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## **NEWGOV**

### **New Modes of Governance**

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

#### **Comparing Modes of Governance: CFSP and JHA in Perspective**

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## Summary

Since the adoption of the Treaty of Maastricht, the evolution of the second and third pillars of the EU has attracted a high degree of interest; what seemed to be a case of parallelism in terms of institutional and procedural features, became a divorce in 1997, when substantial parts of the area of justice and home affairs were communitarised, while CFSP remained basically intergovernmental, enriched by a number of institutional and procedural innovations. In terms of the living constitution, both sectors have revealed a rather policy-specific development, making it difficult even to compare the remaining third pillar, i.e. the police and justice cooperation in criminal matters, to the CFSP. Governance in the two areas follows a policy-specific logic, although overarching trends in terms of the increasing degree of differentiation, growing links between intergovernmental and EC spheres of action, and dynamics towards mixed modes of decision-making, may be observed.

## Contents

<b>1. CFSP AND JHA: BROTHERS IN ARMS OR SPLIT APART? .....</b>	<b>4</b>
<b>2. THE EVOLUTION OF THE LEGAL CONSTITUTION: FROM CO-EVOLVING TO SPREADING APART? .....</b>	<b>4</b>
<b>3. THE LIVING CONSTITUTION OF CFSP AND JHA: TRENDS AND DEVELOPMENTS .....</b>	<b>5</b>
3.1. THE EVOLUTION OF THE LEGAL OUTPUT IN JHA .....	6
3.1.1. <i>Legally Binding Acts: tight regulations, framework regulations</i> .....	6
3.1.2. <i>Non-Binding Acts: Target Setting, Convergence Support, Administrative, Financial and Procedural Matters</i> .....	7
3.1.3. <i>External Governance: International Agreements and arrangements with third countries</i> .....	8
3.1.4. <i>Comparing the legal output of binding and non-binding instruments in different policy fields within JHA</i> .....	8
3.2. THE EVOLUTION OF THE LEGAL OUTPUT IN CFSP .....	10
3.2.1. <i>Treaty-based Instruments: Common Strategies, Common Positions, Joint Actions</i> .....	10
3.2.2. <i>EC legal acts related to CFSP</i> .....	10
3.2.3. <i>Agreements with third countries and international organisations</i> .....	12
3.3. NEW MODES OF GOVERNANCE IN CFSP AND ESDP: COORDINATION AND MARKET REGULATION .....	12
3.4. REGIME-BUILDING IN CFSP AND ESDP: CREATING A MARKET WITHOUT A SUPRANATIONAL AUTHORITY .....	13
<b>4. TRENDS AND EVOLUTIONS IN COMPARISON: TOWARDS MIXED FORMS OF GOVERNANCE? .....</b>	<b>14</b>
<b>5. BIBLIOGRAPHY.....</b>	<b>16</b>

## Table of Figures and Graphs

FIGURE 1. TEXTS ADOPTED IN THE JHA AREA 1 MAY 1999- 31 DECEMBER 2005 (POST-AMSTERDAM PERIOD), EVOLUTION PER YEAR: TIGHT REGULATIONS, FRAMEWORK REGULATIONS.....	6
FIGURE 2. TEXTS ADOPTED IN THE JHA AREA 1 MAY 1999- 31 DECEMBER 2005 (POST-AMSTERDAM PERIOD), EVOLUTION PER YEAR: TARGET SETTING, CONVERGENCE SUPPORT, ADMINISTRATIVE, FINANCIAL AND PROCEDURAL MATTERS .....	7
FIGURE 3. TEXTS ADOPTED IN THE JHA AREA 1 MAY 1999- 31 DECEMBER 2005 (POST-AMSTERDAM PERIOD), EVOLUTION PER YEAR: EXTERNAL GOVERNANCE .....	8
FIGURE 4. TEXTS ADOPTED IN THE JHA AREA 1 MAY 1999- 31 DECEMBER 2005 (POST-AMSTERDAM PERIOD): BINDING AND NON-BINDING LEGAL ACTS PER POLICY FIELD. ....	9
FIGURE 5. TEXTS ADOPTED IN THE JHA AREA 1 MAY 1999- 31 DECEMBER 2005 (POST-AMSTERDAM PERIOD): BINDING AND NON-BINDING LEGAL ACTS PER POLICY FIELD. ....	9
FIGURE 6. TREATY-BASED INSTRUMENTS IN CFSP, 1993-2004: COMMON STRATEGIES, COMMON POSITIONS AND JOINT ACTIONS .....	10
FIGURE 7. EC LEGISLATION RELATED TO CFSP 1993-2004 .....	11
FIGURE 8. BILATERAL AGREEMENTS WITH THIRD PARTIES IN CFSP, 1993-2004.....	12

## **1. CFSP and JHA: Brothers in Arms or Split Apart?**

The comparison between the area of CFSP and Justice and home affairs promises a number of revealing insights into the dynamics of governance in the European Union (Walker 2004; Peers 2006; Howorth 2001; Regelsberger 2004). First of all, there is an apparent policy similarity between both fields, dealing with security – broadly speaking – in its external and internal dimensions. Second, both policy areas seemed to correspond to what has traditionally been labelled as 'high politics', i.e. sensitive areas where national sovereignty is at stake and where the transfer of competencies would meet with considerable resistance at the member state level. Third, both areas were comparatively new in the spectrum of EU fields of action in contrast to well established EC policies such as agriculture or trade.

In the following analysis, the Common Foreign and Security Policy and the Cooperation in Justice and Home Affairs will be compared in terms of their legal and the living constitution in order to discern the dynamics of governance in each of them; similarities as well as differences will be assessed, as well as the driving forces for their evolution. The governance perspective will focus particularly on the instrumental dimension of steering and decision-making, i.e. it will be centred upon the scope, nature and quality of legal and non-legal acts adopted and implemented over the last years.

