

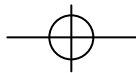
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## Justice and Home Affairs after the 2004 Enlargement

Jörg Monar\*

Looking at the EU acquis in the Justice and Home Affairs (JHA) domain means looking above all at a policy-making area in rapid development. Over the last three years, the EU Council has adopted between 80 and 100 texts – most of which are legally binding – per year, and still only a small part of the treaty objectives of Titles IV Treaty of the European Communities (TEC) and Title VI Treaty of European Union (TEU) and of the ambitious Tampere “milestones” agenda have been implemented. Although some major legislative proposals, especially in the areas of asylum and immigration policy, have been seriously delayed because of disagreements in the still unanimity-bound Council, the pace of progress remains impressive, especially if compared to the nineties. This makes it quite likely that by the time of the next enlargement (May 2004), new substantial measures adding to the acquis will either have to be implemented or will be high on the EU’s decision-making agenda. There have also been some important initial breakthroughs in certain areas that are only likely to develop their knock-on effects fully by 2004 and beyond. An outstanding example is the introduction of the European Arrest Warrant, formally adopted in June

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2002<sup>1</sup> but only due to be fully implemented in 2004, which represents a ground-breaking adoption of the principle of mutual recognition in the JHA domain and could well be the starting point of more legislative measures on mutual recognition in criminal matters.<sup>2</sup>

From an EU perspective, the challenge regarding the *acquis* after the 2004 enlargement is therefore not only to “maintain” the *acquis*, that is, preserve what has already been achieved and ensure that it is effectively implemented, but also to realise fully its further development potential by making sure that the momentum of progress is not lost after enlargement. This article will look first at the key post-enlargement challenges in the JHA domain, and then at the potential and limits of major post-enlargement diversity management instruments and the various possibilities for maintaining or enhancing decision-making and implementation capabilities. It concludes with a consideration of the importance of trust and confidence-building for maintaining and developing the JHA *acquis* after enlargement.

### The key post-enlargement challenges

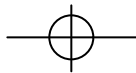
#### Increased diversity

Each enlargement imports new diversity into the EU. Not all of this diversity is negative, as the different experiences, know-how and priorities which come into the Union can add to the variety and effectiveness of its action. Yet increased diversity is clearly also a challenge, the risks of which the EU's insistence on full adoption of the *acquis* and the various efforts made during the pre-accession process have tried to minimise.

In the JHA domain, the challenge of diversity is a fairly specific one, different in nature from those in other EU policymaking areas and more sensitive because the area of freedom, security and justice (AFSJ) that is supposed to be set up is, in essence, a developing common zone of internal security. Internal security is an essential public good and a highly sensitive one of immediate concern to citizens ... and voters. Yet what is true for any security system – be it a bank, a protected data-base or a car – is also true for the AFSJ: the system is only as strong as its weakest link, with a single weakness in any part of it having potentially serious implications for all other parts. It is worth stressing this very simple – even banal – principle because it is one that is understood not only by practitioners but also by the

<sup>1</sup> Official Journal of the European Communities, no. L 190, 17 June 2002.

<sup>2</sup> See on this point, E. Barbé: “Le mandat d’arrêt européen: en tirera-t-on toutes les conséquences?”, in de Kerchove, G. and A. Weyembergh (eds) *L’espace pénal européen: enjeux et perspectives* (Brussels: Editions de l’Université de Bruxelles, 2002) pp. 113-7.



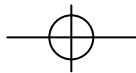
public and the media. If the diversity coming into the EU with the next enlargement introduces weaknesses into the system then this is not simply a question of further adjustment to the economic and administrative functioning of the single market, which might at worst lead to some temporary economic distortions, but a question of the system's efficiency and credibility as a whole as regards the delivery of internal security to the EU's citizens.

All the candidate countries have made substantial progress towards adopting the legal acquis in the JHA area, and there is every reason to assume that the process of formal adaptation of national legislation to the EU JHA acquis will largely be completed by the time of accession. Yet the same cannot be said with confidence of other forms of diversity.

**Political diversity.** Fundamental differences between national political approaches to certain JHA issues, such as internal border controls and responses to drug addiction, continue to hamper progress towards common policymaking among the current 15 member states. The future new members will inevitably add their own specific political interests and approaches to this existing diversity. Two areas may be taken as an example.

