

Zentrum für Europäische Integrationsforschung
Center for European Integration Studies
Rheinische Friedrich-Wilhelms-Universität Bonn

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**When Sleeping Dogs
Wake Up**
Norway and Justice and
Home Affairs in the
European Union

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When Sleeping Dogs Wake Up

Norway and Justice and Home Affairs in the European Union

Introduction

Norwegian citizens twice rejected membership in the European Union. Norway is nevertheless linked to EU policy, most notably through the European Economic Area (EEA). It has to adopt wide parts of the EU's *acquis communautaire*, but has, on the other hand, seldom a voice and never a vote in decision-making. Thus, Norway has become ever more closely linked to EU policy, thereby perceiving itself as a policy taker.

Ever since the Norwegian “Nei” to EU membership, Norwegian governments have been similarly divided over the membership-question. Nevertheless, Norway has conducted a policy which aims not only at using the possibilities resulting from its participation in the EEA, but also at cooperating more closely with the EU beyond the status quo. This has been expressed once again by the Norwegian Foreign Minister Jonas Gahr Støre:

“(...) The EEA-Agreement is clear in what it covers, but there also is a wide range of issues it does not cover. Here we have to use intelligence and reason, in order to find other forms of cooperation..”¹

¹ (Provisional translation. Original: „EØS-avtalen er tydelig på hva den dekker, men det er også en lang rekke områder den ikke dekker. Her må vi bruke vett og fornuft til å finne andre samarbeidsformer“) Jonas Gahr Støre, Norwegian Foreign Minister, *EØS-avtalen: Gir den rom for en aktiv europapolitikk?* Speech at Europabevegelsens rådsmøte, Oslo, 1. April 2006, available at:

Today Norway has established a variety of other forms of cooperation with the EU in areas such as foreign, security and defence policy, the Lisbon Strategy, the Bologna Process and in the field of Justice and Home Affairs (JHA). The latter is mostly based on the Schengen agreement which ensures free movement of persons within the territory of the EU, as well as Norway and Iceland. Norwegian participation in the Schengen agreement is remarkable, because it offers a much broader participation in policy processes for Norway than the EEA. Yet, its participation in this policy field is not very tangible for the Norwegian public sphere. Perceived as historical achievement some ten years ago, the abolition of border controls and the freedom of movement across European countries nowadays seems to be taken for granted by most of the citizens.

A number of studies have been published on the issue of Europeanisation of nation states, and more specifically, about the impact of the EU on the administrative and legislative culture of the Nordic states.^{2 3} However, there are few academic studies that look at the opposite stream of action. Yet, any attempt to assess if Norway can effectively exert *influence* on EU politics must result in speculation. Feasible, in contrast, is an analysis of the extent Norway *uses its opportunities* of participation in EU-politics. This has been undertaken at least to a certain extent regarding the EEA agreement.⁴ Norway's participation in Schengen, in contrast, or even its role in the broader Justice and Home Affairs policy (JHA), has barely been subject

http://odin.dep.no/ud/norsk/aktuelt/taler/minister_a/032141-090019/dok-bn.html
(18.04.2006).

² The term “Nordic states” or “Nordic Cooperation” includes Sweden, Finland, Denmark, Norway and Iceland.

³ Per Lægreid et al., Europeanization of Central government Administration in the Nordic States, in: *Journal of Common Market Studies* 2004, Vol. 42, No. 2, pp. 347-69.

⁴ Jan Ole Gudmundsen, Ny regjering, nye tanker om Europa-politikken, Muligheter for økt innflytelse i EU, in: *Stat og Styring* 2005, Nr. 6, p. 47-48; Riksrevisjonen (Auditor General of Norway), Riksrevisjonens undersøkelse av forvaltningens arbeid med utformingen av EØS-relevant regelverk, *Administrativ rapport* 2005, No. 2, available at: http://www.riksrevisjonen.no/NR/rdonlyres/E685C2FC-E9A7-4F82-A9A9-E0ABCB27D3B9/0/Adm_rapp_nr_2_2005.pdf (09.05.2006); Statskonsult (Edt.), *I komiteer og korridorer, håndbok i EØS-arbeid*, Oslo 2002.

