



Project no. CIT1-CT-2004-506392

NEWGOV **New Modes of Governance**

Integrated Project
Priority 7 – Citizens and Governance in the Knowledge-based Society

**Specific factors, typology and development trends of modes of governance
in the EU Justice and Home Affairs domain**
reference number: 1/D17

Due date of deliverable: October 2005
Actual submission date: 31 May 2006

Start date of project: 1 September 2004

Duration: 48 months

Organisation name of lead contractor for this deliverable:
Université Robert Schuman de Strasbourg; Jörg Monar

Project co-funded by the European Commission within the Sixth Framework Programme (2002-2006)		
Dissemination Level		
PU	Public	X
PP	Restricted to other programme participants (including the Commission Services)	
RE	Restricted to a group specified by the consortium (including the Commission Services)	
CO	Confidential, only for members of the consortium (including the Commission Services)	

Summary

EU governance in the domain of justice and home affairs (JHA) has developed substantially since the entry into force of the Treaty of Amsterdam. It is marked by a number of determining factors specific to this domain such as the diversity of the policy fields covered, a particular focus on cooperation and coordination issues, a strong operational dimension and the artificial divide between the “first” and third pillar” fields. On the basis of a detailed analysis of the texts adopted by the JHA Council in the period 1999 to 2005 four modes of governments can be distinguished, *tight regulation*, *framework regulation*, *target setting* and *convergence support*. Especially the last two modes comprise a number of distinctive features of EU governance in this domain, such as the extensive use of multi-annual programme documents and collective/mutual evaluation reports. These phenomena can be explained both by the Member States’ preference for particularly ‘light’ forms of governance in sensitive areas and by the strong operational dimension of the JHA domain for which ‘hard’ regulation is often inappropriate. The strong reliance on supporting institutional structures, in particular the agencies Europol, Eurojust and Frontex, is a further distinctive feature. It can be explained by the preference of Member States for ‘light’ institutional governance structures which can facilitate the interaction between the national systems rather than integrating them through legislative harmonisation and the creation of institutions with supranational powers. As regards main trends, considerable variations of the ratio between the use of binding and non-binding measures can be observed as well an increasing blurring of the divide between the (communitarised) “first” pillar fields (Title IV TEC) and the (intergovernmental) “third” pillar fields can be observed which can be interpreted as a pragmatic reaction to the different constraints in the individual fields.

Contents

1.	INTRODUCTION	4
2.	SPECIFIC FACTORS OF EU GOVERNANCE IN THE JHA DOMAIN	5
2.1.	THE DIVERSITY OF THE JHA POLICY FIELDS	5
2.2.	THE PARTICULAR SENSITIVITY OF JHA POLICY FIELDS FROM A SOVEREIGNTY, TERRITORIALITY AND POLITICAL POINT OF VIEW	5
2.3.	THE FOCUS OF EU ACTION ON COORDINATION AND COOPERATION RATHER THAN INTEGRATION	6
2.4.	THE STRONG OPERATIONAL DIMENSION OF THE JHA DOMAIN	6
2.5.	DIFFERENTIATION AS A CHARACTERISTIC OF THE JHA DOMAIN	6
2.6.	THE DIVIDE BETWEEN THE “FIRST” AND THE “THIRD” PILLAR FIELDS	7
3.	THE MODES OF EU GOVERNANCE IN THE JHA DOMAIN: AN ADAPTED TYPOLOGY	7
3.1.	A SUITABLE TYPOLOGY OF MODES OF GOVERNANCE IN THE JHA DOMAIN	7
3.2.	THE ‘TIGHT REGULATION’ MODE	8
3.3.	THE ‘FRAMEWORK REGULATION’ MODE	9
3.4.	THE ‘TARGET SETTING’ MODE	9
3.5.	THE ‘CONVERGENCE SUPPORT’ MODE	11
3.6.	ADMINISTRATIVE AND EXTERNAL GOVERNANCE MEASURES AS SEPARATE GROUPS OF MEASURES ..	12
3.7.	THE SPECIFIC INSTITUTIONAL DIMENSION OF EU GOVERNANCE IN THE JHA DOMAIN	13
4.	MAJOR DEVELOPMENT TRENDS OF EU GOVERNANCE IN THE JHA DOMAIN	14
4.1.	TRENDS IN TOTAL VOLUME OF ACTIVITY IN THE JHA DOMAIN	14
4.2.	TRENDS IN THE OVERALL USE OF THE DIFFERENT MODES OF GOVERNANCE IN THE JHA DOMAIN	15
4.3.	TRENDS IN THE USE OF THE GOVERNANCE MODES IN THE DIFFERENT FIELDS OF THE JHA DOMAIN .	16
4.4.	THE BLURRING OF THE “PILLAR DIVIDE”	17
5.	CONCLUSIONS	18
	ANNEXES: TABLES	20

Table of Figures and Graphs

TABLE 1: TEXTS ADOPTED IN THE JHA AREA 1 MAY 1999- 31 DECEMBER 2005 (POST-AMSTERDAM PERIOD): TOTAL NUMBERS IN ALL CATEGORIES.	21
TABLE 2: TEXTS ADOPTED IN THE JHA AREA 1 MAY 1999- 31 DECEMBER 2005 (POST-AMSTERDAM PERIOD): TOTAL NUMBERS PER MODE AND FIELD.....	22
TABLE 3: TEXTS ADOPTED IN THE JHA AREA 1 MAY 1999- 31 DECEMBER 2005 (POST-AMSTERDAM PERIOD): EVOLUTION PER YEAR OF ALL CATEGORIES.....	23
TABLE 4: TEXTS ADOPTED IN THE JHA AREA 1 MAY 1999- 31 DECEMBER 2005 (POST-AMSTERDAM PERIOD): EVOLUTION PER YEAR UNDER THE FOUR “GOVERNANCE MODES”	24
TABLE 5: TEXTS ADOPTED IN THE JHA AREA 1 MAY 1999- 31 DECEMBER 2005 (POST-AMSTERDAM PERIOD): NUMBERS OF BINDING AND NON-BINDING TEXTS PER POLICY FIELD.	25

1. Introduction

Since the entry into force of the Treaty of Amsterdam in 1999 EU justice and home affairs (JHA) in the context of the “area of freedom, security and justice” (AFSJ) has developed into one of the major policy-making areas of the EU: Maintaining and developing the EU as an AFSJ become one of the fundamental Treaty objectives¹, since 1999 the Council has adopted on average each month ten new texts on JHA issues and there is no area of this domain left which is now not covered by multi-annual programmes or action plans. JHA objectives have also “penetrated” into other policy areas of the EU, such as the management of migration and the fight against serious forms of crime into EU external relations and the fight against money laundering and environmental crime to the internal market and environmental policy respectively. Overall it seems hardly exaggerated to regard the JHA domain as the most expansive and rapidly developing EU policy area in the post-Amsterdam era.

The rapid expansion and development of the JHA domain as an EU policy area can in itself be regarded as an interesting phenomenon of EU governance, but in this paper we will focus on the question which specific factors determine EU governance in the JHA domain, which typology can be applied and what development trends can be identified in order to arrive at some conclusions in the end on the specificity and characteristics of EU governance in this domain.

Because of the wide range of different definitions of the concepts of “governance” and of “modes of governance” it seems useful to clarify at the outset the meaning of these terms as used for the purposes of this paper:

- Following broadly the general definition provided by Arthur Benz² we understand by GOVERNANCE *the steering and coordination of interdependent actors through institution-based internal rules systems*. As there is until now no any significant involvement of non-governmental/private actors in EU JHA domain policy-making³ we understand by “interdependent actors” public authorities both at the national level (governments, ministries, police forces, prosecutions services etc.) and the European level (EU institutions, coordinating structures and special agencies) which as a result of the EU framework and EU objectives have to cooperate in one way or another. It should be noted that the definition makes reference only to “internal” rule systems which excludes any rules agreed upon with third countries (i.e. the negotiation and conclusion of international agreements) which could be classified as “external governance”.
- Building on this working-definition of “governance” we understand by MODES OF GOVERNANCE *the different types of instruments (legislative or non-legislative) used for the steering and coordination of interdependent actors through institution-based internal rules systems*. This working definition comes very close to Adrienne Héritier’s analysis of

¹ Article 2 TEU.

² Arthur Benz: Governance – Modebegriff oder nützliches sozialwissenschaftliches Konzept?, in: Benz (ed.): Governance – Regieren in komplexen Regelsystemen. Eine Einführung, Wiesbaden (VS Verlag) 2003 pp. 13-32.

