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Governance in the Justice and home affairs domain: From "softer" to "harder" modes?

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Summary

Since the 1990s there has been an evolution towards the use of "harder" modes of governance in the JHA domain, but this evolution has been slow and has not put an end to the very extensive use of non-binding texts and procedures with a lower degree of hierarchy in decision-making and of uniformity in implementation. In spite of a proliferation of objectives and a considerable output over the last few years EU governance in this domain is clearly not an unqualified success story, and there are substantial performance problems both as regards decision-making and the implementation of adopted measures, especially at the national level.

The Commission's response to these – as developed in the proposals of June 2006 – is aimed at an overall "hardening" of governance. The proposed tighter monitoring and evaluation could have a positive effect both on implementation and an adjustment of policies in the light of results achieved, while still remaining within an overall relatively "soft" governance framework based on non-binding objectives with monitoring and evaluation as key instruments to ensure proper implementation. Yet it is far from clear that the Member States are willing and/or capable to engage in the very comprehensive reporting on the results of JHA measures at the national level the new evaluation mechanism will require.

The proposed extension of the "Community method" to all JHA fields constitutes a much more radical step and would shift JHA "governance" to a significant extent towards "hard" governance. The generalisation of qualified majority voting in combination with an exclusive right of initiative for the Commission and full applicability of EC infringement procedures also in the current 'third pillar' fields would lead to a more hierarchical, rigid and uniform overall governance system in the JHA domain. While this might reduce some of the currently existing deficits in terms of decision-making and implementation it could also reduce the willingness of Member States to continue to agree on relatively ambitious objectives and to more legislation in the particularly sensitive fields of police and judicial cooperation in criminal matters. There is also the problem that the 'communitarisation' initiative comes without any "balancing" elements which would allow Member States to prevent the adoption of binding common measures incompatible with national constitutional provisions or fundamental principles of their legal system.

Overall the Commission's initiative to use the "passerelle" provisions can be seen as an attempt to replace the slow and uneven evolution from "softer" to "harder" modes of governance in the JHA domain by a sort of major regime change in favour of the latter. This appears not only as politically premature – at least as long as the fate of the Constitutional Treaty remains undecided – but also potentially counterproductive as forcing "hard" EU governance on Member States in highly sensitive policy fields might well reduce the willingness of at least several of them to develop and engage in substantial common policies. "Soft" governance modes have contributed much to the development of the "area of freedom, security and justice", and even if there are problems of effectiveness in the JHA domain, they should only be replaced by "harder" modes when, where and to the extent to which the common political will of the Member States is sufficient to sustain their use.

Contents

1. INTRODUCTION 4

2. EFFECTIVENESS PROBLEMS OF CURRENT EU GOVERNANCE IN THE JHA DOMAIN 5

3. THE PROPOSED STRENGTHENING OF MONITORING AND EVALUATION 8

4. THE PROPOSED USE OF THE "PASSERELLE" PROVISIONS 10

5. THE PROS AND CONS OF THE PROPOSED "HARDENING" OF EU JHA GOVERNANCE 14

6. CONCLUSIONS 19

ANNEXES: TABLES 21

Table of Figures and Graphs

TABLE 1: AGGREGATE NATIONAL IMPLEMENTATION DEFICITS UNDER THE HAGUE PROGRAMME (END OF 2005) ..21

TABLE 2: TEXTS ADOPTED IN THE JHA AREA 1 MAY 1999- 31 DECEMBER 2006 (POST-AMSTERDAM PERIOD): TOTAL NUMBERS OF ALL CATEGORIES 22

TABLE 3: TEXTS ADOPTED IN THE JHA AREA 1 MAY 1999- 31 DECEMBER 2006 (POST-AMSTERDAM PERIOD): EVOLUTION PER YEAR UNDER THE FOUR "GOVERNANCE MODES" 22

TABLE 4: TEXTS ADOPTED IN THE JHA AREA 1 MAY 1999- 31 DECEMBER 2006 (POST-AMSTERDAM PERIOD): NUMBERS OF BINDING AND NON-BINDING TEXTS PER POLICY FIELD 23

1. Introduction

In an earlier NEWGOV working paper we have looked at the specific factors, the typology and the trends of EU governance in the justice and home affairs (JHA) domain.[1] One of the conclusions we had drawn from the analysis of texts adopted by the JHA Council from 1999 to 2005 was that the extensive use of non-binding instruments, especially functional and programme target-setting texts and mutual evaluation and monitoring mechanisms can be regarded as one of the most specific features of EU governance in this domain. Because these instruments are not legally binding and are applied in a largely non-hierarchical and cooperative context they can be classified as "soft" modes of governance. They can also to some extent be regarded as "new modes" as they differ from the less discretionary, more uniformly applicable and more hierarchical instruments and mechanisms of the traditional Community method,[2] although the use of the term "new" is slightly more questionable in the JHA domain as the "old" Community method actually made its first significant appearance in this previously intergovernmental domain only after the entry into force of the Amsterdam Treaty in 1999.