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to academic research.⁵ Examining this aspect appears worthwhile for three reasons:

- Generally, it offers an analysis of the extent a non-member state is able to participate in, and possibly exert influence on a specific EU policy field without being member of the EU.
- Based on the research findings, concrete policy recommendations could be made to the Norwegian government, which may potentially be relevant for future dealings with the EU, e.g. in the framework of negotiations of further agreements.
- Broken down to the short and concise form of this paper, the findings may reach a broader readership and thus may contribute to a debate in the Norwegian public on the country's relationship with the EU, which might go beyond the current self-perception of a national economy being mere subject to supranational rules and restrictions.

The following essay is based on the assumption that the Norwegian government is interested in making the best possible use of its association with Schengen, and to find more forms of cooperation beyond the status quo, but without becoming member of the European Union in the short- to medium term.⁶ Having this in mind, the paper tries to answer the following questions: Does Norway make exhaustive use of its possibilities to shape decisions within Schengen, taking into account formal and informal channels of influence? Moreover, to what extent is a further linkage to the EU's JHA policies beyond present agreements possible?

The first statement of this paper is that Norway does not fully use its opportunities provided through the Schengen agreement. It is argued that it does

⁵ Kjell Eliassen and Nick Sitter, *Norges deltakelse i Schengensamarbeidet, Vurderinger og anbefalinger*, Center for European and Asian Studies at Norwegian School of Management, Oslo, April 2003.

⁶ Tom Espen Møller and Henning Hunthorp Johansen, EØS-utvidelsen og endringer i EU's samarbeid på det justis- og innenrikspolitiske området – Utfordringer for norsk arbeidslivs- og innvandringspolitikk, *Statskonsult 2005*, Oslo; Norwegian Ministry of Foreign Affairs, *Norges tilknytning til EUs justis- og innenrikssamarbeid*, available at: <http://odin.dep.no/odinarkiv/norsk/ud/p10002480/annet/032001-990456/dok-bn.html> (15.02.06).

make considerable use of *formal* possibilities within the Schengen agreement, and that this is mainly due to the pressure of participation in the working structures of the Council of the EU.⁷ But Norwegian EU policy tends to be less committed with regard to informal channels of influence outside the Council structures.

The second statement of the paper is that a further linkage of Norway to JHA policies beyond Schengen is restricted by three main problems: (1) the occurrence of legal or constitutional barriers stemming from Norway's third country status that hamper ad-hoc agreements equivalent to original EU policies, (2) the potential lack of congruence with political aims of other EU-outsiders such as Iceland or Switzerland, and (3) the political motivated reluctance of member states to grant Norway a broader role in the field of JHA.

Proceeding

First I will briefly outline the historical development of transnational cooperation in the field of justice and security, thus showing background and preconditions for Norwegian participation in EU policy-making. Second, I present a typology which serves as a framework for analysis. The typology is designed to describe four different ways for a non-EU member to engage in EU policy. The types are termed «sleeping dog», «watch dog», «hunting dog» and «dog behind fence». The metaphorical character of their names is intended to facilitate comprehension for the reader and to enhance, at the same time, the comparability of the types to each other.

In a third step, action fields of Norwegian Schengen policy will be assigned to the different dog-types of engagement. The analysis distinguishes between five possible fields of action:

- Internal coherence (national government perspective)
- Use of formal opportunities (EU internal)
- Use of informal networks (EU internal)

⁷ Meant is the Schengen Mixed Committee (COMIX), which is practically embedded in the working structures of the Council of the EU.

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- Use of bilateral relations, other frameworks of cooperation (EU external)
- Use of other, «lobbyist» channels of influence (conferences, media, financial support etc.)

For each of the five possible fields of action the Norwegian activity, will be analysed and assigned to one of the types of engagement. To this end, a degree of activity (e.g. sleeping dog, watch or hunting dog) is attributed to each of the types, referring to each of the five possible channels of influence (cf. Table I). Subsequently, policy recommendations will be given on how to improve Norwegian political performance in the context of the Schengen agreement.