³ The consultation of interests group carried out by the Commission in certain fields – especially asylum and immigration – and the frequent criticisms raised by civil liberties organisations – such as *Statewatch* – may have an impact on the content of certain measures or generate some political debate on it, but there is so far no evidence that they have any shaping influence on overall governance and the modes of governance in this area.

governance consisting of the use of different types of “steering instruments”, whether legally binding or operating through various forms of common target-setting.⁴

In order to prepare the ground for an analysis of the different modes of EU governance in the JHA domain and major development trends we will first identify a number of specific determining factors which have had and continue to have a major impact on governance in the JHA domain.

2. Specific factors of EU governance in the JHA domain

2.1. The diversity of the JHA policy fields

One specificity of the JHA domain is that it comprises a set of rather diverse policy fields: asylum, immigration, border controls, judicial cooperation in civil matters, judicial cooperation in criminal matters and police cooperation. Both the objectives pursued and the instruments used to achieve them are necessarily rather different if one compares, for instance, the fields of asylum policy, judicial cooperation in civil matters and police cooperation: In the first the main focus is on the common definition of minimum guarantees and procedures regarding asylum seekers, in the second it is essentially the facilitation of the cross-border administration of civil justice and in the third enhanced information exchange and operational interaction between national law enforcement authorities. In each case clearly different regulatory and non-regulatory instruments are needed which makes it practically impossible to apply a “one-size-fit-all” mode of governance. As a result of the diversity of policy fields, therefore, EU governance in the JHA domain is necessarily in itself more diverse than more homogenous policy domains such as agricultural or environmental policy.

2.2. The particular sensitivity of JHA policy fields from a sovereignty, territoriality and political point of view

EU action in the JHA domain touches upon core functions of the state: Providing security and justice to citizens and sovereign control over the national territory are not only central prerogatives of the modern nation-state but also essential elements of its reason of being and legitimacy. The principle that the exercise of law enforcement is strictly limited to national authorities within the national territory, a traditional expression of state sovereignty, continues to be a major problem for JHA cooperation. In addition some of the key issues of the JHA domain, especially internal security and the control of migration, are highly sensitive issues at the domestic level which a high potential of making national governments win or lose elections. It is not altogether surprising therefore that EU governments – at least most of them – have been reluctant to relinquish control over national governance instruments in the JHA domain. Rather than opting for any form of ‘integration’ of their systems and policies – there is not a single official “common policy” in any of the fields so far – they have opted for gradually increasing interaction and synergy between their national systems while limiting as far as possible legislation and common structures which can interfere with national control over JHA instruments. The particular sensitivity of the JHA fields has therefore determined a distinct preference for the use of “lighter” modes of governance.

⁴ Adrienne Windhoff-Héritier: Policy Analyse. Eine Einführung, Frankfurt/New York (Campus) 1987, and Adrienne Héritier: New Modes of Governance in Europe: Policy-Making Without Legislating?, Working Paper no. 81 of the Political Science Series, Vienna (Institut für Höhere Studien) 2002 (http://www.ihs.ac.at/publications/pol/pw_81.pdf).

2.3. The focus of EU action on coordination and cooperation rather than integration

Mainly as a result of the above mentioned sensitivity of the JHA policy fields from a sovereignty, territoriality and political point of view, the EU has so far only been vested with rather limited powers in the JHA domain which come nowhere near the competences in “classic” EC “common policies”. There is, in fact, so far not a single “common policy” within this domain, and even in the case of the “common asylum system” – which may be regarded as coming closest to a common policy – the Treaty does not provide a fully comprehensive transfer of competences. If this can already be taken as an indication of the Member States reluctance to proceed with real “integration” in this domain, a further indicator is the fact that they have shown a strong preference for mutual recognition and minimal(ist) harmonisation as far as legislative action is concerned rather than pursuing any major harmonisation project such as the gradual introduction of a European criminal or civil law code. It is also noteworthy that the Member States have so far not agreed to transfer any operational powers to any of the many special agencies they have set in this domain (Europol, Eurojust, Frontex), so that in a domain where operational action is central to many objectives, especially in the area of law enforcement, the EU as such does not dispose of any capabilities so far.

What emerges from these indicators is that there has so far been a strong political preference for focusing EU action on reinforcing coordination of and cooperation between the national systems rather than interfering with those and forcing major change on them through any real attempt at integrating them into a single system with a strong set of common rules and institutions with cross-border operational capabilities. This political preference has resulted in a focalisation of governance instruments on coordination and cooperation. This does not only mean a preference, again, for instruments which are “lighter” in the sense of being less invasive on the national systems, but also for the development of specific mechanisms and structures which allow to intensify cooperation and coordination while leaving the national systems largely unchanged.

2.4. The strong operational dimension of the JHA domain

The progress of EU integration has traditionally been strongly linked with an extensive use of legislation for setting common rules. While there are some areas, such as asylum and migration, where legislative instruments are also very important for progress in the JHA domain, there are others, especially police cooperation and external border controls, where operational information exchange and coordination as well as the carrying out of joint operations are of more and often enough central importance. Legislative measures on the one hand and operational measures on the other obviously have substantially different rationales and requirements – as regards flexibility and speed, for instance. As a result rather different instruments of governance are needed, and this often enough in one and the same field. Judicial cooperation in the fight against cross-border crime needs, to give an example, needs both legislative action for minimum harmonisation of certain procedural and substantive provisions of criminal law and operational coordination and cooperation of prosecution services. This obviously adds to the diversity of the governance requirements of the JHA domain.

2.5. Differentiation as a characteristic of the JHA domain

Although the AFSJ is formally designed as a single “area” it is the most differentiated of all the constructions which the EU integration process has produced so far: Currently only 12 of

the Member States⁵ fully participate in all the governance instruments and structures which have been developed within the AFSJ. The UK, Ireland and Denmark have all to various degrees “opt-out” arrangements, and the 10 new Member States will only in 2007 (at the earliest) be ready fully join into the Schengen arrangements. Further differentiation is generated by the “association” of Iceland, Norway and (very recently) Switzerland as non-EU Member States with the Schengen system. This characteristic of major differentiation in the JHA domain has substantial implications for EU governance in the sense that some instruments of governments are designed to serve only part of the Member States (i.e. the Schengen countries) and that the form and the use (in a more or less binding way) of instruments can vary depending on whether all Member States participate or not.

2.6. The divide between the “first” and the “third” pillar fields

This is the last, but certainly not the least of the factors determining EU governance in the JHA domain: Although linked together by the common objective of the AFSJ and the common institutional framework (in particular the JHA Council) the “first pillar” fields (asylum, immigration, border controls, judicial cooperation in civil matters) are separated from the “third pillar” fields (police and judicial cooperation in criminal matters) not only by a different legal basis⁶ but also by different decision-making procedures⁷, separate decision-making structures in the Council below the level of the COREPER and different legal instruments (to which we will come back below). This divide, which cuts through the entire domain, means the current Treaty framework – as a result of a political decision of the Member States as “Masters of the Treaties” - imposes a distinct cleavage on EU governance in the JHA domain which can in this form not be found in any other EU policy field. The artificiality of this divide becomes particularly clear in cases in which different procedures and instruments have to be used separately in parallel for the same objective, which is the case, for instance with “first” and “third” pillar legislative measures against illegal immigration. Yet, whether artificial or not, this legal divide is currently a fundamental determining factor of EU governance in the JHA domain.

3. The modes of EU governance in the JHA domain: An adapted typology

3.1. A suitable typology of modes of governance in the JHA domain

Since the end of the 1990s the General-Secretariat of the Council – as part of a laudable effort to increase public transparency regarding EU action in the JHA domain – has been providing annual lists of texts adopted by the JHA Council on the Council’s website.⁸ These lists are a precious tool of analysis for identifying the main modes of governance in the JHA domain as only less than half of these texts – most of which are not formally binding - are published in the Official Journal and appear on EUR-Lex. Adopted by the JHA Council as the supreme decision-making body in the JHA domain they comprise, for instance, the rather large number of action plans, evaluation reports, situation assessments and studies which play an important

⁵ The „old“ 13 Schengen Member States without Denmark which – as a result of its Amsterdam „opt-out“ Protocol – enjoys a special status.

⁶ Title IV TEC and Title VI TEU.

⁷ Mainly qualified majority under Title IV TEC and unanimity under Title VI TEU.