The first is that of external border management. During the 1990s, the EU moved increasingly towards a tightening of external border controls. For some member states (especially current "frontline" Schengen countries like Austria, Germany and Italy), ensuring a high degree of border security through sophisticated and extensive checks is clearly a central objective in the JHA area. The Union's new Eastern European member states are likely not to share this approach fully. For those which will, *nolens volens*, be in charge of part of the EU's new eastern borders, implementing the EU/Schengen external border regime entails major costs in the form of a disruption of relations with ethnic minorities on the other side of the border, of political relations with neighbouring countries and of well established cross-border trade. These countries may give high political priority to the upgrading of their eastern border controls at the moment because this is a conditions to be fulfilled for EU membership. Yet after enlargement, full implementation or even further development of the EU/Schengen external border acquis could well become much less of a priority or perhaps even an area in which they would seek a revision of the acquis.

The second example is that of the fight against money laundering. Measures against money laundering have become a core area of EU policy in the fight against organised crime and rank high on the current member states' agenda, as again confirmed by the Conclusions of the Tampere European Council and the actions taken after 11 September 2001. Yet the



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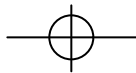
political perspective of the future new member states may not fully coincide with this priority. A very strict application (or even tightening) of the rules against money laundering could have (or be perceived to have) a dampening effect on the inflow of capital, and new member states could well take the view that they are less able to afford this sort of restriction than the more developed economies of the EU. Another reason is that full implementation of the EU's *acquis* and objectives in this area requires a considerable financial and administrative effort (setting up a special agency to monitor financial operations, for instance), which the applicant countries with their huge needs in other areas might prefer to reduce or postpone as much as possible. Both of these reasons provide ample grounds for a different political approach, and it is certainly not by chance, for instance, that the Commission's 2002 progress report on Poland noted that there has been little progress in aligning Polish legislation with the EU money laundering *acquis*.<sup>3</sup>

These and other instances of potential additional political diversity could clearly have an impact on both decision-making and policy implementation.

**Structural diversity.** Efficient JHA cooperation requires a certain degree of compatibility of law enforcement and administrative structures. This continues to be a major challenge among the current member states with their diversity, for instance, in the areas of police and court structures. The new member states will inevitably add to this diversity, with more specific problems regarding their incomplete "catch-up" with the organisational standards required by the EU *acquis*.

One example is migration management. While most candidate countries have undertaken extensive structural changes in the management of migration, including the introduction of computerised data-bases on aliens, unclear demarcation of competencies and inadequate cooperation between administrative and security authorities at the central and local level could not only reduce the effectiveness of legislation adapted to the EU *acquis* but also make cooperation with counterparts in the old member states more difficult. To take another example, it is still not clear whether all the candidates which, like Slovakia, have not yet fully demilitarised their border guards and continue to use conscripts will have completed the process of creating independent specialised civilian border police forces by the day of accession.

<sup>3</sup> European Commission: 2002 Regular report on Poland's progress towards accession, SEC(2002)1408, p. 117.



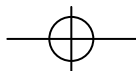
**Implementation capability diversity.** This is likely to be the area with the highest degree of post-enlargement diversity. Most of the candidate countries have substantial staffing, training and equipment deficits which will still require several years' time to be overcome. In both Hungary and Poland, for instance, the actual staff numbers of border guards fell approximately 30 percent short of the official target in 2001, and the Commission's recent progress report on Slovenia, one of the frontrunners in adaptation to the JHA acquis, noted with concern in August 2002 that the Slovenian government had only approved the appointment of 392 border police staff for 2002 and 200 for 2003 instead of the 700 for 2002 and 540 for 2003 originally foreseen in its Schengen Action Plan.<sup>4</sup>

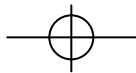
Another problem is that in a number of cases the new member states tend to postpone necessary adaptation to almost the "last minute" before accession. However, the later these changes are introduced, the more likely they are to lead to a significant degree of implementation capability diversity in the enlarged EU. Examples are the late full alignment of national rules to EU visa requirements, as in Poland and Slovakia, and the slow progress with the organisation of data-protection authorities, of central importance for participation in Europol and other computerised EU cooperation networks.

