



Problems and Solutions for New Member States in Implementing the JHA Acquis

Joanna Apap

Abstract

The pace of development of the justice and home affairs (JHA) *acquis* has been quite impressive, especially since the Amsterdam Treaty (and the new Title IV), which has offered a new legal basis and possibilities for progress in this area. After the entry into force of the Single European Act, the balance has been moving increasingly from national towards European Union solutions in JHA. At first the process was steady, but slow. This is unsurprising given that it was the first attempt by a supranational organisation to address problems such as immigration or cooperation in criminal matters. The already voluminous JHA *acquis* is still evolving. Most of the text is legally binding, yet only a small part of the Treaty objectives of Title IV TEC and Title VI TEU have been implemented so far.

The challenge for the enlarged EU regarding the JHA *acquis* is therefore a dual one (Monar 2004):

- ‘maintaining’ the *acquis* in the sense of preserving what has already been achieved and ensuring that it is effectively implemented; and
- ‘developing’ the *acquis* in the sense of making certain that the momentum is not lost.

This paper examines the key post-enlargement challenges in JHA – the problems and solutions that are incumbent to the implementation of the JHA *acquis* and how the lack of mutual trust can be overcome to enhance decision-making and implementation capabilities after the enlargement of 1 May 2004.

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PROBLEMS AND SOLUTIONS FOR NEW MEMBER STATES IN IMPLEMENTING THE JHA ACQUIS

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Introduction

This paper evaluates the main post-enlargement problems in justice and home affairs (JHA) and assesses the possible solutions that can be envisaged to enable an effective implementation of the JHA *acquis*. It assesses to what extent the lack of mutual trust can be overcome to enhance decision-making and implementation capabilities after the enlargement of 1 May 2004.

The already voluminous JHA *acquis* is still evolving. Most of the text is legally binding, yet only a small part of the Treaty objectives of Title IV TEC and Title VI TEU and of the ambitious Tampere ‘milestones’, have been implemented so far.

The EU’s justice and home affairs agenda includes:

- Asylum
- External borders
- Migration
- Organised crime, fraud and corruption
- Drugs
- Terrorism
- Police cooperation
- Customs cooperation
- Judicial cooperation in civil matters
- Judicial cooperation in criminal matters
- The funding of activities
- Issues related to human rights

The pace of development of the JHA *acquis* has been quite impressive, especially since the Amsterdam Treaty (and the new Title IV), which offers a new legal basis and possibilities. Unfortunately, the adoption of certain measures, particularly in the field of asylum and immigration, has been seriously delayed because of disagreements in the Council. As a consequence, not all of the Tampere agenda has been met within the five-year deadline, which expired on the same day as the entry of the ten new member states into the EU. Much remains to be done, which will hopefully be the topic of a ‘Tampere II’ scoreboard.

Since 2001, there have been some important initial breakthroughs, particularly in judicial cooperation on criminal matters such as the introduction of the European Arrest Warrant¹ – which are likely to fully realise their effects only in 2004 and beyond. Important progress has also been made in the field of mutual recognition in the JHA domain and for which the EU arrest warrant will be good testing ground. This could represent the starting point of more legislative measures on mutual recognition in criminal matters (Barbe, 2002 quoted in Monar, 2004).

Therefore, the challenge for the enlarged EU regarding the JHA *acquis* is a dual one (Monar, 2004):

- ‘maintaining’ the *acquis* in the sense of preserving what has been achieved already and ensuring that it is effectively implemented; and
- ‘developing’ the *acquis* in the sense of making certain that the momentum is not lost.

1 The main challenges posed by EU enlargement

1.1 Diversity and mutual trust

The diversity and hence the resultant lack of mutual trust between old EU member states, between the new EU member states, and between the old and new members is one of the biggest challenges posed by the enlargement of 1 May 2004.

Diversity is present on four principle fronts: political, judicial, structural and implementation capacity. Such diversity persists even after enlargement, and will render decision-making in the JHA area more difficult.² The obvious response to this challenge would be the need for a more strongly developed EU decision-making capacity; however, this will not change until the Constitutional Treaty enters into force – around 2009. The main reason for that is the persistence of the unanimity rule. Some unanimity would, however, persist in the more sensitive areas of the JHA *acquis* even after the ratification of the Constitutional Treaty. The unanimity rule has been clearly identified as a serious hindrance to progress. Yet there is also the problem of the continuing lack of mutual confidence and trust of member states in their respective standards and procedures – unlikely to be increased with the entry of ten largely ‘untested’ new member states.

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 issue linkages and package deals, and 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 understanding of policy objectives and methods of achieving them (Monar, 2004). Trust is part of the normative context established through greater interaction among European states and citizens through working together in EU institutions.

Establishing a high level of trust or, to use the Durkheimian term, ‘solidarity’ in police, judicial, border controls and immigration cooperation cannot be separated from wider issues

¹ The European Arrest Warrant was formally adopted in June 2002, but is only due to be fully implemented in 2004 (OJ L 190 of 17 June 2002).

² See also Monar, 2004.

of building a genuine EU community. If all EU citizens regarded each other in the same way as presently they 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.

If existing JHA arrangements are to operate effectively, especially in an enlarged EU, higher levels of trust must be established. The 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. An upgrading of most countries' training systems is required. The quality of the general educational provision in the states especially for such matters as language skills and general understanding of the European Union also needs to be evaluated. The particular difficulties of the new member states will not be the only strain on the EU implementation capability. There are also likely to be new security challenges linked to enlargement, such as longer and more exposed borders and the potentially increased attractiveness of the enlarged internal market for organised crime, traffickers and facilitators involved in the huge business that illegal immigration has become.

As a result of lack of trust, problems of the blockage of initiatives, delays and of the watering down of texts under deliberation could well significantly increase in a Union of up to 25 member states.

