STRIKING A BALANCE BETWEEN FREEDOM, SECURITY AND JUSTICE IN AN ENLARGED EUROPEAN UNION

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Introduction

This monograph assesses the achievements of the European Union in the field of Justice and Home Affairs (JHA) and analyses the pro's and con's of setting up of an area of freedom, security and justice (AFSJ). To what extent has a balance been struck between these three dimensions or has priority been given to one or another over the others? The questions we are asking in this survey of EU Justice and Home Affairs policies have many different answers depending on one's professional, national and cultural background and where one is located in the kaleidoscope of interests and political traditions that make up the European Union and its member states. As researchers wishing to make the European institutions work better and to see the interests of ordinary citizens and residents of the EU taken into account and their rights better defended, we offer one possible set of answers. Our remarks are therefore addressed to policy-makers as well as policy analysts at all levels of European and national institutions, as we try to clarify an increasingly complex and difficult area, avoiding the use of jargon and excessive references to the literature and official documents.

What is wrong with JHA on the eve of enlargement? The defects are obvious and easy to specify. The decision-making processes are inefficient; policies agreed are often ineffective because they are not adequately implemented; there is excessive complexity of programmes and cooperative arrangements; and the EU suffers from weak legitimacy in this area making the cooperation of governments and citizens less than reliable. Member states are ambivalent, pushing for measures and then failing to implement them. The sorry record of third pillar Conventions – only one ratified and implemented out of the 25 negotiated – is a graphic illustration of this point. When the solution of a problem is entirely in their hands – such as the supply of criminal intelligence to Europol – they do not live up to their commitments.

Yet the achievements are important and should be underlined. The EU adopted an ambitious and comprehensive work programme at Tampere in 1999, which balanced the desire for security with the equally important requirement of defending liberty. It also outlined a timetable – the famous Tampere scoreboard – that set deadlines and also gave structure to the agenda in this area. This scoreboard can also be notoriously vulnerable to political shocks. Despite the inefficiency of the decision-making process, the EU has shown after 11 September that it can take radical decisions quickly. Above all, the European Commission accepted important new responsibilities in this area, with a minimum of disruption, and has done its work well. A stream of high-quality drafts have been produced in sensitive areas, such as immigration, asylum, mutual recognition, police and judicial cooperation, which almost always are of higher quality than the proposals made by the member states.

From the point of view of the citizen and the resident of the EU, the view is less clear. What is going on and who is responsible for what is, even for the well informed, shrouded in obscurity. The defence of individual rights in the face of the emerging system of police and judicial cooperation appears weak and at times non-existent. Parliamentary control of the system, at the European and national levels, seems derisory. This is reflected in the ambivalence of the public reactions reported by Eurobarometer polls recording emphatic support for "more Europe" in the fight against serious crime, terrorism, drug-trafficking and fraud but much weaker support for more police and judicial cooperation. There is clearly support for cooperative action against certain perceived evils but much less enthusiasm for assigning more powers to "Brussels".

From the individual's point of view, there seems to be more emphasis on security than freedom, on repressive measures than on defending liberties, on restrictive rather than progressive measures and negative integration (reducing barriers to police and judicial cooperation) rather than positive integration (centred around a programme aimed at reducing risks and promoting safety). From the perspective of non-EU citizens residing in the EU, asylum-seekers and undocumented immigrants, the picture is even bleaker, with little progress having been achieved on a genuine common asylum regime, a common immigration policy and legislation approximating the rights of long-term non-EU residents to those of EU citizens. The Commission has prepared the ground, but the member states have not followed through.

The record is therefore mixed as the EU moves towards the challenge of the next enlargement to Central and Eastern Europe. Enlargement carries with it both risks and benefits. The former include the increase in the

number of legitimate national interests, making agreement on common policies more difficult; the greater effort that has to be devoted to creating trust and solidarity across more countries; increased opportunities for organised crime in a larger market; and potentially greater mobility of criminals and prostitutes from poorer to richer members of the EU. But it is important that the perception of risks does not outweigh the benefits to all of the extension of the area of freedom, security and justice. As was famously said of the nation state that it "extended the area in which homicide was a crime", the benefits of the effective repression of crime and the extension of rights over a wider area cannot be overestimated.

This study analyses the extent to which progress has been made in JHA and how certain frictions and strains between member states have affected the implementation of policy as well as how these may be further exacerbated by the forthcoming enlargement. It examines the relationship between supranational and national institutions and the sharing of competences between them. We evaluate the extent to which the JHA agenda has been shaped by "events" and policy spillover. Our analysis leads to policy recommendations to promote trust, flexibility, cooperation and efficiency (the four concepts elaborated in Chapter 2). These proposals concern policy implementation and the sharing of competences between institutions in a sufficiently flexible manner as to provide responses to events without distorting the finely tuned balance between freedom, security and justice first established by the European Council in Tampere in October 1999.

CHAPTER 1
CHANGES IN CONCEPTS OF SECURITY
AND THE JHA AGENDA

Concepts of security are all based on fear of actual and potential attacks on public authorities, persons and property. The differences arise over what constitutes an attack and the direction from which potential dangers come. Two general changes in conceptions of security are evident over the past decade and a half. First, as the threat of conventional military attack on Western Europe has declined with the collapse of the Soviet Union, there has been a blurring of the distinction between internal and external security. This constitutes a radical change because, since the 17th century, the two were regarded as conceptually distinct – the external threat was that of invasion by a hostile power whilst the internal threat was subversion and threats to public order. The ever-increasing internationalisation of economic and social processes has blurred the traditional distinction between internal and external security worldwide. Nevertheless, the linkage between internal and external security fields lies at the core of the redefinition of the West European security. Criminal threats, including terrorism, are seen as security threats, which have both internal and external dimensions and need to be treated together. The European Heads of State and Government recognised this explicitly in the Tampere Presidency Conclusions.

Before the evaluation of recent developments and setting out of proposals in Justice and Home Affairs, two background matters should be considered. The first is the re-conceptualisation of security in recent years; the collapse of Soviet communism, increasing global integration and the events of September 11th have each produced radical changes in attitudes. These changing ideas about security have had, and continue to have, a powerful influence over the Justice and Home Affairs agenda. The first moves towards JHA cooperation – the Trevi group, ministerial meetings, Schengen and Chancellor Kohl's call for a European FBI – were all motivated by internal security concerns. Secondly, the late 1990s saw a re-balancing in the Treaty of Amsterdam and the Tampere Presidency Conclusions with a new emphasis on freedom and justice, in order to legitimise the growing influence of the EU in this field. However, security concerns and crime fighting remain the determining factors driving policy. But the setting of the JHA agenda is not a straightforward reflection of ideas about security – it is a much more complex matter – and therefore the two should be considered separately.

I

Security, like freedom or equality, is a controversial concept. The various meanings attributed to it are not merely the consequence of different political commitments and beliefs of individuals along a Right/Left spectrum. Notions of security are also influenced by broad cultural, political as well as socio-economic factors. We are therefore dealing with a very complex pattern of beliefs and perceptions, about which generalisations are hazardous.

Although, historically, it was believed that internal and external security policies required coordination, nowadays we see three reasons why we need to rethink this approach:

First, the European Council underlines that all competences and instruments at the disposal of the Union, and in particular, in external relations must be used in an integrated and consistent way to build the area of freedom, security and justice. Justice and Home Affairs concerns must be integrated in the definition and implementation of other Union policies and activities.

Second, some political and law enforcement policy-makers as well as policy analysts developed, from the early 1990s, the idea of a security continuum which makes connections between general categories of illegal activities: terrorism, drug trafficking, organised crime, trans-frontier crime, illegal immigration, asylum-seekers and minority ethnic groups. It is associated with a broadening of the scope of security issues to include societal security – threats to the society, economy, culture and environment. This idea of a security continuum, although useful in certain types of intelligence analysis, has been sharply criticised, by Didier Bigo and others, for linking very different activities, profiling of groups and criminalising illegal immigrants. It also risks impoverishing the policy debate by categorising difficult problems as security issues too quickly and too emphatically.

Third, strategies of change in the tasks, functions and organisation of police, immigration services, customs and intelligence services have been related to the first two as well as to technical innovation (particularly in communications and data storage), and are accelerated by changes in security priorities under the pressure of events, such as, most dramatically, the terrorist attacks in the United States of September 2001. Threat analysis has led to the growing importance of strategic intelligence, the entry of intelligence services into domains previously regarded as the preserve of the police, and problems of definition of roles and coordination of police agencies. It also provides the opportunity of an

enhanced role for international and European organisations in strategic intelligence-gathering and coordination of investigations of trans-border criminal activities.

The reflection of these changing conceptions is that two parallel processes of Europeanisation and externalisation of internal security have got under way.

The major features of Europeanisation are now familiar. During the 1980s, the Schengen Agreement (signed in 1985 and followed, in 1990, by the implementation Convention) and the Single European Act (1986) accelerated the transformation of the European Community into a unified space, where freedom of circulation is the rule and restrictions to it, the exception. Lifting controls and restrictions to intra-European circulation of capital, goods and persons would create – it was said – new opportunities for criminal and other forms of illegal activities. Internal security risks, previously tackled at the national level, bounded by psychologically reassuring state borders, came to be regarded as a legitimate field for European cooperation. The third pillar of Maastricht (almost exclusively regarded as a sphere of law enforcement cooperation) and the area of freedom, justice and security of the Treaty of Amsterdam were the result. Justice and Home Affairs has been, since 1999, the most dynamic area of activity of the EU.

The process of externalisation of internal security was triggered by the perceived requirements of globalisation – especially the opportunities provided by improvements in transport and communications technologies, the collapse of law enforcement systems and the emergence of criminal organisations in the former communist countries, engaged in drug trafficking, money laundering, people smuggling, car theft, etc.; irregular/undocumented/ illegal migration often perceived as a security threat with non-European sources; terrorism, and particular its latest manifestation – Al Qaeda – provided a particularly dramatic stimulus. Externalisation of internal security issues created an incentive for national law enforcement agencies, whose activities had been exclusively concentrated within national borders, to devote an increasing proportion of their institutional and operational efforts to the international arena. It has also provided a crucial legitimising argument for European initiatives – Schengen, OLAF, Europol (especially, in current circumstances, its anti-terrorist unit), EU JHA action plan for Ukraine, agreement with Russia on organised crime and common measures with the US on counter-terrorism are the best-known examples. The Europeanisation and the externalisation of internal security have had a major impact on structures, methods and content of the policy-making process in the field

of JHA. It has caused some problems and generated an increased overlapping of, and occasionally open competition between, the policy communities and agencies traditionally entrusted with external security.

It is perceived that the terrorist attacks of September 11th have radically changed perceptions of security – the world after that date is a very different place. As time passes, this judgement will probably be modified and qualified, but there can be little doubt that these attacks provided a new impetus for the development of the area of freedom, justice and security. This is graphically illustrated by the landmark decisions of the European arrest warrant, the common position on terrorism, mutual recognition of judicial orders for the transfer of evidence and the seizure of assets. The member state governments, security agencies and public opinion have been made dramatically aware of the extent to which international forms of crime, which can only be met effectively through common action, threaten traditional internal security and the AFSJ provides the framework for such action. However, the problem of balance between security (strengthening controls on persons and their activities, improved surveillance, intrusive investigative procedures) and freedom (civil liberties, procedural rights of suspects, rights for non-EU nationals, treatment of immigration and asylum cases, even freedom of speech) has been made more acute.

There is a risk of the security rationale becoming predominant. The decisions adopted by the Council in the six months after September 11th were essentially a security package combining various law enforcement and criminal justice cooperation measures. There has been a spillover of the security rationale of the second pillar into JHA areas extending beyond strictly those of law enforcement against terrorism. An example is paragraph 29 of the Conclusions adopted by the Council on 20 September 2001, which invites the Commission to examine, as a matter of urgency, the relationship between safeguarding internal security and complying with international protection obligations and instruments which – put in less covert words – means a re-examination of asylum and refugee guarantees and procedures in the light of the terrorist threat. The anti-terrorist security package has also almost entirely taken over the agenda of the JHA Council meetings since September 11th, with the effect that other areas – such as judicial cooperation in civil matters, which is a crucial element in the construction of an area of justice – have been pushed down the agenda.

The Conclusions of 20 September 2002 abound with restrictive measures, such as utmost vigilance in the issuing of residence permits, the immediate strengthening of surveillance measures under Art. 2.3 of the

Schengen Convention and more systematic checking of identity papers (paragraphs 24 and 25). The Council has also committed itself to a particular effort to strike a balance between the protection of personal data and the need of law enforcement authorities to gain access to data for criminal investigation purposes (paragraph 4). The context leaves little doubt that this balance is likely to make more rather than less personal data available to law enforcement authorities.

Democratic control may also be weakened; parliaments have been given little time and, in some cases, no authority to examine the security package agreed by the Council. The decision to provide the European Parliament with an annual report on the terrorism situation and trends (to be entitled TE-SAT) cannot be regarded as a sufficient guarantee of effective parliamentary control of cooperation arrangements and structures between law enforcement authorities such as the meetings between the heads of counter-terrorist units (the first took place on 15 October 2001), the projected missions entrusted to counter-terrorist specialists and the drawing up of a common list of terrorist organisations. In Council texts, no mention is made of any parliamentary scrutiny – at the national or European level – of the regular meetings of the heads of the intelligence services (the first of which took place on 11 October). Several new forms of inter-agency cooperation – such as the joint investigation teams consisting of police officers, specialised magistrates, Eurojust and Europol representatives referred to in paragraph 2 of the Conclusions of 20 September – will also not be easily monitored by parliaments because EU governments have so far tended to treat inter-agency cooperation as a purely operational matter.

The balance between necessary confidentiality and desirable transparency is unlikely to be decided in favour of the latter. Cooperation in the fight against terrorism – ever since its origins in the context of the TREVI framework of the mid-1970s – has always been considered as particularly sensitive and therefore secret. The involvement of national intelligence services – the least transparent part, despite recent changes, of national government structures – will not help. However, the Council has made public all the main elements of the post-September 11th security package, which has provoked comment in the media and reactions from civil liberties groups.

Over-optimism, much in evidence in the last quarter of 2001, about both the stability of the anti-terrorist alliance and the consensus on the priority to be given to the fight against terrorism, should be avoided. Improved international cooperation to counter terrorism has often emerged as a priority on the international agenda in the last three decades. It proved to

be an elusive goal. Since the early 1970s, the industrialised nations have repeatedly returned to the theme with repeated lack of success. Prior to 2001, counter-terrorism was a dubious basis for systematic police and judicial cooperation, for a variety of reasons:

- First terrorism is usually directed towards influencing state policy and therefore represents an issue of state security (necessarily a secret domain), rather than ordinary policing.

- Second, since political causes and interests are involved, governments usually have widely differing perspectives on the implications, importance and potential effects of particular terrorist incidents.

- Third, a wide variety of agencies (see Annex 2) – both police and intelligence services – are involved in countering terrorism and coordination between them within states is highly problematic: different agencies often have different interests in international cooperation, and conflicts between them over resources, competences and territory are common.

- Fourth, political violence linked to broadly based political movements cannot be repressed by police action alone but requires a mix of policies aimed at removing the underlying conditions that provoke violence; governments do not have the same priorities or the same level of commitment in these policies.

- Fifth, although acts of terror have a dramatic impact on public opinion, these are relatively rare compared with ordinary criminality, and long periods can pass without countries experiencing any incident; this weakens the day-to-day commitment of police agencies faced by other pressing problems.

These reasons have been obscured by the events of September 11th, but they are still present. Those events have radically altered the international climate but there are grounds for pessimism about the permanence of the change. The war on terrorism will probably prove to be, like the war on drugs, a conflict that cannot be won. The extraordinarily broad international support for the US may not be very deep.

II

The processes by which JHA policies are formed involve a wide range of institutions and political forces. These processes – how the agenda is set, the proposal of alternative solutions to problems, choices between these alternatives, the arrival at authoritative decisions and the implementation

of these decisions – are difficult to grasp in their entirety, even for those directly involved. Yet the outcome must be clear and easily communicated not only to those professionally involved (administrators, magistrates, judges, lawyers, police and non-governmental organisations) but also to broad sections of opinion in the member states. Without this quality of communicability, the risks of policy failure are high and the general reputation of the EU put at risk.

The two crucial stages in terms of establishing the legitimacy of the EU's role in this area are the first – agenda-setting – and the last – implementation. It is essential that a wide range of individuals and groups can contribute ideas and views at the initial stage of policy formation. It is equally essential that the policy finally decided works and can be understood and supported by those whom it affects. The deliberative and decision-making stages by the authoritative institutions (Council, Commission and Parliament) must, of course, be accepted as legitimate but the first and the last stages are crucial in underpinning the constitutional, political and social legitimacy of the EU.

It is therefore worth setting out some ideas about these two stages, agenda-setting and implementation, as a preamble to our analysis of the substance of policy.

The term agenda is used in different ways depending upon the context. An agenda is used to refer to a list of topics to be discussed at a meeting; it is also used to refer to a plan or scheme someone wishes others to adopt, as in the phrase a hidden agenda. It is frequently used to denote a coherent list of proposals or action points, as in the reference to the Tampere agenda. In the context with which we are concerned, it is most usefully applied to the subjects or problems to which governments, EU officials, parliamentarians and those closely associated with them in professional groups, the media and research community (often collectively called the policy community) are paying serious attention. The agenda-setting process narrows the set of conceivable topics that is taken seriously.

There is of course the grand agenda, which involves Heads of State and Government, usually the setting of general goals and objectives, but European Council meetings also can, and do, discuss contentious matters of detail. In addition, there is the agenda involved in the preparation of detailed proposals – both at the level that requires political (ministerial) intervention and at the official level (involving both EU officials and national government civil servants). In the latter case, the list of topics on the agenda varies from one part of the official (EU and governmental) machine to another.

There is always a suspicion that the third level operates as an effective gatekeeper for the other two levels, determining what is considered feasible and what is not. This is why the debate on the agenda, and the participants in this debate, should be kept as open and transparent as possible at all levels. The narrowing of the proposals and ideas from the conceivable to those that become the focus of real attention is always controversial and controversy should not be avoided. This is a necessary part of building trust in the EU's role in this delicate area of policy. This is not an easy pre-condition to fulfil because traditionally the internal security establishment – police, magistrates, officials of ministries of Justice and the Interior – have been used to working under a cloak of confidentiality. However, processes of Europeanisation are effecting a change in this longstanding customary practice.

The agenda-setting in JHA changed substantially as a result of the Tampere Presidency Conclusions because they provided a framework for taking decisions, with a timetable and a scoreboard for publicising whether the timetable was being adhered to. In other words, the member state holding the EU Presidency became less important in influencing the agenda; priorities could not be changed so easily from one Presidency to the next depending on the priorities of particular member states. There remains room for some manoeuvre for the Presidency but now a "good Presidency" is regarded as one that keeps up the momentum on the Tampere agenda.