⁸ Hyperlink:

[http://ue.eu.int/cms3_applications/docCenter.ASP?expandID=146&lang=en&cmsID=245#Justice%20and%20Home%20Affairs%20\(JHA\)](http://ue.eu.int/cms3_applications/docCenter.ASP?expandID=146&lang=en&cmsID=245#Justice%20and%20Home%20Affairs%20(JHA))

role in the JHA domain for targeting common action in a non-binding way and ensuring better implementation. The following analysis of EU governance modes in the JHA domain is therefore based on a detailed analysis of these annual JHA Council text lists. The focus will be on the period after the entry of the Treaty of Amsterdam (i.e. since 1 May 1999) as the extensive changes which this Treaty introduced created a different context for EU governance in this area which also includes new instruments such as the “third pillar” Decisions and Framework Decisions.

In the context of the NEWGOV integrated project *Oliver Treib, Holger Bähr and Gerda Falkner* have suggested a “new typology of four modes of governance”⁹ which is to some extent based on the typology used by *Christoph Knill and Andrea Lenschow*¹⁰. It distinguishes between four basic modes of governance: “coercion” (legally binding and rigid in terms of implementation), “framework regulation” (legally binding and flexible implementation), “targeting” (soft law and rigid implementation) and “voluntarism” (soft law and flexible implementation). With some adaptations this model can be usefully applied to the JHA domain.

3.2. The ‘tight regulation’ mode

The JHA domain clearly has its own set of “coercive” modes of governments, i.e. fully binding legal instruments which – if used – allow for little or no flexibility when it comes to implementation by the EU or its Member States. These are the EC Regulations – applied in the “first pillar” fields –, the formal Council “Decisions” or “common positions” based on Article 34 TEU¹¹ as well as any other formal Council “Decisions” which often regulate rather detailed individual issues such as amendments to the Schengen Border “Manual”. Also to this category belong Conventions concluded by the Member States – such as the 1995 Europol Convention¹² or the 2000 Convention on Mutual Assistance in Criminal Matters¹³ – and Council Acts amending those Conventions. Unlike the other instruments in this category Conventions require the cumbersome process of ratification by national parliaments which is one of the reasons why they have been rarely used since the entry into force of the Treaty of Amsterdam. In order to distinguish this category of fully binding instruments from the following, which also has its “coercive” side, we prefer to call this *tight regulation*.

Both the instruments used under this mode and their content do not differ substantially from those of hard or coercive governance applied in other domains of EU policy-making. The statistical analysis of the Council texts adopted from 1 May 1999 to 31 December 2005 shows that with 187 out of 748 texts or 25,0% of the total, tight regulation texts form the second-largest group (see Tables 1 and 2). This may at first sight surprise if one thinks of the political preference for “lighter” forms of governance and coordinating and cooperative instruments (see sections 2.2. and 2.3. above). Yet it can be explained by the need to frequently adapt existing rules applying to certain horizontal Title IV TEC/Title VI issues or structures which are subject to detailed regulation – such as the rules applying to the Schengen Information Sys-

⁹ Oliver Treib/Holger Bähr/Gerda Falkner: Modes of Governance: A Note Towards Conceptual Clarification, European Governance Papers, No. N-05-02, Mannheim (EUROGOV) 2005 (<http://www.connex-network.org/eurogov/pdf/egp-newgov-N-05-02.pdf>).

¹⁰ Christoph Knill/Andrea Lenschow (eds.): Implementing EU Environmental Policy: New Directions and Old Problems, Manchester (Manchester University Press) 2000.

¹¹ Art. 34 TEU Decisions can also be used to establish or change institutional structures of the AFSJ. A major example is the Council Decision of 28 February 2002 setting up Eurojust, OJ No. L 63 of 06.03.2002.

¹² OJ No. C 316 of 27.11.1995.

¹³ OJ No. C 197 of 12.07.2000.

tem¹⁴ (SIS), the regulatory framework of special agencies – such as Europol in the field of police cooperation – or rather specific elements which have been subject to a high or increasing degree of harmonisation - such as that of the common visa lists of the Schengen countries in the visa policy context. The relatively large number of binding amending texts concerning a rather limited number of issues and structures have a slightly distorting effect on the statistics in the sense that they make the “tight regulation” effort appear much broader than it actually is.

3.3. The ‘framework regulation’ mode

The second mode of the typology of Treib/Bähr/Falkner can be taken over without difficulty: The JHA domain has two instruments of *framework regulation* – “Directives” in the “first pillar” areas and “Framework Decisions” in the “third pillar” areas – which are binding (“coercive”) on the Member States as to their objectives but leave it to them to adopt implementing legislation within the normally more or less broad framework of rules set by the EU, thereby offering a considerable degree of flexibility. Framework decisions are in essence the ‘third pillar’ parallel to ‘first pillar’ directives, the only major difference being that by virtue of Article 34(c) TEU the probably most supranational feature of EC legislative acts – the principle of direct effect – does not apply to *decisions* and *framework decisions* under Title VI TEU as this is explicitly provided for by Article 34(b) and (c). As in other domains of EU policy-making the framework regulation mode is used to reduce the costs of adaptation of the national systems to EU regulatory objectives by wider margins of implementation. Directives have so far served as the primary instrument for putting the EU’s common asylum system into place¹⁵ and Framework Decisions for providing a minimum level of harmonisation of the constituent elements of criminal acts and of penalty levels in the fight against serious forms of cross-border crime¹⁶.

The use and the content of framework regulation in the JHA domain does, again, not differ substantially from that in other domains of EU policy-making. What may seem slightly surprising is that instruments of the framework regulation type are comparatively rarely used. With 29 out of a total of 748 texts adopted by the Council from 1999 to 2005 (see Tables 1 and 2) they account for only 3,9% of the total. This can be explained by a tendency of Member States in the Council to give preference – if tight regulation can be avoided at all – to the “softer” and most heavily mode of target-setting (see below) which allows them in many cases to do without comprehensive national implementing legislation – the use governmental regulatory powers or simple changes to the guidelines for law enforcement authorities are in many cases sufficient – and to escape the risks of judicial review by the Court of Justice.

3.4. The ‘target setting’ mode

The third mode, *target setting*, makes as well sense in the JHA domain, as there is a wide range of texts agreed upon by the Member States in the Council which set common targets or guidelines. One can broadly distinguish between two subcategories of texts:

¹⁴ An example are the Council Decisions 2005/451/JHA of 13 June 2005 and 2005/719/JHA, 2005/727/JHA and 2005/728/JHA of 12 October 2005 concerning the introduction of some new functions for the Schengen Information System of OJ No. L 158 of 21.06.2005, L 271 of 15.10.2005 and L 273 of 19.10.2005.

¹⁵ A recent example is the Council Directive minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ No L326 of 13/12/2005.

¹⁶ A major example is the June 2002 Framework Decision on Combating Terrorism, OJ No. L 164 of 22/06/2002.

The first may be described as *functional targeting* texts. This group includes Council Resolutions, Recommendations and Conclusions as well as “Guidelines” and “Best Practice Manuals”. It focuses on the setting of targets for improving the functioning of often fairly specific aspects of cross-border cooperation between the Member States. An example is the Council Recommendation of 30 March 2004¹⁷ regarding guidelines for taking samples of seized drugs. Targets or guidelines in this subcategory are often quite detailed and can sometimes resemble legislative texts in the density of coverage of certain issues.

The second subcategory of “target setting” texts can be described as *programme targeting*, and comprises Action Plans, Programmes and Strategies which define in a multi-annual perspective common measures – whether legislative or operational – which the Member States are planning to adopt, this often in combination with specific deadlines. The extensive use of such programming documents is one of the most characteristic features of EU governance in the JHA domain. Not only is the further development of the AFSJ as whole governed by an overall programming document – after the “Tampere Programme”¹⁸ which ran from 1999 to 2004 this is currently the 2005 to 2010 Hague Programme on the “strengthening of freedom, security and justice in the European Union”¹⁹ – but the Council has also adopted a whole range of similar documents for major fields of the AFSJ – often with a cross-pillar dimension - containing broad descriptions of objectives to be achieved and individual measures to be adopted in view of those. The most detailed of those is the repeatedly amended EU Action Plan on Combating Terrorism²⁰ which comprises over 200 measures extending to all three “pillars” of the EU. Other examples are the 2000 EU Strategy for the prevention and control of organised crime,²¹ the 2002 Council Plan for the management of the external borders,²² the 2005 to 2008 EU Action Plan on Drugs²³ and the 2005 EU Plan on best practices, standards and procedures for combating and preventing trafficking in human beings²⁴.

