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Université Robert Schuman de Strasbourg; Jörg Monar and Anya Dahmani

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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 observed which can be interpreted as a pragmatic reaction to the different constraints in the individual fields.

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1. Introduction¹

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 objectives², 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.

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. This can be interpreted as a pragmatic reaction to the different constraints in the individual fields.

2. Specific factors of EU governance in the JHA domain

One of the 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. EU governance in the JHA domain is necessarily in itself more diverse than more homogenous policy domains such as agricultural or environmental policy.

Furthermore, JHA as a policy field 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 in the domestic context with a high potential of making national governments win or lose elec-

¹ Note: this policy-brief is based on NEWGOV/ Working Paper 01/D17, www.eu-newgov.org

² Article 2 TEU.

tions. 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 significant of ‘integration’ of their systems and policies – there is not a single official “common policy” in any of the fields so far – they have preferred to gradually increase 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 result of the above is a distinct preference for the use of “lighter” modes of governance. This is reflected in a focus on 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.

Another aspect that defines the specificity of the JHA domain is its strong operational dimension. This obviously adds to the diversity of the governance requirements of the JHA domain.

Major differentiation in the JHA domain, such as the Schengen arrangements, and the “opt-outs” also contribute to its specificity and 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.

The last, but certainly not the least important of the factors determining EU governance in the JHA domain “the third pillar 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 basis³ but also by different decision-making procedures⁴, separate decision-making structures in the Council below the level of the COREPER and different legal instruments (to which we will come back below). 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.

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

Council activity in terms of numbers of texts adopted has gone through one major cycle in the post-Amsterdam period. Overall activity rose steeply from 1999 to 2002 when it reached a peak 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 foreseen a whole range of deadlines for adopting certain measures. 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. The Tampere European Council Con-

³ Title IV TEC and Title VI TEU.

⁴ Mainly qualified majority under Title IV TEC and unanimity under Title VI TEU.

clusions of October 1999 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 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 *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 – a very exceptional event indeed in this case – can have a major accelerating effect on the use of governance instruments.

4. 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. The results, of our research, 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 ratio 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. It should be noted that 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 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 - creating 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.

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. A large number of the binding texts adopted in this field

during the 1999 to 2005 period are related to the role and functioning Europol and the European Police College. Whenever the Council considers it necessary to establish guidelines for cross-border police cooperation target setting instruments are preferred.

As regards horizontal issues stretching across the Title IV TEC/Title VI TEU “pillar divide” the comparatively limited use of binding texts in this field 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. The comparatively high number of non-binding instruments used in this field 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.

Furthermore, 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. There are indications for 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 pragmatic maligned “pillar divide”.

There is 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 (the Framework Decisions on the European Arrest Warrant and on Combating Terrorism are examples) have had significant mutual recognition and harmonisation effects traditionally 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 as the “special agencies”, 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.

5. Conclusions

Can the JHA domain be regarded as a rather specific area of EU governance? In at least three 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. Hence it is obvious that the governance choices must in some respects substantially differ.

Secondly, there is also a 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.

Thirdly, 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 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 simply 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 three 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-making⁵ 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.

⁵ It is worthwhile to recall that the AFSJ emerged as a full-scale political integration project only with the Treaty of Amsterdam in 1999.