## **2. The Evolution of the Legal Constitution: From co-evolving to spreading apart?**

Until 1997, the Second and Third Pillars of the EU seemed to be quite similar in nature, organised basically according to intergovernmental principles. Unanimity and member state predominance, a weak role for the Commission and even weaker for the European Parliament, and almost non-existent judicial control by the Court of Justice, were regarded as the distinctive features; the explanation given widely hinted at the highly sensitive quality of the policies in question, namely external and internal security, in which the nation-state was regarded as unwilling to cede sovereignty to the supranational level of decision-making.

However, with the Treaty reform of Amsterdam the institutional landscape of the Union underwent dramatic changes: the partial 'communitarization' of what had been labelled as the "cooperation in justice and home affairs", coupled with the EU-isation of the Schengen acquis – at least for most member states - left a heavily reduced third pillar henceforth titled "police and judicial cooperation in criminal matters", which furthermore was opened for new forms and ways of legal instruments well beyond the scope of pure intergovernmental cooperation (Kuijper 2004: 613ff.).

CFSP has, in contrast, not witnessed such an impressive turning point. Here, the institutional and procedural set-up has been basically preserved since 1993 (Nuttall 1997), while a number of innovations have been introduced among which the creation of the High Representative for the CFSP and the introduction of 'constructive abstention' into the Treaty were most remarkable (Regelsberger 2004). It was until 1999 when the creation of the European Security and Defence Policy (ESDP) triggered a new dynamics that changed the rhythm and menu of decision-making in CFSP and reflected a new role and responsibility for the Union in the international arena (Howorth 2001; Duke 2000). Henceforth it would be able to carry out crisis management missions of a military and civilian nature, making it necessary to expand and adjust the pre-existing set of instruments and procedures.

One of the highly interesting questions thus is why CFSP and JHA have experienced such different paths in institutional development since the late 1990s. A number of factors may be

made accountable: first, there has apparently been an impetus caused by enlargement. The EU-15 member states were generally interested in making certain elements of JHA as binding as possible for the prospective new members, increasing the threshold for accession. Therefore, the policy areas of visa, asylum and immigration were transferred into the first pillar, subject to a transitional period where 'normal' EC procedures would not be applied; it could be expected at the same time that the transitional period would expire before the accession of new members. Furthermore, there is a much higher affinity of certain fields in justice and home affairs with classical EC activities, particularly with the concept of the internal market in terms of the free movement of persons, making a transfer of policies into the EC pillar functionally more appropriate than in the area of classical foreign policy. Third, the partial communitarisation of justice and home affairs did not lead to a strong 'supranationalisation' of the affected policy fields, but was accompanied by a cautious and moderate approach including transitional periods with special institutional provisions regarding unanimity and co-initiative of member states and Commission.

### **3. The Living Constitution of CFSP and JHA: Trends and Developments**

While justice and home affairs represent less a policy area as such but a broad range of different policies such as visa, asylum, immigration, police cooperation or judicial cooperation (Walker 2004; Peers 2006; Monar 2006), the area of CFSP is much less diversified and more limited in variation. Further, the distinction between foreign, security and defence policy is hard to make and leaves considerable fuzziness; a slightly more identifiable structure is introduced by the distinction between CFSP and ESDP, although the relationship between both is less marked by clear separation but by different functional tasks. At the same time, there is a twofold tension at work: on the one hand it is officially stated that ESDP is part of the CFSP – which was explicitly laid down in the draft Constitutional Treaty – while on the other hand it reveals features that distinguish it increasingly from the former and seems to head towards a particular institutional set-up.

Therefore, for the purpose of differentiation, CFSP policy fields will be categorized into the following areas:

- declaratory foreign policy using diplomatic instruments and textual modes of communication: here, the main instrument lies in common strategies and common positions as well as CFSP declarations by the Presidency.
- operational foreign policy, marked by an EU activity in third countries involving the deployment of staff and resources abroad: here, the legal form of an act is in the shape mostly of a joint action; additionally, in recent years EC legal acts have been concluded on the basis of a common position or joint action in order to impose trade sanctions upon third countries.
- operational security policy, characterized by operations in civilian and military crisis management: these are concluded also as joint actions with subsequent decisions by the political and Security Committee (PSC).
- a structural dimension of security policy, aiming at the convergence of national policies, the improvement of resources and capabilities and the creation of common arenas for policy-making: Here, new forms of governance may be identified in the shape of a weak and soft coordination mechanism for the improvement of military capabilities, and by creating competitive market structures in the realm of military procurement.