In a fourth step, this paper will present the findings of a case study on the Norwegian efforts to obtain a special agreement on the participation in the mechanism of the European Arrest Warrant (EAW). Thereby an outlook will be provided on in how far the challenges that Norway faced during the negotiations on the EAW may constitute future challenges for Norwegian cooperation within the EU's JHA policy.

This paper is based on a Master's Thesis, entitled "When Sleeping Dogs Wake Up - Norway and Justice and Home Affairs in the European Union", submitted at the College of Europe in May 2006. The interviews with officials from Norway and the European institutions were held between January and May 2006.

Norway and Justice and Home Affairs in the EU

"Europe has become a safer place. - Therefore, Norway is safer as well. Nobody can doubt it: Norway's security, Norway's welfare and Norway's development are directly dependent on the development of Europe."⁸

(Jonas Gahr Støre, Norwegian Minister of Foreign Affairs)

In order to better understand Norwegian participation within the EU's justice and security policy, one has to consider Norway's embeddedness in

⁸ (Original: "Europa er blitt et sikrere sted. – Derfor er også Norge sikrere. Ingen kan betvile det: Norges sikkerhet, Norges velferd og Norges utvikling er direkte avhengig av Europas utvikling") Støre, op. cit.

several other frameworks of cooperation. Firstly, Norway is part of the traditionally strong Nordic Cooperation in the field of judicial cooperation and cross-border police cooperation. This has shaped Norway's ability to participate as closely in the Justice and Home Affairs Policy of the EU as it does today. Secondly, Norway was involved in the two parallel branches that led to a common JHA policy within the EU: the intergovernmental cooperation among European security and law enforcement agencies, originating in the Council of Europe (CoE) on one hand, and the Schengen Agreement on the other. Norway is affiliated to CoE as a founding member, and to Schengen as an associated member.

Subsequently, the wider European context of justice and security policy was in major parts absorbed by the EU: In 1995, the Schengen acquis was integrated into the Treaty of Amsterdam. Beyond that, the EU's policy cooperation in the field of JHA evolved very rapidly. The Schengen acquis itself became strongly intertwined with a number of genuine EU policy measures. On one hand, this increased Norwegian participation in policy measures beyond the original Schengen agreement: New measures, given they are related to the achievement of Schengen objectives, also include Norway as an associated member of Schengen. On the other hand, the rapid development of the EU's third pillar – taking up policy issues dealt with rather inefficiently by the Council of Europe – poses a challenge to Norway. Schengen is 'left behind' with a relatively shrinking (because static) policy coverage. Meanwhile, the focus of JHA policy has shifted away from Schengen to newly set objectives that do not foresee Norway's involvement.

While the cooperation within the Council of Europe and Schengen have acted as groundwork and driving forces of Norway's partial inclusion into JHA, the latter's increasing dynamic as genuine EU policy relatively diminishes Norway's prospects of participation.

It becomes evident that Norway has obtained a 'good deal' with regard to its association to Schengen if one considers existing legal and institutional conditions. Norway practically has access to the most important opportunity structure of JHA policy: the Council of the EU. Norway is involved in

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its decision shaping processes, when the latter's bodies sit as Mixed Committee (COMIX). Even though Norway and Iceland do not have any voting right in this area, they chair the COMIX at political level every second semester.

Less important institutional actors in JHA are the European Commission and the European Parliament. In the phase of drafting a proposal that is considered Schengen relevant, Norwegian national experts take part in the corresponding expert groups of the Commission. As a non-member of the EU Norway is not represented in the European Parliament, which makes it difficult to penetrate the structure of this increasingly powerful institution. Nevertheless, Norway, and in particular its National Assembly, is linked to the EP by the parliamentary “Delegation for relations with Switzerland, Iceland and Norway”, which meets once a year.

Having looked at institutional opportunities for Norway to shape policy outcomes, it is worthwhile reminding that they arise only in the context of its association to Schengen. Beyond that there are in principle two possible gateways to participation in JHA:

Implementation of measures that are not clearly Schengen related through the simple adoption of legal acts and without the need to conclude a new separate treaty.⁹

Admission to non-Schengen related mechanisms of the EU through associated agreements, such as the Europol Agreement, Mutual assistance in Criminal matters, Eurojust Agreement and, most recently, the European Arrest Warrant.