A rather specific implementation capability problem is corruption. It can have serious implications for implementation of JHA measures as police officers and prosecutors in old member states could be reluctant to cooperate and share information with counterparts in new member states which are perceived to be highly vulnerable to corruption. Not all candidate countries have been equally successful in tackling the problem so far, leaving considerable differences in the risk of corruption. The Commission's recent progress report on the Czech Republic, for instance, noted that the number of corruption-related criminal offences is increasing and that latent corruption is widespread, including in administrative police departments.<sup>5</sup> Much higher levels of corruption in some member states could obviously have negative implications on the willingness of all to further develop intense cooperation on particularly sensitive internal security issues.

<sup>4</sup> European Commission: 2002 Regular report on Slovenia's progress towards accession, SEC(2002)1411, p. 100.

<sup>5</sup> European Commission: : 2002 Regular report on Czech Republic's progress towards accession, SEC(2002)1402, p. 114.





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### The impact of diversity on decision-making, implementation capability and trust

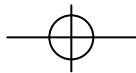
All three dimensions of diversity indicated above will remain after enlargement and will make common decision-making in the JHA area more difficult. The obvious response to this challenge would be a more strongly developed EU decision-making capacity. Yet this is, at least under the current treaty provisions and institutional arrangements, clearly not an option. The main reason for this is the persistence of the unanimity rule, which even the December 2001 Tampere progress evaluation report drawn up by the Belgian Presidency explicitly identified as “a serious hindrance to progress”, especially in the areas of asylum and immigration.<sup>6</sup> Yet there is also the problem of the continuing lack of mutual confidence of member states in their respective standards and procedures – unlikely to be increased with the entry of up to ten largely “untested” new states – and the continuing reluctance to change existing national laws. As a result, the problems of blocked initiatives, delays and the watering down of the texts under deliberation could significantly increase in a Union of, say, 25.

The post-enlargement EU will face increased implementation problems in the JHA domain. One major factor will be the above mentioned deficits in capabilities which, at least in the case of some of the new member states, will last well beyond the day of accession. This is not to lay the blame on the current candidates. In most cases their implementation capability problems are not due to a lack of political will. The problem lies with the paucity of resources and time needed to adapt to an EU acquis that has grown enormously since the 1990s and continues at a pace which makes “catching-up” an ever-evolving challenge.

Nevertheless, the particular difficulties of the new member states will not be the only strain on the EU's implementation capability. There are also likely to be new security challenges linked to enlargement, such as longer and more exposed borders and a potentially increased attractiveness of the enlarged internal market for organised crime, traffickers and facilitators involved in the huge business that illegal immigration has become. All of this is to say that, rather than aiming merely at “maintaining” current implementation capabilities, the Union will actually need more effective instruments and procedures for implementing its JHA measures.

A functioning “area of freedom, security and justice” depends to a very large extent on trust: trust between law enforcement and judicial authorities

<sup>6</sup> “Evaluation of the conclusions of the Tampere European Council” submitted to the General Affairs Council and the European Council on 6 December and formally adopted by the Laeken European Council on 14/15 December (Council document no. 14926/01).



across the boundaries of the different legal systems, law enforcement structures and traditions, but also trust on the part of politicians and their voters that EU action in the JHA domain will provide “value added” in terms of enhanced internal security and will not, on the contrary, create new risks, for instance, through porous external borders or the leaking of confidential data to crime.<sup>7</sup> This trust is still not fully developed among the current member states. An example is that some national police forces continue to be reluctant systematically to provide Europol with relevant data – a constant hindrance for Europol’s work. It will be even more difficult, at least initially, to build sufficient trust vis-à-vis the new partners, in part simply because they are “new”, but partly also because of negative perceptions about insufficient training, potentially lower standards and corruption.

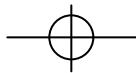
Trust in the EU’s capacity to deliver “value added” in the domain of internal security has gradually increased over the last few years. Yet it still remains limited and fragile. Any evidence, however “thin”, that some internal security problems might actually increase after enlargement could easily destroy much of that trust and make member states less inclined to maintain the momentum in constructing the “area of freedom, security and justice”. For this reason, but also in view of the “newcomers” effective integration in existing EU structures and networks, building up trust in the member states should be regarded as one of the most essential tasks in the JHA domain in the first few years after enlargement.