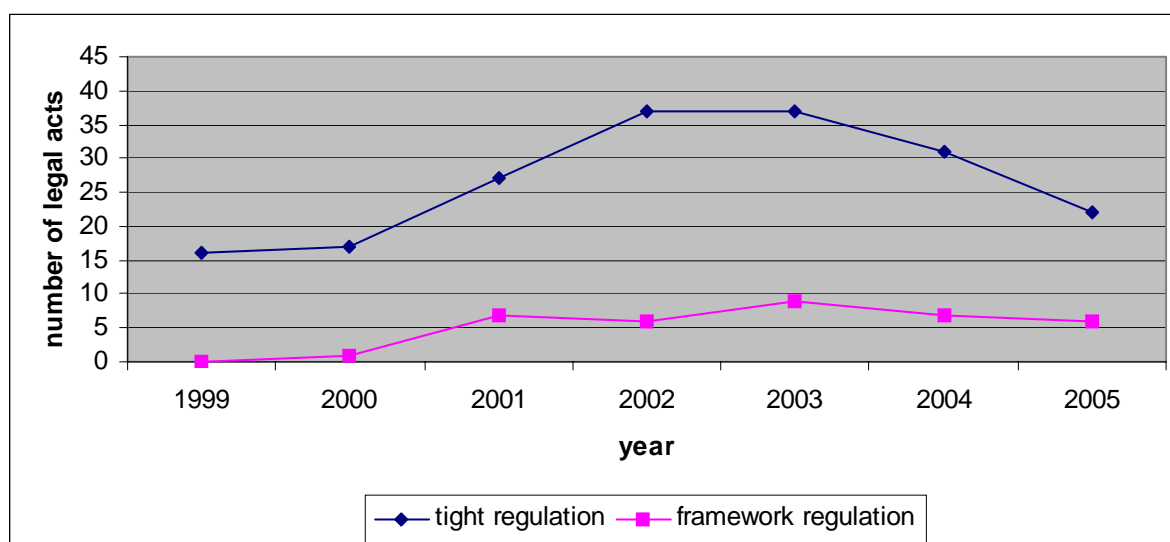
In these areas, different modes of governance may be at work; basically, CFSP and ESDP function as a mechanism in which intergovernmental negotiations take place, trying to coordinate national positions and activities and revealing trends towards transgovernmental ways of decision-making. However, since the inception of CFSP under the Maastricht Treaty, a process of differentiation has taken place that led to an increase of different variations of governance; this process is not finished until today, but still in the making.

### 3.1. The Evolution of the Legal Output in JHA<sup>1</sup>

In the field of justice and home affairs, a first relevant distinction lies in the nature of legal acts, i.e. the question of bindingness (Monar 2005; 2006). The introduction of the area of freedom security and justice with its first pillar and its third pillar elements, has led to a mixed picture in which binding and non-binding acts may be adopted under both frameworks. Jörg Monar distinguishes under the heading of binding instruments 'tight regulation' and 'framework regulation', while non-binding acts are categorized as 'target setting', 'convergence support', 'administrative governance' and 'external governance'. These categories run cross-pillars, i.e. that they may be applied in the EC as well as in the field of police and justice cooperation in criminal matters, signalling a trend towards increasing fuzziness of the pillar structure. In the following passages, the different acts will be explored in further detail and then compared to the key trends in CFSP.

#### 3.1.1. Legally Binding Acts: tight regulations<sup>2</sup>, framework regulations<sup>3</sup>

**Figure 1. Texts adopted in the JHA area 1 May 1999- 31 December 2005 (post-Amsterdam period), evolution per year: tight regulations, framework regulations**



Source: Monar 2006.

The legally binding acts in the framework of justice and home affairs have grown dynamically from the end of the 1990s until 2003, revealing a slowdown from 2004 onwards. The

<sup>1</sup> The subsequent analysis follows basically the contribution by Monar 2006.

<sup>2</sup> 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.

<sup>3</sup> Directives, framework decisions under Art. 34 TEU

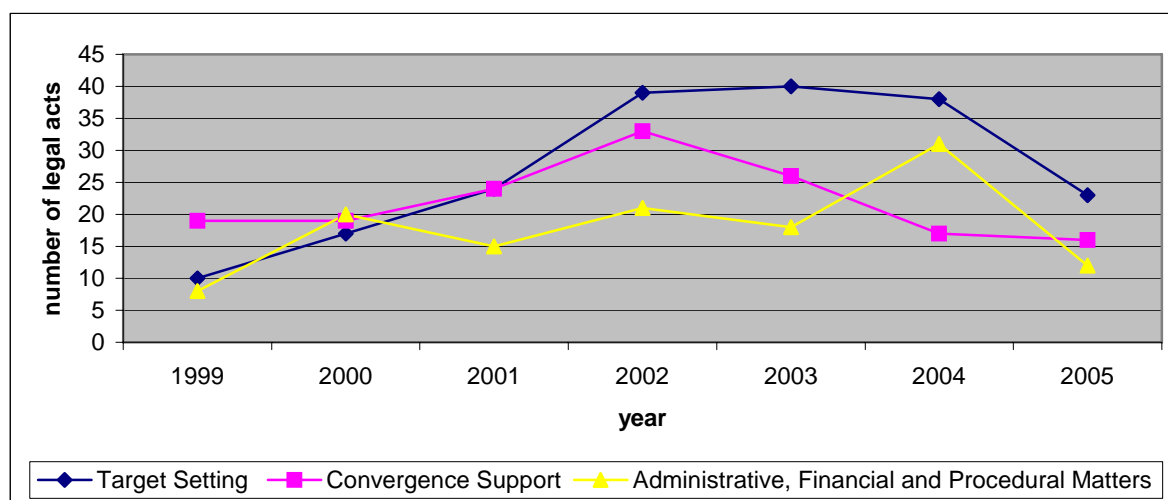
initial dynamics may be explained primarily by the need to incorporate the Schengen acquis into the legal framework of the Union after 1997, of which a substantial part was translated into EC law, and by the existence of the 5 years transitional period which served as a window of opportunity for the member states in which the full application of the Community method was suspended.

Still, the absolute amount of binding legal acts in the area of justice and home affairs and in particular the fact that tight regulation is outnumbering the less strictly binding framework regulation instruments by far, signals a high degree of need for such instruments to the surprise of those expectations that assumed a rather cautious use of legislation due to the high sensitivity of the area under consideration.

### 3.1.2. Non-Binding Acts: Target Setting<sup>4</sup>, Convergence Support<sup>5</sup>, Administrative, Financial and Procedural Matters<sup>6</sup>

In the area of non-binding acts, the trends are interestingly similar to the ones observed above. Since 2004, there is a slow-down of dynamics and even a reversal of the growth in the adoption of acts, most sharply with target setting and administrative acts, less so in the case of convergence support, where since 2002/2003 a downfall has been observed, and ever since a stabilisation was taking place.