The following framework of analysis will help examining a) how Norway uses existing opportunity structures in the context of Schengen, and b) to what extent it is possible to conclude agreements beyond the status quo.

⁹ This and the following category are inspired by Emerson, Michael, Marius Vahl and Stephen Woolcock, *Navigating by the stars, Norway, The European Economic Area and the European Union*, Center for European Policy Studies, Brussels, 2002, p. 83.

Typologies of Influencing Policy-Making

The following typology is designed to describe four different ways for a non-EU member to engage in EU policy. It, thus, stands in contrast to studies that apply the same theoretical scheme to both non-member states and to small member states.¹⁰ The types are termed «sleeping dog», «watch dog», «hunting dog» and «dog behind fence». The metaphorical character of their names intends to make them more comprehensible for the reader and to facilitate, at the same time, a comparison of the types among each other. Each of the dog-types has been attributed a certain behaviour corresponding to each of the five possible channels of engagement (internal coherence, use of formal opportunities, use of informal networks among colleagues, use of bilateral relations, other frameworks of cooperation, use of «lobby» strategies, cf. Table I).

The first type termed *sleeping dog* describes a rather passive government that does not fully exploit the (formal) instruments at hand and that has some weaknesses as regards internal coordination of activities. The sleeping dog is, thus, the type which is the least engaged in policy shaping processes.

The engagement in policy-making of the *watch dog* is higher than that of the sleeping dog: It actively collects information and also knows how to assess and make use of it. A government categorised as watch dog detects possible conflicts with national interests and defends them in a reasonable, constructive way. However, rather than taking own initiatives, the watch dog government follows fellow governments' moves or joins existing initiatives.

The *hunting dog* is the most active type. A so-characterised government stands out from the average by exploiting all possibilities in order to compensate for its lack of decision taking rights. The hunting dog is skilful, especially with regard to lobbying and informal channels of influence.

¹⁰ Cf. Archer, op. cit., p. 14-16, using Tanja Börzel's Typology; cf: Tanja Börzel, Pace-Setting, Foot-Dragging and Fence-Sitting, Member State Responses to Europeanization, in: *Journal of Common Market Studies* 2002, Vol. 40, No 2, pp. 193 – 214.

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The *dog behind fence* always starts from the situation where it is excluded from formal participation in a policy field. It, thus, differs from the other types because it does not assume or define a certain degree of engagement from the outset. However, depending on the specific case, it will adopt characteristic features from the other types. It might preoccupy the reader that all four types are not based on the same criteria of theoretical construction. The three first types refer to the extent of which existing opportunity structures are used. They, thus, describe a degree of engagement, which will, in the context of this paper, refer to Norway's participation in Schengen. The dog behind fence type describes a different situation; i.e. the government is excluded from formal participation. It has to try to find other ways becoming involved in a specific policy process. Its degree of engagement can, hence, only be measured for the particular case. In the context of this paper, the dog behind fence will provide a framework for examining the negotiations between Norway and the EU on the European Arrest Warrant.

Table I - Typology of Engagement

	<i>Dog behind fence</i>	<i>Sleeping dog</i>	<i>Watch dog</i>	<i>Hunting dog</i>
<i>Internal coordination of policy by government</i>	Depending on prioritisation	Little europeised administration, little or no coordination among the different departments, little involvement of politicians	Europeanisation to some extent, ad-hoc coordination among departments, sub-optimal involvement of politicians into development of positions,	High degree of Europeanisation, policy-coordination, involvement of politicians into preference building, strongly developed coordination of EU-affairs
<i>Use of formal opportunities</i>	None	Non-exhaustive Lack of some basic preconditions, e.g. language barriers, lack of EU knowledge, lack of preparation/expertise	Fully acquaintance with behavioural norms, but active rather at expert level than at political level need to enhance EU knowledge and 'culture' /socialisation.	Exhaustive including skilful performance at expert- and political level, high degree of EU knowledge, distinct political awareness
<i>Use of informal networks (EU-internal)</i>	Networks inside EU barely existent	Little or no attempts to maintain contacts or build networks	Some existing, but not stable networks, upheld by few persons	High degree of socialisation, stable networks with staff working in the institutions
<i>Use of bilateral relations, other frameworks of coop. (EU-external)</i>	Depending on interest and prospect of success	No attempts to obtain information, or coordinate positions on bilateral basis; No use of established frameworks of cooperation outside the EU	Ad-hoc exchange of information or consultations; occasional use of other frameworks of cooperation	Frequent meetings in the framework of established (in)formal institutions on bilateral and multilateral basis
<i>Use of other, « lobbyist » channels of influence (NGOs, media, financial support etc.)</i>	Depending on interest and prospect of success	None or little	Occasionally, but no strategic use of lobbying instruments	Often, such as organisation of seminars, systematic cooperation with interest groups