In general, there are four main ways in which the agenda in JHA may be shifted:

- International crises can change priorities. Depending on their nature and given the tendency towards overlap or fusion of internal and external security, these may not always have negative effects on the development of JHA policy. Indeed before September 11th, there is evidence that progress in JHA was lagging behind the scoreboard expectations. Those events gave an essential impetus to the European Arrest Warrant and the Common Position on Terrorism, which might otherwise have been hamstrung by reservations by member states. The risk in this case is that the agenda could become unbalanced with greater emphasis on security and less on the protection of individual rights.

- The demands of other policy areas for attention can remove the whole or part of JHA as a primary focus of interest for EU policy-makers. This has not yet happened in the brief period that has elapsed since the adoption of the Tampere programme because

security and immigration remain important issues for member states in the electoral arena. However, if there is major turbulence in another area over, for example, agriculture in the coming enlargement, it is easy to imagine this happening.

- New policy ideas can emerge in the forefront of debate. One plausible scenario is that sharp differences arise over penal policy, for example in drug control, between member states, which could contaminate the whole of police and judicial cooperation. Again, new policy ideas can have positive effects, making issues previously considered complicated and technically difficult much more straightforward and easier to resolve. This may be particularly the case in legal harmonisation or the approximation in matters such as fraud.

- Problems can arise in policy implementation. This can result in a breakdown of trust if, for example, corruption is present in the police and judicial systems in one or more member states that affects the interests of citizens of other member states, this could easily change the level of integration and cooperation thought feasible in JHA. This is an extreme example of many problems that can arise at the implementation stage – most of the problems could arise if law enforcement authorities considered that EU policies were either irrelevant or involved the wrong priorities in the allocation of resources.

In the next chapter we propose four concepts of trust, flexibility, coordination and efficiency to be used as tools to evaluate the JHA agenda and problems in its implementation. We also analyse potential sources of tension between the competent institutions and agencies and how these affect decision-making in this area and the interaction between national and supranational levels.

CHAPTER 2
REQUIREMENTS OF EFFECTIVE JHA POLICIES

Good policy-making in JHA requires that decision-makers are given a clear mandate and that those agencies charged with policy implementation are well managed.

It should be clear to the public and to professional groups affected by the policies who does what, who is responsible and where the lines of accountability are drawn. At the most general level, the provision of a clear mandate is a constitutional question. The present pillar structure of the EU is unsatisfactory and unclear. It should be replaced in the proposals for the next inter-governmental conference by a simple division of powers – those reserved to the EU, those remaining exclusively with the member states and those shared by the EU and the member states. We return to these issues in Chapter 5.

A well managed system depends on the presence of high levels of trust, adequate flexibility, good coordination and efficiency in terms of cost and rapidity of response to requests for information and cooperation. These concepts are also basic to assessing convergence and divergence between member states in Justice and Home Affairs. They require refinement and re-definition in order to be applicable to specific policy concerns in this policy area. They also help to provide the analytical tools needed for introducing greater clarity in the policy discussions. Despite the complexity of the intellectual debates devoted to these concepts, communicating some ideas from these debates, in language accessible to policy-makers, is overdue.

2.1 Context

Cooperation in Justice and Home Affairs, a policy area once considered to be only slowly evolving in the direction of Europeanisation, has recently become one of the most dynamic policy domains in the EU. The 1999 Tampere European Council provided the necessary political boost for intensifying collaboration among member states on immigration and asylum policy as well as police and judicial cooperation. The European Commission was given a mandate, to be shared with the member states, by the Treaty of Amsterdam to make proposals for translating the broad political objectives outlined in the Treaty into specific policy measures. As emphasised in Chapter 1, the events of September11[th], followed by increasing public concern over illegal immigration, strengthened the political resolve of the member states to overcome differences and proceed faster with the implementation of common initiatives.

After the entry into force of the Treaty of Amsterdam on 1 May 1999, the fields of "visas, asylum, immigration and other policies related to the free movement of persons" came under the first pillar, within the competence of European Community law, under Title IV of the EC Treaty (Arts 61-69). Although decisions must be taken unanimously during a transition period, they have direct effect in the member states. Public order and internal security – policing and judicial cooperation – remain in the third pillar, governed by an intergovernmental method, but with modifications to make decision-making more efficient. An area of freedom, security and justice is to be implemented in the five-year period following the entry into force of the Treaty (1999-2004).

Despite the peculiarities of the present institutional structure of the EU (JHA are present in three pillars), policies falling under the rubric of Justice and Home Affairs are not arbitrarily grouped together. They have important inter-connections, and changes in one policy can have consequential effects on other policies. However, they are usually analysed separately (for a valuable exception, see Monar, 2000) by specialists in different disciplines – lawyers, political scientists, sociologists, economists – or through multi-disciplinary approaches in particular areas such as immigration, police studies, approximation of laws or the constitutional and institutional architecture of the EU. There is already a considerable literature on police cooperation, border checks, immigration control, free movement, Eurojust and the approximation of laws in criminal matters, but this is either firmly within the confines of particular disciplines or is only an ephemeral contribution to the continuing policy debate. This fragmentation would change, if there were greater constitutional clarity in the EU.

At the same time as creating an area of "freedom, security and justice", the EU has announced the firm intention to accept new members. This enlargement of the EU will increase the cultural, social and economic diversity of the Union and place strains on its decision-making processes. The eastern enlargement of the EU is the first enlargement that involves to a significant extent Justice and Home Affairs cooperation. Furthermore, this is occurring at a critical moment for the implementation of new initiatives at European level. The coincidence of these developments poses a major challenge for member states, which are now confronted with the necessity to strengthen collaboration among themselves and at the same time incorporate new members in the EU decision-making structures, making agreement on common actions potentially more difficult.

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Cooperation in JHA differs from other policy areas (with minor exceptions) in the EU because it involves continuing and increasingly intensive cooperation between government agencies in the member states and entails policy convergence and approximation of laws. It is a particularly difficult form of cooperation because of sensitivities about sovereignty and the diversity in the legal systems of the member states (and of the candidate countries).

2.2 Making the system work

Inadequate levels of trust, inflexibility, poor coordination and inefficiencies in terms of poor value for money and a slow operation of systems can lead to serious friction between member states or provoke hostility from sections of public opinion towards the European Union. In order to tackle these difficult practical problems, a common language is essential. Conceptual clarification is the *sine qua non* of good management in this area.

2.3 The concept of trust

Trust is the most difficult of these concepts and widely differing opinions co-exist concerning the basis of trust. Its meaning has been widely debated in philosophy and the social sciences since Emile Durkheim, (particularly his writings on education, professional ethics, individualism and socialism). More recently, it has been important in discussions of social capital. Social theorists do not agree on whether it is a property of individuals, social relationships or social systems.

Trust is a crucially important quality in the relations between individuals who are members of the same family, live in the same locality, are members of the same professional group or organisation, have market relationships or who are the members of the same national society. According to the political analyst Niklas Luhman (1979), "Without trust only very simple forms of human cooperation, which can be transacted on the spot, are possible". Trust is essential for maintaining stable relationships and is vital for the maintenance of cooperation.

Trust can be seen as a mechanism for solving collective action problems because cooperation based on trust exists irrespective of sanctions and rewards. Trust rests on beliefs about people reacting or not reacting in certain ways; it requires reciprocity and moral obligation that exist to the extent that individuals share values and norms. The utilitarian approach in which trust is established by the self-interested actions of rational individuals is unsatisfactory. Cooperation based on a rational calculation of costs and benefits cannot go beyond the specific short-term objectives

that bring the parties together. A "culture of trust" should be the basis of EU-wide cooperation in JHA.

Also central to this policy area is the idea that trust underpins the debate on the 'risk society' – and an assessment of risk is now at the core of planning internal security policies. In particular, the changing nature of risk and its implications for contemporary politics and society have become important topics of debate in the social sciences. Modernisation has produced unintended risks (see Beck, 1998, and Giddens, 1998), which are now a primary preoccupation of citizens and policy-makers. Awareness of and anxiety about risk have become ubiquitous in contemporary society and are the outcome of processes of scientific and technological development. "Manufactured uncertainty" has penetrated everyone's life as most human activities have grown to involve seemingly incalculable risks. As a consequence, political debate has been transformed with the management of risk increasingly at its centre.

These changes, while presenting difficult challenges to policy-makers, offer opportunities as well. High levels of insecurity in the risk society encourage the crossing of bridges between people, cultures, nations and the building of trust in search of better control of risk. The notion of trust, therefore, becomes essential to any policy effort intended to create security in a risk society. This does not mean just a shift in the discourse on safety provision but a radical departure in the way actors engage in policy-making and collaborate to achieve results. Risk management requires more profound involvement with counterparts and partners in an effort to overcome what Beck (1998) refers to as the state of "organised irresponsibility".

To take the example of police cooperation, in a society characterised by "risk abundance", police agencies are increasingly concerned with producing knowledge related to risk and communicating it to other agencies across borders. Information-sharing, therefore, becomes a critical element of the risk-management system, yet it is not feasible without adequate levels of trust between actors – irrespective of national background and functional specialisation.

Yet, belief in the virtues of trust is neither uniformly nor universally shared. Shared values and norms are often built through institutions that express common bonds. Institutions can reduce the transaction costs of exchanges among actors, provide information to governments on the policy options available, give opportunities for an improved cross-issue debate and cooperation, as well as create an environment of predictability and stable expectations about future behaviour. Institutions provide a benchmark for identity by socialising people so that they have a common

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understanding of the policy objectives and the methods of achieving them. Trust is part of the normative context established through greater interaction among European states and citizens through working together in EU institutions.

Despite institutional integration in Europe (in JHA, of very recent origin), sources of mistrust among the EU member states still exist. In the field of JHA, examples of mistrust abound and are reminders of the persistent uncertainties of trust. Visas are expressions of mistrust of third countries – until the mid-1980s they reflected a mistrust of governments and now often a mistrust of people. Visas and border controls have recently caused mistrust between European institutions, illustrated by cases before the European Court of Justice, and between member states over conditions in which visas are issued.

A lack of trust is apparent in the relations between EU member states and applicant countries from Central and Eastern Europe. Apparent double standards on corruption and organised crime (member states expecting standards of candidate states that they did not meet themselves) are both a manifestation and a cause of mistrust. The difficulties that surfaced in the negotiation and implementation of the Schengen II information system also revealed a level of distrust of new member states.

In police cooperation, in the vertical information exchange (local-national-European), there is often a failure to communicate to the higher level. Further, any evidence of police corruption has a destructive effect on trust. The criminal law procedures thought necessary in some member states have had a destructive effect on trust. The use of pre-trial detention by one state of EU nationals from another was a cause of misunderstanding that is now being addressed.

Establishing a high level of trust or, to use the Durkheimian term, "solidarity" in police, judicial, border control and immigration cooperation cannot be separated from wider issues of building a genuine European community. If all EU citizens regarded each other in the same way as they presently regard their fellow countrymen/women, then such a community could be said to exist. The lack of a genuine 'European people' or *demos* is a problem in this and other fields of EU activity. Constitutional and institutional change, the subject of Chapter 5, is a partial contribution to overcoming this lacuna.

Up-to-date and operationally relevant information requires further development of well designed databases to give information about matters such as procedures, legal requirements, operational policies, police organisation and contact persons. The frustrations of not being able

to find quickly the precise information required on databases are well known. Adequate time is probably the most difficult condition to provide. Compared with the compelling demands on police time, making space for trust-building in the European cooperation sphere may seem a nebulous objective to some professional groups, especially the police.

The EU has already embarked upon a range of measures that could serve as the basis of a trust-building strategy. There is an ever-present tendency to 're-invent the wheel'. Developing, improving and increasing the resources, where necessary, of existing programmes and initiatives are crucial. The first PHARE programme on strengthening drug law enforcement in the candidate countries is a good model in a particular respect – police officers are sent out from the member states to advise, supply information and facilitate exchanges. This has a federating effect on the member states because they have to present a coordinated front to the outside world. The OISIN programme, referred to in the next section, is an even more promising example because it provides for improving skills, opportunities for working across borders and learning from experience of joint operations.

If existing JHA arrangements are to operate effectively, especially in an enlarged EU, higher levels of trust must be established. The particular reasons for mistrust are likely to change over time, but the task is to create conditions in which trust is the norm and mistrust the exception. A strategy for trust-building should ensure adequate resources for police and magistrates involved in cooperation, in terms of *knowledge, skills, information, and time.* The first two require upgrading most countries' training systems. They depend also on the quality of the general educational provision in the states particularly for such matters as language skills and general understanding of the European Union.

2.4   The concept of flexibility

The literature utilising the concept of flexibility is extremely diverse. Flexibility was popularised in the 1980s by economists and specialists in industrial relations in studies of the labour market. In the 1990s, there was an application of the concept in policy studies, particularly in the international arena (Davis and Finch, 1993, Jackson et al, 2001). In government and administration, the idea of flexibility is central to the 'new public management' literature, particularly in arguments in favour of flexibility towards client demands (for police, see Walker, 2001). The most recent use of the idea has been to the European Union itself after the negotiation of the Treaty of Amsterdam (Búrca and Scott, 2000 and Den Boer, 1998). A common thread in this body of literature is that flexibility

enables individuals and groups (and even states) to adapt to different and changing circumstances in order to pursue the same overall objectives.

A distinction may be drawn between "variation" and "flexibility". Variations in practice occur without necessarily being noticed or consciously willed by the people involved. If they are noticed, they are regarded negatively when they occur in EU measures with direct effect, for example the persistent variations in French practice over dates of the hunting season in apparent contradiction with an environmental directive of 1979. Flexibility, by contrast, may deliberately be introduced into practices, procedures and behaviours to produce desired outcomes. This does not imply, as it does in the case of variation, the absence of or non-compliance with rules. Rules to allow for flexibility are necessary to regulate when, how and in what way departures from a norm are permissible.

There are various kinds of flexibility in the EU. The first is constitutional or treaty-based. Exceptions are extended to particular member states. This can take two forms – it may allow opt-outs or opt-ins in particular sectors of policy such as the common currency or border controls; or it may allow, in the case of enhanced cooperation, a group of states (a minimum of eight, according to the Treaty of Amsterdam) to integrate more closely whilst using EU institutions to do so. In the case of EU measures with direct effect, derogations for particular states are allowed on specific items when they establish a case that the objectives of the measure would not be achieved without such an exception being made. In addition, there is institutional flexibility – the establishment of new machinery or units at the European, national and local and/or regional levels; new institutional practices may allow a more open-ended conception of the role of EU agencies; the use of guidelines in calling for direct cooperation between agencies in member states rather than of EU law and regulation can contribute to another layer of flexibility. Finally, there is flexibility in the area covered by EU systems, that is to say, neighbouring states (e.g. the Schengen association agreements with Norway and Iceland, and now with Switzerland) may be co-opted into EU JHA systems.

The most important form of flexibility in the JHA area is flexibility in implementation of measures. This applies to all instruments used in JHA (e.g. framework decisions, decisions, common positions, recommendations, action programmes and conventions), excepting those (some civil law legislation and all freedom of movement rules) contained in pillar 1. Member states must, for example, have central offices for the Schengen system and for cooperation with Europol, but it is at their discretion how these are staffed, by whom and according to what rules of

organisation. The concept of flexibility can be widened to include multilateral and bilateral agreements, which are common in the law enforcement area, between member states outside the EU framework and with third countries.

Almost invariably, flexibility has unintended and frequently negative consequences. It is potentially in conflict with the other desirable values discussed in this chapter. It creates greater uncertainty, which can undermine relations of trust since one of the requirements of trust is predictable behaviour. Lack of knowledge about how other states are implementing measures can create serious suspicions about whether they are implementing them at all. It may undermine systems of coordination because it allows very different arrangements in the member states for implementing policies – thus with whom to coordinate becomes problematic. Efficiency can be reduced because in a complex cultural area like the EU, flexibility can be interpreted in different ways in different member states and by different professional groups, leading to misunderstandings. Also the costs, particularly information costs, are likely to increase considerably. Flexibility as now practised in the EU creates a very complex world, raising problems of comprehensibility even for the well informed.

Nonetheless flexibility is necessary in JHA cooperation in order to coordinate joint actions, implement policies, adapt to changing circumstances and take account of variations in local conditions. The absence of flexibility, namely the attempt to impose common harmonised standards, would slow down the decision-making process and, in some sensitive areas, would block it altogether. Also harmonisation could reduce efficiency in circumstances where there are inevitable variations – legal, institutional and geopolitical –between member states that ought to be taken into account.

New machinery or units at the European Union level – Europol, Schengen, Eurojust, European Police Academy, Police Chiefs Task Force and OLAF – illustrate the advantages and some of the drawbacks of EU institutional flexibility. New initiatives will doubtless be proposed from time to time. The existing initiatives and the possibility of new ones demonstrates the adaptability of the EU, but once the machinery is in place they add an element of rigidity to the EU system since they develop institutional interests in their survival and in the development of their influence and field of activity. These often co-exist with older forms of cooperation and communication, established outside the EU framework, but rationalisation is difficult because of the difficulties of abolishing institutions or regular practices that have worked reasonably well.

A form of flexibility within member states is that a new remit for national institutions tends to follow, often with some delay, changes at European or international level. The most commented on has been the partial re-conversion of security services from espionage or counter-espionage against other countries to combating international crime and terrorism. Some changes in remit have been the direct outcome of Europeanisation. Occasionally they have proven unsuccessful (as the temporary conversion of the French PAF – *Police de l'Air et des Frontières* – to the DICCILEC – *Direction Centrale de la Lutte contre l'Immigration et le Travail Clandestine*), and a step backwards has been taken. The extent to which change in remit is possible varies across the EU member states. This adds a new layer of complexity to the effects of flexibility.

New techniques in information and communications technologies often result in flexibility because they provide new possibilities of data storage, analysis and transmission. These are diffused quickly but adopted unevenly across the member states and the candidate states. In certain areas, police techniques such as finger print searches, DNA testing and analysis of firearms are more standardised, partly for financial reasons. Where they are not, the Trevi group had, and now Europol has a responsibility to disseminate "best practice", but practical constraints such as budgets mean that there is large variation in practice. Exactly how much is not systematically established. The question of what flexibility (or permissible variation) is desirable has not yet been posed.

Redeployment and re-training of personnel is one of the difficult preconditions of flexibility of police, magistrates, immigration officials and personnel of ministries of Justice and the Interior. This is because of time constraints on these professionals, their conservatism and *esprit de corps*, and certain political blockages. The JHA programme OISIN addresses mainly the training aspect of the problem. Its objectives are:

- to raise language skills and knowledge of legal and operational terminology;

- to promote awareness of legislation and operational procedures through training, exchanges and study visits;

- to organise joint operational projects;

- to organise briefings and debriefings of joint operational projects; and,

- to provide information, training, research, operational studies and evaluation.

However, the resources (at €8 million) devoted to this programme are insufficient.