The post-enlargement EU will face increased implementation problems in the JHA domain. One major factor will be the aforementioned deficits in capabilities, at least in the case of some of the new member states. This is not necessarily the fault of the new member states as this is not normally a result of a lack of political will but rather owing to lack of resources and sufficient time to adapt the new EU members' national systems to an EU *acquis* that has grown enormously since the 1990s and still continues to grow at a pace that makes the 'catching-up' an ever-evolving challenge (Monar, 2004).

A functioning Area of Freedom, Security and Justice depends to a very large extent on trust. This involves trust between law enforcement and judicial authorities across the boundaries of the different legal systems, law enforcement structures and traditions, but also trust of politicians and their voters in that EU action in the JHA domain provides 'value added' in terms of enhanced internal security and does not, create new risks, for instance, through porous external borders or the leaking of confidential data to crime (Walker, 2002 and Monar, 2004). This trust is still not yet fully developed among the 'old' member states, let alone among the newer ones. This is shown, for instance, by the fact that some national police forces continue to be very reluctant to systematically provide Europol with relevant data, which is a constant problem for the work of Europol. It will be even more difficult, at least initially, to build sufficient trust *vis-à-vis* partners in the new member states, in part simply because they are new, yet partly also because of negative perceptions about insufficient training, potential lower standards and corruption. The building up of trust in the member states of the enlarged EU should be regarded as one of the most essential tasks in the JHA domain in the first few years after enlargement.

1.2 The diversity of instruments

Since the entry into force of the Single European Act, the balance has been moving from national towards EU solutions in JHA. At first the process was steady, but slow. This is unsurprising given that 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 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 becomes 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). 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 the third pillar decision-making promoted changes in the working structure and practices of the Council in JHA. Overall, ministers of justice and the interior have retained their power, notwithstanding the attempts to reinforce the coordinating role of the COREPER over the JHA domain.

The position of some aspects of JHA under the first and third pillars must be reviewed, to illustrate the complexity and obscurity of the present situation. Progress in matters under the first pillar has been 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 the decisions taken.

First pillar

a) 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 had to be taken by a unanimous vote until 1 May 2004; from 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 is 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. It is crucially important, however, that by transferring this competence to the first pillar the member states have implicitly recognised the authority of the European Court of Justice (ECJ).

b) The status of third-country nationals

On non-EU citizens, the Treaty of Amsterdam neither framed a coherent strategy nor a comprehensive approach to them in Arts. 61, 62 and 63. New objectives, which had to be achieved within a fixed timetable, were assigned to the Community. Nonetheless, the result was that, 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 does 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.

The Treaty of Amsterdam stipulates in Art. 61 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 Article 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. Article 14 simply restates that the internal market shall comprise an area without internal borders and that within this area persons will have a right of free movement.

c) Entry into the European Union

The sensitive issue of whether or not third-country nationals need a visa to enter the European Union is included in Art. 62.2, under “measures concerning the crossing of the external borders of the Member States”. 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 drawing up a ‘black’ list of countries, the nationals of which will need a visa to cross the external borders, and a ‘white’ list of countries that are exempted from such a requirement. The Council has authority to adopt technical rules concerning the procedure for the issuing of visas and the specifications of a standard visa. All of these rules are intended to bring the systems of the various member states closer together.

The issuing of visas was already communitarised by the Maastricht Treaty. Nevertheless, the new wording helped to solve the serious difficulties of interpretation among JHA ministers. The adoption of Regulation No. 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. This was preceded, however, 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 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 exempt, thus abolishing the discretion of member states to add other countries that were not on the common visa list.

The Community is empowered by Art. 62.2 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 persons is ensured. This issue of detail, which could have important effects on individuals, illustrates the need for a clearer definition of competences. Yet 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 article, 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 a granting of 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 on 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. To make matters worse, the provision does not at the moment have direct effect.

In November 2003, the Council adopted 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).³ The Council has consulted Parliament on the proposed Directive, but the latter has not so far been adopted.

d) 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, which 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 by an 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 the 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

³ Council Directive 2003/109/EC, concerning the status of third-country nationals who are long-term residents, of 25 November 2003 (OJ L16/44, 23 January 2004).

fortuitous. The addition, the repatriation of persons without authorised residence is also significant, as individual member states have not managed to control undocumented immigration. Some states tolerated the presence of undocumented migrants on their territory more than others, as long as they did not seek recourse to public funds, as they viewed these persons as a source of cheap labour.

The “measures defining the rights and conditions under which nationals of a third country who are legally resident in one Member State” are covered in Art. 63.4, 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 few 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 only a few of them have been adopted so far. These delays are mainly because of 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 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 wanted adoption without delay.

e) Fraud against the EU

One of the scandals of the European Community until the last decade was that fraud against EC funds were treated differently in member states and there were deep suspicions that some states did not take it seriously and 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. Article 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 fraud in the customs field, 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 succeeding the Task Force for the Co-ordination of fraud prevention (UCLAF), part of the Secretariat-General of the Commission, created in 1988. 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 part of the responsibilities of the Commissioner in charge of the budget.

Its independence is safeguarded by the provision that the director general of OLAF 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 or her independence, the latter is entitled to initiate legal proceedings against the

Commission before the 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 in its investigative capacity is concerned, the rule mirrors which is laid down in Art. 213 for members of the Commission.

In order to coordinate the repression of fraud against the interests of the Communities, OLAF provides support for member states to assist close and regular cooperation between the competent national authorities. OLAF's work also consists 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 (such as access to information and the buildings of the Community institutions, the possibility to check accounts and to obtain extracts of any document). In addition, it can request from any person concerned information that it judges useful for its investigations. In accordance with the arrangements laid down in Regulation No. 2185/96, it can carry out spot controls of the economic actors concerned to acquire information concerning possible irregularities. OLAF is not a 'secret service', nor a police force. It is rather the legal instrument for administrative investigation to guarantee better protection of Community interests and compliance with the law against attacks by organised crime and fraud.

The main question is whether, in the longer term, this is sufficient. OLAF has powers that parallel police power of investigation and access to documents. One of the advantages of abolishing the pillar structure and moving towards the constitutional division of powers proposed above is that OLAF could be merged with Europol. This is desirable 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 from occurring.