Categorisation of and Recommendations for Norwegian Schengen-Policy

At this point, it is worth recalling the first research question of this paper: Does Norway make exhaustive use of its possibilities to shape decisions within Schengen, taking into account formal and informal channels of influence? This section tries to answer the question by dividing the general range of opportunities into five specific fields. Each field will be assigned to either the sleeping dog, watch dog or hunting dog. Moreover, recommendations will be given on how to improve performance in each field of action.

For the first field – Norway’s **internal coordination** of JHA policy – it reveals difficult to clearly assign it to one type, because there are two responsible ministries with differing degrees of Europeanisation and different internal coordination mechanisms. The Norwegian Ministry of Work and Social Inclusion (AID), on one hand, may rather be characterised as a hunting dog, due to its standardised working processes, a clear and strong guidance of its experts and officials, and the inclusion of other ministries into its internal preference formation processes. The Ministry of Justice (JD), on the other hand, responsible for Schengen matters of the third pillar, can be categorised as a watch dog, because its process of position building is less inclusive does not necessarily foresee the consultation of other ministries with adjacent competences. Also, the political guidance of JD’s personell is less standardised. Between the two ministries there is a rather low frequency of consultation, in particular at lower hierarchical levels. Hence, as regards the internal coordination of Schengen policy, an optimal use of opportunities cannot be stated – here Norway reaches the watch dog level.

To improve internal coherence, the government could further institutionalise its position building processes. Clear mandates or guidelines for staff participating at the various COMIX-levels should be developed where this is not yet the case. It would furthermore be advisable to hold more often seminars or workshops with participants from several ministries, thus offering a possibility to gain perspectives on JHA policy that go beyond the

range of issues dealt with by one unit or ministry. Another step would be to augment financial and human resources in certain areas. To this end, a clearer definition of Norwegian interests and priorities within Schengen is needed.

As regards the second field, **participation in formal processes**, it appears even more difficult to make a clear-cut assignment to one of the dog-types. At the level of working groups both of the Commission and the quasi-Council structures of COMIX, Norwegian officials is attested a strong performance, high technical expertise and EU knowledge, as well as a distinct political awareness¹¹ – all characteristics of the hunting dog. It is thus at expert level where Norwegian representatives – according to their own testimony – feel most likely to gain the impression of being able to exert at least a certain influence on formal decision-making processes.¹² This is due to the rather informal character of expert group meetings that contributes to a process of socialisation and trust building among the participants, who virtually “tend to fall in love with each other”¹³. Also, the often heard argument that working groups play a strong anticipatory role in the decision making processes¹⁴ is suitable to underpin this impression.

In contrast, the findings on the performance *at political level* barely suggest an assignment up to the level of the watch dog. The main shortcomings identified reflect principle peculiarities of the sleeping dog: insufficient language skills, absence of acquaintance with procedural rules and general unpreparedness of Norwegian political actors.¹⁵ In addition, the organisation of Norwegian COMIX-chairmanship has been attested a suboptimal preparation and a lack of communication with preceding chairmanships.¹⁶

In order to improve their performance at the political level of Schengen decision making processes, Norwegian politicians and high officials should

¹¹ Interview with an official of the European Commission; Interview with a senior official of the Council, 03.03.2006.; Interview with a senior official of the Swedish Representation to the EU, Bruges, 01.04.2006.