What is common to all types of *target-setting* in the JHA domain – both functional and programming - is that it does not take the form of legislative acts. Whereas some of the instruments in this category – especially the Recommendations, Resolutions and Conclusions - may entail an indirect legal effect, for instance, as a preliminary to a subsequent fully binding instrument or a source of interpretation for provisions of binding instruments, such effects are highly dependent on the individual case and can certainly not be generalised. The programming documents have in any event no binding effects. It is therefore not possible to classify this whole mode as “soft law” – an anyway rather problematic category - as suggested in the *Treib/Bähr/Falkner* typology. However, there is a relatively high degree of rigidity in most of the “targeting” texts in the sense that they prescribe a line of action the Member States and the institutions are expected – though not in the legal sense obliged – to follow.

In the *target-setting* mode EU governance in the JHA domain clearly shows some specificity. The statistical analysis of the Council texts adopted from 1 May 1999 to 31 December 2005 reveals that with 191 out of 748 texts or 25,5% of the total target-setting texts form the largest

¹⁷ OJ No. C 86 of 06.04.2004.

¹⁸ To which we will come back in section 4.1. below.

¹⁹ OJ No. C 53 of 03.03. 2005.

²⁰ Latest version: Council document No. 5771/1/06 of 13.02.2006.

²¹ OJ No. C 124 of 03.05.2000.

²² Council document no. 10019/02 of 14.06.2002.

²³ OJ No. C 168 of 08.07.2005 (based on the EU 2005 to 2012 “Drugs Strategy”).

²⁴ OJ No. C 311 of 09.12.2005.

group (see Tables 1 and 2). The political preference for “lighter” forms of governance and coordinating and cooperative instruments (see sections 2.2. and 2.3. above) can be regarded as the main reasons for that. However, the strong operational dimension of the JHA domain (see section 2.4. above) is also a contributory factor as tight or even framework regulation of the operational rules under which national law enforcement authorities have to operate would be regarded as highly invasive upon the national systems and likely to encounter much opposition. The national governments therefore prefer to set targets or guidelines for areas such as police cooperation or horizontal operational coordination.

The extensive use of multi-annual programming instruments merits special consideration. It can be explained by the need for the Member States to agree on a longer-term path of common action in fields which are affected by the diversity of the JHA policy-areas (see section 2.1. above), much differentiation (see section 2.5. above) and the artificial divide between the “pillars” (see section 2.6. above). These specific problems or at least challenges of the JHA domain account for a particular need of cross-cutting common objectives, scheduling and prioritisation of action to be taken.

3.5. The ‘convergence support’ mode

It is with regard to the fourth mode of governance that the JHA domain deviates most from the *Treib/Bähr/Falkner* typology. Because of the focus of EU governance on coordination of and cooperation between the national systems (see section 2.3. above) a significant number of measures have been adopted to support such coordination through evaluation mechanisms and reports. The texts adopted under this mode do not set any rules or even only guidelines to be complied with, but rather identify performance or implementation weaknesses at the European and/or the national level and/or needs for further action or simply provide situation assessments on the basis of which action can be taken. They comprise, for instance, the regular (classified) evaluation reports on the implementation of the Schengen rules by current Schengen Member States (so-called “Schengen evaluations”), the collective evaluation reports on the state of preparedness of candidate countries for implementing the JHA acquis²⁵ and evaluation reports on specific issues such as, for instance, on the exchange of information and intelligence between Europol and the Member States and between the Member States respectively²⁶. Also within this category fall situation or monitoring reports on specific forms of crime²⁷ or illegal immigration and facilitation, reports on data protection issues and information studies. Although all these texts do not entail any legal effect – even a negative evaluation report cannot as such legally “force” a Member State to act on its own weaknesses -, they contribute in a varying degree to convergence in the coordinated space of national systems which the AFSJ constitutes. They do so by “encouraging” Member States to address identified weaknesses because of peer pressure resulting from a negative report and by contributing to a common perception of problems and needs for action through common situation assess-

²⁵ A good summary of the collective evaluation process and its reporting mechanisms is given in Council of the European Union: Enlargement. Statement by the Collective Evaluation Group, Council document no. 14264/2/03 of 11/05/2006.

²⁶ For a rare (and not completely declassified) example see Council of the European Union: Evaluation of the third round of mutual evaluations – Report on Spain, Council document no. 1410/05 of 19/04/2006.

²⁷ Such as the annual Europol Organised Crime Report (OCR) which exists in a full version which is classified and an abridged version which is public (see Europol: European Union Organised Crime Situation Report 2005, Council document no. 13788/1/05 of 17/11/2005).

ments. Reports can also serve as an instrument of “collective discipline” reminding them collectively that they need to make additional efforts to meet agreed objectives.²⁸

This mode of governance is certainly a weaker one than that of “target-setting”, but it is not entirely “voluntary” as all Member States submit to these rules based procedures and as reports and situation assessments can at the very least support convergence in both the implementation of agreed measures and decision-making on further measures/rules in the Council . As a result we prefer to call this mode *convergence support*.

The *convergence support* mode, which with 156 out of 748 texts (20,86%) of the 1999 to 2005 period (see Tables 1 and 2) forms the third largest group of texts adopted by the Council, can also be regarded as a rather specific feature of EU governance in the AFSJ domain. Again the political preference for “lighter” forms of governance and coordinating and cooperative instruments (see sections 2.2. and 2.3. above) can be regarded as the main reason for the extensive use of instruments under this category. A cynical view could lead to the conclusion that national governments prefer to be reminded by evaluation reports that they are failing to respect certain obligation than to face possible judicial sanctions in a tight or even framework regulation context. It has to be acknowledged, however, that the strong operational dimension (see section 2.4. above) is also of some importance in this context as it is often only through detailed reports or situation assessments “on the ground” that certain deficits of operational cooperation and coordination and/or needs for new forms of operational coordination and cooperation can be identified.

3.6. Administrative and external governance measures as separate groups of measures

There are two further broad groups of measures in the JHA domain which – although not falling within our governance definition with its focus on the steering of actors through internal rules systems nevertheless should be mentioned as they account for a substantial part of the texts adopted by the Council:

A very significant number of the texts adopted by the Council do not set rules for the Member States or regulate matters of their interaction but deal with the administrative, financial and procedural framework which the EU has set up to facilitate decision-making and implementation. The texts adopted for this purpose often have a legal status, but either only regulate specific administrative matters (such as appointing the Director of a special agency) or financial issues (such as approving the annual budget of a special agency) or emanate from intermediary steps of a legislative process (such as Commission or Member State legislative initiatives or Council common positions under the co-decision procedure). As such they are essentially “institution specific” and do not establish any rules for steering or coordinate national or EU authorities. As a result they should be listed under a separate heading (see Tables 1 and 2).

During the last few years the Council has adopted an increasing number of texts relating to EU external relations in the JHA domain such as agreements concluded with third countries (e.g. return agreements or agreements on judicial assistance) and the decisions of the Council regarding negotiation mandates or authorisations. As these are aimed at establishing rules between the EU, its Member States or agencies on the one hand and third countries on the other,

²⁸ An example are the regular reports of the EU Anti-Terrorism Coordinator on the implementation of the EU Action Plan to Combat Terrorism which each time identifies major deficits in the implementation of legislative acts, in information supply and coordination. See, for instance, the report of November 2005, Council document no. 14734/05 of 22/11/2005.

rather than rules internal to the EU system, they do not fall within our definition of governance. In our statistical analysis they are therefore listed separately under the heading of “acts of external governance” (see Tables 1 and 2).