With "soft" modes often being presented as alternatives to "hard" modes and with some authors clearly seeing the future of EU governance more in the "soft" than in the "hard" ones,[3] it seems a worthwhile question to ask what place "soft" modes of governance occupy in the JHA domain and whether their use is increasing or decreasing. In this contribution we will explore these questions, taking as a point of reference the European Commission's evaluation of progress and deficits in construction of the "area of freedom, security and justice" and its June 2006 proposals for a number of important reforms with implications for "soft" and "hard" governance in the JHA domain. The Commission's evaluation – as well as a number of other indicators – actually point to some serious problems of effectiveness of current EU JHA governance, and the Commission's proposals, especially that of using the "passerelle" provisions of Treaty for a 'communitarisation' of the 'third pillar' areas, appear to be based on the assumption that an at least partial return to "harder" instruments and procedures might reduce those problems. As the Commission's proposals got substantial backing from several Member States, it seems a distinct possibility that the EU might in due course engage in a major move from "softer" to "harder" governance in the JHA domain. We will first look at the current governance problems and then analyse the two main strands of the Commission's proposals, the strengthening of current monitoring and evaluation procedures and the use of the "passerelle" provisions. This will then enable us to discuss the pros and cons of the proposals and to conclude with an overall assessment of this latest drive towards a "hardening" of EU governance in the JHA domain.

A small conceptual clarification seems appropriate: As the border lines between "soft" and "hard" modes of governance are to some extent fluid there is a risk of an excessive contrast-

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[1] Jörg Monar: Specific factors, typology and development trends of modes of governance in the EU Justice andHome Affairs domain, NEWGOV Working Paper, no. 1/D17, May 2006.

[2] A distinction made, inter alia, in Adrienne Héritier: New Modes of Governance in Europe: Policy-making Without Legislating?, in: A. Héritier (ed.). The Provision of Common Goods: Governance Across Multiple Arenas, Boulder (Rowman & Littlefield) 2002, pp. 185-206.

[3] See, for instance, the assessment in Jonathan Zeitlin: The OMC in Action, Theoretical Promise, Empirical Realities, Reform Strategy, in: Jonathan Zeitlin/Philippe Pochet (eds.): The Open Method of Coordination in Action: The European Employment and Social Inclusion Strategies, Brussels (P.I.E.-Peter Lang) 2005, pp. 447-503.

ing of the two categories.[4] We therefore understand "soft(er)" and "hard(er)" modes in relative rather than absolute terms, with the degree of hierarchy ("command-and-control") and imposed uniformity as key criteria for separating the first from the second.

2. Effectiveness problems of current EU governance in the JHA domain

The rapid development of EU action in the JHA domain since the entry into force of the Treaty of Amsterdam – with an average of over ten texts adopted by the Council per month – cannot hide the fact that there are some problems which reduce the effectiveness of EU policies. Already in its June 2004 assessment of the results achieved by the 1999 to 2004 "Tampere Programme" the Commission pointed to the difficulties of achieving a number of objectives set by the Programme because of blockages in the EU decision-making system and poor implementation of adopted measures by the Member States.[5] With the implementation problems worsening and an explicit mandate from the European Council to review the progress made with the implementation of the 2004 to 2010 Hague Programme, the Commission submitted in June 2006 to Council and Parliament both a report on the implementation of the Programme during 2005[6] and a Communication entitled "Implementing the Hague Programme: The way forward"[7] which - on the basis of an identification of the main difficulties of decision-making and implementation - proposed enhanced evaluation procedures and a use of the "passerelle" provisions. Taken together these documents provide a fairly clear and comprehensive assessment of current EU governance problems as seen by the Commission:

According to the Commission's analysis only 65,22% of the measures scheduled by the Hague Programme for 2005 were achieved during that year, with the rest being delayed or postponed.[8] In addition the Commission pointed to several key measures having been delayed for a very long time.[9] Examples are

- the Framework Decision on the European Evidence Warrant which was proposed in November 2003, should according to the Hague Programme have been enacted at the end of 2005 and is currently (March 2007) still not adopted;
- the Framework Decision on procedural rights in criminal proceedings which was proposed in April 2004, should according to the Hague Programme also have been enacted at the end of 2005 and is also currently still not adopted;
- the Framework Decision on racism and xenophobia which is aimed on condemning in the same way offences of racism and xenophobia throughout the Union and on authorising further cross-border investigation and was proposed already in November 2001 as part of the Tampere agenda but has made little progress in the Council until now;
- the adoption of the Directive on minimum standards on procedures in the Member States for granting and withdrawing refugee status[10] only on 1 December 2005, although it had been proposed already in November 2000 and should have been adopted already under the Tampere Programme by the end of April 2004.