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 in Arts. 29-43 TEU; particularly important is Art. 34, as it contains a list of the available legal instruments. These are:

1. Common Positions, which define the approach of the Union to a specific topic, often related to external relations;
2. Framework Decisions and Decisions, which do not have direct effect, but are binding on the member states; and
3. Conventions, which 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 of 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, 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 co-operation” (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.

f) Europol

Europol was the first organisation established in the third pillar. Its purpose is to strengthen police and customs cooperation to prevent and combat crime 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 has not gone beyond 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. Article 29 of the 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 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 specialised 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 kinds of problems. First, Europol has not yet sufficient resources to fulfil its tasks. With a budget of €30 million and approximately 300 officials at The Hague headquarters, it is not in a position to cover the full range of criminal intelligence, let alone the future tasks of initiating and participating in the investigations of the member states. Second, the national authorities have so far failed to provide adequate criminal intelligence for Europol to demonstrate its value.

Article 30 of the TEU contains two provisions that 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. Yet Art. 30 provides for a five-year period before the Council actually has to implement this. As mentioned above, the Council does not seem eager to move quickly in this area. 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 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 that 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 overly heavy accountability procedures. This is probably a shallow debate because accountability and effectiveness should go together.

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

1. Political accountability, whereby the management board has to report regularly to ministers;
2. Budgetary control, such that accounts are supervised by three institutions, an independent private undertaking, financial controllers and experts from the member states; and
3. Judicial control, whereby the legality of activities is weakly overseen by the Court of Justice. A protocol allows the member states to opt-in with respect to the jurisdiction of the European Court of Justice.

These forms of scrutiny are not satisfactory when and if the competence of Europol is broadened. For example, political accountability is ensured by the relationship 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, which 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 Parliament.

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 among national prosecuting authorities, Eurojust, Europol, the Commission (OLAF) and the European Judicial Network (see below).

g) 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. Eurojust was proposed at the Tampere meeting of the European Council, in October 1999 (Council Decision 2000/799/JHA), and was initiated 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 EJM”. 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 of Eurojust one day 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 (EJM), which became operational earlier (in 1998). The main difference between the two is that EJM is a decentralised network, which links EU lawyers and judges working on criminal cases to help them exchange information rapidly and effectively, whereas Eurojust is a central unit. EJM has specialist contact points 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 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’, asking for information or enquiries to the authorities in another member state, and sends them to the right authorities for action. 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, if necessary, is 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 EJM 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 EJM cover EU policy on judicial cooperation, international criminal case studies and the development of practical cooperation.

The EJM is a non-threatening arrangement and the only question mark hanging over it is its usefulness when Eurojust is 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 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 co-operation instruments” (Art. 7 (a)(iv) of the above-mentioned decision). Nevertheless, 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; further, they may 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 achieved 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 (i.e. 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 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 (SIS). The proposal that the Eurojust has access to the SIS immediately gave rise concerns about the indirect access that Europol would have thus enjoyed (through the exchange of information). The 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 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 every 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 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 the 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 starting point for this is Art. 31 of the 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 such as a European public prosecutor or a common (basic) penal code, but with the institution of Eurojust the road is open. The possibility of such long-term developments makes it paramount to strengthen the political and democratic controls on Eurojust and other agencies.

2 The institutional division of powers in JHA

The further development of JHA cooperation is hindered primarily by constitutional issues. The current pillar structure of the EU is both unsatisfactory and unclear. Each pillar consists of a variety of legal instruments, which are not always the most suitable instruments for JHA, and this contributes to confusion. Also the division of powers between the pillars as well as within the pillars is obscure. This structure was in fact replaced in the Constitutional Treaty agreed on 18 June 2004 and signed on 29 October 2004, which does away with the awkward pillar structure and transfers most competences to the first pillar and to Community-level authority. The exclusive competence of the member states has been retained in a minimum of the most sensitive areas and some powers will remain under the exclusive exercise of EU 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 a complete stalemate on some issues.

The developments brought about by this Constitutional Treaty – now awaiting ratification – go with the grain of the development of the EU and conform to the principles of a federalist Europe. Should these developments enter into force, a clear scheme (even though the practicalities would be complex) could be presented of those powers exercised by the EU institutions alone, those shared between the European Union and the member states, and those reserved to the member states.

The powers attributed to the EU alone will be quite limited, restricted to offences against the financial interests of the EU, counterfeiting the euro and many matters related to free

movement, possibly including the crossing of the EU's external borders.

The second category (powers shared between the Union and the member states) is the most difficult but, in general terms it will include all offences of a serious nature – contained in the list appended to the European Arrest Warrant – that involve two or more member states. But the European Union's authority will 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 such as those touching state sovereignty (De Hert, 2004).

These 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 clearly identify 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 ones. Yet it would represent an important advance over the present situation, which is a confusing and unclear transitional regime. This regime could indeed last a long time even if the pillar structure is formally abolished by the Treaty revision.

2.1 The Treaties of Maastricht, Amsterdam and Nice

The Maastricht Treaty, also known as the Treaty on European Union (TEU), came into force on 1 November 1993. Building upon the foundations of the European Community, it marked the beginning of an important construct – the European Union. This marked a new step in the process of creating an ever-closer union among the peoples of Europe.

This new construct is based on three pillars. The first pillar consists of the European Communities, and is a term used to classify those powers or competencies explicitly conferred to the Communities by the Treaties establishing the European Communities.⁴ Within this framework the Community institutions may jointly exercise their sovereignty by drawing up legislation in their respective areas of responsibility. This EC law applies directly in the member states and may claim precedence over national law.