**Figure 2. Texts adopted in the JHA area 1 May 1999- 31 December 2005 (post-Amsterdam period), evolution per year: Target Setting, Convergence Support, Administrative, Financial and Procedural Matters**



Source: Monar 2006

The number of non-binding legal acts has evolved in a dynamic manner since the late 1990s, with rather disparate trends between the different instruments: while target setting has been

<sup>4</sup> Resolutions, recommendations, conclusions, action plans, strategies, programmes, guidelines, annual programmes of agencies, best practice manuals.

<sup>5</sup> Reports, evaluations, information studies, situation assessments adopted or taken note of.

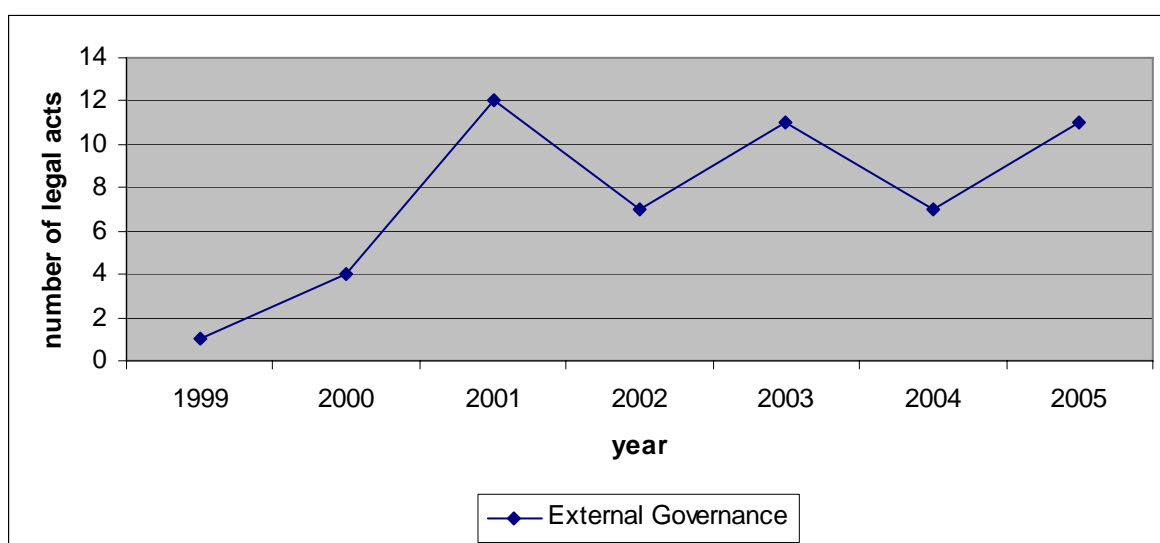
<sup>6</sup> Administrative documents (Personal matters, budgetary affairs, etc.), proposals for legislative acts under Title IV TEC and Title VI TEU, opt-in demands, inter-agency agreements, requests for an opinion from the Court of Justice, authorisation to adhere to international conventions, texts on working methods, authorisations to forward documents, Handbooks, audit reports.

quite stable between 2002 and 2004, it has experienced a decline since 2005, similarly to instruments in administrative, financial, and procedural matters, while convergence support is at a rather stable level since 1999, with a temporary peak in 2002.

### 3.1.3. External Governance<sup>7</sup>: International Agreements and arrangements with third countries

The development in the field of external governance has been quite volatile since 2001, reaching peaks and downs in a regular rhythm, but all in all stable with regard to the average values. Compared to 1999, a moderate growth can be identified that may be regarded as a reflection of the increasing international inter-connection of justice and home affairs, as well as the enlargement process producing close contractual relations with accession countries.

**Figure 3. Texts adopted in the JHA area 1 May 1999- 31 December 2005 (post-Amsterdam period), evolution per year: External Governance**