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The concept of flexibility is an essential tool in managing any complex system. An assessment of flexibility in the context of JHA policies should be part of both the quality audit and the monitoring of implementation of JHA policies, both of which are recommended below.

2.5   The concept of coordination

Coordination can be defined as 'the actions of separate individuals or organisations – which are not in pre-existing harmony – [are] brought into conformity with one another through negotiations' (Krasner, 1983, p. 1; Keohane, 1984, p. 51). There are two types of coordination, which are analytically distinct though inseparable in practice – political coordination and administrative/managerial coordination. Until the present time, the former has been incommensurably more important in JHA, because most policies agreed had the character of guidelines. It remained the exclusive responsibility of the member states to implement them, thus avoiding issues of administrative/managerial coordination at the EU level. With the establishment of Schengen, Europol, Eurojust and the European Police Academy, together with the more informal but continuing arrangements such as the European Judicial Network and the Working Group of Chiefs of Police, managerial coordination within and between these entities will assume an ever-increasing importance.

In the JHA field, policy coordination fluctuates over time as the interests and loyalties of the main actors shift. The analytical framework provided by the "pendulum model" proposed by Wallace (1996, p. 13) is useful in understanding this fluctuation (see Figure 1). Helen Wallace uses the metaphor of a pendulum oscillating between two magnetic fields, one nationally based and the other one transnationally/supranationally-oriented. The transnational policy arena is located in the European institutions, whereas at the national level, governance is performed by the member state, although in some west European countries there exist also minor magnetic fields at regional and local levels. The probability of adoption of national or transnational policies depends on the relative strength of the magnetic fields. If both sides are weak, then no coherent policy will emerge either at transnational or at national level. The movement of the pendulum encapsulates the process of European integration: at times it is regular, and irregular at other times; at times it oscillates, and in some instances it remains stationary.

The model is based on three premises:
- European states are politically inadequate;
- globalisation has a significant impact; and,
- the European region has specific features.

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Figure 1. Shifts in interests between national and supranational levels in the EU
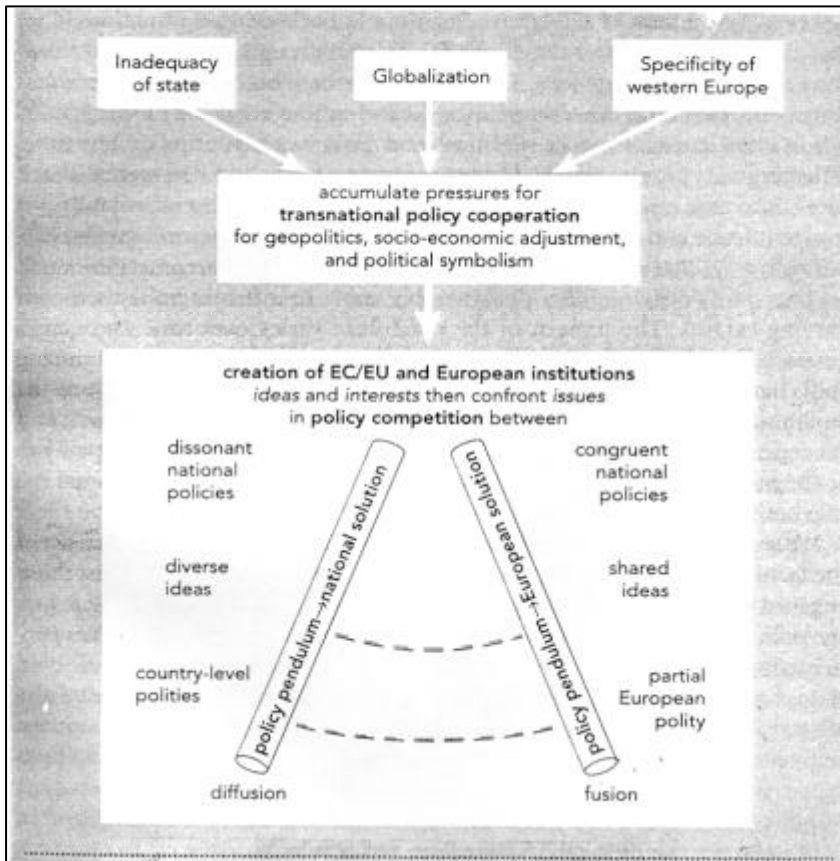
Source: Wallace (1996, p. 13).

Choices between national policy and various forms of transnational collaboration are subject to political competition, and are thus inherently unstable. An example is in immigration policy: member states have very different expectations and traditions with regard to this issue and wish to control it, but pressures and incentives accumulate for strengthening collective European action, giving the transnational field at least a temporary advantage. But this model suggests that neither field will win a permanent and decisive victory. For example, notwithstanding the common challenges relating to policy towards resident third-country nationals in the EU and immigration, policies in the various EU member states remained, and, to a certain extent, still are different one from another. In this and other fields, evolving arrangements are conceived as

a set of similar policies, so that national sovereignty and prerogatives need not be infringed. As one Commission official put it, "a great deal of time [is] spent negotiating legal texts which [are] later watered down to carry as little legal obligation as possible to ensure they are acceptable to all Member States".

Thus, Title VI of the Maastricht Treaty confirmed intergovernmental cooperation as the proper way to deal with JHA matters. In addition, the Treaty failed to define whether the aim of Justice and Home Affairs cooperation was to provide for and/or encourage legal initiatives, or rather to develop a practical, operational cooperation (Den Boer, 1996). Its economic provisions increased pressure towards collective European measures in other fields, creating conditions for further integration in JHA. To borrow Helen Wallace's words, this allowed "ideas and interests [to become] congruent and shared across borders and hence mutually compatible and reinforcing" (Wallace, 1996). The potential for policies at a transnational level was embodied in the Treaty of Amsterdam, but this was the case only with regard to some issues. The Tampere Conclusions and the accompanying 'scoreboard', together with the Commission's right of initiative in the JHA area, are important new instruments of policy coordination. But they are far from settling the issue: the pendulum between state-centred and European-level solutions is likely to swing for some time yet.

In terms of administrative and managerial coordination, the EU level is in a peculiar position because it lacks most of the means of coordination available in national administrations, or possesses them only in a weak form. According to Ernest R. Alexander (1995, p. 1), who adopts a rational choice approach, "for an organisation to agree to participate in a coordinated effort, the prospective rewards of inter-organisational cooperation must be greater than its costs, risk or threat to the organisation or relevant vested interest within it". The state can manipulate the costs and rewards of units to achieve good coordination. This is done by budgetary and accounting controls, judgements of administrative courts, opinions of administrative advisory bodies, and pressure from inter-ministerial committees, which are eventually backed by executive decisions taken at the political level. But the purpose of coordination at the national level is not to maximise benefits for the agencies involved. Consistency in policy and policy implementation is regarded as a political necessity for governments.

The coordinating instruments evident at the state level are either not present at the EU level or present in a diluted form. EU inter-governmental agencies are financed by inter-governmental means and are

not subject to EU budgetary controls. Many EU-financed programmes in JHA are co-financed with the member states, over which the EU can exercise partial budgetary controls. The EU Court of Auditors has emerged as a powerful form of control wherever EU funds are involved. The European Court of Justice of First Instance is a rapidly expanding administrative jurisdiction, but it is by no means the equivalent of the French Conseil d'Etat either as an administrative court or an administrative advisory body. Joint working parties and joint meetings have acquired an important role in coordinating practices, although they are not the equivalent of inter-ministerial committees at the national level.

However, JHA institutions and agencies are of such relatively recent creation that coordination between them has not yet surfaced as a pressing issue. There are concerns about the overlap between Europol and the Schengen system, which is stimulating the first discussions of coordination. It is too early to advance highly developed schemes of what ought to be the over-arching coordinating mechanisms in the JHA area. But a systematic enquiry ought to be made into the problems involved in conjunction with assessments of management efficiency within the agencies.

2.6   The concept of efficiency

The European Commission has made a practice of commissioning from evaluation reports on specific programmes from panels of experts or management consultants. These are based on both qualitative and quantitative analysis. Value for money and "efficiency" are concepts frequently used. Both, and particularly the latter, are slippery concepts and alleged misuse of them can cause angry reactions from the groups being assessed. The two main professional groups most involved in JHA, police and magistrates, are particularly sensitive about attempts to apply these concepts to their activities. Efficiency is desirable in JHA cooperation but what this means should be carefully reviewed; different kinds of efficiency criteria should be developed which should be easily comprehensible and avoid technical complexity.

Efficiency is a concept that has been a particular preoccupation of economists. Pareto made the most influential contribution to the definition of efficiency in his discussion of maximising welfare, positing that an efficient outcome is one that makes some people better off without worsening the situation for others. Pareto-optimal policy solutions bring additional net benefits for some of the parties concerned while not incurring costs to others. Agreeing on a cooperative JHA policy solution that meets the Pareto-efficient criteria may be politically

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unsustainable. Policy-makers at the political level are rarely concerned with efficiency only – often they scarcely take it into account. Calculations of national interest – particularly political and electoral impacts – are often given much higher priority. Nonetheless, assessment policies in terms of Pareto optimality can serve as a valuable reminder to the highest level of decision-makers that other criteria exist.

Currently, benchmarks for efficient policy in this field do not exist although the Tampere scoreboard provides a yardstick for efficient policy-making (in the sense of whether decisions are taken in a timely manner). The Tampere Presidency Conclusions of 1999 and the Tampere scoreboard are the boldest and the most far-reaching documents approved by all member states. The former laid out a broad vision for "a union of freedom, security and justice" and called for specific common actions in four broad areas: asylum and migration policy, justice, the fight against crime and external policy vis-à-vis third countries. It put forward a strategy on what objectives the Union should pursue and what instruments it should seek to acquire within the clear timeframe laid out in the scoreboard. It also introduced a biannual review process, conducted by the Commission, of the progress made towards achieving the common goals.

Justified criticisms have been directed at the slow progress in implementing the Tampere scoreboard. In its review of the second half of 2001, however, the Commission emphasised the major advance in "the general acceptance of the concept of mutual recognition of Court judgements as a practical way of overcoming deeply embedded differences in Member States' judicial traditions and structures." It, nevertheless, expressed regret for the failure to meet the Tampere deadlines in specific areas involving new legislation. The biggest danger arising from such delays, in the Commission's view, is the formulation and implementation of national policies with little or no consideration of the European dimension and the lack of interest in member states for further regulation at European level. Undoubtedly, taking decisions in a timely way is an important element in assessing the efficiency of European initiatives in JHA.

Even in the area of immigration and asylum where the "pillar switch" (from the third to the first pillar) was expected to create a momentum for improved and more efficient decision-making, progress has been slow. The reasons are that the unanimity rule is still required for most decisions and political will for making concessions and speeding up negotiations has been lacking. Abandoning the unanimity rule in blocked areas would be an efficiency gain. The Commission proposes legislation in a timely

manner, lout this is not yet sufficient to ensure positive results in the immigration and asylum policy domain as the legislation gets blocked in the Council.

Implementation of the Tampere scoreboard is further impeded by the complexities of enlargement and these can be the enemy of efficiency. The JHA _acquis_ is constantly evolving and confronting applicant countries with difficulties in adapting to ever-changing demands and complying with legislation with far-reaching consequences. This is not to say that enlargement constitutes an obstacle for achieving an area of freedom, security and justice, but it does introduce additional strains in the JHA policy-making and policy implementation. Considering the intricacies of accession negotiations, reasonable expectations need to be set for benchmarks in JHA.

Cost-benefit analysis is an important way of assessing efficiency and has the advantage that a large body of practical experience is available. In the JHA field it has limited but useful application to specific activities of particular agencies. The quality audit developed by agencies such as the UK Audit Commission is, to a large extent, based on cost-benefit analysis. It can be applied to the Schengen Information System, intelligence analysis by Europol, requests for advice and assistance to Eurojust and so on. Published quality audit reports would serve as useful management tools for the agencies concerned and provide useful publicity for the good work that they are doing. It is important, however, that rigorous cost-benefit/quality auditing is not applied in the initial stages of the setting-up of agencies. There should be an initial period when directors and managers have the opportunity to experiment and adjust resources available to the strategic objectives set for them. The various public agencies envisaged by Tampere such as EUROJUST, the Police Chiefs Task Force and the European Police College (CEPOL) have been established and, to varying degrees, commenced operations, but it is too early to impose quality auditing, as opposed to accounts auditing.

More generally, efficiency has to be assessed in terms of fundamental but intangible criteria such as building trust among member states, allowing for flexibility in policy formulation and implementation and taking into consideration the feasibility of convergence among member states in the specific sub-fields of JHA cooperation. What is needed is an evaluation that is both pragmatic and imaginative in terms of what is achievable given the existing constraints. This should be developed by an "Observatory" set up to monitor and assess implementation of JHA policy.

Institutional questions will be discussed in Chapter 5 but some institutional features of the EU impact efficiency, partly because, as discussed in the preceding section, they make the system more cumbersome than it should be. The practice of rotating the EU presidency every six months brings new priorities to the agenda of the Council on a regular basis, and JHA issues are not always a top priority. Indeed, the Commission has been consistent in its efforts to develop a coherent strategy for different issue areas of JHA. Yet many proposals tabled by the Commission are delayed, pending approval by the Council of Ministers. Unanticipated events can disrupt consistency and continuity in the policy process, as amply demonstrated by September 11th.

2.7 Recommendations

1. The EU Commission should propose a trust-building strategy in JHA, which should involve all the professional groups involved in the member states. In the first instance, this should be done by evaluating and coordinating existing policies that contribute to trust-building.

2. A quality audit should accompany an audit of accounts for the EU agencies involved in JHA. This quality audit should involve specialists in management, public administration, cultural anthropology and social psychology, as well as those from member states with experience in conducting quality audits.

3. Research should be commissioned on the needs of coordination between JHA cooperative arrangements and EU agencies in JHA with a view to proposing instruments of coordination and whether any changes in their remit are desirable.

4. An independent JHA Observatory should be set up to monitor the implementation of JHA policy, which should publicise best practice, as well as indicating omissions. This Observatory should be managed by a small board appointed by the European Council and consisting of practitioners as well as recognised authorities on EU policies.

CHAPTER 3
IMMIGRATION AND ASYLUM POLICY

3.1 Context

During the 1990s, immigration and asylum became the most widely debated item on the Justice and Home Affairs agenda. This was the result of several factors. An influx of refugees from non-European countries as well as the Balkan conflicts resulted in growing pressure for a common EU asylum policy, going beyond that of the 1990 Dublin Convention. The latter, concerning which state is responsible for examining requests for asylum does not really work and a more comprehensive agreement is required. The failure of "zero immigration" targets, the persistence of irregular immigration, the need for immigrant workers in some sectors in the face of an ageing European population coupled with the removal of internal border controls promoted the idea of a common EU immigration policy. The great challenge for the European Union is to reach agreement on positive policies in these fields and not to fall back into the negative position of simply restricting entry as much as possible into the EU.

With the entry into force of the Amsterdam Treaty in May 1999, the field of "visas, asylum, immigration and other policies related to free movement of persons" came under the first pillar, under the jurisdiction of the European Community law, under Title IV of the EC Treaty (Arts 61-69). The fields moved into EC jurisdiction are:

    a) border controls;

    b) the issue of visas;

    c) the circulation of nationals of third countries within the territory of the Community;

    d) measures concerning asylum (jurisdiction for examining applications for asylum, minimum regulations governing the reception afforded to asylum-seekers, the attribution of the *status* of refugee and the concession or revocation of such a status);

    e) measures applicable to refugees and displaced persons (temporary protection, a balance of efforts between the states receiving the refugees and displaced persons);

    f) measures in the field of immigration policy (conditions of entry and residence, issue of long-term visas and residence permits, including the ones for reunification of families);

g) irregular immigration and residence, including repatriation of irregulars; and

h) measures governing the extent to which nationals of third countries can stay in member states other than the one in which they are legally residents.

The question of jurisdiction is therefore in principle resolved and the Conclusions of the European Council in Tampere (15-16 October 1999) provided a framework for the adoption of measures considered necessary in these fields. However, the devil is in the detail. This area of policy remains governed by the unanimity rule until the end of 2004, and agreement is not easy on many detailed measures, with member states wishing to preserve as much of their authority as possible. Even specific problems that have caused political tension – such as the Sangatte reception centre for asylum-seekers wishing to enter the UK, which is situated close to the French end of the Channel Tunnel – have proven difficult to resolve. Consensus on the general strategy for dealing with illegal immigrants has not been easy, as the weak compromise at the June 2002 Seville Council demonstrated.

3.2 An Increased role for the European Commission in the field of immigration and asylum

The changes in the Treaty of Amsterdam meant that the Commission has increased authority and a developing role in this area. The activity of the Commission to date has been positive and forward-looking. It merits more recognition and greater support than it has so far received.

The Commission emphasises the distinction between immigration and asylum, although recognising that the two overlap in important ways in the day-to-day work of national administrations. In communications to the Council and the European Parliament of November 2000, the Commission re-launched the debate on a common asylum and immigration policy at European level and pointed to the benefits of going beyond minimum standards in asylum and immigration policy. Stressing the linkage between immigration and asylum issues and other policy areas such as employment policy, social development and integration and economic policy in the context of an ageing population, the Commission tried to convince opinion, and national governments in particular, of the gains to be made by fully developed EU-wide policies.

The Commission has also promoted measures to ensure appropriate legal protection of immigrants, refugees and asylum-seekers, including respect for human rights and enjoyment of privileges similar, where possible, to

those of EU nationals. An example is the proposed Directive on the freedom of travel within the Schengen area for third-country nationals. It was complemented by a proposed Directive, published on 11 July 2001, on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employment. In addition, the Commission has prepared a draft Directive on the admission of third-country nationals for study and vocational training purposes. The extension, on certain conditions, of the free movement of persons and other fundamental rights of EU citizens under EU law to non-EU nationals is a basic step in allowing third-country nationals to enjoy the benefits of the EU legal space.

Events have proved, however, at least temporarily, a powerful determinant of the direction of European interests. The electoral rise of the populist and extreme Right in member states in 2002 has tilted the balance back to repressive measures.

3.3 Asylum policy

In the past, decisions about whether or not to grant asylum have been essentially political, an act of sovereign power, even though the 1951 Geneva Convention placed a general obligation on signatory states to give sanctuary to persecuted persons. The project to achieve a general EU system requires that the whole regime for reception, treatment, consideration of requests and repatriation is routinised and de-politicised. Whether this can be completely achieved remains an open question. It is, however, a desirable aim that ought to be pursued.

Based of the experience of recurring Balkan conflicts, the Commission proposed a Council Decision for a European Refugee Fund on 14 December 1999. The objective was a framework for "structural" measures to facilitate the reception and voluntary repatriation of asylum-seekers. Also included was emergency aid to help member states face the financial burden in the event of an unexpected arrival of large numbers of refugees or displaced persons – the first attempt at burden-sharing and common responsibility for refugees by the EU member states. The proposal establishing the European Refugee Fund was adopted as Council Decision 2000/596/EC on 28 September 2000.