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4 See on this point Renaud Dehousse: The Open Method of Coordination: a New Policy Paradigm?, in: Cahiers européens de Sciences Po, 3 (2003).

5 COM(2004) 4002 of 02.06.2004, pp. 4-5.

6 COM(2006) 333 of 28.06.2006.

7 COM(2006) 331 of 28.06.2006.

8 COM(2006) 333 of 28.06.2006, p. 4.

9 Ibid., p. 5, 10 and 16, and COM(2006) 331 of 28.06.2006, p. 12.

10 Directive 2005/85/EC, OJ L326 of 13.12.2005.

As regards the implementation of adopted legislation the Commission calculated significant levels of "aggregate implementation deficits", a category covering failures to notify transposition measures, non-compliance and invalid application, affecting from around 2,7% of the measures in the case of Poland to around 25,68% in the case of Luxemburg (see Table 1) with an average of 11,08%.[11] The Commission emphasized that in the fields of the 'third pillar' (Title VI TEU) "most striking deficiencies in both qualitative and quantitative terms" were to be found as regards the transposal of adopted instruments[12]

Since the Commission used its evaluation to put forward a major political initiative – the use of the "passerelle" provisions – one could be tempted to regard its alarmist elements as rather self-serving. Yet other evaluations independent from the Commission come to a similar – in part even more critical - assessment of the major deficits. This is true, in particular, for the half-yearly reports which the EU Counter-Terrorism Coordinator, Mr. Gijs de Vries, has been drawing up since 2004 on the implementation of the EU Action Plan on Combating Terrorism, the most extensive and detailed of the 'sectoral' multi-annual programme documents of the AFSJ. In its latest report of November 2006[13] the Coordinator criticised not only the Council's failure to agree on long-delayed legal instruments provided for in the Action Plan – such as the European Evidence Warrant – but also the serious delays in the transposal of legal instruments crucial for the fight against terrorism. Less than half of the Member States, for instance, had implemented the 2003 Framework Decision on the freezing of property and evidence although the deadline had been set for August 2005. Implementation of the 2002 Framework Decision on Combating Terrorism and of the Council Decision on the exchange of information and cooperation concerning terrorist offences was also not yet completed, and – after six years – five member states had still not ratified and/or implemented the 2000 Convention on mutual legal assistance. Several important protocols to existing instruments – especially to the Europol Convention – which were destined to enhance anti-terrorism capabilities had also not yet been fully transposed in spite of an original deadline of December 2004. Implementation deficits are not limited to legislation. The November 2006 report also criticized, for instance, that the network of the Financial Intelligence Units was still incomplete, that not much progress had been made on the abuse of the non-profit sector by terrorist financiers, that any emergency deployment of the special intervention units of member states regrouped in the so-called "Atlas" network was obstructed by the Council's failure to agree on an appropriate framework and that the Council had failed to give an appropriate follow-up to the considerable difficulties in communication and coordination which a 2005 cross-border exercise regarding a simulated terrorist attack with small-pox had revealed.

In its evaluation the Commission has placed a major emphasis on problems in the 'third pillar' areas, and the anti-terrorism domain is clearly a case in point. Yet some difficulties can also be identified in the 'first pillar' JHA fields. The already mentioned late adoption of the 2005 asylum procedures directive made the EU miss a major objective of the Tampere Programme, the completion of the 'first phase" of asylum legislation. In a memorandum of August 2006 to the Finnish Presidency on priorities regarding the Hague Programme the European Council of Refugees and Exiles has pointed to transposal deficits as a major problem in

[11] COM(2006) 333 of 28.06.2006, p. 15, and detailed national implementation figures (see Table 1) provided by Unit A.1. of the Commission's DG Justice, Freedom and Security. The author thanks Mrs. Ruta Simelyte, Legal Officer, for making the detailed figures available to him. The average percentage is based on our own calculations.

[12] Ibid., p. 16.