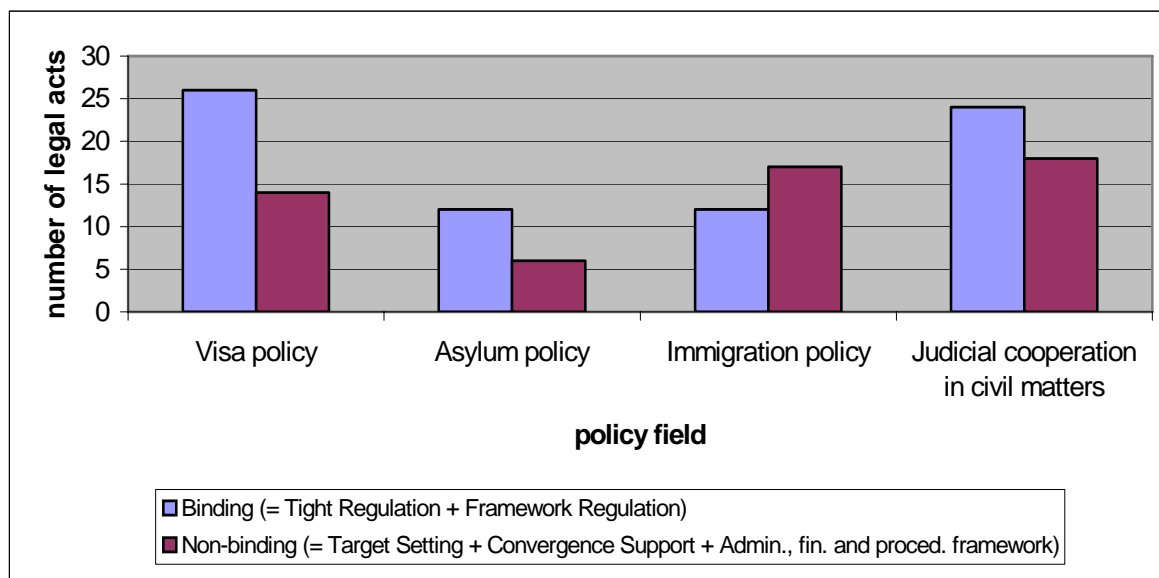
Source: Monar 2006

### 3.1.4. Comparing the legal output of binding and non-binding instruments in different policy fields within JHA

When comparing the ratio between the binding and the non-binding instruments in different policy fields, it is not surprising that in the EC-related areas of activity in general, a higher proportion of binding law may be observed. This is particularly the case in visa and asylum policy, less so in immigration, due to political reasons. As Monar (2006) points out, the amount of binding legislation has to be seen in connection with issues of political will and consensus among the member states; immigration policy has thus traditionally caused higher tensions and was much less accepted for European policy-making than visa and asylum, which in the context of the Schengen system already had played a relevant role. Judicial cooperation in criminal matters is revealing close relations to the area of EC legislation in internal market affairs, so that a higher ration of binding legislation compared to non-binding instruments can be explained.

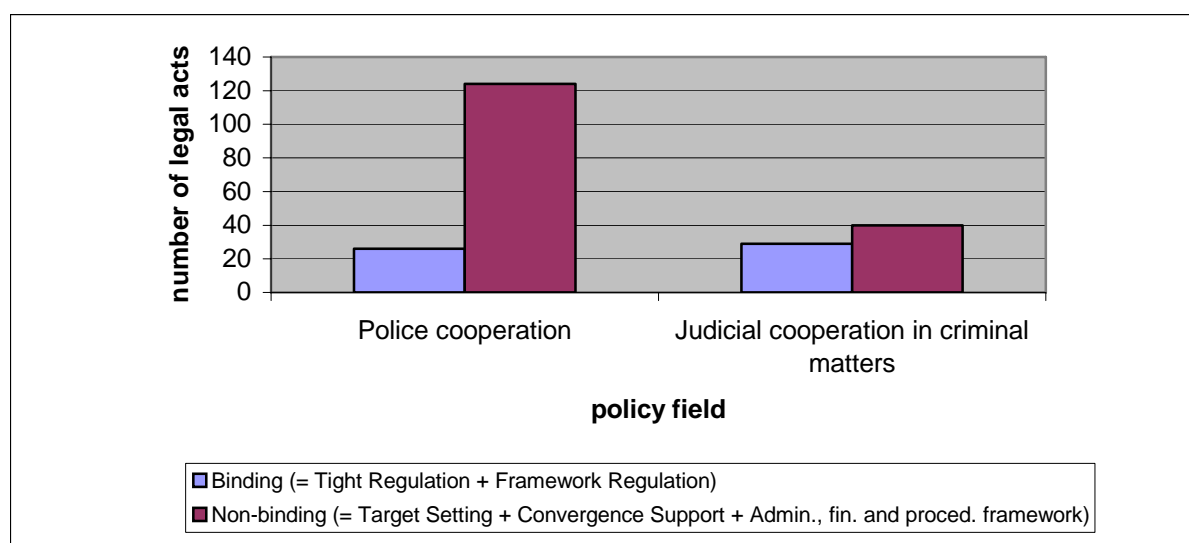
<sup>7</sup> International agreements under Title IV TEC and Title VI TEU, letters to third countries, joint declarations with or regarding Third Countries.

**Figure 4. Texts adopted in the JHA area 1 May 1999- 31 December 2005 (post-Amsterdam period): Binding and Non-binding legal acts per policy field.**



Source: based on Monar 2006.

**Figure 5. Texts adopted in the JHA area 1 May 1999- 31 December 2005 (post-Amsterdam period): Binding and Non-binding legal acts per policy field.**



Source: based on Monar 2006.

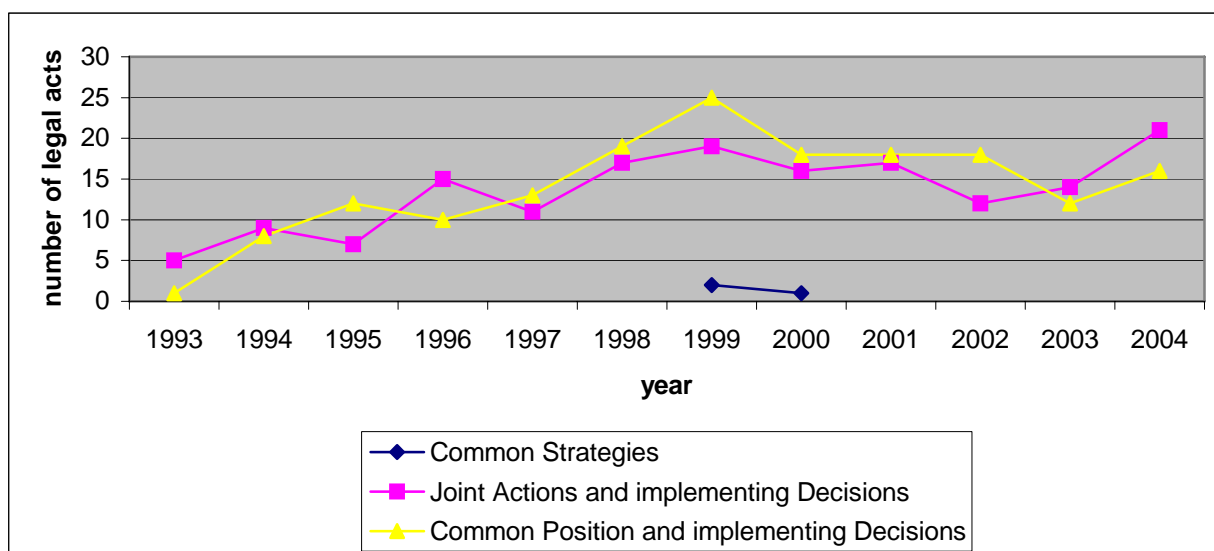
The picture in the fields of police and judicial cooperation in criminal matters is quite different from the EC area. Here, the ratio is in favour of non-binding instruments, although much higher in the field of police than of judicial cooperation. Apparently, however, the institutional structure of the policy field under investigation does play an important role for the use of legal instruments in REU governance.