The provision of minimum temporary protection for displaced persons, including residence permits, access to employment, accommodation and housing, means of subsistence, access to medical treatment, the right to education of minors, and so on, was proposed by the Commission in May 2000. The initiative was to harmonise the temporary protection measures across national borders in the EU while preventing 'asylum-shopping'

opportunities and simplifying decision-making mechanisms. The European Parliament approved the proposal on 13 March 2001. The Directive (2001/55/EC) was formally adopted by the Council on 20 July 2001, and became the first serious achievement in European regulation of asylum.

Initiatives to develop a European asylum dimension include the Council Regulation 2725/2000 on 11 December 2000, to establish "Eurodac" for fingerprints of asylum-seekers. The Eurodac system is meant to help effectively apply the "first safe haven" principle of the Dublin Convention. It will be operational by the end of 2002, if every member state is ready. On 15 March 2001, Norway and Iceland were incorporated into the Eurodac.

The European Commission persistently seeks to devise a comprehensive European asylum regime. In September 2000, it tabled a proposal for a Council Directive on minimum standards on procedures in member states for granting and withdrawing refugee status. The approach respects national regulatory systems and avoids the introduction of uniform procedures. The member states have wide discretion to apply their national procedures as long as they ensure certain minimum standards with respect to granting and withdrawing refugee status. These will probably be the basis of the measures, approved by the Seville Council, for the repatriation of refugees (particularly Afghans) when they are worked out in detail.

The Commission adopted a similar approach in a draft Directive setting out minimum standards for the reception of asylum-seekers by member states. The latter aims at providing equal legal treatment and an adequate level of assistance to asylum applicants and their families in the period of evaluation of their cases by respective national authorities. The method relies on a high degree of trust in the respective public bodies and regulations of other member states. While member states have experience in implementing the principle of mutual recognition in areas related to the single market, it remains to be seen whether they can transfer this experience to the area of asylum policy.

3.4 Immigration policy

Immigration policy is probably the most difficult and sensitive policy area for the EU because of the great divide between elites in the member states and the European institutions and large populations throughout the European Union. The political danger is that the groups hostile to immigration will blame the EU, and the Commission in particular, even

though any policy must carry the agreement and the authority of the member states.

Currently there are four dimensions to the EU immigration policy:

1. Regulation of migration flows;

2. Integration of those residing in the EU;

3. Co-development; and

4. Readmission of illegal immigrants.

One of the first post-Amsterdam initiatives proposed by the Commission in the area of immigration is the draft Directive on the right to family reunification, submitted to the Council on 1 December 1999. This draft Directive – the first in a series on the admission of third-country nationals – is not yet approved.

The Commission also made a striking intervention in November 2000 with a Communication with a Green Paper analysing the state of the immigration debate. The Commission took as a starting point "a growing recognition that the 'zero immigration' policies of the past thirty years are no longer appropriate" in the current economic and demographic context of the European Union and of the countries of origin. It argued for a "new approach", according to which legal channels for immigration should be available, especially for labour migrants. The Commission emphasised the need for a "proactive" immigration policy, which is to say to replace attempts to prevent immigration by a form of controlled immigration that responds to the changing needs of the European labour market.

The Commission rejected a European wide quota system as "impracticable", but suggested "indicative targets" – a system based on periodic reports of the member states, examining the impact of their immigration policies and making projections on the number of economic migrants they would need in future (including their qualification levels). These indicative targets would take into account labour market needs in each member state, agreements in place with countries of origin of migrants, public acceptability of additional migrants, resources available for reception and integration, possibilities of cultural and social adaptation, and so on.

This process should take into account the development of the general employment situation in the EU, and progress in the implementation of the European Strategy for employment, defined by the European Councils of Luxembourg (1997) and Lisbon (March 2000). The mechanism proposed by the Commission leaves authority to the member

states on the admission of migrants, but the various migration policies would be coordinated. Whether member states will follow the lead of the Commission in this modest proposal, considering the sensitivity of immigration and the differences of approach to the issue at the national level remains to be seen.

The Commission's proposal for a Council Directive of 11 July 2001 on conditions of entry and residence of third-country nationals for the purposes of paid employment and self-employed economic activity is another move forward in the same direction. This is also aimed at improved efficient management of migration flows through the introduction of common criteria in all member states and a single procedure (and single "stay and work" document) for applications from eligible third-country nationals. The principle of fair treatment of legal residents from third countries has been addressed by the adoption of legislation on equal treatment irrespective of racial and ethnic origin and on combating racism and discrimination.

Other initiatives of the Commission submitted to the Council in 2001 and 2002 for its review and approval include proposals for Council Directives concerning:

1. the status of third-country nationals who are long-term residents;

2. an action programme for administrative cooperation in the fields of external borders, visas, asylum and immigration;

3. minimum standards for the qualification and status of third-country nationals and stateless persons as refugees or as persons who otherwise need international protection; and

4. a short-term residence permit issued to victims of trafficking in human beings who cooperate with the competent authorities.

This represents a considerable work programme and clearly places important elements of a comprehensive immigration policy on the agenda.

3.5 The open coordination method

In three successive Communications to the Council and the European Parliament in 2001 and 2002, the Commission elaborated its ideas on an open method of coordination for Community policies on immigration, illegal immigration and asylum. This methodological contribution is of fundamental importance in arriving at a common policy on these issues. It is based on the assumption that greater convergence among member states can deliver much better results for the whole system. It addresses

the multi-dimensional character of immigration and asylum, the multiplicity of actors and public bodies involved and the continued competence of national governments over policy and policy implementation. The Commission proposed an approach, which "implies drawing up strategic guidelines, benchmarking, targeting and the introduction of monitoring to evaluate progress". This complements a legal framework with intensive consultations and deliberations among member state representatives to ensure gradual convergence on policy objectives and methods.

The Commission sees its role in the open coordination method as "presenting proposals for European guidelines, ensuring coordination of national policies, the exchange of best practice and evaluation of the impact of Community policy, as well as through regular consultations with third countries concerned". In line with this strategy, the Commission suggested the following European guidelines on immigration:

- Developing a comprehensive and coordinated approach to migration management at national level;

- Improving legal information available on admission to the EU and on the consequences of using illegal channels;

- Reinforcing the fight against illegal immigration, smuggling and trafficking;

- Establishing a coherent and transparent policy and procedures for opening the labour market to third-country nationals within the framework of the European employment strategy;

- Integrating migration issues into relations with third countries, in particular with the countries of origin; and

- Ensuring the development of integration policies for third-country nationals residing legally in the territories of the member states.

Likewise, in the area of illegal immigration, the Commission has singled out six issues for possible further coordination among member states:

- Visa policy;

- Infrastructure for information exchange, cooperation and coordination;

- Border management;

- Police cooperation;

- Aliens law and criminal law; and

- Repatriation and readmission policy.

The targets identified by the Commission in the area of asylum policy are:

- Improving the understanding of migratory flows connected with humanitarian admissions;

- Developing an effective asylum system that offers protection to those who need it, according to a full and inclusive application of the Geneva Convention;

- Improving the effectiveness of the policy on returns;

- Including matters relating to international protection with regard to third countries; and

- Ensuring that policies are framed to promote the integration or inclusion of beneficiaries of international protection in a member state.

These broad guidelines, together with specific suggestions on each, aim to streamline consultations among member states and encourage the setting of a timetable with short-term, medium-term and long-term objectives. The guidelines can then be incorporated into national policies by appropriate policy instruments to take into account the national specificities of member states. The open coordination approach is predicated on the willingness of member states to proceed with approximation of their immigration and asylum regimes. The Commission can do little without the full support of national governments.

This area provides a convincing illustration of the premise that the inter-governmental and the communitarian methods, often presented as competitive or antagonistic, can in practice be complementary. The Commission is active in setting the agenda for member states' discussion and decision, by proposing a framework of legislation and suggesting further areas of integration in the immigration and asylum fields.

The Commission raised various policy issues to communicate its strategy and to invite ideas on the development of policy to other EU institutions and to national policy-making circles. An example is the Green Paper on a Community return policy on illegal residents, issued by the Commission on 11 April 2002. The primary objective of the paper is to solicit opinions from interested parties, including the European

Parliament, the Council, candidate countries, third-country partners, NGOs, the academic community and other organisations to increase the number of voices in the policy-making process. The Commission wishes to generate innovative ideas in the fight against illegal immigration by presenting in the near future a Communication on European border management, including the creation of a European Border Guard (an Italian-led feasibility study was completed in May 2002). Also on the agenda is the creation of a European visa identification system to allow the exchange of information on visas issued by member states.

The breadth of issues the Commission has striven to put on the EU agenda on immigration and asylum is indicative of a consistent strategy to expand the EU mandate in this area. The Commission is acting as a policy entrepreneur to structure the debate and guide the legislative programme of the Council, but the member states, acting through the Council, have the final say on policy decisions and set the pace of progress towards Europeanisation of this policy domain. National policy-makers are driven by different considerations and the success of the Commission in convincing them of the benefits of convergence of national systems will ultimately determine the extent to which the Commission has made a difference in the policy process. The roles of the European Parliament and the European Court of Justice are still marginal but will probably increase in future. The quest for greater accountability and transparency in EU decision-making in general can be expected to result in more direct parliamentary and judicial oversight in the JHA system in the future.

Given the political pressures, the place of immigration policy will increase in EU external policy and in policy on overseas aid (it is already present in the Euro-Med partnership. The idea of placing sanctions on countries of origin for failing to control illegal migration, floated at the June 2002 Seville European Council, has given wide publicity to this possibility. The proposal to sanction poor countries is impractical because it is virtually impossible for any non-totalitarian regime effectively to control exit from its territory. But migration diplomacy to reach agreements on legal immigration to the EU and co-development programmes to reduce migratory pressures should be actively pursued. This will require more coordination between the EU first, second and third pillars and will result in further pressure for institutional reform.

3.6 The EU member states: Willing or unwilling partners?

Very few of the Commission's ideas have so far been translated into legislation by the member states, which raises the questions of why this is

so and whether national governments are genuinely committed to cooperate in this field.

The texts adopted by the Council in the JHA area, in the course of 2000-02, show that immigration and asylum issues have not been priorities for the member states. Three important decisions have been taken, however. On 25 November 1999, the Council agreed on standard clauses to be included in all readmission agreements between the European Community, its member states and third countries. This decision standardises the application of the "safe third country" principle by member states in relations between the EU and third countries in general, including applicant countries from Central and Eastern Europe. The principle has been widely accepted in the national legislation of member states in the 1990s in the wake of the democratisation process in Central and Eastern Europe, which established this region as safe for refugees. A network of readmission agreements between member states and the neighbouring countries is now in place.

Another Directive adopted by the Council, on the initiative of the French government, concerns the mutual recognition of decisions on the expulsion of third-country nationals. This text contains certain complexities in the expulsion procedure and its applicability to different categories of third-country nationals. It makes a very brief reference to the obligation of member states to apply the Directive "with due respect for human rights and fundamental freedoms". The right of third-country nationals to appeal against expulsion is recognised, according to the national legislation of the member state issuing the order. But the major purpose of the directive is to ensure that once an individual is expelled by one member state, s/he becomes a *persona non grata* in the whole Schengen area. Trust in the national administration of other member states for enforcing a restrictive measure does not seem to pose a problem in this field.

An area of increasing concern for the member states is the fight against illegal immigration. This is a point where pillar I and III issues come close together. Due to the linkage with criminal activities and the political willingness of national governments to cooperate in combating crime, illegal immigration is becoming more and more the focus of initiatives undertaken by the Council. In October 2001, in view of the intensifying cooperation between CIREFI (Centre for Information, Discussion and Exchange on the Crossing of Frontiers and Immigration) and Europol in the field of illegal immigration and related issues, an agreement was reached in COREPER on a list of measures to reinforce the working relationship between the two bodies.

The Spanish Presidency subsequently put forward a proposal for a comprehensive plan to combat illegal immigration and trafficking of human beings in the EU in February 2002. This very detailed document covers a broad spectrum of issues including visa policy, information exchange and analysis, pre-frontier measures, measures relating to border management, readmission and return policy, the role of Europol in fighting illegal immigration and penalties for different categories of legal violations. It suggests concrete measures to be adopted and implemented by member states in the short- and medium-term in order to make cooperation in this area more efficient. The Spanish Presidency envisaged a role for the Commission in evaluating the progress towards achieving these goals on an annual basis similar to the Tampere scoreboard. This initiative was taken up enthusiastically by the rest of the national governments as it is clear that illegal immigration is one issue area where member states are more likely to resort to common action. The fight against illegal immigration occupied a central place in the discussions among the Heads of State or Government at the Seville European Council and the measures adopted to that end are a clear indication that the member states are getting serious about common action in immigration policy.

Yet, member states more easily find common ground for cooperation on restrictive and repressive initiatives and are slower and more reluctant to promote rights for third-country nationals and a pro-active immigration policy. Legislation limiting rather than reinforcing the rights of immigrants and asylum-seekers has dominated the agenda of the Council. The measures adopted, while involving greater coordination among national systems, do not interfere directly in very sensitive areas for national governments. Common actions involving more substantive encroachments in the national sovereignty of member states are still pending the Council's approval.

The political pressures on the member states are obvious and difficult to combat without exposing "Europe" to a populist backlash. Further information campaigns on the need for immigrants are required. The EU and the member states should conduct these in a cooperative and coordinated manner. The most important measures to counter anti-immigration sentiment concern labour market policies that have nothing directly to do with immigration. Greater labour market flexibility in order to prevent high structural unemployment and low participation rates in the labour market, evident even in times of economic expansion, would undermine the argument that "immigrants take our jobs". Measures to promote more labour mobility between member states are also an aid to labour flexibility. Similarly, assisting female participation in the labour

market by adequate childcare and re-training after periods of absence for child-rearing would contribute towards this end. Allowing, and even encouraging, people beyond the statutory retirement age to continue working is an additional avenue that should be explored at the EU level.

Making it clear to European electorates that immigrants are necessary, in what numbers and with what qualifications is the only way forward in this politically sensitive area.

3.7 Recommendations

1. The open coordination method, promoted by the Commission, should be energetically and persistently pursued as a means of associating as wide a range of constituencies as possible in the policy-making process.

2. Timely consideration should be given by the Council to the proposals laid before it by the Commission, and a scoreboard on the model of the Tampere scoreboard should be established for this area.

3. Another Green Paper, a sequel to that of November 2001, should be published on immigration and a separate one published on asylum to reinvigorate public debate and to invite contributions from "civil society" at an early stage in the policy debate.

4. These Green Papers should form part of a wider publicity and information action, which should be conducted jointly by the Commission and the member states to avoid the possibility of making the Commission a scapegoat by anti-immigrant groups and timorous governments.

5. Labour market policies should be reviewed in order to ensure that anti-immigrant arguments have little basis to mobilise public support.

6. Migration diplomacy to reach agreements on legal immigration to the EU and co-development programmes to reduce migratory pressures should be actively pursued.

CHAPTER 4
JUDICIAL AND POLICE COOPERATION

The idea of a "European judicial space" was first popularised by the French President Valèry Giscard d'Estaing, in the 1970s. It was then intended as an instrument to combat terrorism in a situation where individual European states were subject to blackmailing pressure from Middle Eastern terrorist groups. A European judicial area, however, only began to become a reality after the Treaty of Amsterdam. Although repression of terrorism is still a driving force behind the idea of a European judicial area, the project is very much more ambitious involving cooperation in repression of all forms of serious crime, cooperation in civil law matters, securing free movement and the defence of individual rights.

A European judicial area can be created by three methods – the creation of an European Criminal Code and a new European jurisdiction in criminal matters; mutual recognition of the judicial decisions in one member state across the whole of the European Union; and the approximation of laws and penal policies. Member states and the legal professions are wary about the first method and little progress has been made. However, for offences against the financial interests of the EU and in some civil law matters, it will be the route taken. The second is the method in which the most dramatic developments have taken place. The third is a continuing but slow, and little publicised, process. There are likely to be concurrent, even competing, projects of judicial cooperation/integration going on, following different methods.

The establishment of a European judicial area poses two categories of problems. The first is the inevitable complexity of such a project. This creates problems of communicating the implications of decisions made and legislation enacted to the professional groups affected by them in the member states, to national policy-makers and to broad sections of the public. The second is the weak constitutional, democratic and social legitimacy of the project. The legitimacy of EU action in this area is not underpinned, as it is in the member states, by centuries-long practice of the exercise of authority. The EU is a very complex social and political space, which hinders the development of a strong sense of common identity – a pre-condition of democratic legitimacy. These matters are discussed in Chapter 5.

At present, there is an ambiguous sharing of competences in EU arrangements in judicial and police matters between the national and European levels of policy-making. Judicial cooperation in civil matters with cross-border implications, including the simplification of civil proceedings, the taking of evidence and cross-border service of documents is in the first pillar and is a considered a Community business. Judicial cooperation in criminal matters and police cooperation is in the third pillar where the right of initiative is shared between the Commission and the member states. A peculiar feature of the division of labour in police cooperation is the communitarisation of the investigation of fraud against the Community's financial interests, an area that is currently an exclusive domain of the European Commission.

Judicial cooperation specifically among EU member states does not have a long history. There is a wide variation of the national jurisdictions of member states, which renders any attempt at harmonisation and convergence difficult, both politically and operationally. The first steps in collaboration between the national judicial authorities came with the Maastricht Treaty that provided for the establishment of liaison magistrates, a European Judicial Network and promotion of best practices in judicial cooperation in criminal matters. These measures were mainly aimed at information exchange and familiarisation of legal practitioners with jurisdictions and counterparts in other member states. While modest in their nature, they set the stage for further European initiatives in the judicial field, which culminated in the establishment of Eurojust (legally recognised in the Treaty of Nice but proposed earlier at the Tampere Summit).

4.1 Judicial cooperation in civil matters

The distinction between civil and criminal matters in judicial cooperation is critical for understanding developments in the European judicial area. The Treaty of Amsterdam links civil judicial cooperation with the principle of free movement of persons, thus giving the Commission the right to propose legislative initiatives. Criminal justice cooperation is exclusively the domain of the member states with much less possibility of involvement of supranational institutions in policy-making.

Judicial cooperation in civil law matters is generally of lower political profile and sensitivity than in criminal matters – although particular matters, such as custody of children, has caused strained relations between member states in the past. Many civil law issues are highly technical and, for much of the time, of interest only to professionals. Three main priorities in civil matters were identified by the Heads of

State or Government at Tampere: 1) better access to justice; 2) mutual recognition of judicial decisions; and 3) approximation of legal procedures.