The second pillar is a new development. It elaborates a common foreign and security policy laid down in Title V of the Treaty on European Union. The third pillar is also new and makes

⁴ The first pillar is made up of the three European Communities (EEC, Euratom and ECSC), which have been deepened and enlarged by economic and monetary union. When the EU was established, the European Economic Community was renamed the European Community. The EEC Treaty became the EC Treaty. This change was intended to give expression to the transition from a purely economic community to a political union. But this change of name did not affect the three existing Communities (ECSC, Euratom and EC) since it did not entail any formal unification of them. In the course of the establishment of the EU, some institutions of the EC changed their names. The Council of the European Communities has since 8 November 1993 been referred to as the Council of the European Union. The Commission of the European Communities has become the European Commission. On 17 January 1994, the Court of Auditors was renamed the European Court of Auditors. Nevertheless, the legal acts of the respective bodies still constitute legal acts of the Community at any given time.

possible cooperation in the fields of justice and home affairs laid down in Title VI of the Treaty on European Union.⁵

The Maastricht Treaty was only a first milestone towards further reform as called for by the partisans of a stronger Europe (Apap, 2002 and De Hert, 2004).⁶ This first milestone was effective in initiating a process of reflection on the soundness and effectiveness of the legal framework and of the democratic nature of its procedures (Ludlow, 2001, p. 23, quoted in De Hert, 2004).⁷ The first outcome of this process was the Treaty of Amsterdam, signed in Amsterdam on 2 October 1997, entering into force on 1 May 1999. It amends the Treaty on European Union, the Treaties establishing the European Communities and certain related acts. This Treaty amplifies the content of the Maastricht Treaty in five main areas: freedom, security and justice; citizenship of the Union; external policy; EU institutions and closer cooperation. It also contains provisions aiming at simplifying and codifying the Treaties, in particular by renumbering the articles and removing from the European Treaties all provisions that the passage of time has rendered void or obsolete.⁸

The Treaty of Amsterdam was not considered to be an end in itself. It represented substantial progress in establishing a ‘constitutional’ bases for EU and Community policies and the process of democratisation, but did not include all the institutional reforms (extension of qualified majority voting, re-weighting of votes in the Council or composition of the Commission) desired by institutions such as the European Parliament or partisans of the supranational method (De Hert, 2004).⁹ The Amsterdam Treaty also did not respond to the structural need of cross-pillar coordination that was felt after the Maastricht Treaty (Pastore, 2002).¹⁰ Provision was made for further institutional adjustment. An intergovernmental conference, convened in February 2000, concentrated on points that had not been resolved in Amsterdam. The result of this conference and the political debates gave way to the Treaty of Nice (Best, 2002 and De Hert, 2004).

This Treaty, ratified on 1 February 2003, will enable considerable progress towards qualified majority voting and abandon the unanimity requirement for most first pillar issues.¹¹ The rule of unanimity has received bad press (Monar, 2002).¹² Qualified-majority voting is said to be a

⁵ Titles V and VI provide for intergovernmental cooperation using the common institutions, with certain supranational features such as associating the Commission and consulting Parliament.

⁶ The idea behind three pillars, i.e. three approaches towards Europe, should be viewed as a compromise between the partisans of the intergovernmental method and the partisans of the more communitarian or supranational approach, the former carrying more weight.

⁷ This author uses the term ‘Monnet method’.

⁸ For legal and political reasons the Treaty was signed and submitted for ratification in the form of amendments to the existing treaties. In order to make it more comprehensible and facilitate practical work, a consolidated version of the EU Treaty and the Treaty establishing the European Community was published, incorporating all the changes made by the Amsterdam Treaty.

⁹ See “The Maastricht and Amsterdam Treaties: Prospects for the European Union”, Fact Sheet 1.1.3, published on 16 November, 2000 (retrieved from www.europarl.eu.int).

¹⁰ Some even hold that the integration processes in both the second and the third pillar (with its splitting and partial communitarisation) that followed Amsterdam have made fragmentation risks all the more concrete and, correspondingly, the need for cross-pillar coordination all the more urgent.

¹¹ For a historical overview and a description of the Nice implications, see “Qualified Majority Voting: General Overview”, Fact Sheet (retrieved from <http://europa.eu.int/comm/archives/igc2000/geninfo>, December 2002, p. 4).

¹² It is considered to be one of the reasons behind the Union’s inability to live up to expectations in areas such as asylum, immigration, judicial cooperation and the fight against international crime.

more effective system in cases where an operational policy needs to be developed (Monar, 2002).¹³ Since the Amsterdam Treaty (1997), the Council has adopted most legislative instruments by qualified majority and in conjunction with the European Parliament under the co-decision procedure.¹⁴ Most justice and home affairs matters are, however, still firmly in the grip of the unanimity rule. The events since 11 September 2001 have stimulated the debate about an extension of qualified majority voting to most areas of justice and home affairs (Monar, 2002 and De Hert, 2004), but the preliminary post-Nice agenda did not provide for any further reform of the institutions.¹⁵

First pillar

In 1986, Art. 7A (Art. 14) the Single European Act of stated that “The internal market shall comprise an area without internal borders in which the free movement of goods, persons, services and capital is ensured in accordance to the provisions of this Treaty”.

This Art. gave rise to different interpretations of who has freedom of movement rights and the methods, including the compensatory measures involved, of implementing free movement of persons. The Single European Act did not clarify the question of the institutional framework of the compensatory measures for free movement of persons. While the programme of the Commission in this area had to be carried out according to Community standards and by the Community method, some member states considered that only the intergovernmental method was acceptable in matters at the core of national sovereignty. Progress has been made, however, in that member states have agreed on a common approach to foreigners’ rights.

Omissions and ambiguities in the Single European Act led to conflict between the Commission and certain member states on the competence of the Community Institutions with the result that member states decided policy by the inter-governmental method; a good example of the latter was the Schengen Agreement of 14 June 1985, followed by a Convention of 19 June 1990. Various episodes of the conflict about competence even provoked disagreement between Community institutions. Worn down by these disputes and the systematic blocking by the Council of Ministers, the Commission for the most part conceded the intergovernmental method in the field of justice and home affairs, in the hope that a pragmatic stance would make progress possible in this sensitive field. The European Parliament suffered most because it was to a large extent excluded from the decision-making process.

