



## **Towards Closer Partnerships**

### **Requirements for More Effective JHA Cooperation in an Enlarged EU**

**Joanna Apap**

#### **Abstract**

The requirements of good policy-making in JHA are that decision-makers have a clear mandate and that those agencies charged with policy implementation are well-managed. Who does what, who has responsibility and the lines of accountability should be clear to the public and to professional groups affected by the policies. At the most general level, the provision of a clear mandate is a constitutional question. The present pillar structure of the EU is unsatisfactory and unclear. Should the Constitutional Treaty that was politically adopted at the intergovernmental conference (IGC) on 18 June 2004 enter into force as foreseen in 2009, the pillar structure would cease to exist, the European Parliament would have a greater role in the co-decision procedure (Article III-302) and the European Court of Justice would be conferred the power to review and interpret all these policies. In the proposals for the next IGC, the pillar structure should be replaced by a simple division of powers – those reserved for the EU, those remaining exclusively with the member states and those shared by the EU and the member states in an enlarged European Union.

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

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# **TOWARDS CLOSER PARTNERSHIPS**

## **REQUIREMENTS FOR MORE EFFECTIVE JHA COOPERATION IN AN ENLARGED EU**

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#### **Introduction**

Cooperation in justice and home affairs (JHA), a policy area once considered to be only slowly evolving in the direction of Europeanisation, has recently become one of the most dynamic policy domains in the EU. The 1999 Tampere European Council provided the necessary political boost for intensifying collaboration among member states on immigration and asylum policy as well as on police and judicial cooperation. The Treaty of Amsterdam gave the European Commission a mandate, shared with the member states, to make proposals for translating the broad political objectives outlined in the Treaty into specific policy measures. The events of 11 September 2001, followed by increasing public concern over illegal immigration, strengthened the political resolve of the member states to overcome differences and proceed faster with the implementation of common initiatives. This was reinforced further by events of 11 March 2004 in Madrid.

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

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

At the same time as creating an area of freedom, security and justice, the EU has announced the firm intention to accept new member states. This enlargement of the EU will increase the cultural, social and economic diversity of the Union and place strains on its decision-making

processes. The southern and eastern enlargement of the EU is the first enlargement that involves significant cooperation in JHA. Furthermore, this is occurring at a critical moment for the implementation of new initiatives at the EU level. The coincidence of these developments poses a major challenge for member states, which are confronted with the necessity to strengthen collaboration among themselves and at the same time incorporate new members in the EU decision-making structures, making agreement on common actions potentially more difficult

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

### **Making the system work**

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

#### *The concept of trust*

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

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

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

Also central to this policy area, the idea of trust underpins the debate about the ‘risk society’ – and assessment of risk is now at the core of planning internal security policies. In particular, the changing nature of risk and its implications for contemporary politics and society has

become an important debate in social sciences. Modernisation, as Ulrich Beck and Anthony Giddens argue, has produced unintended risks, which are now a primary preoccupation of citizens and policy-makers. Awareness of and anxiety about risk have become ubiquitous in contemporary society and are the outcomes of scientific and technological development. ‘Manufactured uncertainty’ has penetrated everyone’s life as most human activities have grown to involve apparently incalculable risks. Political debate, as a consequence, has been transformed and is increasingly concerned with the management of risks.

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

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

Yet belief in the virtues of trust is neither uniformly nor universally shared. Shared values and norms are often built through institutions that express common bonds. Institutions can reduce the transaction costs of exchanges among actors, provide information to governments on the policy options available, offer 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. Trust is part of the normative context established through greater interaction among European states and citizens through working together in EU institutions.

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

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

In police cooperation, there is often a failure along the vertical information exchange (local-national-European) to communicate to the higher level. Further, any evidence of police

corruption has a destructive effect on trust. The criminal law procedures thought necessary in some countries have also had a destructive effect on trust. The use of pre-trial detention in some countries for EU nationals from other countries was a cause of misunderstanding that is now being addressed.