3.7. The specific institutional dimension of EU governance in the JHA domain

The annual lists of texts adopted by the Council – which form the basis of our analysis – cannot fully account for one rather important dimension of the EU governance in the JHA domain: the extensive institutionalisation of cooperation and coordination which has emerged since the beginning of the 1990s. Not only has the JHA domain seen the establishment of more than 30 specialised Council committees and working parties within the decision-making hierarchy of the JHA Council and the establishment of two fully fledged directorate-generals in the Council and Commission, but it has also been populated with an increasing number of institutional structures quite specific to this area of EU policy-making.²⁹ These include the special agencies Europol, Eurojust and Frontex³⁰, which all have information exchange and analysis as well as coordination functions, the office of the EU’s Anti-Terrorism Coordinator in the General Secretariat of the Council, the monitoring centres for drugs³¹ and racism and xenophobia³² and the European Police College (CEPOL). All these structures contribute to a varying degree to the “steering and coordination” of the national authorities operating within the AFSJ “through institution-based internal rules” in the sense of our adopted definition of “governance”. Although this contribution is of a non-regulatory nature it nevertheless makes a significant contribution to cooperation and coordination. A few examples can demonstrate that:

Through its assessments of serious forms of cross-border crime in the EU as whole *Europol* not only contributes to a common assessment of major internal security risks but its analytical work also often results in the identification of related targets in several Member States, the initiation of coordinated operational activities in response to these targets and cooperation on arrests or the initiation of new cases in Member States.³³ *Eurojust* not only facilitates the cross-border interaction between national prosecution authorities, but can also request national prosecution authorities to initiate prosecution, help coordinating prosecution activities across borders, help resolving conflicts of jurisdiction, push for the setting-up of Joint Investigation Teams and identify, facilitate and monitor the application of the European Arrest Warrant and promote best practices in cooperation between prosecutors.³⁴ In the case of *Frontex*, the youngest of the EU’s special agencies, the coordination role is even more pronounced: Not only is it the task of Frontex to coordinate operational cooperation of Member States in the field of external border controls but it also has to work on the establishment of common training standards, the carrying out of standardised risk analyses and to ensure the identification and coherent and uniform application of best practices in external border con-

²⁹ For the main elements of this institutionalisation process see Jörg Monar: Institutionalising Freedom, Security and Justice, in: John Peterson/Michael Schackleton (eds.): The Institutions of the European Union, Oxford (Oxford University Press) 2002, pp. 186-209.

³⁰ The EU Agency for the Management of Operational Cooperation at the External Borders which was established in Warsaw in June 2005.

³¹ European Monitoring Centre for Drugs and Drug Addiction (EMCDDA), Lisbon.

³² European Monitoring Centre on Racism and Xenophobia (EUMC), Vienna.

³³ See Europol: Annual Report 2004, The Hague 2005.

³⁴ Examples are given in Eurojust: Annual Report 2005, The Hague 2006.

trols.³⁵ The definition of “common training standards” and “best practices” can well be regarded as a kind of “target-setting” at an operational level. Although the EU’s *Anti-Terrorism Coordinator* – currently Mr. Gijs de Vries - has not been vested with any “hard” coordination powers, he plays a significant role in the monitoring of the implementation of the EU Action Plan on Combating Terrorism (see section 3.4. above) and the identification of weaknesses in both the implementation of the Plan and interaction between national authorities³⁶ which can then be acted upon. Through training courses aimed at the transfer of advanced policing techniques and best practices the *European Police College* also contributes to a minimum level of joint standards in the area of policing.³⁷

All these institutional structures and their respective roles have primarily grown out of the need to create “steering and coordination” instruments for the strong operational dimension of the JHA domain (see section 2.4. above). Extensive regulatory activity of cross-border cooperation between national law enforcement authorities would not only encounter strong resistances because of the sensitivity of this area from the national sovereignty, territoriality and political points view, but it would also in many cases not be efficient as in operational cooperation shared best practices, pragmatic cooperation through trusted channels and the joint identification of weaknesses which can be addressed through pragmatic changes to working procedures can often be more effective than inflexible rules imposed by EU legislation. “Institutionalised cooperation and coordination” can therefore be regarded as an essential instrument of EU governance in the JHA domain.

4. Major development trends of EU governance in the JHA domain

4.1. Trends in total volume of activity in the JHA domain

Council activity in terms of numbers of texts adopted has gone through one major cycle in the post-Amsterdam period. As Table 3 shows overall activity rose steeply from 1999 to 2002 when it reached a peak which was maintained as regards activity in the *tight regulation* and *target setting* modes in 2003 but dropped in 2004 and even more sharply in 2005. This can be primarily explained by the impact of the end of the five-year “transitional period” provided for by the Treaty of Amsterdam which ended on 30 April 2004 and had provided for a whole range of deadlines for adopting certain measures. This deadline had been reinforced by the conclusions of the Tampere European Council of 15 October 1999 which had set additional targets to be achieved until the end of the transitional period. There was therefore a considerable pressure on the Council and the Commission to adopt a large number of decisions before 30 April 2004 which contributed much to the high output in 2002 and especially 2003, and also a lot to the high number of administrative, financial and procedural measures which had to be taken in 2004 to fully implement the many decisions taken during 2002 and 2003. The Tampere European Council Conclusions actually amounted to the first multi-annual programme for the development of the AFSJ, covering the period of 1999 to 2004. It was the predecessor of today’s 2005 to 2010 Hague Programme (see section 3.4. above) which also provides for a range of deadlines. Looking at the statistics of the 1999 to 2004 period one can draw the conclusion that it is one of the effects of multi-annual programming as part of the

³⁵ See Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, Article 1-5 and 16, OJ No. L 349 of 25.11.2004.

³⁶ For an example see the Antiterrorism Coordinator’s regular report referred to in note 28 above.

³⁷ For examples see the 2006 list of courses and seminars provided by CEPOL: <http://www.cepola.net/KIM/>.

target setting governance mode that output increases towards the end of the programming period as Member States tend to postpone certain decisions until the self-imposed deadlines draw closer. It seems safe to assume that the same is going to happen towards the end of the Hague Programme period.

It should be noted, however, that a further contributory factor to the high output during 2002 were the terrorist attacks in New York of 11 September 2001. They led to the adoption of a whole range of measures during that year – such as the European Arrest Warrant and the Framework Decision on Combating Terrorism – which otherwise would probably have been adopted much later (or even not at all). It can be regarded as a quite specific feature of governance in the JHA domain that single exceptional events – one has to say, though, a very exceptional event indeed in this case – can have a major accelerating effect on the use of governance instruments.

4.2. Trends in the overall use of the different modes of governance in the JHA domain

If one looks at the four modes of governance which we have identified above – leaving aside the administrative and external governance texts – one can see that the use of the tight *regulation* and the *target setting* modes has evolved roughly in parallel with not much difference in overall numbers (see Table 4). As indicated earlier (see section 3.2. above) the focus of tight regulation activity on a comparatively smaller number of issues and structures makes the use of this mode appear rather broader than it actually is. Nevertheless the trend is strong enough to draw the conclusion that the Member States in Council have a distinct preference for either using target setting or tight regulation as modes of governance independent from the moment of the policy cycle. This contrasts sharply with the continuously rather flat curve of the *framework regulation* mode. It seems that the Member States – if they want to give themselves a wider margin of flexibility – by far prefer to use a target setting than a framework regulation instrument. On the one hand this can be explained by the fact that a large number of the target setting could not be sensibly transformed into a framework regulation instrument. It would make no sense, for instance, to cast multi-annual political programming instruments, such as the action plans, into framework legislation. However, certain Council Resolutions, Recommendations and Conclusions could certainly be developed into framework legislation if the Member States would be willing to do so. Although this is obviously not spelled out in any official texts one can safely assume that the reason for them to prefer in these cases target setting texts is that this allows them to avoid the more cumbersome legislative process – which would involve consultation of the European Parliament -, to escape potential jurisdiction by the Court of Justice and – in many cases – to avoid any precise commitments regarding potential national implementing legislation which might cause difficulties at the national level.

One trend which also needs explanation is the steep increase of the number of texts of the *convergence support* mode up to 2002 and its gradual but clear decrease afterwards (see Table 4). The main explanation for this is the considerable effort which the Council engaged in to monitor the progress made by the candidate countries in the JHA domain: Every accession candidate went through several monitoring and assessment phases, and reporting peaked in 2002 as the decision whether or not to admit the candidates had to be taken in 2003 for accession in 2004. This contributed to an exceptionally large number of reports – which we have identified as one of the convergence support instruments - adopted by the Council in 2002, with a corresponding decline afterwards as the accession decision “pressure” decreased.

4.3. Trends in the use of the governance modes in the different fields of the JHA domain

It is obviously not a question without interest whether the use of the modes of governance in the JHA domain varies between the individual policy-fields, and particularly, whether there are certain fields where there is tendency toward the use of “harder” rather than “softer” modes of governance or vice versa. In order to arrive at a clearer results we have added together in Table 5 the texts falling under the *tight regulation* and *framework regulation* modes on the one hand as *binding* (legislative) texts on the one hand and those falling under the *target setting* and *convergence support* modes as *non-binding* (non-legislative) texts on the other, leaving again aside the administrative and external governance texts. The results show that within the AFSJ domain the balance between binding and non-binding measures varies quite considerably from one field to the other. Five fields, in particular, show significant differences which are worthwhile to be commented on:

Visa policy: Here binding texts exceed non-binding texts by a ration of around 2:1. This is actually not too surprising as Article 62(2)(b) TEC provides for a high degree of harmonisation of visa policy as regards country lists, procedures and conditions for issuing visas and the uniform format for visas. Treaty defined objectives in this field – which were also linked to the deadline of the end of the “transitional period” – could not be attained without the use of legislative instruments, so that non-binding instruments have been of much less use. It should be noted that visa policy is a field of high differentiation (see section 2.5 above) as the Schengen “opt-outs” are not participating in legislative measures in this field, which has made it slightly easier for the Council to use binding instruments in this field.