Action on these is very recent, and therefore worth recalling in a certain detail. Adequate level of legal aid in cross-border cases has been a key concern of the Commission, which published a Green Paper on legal aid in civil matters in March 2000. This first initiative was followed up by a hearing with national experts and professionals on 20 February 2001, which endorsed Community action on the matter. To take account of different national perspectives early in the process, the Commission organised a meeting with experts from the member states on 29 June 2001, to present a draft proposal for a Council Directive on better access to justice and invited comments. The Commission then proposed on 18 January 2002 a Council Directive to improve access to justice in cross-border disputes by establishing minimum common rules for legal aid and other financial aspects of civil proceedings.

A similar strategy of broad consultations with member states and reaching a general consensus before undertaking legislative initiatives has been the approach of the Commission in two additional matters. On 28 September 2001, the Commission issued a Green Paper on compensation to crime victims with the purpose of soliciting expert opinions on possible measures to be taken by the EU. Similarly, it published a Green Paper on alternative dispute resolution in civil and commercial law on 19 April 2002 to initiate a wide debate.

Mutual recognition of judicial decisions has been established by the European Council as a fundamental principle of judicial cooperation in both civil and criminal matters. Legislative initiatives upholding the principle have been sponsored by the member states themselves acting through the Council, for example:

- Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (known as the "Brussels I" Regulation);

- Council Regulation (EC) No. 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgements in matrimonial matters and in matters of parental responsibility for children of both spouses (known as the "Brussels II" Regulation);

- Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings; and

- Council Regulation (EC) No. 1348 of 29 May 2000 on the service in the member states of judicial and extra-judicial documents in civil or commercial matters.

In addition, the Commission has tabled a proposal for a Council Regulation on parental responsibility that would extend the principle of mutual recognition to all decisions in that area, following the example set in the Brussels II regulation. The Council is also discussing a proposal for a Regulation on rights of access to children put forward by France on the basis of mutual recognition of judicial decisions.

The Council adopted ancillary measures intended to foster cooperation between national judicial authorities, including Regulation (EC) No. 1206/2001 on cooperation between the courts of member states in the taking of evidence in civil or commercial matters and Decision 2001/470/EC establishing a European Judicial Network in civil and commercial matters. All these initiatives, while not far-reaching in terms of substantial convergence of member states' judicial regimes, introduce a degree of coordination among national authorities and administrative improvements. They also aim at setting some minimum standards for certain aspects of civil procedure, which can prepare the ground for further approximation of law.

The following recommendations for priorities in civil law are matters for rapid attention:

- The principle of mutual recognition should remain the cornerstone of future work on European judicial cooperation in civil matters. The mutual recognition programme adopted by the Council should be implemented. In particular, priority should be given to decisions concerning uncontested claims making it possible to establish a genuine European Enforcement Order as well as to certain judgements concerning family law disputes such as the cross-border right of access to children.

- The setting of minimum standards for procedures for serving documents, respecting the principles of member states' laws, is a logical precondition for the full application of the principle of mutual recognition, and should also constitute a priority.

- The compatibility of the rules applicable in member states with regard to conflicts of laws, provided for in Art. 65 of the Treaty, is also an important element of mutual recognition. Discussions should be started as quickly as possible on the matter of the law applicable to extra-contractual obligations.

4.2 Judicial cooperation in criminal matters

The one area of criminal judicial cooperation where the Commission has an official right of legislative initiative is that initiated by a celebrated report to the European Parliament by Prof. Delmas-Marty – the protection of the Community's financial interests against criminal offence.

The European Commission's Anti-Fraud Office (OLAF) proposed the establishment of a European Public Prosecutor, an independent judicial authority with powers of investigation and prosecution in all EU member states into criminal acts, such as fraud and corruption, against the Community's financial interests. It issued a Green Paper on the possible legal status and organisation of the European Public Prosecutor, the range of offences to be covered, various issues of procedural law and the problem of judicial review.

The initial reaction of the member states to the Green Paper was unenthusiastic. At the Laeken European Council meeting in December 2001, the Heads of State and Government showed a willingness to explore the feasibility of the project, calling on the Council to "examine swiftly" the Commission proposal. At the Justice, Home Affairs and Civil Protection Council Meeting of 28 February 2002, however, the Ministers of the member states expressed unease about setting up a European Public Prosecutor. They raised concerns about the timeliness of the proposal on the grounds that Eurojust and OLAF have not yet had enough time to gain sufficient experience in the fight against financial fraud. Pointing to the constitutional complexities evoked by the Green Paper, ministers showed little support for the proposed initiative.

Behind the reluctance of member states to proceed with a European Public Prosecutor are different perceptions of problems and priorities, as well as unresolved contradictions between policy objectives. In the past, member states have been slow to take adequate measures for the repression of fraud against the Community budget. However, at the core of their reluctance is inadequate mutual trust in the national judicial systems, especially when some are perceived as very different and inferior to one's own. A major incident of fraud or corruption may be necessary to overcome this reticence. Nonetheless, this project must be kept on the European agenda because it is the only adequate response to a persistent problem.

Several political, legal and institutional difficulties can be identified as hampering the setting up of a true European judicial area in criminal matters. These are illustrated by the blockages in, and discussions of current proposals.

In accordance with point 37 of the Tampere Conclusions, the Council adopted, within the time limits set, a range of proposals to implement the principle of mutual recognition. Work on the first instruments (e.g. freezing of assets, European arrest warrant) began with their acceptance in principle but major differences of approach emerged.

In the case of the European arrest warrant, some member states are reluctant to abolish supervisory checks in the state of enforcement because they want to ascertain that the state of issue has complied with the requirements of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and of the Charter of Fundamental Rights of the European Union. The Commission has been asked to submit to the Council a proposal aimed at strengthening in all member states minimum procedures of protection, developed by the case law of the Court of Human Rights. This would increase the level of trust in other member states' judicial systems but there is also scepticism about the competence of some of the magistrates in some countries. A French proposal to set up a network of colleges for training of magistrates is intended to address these doubts.

Several instruments approximating definition of crimes and penal sanctions in the areas identified by the Amsterdam Treaty and by the Tampere Conclusions have been adopted. The Community is, however, faced with a three-fold difficulty: first, the diverse judicial systems in the member states and the reluctance of member states to review their criminal law; second, the consistency of their system of penalties is given by member states as a reason for their opposition to harmonising penal sanctions, especially when setting the minimum length of a maximum sentence; third, member states differ on the relationship between harmonisation and mutual recognition – some wish to emphasise the latter in order to avoid the former.

There is little to be done about the first difficulty in the short term. On the second two, the JHA Council as well as, in turn, the grand European Council, should make clear its determination to undertake, as soon and as ambitiously as possible, the exercise of approximating definition of crimes and penalties in the areas defined by the Amsterdam Treaty and the Tampere Council.

The competences of the Community and the Union in criminal matters should also be clarified. When a Commission proposal for a Directive competes with a framework decision proposed by a member state, which has happened in the case of criminal sanctions for breaches in environmental law, the Council's work is delayed and potentially paralysed by conflicts over which legal basis to choose. This is

potentially a matter of concern in several areas: public procurement, protection of EU financial interests, insider trading, combating traffic in human beings, and so on.

As the Tampere scoreboard shows, member states are slow to ratify International Conventions negotiated through the Council. Further, no mechanism exists to monitor either their implementation or the ways in which the member states implement framework decisions and decisions adopted by the Council. There is a proposal that the Commission be asked to make arrangements in all cases to submit to the Council reports on progress in transposing the various instruments adopted in the framework of Title VI of the TEU. In our view, monitoring should also be done by an independent Observatory (as proposed in Chapter 2)

In the fields of crime prevention and criminal investigation, there is a similar picture of achievements and difficulties, although police cooperation has made the most remarkable advances. The Tampere European Council emphasised in its Conclusions the development of a preventive approach to crime, in tandem with police cooperation and judicial cooperation in criminal matters. The creation of a crime prevention network and the setting up of a Forum on the prevention of organised crime constitute two concrete achievements of this approach, but the lower priority and the fewer resources than those given to agencies involved in the investigation and repression of crime evident at national levels, is also apparent at the EU level. Work in this area should be actively promoted where EU initiatives have clear added value.

4.3   Police cooperation

European police cooperation should not be regarded in purely EU institutional terms – Europol, Schengen, EU Customs cooperation, the European Police Academy and the Police Chiefs Task Force. To do so simplifies an extremely complex reality. Within the member states, the criminal law, the law enforcement system and police organisation have very different characteristics. This results in different priorities and perspectives on cross-border cooperation. It also means that a whole tissue of trans-border cooperative agreements and arrangements have emerged over a long period of time outside the EU framework.

In addition, the field of internal security has greatly expanded in recent years and agencies that are not conventionally described as police forces are heavily involved. They are nevertheless important in control and surveillance of persons, crime prevention and even in criminal investigation. These include, inter alia, state security services, private

security services (the best known are international ones such as Interpol), private investigators, and fraud investigation agencies.

The relationship between state security services and police in the member states is a difficult one that has relevance to the EU. In the field of counter-terrorism and, to a lesser extent, in the fight against organised crime, the role of the security services is central. The Police Chiefs Task Force has been charged by the European Council with liasing with intelligence services and this initiative should continue to receive strong political backing.

A crucial area of the internationalisation of policing is informal cooperation between police in different countries. The extent of cooperation on the basis of reciprocity, which does not pass through official channels, is to be assessed because it leaves no trace. When new formal arrangements are set up for police cooperation, they almost always produce informal cooperation alongside them. Informal cooperation often arouses suspicions outside the police milieus, precisely because it lacks a legal basis, but it is often an essential response to the need for quick communication of information and rapid cooperation in a specific criminal investigation.

Trust is the basis of all forms of police cooperation. In the absence of trust, cooperation does not occur and this makes essential the trust-building strategy, recommended in Chapter 2. Trust between police forces is inevitably fragile and needs careful nurturing. Amongst the many reasons for this fragility are:

- The legal and police systems of European states differ considerably and there is still insufficient knowledge of these differences within the police. Unfavourable comparisons are often made between "their system" and "our system".

- State frontiers remain crucial barriers in police work – the psychological distance, despite modern means of transport and communications, between police forces can be very great.

- Police malpractice (particularly corruption, use of excessive force and pliability to political pressure) in other countries seems much less acceptable both to the police and to the general population than in one's own country.

- The complexity of cooperative arrangements is confusing. Parallel and overlapping methods of cooperation can be useful to law enforcement officials because if one channel of communication does

not work, another can be used. But their existence undermines effective accountability and control.

• Ministries of the Interior, responsible for the police within the member states, have often been the most nationalist and _souverainistes_ in their governments, except for those officials directly engaged in EU affairs. Officials regard cooperation and trust-building as a marginal issue until they directly affect cooperation about specific matters.

There are three different levels of European police cooperation as viewed by operational police officers. The highest level – Europol – is at a considerable distance from what many investigating officers, until now, consider to be "real police work". Europol groups a relatively small number of police officers operating in an international environment, with an ambitious range of objectives. The national offices of Europol are often located in units responsible for all international relations.

The Schengen system is at an intermediate level. It is a system of information exchange, with on-line access to a database, complemented by national offices to facilitate cooperation. It systematically and continuously provides indispensable data to frontier police working at the external frontier, and to others.

The third level is the local level which can be multilateral, for example, Nebedeag-Pol at the Maastricht-Aachen, German, Netherlands, Belgium frontier or bilateral such as the juxtaposed police stations at the Channel tunnel, the joint police stations at the Franco-German, Franco-Spanish frontiers and elsewhere. In this context, operational police officers are operating alongside one another on a day-to-day basis.

It is usually at the third level that trust is most readily established and lessons should be learned from this for the other two levels.

Europol is, and is likely to remain, the lynchpin of EU-level cooperation. In establishing Europol, the EU acquired a police bureau without the executive police powers (search seizure and arrest) characteristic of police forces in the member states. The adoption of the many regulations implementing the Europol Convention, the gradual extension of its powers notably in relation to combating money laundering, the approval of ever-growing budgets, the Council and the member states have ensured that Europol has got off to the best possible start. However, in addition to the delay in installing its computer system, Europol is not yet able – despite a staff of over 250 persons and a budget of over €35 million – to provide the member states' police services with sufficiently refined analyses and information.

The new tools for police cooperation have not yet produced the added value in operational terms that was expected of them. The main reason is the reluctance, widely but not universally shared, of police agencies in member states to provide Europol with sensitive information. This reluctance is based on a mixture of considerations. Many criminal investigators are unwilling to communicate case-related information except on "a-need-to-know" basis; state-centred, *souverainistes* attitudes are common in police agencies because of their historically close affinity with the state (or the Crown in the UK); Europol is often considered by police officers as based on a political aspiration rather than police needs and Europol has to demonstrate its value.

Some change in these attitudes, stimulated by particular incidents, may be expected. Indeed, in his report to the (JHA) Council on 6 and 7 December 2001, the Director of Europol demonstrated that member states were more willing to provide Europol with information following the terrorist attacks of 11 September 2001. Other initiatives such as the embryonic European Police College and the Working Group of Chiefs of Police should help, if a conscious effort is made by them to promote an understanding of the role of Europol. The introduction of Europol's on-line data storage and information exchange of criminal intelligence will also contribute to its standing, provided that relations with the Schengen and Interpol systems are resolved to the satisfaction of criminal investigators.

The extension of Europol's powers to all the forms of crime mentioned in the Annex to the Europol Convention provides too broad a remit and requires that the Europol Management Board adopt a much more selective strategic plan. The work begun under the French Presidency and continued under the Swedish and Belgian Presidencies to define a "vision" for Europol should provide the beginnings of a response. The Council should request the Management Board of Europol to continue its discussions on corporate governance and management control.

In the legislative field, work is under way to identify those Arts of the Convention in need of amendment. Amendments should render binding the two Resolutions adopted under the French Presidency on Europol's participation in joint investigation teams and on the possibility of Europol requesting member states to initiate investigations. The legal framework required for setting up joint investigation teams will be in place since 1 July 2002, and these, in due course, should enhance the added value of Europol in criminal investigation. It has yet to be determined whether greater operational powers should be conferred on Europol and, if so, what form of parliamentary control of its activities should be devised and

what arrangements should be made for cooperation with Eurojust. Adequate systems of legal and political accountability are a _sine qua non_ of greater operational powers.

Four other initiatives in civil police cooperation are essential elements in the emergent EU system – the Police Chiefs Task Force, the European Police College (CEPOL), the new version of the Schengen Information System, and Police in support of peacekeeping missions (CIVPOL).

The Tampere European Council decided to set up the Police Chiefs Task Force as a forum for discussing and planning joint operations. The Police Chiefs have potentially an important part to play in the preparation, implementation and evaluation of the decisions taken by the Council. It has met on four occasions since then but there is still uncertainty about its role and purpose. Police officers often regard the EU as the business of senior officials and politicians, in which they have no role, even though the police unions have taken an interest in it. The Task Force could provide a police "voice" in EU policy-making but its place in EU institutions and its working methods remain to be worked out.

After a difficult start – it lacked legal personality and had no permanent secretariat – the European Police College (CEPOL) drew up a more targeted training programme on the basis of the Council's priorities. The effectiveness of its activities will, however, depend on the European Council's decision where to locate it and its transformation from a network of police colleges into a genuine autonomous agency.

In addition to its function in the immigration field, the Schengen Information System (SIS) is the most useful tool of operational cooperation between the member states' police services. The need to enhance its functions in SIS II and modernise its technical capabilities, in order to incorporate the new member states, has been flanked by the necessity to clarify its legal status. A decision must be taken on whether or not to contract out its management to an external agency.

The EU and its member states are active in criminal law enforcement globally but especially in their immediate neighbourhood. Police liaison officers from the member states (who act on behalf of other member states) are present in most sensitive regions of the world. Police technical assistance programmes are now better coordinated between member states. The role of civilian police has been recognised as crucial in peacekeeping missions in the Balkans and the EU is now prepared, through CIVPOL, for future missions. These activities implicate the police in second pillar (Foreign and Security Policy) matters.

To the extent that the external projection of EU law enforcement is coordinated, it has a federating effect on the police, because of pressure to present a common front to the outside world. This promotes trust between the police forces of the EU. But external bilateral action by member states can have the opposite effect, with the projection of national models of policing and the promotion of potentially competitive interests.

These four areas of activity, as well as Europol, have important overlaps between them. They are, however, scattered over the three pillars of the EU. This is a particular area in which future needs for coordination between them should now be addressed.

4.4 Recommendations

1. The principle of mutual recognition should remain the cornerstone of future work on European judicial cooperation in civil matters. The mutual recognition programme adopted by the Council should be implemented. In particular, priority should be given to decisions concerning uncontested claims, making it possible to establish a genuine European Law Enforcement Order, and to certain judgements concerning family law disputes, such as the cross-border right of access to children.

2. The setting of minimum standards for procedures for serving documents, respecting the principles of member states' laws, is a logical precondition for the full application of the principle of mutual recognition, and should be a priority.

3. The proposal for the establishment of a European Public Prosecutor, an independent judicial authority with powers of investigation into and prosecution of criminal acts in all EU member states against the Community's financial interests should be pursued with all due speed.

4. The JHA Council/European Council should confirm its determination to undertake, as soon and as ambitiously as possible, the exercise of approximating definition of crimes and penalties for the offences mentioned in the Amsterdam Treaty and in the Conclusions of the Tampere European Council.

5. The respective jurisdictions of the Community and the Union in criminal matters should be clearly determined to avoid parallel proposals for directives and framework decisions.

6. Adequate systems of legal and political accountability should be established for Europol prior to granting it additional operational powers.

7. The Council should request the Management Board of Europol to reach an early conclusion to its discussions on corporate governance and management control.

8. The task given by the European Council to the Police Chiefs Task Force to liase with intelligence services should continue to receive strong political backing.

9. Europol, CEPOL, the Police Chiefs Task Force, CIVPOL and Schengen have important overlaps between them. Because they are scattered over the three pillars of the EU, future needs for coordination between them should now be addressed.

CHAPTER 5
CONSTITUTIONAL AND INSTITUTIONAL ASPECTS OF JHA

The basic problem facing the further development of JHA cooperation is constitutional. The present pillar structure of the EU is unsatisfactory and unclear. The variety of legal instruments in each pillar, which are not always the most suitable instruments for JHA, contributes to the confusion. Ambiguity in the division of powers between the pillars as well as within the pillars also characterises the current system. That system should be replaced in the proposals for the next inter-governmental conference by a simple division of powers – transferring a maximum of competence to the first pillar, that is, to the Community level, retaining a minimum of the most sensitive areas as the exclusive responsibility of the member states, with some powers exercised exclusively by the European institutions. The introduction of a system of qualified majority voting is necessary for all JHA policies, allowing for unanimity voting only for those issues that remain the exclusive competence of the member states. The introduction of such a system is particularly necessary after enlargement to avoid blockages in decision-making, which could result in complete stalemate on some issues.

