



## EUROPEAN UNION STUDIES ASSOCIATION

Vol. 15, No.2  
Spring 2002

ISSN 1535-7031  
www.eustudies.org

# EUSA REVIEW

### **Justice and Home Affairs in the Aftermath of September 11: Opportunities and Challenges**

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THE ROAD TO SHAPING COOPERATION in Justice and Home Affairs (JHA) matters, a policy domain that includes immigration and asylum issues as well as collaboration in judicial and police matters, has been a bumpy one. Even though JHA is arguably the most rapidly evolving policy field in the EU, progress in this new arena has been hampered by the sensitivity of the issues tackled in the dossier, lack of coherence and consensus, member states' reluctance to transfer policy-making authority to European institutions, and the awkward institutional structures and cumbersome intergovernmental decision-making processes created by Maastricht Treaty. The Amsterdam Treaty attempted to tackle the causes of the lackluster policy output by proclaiming the dawn of a European "Area of Freedom, Security, and Justice (AFSJ)." The JHA dossier was partially communitarized, bringing immigration, asylum, and judicial cooperation in civil matters into the First Pillar and establishing a timetable for the "normalization" of the decision-making practices. At the same time, however, Amsterdam left behind police and judicial cooperation in criminal matters in a revamped Third Pillar that was to operate intergovernmentally for the foreseeable future. Now divided between two pillars, JHA cooperation continued to press forward slowly, and received another push at the special JHA Tampere European Council in 1999.

While the blueprint adopted at Tampere certainly contributed to the proliferation of JHA initiatives since 1999, the attacks of September 11 have also invigorated efforts in the EU to jointly develop policies, in particular to enhance security internally and at the Union's external borders in order to combat terrorism. The attacks resulted in an unprecedented demonstration of political will to speed up work to address cross-border criminal matters collectively. As the European connections of some of the attackers were uncovered, members of the EU were confronted with their own vulnerabilities. In short order, and with the entrepreneurial efforts of JHA Commissioner António Vitorino, judicial and police cooperation in criminal matters—areas that were previously eclipsed by the Union's emphasis on developing policies to guard its external borders—rose to the top of the collective agenda. The events underscored the obvious: even though member states had traditionally not been particularly comfortable with aligning

their national legal systems or working very closely with each other's law enforcement units, such reticence and the resultant incomplete integration could produce significant internal security gaps in a frontier-free Europe. Immediately following the attacks, the EU and its member states quickly condemned terrorism and expressed their solidarity with the U.S. They then embarked on developing EU-wide and transatlantic mechanisms to combat terrorism as well as other serious trans-border crime. Politicians were keen to demonstrate that they were neither soft on terrorism nor slow in developing responses. So the EU swiftly adopted anti-terrorism measures that involved cooperation in criminal matters, most of which would surely have taken years to discuss and adopt were it not for the unusual sense of urgency.

The unexpected political terrain of post-9/11 JHA cooperation signaled a decisive opportunity for energizing the member states' individual and collective willingness to deepen integration in JHA matters. The initial progress made—significant by JHA standards—suggests that the member states were interested in capitalizing on this window of opportunity. Immediately after the attacks, member states were summoned to an extraordinary European Council on September 21. An October 19 meeting of the JHA Council followed with actual policy proposals. With the notable exception of upgrading airport security measures—which was a direct response to the attacks—most of the items on the agenda for these meetings were instruments that had long been under discussion. Member states now appeared committed to fast-tracking several initiatives that had barely been inching along earlier. Most notably, ministers agreed to promptly develop a common EU definition of terrorism, a common list of organizations suspected of terrorism, a common list of serious trans-border crimes, and a European search and arrest warrant to expedite the apprehension of suspects involved in such crimes. In order to boost cross-border police cooperation, the European Police Office (Europol) was given additional responsibilities through a new anti-terrorism unit responsible for cooperating closely with the intelligence agencies of member states and the U.S. (Council of the European Union, 2001a). The ministers also committed the Union to developing a common decision on the freezing of assets with links to suspected terrorists, and—linking the fight against terrorism squarely to better border controls—intensifying efforts to combat falsified and forged travel documents and visas.