Civil law cooperation: In this field binding texts exceed non-binding texts at a ratio of around 3:1. The main reason for the more extensive use of legislation in this field is that civil law cooperation has always had a close link with the construction and completion of the internal market where the use of binding instruments has always been seen as necessary for creating sufficient legal certainty for cross-border economic activities. Long before the introduction of JHA as a formal policy-making domain important binding texts had already been adopted in the field of civil law, such as the – now transformed - 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. One can therefore say that in this field there has been a long tradition and several important precedents of using binding instruments, so that a shift towards non-binding instruments would have run against an established method, an already quite substantial binding *acquis* and the legal certainty needs of economic actors within the internal market as well as parents and children involved in cross-border divorce and parental responsibility proceedings. Measures in the civil law field also received a quite distinct orientation towards legislative action by the multi-annual “Programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters” which the Council adopted on 30 November 2000³⁸ so that one can indeed speak about a “programmed” strong use of binding instruments.

Police cooperation: Here the situation is almost exactly the reverse from that of civil law cooperation, with the use of non-binding instruments exceeding that of binding ones by a ratio of over 3:1. The main reason for this is that because of the sensitivity of police cooperation from the national sovereignty and territoriality point of view Member States have tended to be highly reluctant to use binding instruments which might interfere with the autonomous control and organisation of the police forces. The broad majority of the binding texts adopted in this

³⁸ See OJ No. C12 of 15.01.2001.

field during the 1999 to 2005 period are related to the role and functioning Europol and the European Police College, institutions which have not changed or interfered with the role of national police forces in any notable way. Whenever the Council considers it necessary to establish guidelines for cross-border police cooperation target setting instruments are preferred.³⁹ The considerable number of reports drawn up by Europol for the Council – which we have classified as belonging to the convergence support mode – also add to the high overall number of non-binding instruments.

Horizontal issues: A significantly higher use of non-binding rather than binding instruments – of a ratio just under 3:1 - can also be observed in horizontal issues under Title VI TEU and cross-pillar horizontal objectives which extend to both Title IV TEC and Title VI TEU. In the fields of Title VI – police and judicial cooperation in criminal matters – this cannot really surprise. Horizontal issues under Title VI TEU concern in most cases general aspects of the fight against certain serious forms of cross-border crime which often involve questions of strategy and broad coordination for which the use of legislative regulatory instruments would make little sense.⁴⁰ Reports on certain forms of crime also contribute to the higher figure of non-binding texts in this horizontal area.

As regards horizontal issues stretching across the Title IV TEC/Title VI TEU divide the comparatively limited use of binding texts can be explained by the fact that the legal divide between the “first” and the “third” pillar normally requires the use of separate legal instruments for different aspects of the same issue. In the fight against illegal immigration, for instance, a “first pillar” legal basis and “first pillar” legal instruments are required for measures at external borders whereas a “third pillar” legal basis and legal instruments are required, for instance, for penal law measures against traffickers and facilitators. The major part of the binding horizontal Title IV TEC/Title VI TEU measures which appear in Tables 5 and 2 relate in fact to the functioning and further development of the SIS which we have classified as a horizontal issue as the SIS fulfils important functions both in the “first” pillar – especially with regard to external border controls and migration management – and in the “third pillar” – because of its law enforcement support functions. The comparatively high number of non-binding instruments can be explained by the fact that many of the reports adopted or taken note of by the Council apply to both the Title IV TEC and the Title VI TEU fields – for instance all evaluation reports on candidate countries – and that many of the *target setting* texts, including some of the multi-annual programming documents,⁴¹ have a cross-pillar dimension.

4.4. The blurring of the “pillar divide”

The analysis of the texts adopted in the JHA domain contradicts to some extent the traditional assumption that “communitarisation” tends to lead to a greater use of binding instruments than this is normally the case in “intergovernmental” areas of cooperation. Table 5 shows in fact that in one of the “communitarised” JHA fields of Title IV TEC – immigration – more non-binding than binding instruments have been used whereas in one of the “intergovernmental”

³⁹ Good examples are the Council Conclusions on police professional standards concerning international police cooperation (Council document no. 14633/04) and the Council Recommendation concerning the reinforcing of police cooperation especially in the areas surrounding the internal borders of the EU (Council document no. 15105/04), both adopted on 02.12.2004.

⁴⁰ An example are the Council Conclusions on the fight against organised crime originating from or linked to the Western Balkans (Council document no. 14703/04 adopted on 19.11.2004) and the Council Conclusions on the development of a strategic concept with regard to tackling cross-border organised crime in the EU (Council document no. 15050/04 adopted on 02.12.2004).

⁴¹ A recent example is the 2005 to 2008 EU Action Plan on Drugs (see note 23 above).

tal fields” of Title VI TEU – judicial cooperation in criminal matters – more binding than non-binding instruments have been used. Furthermore the “communitarised” field of external border controls has seen a nearly equal use of both binding and non-binding measures. This points towards a rather pragmatic attitude of the Member States: Rather than having a systematic preference, for instance, in the “intergovernmental” context of Title VI TEU for non-binding measures they are prepared to make a significant use of binding instruments if they are dealing with a field which is more appropriate for legislative action – which is certainly the case for judicial cooperation in criminal matters – and if there is sufficient common political will. This applies vice versa also to the “communitarised” context of Title IV TEC: The higher number of non-binding measures in the field of immigration can to a considerable extent be explained by the absence of the necessary political will to legislate more on the sensitive issue of legal immigration. In terms of usage of the different governance modes one can therefore speak about a certain “blurring” of the much discussed and much maligned “pillar divide”.

There is also a further tendency towards the blurring of this divide which needs to be mentioned. There has in fact been a certain “hybridisation” of instruments formally and traditionally assigned to either the “community method” or the “intergovernmental” method: As already mentioned the instruments under Title VI TEU (Decisions, Framework Decisions) are largely similar to the equivalent “first” pillar instruments (Regulations, Directives). Some measures in the “intergovernmental” domain (Framework Decisions on the European Arrest Warrant and on Combating Terrorism are examples) have had significant mutual recognition and harmonisation effects which have traditionally been more associated with the community than with the intergovernmental method. While governance modes in the “intergovernmental” fields of Title VI TEU have thus to some extent become more similar to those used in the “communitarised” fields of Title IV TEC, certain instruments which had initially been used only in the “third pillar” fields, such the “special agencies” (see section 3.7. above), have made their appearance in the “communitarised” fields as the example of the establishment of the Frontex agency with primary responsibilities in the “communitarised” external border controls field shows.

As a result of the above the explanatory value of the “first/third” pillar and “communitarised”/“intergovernmental” divide for the understanding of EU governance in the AFSJ domain is rather limited. While the legal divide forces Member States in the Council to use different instruments and decision-making procedures the balance between the use of the different modes of governance depends rather on field specific practical and political considerations.

5. Conclusions

Can the JHA domain be regarded as a rather specific area of EU governance? In at least four respects this question has to be answered affirmatively:

Firstly, there are a number of factors – such as the diversity of the fields, the particular national sovereignty sensitivity of some of them and the strong operational dimension – which have significant implications for the choice of governance modes. There is no equivalent, for instance, in EU social or environmental policy to the strong operational dimension which EU action on cross-border law enforcement demands. Hence it is obvious that the governance choices must in some respects substantially differ.

Secondly, while the use of legislative *tight* and *framework regulation* instruments is quite comparable in procedure and substance to those of other domains of EU policy-making, there

are some significant differences in the use of *target setting* instruments and – even more so – in the use of what we have called *convergence support* instruments. As regards the target setting mode both the fact that texts in this category form the largest group and the extensive use of multi-annual programme documents can be regarded as fairly specific to the JHA domain. This applies even more so to the large number of *convergence support* texts, with the extensive use made of collective/mutual evaluation, monitoring and situation assessment reports being certainly amongst the most particular features of EU governance in the JHA domain. It has been shown that this can be explained both by the Member States' preference for particularly 'light' forms of governance in sensitive areas and by the strong operational dimension for which 'hard' regulation is often inappropriate.