These suggestions are consistent with the development of the EU and with the constitutional principles of federalism. They may not be adopted – indeed, they probably will not – because of deep divisions of view between the member states. Also, many among political elites, influential opinion leaders and broad sections of the electorate are not ready to believe that there are already important federal elements in the EU, and are still less prepared to sanction them in this area.

If they are adopted, a clear scheme (even though the practicalities would be complex) could be presented of those powers exercised by the European institutions alone, those shared between the EU and the member states and those reserved to the states. The powers attributed to the EU alone could and should be very limited, restricted to offences against the financial interests of the EU, counterfeiting the euro and to many matters related to free movement, possibly including the crossing of the external border of the EU. The second category (powers shared between the Union and the member states) is the most difficult but, in general terms, it should include all offences of a serious nature – included in the list appended to the European Arrest Warrant – that involve two or more member states. But the Union's authority should be limited to assisting the repression of crime, and the authority to legislate on criminal

matters should be reserved to the member states unless there is a specific derogation to allow harmonised legislation. As in all statements of constitutional principle, the precise meaning of this would be established by practice over time, particularly in the area of shared competences. Conflicts would inevitably arise and should be settled politically. The European Council should, after receiving an opinion from the European Court of Justice, decide on the basis of qualified majority voting. This would avoid "government by judges" in sensitive matters touching state sovereignty.

Such constitutional provisions would resolve, at least at the level of principle, the problems of legal and political responsibility. Difficult borderline cases would inevitably arise, but it would set out a distribution of powers that would be comprehensible to everyone. It would also identify clearly the roles of the ECJ and the European Parliament. The problems would be many and severe, not least because of the practical and political necessity of preserving various forms of flexibility and possibly creating new forms. It would represent an important advance over the present situation, which is a confusing and unclear transitional regime. This chapter is devoted mainly to a presentation of the current position with some suggestions for change in this transitional regime. This regime could indeed last a long time even if the pillar structure is formally abolished by the Treaty revision.

Since the entry into force of the single European act, the balance has been moving from national towards European solutions in JHA; at first the process was steady, but slow. This is unsurprising since it was the first attempt by a supranational organisation to address problems such as immigration or cooperation in criminal matters. The whole weight of tradition and practice in ministries of justice and interior sustained a preference for intergovernmental cooperation and the preservation of sovereign control rather than harmonisation and common policies. The European Commission conceded the necessity of the intergovernmental method to make possible progress in the field. The loser was the European Parliament, which was for the most part excluded from the decision-making process, and important matters risked escaping robust systems of accountability.

The institutional arrangement of the EU in the field of Justice and Home Affairs is based on the distinction between matters that, as mentioned in Chapter 1, have been brought under the first pillar and those that have remained in the third. As the external dimension of JHA, with an expanding number of international agreements, technical assistance programmes and the deployment of civil police in international

peacekeeping missions, JHA is becoming increasingly involved in the second pillar. Treaty changes have brought about a different allocation of responsibilities. In the Treaty of Amsterdam, "visas, asylum, immigration and other policies related to the free movement of persons", such as judicial cooperation in civil matters, are now subject to the Community decision-making system (with derogations), whereas the decisions on police and judicial cooperation in criminal matters in the new Title VI of TEU are still taken on an intergovernmental basis. The incorporation of Schengen and the reform of third pillar decision-making promoted changes in the working structure and practices of the Council in JHA. Overall, justice and interior ministers have retained their power, notwithstanding the attempts to reinforce the coordinating role of the COREPER over the JHA galaxy.

The position of some aspects of JHA, under the first and third pillars, must be reviewed, at the cost of straining the patience of the reader, to illustrate the complexity and obscurity of the present situation. Progress in matters under the first pillar has been both disappointing and slow perhaps because decisions have direct effect. Under the third pillar, there has been a great amount of activity perhaps because it is entirely within the competence of the member states when, how and if they implement decisions taken.

5.1 First pillar

5.1.1 Free movement

The new Title IV "Visas, asylum, immigration and other policies related to free movement of persons" is subject to special procedures providing for derogation from the "community method" (Art. 67) of the rest of the first pillar. In particular, in the decision-making process under this Title, the Commission shares the right of initiative with the member states, and the Parliament is only consulted. Moreover, apart from certain legislation on visas, all the decisions have to be taken by a unanimous vote until 1 May 2004; at that date the Commission should regain its exclusive right of initiative, and the decision-making process should shift to majority voting. Before the latter step is taken, however, it will be necessary to have a unanimous agreement of the member states.

It is currently enough to consult the European Parliament, but in the future the Council could accept the co-decision procedure. However, it is crucially important that, by transferring this competence to the first pillar, the member states have implicitly recognised the authority of the European Court of Justice.

5.1.2 The status of third-country nationals

On non-EU citizens, the Treaty of Amsterdam neither framed a coherent strategy or a comprehensive approach in Arts 61, 62 and 63. New objectives, which had to be achieved within a fixed timetable, were assigned to the Community. Nonetheless, until the entry into force of the Treaty of Amsterdam, third-country nationals (excepting some specific categories) were not covered by the provisions of Community law.

The Treaty establishing the European Community (TEC) (as amended by the Treaty of Amsterdam which entered into force on 1 May 1999) does not mention a common immigration policy, but lists some of the elements of such a policy: "visas, asylum, immigration and other policies connected with free movement of persons". The competence accorded to the EU in migration matters do not live up to the statement of the intent to introduce a comprehensive and coherent immigration policy. Also the second subparagraph of Art. 63 introduces a safeguard for the member states, stipulating that they can pass (or maintain) national legislation provided that such legislation is "compatible with this Treaty and with international agreements". Only recourse to Art. 308 (TEC) of the Treaty establishing the European Community makes it possible to avoid a purely intergovernmental approach, by transferring the provisions concerning immigration policy from the third to the first pillar (Hailbronner, 1998). It is difficult to establish which decisions will and should be taken at a European level from a reading of the Treaty. The Treaty of Amsterdam was therefore not the beginning of a comprehensive European immigration policy but the first step towards such a goal.

Art. 61 of the Treaty of Amsterdam stipulates that the Council will adopt "within a period of five years after the entry into force of the Treaty of Amsterdam the measures aiming to ensure free movement of persons in compliance with Art. 14"; this illustrates the resistance of the member states to rapid Europeanisation of the regulation of the movement of third-country nationals within the EU. Art. 14 simply restates that the Internal Market shall comprise an area without internal borders and that within such area persons will have a right of free movement.

5.1.3 Entry into the European Union

Art. 62(2) – "measures concerning the crossing of the external borders of the member states" - includes the sensitive issue of whether or not third-country nationals need a visa to enter the European Union. It stipulates that the Council may adopt "rules concerning the visas for the stay envisaged of a maximum three-month duration". Within this framework, the Council is charged with the drawing up of a "black list" of countries,

whose nationals will need a visa to cross the external borders and a "white list" of countries exempted from such a requirement. The Council has authority to adopt technical rules concerning the procedure for issuing a visa and the specifications of a standard visa for the purpose of bringing the systems of the various member states closer together.

The issuing of visas was already communitarised by the Maastricht Treaty. However, the new wording helped solve the serious difficulties of interpretation among JHA ministers. The adoption of Regulation 2317/95 of 25 September 1995, determined which third-country nationals must be in possession of a visa when crossing an external border of the member states. However, this was preceded by political wrangling about the limits of the jurisdiction of the European Community. In the Treaty of Maastricht the only power explicitly granted to the Union was to draw up a list of those third-country nationals who require a visa to enter the Union. This implied that member states reserved for themselves the power to add to this joint list. The situation is, in principle, resolved by Regulation No 539/2001 establishing a common list of those third countries whose nationals require a visa and those who are exempted, thus abolishing the discretion of member states to add other countries which were not on the Common Visa list.

Art. 62(2) empowers the Community to frame a uniform visa, a measure that would make it easier to identify illegal immigrants. But it does not grant the power to determine the value of this visa in the member states, despite the obligation appearing in Art. 14 to establish an area without internal borders in which free movement of person is ensured. This issue of detail, which could have important effects on individuals, illustrates the need for a clearer definition of competences. However, the Art. unambiguously stipulates that the measures adopted by the Council shall ensure the absence of any controls on persons "be they citizens of the Union or nationals of Third Countries" when they cross the internal borders. In these articles, the concept of "persons" must be understood in a broad sense. This broad meaning was not contained in the Treaty, except in the form of granting a derogation to the United Kingdom and Ireland enabling these two countries to maintain controls at their internal borders with the other member states.

Thus, as a consequence of the entry into force of the Treaty of Amsterdam, third-country nationals are not to be checked at the internal borders (except in the case of the UK and Ireland). Furthermore, Art. 62(3) specifies that among the measures to be adopted by the Council are those setting out the conditions for third-country nationals to move freely within the territory of all member states for a maximum three-month

duration. This has been aptly labelled as the right to travel by the Commission. In fact, this provision does not entrust third-country nationals with an individual (subjective) right of free movement. Moreover, this provision does not at the moment have direct effect. Only a privileged group of third-country nationals can benefit indirectly from free movement rights of more than a three-month duration, through derived rights. These third-country nationals include:

- members of the family of an EU national;

- nationals of states connected to the EU by an association or cooperation agreement; and

- workers of a company on whose behalf they carry out services in another member state (according to the Vander Elst principles).

In March 2001, the Commission proposed to the Council a Directive concerning long-term resident third-country nationals to extend their free movement rights, on the basis of Art. 63(4) (Com 2001 127 final). The Council has consulted the Parliament on the proposed Directive, but the latter has not so far been adopted.

5.1.4 Residence in the European Union

Point (a) of Art. 63(3) covers "conditions of entry and residence, and standards on procedures for the issue by member states of long term visas and residence permits, including for the purpose of family reunion". To some degree, this provision can be considered a step backwards compared with the Maastricht Treaty that included among the grounds for the issue of long-term visas and residence permits "access to employment". No mention is made in the Treaty of Amsterdam of the "harmonisation" of conditions of residence, contained in a text submitted in December 1996 to the intergovernmental conference and in the plan proposed in October 1996 by the Commission concerning an area of freedom, security and justice (CONF 3912/96 of 18 September 1996).

Point (b) of Art. 63(3) is of a repressive nature; it covers "illegal immigration and illegal residence, including repatriation of illegal residents". The reference to illegal employment of third-country nationals made in the Maastricht Treaty disappeared and this cannot be fortuitous. The addition of repatriation of persons without authorised residence is also significant, as individual member states have not managed to control undocumented immigration. Certain states, some more than others, tolerated the presence of undocumented migrants on their territory as long as they did not seek recourse to public funds as they viewed these persons as a source of cheap labour.

Art. 63(4) covers "measures defining the rights and conditions under which nationals of third country who are legally resident in one member state" but again, the reference to the "right to seek employment in the other member states" disappeared in the text adopted in Amsterdam.

After the first years of application of these articles, the Commission forwarded to the Council proposals for various directives, for instance on refugee status and conditions of residence, but none of them has been adopted so far. These delays are mainly due to the necessity of reaching unanimity to adopt the directives, complicated by the fact that many member states prefer to approximate the existing national laws, which makes it difficult to arrive at compromises acceptable to all.

The JHA Council of the 25 April 2002 reached agreement on the proposed Directive on minimum standards for the reception of asylum applicants. After the Directive is adopted, the member states will have two years to implement it. Despite its general nature and the room for exceptions or adaptation that it allows, it represents significant progress because of the difficulties caused by different standards across the member states. The Directive is among those, which the European Council wants adopted without delay.

5.1.5 Fraud against the EU

One of the scandals of the European Community up until the last decade was the varying severity with which fraud against EC funds was prosecuted in the different member states. There were deep suspicions that several states did not take the crime very seriously and that some even connived in it. This has now changed. The protection of the financial interests of the Community has become one of the major priorities for the European institutions. Art. 280 (TEC) stipulates that "the Community and the member states shall counter fraud and any other illegal activities affecting the financial interest of the Community". To this end, the Council is called upon to adopt "the necessary measures […] with a view to affording effective and equivalent protection in the Member States".

The activities covered concern customs fraud, misappropriation of subsidies and tax evasion, insofar as the Community budget is affected by it, as well as the fight against corruption and any other illegal activity harmful to the financial interests of the Community. The European Anti-Fraud Office (known by its French acronym – OLAF) was established in 1999 as a successor to the Task Force for the Coordination of fraud prevention (UCLAF), which was created in 1988 as part of the Secretariat-General of the Commission. Provision was made for OLAF's

investigative independence; fraud prevention and safeguarding Community interests against irregular behaviour likely to lead to administrative or penal proceedings are also a part of its remit (EC Decision 352/1999). Although OLAF has an independent status for its investigative function, it is located in the European Commission and is part of the responsibilities of the Commissioner in charge of the budget.

Its independence is safeguarded by the provision that the Director General of the Office shall "neither seek nor take instructions from any government or any other body (including the Commission)". If the Commission takes a measure that the Director General considers as a threat to his independence, the latter is entitled to initiate legal proceedings against the Commission before the European Court of Justice. Also, the investigative function of OLAF is constantly scrutinised by a Supervisory Committee, consisting of external experts independent of the Community institutions. To this end, OLAF can carry out administrative investigations inside the institutions (EC Decisions 1999/394 and 1999/396), the bodies and organs of the Community, in the event of fraud harmful to the budget of the EU. As far as the independence of OLAF's in its investigative capacity is concerned, the rule mirrors what is laid down in Art. 213 for Members of the Commission.

In order to coordinate the prosecution against fraud of the interests of the Communities, OLAF provides support for member states to assist close and regular cooperation between the competent national authorities. The work consists also of a *pars construens*, in that its know-how is utilised to devise innovative and more effective anti-fraud methods.

OLAF has a series of powers (access to information and the buildings of the Community institutions, the possibility to check accounts and to obtain extracts of any document). In addition, the office can request from any person concerned information that it judges useful for its investigations. In accordance with the arrangements laid down in Regulation N° 2185/96, it can carry out on-the-spot controls of the economic actors concerned to acquire information concerning possible irregularities. OLAF is not a "secret service", nor a police force. Rather, it is the legal instrument for administrative investigation to guarantee better protection of Community interests and compliance with the law against attacks from organised crime and frauds.

The main question is whether, in the longer term, this is sufficient. OLAF has powers that parallel police power of access to documents and of investigation. One of the advantages of abolishing the pillar structure and to move towards a constitutional division of powers proposed above is

that OLAF could be merged with Europol. It is desirable that this be done because Europol also has competence in the area of fraud. Lessons should be drawn from the history of "turf battles" between US law enforcement agencies and everything should be done to avoid this phenomenon.

5.2 Third pillar

Police and judicial cooperation in criminal matters fall under the third pillar (Title VI of the TEU). The stated objective of the Union in this area is to provide a "high level of safety" by adopting common actions among the member states in police and judicial cooperation and by preventing racism and xenophobia. The relevant provisions are found in Arts 29-43 TEU, and particularly important is Art. 34, as it contains a list of the available legal instruments. These are:

1. Common Positions. These define the approach of the Union to a specific topic, often related to external relations.

2. Framework decisions and decisions adopted by the Council. These instruments do not have direct effect, but are binding on the member states.

3. Conventions. These are ratified and implemented in accordance with the constitutional provisions of the member states.

The adoption of the instruments is by unanimous vote and after the consultation with the European Parliament; there is limited scope for judicial review by the European Court of Justice. The record suggests that they are not suited for ambitious legislative projects, if only because of their lack of direct effect. The decisions often involve complex legal arrangements and technicalities that need to be translated into national laws down to the smallest detail, which is a very time-consuming process. The only possibility of forcing a member state to implement a decision in a reasonable time and being faithful to the original text would be through proceedings brought before the Court of Justice by another member state on the basis of Art. 227 of the Treaty establishing the European Community. The latter entitles member states to bring the matter before the Court of Justice if they consider "that another member state has failed to fulfil an obligation under this Treaty". It is highly unlikely that member states will initiate legal action against each other, for fear of retaliatory action.

Developments in transnational crime and reactions to the "problem" of immigration have resulted in the creation of new institutions/agencies with law enforcement tasks. As in other fields of European integration, however, the creation of such agencies has been ad hoc. The result has

been defined as "an opaque and complex patchwork of institutions (official or otherwise), agreements and structures, which aim to promote different forms of cooperation" (Bruggeman, 2000). The current situation is characterised by partly overlapping competences, areas in which the authorities can exercise their powers and functional specialisation, as well as by the absence of clear and coherent coordination, and the lack of accountability and democratic control. On the positive side, Justice and Home Affairs cooperation encourage national administrations to restructure their criminal justice organisation (police, customs and public prosecution) in order to facilitate transnational cooperation. Therefore, although at the moment police legislation, penal law and criminal procedure still differ widely from one country to another, reforms are implemented or discussed in many member states.

5.2.1 Europol

Europol was the first organisation established in the third pillar. Its purpose is to strengthen police and customs cooperation for preventing and combating crime in fields such as terrorism, drugs trafficking and other serious forms of international crime, chiefly through the central exchange and analysis of information and intelligence. The role of Europol is limited to intelligence-handling, support and coordination. Its role in supporting joint teams of investigators is potentially important but these have not gone beyond the consultation stage. A right to initiate investigations is envisaged and discussed in various Councils, but this step has not yet been taken.

Europol is based on the Convention of July 1995, but also comes within the scope of Arts 29, 30 and 31 of the Treaty of Amsterdam. Art. 29 TEU, contains a list of common matters of interest, introduced as a response to the criticisms concerning the loose nature of the Trevi group which had previously been the locus of police cooperation. This list contains general objectives open to broad interpretation, and do not define the various crimes with a European dimension against which common action should be taken. The mandate of Europol specified in the Convention originally included preventing and combating terrorism, unlawful drug-trafficking, trafficking in human beings, crimes involving clandestine immigration networks, illicit trafficking in radioactive and nuclear substances, illicit vehicle trafficking, combating the counterfeiting of the euro and money-laundering associated with international criminal activities.

These original provisions have been extended by a series of Council decisions. On 29 April 1999, the Council adopted a decision extending

Europol's mandate to deal with forgery of money and means of payment. On 30 November 2000, the Council adopted an act drawing up, on the basis of Art. 43(1) of the Convention on the establishment of a European Police Office (Europol Convention), a Protocol amending Art. 2 and the Annex to that Convention. This extends Europol's powers to money laundering in general, regardless of the type of offence from which the laundered proceeds originate. On 30 November 2000, the Council adopted a recommendation to member states in respect of Europol's assistance to joint investigative teams set up by the member states. In this document, the Council describes how Europol can assist joint investigative teams and recommends that the member states make full use of these possibilities.

The creation of a team of counter-terrorism specialists (Council Decision, 25 September 2001) to which the member states are invited to appoint liaison officers from police and intelligence services experienced in the fight against terrorism without prejudice to the legislation by which they are governed, also represented an important new step. Finally, on 1 January 2002, the mandate was extended to cover all forms of serious crime. This will not necessarily increase the number of tasks for Europol but will allow greater flexibility in using data relevant to organised crime.