## Potential and limits of major diversity management instruments

### The Community method

The Community method with its emphasis on binding legal instruments, majority voting, the Commission’s exclusive right of initiative and comprehensive control by the Court of Justice has the great advantage of producing common approaches codified in Community law on the basis of a well defined decision-making process within a single legal and institutional (“constitutional”) framework. Yet it also has clear disadvantages because in some areas, such as legal immigration, police legislation and penal laws, member states are extremely reluctant to go down the road of common legal norms and resist any surrendering of national powers to the Community system. As a result many tend to prefer the absence of common action – or at least very long delays before such action is taken – to full use of the

<sup>7</sup> On the interrelationship between trust and security in the context of the enlargement in the JHA domain, see N. Walker, “The Problem of Trust in an Enlarged Area of Freedom, Security and Justice: A Conceptual Analysis”, in Anderson, M. and J. Apap (eds) *Police and Justice Cooperation and the New European Borders* (The Hague: Kluwer, 2002) pp. 19-33.



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Community method. It was quite characteristic that when the areas now under Title IV TEC were "communitarised" by the Treaty of Amsterdam, the member states only agreed to it on the condition of maintaining unanimity and making the Commission's right of initiative non-exclusive. There can be little doubt that some current member states have and some future member states may have objections in principle against the use of the Community method in areas such as police cooperation.

A further problem with the Community method is that it has rather cumbersome decision-making procedures which, if combined with unanimity, can lead to long delays and least common denominator agreements. In other respects also, it cannot always be taken for granted that the Community method is the most effective. The last few years have shown, for instance, that it can sometimes be quite useful, or even more effective, for member states to share the right of initiative with the Commission because the former may have more expertise on certain issues and may – especially if they bring in joint initiatives – facilitate the build-up of a critical mass for decision-making in the Council. An example is the so-called "Four Presidencies" initiative on the establishment of Eurojust in July 2000.<sup>8</sup> It is interesting to note that European Convention Working Group X ("Freedom, security and justice"), in its final report, suggested that member states maintain a right of initiative in the areas of the current "Third Pillar" subject to a threshold of one quarter of member states.<sup>9</sup> This would certainly help to ensure a critical mass for bringing proposals on the Council agenda and to avoid a potentially burdensome multiplication of national initiatives.

In the enlarged EU, the Community method should therefore be maintained or even extended wherever possible. Nevertheless, it seems unlikely that it can or will be used in all JHA areas and it may not even always be the best option for ensuring effective decision-making capacity. Some flexibility should therefore be applied: While there should still be a *préjugé favorable* in favour of the Community method because of the high degree of integration and legal certainty it produces, it should not necessarily be applied to all issues and not necessarily with all of its traditional components.

### Enhanced co-operation

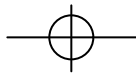
The advantages and disadvantages of "enhanced cooperation"<sup>10</sup> as an instrument of flexibility in EU integration have generated much debate (and

<sup>8</sup> See J. Monar, "Justice and Home Affairs", in Edwards, G. and G. Wiessala (eds) *The European Union. Annual Review of the EU 2000/2001*, *Journal of Common Market Studies*, 2001, pp. 131-2.

<sup>9</sup> European Convention document no. CONV 426/02, 2 December 2002, p. 15.

<sup>10</sup> The term referred to in the Nice Treaty is used instead of "closer cooperation".





literature) since the Treaty of Amsterdam and need not be discussed here. The basic issue with the use of enhanced cooperation as a diversity management instrument in the JHA area (as in other areas) is the trade-off it involves between the desirability of common policymaking, given the legal and political coherence it ensures with all member states participating and moving forward at the same time, and the need to avoid a complete standstill in certain areas if some member states persistently block the progress desired by others.

If unanimity is to a large extent maintained in the JHA domain, it seems increasingly likely that enhanced cooperation could actually be used as a diversity management instrument after enlargement. The fact that the Belgian Presidency, with the backing of most of the other member states, "threatened" Italy's Berlusconi government with potential use of that instrument when Italy prevented unanimity on the European Arrest Warrant in December 2001 can be taken as an indication that it is no longer considered a purely abstract possibility. With unanimity in an EU of 25 obviously much more difficult to achieve, groups of eight or more member states – according to the new rules introduced by the Treaty of Nice<sup>11</sup> – might prefer this instrument to months or years of delays and blockage.

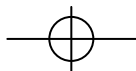
Saying that enhanced cooperation could well be used does not necessarily mean that it will be used only to exclude unwilling or unable new member states. It seems perfectly feasible, for instance, that some of the new member states might be willing to go ahead with some of the old in areas where other old ones are not willing to follow. In the run-up to the June 2002 Seville European Council, for instance, it seemed that some of the current member states, especially the UK, did not favour the idea, backed inter alia by Italy and Germany, of gradually moving towards a common European Border Guards Corps, whereas some of the current candidate countries supported the idea.