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Among these initiatives, the European arrest warrant occupies a prominent position. It is designed to replace the protracted extradition procedures between EU member states with an automatic transfer of suspected persons from one EU country to another. The efforts to secure timely extradition of suspects have long been hamstrung by mistrust between the national authorities as demonstrated, for example, by the refusal of Belgian courts to extradite suspected Basque separatists to Spain. Initially, it was expected that the list of 32 Euro-crimes (among them terrorism, trafficking in human beings, corruption, racism, forgery, rape, hijacking, kidnapping, cyber-crime, money laundering, and fraud) to which the arrest warrant would apply was poised for unopposed adoption, with an implementation date of January 2003. However, as if to demonstrate the limits of post-9/11 consensus in JHA, its adoption encountered last minute problems when Italy—once a staunch supporter of the EU—obstructed the initiative at the JHA ministerial meeting on December 6-7. The ensuing five-day impasse was attributed to the Italian justice minister and the conservative and increasingly EU-skeptic Berlusconi government he represented and drew indignation from several member states as well as from Commissioner Vitorino, who protested that progress was being “held hostage to Council unanimity” (European Report, 2001). In the end, the Berlusconi government—amidst criticism that the Italian resistance to the arrest warrant was primarily motivated by concerns that Berlusconi himself could be charged with several of the Euro-crimes to which the warrant would apply—eventually backed down and the initiative was adopted on December 11 with an implementation date of 2004. The episode was understandably traumatic for those counting on an extended honeymoon period of consensus in post-9/11 JHA. Nonetheless, the adoption of the arrest warrant is an important step towards giving meaning to mutual recognition between the judiciaries of member states. EU members will now hand over suspects (including their own nationals) to foreign courts, even when the offence is not a crime under their own laws. As this is a significant departure from past practice, several member states including Portugal, Greece, Austria and Italy will need constitutional amendments.

The Council also adopted a Common Position to combat terrorism, which includes an EU definition of terrorism—including acts carried out against a country and an international organization—and proposed prison sentences for those who plan and carry out terrorist acts. The broadly cast definition of terrorist acts<sup>1</sup> drew immediate criticism from human rights activists who were concerned that the broad definition might impinge on freedom of speech and assembly. In order to facilitate legal cooperation in criminal cases, the JHA Council also finalized the decision to operationalize Eurojust (the judicial equivalent of Europol), to be seated in the Hague, and comprised of senior lawyers, magistrates, prosecutors, judges and other legal experts seconded from EU members to provide timely legal advice for cross-border investigations. Finally, shortly before Belgium handed the Presidency over to Spain, a CFSP common position published a list of terrorist persons,

groups, and organizations. The list—circulated to EU governments and adopted without debate—included mostly organizations of immediate concern to member states (Council of the European Union, 2001b).<sup>2</sup>

The EU was able to capitalize on the political opportunities afforded by the post-9/11 consensus and make significant policy progress on a sensitive dossier. Nonetheless, some significant challenges remain. The EU must now keep the window of opportunity open by maintaining the policy-making momentum, ensuring the implementation and enforcement of the policies adopted, developing new cooperative mechanisms, and doing all of this with due regard to respect for civil liberties. Maintaining momentum is likely to be difficult once the immediate pressures to produce policy subside. Rifts between members have already started to surface, which might slow down the pace of cooperation. Such rifts can spell stagnation in a decision-making environment that is still governed by unanimity. Unlike the dossiers communitarized by Amsterdam which might move towards Qualified Majority Voting (QMV) and (possibly) co-decision in 2004, JHA cooperation in criminal matters currently has no such prospects. There might now be a unique opportunity to negotiate the normalization of the residual Third Pillar and the extension of QMV to criminal matters. This, and the decision to move towards QMV in the communitarized parts of JHA will be a significant challenge for the EU. Some member states—those who argued for the complete communitarization of the Third Pillar in the first place—would like to see police cooperation moved into the Community system. Others argue that keeping police and judicial cooperation in criminal matters intergovernmental affords a level of flexibility to governments that have concerns about the pace and extent of the Europeanization of sensitive issues. Another linked challenge is improving the position of the Commission, the Parliament, and the Court in JHA. Otherwise, the marginalization of the European Parliament and the exclusion of the European Court of Justice from the decision-making process are likely to sustain criticism of the functioning of JHA cooperation in general and keep the debate on accountability and the democratic deficit alive.

In addition to the institutional difficulties that are likely to persist at least until 2004, future progress in developing policies to ensure internal security is likely to be conditioned by each member state's level of comfort with developing additional policies. Countries such as France, Spain, and the UK are very sensitive to issues of terrorism because of their first-hand experience and are at the forefront of urging EU-wide efforts. Others (such as the Scandinavian countries) find it hard to maintain popular support for far-reaching governmental and EU-wide policies that might be seen as circumscribing civil liberties. A multi-speed process is a tempting possible solution to the willingness differential between member states. This, of course, is nothing new. Amsterdam Treaty formalized opt-ins for the UK, Ireland, and Denmark in JHA matters, leaving the door open for speedier integration by some members while providing an opportunity for skeptics to set their own pace. Similar noises are now being made for the emergent policy

proposals. For example, at the February 15 Council meeting at Santiago de Compostela, Spain, the UK, France, Belgium, Portugal and Luxembourg announced their intention to implement the European arrest warrant in early 2003, a year ahead of the previously negotiated date. But, even this flexible approach to forge forward with the “willing and ready” is not a sure thing: barely two weeks after pledging its resolve, the UK announced on February 28 that it was postponing the introduction of the legislative initiative that would have made the early implementation of the European arrest warrant possible. JHA cooperation to date has already produced a several-speed Europe replete with complex operational problems.