This summary of measures shows how the scope of Europol's mandate has been steadily broadened, giving rise to two orders of problems. First, Europol has not yet sufficient resources to fulfil its tasks. With a budget of € 30 million and approximately 300 officials at headquarters in the Hague, it is not in a position to cover the full range of criminal intelligence, let alone to perform the tasks in future of initiating and participating in investigations of the member states. Second, the national authorities have so far failed to provide adequate criminal intelligence for Europol to demonstrate its value.

Art. 30 TEU contains two provisions, which could be the beginnings of operational powers for Europol. Paragraph 2 a) stipulates that the Council shall "enable Europol to facilitate and support the preparation […] of investigative actions by the competent authorities of the Member States". The provision envisages Europol officials joining member states' operational police actions in a support capacity. However, Art. 30 provides for a five-year period before the Council actually has to implement this, which, as mentioned above, it does not seem eager to do so. Additional legislation is needed, in order to establish the legal status of Europol personnel while performing support functions, which could entail participating in searches and questioning of suspects. Paragraph 2 b) allows, after appropriate legislation is adopted, Europol to ask the

member states to conduct and coordinate investigations. Member states would not be obliged to comply with the request, but there would be clear moral pressure on states to do so. Transforming Europol into an FBI-type organisation is not practical as long as the essential flanking instruments are not put in place (EU penal law, EU procedural law, European Court, etc.). Euro counterfeiting is the first criminal offence in which it is possible to envisage a European criminal jurisdiction and law enforcement capacity. On the very point of euro counterfeiting, the ambiguity arises whether this is really in the remit of Europol or whether it shouldn't be mainly OLAF's competence.

At the JHA Council of 28 February 2002, it was acknowledged that "broad agreement exists for Europol participation in joint investigative teams and Europol's right to ask member states to launch investigations in specific cases". To entrust the agency with such powers, it is necessary to amend the Europol Convention, which requires a complex procedure. The ministers could not reach an agreement on the best possible way to simplify this procedure (three proposals were put forward, the most radical being the replacement of the entire Europol Convention with a Council decision which in the future could be amended by another Council decision). The stalemate was not broken at the JHA Council on the 25 April 2002, so the agreement on Europol's possibility to participate in joint investigations may take the form of a protocol to the Europol Convention, a procedure likely to take several years.

The extension of Europol's mandate will make it all the more necessary to have adequate forms of accountability and control. This has given rise to a "chicken-and-egg" debate – whether improved forms of control should come before operational powers for Europol to show that they work or should be introduced after the extension of the mandate to avoid undermining the effectiveness of the organisation by burdening it with too – heavy accountability procedures. This is probably a false debate because accountability and effectiveness should go hand in hand.

The various forms of control are included in the Europol Convention. The latter provides for:

1. Political accountability: the Management Board has to report regularly to the Ministers.

2. Budgetary control: accounts are supervised by three institutions, an independent private undertaking, financial controllers, and experts from the member states.

3. Judicial control: the legality of activities is weakly controlled by the European Court of Justice. A protocol allows the member states to opt

in with respect to the jurisdiction of the ECJ.

These forms of scrutiny are not satisfactory when and if the competence of Europol is broadened. For example, political accountability is ensured by the relation of the Management board to the Council, but the Council is not the appropriate body. The weakness of the democratic accountability of the Council itself is a feature of the EU that undermines its legitimacy in the eyes of many informed EU citizens. European Parliamentary control is desirable and this could take two forms. The first option would be to integrate Europol into the first pillar under the responsibility of a Commissioner. This is unlikely to be acceptable to the member states. Some progress has been made so far under the third pillar in parliamentary control and an amendment of the Europol Convention could provide for strengthened parliamentary control by making Europol formally accountable to the EP.

More important from the point of view of guarantees of individual rights, there is no judicial protection at the Union level against Europol's activities. Proceedings can theoretically be brought before the national courts, but this is a difficult option to exercise, especially if the Europol officials involved are of another nationality. As a consequence of the inadequacy of control, police autonomy has been expanded.

Scrutiny and control should not hinder the operational capabilities of Europol; control "needs to be effective but not abusive". The Director of Europol has recently complained about the constraints on the work of his agency represented by the loose controls already in place. Law enforcement officials habitually complain about controls, which illustrates the enduring conflict between freedom and security and between public order and individual freedom.

In the near future, particular attention should be given to determining relations between national prosecuting authorities, Eurojust, Europol, Commission (OLAF) and the European Judicial Network (EJN – see below).

5.2.2 Eurojust and the European Judicial Network

Eurojust has been set up to smooth the way and to help coordinate investigation and prosecution of serious cross-border crime. Proposed at the Tampere meeting of the European Council in October 1999, the agency got under way (Council Decision 2000/799/JHA) as a provisional judicial cooperation unit, gathering prosecutors from all member states. These were "supported by the infrastructures of the Council" and worked in "close cooperation with the General Secretariat and the EJN". Eurojust

was formally established by Council Decision 2002/187/JHA on 28 February 2002. It is located in The Hague with Europol and is to coordinate with investigating and prosecuting officials from the member states, Europol and other agencies. The new unit raises the long-term prospect Eurojust one day of bringing public criminal prosecutions for trial at the European Court of Justice.

At the moment, Eurojust neither implies change in national legislation nor harmonises them. It helps national judges and prosecutors in cross-border cases, working alongside the European Judicial Network (EJN), which became operational earlier (in 1998). The main difference between the two is that EJN is a decentralised network that links EU lawyers and judges working on criminal cases to help them exchange information rapidly and effectively, whereas Eurojust is a centralised unit. EJN has designated specialists in all member states, which can be contacted and asked for advice.

Eurojust gives immediate legal advice and assistance in cross-border cases to the investigators, prosecutors and judges in the member states. It advises judges and prosecutors where to look for information and on how to proceed in cross-border cases. It handles "letters rogatory", which are a formal request from a court in one country to the appropriate judicial authorities in another for testimony or other documentary evidence. It also cooperates with OLAF, in cases affecting the EU's financial interests.

Eurojust is composed of senior lawyers, magistrates, prosecutors, judges and other legal experts seconded from every member state. They keep their status as members of the national organisations or corps from whence they come, and draw their salaries from the member states. Members have an expert knowledge of the legal systems of their country, have rapid access to them and can engage in direct dialogue with the national authorities. They can immediately consult other team members, and advice is, if necessary, given collectively from the whole team and not simply from one individual. They have the further advantage of having an overall view of what is going on in their domain throughout the EU.

The EJN is a parallel organisation, which engages in similar activities, but it takes a different form and has a different modus operandi. It comprises contact points in every member state and holds meetings of these twice a year. It has a dedicated telecommunications network and its own permanent secretariat (now part of the Eurojust secretariat). Contact points informally expedite requests for assistance in criminal investigations or prosecutions (international judicial orders or "letters

rogatory") and the network provides up-to-date information on the different procedures and laws in the member states. Meetings of the EJN cover EU policy on judicial cooperation, international criminal case studies and the development of practical cooperation.

The EJN is a non-threatening arrangement and the only question mark hanging over it is its usefulness when Eurojust gets fully under way. The debate on the establishment of Eurojust highlighted three controversial areas – powers, relations with other institutions and accountability

On the first, the powers of Eurojust were disputed among the member states. The Art. 36 Committee meeting on 6 April 2000 acknowledged that certain delegations wanted a "light" Eurojust while others insisted on the full implementation of the Tampere Conclusions. The result was a compromise. When acting as a college, Eurojust will be entitled to ask the competent authorities to "undertake an investigation or prosecution of specific acts" (Art. 7 (a)(i) of the Council Decision setting up Eurojust) or to "set up a joint investigation team in keeping with the relevant cooperation instruments" (Art. 7 (a)(iv) of the above-mentioned decision). However, the authorities of the member states can refuse to comply with such a request. The grounds for refusal are not laid down, so the national authorities cannot be held accountable for non-compliance. Moreover, it is not necessary to provide a reason if this "would jeopardise the success of investigations under way or the safety of individuals" (Art. 8 (iii)). Loose exemptions of this kind are likely to undermine the system, because prosecutors can easily claim to be at different stages of investigations, or they might have different views as to the further steps to take.

Certain improvements should be made quickly. After a fixed transitional period, any national authority not following a recommendation by Eurojust should be obliged to provide a reasoned justification for this within a reasonable time. In addition, Eurojust will only be able to contribute effectively to coordination of prosecution activities if it is sufficiently informed. It must therefore be able to issue binding information requests to national prosecution authorities.

Second, Eurojust is obliged to coordinate with other institutions, but the way in which this will be done is not yet clear. Eurojust is required by Art. 26 (of the Council Decision setting up Eurojust) to establish and maintain close cooperation with Europol, and to "take into account the need to avoid duplication of effort".

The privileged relations with the European Judicial Network are based on consultation and complementarity. The Judicial Network and Eurojust are

complementary and should function harmoniously together. Any possible "competition" or conflicts of responsibility or wasteful duplication of work should be avoided as far as possible.

Eurojust is also required to establish and maintain close cooperation with OLAF. OLAF should contribute to Eurojust's work to coordinate investigations and prosecution procedures, although national authorities must tacitly agree by not opposing this contribution. Indeed, member states may not want a supranational body (the Commission, of which OLAF is a part) to interfere with national investigations. The Commission's Communication of 28 June 2000 announced a judicial support unit, composed of experts with experience as magistrates or prosecutors, in OLAF to give support and assistance to the judicial authorities of the member states. Cooperation between OLAF and Eurojust will be required in this to ensure both the avoidance of potential overlap and to maximise effectiveness.

A controversial topic concerning the powers of Eurojust, not expressly referred to in the decision establishing it, concerns access to the Schengen Information System. The proposal that Eurojust should be given access to the SIS immediately gave rise to concerns about the indirect access that Europol would enjoy (through the exchange of information). Council's Decision simply refers to "any information that is necessary for [Eurojust] to carry out its tasks", without specifying whether it is entitled to ask for data contained in the SIS. Members of Eurojust, in accordance with their national law, are "empowered to consult the criminal record" database, and (subject to the same reservations) should be able to access the SIS (Art. 8, 3). When acting within their own territories, Eurojust officials will be subject to national law and procedure. The question of them acting in another state is alluded to in terms of mutual recognition: "Each Member State shall define the nature and extent of the powers it grants its national member in its own territory. The other Member States shall undertake to accept and recognise the prerogatives thus conferred" (Art. 8(2)).

Third, the provisions on accountability in the Council's decision are minimal. Indeed, Eurojust was the creation of officials, under the sole control of national Ministers, a process that gave rise to preoccupations by defenders of civil liberties. Eurojust adopts its own rules of procedure, and only has to report to the JHA Council in writing once a year. A report will be communicated to the European Parliament but the wording of Art. 32 of the Council Decision of 28 February 2002 on the setting up of Eurojust with a view to reinforcing the fight against serious crime does

not make clear whether it will be the same report the Council receives, or a shorter and less informative one.

Eurojust can be seen as a judicial counterpart of Europol, but this does not imply judicial supervision of Europol – only that Europol's activities need to be backed up and complemented by coordination of prosecutions. In the long-term, however, these institutions may be an embryonic federal system for justice and law enforcement. This would require a common penal code. A first starting point for this is Art. 31 TEU, which stipulates the progressive adoption of measures "establishing minimum rules relating to the constituent elements of criminal acts and to penalties". In the JHA Council of 28 February 2002, ministers declared that it is still too early for such radical innovations as a European Public Prosecutor and a Common (basic) Penal Code, but with the institution of Eurojust the road is open. The possibility of such long-terms developments makes it paramount to strengthen the political and democratic controls on Eurojust and other agencies.

5.2.3 Recommendations

The cornerstones to the construction of an area of freedom, security and justice have been laid. For this foundation to be solid foundation, however, a balance between freedom, security and justice must be struck and given constitutional underpinning. With this objective in view, we make the following recommendations:

1. All legislative proposals, declarations and agreements in JHA should be explicitly based on respect for human rights. This should become the fundamental normative basis for each practice, (legal) instrument, institution and process within AFSJ.

2. The EU Charter on Fundamental Rights should be included in the Constitution or Constitutional Treaty being developed for Europe. The EU as a polity should have a status equivalent to that of signatory States to the European Convention on Human Rights.

3. A particular danger at the moment arises from populist discourse and feelings of "insecurity" leading to a "big-brother type" surveillance society. Fundamental rights and freedoms, and democratic rights should be re-affirmed. Data protection should be given particular importance as intrusions into personal privacy may increase: uniform standards of protection should be introduced in all countries participating in international data-exchange systems.

4. The AFSJ should promote inclusiveness. In particular, candidate countries should be involved to allow them, prior to accession, an

influence over decisions; third-country nationals should benefit more from free movement provisions within the EU.

5. Democratic control should be consolidated in JHA by the following actions:

   - All Parliaments be given adequate and timely information.

   - The European Parliament and the national parliaments should reinforce inter-parliamentary cooperation.

   - Co-decision between the Council of Ministers and the European Parliament should become the general practice for all JHA matters.

   - Institutions that exchange sensitive information, such as Europol and Eurojust, should be subject to tighter democratic control. National models for parliamentary control on policing activities could adapted to the EU-level.

6. Judicial control should be enhanced by widening the competences of the European Court of Justice with regard to Title VI matters. A *European Judicial Area* should be gradually established containing the following core elements:

   - A European Criminal Court

   - A European Public Prosecutor

   - A European Defence Lawyer

   - Eurobail

   - Eurocrimes and a European Criminal (Procedure) Law

   - These elements may be considered as complementary to a future extension of Europol's mandate with an operational one.

7. Measures should be taken to make EU institutions function more efficiently:

   - The Council working methods should be revised and rationalised.

   - Inter-pillar cooperation should be further encouraged, especially to clarify roles and responsibilities concerning crisis management, drugs and data-protection.

   - Performance indicators should be developed for the executive agencies Europol and Eurojust in order to enhance their efficiency and accountability.

   - When the pillar structure of the EU is abolished, OLAF should be

merged with Europol.

- An amendment of the Europol Convention should provide for strengthened democratic accountability by making Europol formally accountable to the European Parliament.

- Attention should be given to defining relations and clarifying systems of coordination between national prosecuting authorities, Eurojust, Europol, Commission (OLAF) and the European Judicial Network.

- After a fixed transitional period, a national authority failing to follow a recommendation by Eurojust should provide a reasoned justification within a specified period. Eurojust should be empowered to issue binding requests for information to national prosecution authorities.

8. Civil society should participate in the debate about the current and future developments in the AFSJ to help to disseminate information, to promote a broad consensus amongst citizens about measures in JHA and to strengthen the social legitimacy of AFSJ.

9. Subsidiarity should remain the basic principle for the division of powers and competences between EU institutions and the national, regional or local law enforcement authorities.

CHAPTER 6
GAZING INTO THE CRYSTAL BALL

The previous chapters have been mainly devoted to what should happen in developing the area of freedom, security and justice. This conclusion is concerned with possible future policy directions. Making statements about the future, especially in this field, is notoriously hazardous, but the reason for imagining the future is to plan strategies that prevent the development of undesirable states of affairs.

The agenda in JHA is highly susceptible to political shocks. Parliamentarians and governments are too often influenced by "the politics of the last outrage". When will the next outrage take place, and what its nature will be is impossible to predict. The last influential outrage, 11 September 2001, is a graphic illustration of this point. This was unexpected and had many important consequences in international relations and security policy. Other shocks will inevitably occur. Regardless of whether counter-terrorism remains the driving force behind EU security cooperation, the aftermath of September 11th will be with us for some time to come. Its long-term effects can be grouped under ten headings:

1. The impact of September 11 could help to correct the current imbalance between an ambitious political agenda and the actual institutional capacity to deliver results. This will help to promote two of the core values identified in Chapter 3 – efficiency, especially in the decision-making processes of the EU, and better operational coordination. When clear political will is shown, as over the decision to accept the principle of the European Arrest Warrant, important decisions can be taken. The European Arrest Warrant is a very significant step as it is one of the first concrete instances of mutual recognition in penal matters at European level. Others, such as facilitating the transfer of evidence and the seizure of assets, have followed. These have set precedents that will be followed. Necessary practical steps will eventually include an overhaul of the working procedures in the Council of Ministers and re-opening the debate about an extension of qualified majority voting to most areas of JHA, including police and judicial cooperation in criminal matters, which is still firmly in the grip of the unanimity rule. September 11 will therefore emerge as one of the starting points for treaty reform in JHA, aimed at increasing the EU's decision-making capacity.

2. The profile of EU coordinating mechanisms in counter-terrorism has

been considerably enhanced – particularly Europol (especially its anti-terrorist unit), the Working Group of Chiefs of Police and Eurojust, regular meetings with the US authorities and EU-sponsored meetings of heads of security services. These effects are likely to endure and have knock-on effects over the whole spectrum of criminal law enforcement issues. This will promote the core value of efficiency in terms of credibility and effectiveness of these EU institutions in their relationships with national law enforcement systems. There is pressure to refine and extend the mandate of the EU law enforcement units. As soon as they are institutionally secure, like all bureaucracies with political support, they will press for increases in their resources, establishments and powers. This will introduce additional elements in the complex area of treaty revision and constitution-building in the EU. A clarification of the lines of political and legal responsibility is particularly important in police and judicial cooperation and this will be an increasingly important theme in the EU policy debate. However, member states, especially some small states, are likely to defend their sovereign rights in such a way that this desirable objective will be very difficult to achieve.

3. The clear reluctance of member states to agree to harmonisation of criminal law and criminal law procedure will probably not change in the short-term. The combination of nationalism and the conservatism of legal establishments represents a formidable barrier to change. In this area, promoting the basic core value of trust, discussed in Chapter 3, is essential. The practical effect of the lack of trust is that most of the EU-level decisions remain in the category of "soft" law – texts with the appearance of law but which the courts cannot apply. Among the main categories are conventions negotiated under international law, which, even when ratified, do not enter the municipal law of most member states unless some form of legislative action is taken; still less do they form a part of European law. Action plans, the most celebrated of which is the action plan on organised crime, common positions such as that on terrorism, recommendations and new third-pillar instruments introduced by the Treaty of Amsterdam fall into this category. Since some member states have a poor record in implementing first-pillar directives, implementation rates of third-pillar instruments is likely to be mediocre or poor. This will lead to cynicism about the European Union, punctuated by occasional attempts to improve levels of implementation.

4. What happens to these categories of soft law depends on future political shocks and the general political support for the EU. The EU Council may decide that some of the rules and recommendations in

this domain should be made justiciable, enforceable in the courts. The member states did this (after a transitional period) in the Treaty of Amsterdam by simply transferring immigration and asylum policy from the third to the first pillar. They could extend what is understood by these headings to issues such as management and control of the external frontier. Or they may decide that a new instrument in JHA should be given a basis in European law. One of the most frequently mentioned is executive police powers for Europol, as it gains a greater presence in operational policing. The debate about this is likely to be long and difficult, based explicitly on sovereignty concerns and implicitly about lack of trust.