¹² Møller & Johansen, op. cit., p. 18.

¹³ Interview with a consultant of „Statkonsult“, op. cit.

¹⁴ Hayes-Renshaw and Wallace, op. cit., p. 259.

¹⁵ Eliassen and Sitter, p. 15.

be prepared as well as possible with view to potential problematic issues and the broader political context of a meeting. Another important aspect is to familiarise Norwegian political actors with informal norms of behaviour within EU institutions. The Norwegian chairmanship of COMIX leaves additional room for improvement. It provides an excellent opportunity for Norway to add matters of concern to the agenda and to distinguish itself from its Schengen partners. Through cooperation with the preceding presidency important insights on ongoing topics and national positions may be obtained. For the same reason, consultation of the corresponding EU presidency that chairs the COMIX at expert level is desirable.

Concerning the practice of policy making through **informal networking** inside EU institutions, the Council represents a prime venue. When trying to build stable networks, Norway faces two main disadvantages:

- The Council does not employ Norwegian nationals
- A relatively high fluctuation of personal within the Norwegian administration hinders the building of durable networks¹⁷.

Interviews conducted with Norwegian officials indicate that they may succeed in building contacts with colleagues from other member states with a similar cultural background, but less with Council personnel.¹⁸ The three JHA counsellors in the permanent Mission of Norway to the EU are – because of their permanent residence in Brussels – most likely to be able to develop stable networks, but they are restricted in number. Based on these findings, it can be stated that Norway only plays the role of a watch dog with regard to the use of informal networks within the Council. Furthermore, the increasing importance of Parliament and Commission in the policy-making of JHA are not being paralleled by stronger networking efforts of Norway. Observers stress that it “is entirely possible [for Norwegian experts] to use their competence and access to information [within the Com-

¹⁶ Interview with a senior official of the Council, op. cit.

¹⁷ Interview with two Norwegian senior officials of the Mission of Norway to the EU, Brussels, 15.02.2006.

¹⁸ Interview with a senior official of the Norwegian Ministry of Work and Social Inclusion, 06.04.2006.

mission] better than it is the case today”.¹⁹ Neither does the Norwegian Government actively maintain contacts within the European Parliament, one of its bodies or groups in the context of Schengen. It is obvious that Norway has put little emphasis taking advantage of the role of the Parliament in Schengen cooperation.²⁰ Here it is clearly a sleeping dog.

Future fundamental institutional reforms will entail a considerable increase of decisions taken by Qualified Majority and under the regime of co-decision, which will enhance the role of both the Commission and the Parliament in JHA. Therefore, existing contacts in the Commission should be used more extensively. A way to tackle the Parliament might be an increase in contacts among like-minded political parties or the Storting with the “Delegation for relations with Switzerland, Iceland and Norway” which considers itself as an “interlocutor”, offering “an effective tool for influencing not only third countries but also the other institutions of the European Union itself”.²¹

It was mentioned already that the Nordic Cooperation represents quite an elaborated framework of Norwegian international policy. Profiting from close political ties that already existed before Schengen, Norway is a 'natural' hunting dog in the field of **networking outside the EU-structures**, at least within the traditional and proven framework of the Nordic Cooperation. With regard, however, to the relative weakness of the Nordic ‘bloc’ within the enlarged Union, Norway should strengthen cooperation with bigger member states, such as Germany or the UK, either on a bilateral basis or, for instance, in the context of the United Nations.

Finally, Norway makes just to a little extent use of **lobbying strategies**, such as for example the cooperation with professional interest groups in the human rights sector. As an indirect canal for pursuing Norwegian interests

¹⁹ Ibid.

²⁰ Ibid.; Interview with a senior official of the Norwegian Ministry of Justice, 18.04.2006.

²¹ European Parliament, Delegation for relations with Switzerland, Iceland and Norway, *Information Note on the Work of the Delegation for EP-Norway Parliamentary Relations*, p. 2, available at: http://www.europarl.eu.int/intcoop/euro/id/sin/history2004_sin_en.pdf (06.05.2006).