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

Up-to-date, operationally relevant information requires further development of well-designed databases to give information about matters such as procedures, legal requirements, operational policies, police organisation and contact persons. The frustrations of not being able to quickly find the precise information required on databases are well known. Adequate time is probably the most difficult condition to provide. Compared with the compelling demands on police time, making space for trust-building in European cooperation may seem a nebulous objective to some professional groups, especially the police.

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

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

### *The concept of flexibility*

The literature on the concept of flexibility is extremely diverse. Flexibility was popularised in the 1980s by economists and specialists in industrial relations in studies of the labour market. In the 1990s there was an application of the concept in policy studies, particularly in the international arena (Davis & Finch 1993; Jackson et al., 2001). In government and administration the idea of flexibility is central to the literature on ‘new public management’, particularly in arguments in favour of flexibility to meet client demands (for police, see Walker, 2001). The most application of the idea has been to the European Union itself after the negotiation of the Treaty of Amsterdam (de Búrca & Scott, 2000; Den Boer &

Guggenbühl, 1998). A common thread in this diverse literature is that flexibility enables individuals and groups (and even states) to adapt to different and changing circumstances in order to pursue the same overall objectives.

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

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

The most important form of flexibility in the justice and home affairs area is flexibility in implementation of measures. This applies to all instruments used in JHA (for example framework decisions, decisions, recommendations, action programmes and conventions), excepting those contained in pillar 1 (some civil law legislation and all freedom of movement rules). Member states must, for example, have established central offices for the management of the Schengen system and for cooperation with Europol, but it is at their discretion how these are staffed, by whom and according to what rules of organisation. The concept of flexibility can be widened to include multilateral and bilateral agreements, common in the law enforcement area, between member states outside the European Union framework and with third countries.

Almost invariably, flexibility has unintended and frequently negative consequences. It is potentially in conflict with the other desirable values discussed in this paper. It creates greater uncertainty, which can undermine relations of trust since one of the requirements of trust is predictable behaviour. Lack of knowledge about how other states are implementing measures can create serious suspicions about whether they are implementing them at all. It may undermine systems of coordination because it allows very different arrangements in the member states for implementing policies – thus who coordinates them with becomes problematic. Efficiency can be reduced because in a complex cultural area such as the EU, flexibility can be interpreted in different ways in different member states and by different

professional groups, leading to misunderstandings. Also the costs, particularly information costs, are likely to increase considerably. Flexibility as now practiced in the EU creates a very complex world, raising problems of comprehensibility even for the well-informed.

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

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

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

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

Redeployment and re-training of personnel is one of the difficult preconditions of flexibility of police, magistrates, immigration officials and personnel of ministries of justice and the interior. The difficulty relates to the time constraints of these professionals, their conservatism and *esprit de corps*, along with certain political blockages.

The JHA programme AGIS (a follow-up to, among others, the OISIN programme) mainly addresses the training aspect of the problem. Its objectives are *inter alia* to

- raise language skills and knowledge of legal and operational terminology;
- promote awareness of legislation and operational procedures through training, exchanges and study visits;
- organise joint operational projects;
- organise briefings and debriefings of joint operational projects; and
- provide information, training, research, operational studies and evaluation.