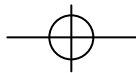
It should be emphasised, however, that a proliferation of enhanced cooperation frameworks would come at the cost of political and legal fragmentation within the "area of freedom, security and justice", drastically increasing the complexity and difficulty of common policymaking and reducing transparency. It should therefore be regarded as it is defined in Article 43(1)(c) TEU, as a measure of "last resort".

### The open method of coordination

The open method of coordination – much invoked and discussed as a "new" EU governance instrument – has already found its way onto the EU agenda

<sup>11</sup> In particular, amended Article 43(g) TEU.





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in the JHA domain. Faced with the slow progress with implementing the Tampere agenda through common legislative measures, the EU Commission suggested using the open method of coordination for both immigration and asylum policy, proposing the adoption of multi-annual guidelines to be implemented through national action plans and monitored by the Commission, which would also make new legislative proposals wherever needed.<sup>12</sup> The Commission clarified that the use of the open method would come in addition to some common legislation – part of which it had already proposed – rather than as a replacement of it. However, it was fairly clear that the Commission saw this as a temporary alternative to avoid protracted deadlocks in the development of a common approach in certain areas of migration, especially those of primary member state responsibility such as admission of economic migrants and integration policy.

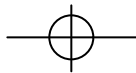
Could the open method of coordination, then, also be used as a post-enlargement diversity management instrument? Essentially, it could allow for some progress in areas in which (a) the Community method is likely to produce deadlocks because of member states' unwillingness to accept tightly binding policy outcomes, and (b) closer/enhanced cooperation is undesirable because of its break-up effects on a common approach.

With regard to the new member states' implementation capability problems, the open method could have the advantage of making it easier for them to accept certain common targets and guidelines as they would be associated with a longer timeframe and a certain margin of flexibility in the national implementation of these targets and guidelines.

Yet the open method of coordination also involves some risks, precisely because of its nature as an essentially intergovernmental coordination instrument. The guidelines would likely be open to different interpretations, non-adherence not subject to any legal sanction, and "peer pressure" not sufficient to ensure respect of deadlines. There are already plenty of examples in the JHA domain of legally non-binding deadlines (such as those set down in the 1998 Vienna Action Plan) being missed and rather silently put aside.

In all cases where significant degrees of approximation or even harmonisation of laws and practices are needed to ensure the effectiveness of EU policies in a relatively short period of time, the open method is clearly not an appropriate instrument. There would have been little point, for instance, in applying the open method to most of the measures taken by the EU in response to the 11 September terrorist attacks. Furthermore, there will

<sup>12</sup> See COM (2001) 387 and 710 of July and November 2001, respectively.



always be some areas, such as harmonisation of penalties for serious forms of cross-border crime, where the open method cannot be effectively applied.

### EU aid programmes

Financial transfers through specific EU programmes are also a substantial diversity reducing instrument in that “weaker partners” can be helped to bring their implementation capabilities up to required standards. From 1997 to 2001, a total of 541 million euros were allocated under the PHARE programme to various programmes in the JHA domain.<sup>13</sup> As quite substantial implementation capability deficits are likely to persist after enlargement, especially in the areas of training and equipment, it seems crucial that specific aid instruments be designed in time to replace the existing pre-accession instruments currently scheduled to end – at the latest – on the day of accession.

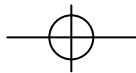
It should not be too difficult to justify politically the introduction of specific post-enlargement JHA aid programmes. If the idea of a common “area of security” with its corollary of the “weakest link” is taken seriously, then it should be possible to make parliaments, the media and the citizens understand that every euro spent, for instance, on control of the EU’s external borders is also a euro spent on their own security. Apart from specific programmes for training and equipment upgrading, new instruments of financial solidarity to cover the costs of the intended “high level of safety” within the AFSJ<sup>14</sup> should be developed. Community funding for the gradual build-up of common border guard structures for the Union’s external land borders could be one of them.