### 3.2. The Evolution of the Legal Output in CFSP<sup>8</sup>

#### 3.2.1. Treaty-based Instruments: Common Strategies, Common Positions, Joint Actions

The number of common positions and joint actions has steadily increased since the early 1990s, as a result of growing foreign policy commitments by the EU; the creation of the ESDP after 1998 has further consolidated this trend due to the fact that crisis management missions are formally adopted as joint actions, particularly after 2003. A similar trend may be observed for the adoption of common positions which have been at a stable level since the early 2000s and are in rise again after 2003. Both instruments belong to the traditional CFSP set of acts whose bindingness is more a question of political than legal relevance. On the other hand, joint actions in terms of crisis management, once decided, require a degree of formal obedience to common rules that go well beyond the practice of classical diplomatic intercourse.

**Figure 6. Treaty-based instruments in CFSP, 1993-2004: Common Strategies, Common Positions and Joint Actions**



Source: Own compilation based on Eur-Lex data

#### 3.2.2. EC legal acts related to CFSP

The legal basis for most of the regulations imposing restrictive measures is provided for by Arts.60 TEC, Art.301 TEC, and Art.308 TEC. Art.60 TEC stipulates that "(i)f, in the cases envisaged in Article 301, action by the Community is deemed necessary, the Council may, in accordance with the procedure provided for in Article 301, take the necessary urgent measures on the movement of capital and on payments as regards the third countries concerned. [...]".

Art. 301 TEC provides the link to CFSP by stating that "(w)here it is provided, in a common position or in a joint action adopted according to the provisions of the Treaty on European Union relating to the common foreign and security policy, for an action by the Community to

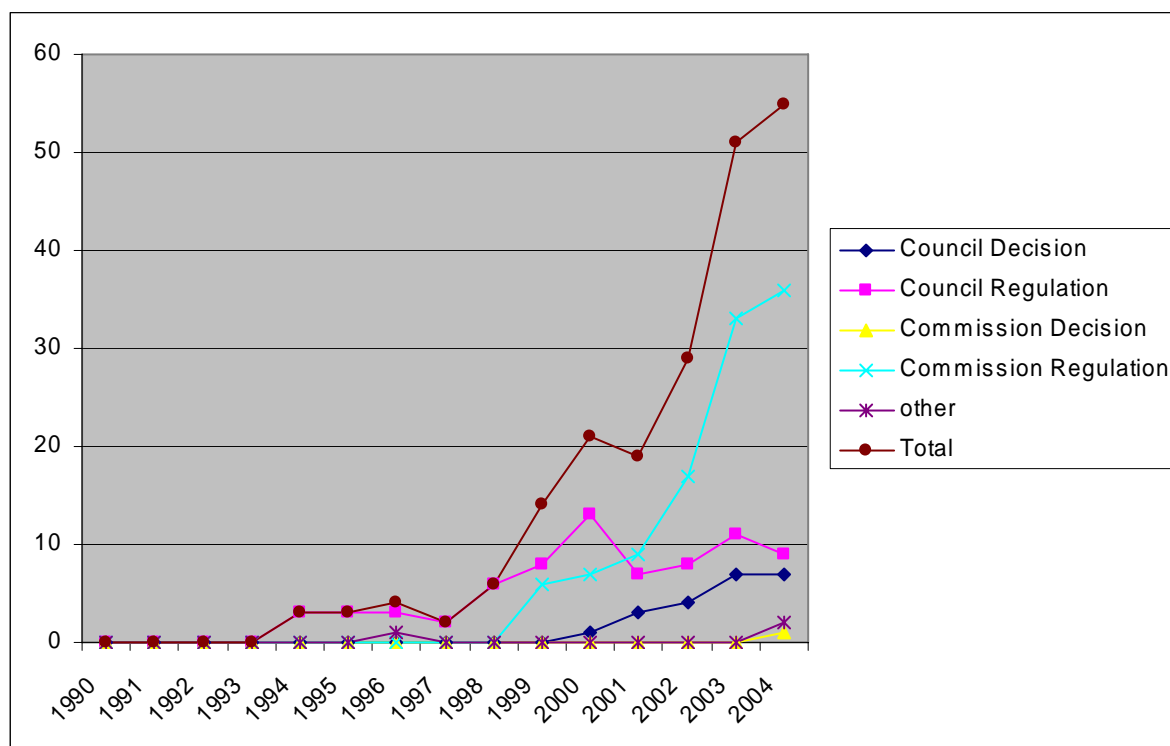
<sup>8</sup> The following analysis follows basically the argument by Diedrichs 2007.

interrupt or to reduce, in part or completely, economic relations with one or more third countries, the Council shall take the necessary urgent measures. The Council shall act by a qualified majority on a proposal from the Commission".

The general clause of Art.308 TEC is also used, authorising the Council to take decisions without an explicit provision in the EC Treaty in that regard: "If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures."

One of the most prominent cases of an EC regulation providing for restrictive measures directed against legal or natural persons has been the regulation against Usama bin Laden, Al Qaida and the Taliban, which, after the adoption of the act in 2002 by the Council has been amended (by the Commission) 42 times until 2004; amendments concerned the list annexed to the regulation naming the persons and entities to be submitted to the restrictive measures. The Commission has been authorized by EC regulation 881/2002 (Art. 7) to adjust this list on the basis of decisions by the UN Security Council or the Sanctions Committee. In a similar manner, restrictive measures against third countries have been updated in recent years, leading to a dynamic set of regulations. The amount of legal acts adopted under the EC has not led to a blurring of institutional processes in the first and second pillar, but nonetheless it has underlined the fact that binding EC measures have become a key element of the EU's foreign policy, relying thus on cross-pillar combinations of legal acts.