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

### *The concept of coordination*

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

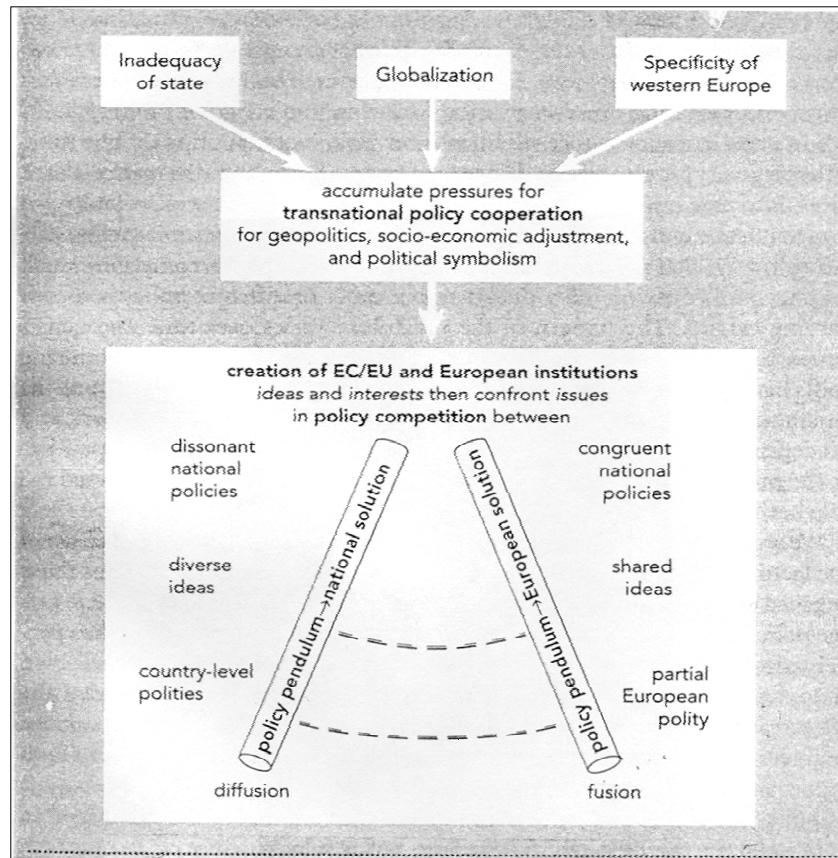
In the field of justice and home affairs, policy coordination fluctuates over time as a result of a shift in interests and loyalties of the main actors. The analytical framework provided by the pendulum model proposed by Helen Wallace (Wallace, 1996, p. 13) is useful in understanding this fluctuation.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

The model is based on three premises:

- the EU states are politically inadequate;
- globalisation has a significant impact; and
- the European region has specific features.



Figure 1. Pendulum model on policy coordination



Choices between national policy and various forms of transnational collaboration are subject to political competition and are thus inherently unstable. An example is in immigration policy: member states have very different expectations and traditions with regard to this issue and wish to control it, but pressures and incentives accumulate for strengthening collective European action, giving the transnational field at least a temporary advantage. But this model suggests that neither field will win a decisive or permanent victory. For example, notwithstanding the common challenges relating to policy towards resident third-country nationals in the EU and immigration, policies in the various EU member states have continued to remain different from each other to a certain extent. In this and other fields, evolving arrangements are conceived as a set of similar policies, so that national sovereignty and prerogatives need not be infringed. As one Commission official put it, “a great deal of time [is] spent negotiating legal texts which [are] later watered down to carry as little legal obligation as possible to ensure they are acceptable to all member states”.

Thus Title VI of the Maastricht Treaty confirmed intergovernmental cooperation as the proper way to deal with JHA matters. In addition, the Treaty failed to define whether the aim of justice and home affairs cooperation was to provide for or encourage legal initiatives (or both), or rather develop a practical, operational cooperation (Den Boer, 1996). Its economic provisions increased pressure towards collective EU measures in other fields, creating conditions for further integration in JHA. To borrow Helen Wallace’s words, this allowed “ideas and interests [to become] congruent and shared across borders and hence mutually compatible and reinforcing”. The potential for policies at a transnational level was embodied in the Treaty of Amsterdam, but this was the case only with regard to some issues. The

Tampere Conclusions and the accompanying scoreboard, together with the Commission's right of initiative in the JHA area, are important new instruments of policy coordination. But they are far from settling the issue: the pendulum between state-centred and EU-level solutions is likely to go on swinging for some time.