The EU recognised the financial requirements of enlargement in the JHA domain to some extent by agreeing at the Copenhagen European Council on 12/13 December 2002 to a special “transitional Schengen measures” facility of 286 million euros annually for 2004, 2005 and 2006.<sup>15</sup> It seems far from certain, though, that this will be sufficient. For instance, the full cost in terms of equipment and training of the new member states’ participation in the upgraded Schengen Information System (so-called “SIS II”), expected to be put into place in 2006, is still difficult to estimate.

<sup>13</sup> See W. de Lobkowicz, “L’Europe et la sécurité intérieure”, Paris, La Documentation Française, 2002, pp. 91-3.

<sup>14</sup> According to Article 29 TEU.

<sup>15</sup> See Copenhagen European Council Conclusions, Council document no. SN 400/02, Annex I, Budgetary and Financial Issues. In the final round of the accession negotiations, Poland negotiated an increase of its share in the Schengen facility from 172 mn to 280 mn euros over the three years (Europe, No. 8362, 15 December 2002).



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### Maintaining/improving the decision-making capacity

#### Extending majority voting

The importance of majority voting for maintaining and developing the *acquis* after enlargement needs no further explanations. The EU cannot afford risking years of delays or complete deadlock in the JHA domain because of the unanimity requirement. EU experience has shown that in areas of majority voting, member states often behave much more flexibly from the very beginning and are more willing to engage in compromise building than in areas of unanimity. The mere possibility of a qualified majority vote often makes its actual use superfluous as consensus is in most cases reached well before member states run the risk of being formally outvoted.

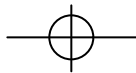
By virtue of Article 67 TEC, in 2004 the Council will be able to decide on the introduction of the co-decision procedure for part or all of the communitarised areas falling under Title IV TEC. Taking this step – which requires unanimity – is the very least the Union must do to preserve its decision-making capacity in an enlarged EU. The areas of the “Third Pillar” – whether the latter continues to exist in some form or not – should not be considered immune to the introduction of majority voting, although certain areas of police cooperation, such as potential operational powers for Europol and approximation or harmonisation of penal laws, may still be too sensitive for member states to submit to the common discipline of majority voting for some years. In this context, it should be noted that in its final report, Working Group X of the European Convention suggested retaining the unanimity rule for only a few selected areas.<sup>16</sup>

#### Streamlining the decision-making system

The current working structure in the Council – largely based on the “box approach”, that is, having a committee or working party for any problem area or issue – may satisfy senior ministry officials’ desire to be involved fully in Brussels, but has become increasingly complex and overextended. A reduction of the number of working parties and the transformation of some of them into multidisciplinary groups with a broader remit would not only reduce the coordination effort and speed up certain procedures, but also facilitate the insertion of the new member states in the decision-making system.

The “Haga process”, initiated under the Swedish Presidency in 2001, has also highlighted certain problems in decision-making procedures, such as member states submitting overlapping or badly timed national initiatives. In

<sup>16</sup> European Convention document no. CONV 426/02, 2 December 2002, p. 14.



an EU of 25, such problems could proliferate if the Council's rules of procedure are not adapted accordingly.

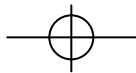
#### Increased use of deadlines

Only a part of the current JHA objectives in the treaties are linked to legally binding deadlines. Where this has been done, however, the pressure on the Council and the Commission to act has been greater than in the non-binding deadline linked areas. The Commission's half-yearly "scoreboard" also derives a considerable part of its usefulness as a peer pressure instrument from the deadlines set in the Treaties, the Vienna Action Plan and Tampere. There can be no doubt that deadlines introduce an additional dimension of urgency into the decision-making process. For the EU after enlargement, therefore, any JHA objective defined in the Treaties should also be linked to a deadline for adopting the respective measures.

#### Increased use of "stand-still" and "sunset" clauses

The EU's decision-making capacity in the JHA domain has repeatedly been impaired by member states preparing and adopting diverging legislation in relevant JHA areas, thereby complicating or even obstructing the adoption of common measures. A recent example is the new German immigration law (Zuwanderungsgesetz) which made the German delegation in the Council repeatedly argue last year that it could not commit itself to EU legislation in this area before the new legislation at the national level was completed. Some parts of this legislation, such as those on family reunification, clearly do not make adoption of common EU measures easier. In a larger EU, this sort of problem could increase. A useful remedy could be increased use of "stand-still" clauses obliging member states not to adopt any new legislation that might constitute an obstacle to common legal instruments in the respective area. These should be applied whenever and as soon as a legislative text has been formally proposed to the Council.