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may be considered the bilateral annual payment of 113.4 million Euro towards a ‘Norwegian Financial Mechanism’, in order to “contribute to the reduction of the economic and social disparities in the enlarged EEA”²². Otherwise, beyond short public interventions of political actors in some cases, little has been done so far in terms of genuine lobbying. While one certainly has to categorise Norway as a sleeping dog for its low activity level, it should be taken into account that very strong and open attempts to influence EU-politics are not expected from a state which has rejected EU membership.

The working methods of professional interest groups could serve as a model for Norway. The Norwegian Government could contact with Norwegian human rights groups in order to define common issues of concern, as for instance on immigration and asylum questions. Moreover, indirect lobbying via interest groups would provide a possibility to tackle the Parliament and the Commission as the two most popular lobbying targets for EU matters.

Overall, Norwegian participation in Schengen is not a sleeping dog. This can certainly be explained by the pressure to follow suit, caused by its strong inclusion in the decision-making processes. Yet Norway is not a hunting dog either, because it leaves certain possibilities unused. If one single category could be attributed to the whole range of Norwegian Schengen participation, it would have to be the watch dog type. This categorisation might appear vague, but it reflects the process of development in which Norway currently finds itself. Having started as sleeping dog, Norway has gained experience and knowledge in the course of the Schengen-years. Thereby it has benefited from a close cooperation with its Nordic neighbours. Within the framework of Schengen, however, it has barely extended its activities to opportunity structures beyond the Council.

The Government of Jens Stoltenberg heralded a change in its policy strategy and has taken measures to improve Norwegian EU policy, also in the

²² European Parliament, *Background note on the political and economic situation of Norway and its Relations with the EU*, Delegation for Relations with Switzerland, Iceland and Norway and to the EEA Joint Parliamentary Committee, p. 7.

field of JHA. In his speech “An active European policy”, Norwegian Foreign Minister Støre announces new efforts to be taken by Norway in the context of its EU policy. These include a more “active debate on European issues”, involving closer cooperation with societal groups that dispose of “knowledge and expertise on Europe as well as networks and contacts”, also with “NGOs and the European research community”.²³

“We must use other channels of influence than the member states, often less formal ones. Because we are out of sight, we are also often out of mind.”²⁴

If Norway continues developing expertise, knowledge, best practices and good arguments, Norway might become a hunting dog in the future. Nevertheless, a hunting dog should also avoid the risk of over-acting: Very proactive behaviour or the attempt to pursue national interests is not always perceived appropriate.

Some Lessons from the EAW Negotiations

Other than sleeping dog, watch dog and hunting dog, the dog behind fence is entirely excluded from formal participation in a policy field. This was the case with regard to the European Arrest Warrant (EAW), a measure based on the principle of mutual recognition, that facilitates fast track extradition of a sentenced or prosecuted person from one member state to another, thereby replacing the rather cumbersome existing rules of extradition. Rather for political than for technical reasons the EAW was classified as “non-Schengen-relevant”.²⁵ Norway, however, was assured that a separate agreement would be concluded in order to associate it with the mechanism. In this context, Schengen certainly functioned a door opener for Norway, because, as the Council stated, “*current relationships* among the Contract-

²³ Jonas Gahr Støre: An active European policy, non-published Article, 01.10.2006, http://www.regjeringen.no/nb/dep/ud/dep/Utenriksminister_Jonas_Gahr_Store/taler_artikler/2006/An-active-European-policy.html?id=440364.

²⁴ (Original: „Vi må utnytte andre kanaler for innflytelse enn medlemsstatene, ofte mer uformelle. Fordi vi er ute av syne, er vi også ofte ute av sinn“) Støre, *EØS-avtalen*, op. cit.

ing Parties [the EU on one hand, Norway and Iceland on the other hand] require close cooperation in the fight against crime”²⁶.

The example of the EAW illustrates the restricted activity radius of Norway as dog behind fence. The negotiations to the EAW have shed light on a principal disadvantage that Norway faces: its status as third country from the perspective of the EU member states' constitutions. The principle of mutual recognition makes national legal systems more vulnerable against deficiencies of the legal systems of cooperating countries. Therefore, some constitutions do not regard a third country with the same level of trust as they regard legal systems of other EU member states. This fact has hampered the EAW negotiations from Norwegian perspective. Against this background, also future negotiations on mutual recognition agreements might prove challenging for Norway.