The Maastricht Treaty signed in 1992 gave comfort to the partisans of the intergovernmental method over those who were in favour of a more communitarian/supranational approach. The new Title VI, called “Co-operation in the fields of Justice and Home Affairs”, was nothing

¹³ Under the unanimity rule, each member state has a right of veto. As the number of member states increases, the danger that one of them may exercise that right increases accordingly. The veto can be used to block the decision-making process.

¹⁴ The policy areas in the first pillar, which remain subject to unanimity, include taxation, industry, culture, regional and social funds and the framework programme for research and technology development.

¹⁵ This ending of institutional reform was backed up with the argument that all the big projects required the construction of a political union, with most if not all the attributes of a European state – EMU, the Single Market, the Area of Freedom, Security and Justice, the common foreign, security and defence policies – are underway. Critical of this view, arguing that many issues and questions are still unresolved is Ludlow, 2001, p. 2. Note, however, that in 2004 a new intergovernmental conference is to be convened to consider a more precise delimitation of competences between the European Union and the member states, the status of the Charter of Fundamental Rights, simplification of the Treaties and the role of the national parliaments (Best, 2002, p. 8).

other than the formalisation of very slightly modified intergovernmental cooperation. The policy sectors covered by Title VI were referred to simply as “matters of common interest” (Art. K.1). This weak statement of intent was scarcely developed by Art. K.3, which states only “Member States shall inform and consult one another within the Council with a view to co-ordinating their action”. There was no clarification of whether Justice and Home Affairs cooperation is intended to provide for and/or encourage legislative initiatives, or whether practical, operational cooperation was the objective (Den Boer 1996). Rather than a clear distinction between supranational or intergovernmental co-operation, the Third Pillar occupied (and, what remains of it, still occupies) a half-way house, struggling to reconcile two very different institutional patterns, neither with primacy.

In the Maastricht Treaty, member states seemed happy to have a reference to the principle of subsidiarity included in the Treaty. The EC shall act “only if ... the objectives of the proposed action cannot be sufficiently achieved by the member states and can therefore, by reason of the scale or effects of the proposed action be better achieved by the Community” (Art. 3b [now Art. 5]).

In the Amsterdam Treaty, the transfer of competence of the third pillar towards the first pillar seems impressive: all the matters listed under Art. K.1 of the Maastricht Treaty were transferred to the first pillar, except for police and judicial cooperation in penal matters, which remain in the third pillar. The new Title IV “Visas, asylum, immigration and other policies related to free movement of persons”, which brings together the most important provisions, is subject to a special institutional mechanism providing for derogation on numerous points from the supranational approach (Art. 67). It also allows for a transition period – five years after the entry into force of the Treaty before majority voting is introduced. Policy towards third-country nationals until the Amsterdam Treaty was one clear example of the limits of European integration. The Amsterdam Treaty tried to address the various *lacunae* by assigning to the Community objectives to be achieved within a fixed timetable. Parliament may eventually be involved if the Council of Ministers accepts the co-decision procedure. Furthermore, the transfer of competence to the first pillar implies recognising the authority of the European Court of Justice in the new areas of Community competence. The Nice Treaty has tried to address some of these *lacunae*, though it will be the new Constitutional Treaty, once ratified, that will have to make the break with the past.

Prior to the Amsterdam and Maastricht Treaties there was only this one pillar and there was definitely no such thing as a third pillar creating a European forum to discuss matters relating to public order. Justice and home affairs did not exist as a policy-making area in the European arena – it was purely a matter of national competence. The member states were also responsible for the enforcement of Community law. Matters relating to public order remained the sole competence of the member states and in particular their ministries of justice and the interior, a situation that gave birth to the term ‘justice and home affairs’. Community law had simply nothing to say on such matters. Until then, Europe remained a merely economical instrument until the late 1990s and important initiatives in the field of justice and home affairs, such as Trevi and Schengen,¹⁶ were set up outside the European structure. This was a

¹⁶ Formal police cooperation between the member states’ representatives began in 1976 with the creation of working parties known as ‘Trevi groups’. Its main subjects were terrorism and the organisation and training problems of police departments. By 1989 there were four working parties, on terrorism, police cooperation, organised crime and the free movement of persons, headed by a group of senior civil servants responsible for preparing decisions for the Council of Ministers. This system prefigured the intergovernmental structure set up by the Schengen Agreements and the Treaty of Maastricht. In the early 1990s, a majority of 13 EU member

deliberate choice owing to sensitivities about sovereignty and problems of a practical and ideological nature. Unlike the Single Market, cooperation and policy-making in this area involves continuing and increasingly intensive cooperation among government agencies in the member states. Moreover, creating a European judicial area involves policy convergence and approximation of laws. It also involves ideological concepts, e.g. ‘a high level of security’, as well as argument on basic values. All these may be conceived differently in different national settings.

Consequentially, the Community has never adopted any directives or regulations aimed at the harmonisation of rules of procedure, civil administration or criminal law in the member states (De Hert, 2004).¹⁷ However, nature abhors a gap. Communitarian initiatives with a justice and home affairs stamp did come to light within the European structure. As early as 1962 a working group dealing with the criminal aspects of Community law was set up by the European Commission (Thomas, 1993; Bleeker, 1993 and Stessens, 1994). Before Maastricht, and with no clear authorisation, the Community was accommodating the request to elaborate legislation at EC level covering new forms of offences with an international character (Demagnet, 1985). The EC Community was pushing member states to adopt criminal sanctions with regard to money laundering, drugs and weapon trafficking (Buruma, 1995 quoted in De Hert, 2004).

As De Hert (2004) underlines, one important initiative was the creation in 1989 of the Anti-Fraud Unit of the European Commission (UCLAF) with a view to protecting the financial interests of the European Communities (De Hert, 1995). UCLAF (since 1999 ‘OLAF’) plays a coordinating role in the complex investigations in the member states concerning the prosecution of this form of serious crime. Furthermore, the 1991 EC Money Laundering Directive obliged the member states to create financial intelligence structures that collect and analyse information from financial institutions on irregular or suspicious transactions. The foregoing examples show that some justice and home affairs issues were dealt with within the Community structure (first pillar) without an explicit mandate.