All too often, it is a fairly painless option for member states to struggle endlessly in the Council for a better deal on new EU legislation or to accept long delays in the introduction of national implementing legislation as long as the existing arrangements still provide an acceptable fall-back position. The use of "sunset clauses", for instance in the context of legislative acts requiring implementing legislation, can increase the pressure to act as they provide for existing bi- or multilateral arrangements to become invalid on a certain date if they have not been changed or replaced by a common legal instrument or followed by appropriate national implementing legislation.



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### Maintaining/improving implementation capacity

#### Strengthening monitoring procedures (including benchmarking)

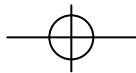
The EU has already acquired quite substantial experience with collective evaluation mechanisms, the "Standing Committee on the Evaluation and Implementation of Schengen" being the most notable example. Such monitoring mechanisms will be even more important in an enlarged Union in which some of the new member states might have special difficulties with meeting standards set by the old and where it will be important to increase transparency between all member states to avoid false suspicions and distrust. These evaluation mechanisms should obviously apply to all member states (not only the newcomers). The Schengen Standing Committee could serve as a model, yet there should be separate evaluation mechanisms for all parts of the acquis, not only for the Schengen acquis which remains heavily focused on border controls and compensatory measures.

Such monitoring mechanisms should be combined with a system of benchmarking, with member states then being given some sort of "marks" for their respective performance which would increase pressure on those with "low scores". The monitoring could also be linked to a system of "incentives", with financial rewards for those performing above average. Major failures to meet agreed standards might also be "penalised" through the temporary suspension of membership rights such as participation in certain programmes or (in case of data protection problems) access to certain common data bases.

#### Improved "best practice" identification and transfer

The member states are a huge reservoir of different experiences and practices. By analysing and evaluating them and identifying the practices that produce the best results, member states can be given an incentive to learn from each other and common EU measures can be based on best practices rather than on a compromise between good and mediocre ones. Best practice identification and transfer already plays a substantial role in the work of some of the special EU agencies in the JHA area, such as the European Police College (CEPOL),<sup>17</sup> the European Monitoring Centre for Racism and Xenophobia in Vienna and the GROTIUS training programme. In the enlarged EU, best practice identification should be elevated to a major objective of the AFSJ, generalised across all areas, and made a central

<sup>17</sup> Which currently only exists as a network of national police training institutions.



element of all training programmes. The main advantage of best practice identification and transfer as a diversity management instrument is that it is both a relatively painless process – as there are no formal sanctions – and a cost-effective way of improving implementation capabilities.

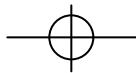
#### Increased use of common institutional structures and “joint teams”

The creation of common institutional structures – such as Europol and Eurojust and perhaps a common European Border Guards Corps in the future – and the formation of “joint teams” have the triple advantage of increasing the operational expertise available to officers on law enforcement or control missions, generating learning effects, and increasing trust. In the enlarged EU, such common institutional structures should be appreciated and used as agencies for the continuous exchange of expertise and experience. The formation of joint operational teams, such as the “investigation teams” provided for by the 13 June 2002 Framework Decision,<sup>18</sup> which bring together officials from “old” and “new” member states, could be particularly valuable in the first years after enlargement.

#### Introduction of support programmes for “weak spots”

Certain external events, such as a sudden increase in migration or refugee pressure on parts of the EU’s external borders, as well as weaknesses identified in monitoring exercises could justify the use of EU aid instruments for strengthening the AFSJ’s “weak spots” in the interest of the whole. Some instruments, such as the European Refugee Fund, have already been put into place, but there are very few of these “emergency aid” instruments and they tend to be underfunded and cumbersome to use. In an enlarged European Union – where more “weak spots” are likely to appear – a more extended and flexible system of rapidly adaptable support instruments should be established. Financial reserves which can be called up at short notice should be provided for by the EU budget in the context of broadly defined JHA programmes. A further possibility would be EU-supported “lending” of personnel by certain member states to others experiencing temporary problems at external borders or over particular law enforcement issues such as the fight against organised crime, trafficking in human beings or terrorism. The possibility of member states being able to request the intervention of a “rapid response unit” consisting of officers from other

<sup>18</sup> Official Journal of the European Communities, no. L 162, 20 June 2002.



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member states for problems at border crossing points<sup>19</sup> envisaged in the June 2002 external border management plan goes in that direction.