Moreover, developing policies is one thing, implementing and enforcing them is another. The success of the ambitious internal security blueprint hinges on the effective approximation of the judicial systems of the member states, and the creation of effective joint agencies for police and prosecutors. This requires overcoming entrenched reluctances at the national level, which is likely to occur at a significantly slower pace. The institutions that are charged with spearheading cross-border cooperation in criminal matters (Europol and Eurojust)—while groundbreaking prototypes—each have their own implementation and enforcement problems. Currently, Europol does not have enforcement powers if member states refuse to cooperate with its requests. Unlike national law enforcement units, it cannot arrest or detain people. And Eurojust is far from a European prosecutor’s office and appears to run the risk of being reduced to another information exchange outfit. Europol and Eurojust need to evolve into institutions endowed with real powers and capacities. Furthermore, to address fears of runaway European bureaucracies, clear lines of review and accountability need to be established for both institutions.

Regardless of the level of cooperation, JHA issues are likely to remain closely linked to security (Geddes, 2001). After the initial burst of activity in the criminal field, collective attention is likely to shift (back) to border control issues, with an emphasis on thwarting illegal migration seen as a potential breach of internal security. Since Maastricht, JHA ministers have spent considerable time hammering out common standards of entry into the Union. Now, several member states are arguing that—especially in the face of growing numbers of unauthorized entries—the EU needs to be even more careful about monitoring immigrants and asylum seekers and perhaps even develop a common European border guard to ensure the uniform implementation of joint policies (Commission of the European Communities, 2001). Previously proposed by Germany and Italy and floated by Prodi soon after the attacks, the proposal envisions cooperation possibilities ranging from exchange of equipment and best practice to the creation of full-fledged joint border patrol units. Even if a common border guard does not materialize, however, the EU is likely to continue on its path of tightening border controls and scrutinizing access into its territory. These efforts also create pressures for nonmembers to monitor and adapt to the EU’s emerging regulatory environment and content in JHA. This is especially true for

those countries lining up for membership who are expected to adopt the JHA *acquis* and contribute to the guarding of the EU’s (future) borders (Lavenex and Uçarer, forthcoming 2002).

Another significant challenge is developing policies that protect the security of those residing in its territory while ensuring that human rights and civil liberties—including those of suspects—are respected. This is a delicate line to walk. So far, the EU’s anti-terrorism efforts have largely been supported by the European populations. However, if the new measures are not complemented with procedural and substantive safeguards, the EU may see public support wane quickly. Civil liberties proponents raise legitimate concerns about inadequate parliamentary and judicial oversight of EU’s policy-making bodies. Institutional reform that would ensure transparency and accountability might help allay fears about a European Big Brother.

Last but not least is the challenge to maintain the promise of transatlantic cooperation in criminal investigations of major offenses. This process may run into practical difficulties previously masked by the urgency of the attacks. The Spanish presidency hopes to negotiate with the U.S. an agreement on judicial cooperation in criminal matters. However, extradition to the U.S. is likely to become a thorny issue. Member states, through the Council, can be expected to insist that an agreement reached with the U.S. must comply with the Union’s stance on the death penalty. At a minimum, the EU is likely to insist that death penalties that result from extradition not be carried out. The momentum towards developing joint efforts can also be hampered by differing views on how individuals extradited on suspicion of terrorist activities should be tried. As negotiations on the U.S.-EU extradition treaty proceed, the EU is likely to resist extraditing individuals who might be tried by military tribunals.

Navigating the sensitive waters of JHA cooperation has never been easy. But the EU has nonetheless made significant progress in an area that is at the heart of state sovereignty. Now, invigorated by the unfortunate events of September 11, the EU is presented with a unique opportunity to rethink its institutional mechanisms that have slowed down progress and hampered efforts to create the AFSJ. Whether the EU will rise to the challenges that come hand in hand with this occasion and maintain the momentum forged by September 11 remains to be seen.

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### Notes

1. Terrorist acts were defined as intentional acts which may “seriously damage a country or an international organization ... with the aim of (i) seriously intimidating a population, or (ii) unduly compelling a Government or an international organization to perform or abstain from performing any act, or (iii) seriously destabilizing or destroying the fundamental political, constitutional, economic, or social structures of a country or an international organization” (Council of the European Union, 2001b).
2. Included in the list are the Basque separatist group ETA, three Greek organizations, Palestinian Islamic Jihad, the violent wing of Hamas, several Irish groupings, and individuals with links to these groups. Perhaps as interesting is who is not included in the list. Notably absent on the list are groups such as the Irish Republican Army (which has recently de-commissioned some of its weapons), Lebanon’s Hezbollah, and the PKK (Kurdish Worker’s Party).