Third pillar

As explained in previous sections, the Treaty on European Union brought about a three-pillar structure, which also added further dimensions to the development of Europe by integrating an existing economic framework into a political union under construction. This was a historical turning point for justice and home affairs as it ceased to be considered a purely national matter. Cooperation in this area became one of the objectives of the new political construct. According to Art. B of the TEU in the Maastricht version, “The Union shall set

states had jointly paved the way for reinforced cooperation in multiple areas, such as external border control, asylum policy, and police and justice cooperation in criminal matters, through the Schengen Agreements. From the outset, Schengen was launched as a temporary initiative in order to test a common framework of internal security control and to gradually expand this framework to the whole European Community. This integration was meant to bring an end to the undesirable external institutional, political and legal existence outside the European Union. The incorporation of the Schengen *acquis* into the framework of the European Union became a fact when the Treaty on European Union (TEU) entered into force on 1 May 1999.

¹⁷ “Under the terms of the Community treaties (...) the harmonisation or approximation of the provisions of procedural law of the Member States was not considered a Community objective, even if it could be argued that such harmonisation is not necessarily excluded by the terms of Article 100, 100a and 235 TEC (in the Treaty of Maastricht versions)” (Schutte, 2000, p. 45).

itself the following objectives: (...) to develop close cooperation on Justice and Home Affairs”.

The means to implement this objective is elaborated in Title VI of the TEU, “Provisions on cooperation in the fields of justice and home affairs”.¹⁸ Through the third pillar European cooperation in this field of justice and home affairs is made possible.¹⁹ The widening of the scope of the European institutions was deemed necessary to maintain and develop the Union as an Area of Freedom, Security and Justice (AFSJ), in which the free movement of persons is assured (cf. Art. 2, TEU). The Europeanisation of justice and home affairs was seen as part of a series of flanking measures intended to compensate for the security deficit arguably arising from the abolition of internal border controls (De Hert, 2004). This argumentation, based on the principle of subsidiarity, maybe indeed true for first pillar matters, but where does one situate third pillar provisions? The Council’s European fact sheets answer this question positively, but a closer look reveals a quick step from problems “of great concern to all the Member States” to problems that should be dealt with on a European level (De Hert, 2004).²⁰

Actually, against this background, one may justifiably argue that the third pillar was not much more than an attempt to rationalise various ongoing initiatives regarding police, customs and judicial cooperation that were launched by the member states in the 1970s (judicial cooperation, for example, originated in the framework of the Council of Europe and dates

¹⁸ The first article of this Title (Art. K.1.) states that

For the purpose of achieving the objectives of the Union, in particular the free movement of persons, and without prejudice to the powers of the European Community, Member States shall regard the following areas as matters of common interest: 1. asylum policy; 2. rules governing the crossing by persons of the external borders of the Member States and the exercise of controls thereon; 3. immigration policy and policy regarding nationals of third countries:

- (a) conditions of entry and movement by nationals of third countries on the territory of Member States;
- (b) conditions of residence by nationals of third countries on the territory of Member States, including family reunion and access to employment;
- (c) combating unauthorised immigration, residence and work by nationals of third countries on the territory of Member States;
- 4. combating drug addiction in so far as this is not covered by 7 to 9; 5. combating fraud on an international scale in so far as this is not covered by 7 to 9; 6. judicial cooperation in civil matters; 7. judicial cooperation in criminal matters; 8. customs cooperation; 9. police cooperation for the purpose of preventing and combating terrorism, unlawful drug-trafficking and other serious forms of international crime, including if necessary certain aspects of customs cooperation, in connection with the organisation of a Union-wide system for exchanging information within a European Police Office (Europol).

¹⁹ The third pillar brings together the ministries of justice and interior and their departments of the member states of the EU. The Community institutions (Council, Parliament, Commission and court) are also involved. The third pillar permits dialogue, mutual assistance, joint effort and cooperation between the police, customs, immigration services and justice departments of the member states. See the European fact sheet on Cooperation in the Field of Justice and Home Affairs, Council of the EU, Office of European Publications, Luxembourg (2002).

²⁰ See the European fact sheet on *Cooperation in the Field of Justice and Home Affairs* the Chapter II, “Is there a need for cooperation in the fields of Justice and Home Affairs?”, European Council, Office of European Publications, Luxembourg (2002), which states,

The Member States of the European Union can no longer tackle certain problems in dispersed order, but must combine their efforts. Drugs, organised crime, international fraud, trafficking in human beings and the sexual exploitation of children are all problems of great concern to all the Member States of the European Union. These disorders know no frontiers. The aim of the European Union is to become an area of freedom, security and justice, and not an area for all manner of trafficking. The Union’s citizens want to be able to benefit fully from the freedom of movement being brought about by the development of the Union, and at the same time to be protected from threats to their personal security. That security must remain an important objective in the context of enlargement of the Union.

back to the 1950s). Groups of experts in various areas used to meet and they multiplied on an intergovernmental basis, with no direct link with the European Communities.

The Treaty on European Union, particularly its Title VI, provided a framework for that cooperation. It provided a new structure with a permanent secretariat, combined efforts and named the actors and joint instruments for dealing with sensitive issues.²¹ Another way of understanding the Maastricht Treaty and of viewing the third pillar is to look at it as a settlement between two opposing views on the future of the Europe Union: supranational or intergovernmental. Through the third pillar idea the partisans of the intergovernmental method are given comfort in areas related to justice and home affairs (Apap, 2002).