### Building trust and confidence

#### Common structures and training for generating trust

The proliferation of special common structures in the JHA domain, ranging from institutions such as Europol to monitoring centres and networks such as the European Judicial Network, has recently attracted some criticism. There is, of course, a problem with creating structures, such as the Police Chiefs Task Force, whose role and position have been ill defined.

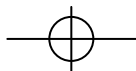
Yet common structures can play a very useful role after enlargement because they constitute points of regular encounter and cooperation between practitioners of old and new member states. These can help spread knowledge about their respective law enforcement and judiciary systems, increase transparency and create trust through routine cooperation. Early and full integration of officials from the new member states into the work of common JHA structures – which in the case of Europol is now already well under way – should therefore be regarded as a priority for both the remaining time before accession and the first months after accession.

#### Common management of external borders

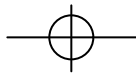
In this context, the action plan for the integrated management of the European Union's external borders adopted by the Seville European Council in June 2002,<sup>20</sup> aimed at the creation of a European Border Guards Corps could play a crucial role in building trust. External border security is clearly one of the primary enlargement-related concerns of current member states. Elements such as common operational coordination, exchange of personnel, formation of joint operational teams and the introduction of burden-sharing mechanisms as part of a gradual move towards a European Corps would give the "old" member states a feeling of having an insight into and influence on the way the new external borders are managed, provide ample opportunities for sharing experiences between officials from old and new member states and facilitate the transfer of expertise. All this would make a substantial contribution to trust- and confidence-building. As was rightly emphasised in the final report of Working Group X of the European Convention, the

<sup>19</sup> Council document no. 10019/02.

<sup>20</sup> Council documents no. SN 200/1/02 REV 1 and 10019/02.







principle of solidarity between member states, including financial solidarity, will be of considerable importance in this context.<sup>21</sup>

#### More extensive use of liaison agents and exchange of experts

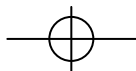
Liaison agents placed in ministries, police headquarters and border control posts have played a very useful role in increasing trust and operational efficiency in cooperation between current member states. The same applies to the exchange and temporary posting of experts. This system should be expanded in the enlarged EU, especially as the current programmes of pre-accession advisers will have come to an end by then. Staff shortages in ministries and law enforcement agencies pose serious constraints in this area, but the benefits on the trust-building side would be considerable.

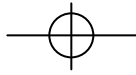
#### Generating support and confidence among citizens

The AFSJ has to be based not only on trust between the practitioners involved in implementing it but also on support from the citizens for whom it is supposed to provide "added value" in terms of increased internal security, freedom and justice. This support of citizens cannot be taken for granted. There is some suspicion among civil liberties groups in current member states towards the structures and policies currently being developed by the EU. The accusation is that they are essentially repressive in nature and follow the logic of an EU fortress, watched over by a central "big brother" with huge data-bases, with decisions taken behind closed doors outside of effective parliamentary control. Citizens in the new member states – with memories of their own "big brothers" and their omnipresent instruments of control and repression still vivid – could well be even more sceptical of the build-up of central EU structures and policies in the internal security area. In several of the new member states, the negative impact of the Schengen acquis on the traditionally rather open borders to eastern neighbours is unlikely to fuel enthusiasm about the AFSJ.

It will therefore be extremely important to increase the transparency of the AFSJ through better information on its objectives and progress to parliaments, the media and the citizens, as well as more effective parliamentary control. It is no less important to ensure that the "freedom" and "justice" objectives of the AFSJ are not overshadowed by the internal security dimension, which means that the institutions should aim at a better

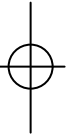
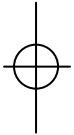
<sup>21</sup> European Convention document no. CONV 426/02, 2 December 2002, p. 17.





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balance between the three essential public goods promised by AFSJ. Making the Charter of Fundamental Rights a legally binding part of AFSJ and further increasing European citizens' access to justice across borders would be important elements in such a re-balancing effort. It would reassure the citizens of the new member states that EU justice and home affairs are not only about law enforcement but also about guaranteeing their freedoms and, as the 1998 Vienna Action Plan ambitiously but rightly indicated, giving citizens "a common sense of justice"<sup>22</sup> across the EU.



<sup>22</sup> Official Journal of the European Communities, no. C 19, 23 January 1999, para. 15.