**Figure 7. EC Legislation related to CFSP 1993-2004**

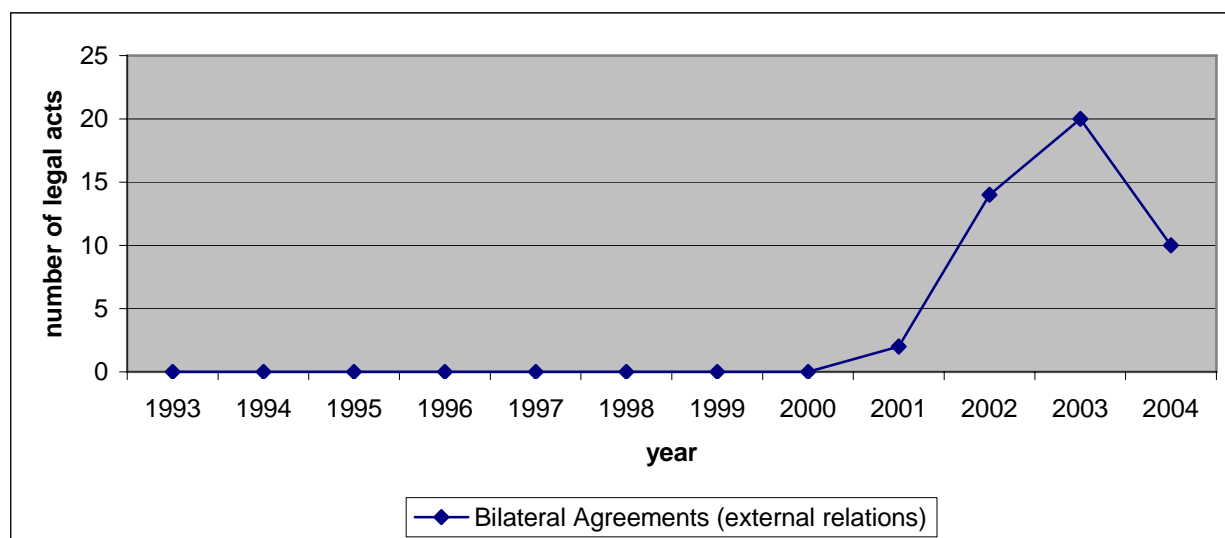


Source: Own compilation based on Eur-Lex data

### 3.2.3. Agreements with third countries and international organisations

The number of agreements by the EU with third countries has not been an intensively used instrument since its inception by the Treaty of Amsterdam, but has dramatically grown in number after 2000; this trend is most probably due to the creation of the European Security and Defence Policy where agreements are concluded in order to arrange for the participation of third countries in EU crisis management operations; here in the first place candidate countries have been active; thus, it may be expected that the number of agreements of that kind will decrease due to the last enlargement round in 2004.

**Figure 8. Bilateral Agreements with third parties in CFSP, 1993-2004**



Source: Own compilation based on Eur-Lex data.

### 3.3. New Modes of Governance in CFSP and ESDP: Coordination and Market Regulation

Since the emergence of ESDP in the late 1990s the EU has tried to define a set of military and civilian goals that should be achieved in order to become fully operational for the conduct of crisis management operations (Lindley-French 2002). The Helsinki Force Catalogue included the list of resources in terms of staff, equipment and weapon systems which would be needed to fulfil the Petersberg tasks. As a key principle of ESDP was defined in terms of voluntary contributions to crisis management by the member states, it was evident that neither a supranational authority nor procedural patterns from the EC would be applied. The result was a tension between intergovernmentalism in institutional terms and the need for more effectiveness in operational terms. As the option of binding supranational mechanisms in decision-making did not exist, a particular process of capability improvement was developed that should avoid explicitly naming certain countries and their 'sins', but was designed to increase the pressure on the governments so as to make them act. The first element of this process has been the existence of regular reports on ESDP by the Presidency since 1999, describing the state of the art, the gaps and the perspectives. Since December 2001, the European Capabilities Action Plan was inaugurated officially by the European Council which led to the creation of panels composed of national experts who should discuss the existing lacks and gaps and try to find solutions for sensitive capability deficits. ECAP allowed to mobilise technocratic expertise from the ministries of defence and also triggered an expert discourse on the capabili-

ties of ESDP which created a kind of semi-public pressure upon the member states for improving their national capabilities.

The coordination of the panels was entrusted to a Headline Goal Task Force, which was supported by the EU Military Staff (Schmitt 2005). As a next step, in 2003 a new stage in the definition of the headline goals was envisaged which led to the adoption of the Headline Goal 2010 in June 2004, focusing more on qualitative improvements, the higher spectrum of the Petersberg tasks, and multi-national projects between the member states in order to mobilise synergies (Council of the EU 2004).

Since March 2003 the Capability Development Mechanism (CDM) started to operate including mid-year progress reports as well as since 2004 the publication of the Capabilities Improvement Chart. Thus, due to the functional need for improving the military capabilities of the member states a process of reporting emerged which was then reflected in national media and expert publications. There is no explicit naming of specific national deficits so that no naming and shaming is taking place, which would be unacceptable for member states governments. On the other hand, the information and the data on defence spending regularly published, allow for comparisons and for identification of compliers and non-compliers. This is less a question of objective criteria which may be applied, but much more of a political discourse where the level of ambition of a country is compared to the real performance. So far the mechanism has proved to be of little effectiveness, mostly due to its cautious approach and to the political resistance against binding obligations. On the other hand, there seems to be a mechanism of good practice or following examples, which could be seen in the initially French-British initiative on the battle groups of February 2004, which was taken up by Germany and in November of the year led to broader initiatives that included almost all EU countries.