In light of this discussion between supranationalism and intergovernmentalism, it is important to read through the legal provisions with care. All the terms used have their meaning. The policy sectors covered by Title VI in the Maastricht version of the TEU are not “powers”, but “matters of common interest” (Apap, 2002).²² Moreover, the policy sectors are only picked up on an EU level “for the purpose of achieving the objectives of the Union”, and “without prejudice to the powers of the European Community”. Further, it is not said that these matters of common interest fall completely under the third pillar construction. The language used for areas such as ‘immigration policy’, ‘conditions of residence by nationals of third countries’ and the fight against ‘drug addiction’ is much less restrictive than that for ‘fraud’, ‘civil matters’ or ‘criminal matters’ (De Hert, 2004). In fact, only the transnational aspects of these second groups or domains are considered.

With the entry into force of the Amsterdam Treaty, only matters related to judicial cooperation in criminal matters remained in the ‘new’ third pillar. The focus was placed on facilitating international cooperation, rather than a real harmonisation of criminal laws or rules of procedure or on operational policies.²³ Without doubt this prudent use of the third pillar is the result of legal impediments,²⁴ legal vagueness²⁵ and self-imposed intergovernmental caution.²⁶

²¹ See Chapter IV, “Is cooperation in the field of Justice and Home Affairs effective?” in the fact sheet on *Cooperation in the Field of Justice and Home Affairs*, op. cit., pp. 7-8.

²² This author considers these terms as a “weak statement of intent”.

²³ Under the heading ‘cooperation in civil matters’, the third pillar actors dealt with problems connected with the mutual recognition of judgments in divorce or child custody cases or commercial questions (bankruptcy) where two or more member states are involved. Cooperation in criminal matters concerned questions relating to extradition or mutual legal assistance.

²⁴ Art. K.5, TEU (Maastricht version) is very clear with regard to operational policies: “This Title shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security”.

²⁵ Art. K.3 only stated that “Member States shall inform and consult one another within the Council with a view to coordinating their action”. Art. K of the TEU scarcely developed the way these areas of common interest should be tackled. There was, for instance, no clarification of whether the cooperation was intended to provide for and/or encourage legislative initiatives, or whether practical operational cooperation was the objective (see Apap, 2002, p. 46).

²⁶ This attitude also accounts for the choice of soft law whenever sensible subjects such as harmonisation of criminal law was on the agenda; see Joint Action of 17 December 1996 adopted by the Council on the basis of Art. K.3 of the Treaty on the European Union concerning the approximation of the laws and practices of the member states of the European Union to combat drug addiction and to prevent and combat illegal drug trafficking, OJ L 342, 31 December 1996.

Everything that came close to the heart of law enforcement was dealt with in conventions and all the rest was dealt with in soft-law instruments such as resolutions and joint actions.²⁷

2.2 Scrutinising the principle of subsidiarity

The principle of subsidiarity²⁸ is explicitly referred to in Art. 5 TEC and Art. 2 (B) TEU. Its explicit reference in the Treaties makes it therefore liable to judicial scrutiny, although this has not always been the case.²⁹ Also one can barely claim say that there is a tradition of strict scrutiny of the application of the principle (De Hert, 2004) as this tends to be more of a theoretical exercise by the Court rather than a matter that the EU's bodies would apply to the letter. The EU's bodies actually have wide discretion regarding the form that this takes, which the Court is bound to respect.³⁰

The principle of subsidiarity in its current formulation is not capable of safeguarding a strict division between the national and European sphere. The power of judicial review is limited and much is left to political interplay. This is especially true in the third pillar where almost no action is taken without the involvement of the member states. Whereas in Community matters member states are considered to be the prime actors in protecting the division (to the benefit of the national sphere that could be endangered), in the third pillar they could actually form a threat to the principle (De Hert, 2004). In its current formulation the principle does not protect against activist states jumping the scales for non-legitimate (i.e. non-treaty based) objectives. Pending proposals to improve the 'reviewability' of the principle are, in this connection, insufficient.³¹

European Union citizens cannot derive any rights directly from either Art. 5 TEC or from Art. 2 TEU. Since justice and home affairs are intimately connected to liberty interests, individuals should be given a right to have judicial testing by the Court. Moreover, the principle should be more explicitly reaffirmed in the Treaty chapters on the third pillar. The duty to respect the

²⁷ Compare "During the period between the entry into force of the Treaty of Maastricht on 1 November 1993 and the entry into force of the Treaty of Amsterdam in 1999, a considerable number of legal instruments have been adopted by the Council of the European Union in the field of Justice and Home Affairs, including on judicial and police cooperation in criminal matters. In the judicial and police field there are some 17 Conventions (including protocols to Conventions), more than 20 'Joint Actions' and a dozen resolutions and recommendations. Going through these instruments, one notes that questions related to harmonisation or approximation of rules in the field of procedural criminal law have hardly been touched" (Schutte, 2000, p. 48).

²⁸ In its judgments of 12 November 1996 in Case C-84/94 (*ECR I-5755*) and 13 May 1997 in Case C-233/94 (*ECR I-2405*), the Court found that compliance with the principle of subsidiarity was one of the conditions covered by the requirement to state the reasons for Community acts, under Art. 253 (190) TEC. This requirement is met even if the principle is not expressly mentioned in the act's recitals but it is clear from reading the recitals as a whole that the principle has been complied with.

²⁹ The principle of subsidiarity has not just applied since its incorporation in Art. 5 TEC. As long ago as 1951, Art. 5 of the ECSC Treaty stipulated that the Community should exert direct influence on production only when circumstances so required. And although it was not expressly so defined, a subsidiarity criterion was included in Art. 130r TEC, on the environment, by the Single European Act in 1987. Nevertheless, the Court of First Instance of the EC ruled in its judgment of 21 February 1995 that the subsidiarity principle was not a general principle of law, against which the legality of Community action should be tested, before the EU Treaty entered into force; see "Subsidiarity", *op. cit.*, 1 with ref. to Court of First Instance, Judgment of 21 February 1995, *ECR*, II-289 at 331.

³⁰ "Subsidiarity", *op. cit.*, 3.

