The Week 15-19 July 1996, p. 7-11.

34) Ray Mosely "Britain Remains Holdout to Open-Border Treaty." Chicago Tribune, 20 February 1995; "Do We Have to Open the Door?" Daily Mail 15 February 1995; Tony Bunyan "Borders go Down, Walls Go Up." The Guardian, 15 February 1995; "Britain may clash again with EU on border checks." Xinhua 15 February 1995; "Britain under pressure to scrap border controls". Xinhua 26 April 1995; "Britain-Europe: Major has a year to get his house in order." Inter-Press Service 7 July 1995; "Britain to veto EU plan on borders." Xinhua 13 July 1995.

35) "Europe-Politics: EU battle builds up over visa crackdown." Inter-Press Service, 10 March 1995.

intends among others to make measures relating to the free movement of persons exempt from the projected Qualified Majority Voting (QMV).³⁶⁾ Despite this fact, the European Commission seems to be resolved to push ahead its Directive proposals and the decision-making process. The UK's proposal will be discussed at the IGC Working Group in Luxembourg on 30 September 1996. If Britain continues to reject any progress on this field, the European Commission might take the UK government to the European Court of Justice. The conviction among British government lawyers is rising that in such a case, the judgement might be not favourable for the UK's policy.

3.5 Public Opinion on the Freedom of Movement of Persons

The main argument against freedom of movement of persons consists of security concerns.³⁷⁾ But the Schengen agreement has introduced many safeguarding provisions, i.e.

- ⇒ common visa policy
- ⇒ stricter controls of outside borders
- ⇒ police co-operation
- ⇒ SIS database,

and the proposed EU legislation is to apply almost identical ones.

Opinion polls on the Schengen Agreement conducted between April and June 1995 indicate that the opinion of the EU population is split on its merits : 43 % regarded the removal of border controls as a good, 42 % as a

36) "Proposal to amend Articles 100 a(2) and 130 s(2) to the EU Intergovernmental Conference (IGC). The Government's White Paper on the IGC, 'A Partnership of Nations'" (FCO Spokesman 20 September 1996).

37) cf. Margarethe SAWADA (1992), Margarethe SAWADA (1993).

bad thing. The most markedly positive public attitudes towards the “Schengen area” are found in Spain (66% : “a good idea”). In Portugal, Belgium, Austria, Germany, Ireland, Greece and Italy, the positive attitudes outweighed the negative ones, whereas public opinion was opposed to control-free frontiers in Luxembourg, Finland, France, Denmark, the Netherlands and Sweden. The strongest objection could be found in Great Britain (68% : “a bad idea”).³⁸⁾ By October 1995, the opposition increased further in most countries.³⁹⁾

On the other hand, the European Federation of Green Parties demands even more consistent provisions for the free movement of persons. At the Fourth Council meeting in Turin, 11 February 1996, the following position was adopted :

“All citizens legally resident in a member State should have their fundamental rights guaranteed and respected. In particular, their freedom of movement should be guaranteed by a European Residence Permit. A framework Directive on a statute for resident citizens from third countries should be adopted at the European level including specific rights of family reunification, access to employment, vocational training, administrative independence for married women, political action as well as voting in and contesting elections.”⁴⁰⁾

38) The implementation of the Schengen Agreement : a split European opinion. *EUROPINION* July 1995, N° 5.

39) *Itar-Tass* 24 November 1995.

40) “The political position of the European Federation of Green Parties at the EU Intergovernmental Conference of 1996. As adopted by the Fourth Council meeting in Turin, 11 February 1996.” Brussels 7 March 1996.

4. Conclusions

The grotesque reality shows that the freedom of movement of people is the only one of the four freedoms of the Single Market Program that is achieved not even officially. Austrian MEP Johannes Voggenhuber characterized the situation by questioning "whether the freedom of movement for people posed a bigger risk to society than, for example, free movement of goods and the ensuing threat to the environment".⁴¹⁾ This delay is mainly caused by the opposition by the UK and by Ireland, and the fact that these countries could block EU legislation with their veto.

Theoretically speaking, the significance of internal borders in the context of the EU can be described in a two-fold way :

- ① The border as a line of demarcation between areas where different legal norms are applicable (tax laws, social security laws, technological standards, professional qualifications). These differences are not automatically changed by the eradication of border controls, but might cause unwanted consequences (trade distortion in countries with high VAT rates, burden on the social aid system by an influx of people from other Member States). Therefore, further harmonization of rules respectively their vice-versa recognition proves essential. To some regard, borders still divide areas with different levels of economic power, but it is just the intention of European economic integration to smooth them out.
- ② The border as a place of investigation and separation : The old-style

41) Session News. Directorate for Press and Audiovisual Services. The Week 15–19 July 1996, p. 10.

concept of nation states still regards borders as a suitable instrument for investigations, because borders are an arbitrary, but sophisticated and somehow efficient system. But it fails to explain, why the same results cannot be achieved by other methods, e.g. those applied in the Schengen Treaty. Fear about immigration waves and terrorist attacks serve as a pretext for maintaining border checks. Mistrust into the policy and the administration of fellow EU Member States as well as different intentions and interests by different countries are to blame. In the same category fall provisions that suspend rules on free movement in emergency cases.