A further difficulty which arose during the negotiations to the EAW was the fact that Iceland, which also negotiated on an association to the EAW, did not want to go as far as Norway on certain aspects of the mechanism. This leads, in a wider perspective, to the question whether a close collaboration between Norway and Iceland is advantageous in all matters, or if Norway should consider independent solutions with the EU for some cases. As regards Eurojust, for instance, Iceland and Norway concluded separate agreements with the EU.

Moreover, one may question to what extent Switzerland, which recently joined Schengen and already participates in COMIX on a provisional basis, will be willing to attach itself to further developments of JHA policy at all. In the light of its rather restricted vision of Schengen, and the potentially differing positions of Norway and Iceland, a situation might arise where the three countries express their wish to join a certain mechanism under three different and country-specific conditions. As the latter option would cause

²⁵ Interview with a senior official of the Council, *op. cit.*

²⁶ (Emphasis added) Council of the European Union, General Secretariat, Draft Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway, available at: <http://register.consilium.europa.eu/pdf/en/06/st08/st08762.en06.pdf> (08.05.2006).

legal incoherence, a common agreement might be considered as more feasible from the EU point of view. Norway could thus face disadvantages in so far as such agreements would be based on the lowest common denominator. In the wider context, special agreements may raise the concern that they create a precedence and thus encourage further countries, for example the USA, to apply for cooperation in certain policy fields.

A final lesson from the case study is that access to policy-making of the EU always depends on the political will of its member states. This is, for instance, reflected in the long negotiation process, which was protracted over several years, *inter alia* because it did not constitute a priority on the agenda of some presidencies. The agreement that was finally reached only contains a slimmed-down version of the EAW.

Conclusion

This paper has tackled a twofold task: First it has, for each activity field, categorised Norwegian engagement in Schengen as sleeping dog, hunting dog or dog behind fence, in order to determine to what extent existing channels of influence are used. Overall, it has categorised Norway as a watch dog for its engagement in Schengen policy. For each field of activity, recommendations were given on how it might use existing opportunities more exhaustively. However, it should be kept in mind that a stronger engagement of Norway in Schengen policy does not guarantee a *de facto* possibility of influence, just as the right to participate in policy processes does not represent a clear guarantee of influencing a decision. When decisions are taken in the EU, it is never possible to satisfy all viewpoints. Against this background, it is obvious that the voice of a non-member will hardly be heard in a choir of 25 member states. This means, eventually, being an outsider to the EU is not compensable with increased engagement.

Second, based on findings from a case study on the Norwegian negotiations to the EAW, the paper has looked at possibilities and limits for Norwegian involvement in JHA policy *beyond* Schengen. It has come to the conclusion that, from a dog behind fence-position, it becomes more and more difficult to negotiate separate agreements with the EU in the area of JHA. One rea-

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son is that legal barriers occur for third countries when EU agreements touch upon national (judicial) competences. Another factor is the increasing number of outside actors who wish to conclude separate agreements with EU, but to a differing extent, such as Iceland in the case of the EAW negotiations. A final lesson from the case study is that access to policy-making of the EU always depends on the political will of its member states. Eventually, the most obvious obstacle to Norwegian participation in JHA, as in any other policy field of the Union, is its own rejection of EU membership.

“In joining the EEA you gave up a part of your sovereignty to a common, greater structure. But you have very limited leverage on the formulation of policy in this greater structure. (...)From outside, you have to negotiate with the Union as a whole. To those within, who have signed up to the overall framework, there is much more room for manoeuvre. But you cannot be half in and half out.”²⁷

(Chris Patten, former External Relations Commissioner)

²⁷ Chris Patten, Norway and Europe - the limits of Sovereignty, Speech at NHO Annual Conference - Norwegian Business and Industry Confederation, Oslo, 10 January, 2001, available at: http://europa.eu.int/comm/external_relations/news/patten/speech_01_3.htm (05.05.2006).

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