³¹ As long ago as 1990 Parliament suggested the introduction of an Art. 172 (a) into the TEC to give the Court of Justice the right to determine whether a proposal breaches the limits of Community competence (referral to the Court would take place after a legal act was adopted but before it was implemented, and would be open both to the member states and the institutions).

principle should be laid more firmly on the shoulders of the member states. An alternative could be to rewrite Protocol 30. This Protocol obliges the Commission to consult widely before proposing legislation and, wherever appropriate, publish consultation documents and to justify the relevance of its proposals with regard to the principle of subsidiarity; whenever necessary, the explanatory memorandum accompanying a proposal will give details in this respect.³² This and other obligations that demand a true engagement with the principles are useful instruments that qualify for being applied to the member states.

2.3 EU aid programmes and support for weak areas

Prior to accession, as stated in Monar (2004), between 1997 and 2001 a total of €541 million under the PHARE programme was allocated to various programmes in the JHA domain (De Lobkowicz, 2002, quoted in Monar, 2004). As there are still substantial capability deficits – especially in the areas of training and equipment – following enlargement it seems crucial that specific aid instruments are designed that will take over from the existing pre-accession instruments, which are currently scheduled to end at the latest with the day of accession.

3 Consequences of enlargement on justice and home affairs

It is imperative that the EU institutions and the new member states should agree upon clear benchmarks and a transparent priority order for the JHA measures that still need to be accomplished after enlargement. The new member states will still be monitored for certain outstanding matters; however, they should be involved in a close dialogue with the EU to ensure that regional sensitivities are taken into account and that practical measures are not overlooked. They both have equally high stakes in a successful accession, as well as fully efficient, effective and operational JHA measures. For these to occur, it is recommended that a balanced approach consisting of open and accepting dialogue (instead of continual dictation and counter-reactive statements) and practical implementation in the technical aspects take place. Questions from both sides need to be clear, precise and appropriate.

3.1 Fundamentals of EU JHA policy post-enlargement

The fundamentals of JHA policy post-enlargement should incorporate the following: trust and confidence between the candidate countries and EU, a democratic method of policy-making through the elimination of the unanimity procedure and a clear division of EU and national competencies. It can be implied that different legal cultures often clash when forced to come to a compromise; thus the basic element of trust is of utmost importance. If the last two factors are applied, it will become clear who has the mandate to act within a distinct capacity, and thus the responsibility that comes with the post can then become accountable.

³² Protocol 30 obliges the Commission to a) consult widely before proposing legislation and, wherever appropriate, publish consultation documents (except in cases of particular urgency or confidentiality); b) to justify the relevance of its proposals with regard to the principle of subsidiarity; and c) whenever necessary, to give details in this respect in the explanatory memorandum accompanying a proposal. The financing of Community action in whole or in part from the Community budget should require an explanation, take duly into account the need for any burden, whether financial or administrative, falling upon the Community, national governments, local authorities, economic operators and citizens, to be minimised and proportionate to the objective to be achieved and to submit an annual report to the European Council, the European Parliament and the Council on the application of the principle of subsidiarity. This annual report must also be sent to the Committee of the Regions and to the Economic and Social Committee.

3.2 Scenarios of crime, law and justice in an enlarged European Union

There needs to be a clear distinction between an imaginary risk and a real one. Migratory policies have often suffered at the hands of imaginary insecurity, which proclaims that migrants are the derivatives of insecurity. These myths further complicate the situation of the candidate states and their possible destabilising potential towards the EU's immigration policy. Thus, for the EU's immigration policy to strike a balance between security and migration, it should include the following factors:

- a clear understanding of the subjects in discussion; and
- a highly distinct separation between myths and realities.

The emerging theme is that traditional aspects of crimes will remain after enlargement. Yet, because of new technologies that facilitate communication and transport, other areas of crime of a more trans-border character will bring new façades to the ever-growing challenges to the area of justice and home affairs. In order for the EU to be effective and efficient in combating crimes, it needs to first expand the operational powers of EU organisations such as Europol, and second, to increase or maintain close cooperation with non-EU organisations such as the members of the stability pact and Council of Europe. Questions that are left open-ended in this session are evaluative, such as whether these organisations/agencies have been efficient and effective.

And most important of all, how efficient and effective will these organisations be when other agencies are created alongside and have to operate within the remit of 25 to 27 member states?

3.3 Towards an immigration and asylum policy for Europe

The overall feeling is that the EU's move towards a common immigration policy has not been accomplished with the openness that it required. In fact, it has become increasingly restrictive; negotiations in the Council have embraced the lowest common denominator. Although the role of the state has been diminishing in immigration policies, the EU is the exception. It still retains much of the power that states exerted in past years. Border guards are necessary, but the tightening of the borders does not necessarily provide security. The difference between immigration and asylum needs to be strongly highlighted and maintained.

Hence, the EU can and should maintain the element of openness in establishing a common immigration policy, through: 1) adopting basic integration measures – the adoption of the Directive on family reunification was a first step in this direction; 2) avoiding the acceptance of the lowest common denominator; and 3) maintaining a strict separation between asylum and immigration issues and measures. Some of the questions that remain open on the practical side include how to distinguish between migrants and asylum-seekers, along with how the European Union can maintain a secure border while providing openness for those who seek it.

3.4 Future of justice and home affairs policies and processes

Normative aspects need to be included in the adopted policies, bringing intelligence services closer to the decision-making process. A first step is strengthening Europol's operational powers while bringing Europol and other third pillar agencies under the scrutiny of the European Parliament and European Court of Justice. Access to the European Court of Justice should be improved, and an annual report needs to be submitted by the European Parliament

summarising activities and priorities in the area of criminal law. Adding to these suggestions is the dimension of flexibility, it is recommended that all approaches taken to adopt, revise and implement future JHA policies should incorporate some element of flexibility so as to incorporate differences between the 'old' EU member states and the 'new' ones. Nonetheless, it should be noted that flexibility contains both risks and opportunities, and a desired policy would explore the opportunities while successfully avoiding the risks.

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