### **3.4. Regime-Building in CFSP and ESDP: Creating a Market without a Supranational Authority**

The creation of the European Defence Agency has so far had a double effect: it has introduced a new institutional player in the CFSP/ESDP arena, and it has led to the creation of a specific regime under the authority of the Agency: an emerging European procurement and defence equipment market. It is more or less the experiment of creating market structures by opening national procurement systems not through the Monnet method, but by a strict intergovernmental set of rules and principles to which participant countries subscribe. The European Defence Agency (EDA) has been put in charge of defence capabilities development, of armaments cooperation, of the defence technological and industrial base and of the defence equipment market, research and technology.

It is a crucial actor in the process of capability improvement, and responsible for the coordination of the ECAP, and it is also the supervising authority for the defence equipment market (Keohane 2004). The EDA, conceived as a network more than a heavily loaded organisation, has increasingly become a focus for defence cooperation. The Western Europe Armaments Group soon disappeared, while the EDA became a player in the creation of a EU defence market. On the 1 July 2006 the regime for a European defence equipment market entered into force, which tried to open national procurement systems on the basis of a *Code of Conduct on Defence Procurement* (Code of Conduct 2005) which constitutes a voluntary commitment by the participating states on the opening of their defence markets. It is self-declared non-binding, intergovernmental and aimed at encouraging competition based upon reciprocity between the participating states. Member states will offer – with some exceptions – equal opportunities to suppliers in other countries, thus accepting tenders to be published by the EDA on

the Electronic Board Bulletin (EBB). This would constitute a first cautious step in the direction of overcoming the impediments of Art. 296 TEC, that has prevented the application of the single market to goods in defence equipment. The crucial question will be to know whether market structures can develop under such a regime without binding rules and a strong supranational authority supervising the application of the rules established, and whether the EDA could grow into a regulatory agency that would be able to compensate for the lack of such an authority. In terms of modes of governance, two aspects are of interest: will the EDA become increasingly autonomous, thus strengthening "governance by delegation", and in how far will it contribute to establish forms of competitive modes of interaction for public and private actors. The empirical basis for an investigation of these fundamental questions is still too narrow, but in the coming years more data will be available allowing for a systematic analysis.

#### **4. Trends and Evolutions in Comparison: Towards Mixed Forms of Governance?**

The analysis of major trends in governance in the areas of justice and home affairs and the foreign and security policy has at first sight confirmed the assumption that the dynamics and peculiarities of governance has to be analysed in a policy-specific perspective. The case of justice and home affairs is revealing in this regard, showing that the mix between binding and non-binding instruments differs in visa, asylum and immigration policy although all of these are integrated in the EC. It is less the pillar structure than the specific rationale in a policy that makes the difference and accounts for deviations in forms and modes of governance. Immigration policy is a telling case where political sensitivity and concerns for sovereignty have impeded the establishment of a strong *acquis* of supranational regulation and thus have contributed to the

In CFSP, the evolution follows quite specific paths, too. Here, the distinction between binding and non-binding instruments makes sense only to a limited extent. Instead, the emergence of different forms of governance in the shape of weak coordination and of an intergovernmental market regime seems to be of much higher attraction. Still, the link between EC legislation and CFSP decisions has become of growing importance in quantitative terms, while the conclusion of agreements has also experienced a dramatic dynamics since the late 1990s. EC measures based upon a CFSP common position or joint action according to Art. 301 TEC don't tilt the balance of CFSP towards supranationality, but reveal that binding measures in the shape mostly of economic sanctions have become a common element in the EU's foreign policy. Next, EU agreements – though not concluded under Art.300 TEC as Community agreements – show strongly binding features for the parties involved.

The traditional conceptualisation of CFSP as an intergovernmental policy area is not out of date or out of touch, but experiences regular phases of reinforcement in case of major crises (like Yugoslavia or Iraq). A major source of innovation and dynamics lies in the creation of the ESDP, which has not, as many observers expected, strengthened the intergovernmental nature of CFSP, but led to new windows of opportunity by opening up new fields of activities. Crisis management operations rely on mixed sources of financing, even when they are primarily military in nature; the creation of a defence equipment market is an experiment without example in the EU.

Extremely soft forms of coordination might even be identified in ESDP when it comes to the capability improvement mechanism. A regime for the creation of a market on defence procurement has been established, which leaves open an exit option for all participating states,

but also represents a window of opportunity for a further-reaching process of regulatory policy-making in the future.

In both areas – justice and home affairs as well as CFSP – the legal spheres of action and application have so far not been mixed up, but they have grown further together. Differentiation of instruments applied in both spheres has increased since the late 1990s, while at the same time more diversity has been visible in the range of acts adopted under the area of freedom, security and justice and the second pillar.

There is, in sum, a limited trend towards binding instruments in justice and home affairs as well as in CFSP, while these trends must be seen with extreme caution and in recognition of the specific policy area in question.

Also, the pillar structure is relevant for both policy areas, but ever less as an insurmountable obstacle to combinations and inter-linkages of instruments. This is clearly the case in justice and home affairs when regarding e.g. the fight against illegal immigration where first pillar measures are applied for external border control whereas third pillar acts are applied in the fight against trafficking. In CFSP, the recourse to Art.60 TEC, Art.301 TEC and Art.308 TEC has become of mounting importance in quantitative terms since the early 2000s, due mainly to the EU response to terrorism after September 11<sup>th</sup>, 2001. In both policy fields however, the link between EC and EU instruments is guided by rather different logics and generates peculiar results, which taken together should not lead us to assume the existence of an overall trend.

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