5. The European Court of Justice may engage in some creative jurisprudence; the ECJ established the supremacy of European economic law and its direct effect in the member states in a series of landmark judgements, and it has extended the domain of EU law beyond the strict limits of the treaties. It already is accorded the competence by most member states to give the authoritative interpretation of third-pillar conventions. It could expand the area understood by free movement, immigration and asylum and even other areas such as money laundering to give the EU greater criminal law competence. It is unlikely that the ECJ would repeat the extension of EU criminal law competence in the same way as in economic law, unless a clear political consensus emerges to do so, but some movement in this direction may be expected.

6. On budgeting, September 11 may, along with other things, serve as an incentive to increase EU spending on JHA and reduce the imbalance between objectives and financial means. At the very least, one would expect new programmes of training, research and know-how transfer as well as new pilot projects being introduced in the area of the fight against terrorism. Such new programmes could give the EU some authority to monitor whether minimum standards of performance are met by member states. This will certainly have implications for other areas of repression of serious crime. The authority and resources of the Bundeskriminalamt increased rapidly as a result of terrorist activity in Germany in the 1970s and did not diminish thereafter. This may be replicated at the European level. However, increased spending on JHA crucially depends on what happens to other budgetary headings, such as the Common Agricultural Policy. No pressure to increase overall EU expenditure is probable.

7. An important impact of September 11, along with other pressures

such as difficulties about American involvement in the Balkan peacekeeping missions, is likely to be a better balance and better coordination between internal and external EU action. The terrorist attacks highlighted in a dramatic way the global dimension and the need for the EU to play a more active role in international action and cooperation. The Council has also decided to sustain a more active role for the EU in relevant JHA areas in the UN context. The US is the first bilateral partner, and the EU has already engaged in a number of measures to upgrade cooperation. While this cooperation has problematic aspects – such as the question of the adequate protection of personal data provided by the EU to the US, the death penalty in the US and the legal rights of EU nationals held in Guantanamo Bay – there can be no doubt that it marks a new departure in external action. The involvement of representatives of a third country in EU cooperation structures and mechanisms is an important new feature. It is a particular sign of solidarity with the US, which may not be easily transferable to relations with other third-countries. The EU has put pressure on a number of third countries for more cooperation in the fight against the financing of terrorism. Taken together these amounts to a new dynamism within the EU in the external security dimension of the AFSJ.

8. Greater clarity in the methods of external cooperation will become a priority. The many different frameworks of cooperation are a hindrance. These include: a common strategy and an overall action plan (Ukraine), a targeted action plan (Russia – organised crime), a stability pact, a stabilisation and association process (Balkans), a common strategy and the Barcelona process (Mediterranean), an informal dialogue alongside the Task Force or the Joint Cooperation Committee (United States, Canada), and common approaches or joint positions within international organisations. The picture is further complicated by the number of international fora (Council of Europe, United Nations, Financial Action Task Force, G8, Special Conferences, etc.) in which the EU is present. Member states also take initiatives, reducing the visibility of EU actions still further. The instruments for providing assistance to cooperative actions are also complex, to mention only obvious examples: regional programmes, action plans, regional cooperation, and the methods used – MEDA (Financial support for the Euromed partnership), TACIS (Support for transformation in East Europe and Central Asia) and shortly CARDS (Assistance for the Western Balkans). The external relations of JHA would be clearer if they were part of a more integrated, overall approach that was understood by those responsible at the technical

level, as well as the press and parliamentarians in the member states. A regular assessment of each priority set out on a list, as is already the practice for the Balkans, is a highly probable development. Pressure for these approaches is likely to increase. To refer again to the core values identified in Chapter 3, improved coordination between the various programmes and instruments is essential.

9. Management of the external frontier has acquired, and will continue to have greater salience, especially if terrorist incidents happen inside the EU or further attacks on the US are partially planned in Europe, or if undocumented immigration continues to be high on the political agenda. This will draw much needed attention to the very complexity of the issues involved – the very different conditions pertaining to different sections and different ports of entry to the EU, the very different kinds and categories of people seeking to enter the EU, the number and sensitivity of tasks at border check points and the varying perceptions and political significance of border controls. The disruptive effects of upgrading border controls and migration management systems at the future external border should not be overestimated – a tendency among states neighbouring the EU and some academic analysts. Certainly if there are more rigorous personal checks on every individual seeking entry to the EU and if all goods crossing the external frontier are subject to detailed physical examination, the results will be disastrous. But if intelligence is upgraded and ways of filtering out any suspect individuals are improved, disruption can be kept to a minimum. All too often, the Justice and Home Affairs aspect of the enlargement process, particularly the requirement for candidate states to adopt Schengen norms, has been depicted in wholly negative terms. Images are conjured up of Fortress Europe or of a new Iron Curtain dropping across Eastern Europe, disrupting relationships between countries that have hitherto enjoyed close ties. The reality is entirely different. The Union's objective is to construct an area of peace, stability and prosperity, which extends beyond the borders of the enlarged Union. However, the perceptions of the citizens of the relatively poor states neighbouring the EU are not likely to believe in this benign vision, unless flexible ways are introduced for handling local border traffic. Despite pressures to upgrade the management of the external border, progress on the setting up of a "European Border Police" is likely to be slow but increased emphasis on common training standards, information-sharing, liaison officers and assistance to member states facing difficulties are fairly certain. These will promote trust, efficiency and improved coordination.

10. A danger of the aftermath of 11 September and the current preoccupation with undocumented immigration and terrorism is that a dynamic may be established that leads to an over-securitisation of European society with adverse effects on the internal cohesion of European societies. In particular, certain minority groups could feel as they already do in some cases, that they were subject to excessive attention by security forces. Also the legitimacy of the fight against terrorism can be used to undermine legality at the national and EU levels. Anti-terrorist legislation inevitably diminishes individual rights, and this legislation can be abused. In addition, the discretionary powers of police and security agencies can be extended, and increased latitude given to these agencies can seem, in an atmosphere of fearful public opinion, to be justified. The EU, the member states and law enforcement agencies generally will be reminded, by parliamentarians and civil liberties groups, of the European Council's declaration on 21 September 2001 that the objective of these efforts to combat terrorism is a world of tolerance, peace and rule of law. The procedural and substantive rights of individuals should be protected with even greater vigilance in the new circumstances. However, some of the bodies and meetings set up after 11 September and some information exchange have no secure legal basis. It will be impossible to build a Europe of the rule of law if in the process the fundamental principles of this rule are disregarded.

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The road to establish a genuine Area of Freedom, Security and Justice is still a long one. But a dynamic has been established which is neither desirable nor possible to stop. This area will need constant attention, particularly as the inevitable attempts to shore up national sovereignty result in the perverse effects of undermining accountability and the rule of law. It is an area in which there should be active citizen participation, increased transparency of decision-making, and a constant effort on the part of authorities at all levels to inform and explain. These conditions are extremely difficult to fulfil.

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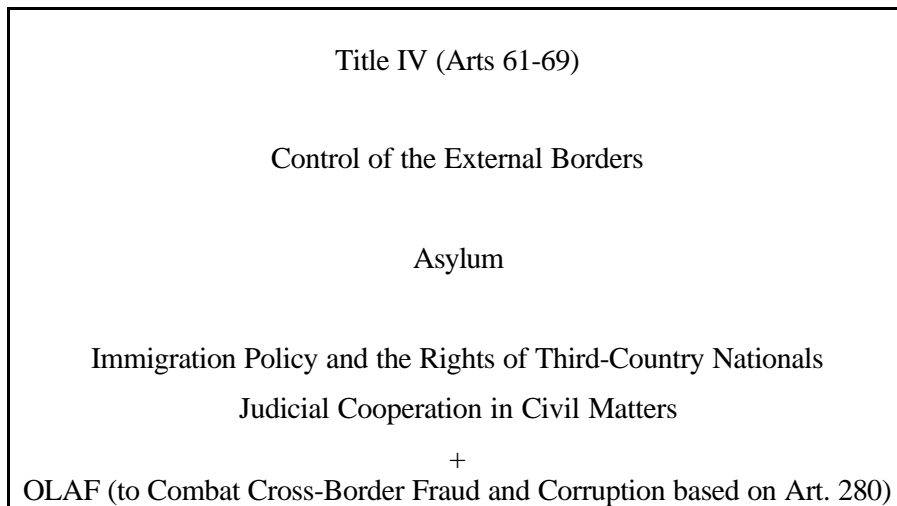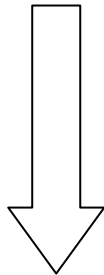Weiler, J.H.H. (1999), *The Constitution of Europe,* Oxford, Clarendon Press.

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# DIVISION OF COMPETENCES
BETWEEN THE 1ST & 3RD PILLARS

First Pillar

EU institutions (EU Commission, EU Parliament, EU Council and the European Court of Justice) in shared competence with the EU member states (with the exception of Denmark, UK and Ireland) govern the area of freedom, security and justice which since 1 May 1999, is in the first pillar.

Title IV (Arts 61-69)

Control of the External Borders

Asylum

Immigration Policy and the Rights of Third-Country Nationals

Judicial Cooperation in Civil Matters

+
OLAF (to Combat Cross-Border Fraud and Corruption based on Art. 280)

Third Pillar

*The 15 member states
govern the third pillar which covers police and judicial cooperation in
penal matters.*
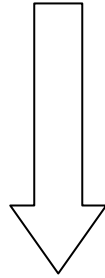
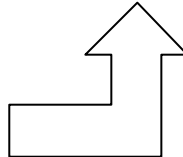*The main competence lies with National Ministries of Justice and
Interior.*
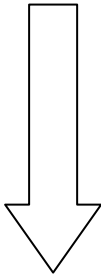
Agencies at European Level:	
Europol	Eurojust
Cepol	European Judicial Network (EJN)
Task Force of Police Chiefs	Joint Investigation Teams

*They second to European Agencies:
National Police/Customs Officials[1]
National Prosecutors/ Judges/Magistrates*

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[1] Most customs coordination and liaison takes place, when they are acting in their revenue-collection capacity, under pillar 1.

PROVISIONS IN THE JHA *ACQUIS*: 1ST AND 3RD PILLAR

EU First Pillar Matters in the Area of Freedom, Security & Justice

Following a vote in the Council in 2004, the European Parliament will have co-decision powers and there will be a greater role for the European court of justice. Decision-making will become by qualified majority voting in all these matters. Until now there is a shared competence in policy-making between the EU institutions and member states.

Title IV (Arts 61-69)

Crossing of External Borders

- List of countries whose nationals are subject to the visa requirement
- Airport transit arrangements
- Uniform Community format for visas
- Convention on the control of individuals
- Pre-frontier assistance and training assignments
- Local consular cooperation regarding visas
- Counterfeit travel documents: exchange of information
- Detection of forged documents
- FADO Image Archiving System

Asylum Policy

- Centre for Information, Discussion and Exchange on Asylum (CIREA)
- Conditions governing eligibility for refugee status or international protection
- Definition of the term refugee
- Determining the member state responsible for examining an asylum application (Council Regulation)
- Convention determining the State responsible for examining applications for asylum: Dublin Convention
- "Eurodac" system
- Minimum standards on the reception of applicants for asylum
- Minimum guarantees for asylum procedures
- Minimum guarantees for procedures for granting and withdrawing refugee status
- Criteria for rejecting unfounded applications for asylum

- Burden-sharing (1996)
- Financing of specific projects (1997-1998)
- Reception and voluntary repatriation of refugees, displaced persons and asylum applicants (1999)
- Programme to promote the integration of refugees
- Temporary protection in case of mass influx of displaced persons
- Monitoring instruments already approved
- Admission of third-country nationals to the member states for study purposes
- Unaccompanied minors who are nationals of third countries
- Monitoring the implementation of instruments concerning admission, clandestine immigration and expulsion

Immigration Policy and the Rights of Third-Country Nationals

Immigration Policy

- Centre for Information, Discussion and Exchange on the Crossing of Frontiers and Immigration (Cirefi)
- Coordination of the Community immigration policy
- Uniform format for residence permits
- Assistance for the voluntary repatriation of third-country nationals
- Convention on the admission of third-country nationals to the member states
- Marriages of convenience
- Expulsion of third-country nationals
- Mutual recognition of expulsion decisions
- Readmission agreements
- Obligations as between member states in matters concerning readmission
- Preventing the facilitation of unauthorised entry and residence
- Financial penalties imposed on carriers
- Combating illegal immigration and employment
- Limitations on the admission of third-country nationals for the purpose of pursuing activities as self-employed persons
- Limitations on the admission of third-country nationals for employment

Rights of Third-Country Nationals

- Free movement for periods not exceeding three months and specific authorisation
- Conditions of entry and residence for third-country nationals
- Right of third-country nationals to travel

- Freedom of movement with a long-stay visa
- Long-term residents
- Council Directive relating to long-term resident status
- School pupils from third countries
- Family reunification
- Free provision of services
  - Posting of employees from third countries by undertakings for the provision of cross-border services
- Extension of free movement of cross-border services to self-employed nationals of a third country established within the Community

Fight against Cross-Border Corruption (Art. 280 Of TEC)

- OLAF (the antifraud organisation)
- Union policy against corruption
- Corruption involving European Community officials or national civil servants
- Corruption in the private sector
- Negotiations in the Council of Europe and the OECD regarding action against corruption
- Combating fraud and counterfeiting of means of payment
- Preventing fraud and counterfeiting of non-cash means of payment
- Unfair practices in the award of public contracts

EU JHA Third Pillar Matters

(Police and Judicial Cooperation in Penal Matters)

Until now decision-making is by intergovernmental agreements and member states initiated.

Police Cooperation

- European Police College
- Task Force of Chiefs of Police
- Joint Investigation Teams
- Europol Convention
- Europol Drugs Unit
- Transmission of personal data by Europol
- Secretariat for the joint supervisory data-protection bodies
- Keeping public order and security

- o Fight against terrorism
- o Fight against terrorism: directory of skills
- o Combating the financing of terrorist groups
- o Exchange of information on movements of groups
- o Prevention and control of hooliganism
- o Security in connection with football matches with an international dimension

Judicial Cooperation in Criminal Matters

- Mutual recognition of financial penalties
- Framework decision on combating racism and xenophobia
- Mutual recognition of final decisions in criminal matters
- Mutual Assistance in Criminal Matters between member states
- European arrest warrant
- Joint investigation teams
- Extradition: simplified procedure
- Extradition Convention
- Collaboration with individuals who cooperate with the judicial process
- Provisional judicial cooperation unit
- European Judicial Network
- European judicial training network
- Framework for the exchange of liaison magistrates
- Convention on Driving Disqualifications
- Crime victims rights
- Execution of orders freezing assets or evidence
- Protection of the European Communities' financial interests: a convention
- Protection of the Communities' financial interests: regulation
- People responsible for genocide and crimes against humanity: network of contact points
- Eurojust
  - o Initiative of the Federal Republic of Germany
  - o Initiative of Portugal, France, Sweden and Belgium
  - o Communication from the Commission on the establishment of Eurojust

Fight against Organised Crime

- Crime prevention
  - o Comprehensive strategy for combating organised crime
  - o Strategy for the prevention & control of organised crime
  - o Crime prevention
  - o European crime prevention network

- Common reference framework for liaison officers
- Mechanism for evaluating ways to combat organised crime
- Identification, tracing and confiscation of instrumentalities and the proceeds from crime
- Exchange of DNA analysis results
- Making it a criminal offence to participate in a criminal organisation in the member states
- Crime associated with particular routes
- Convention on Cyber Crime
- Contact points to combat high-tech crime
- United Nations convention against organised crime
- Money laundering
- Serious environmental crime
- Protection of the environment through criminal law

Fight against Trafficking in Human Beings

- Trafficking in human beings, the sexual exploitation of children and child pornography
- Council framework against trafficking in human beings
- Framework decision against the sexual exploitation of children and child pornography
- Joint Action to combat trafficking in human beings and sexual exploitation of children
- Trafficking in women for the purpose of sexual exploitation
- New measures to combat trafficking in women
- Combating child sex tourism
- The implementation of measures to combat child sex tourism
- Combating child pornography on the Internet
- Search for missing or sexually exploited children

ABOUT THE CEPS-SITRA NETWORK

CEPS, with financial assistance of the Finnish SITRA Foundation, embarked at the end of 2000 on a programme to examine the impact of Justice and Home Affairs acquis on an enlarged European Union, the implications for the candidate countries and for the states with which they share borders. The aim of this programme is to help establish a better balance between civil liberties and security in an enlarged Europe.

This project will lead to a series of policy recommendations that will promote cooperation in EU JHA in the context of an enlarged Europe as well as institutional developments for the medium- to long-term in areas such as a European Public Prosecutors Office, re-shaping Europol and a developed system of policing the external frontier (Euro Border Guard). These must be made within a balanced framework. There are two key issues:

First of all, to prevent the distortion of the agenda by "events" – some items are being accelerated and other marginalised. This risks upsetting the balance, carefully crafted by the Finnish Presidency, between freedom, security and justice. The current 'threat' is that security issues, at the expense of the others, will predominate after the catastrophic events of 11th September. These have resulted in a formidable political shock, which served as a catalyst to promote certain initiatives on the political agenda, such as the European arrest warrant, and a common definition of terrorism. The monitoring of items, which could be marginalised and the nature of the institutional/political blockages that could distort the Tampere agenda, is our priority.

Secondly, how to look beyond the Tampere agenda, both in terms of providing a flexible approach during the period of completion of the Tampere programme as well as what should come afterwards. Much detail remains to be filled in about rigid items on the Tampere agenda and CEPS will continue to work in three very important areas:

- Arrangements for managing and policing the external frontier;

- Judicial co-operation leading to the development of a European Public Prosecutor; and

- Strengthening of Europol, particularly in the field of serious trans-frontier violence and moves towards a more federalised policing capacity.

The CEPS-SITRA programme brings together a multi-disciplinary network of 20 experts drawn from EU member states, applicant countries as well as neighbouring states: the European University Institute in Florence, the Stefan Batory Foundation (Warsaw), European Academy of Law (ERA Trier), Academy of Sciences (Moscow), London School of Economics, International Office of Migration (Helsinki), Fondation Nationale des Sciences Politiques (CERI) in France, Universities of Budapest, Université Catholique de Louvain-la-Neuve, University of Lisbon (Autonoma), University of Nijmegen, University of Burgos, CEIFO in Stockholm, University of Tilberg and University of Vilnius, as well as members with practical judicial and legislative backgrounds

A Note about SITRA (Suomen itsenäisyyden juhlarahasto

Is the Finnish National Fund for Research and Development. It is an independent public foundation under the supervision of the Finnish Parliament. The Fund aims to promote Finland's economic prosperity by encouraging research, backing innovative projects, organising training programmes and providing venture capital.