The slow implementation of the four freedoms once more demonstrates the need for more efficient decision-making structures within the EU, in particular the abolition of unanimity vote, at least if measures are within the scope of European treaties. Intergovernmental initiatives can be useful, as long as a decision-making process cannot be organized in another way. But on the other hand, if only few member countries take part in such initiatives, they will serve to create additional borders dividing an 'inner core' Europe from other EU Members. It is also questionable that such an important field as the free movement of persons would be exempt from the control by EU institutions if left to intergovernmental procedures.

Selected Bibliography

- Folsom, Ralph H. (1993) *European Community Business Law. Selected EC Treaties, Legislation and Litigation Materials. Sourcebook, 1993 edition.* St. Paul: West Publishing.
- 南部朝和(1996)「人の自由移動政策の形成過程」『EUの社会政策. 日本 EC 学会年報』16:

101-118.

Pollard, David / Ross, Malcolm (1994) *European Community Law. Text and materials.* London, Dublin, Edinburgh : Butterworths.

Sawada Margarethe (1991) 「人の自由移動をめぐる諸問題—シェンゲン協定を中心として」『上智法学論集』34(1) : 81-102.

Sawada Margarethe (1992) "The Schengen Convention – A Response to a Frontier-Free Europe" 『日本 EC 学会年報』(EC Studies in Japan) 12 : 125-152.

Schütz, Raimund (1995) "Europaweite Freizügigkeit ohne demokratische Kontrolle—Überwachung der Anwendung der Schengen II-Konvention durch die nationalen Parlamente." *Archiv des öffentlichen Rechts* 120(4) : 509-548.

"Britain may clash again with EU on border checks." *Xinhua*, 15 February 1995.

"Britain under pressure to scrap border controls." *Xinhua*, 26 April 1995.

"Britain-Europe : Major has a year to get his house in order." *Inter-Press Service*, 7 July 1995.

"Britain to veto EU plan on borders." *Xinhua*, 13 July 1995.

"EU citizens disappointed by open borders regime." *Itar-Tass* 24 November 1995.

"Europe-Politics : EU battle builds up over visa crackdown." *Inter-Press Service*, 10 March 1995.

"Schengener Abkommen hat sich bewährt. Innenministerium : Wegfall der Grenzkontrollen erfolgreich – Verhandlungen mit Skandinavien über Assoziierungsstatus." *Die Welt*, 14 March 1996.

Papers published by the European Union :

Commission of the European Communities :

—"Proposal for a Council Directive on the elimination of controls on persons crossing internal frontiers (presented by the Commission) COM(95) 347 final".

—"Proposal for a Council Directive on the right of third country nationals to travel in the Community (presented by the Commission) COM(95) 346 final".

—"Proposal for a European Parliament and Council Directive Amending Directive 68/360/EEC on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families and Directive 73/148/EEC on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services (presented by the Commission) COM(95) 348 final".

*European Commission : *The Single Market in 1995. Report from the Commission to the Council and the European Parliament.*

*European Commission, DG X (1995) : "Free Movement of Persons within the European Union : Europe Without Frontiers, Questions and Answers".

European Commission, DG XV :

- * "Commissioner Monti Outlines Single Market Priorities to 23 November Council".
- * "La confection du modèle type du visa uniforme est terminée".
- * "Free Movement of Persons within the European Union – The Commission adopts proposals for Free Movement of persons at the end of 1996".
- * "Free Movement of Persons within the European Union – Schengen Treaty fully implemented since July 1, 1995".
- * "Free Movement of Persons within the European Union. The Three Proposals."
- * European Commission Directorate General for Information, Communication, Culture and Audiovisual Media. 1st report on the consideration of cultural aspects in European Community action. Part I, chapter V : "Movement of cultural assets".
- * European Commission Directorate General for Information, Communication, Culture and Audiovisual Media (ed.)(1996) *Frontier-free Europe*, No. 6 , No.7.
- European Parliament. Briefing. Directorate General for Information and Public Relations. 15–19 July 1996.
- "Ohne Paß durch Europa. Grenzkontrollen sollen endlich fallen." *Europa-Forum. Informationen aus dem Europäischen Parlament* (10) 21–25 Oct 1996 : 3.
- *EUR-OP News : "After Schengen. Commission calls for removal of all border controls." IP/96/338 : "Free Movement of Persons : First Meeting of the High-Level Panel Chaired by Simone Veil (23 April 1996)".
- The Official Journal of the European Communities (1995). No. C 289, C 306, C 307.
- Session News. Directorate for Press and Audiovisual Services. The Week 15–19 July 1996.
- *Single Market News. The Newsletter of DG XV – Internal Market and Financial Services. Dossier Spécial, Nov. 1995 "Libre circulation des personnes."
- *Single Market News. The Newsletter of DG XV – Internal Market and Financial Services 2/96, 3/96, 6/96.
- Vertretung der Europäischen Kommission in Deutschland (Hg.) (1995): *EU-Informationen* 3 (June 1995).

Papers published by the German government :

- Presse- und Informationsamt der Bundesregierung (1996) : Das Schengener Abkommen. Dokumentation des Bundesministeriums des Innern zum Schengener Durchführungsübereinkommen (SDÜ) anlässlich des ersten Jahrestages der Inkraftsetzung. Bonn.
- Pressereferat des Bundesministeriums des Innern (1995) : Das Bundesministerium des Innern teilt mit : Was bedeutet Schengen für Bürger und Reisende? Das Schengener Durchführungsübereinkommen im Rahmen der gesamteuropäischen Sicherheitslandschaft
- * An asterisks marks material available on the Internet Server of the European Union ([http : //europa.eu.int](http://europa.eu.int)) .