Thirdly, as an also quite specific feature of EU governance in this domain can be regarded the strong reliance on specific institutional structures, in particular the special agencies Europol, Eurojust and Frontex, to facilitate, support and even initiate cooperation and coordination between national authorities. Here again the reluctance to let legislative rules and centralised powers at the EU level interfere with the organisation and functioning of national authorities has led to the introduction of specific 'light' institutional governance structures which can facilitate and increase the efficiency of interaction between the national systems rather than integrating them through legislative harmonisation and the creation of institutions with supranational powers. The extensive use of most of these institutional structures for best practice identification and transfer and their training functions can as well be regarded as important EU governance feature in the JHA domain.

Fourthly, and finally, the JHA domain, although regrouped under a single treaty objective – the objective of establishing and maintaining the AFSJ as laid down in Article 2 TEU – and a single decision-making authority – the JHA Council – shows a significant degree of heterogeneity in the use of the four identified governance modes. Whereas some fields show a 2:1 or even 3:1 ratio of usage of binding against non-binding texts (visa policy and judicial cooperation in civil matters), other show an inverse ratio (police cooperation and horizontal issues). Field specific practical and political considerations clearly account for this variation, which also reflects the diversity of the JHA fields which are covered by the AFSJ as a political project. That this variation between the fields cannot be explained by the divide between the (communitarised) "first pillar" fields on the one hand and the (intergovernmental) "third pillar" fields on the other adds in a sense to the specificity of the JHA domain.

With these four elements of specificity EU governance in the JHA domain appears as somewhat like a laboratory of EU governance: What we are looking at is in fact a still rather young domain of policy-making⁴² with a considerable degree of complexity due to its diversity, its "pillar divide" and its differentiation. Rather than sticking to any notion of "purity" in applying "communitarian" or "intergovernmental" methods and instruments and restricting themselves to traditional 'hard' and 'soft' instruments of governance the Member States have pursued a rather pragmatic path, adapting existing instruments or even engaging in the development of new ones, such as the systematic mutual evaluation applied by the Schengen countries. There may be some lessons to be taken from this flexible and partially innovative evolution of EU governance for other domains of EU policy-making.

⁴² It is worthwhile to recall that the AFSJ emerged as a full-scale political integration project only with the Treaty of Amsterdam in 1999.

Annexes: Tables

Prepared by **Anya Dahmani**, Research Associate of the NEWGOV Project at the Marie Curie Chair of Excellence (SECURINT) of the Université Robert Schuman de Strasbourg.

The author extends his warmest thanks to Anya Dahmani for having gone through the not always enchanting task of categorising several hundreds of texts adopted by the JHA Council, which are often not models of transparency.

Table 1: Texts adopted in the JHA area 1 May 1999- 31 December 2005 (post-Amsterdam period): Total numbers in all categories.

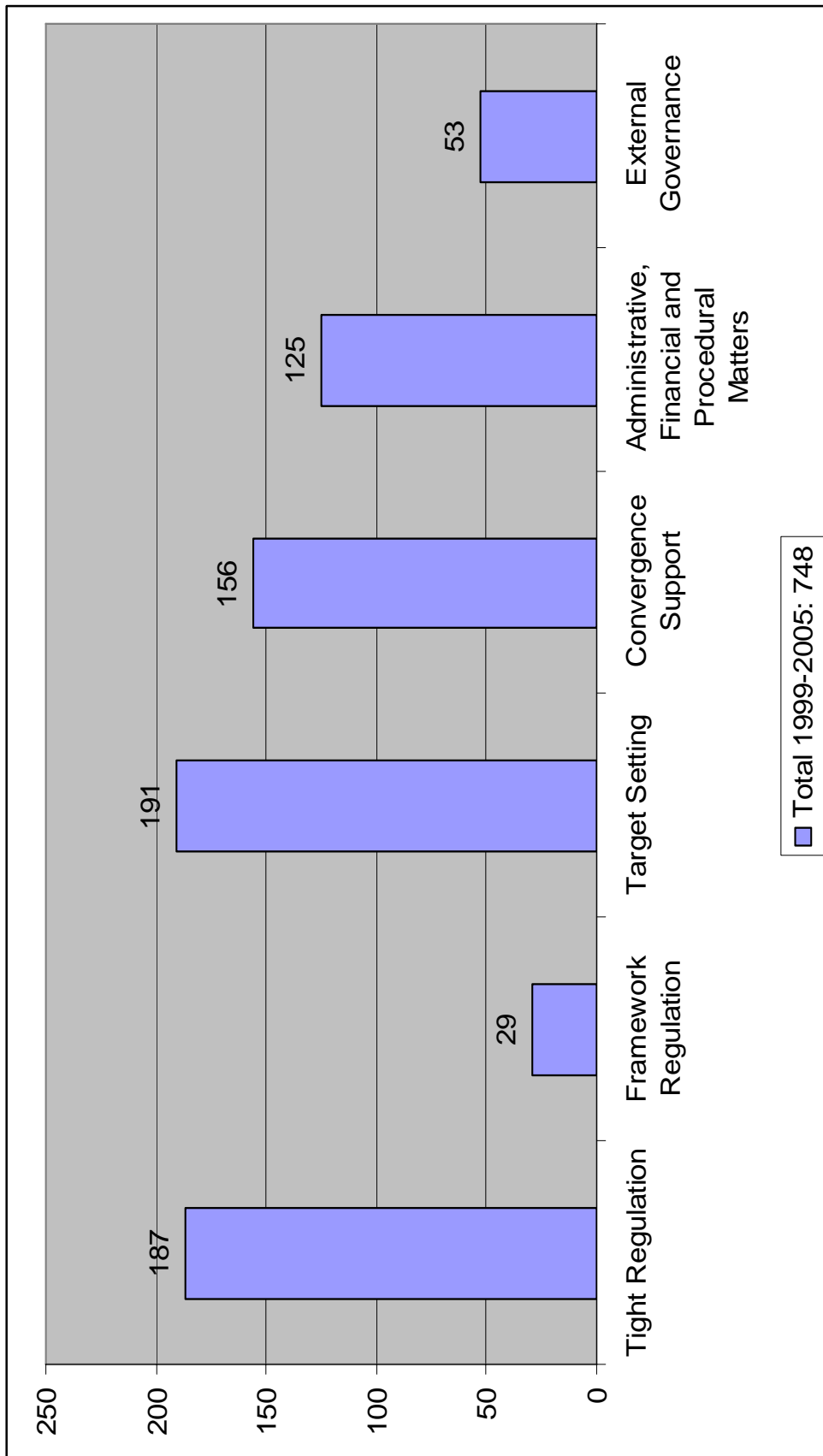


Table 2: Texts adopted in the JHA area 1 May 1999- 31 December 2005 (post-Amsterdam period): Total numbers per mode and field.

MODE	FIELD	Asylum	Immigr ation	External borders	Visa	Civil matters (jud. coop.)	Criminal matters (jud. coop.)	Police co- operation	Customs coop. (Title VI TEU)	Horizontal Issues Title IV TEC¹	Horizontal Issues Title VI TEU²	Horizontal Issues Titles IV TEC and VI TEU³	Total
	Tight regulation⁴	8	4	24	26	22	14	25	1	13	16	34	187
	Framework regulation⁵	4	8	1	0	2	15	1	0	1	4	2	29
	Target setting⁶	4	13	15	13	5	9	39	4	13	35	41	191
	Convergence support⁷	0	2	8	0	2	12	47	5	10	21	46	156
	Administrative, finan- cial and procedural framework⁸	2	2	39	1	11	9	38	0	4	7	12	125
	External governance⁹	1	5	0	1	3	4	27	0	4	4	3	53
	Total	19	36	87	41	45	61	177	10	46	90	128	748

¹ Asylum, immigration, border controls, judicial cooperation in civil matters.

² Police and judicial cooperation in criminal matters including fight against drugs, organised crime, terrorism.

³ Schengen, enlargement, data protection, drugs, etc.

⁴ Regulations, decisions under Art. 34 TEU, other formal decisions, conventions, common positions under Art.34 TEU, acts of Council according to Conventions under Title VI TEU.

⁵ Directives, framework decisions under Art. 34 TEU.

⁶ Resolutions, recommendations, conclusions, action plans, strategies, programmes, guidelines, annual programmes of agencies, best practice manuals.

⁷ Reports, evaluations, information studies, situation assessments adopted or taken note of.