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

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

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

### *The concept of efficiency*

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

Efficiency is a concept that has been a particular preoccupation of economists. Pareto made the most influential contribution to the definition of efficiency in his discussion of

maximising welfare, positing that an efficient outcome is one that makes some people better off without worsening the situation for others. Pareto-optimal policy solutions bring additional net benefits for some of the parties concerned while not incurring costs to others. Agreeing on a cooperative JHA policy solution that meets the Pareto-efficient criteria may be politically unsustainable. Policy-makers at the political level are rarely concerned with efficiency only – often they scarcely take it into account. Calculations of national interest along with political/electoral impacts are often given much higher priority. Nevertheless, the assessment of policies in terms of Pareto optimality is a valuable reminder to the highest level of decision-makers that other criteria exist.

Currently, benchmarks for efficient policy in this field do not exist, although the Tampere scoreboard provides a yardstick for efficient policy-making (in the sense of whether decisions are taken in a timely manner). The Tampere Presidency Conclusions of 1999 and the Tampere scoreboard are the boldest and the most far-reaching documents approved by all member states. The former laid out a broad vision for “a union of freedom, security and justice” and called for specific common actions in four broad areas: asylum and migration policy, justice, fight against crime, external policy *vis-à-vis* third countries (European Commission, 2001). It put forward a strategy on what objectives the EU should pursue and what instruments it should seek to acquire within the clear timeframe set out in the scoreboard. It also introduced a biannual review process, conducted by the Commission, of the progress achieved.

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

Even in the area of immigration and asylum, where the ‘pillar switch’ (from the third to the first pillar) was expected to create a momentum for improved and more efficient decision-making, progress has been slow. The reasons are that unanimity rule is still required for most decisions and political will for making concessions and speeding up negotiations has been lacking. Abandoning the unanimity rule in blocked areas would be an efficiency gain. The timely manner in which the Commission proposes legislation is not yet sufficient to ensure positive results in the immigration and asylum policy domain.

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

Cost-benefit analysis is an important way of assessing efficiency and has the advantage that a large resource of practitioner experience is available. It has limited but useful application in the JHA field to specific activities of particular agencies. Quality audits developed by

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

More generally, efficiency has to be assessed in terms of fundamental but intangible criteria such as building trust among member states, allowing for flexibility in policy formulation and implementation, and taking into consideration the feasibility of convergence among member states in the specific sub-fields of JHA cooperation. What is needed is an evaluation that is both pragmatic and imaginative on what is achievable given the existing constraints. This evaluation should be developed by an observatory on the implementation of JHA policy. The establishment of such an observatory will be one of the principle objectives of the forthcoming FP6 Integrated Project, CHALLENGE, which will build upon the work of the current FP5 project, ELISE.

Some institutional features of the EU have impacts on efficiency, partly because they make the system less consolidated than it should be. Changing the EU presidency brings new priorities to the agenda of the Council every six months and JHA issues are not always a top priority. Indeed, the Commission has been consistent in its efforts to develop a coherent strategy for different issue areas of JHA. Yet many proposals tabled by the Commission are delayed, pending approval by the Council of Ministers. Unanticipated events can disrupt consistency and continuity in the policy process as the events of 11 September 2001 and 11 March 2004 in Madrid have amply demonstrated.

## **Recommendations**

1. The EU Commission should propose a trust-building strategy in JHA, which should include all the professional groups involved in the member states. In the first instance, this should be done by evaluating and coordinating existing policies that contribute to trust-building.
2. A quality audit should accompany an audit of accounts for the EU agencies involved in JHA. This quality audit should include specialists in management, public administration, cultural anthropology and social psychology, as well as those from member states with experience in quality audits.
3. Research should be commissioned on the requirements for cooperative arrangements among EU agencies in JHA, with a view to proposing instruments of coordination and assessing whether any changes in the remit of the agencies are desirable.
4. An independent observatory for monitoring the implementation of JHA policy should be established, which should publicise best practice as well as indicate omissions. This observatory should be managed by a small board appointed by the European Council and consist of individuals drawn from the world of practice as well as acknowledged authorities on EU policies.

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