⁸ Administrative documents (Personal matters, budgetary affairs, etc.), proposals for legislative acts under Title IV TEC and Title VI TEU, opt-in demands, inter-agency agreements, requests for an opinion from the Court of Justice, authorisation to adhere to international conventions, texts on working methods, authorisations to forward documents, Handbooks, audit reports.

⁹ International agreements under Title IV TEC and Title VI TEU, letters to third countries, joint declarations with or regarding Third Countries.

Table 3: Texts adopted in the JHA area 1 May 1999- 31 December 2005 (post-Amsterdam period): Evolution per year of all categories.

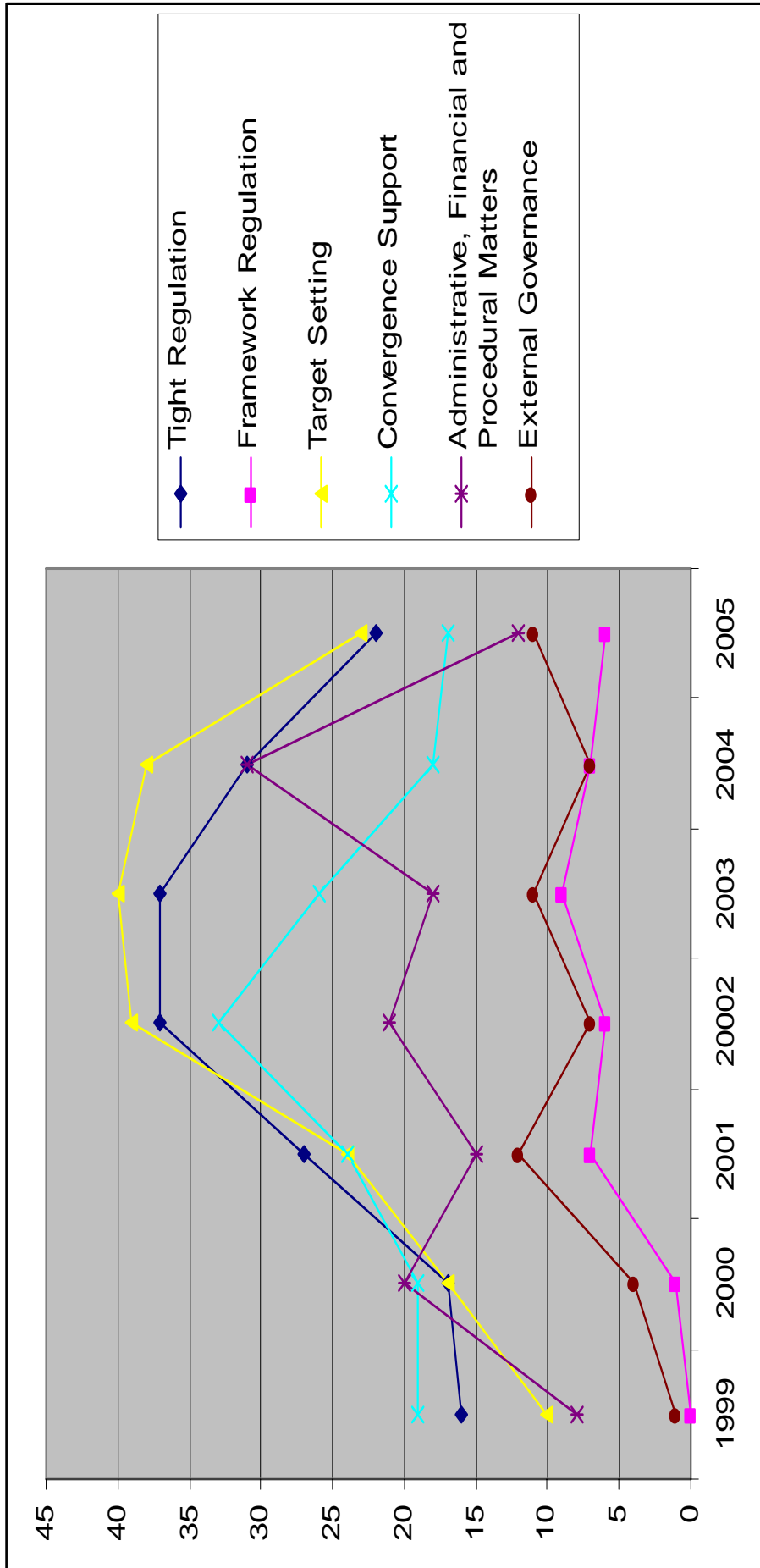


Table 4: Texts adopted in the JHA area 1 May 1999- 31 December 2005 (post-Amsterdam period): Evolution per year under the four “governance modes”

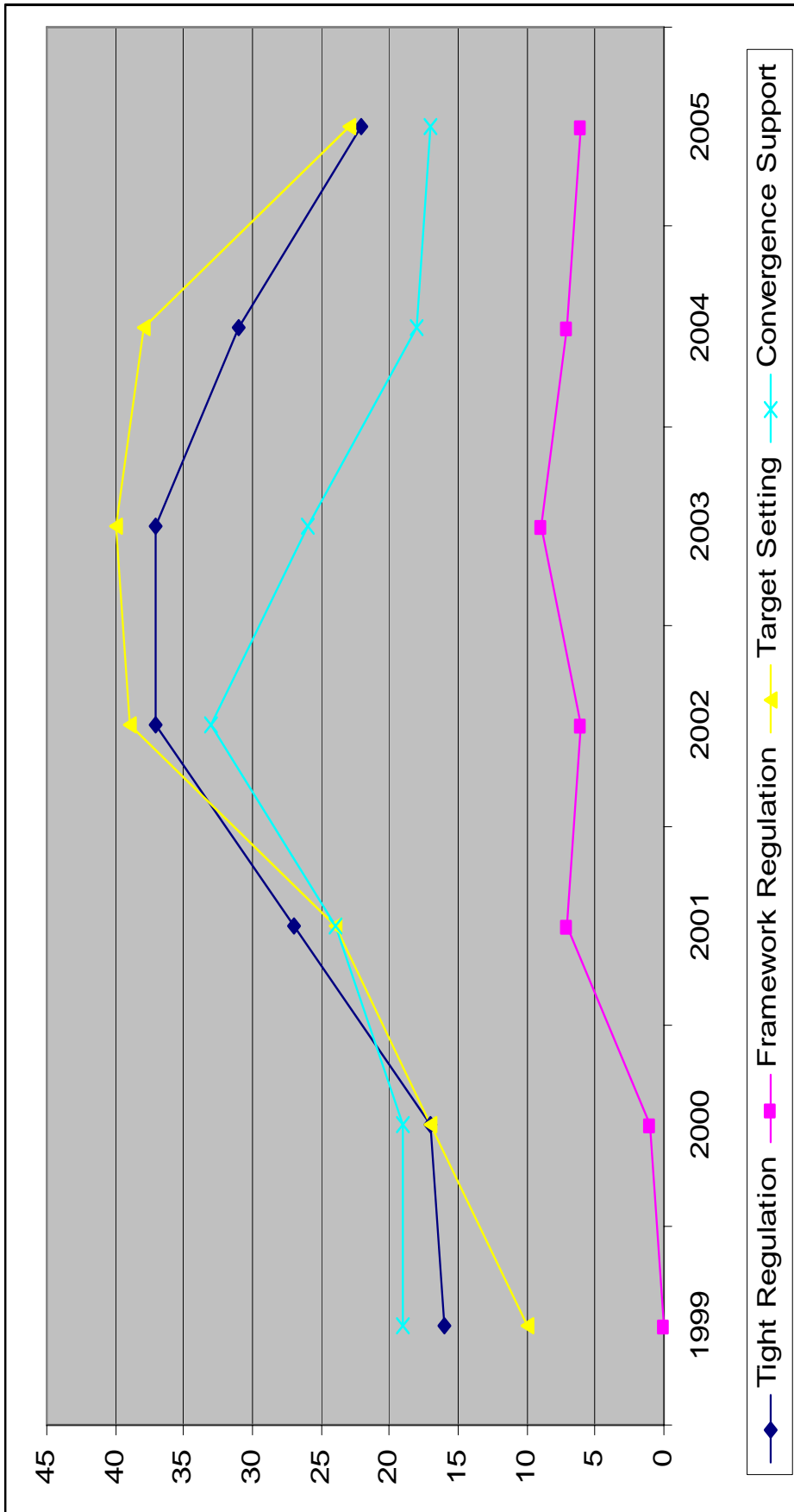


Table 5: Texts adopted in the JHA area 1 May 1999- 31 December 2005 (post-Amsterdam period): Numbers of binding and non-binding texts per policy field.