[13] Council document 15266/1/06 of 24.11.2006.

the EU asylum policy domain, declaring some implementing measures as "woefully inadequate".[14]

Overall it is clear from the above that EU governance in the JHA domain currently suffers from a double implementation problem:

- a deficit of implementation of agreed objectives at EU level by a failure to adopt necessary decisions as scheduled, and
- a deficit of implementation at the national level of decisions taken at EU level, both as regards formal transposition of legal instruments and practical application.

The extensive use made in the JHA domain of comprehensive programming documents, both at the strategic level (the Hague Programme) and the sectoral level (an example is the Action Plan on Combating Terrorism), and of regular monitoring and reporting procedures highlights the discrepancy between objectives and implementation all the more glaringly.

In its analysis of June 2006 the Commission developed some arguments which would suggest that the "softer" modes of governance in the JHA domain are part of the problem. A key point made by the Commission – and not a very surprising one - was that the use of unanimity reduces both the speed and the quality of decision-making because of the delays in reaching consensus and agreements on the lowest common denominator.[15] The unanimity rule currently still applies in the JHA domain not only to the 'third pillar' (Title VI TEU) but also – by virtue of a Council Decision of December 2004[16] - to legal immigration and family law matters in the 'first pillar' (Title IV TEC). As the unanimity principle prevents minorities from being potentially subject to the "hierarchical" effect of a majority decision and requires a more all-inclusive cooperative process in the Council it can be regarded as belonging to "softer" rather "than" harder governance. The Commission also put a major emphasis on the lower implementation discipline resulting from the 'third pillar' legal instruments[17] and the lack – under Title VI TEU - of formal infringement procedures to ensure proper transposition and implementation, including the restrictions imposed on the Court of Justice under the 'third pillar'. In this context the Commission pointed to the need of a "uniform application throughout Europe" which the Court because of the current limitations of its role could not adequately ensure.[18] It is difficult not to see here at least an implicit critique of the proliferation of "soft" governance instruments and procedures in the JHA domain with the greater latitude they offer on the implementation side. Finally, the Commission also elaborated at length on the many deficits of current implementation monitoring and evaluation procedures, criticising their non-systematic nature and the often uncertain obligations for member States and describing current procedures as "certainly insufficient".[19] In this respect as well the Commission certainly showed some degree of frustration about the applied "soft" instruments as apparently being too "soft" to be effective.

It has to be said that the Commission did not carry out an in-depth investigation into the reasons for the implementation deficits at the national level, which would no doubt have led it to identify, amongst others, lack of political will, ill-adapted parliamentary procedures, bureau-

[14] European Council of Refugees and Exiles: Memorandum to the Finnish Presidency. The Hague Programme and beyond, AD6/8/2006/EXT/RW, Brussels (ECRE) 2006.

[15] COM(2006) 331 of 28.06.2006, p. 12.

[16] Council Decision 2004/927/EC, OJ L396 of 31.12.2004.

[17] Common Positions, Framework Decisions, Decisions and Conventions.

[18] COM(2006) 331 of 28.06.2006, p. 12-13.

[19] COM(2006) 333 of 28.06.2006, pp. 10-16.

cratic obstacles and other potentially embarrassing phenomena at the national level. It has instead limited its analysis to the EU level and deficits in EU rules and procedures, which – having regard to its competences and the inadvisability of any interference with the domestic systems of the Member States - seems an understandable enough limitation. The points raised by the Commission are also sufficiently backed by evidence to suggest that the deficits at EU level are one – although not the only - major factor of the effectiveness problems in the JHA domain.

The Commission's analysis of current deficits was largely endorsed by the Finnish Presidency of the second half of 2006. In a note for the Informal JHA Ministerial Meeting in Tampere of 20-22 September 2006 published on 30 August 2006, the Presidency emphasised as well that there were serious issues of "deficient efficiency" (mainly due to the unanimity requirement) and "deficient implementation" (mainly due to the lower quality of legal instruments and the absence of effective infringement proceedings) in the JHA domain which would need to be addressed.[20]

In order to tackle the identified effectiveness problems the Commission has proposed two different but complementary sets of reforms: A strengthening of current monitoring and evaluation mechanism and the use of the "passerelle" provisions for the purpose of "communitarising" the 'third pillar' fields. We will start our analysis of the Commission's proposals with the former as this is the 'lighter' and politically less controversial of the two.

3. The proposed strengthening of monitoring and evaluation

The monitoring of progress in the JHA domain has been on the Commission's agenda for some time. The proliferation of objectives after the launch of the Tampere Programme, the extensive use of non-binding texts by the Council and the lack of an infringement procedure in the 'third pillar' led the Commission already in 1999 to think about a monitoring mechanism to put some pressure on Member States in the Council as regards the timely implementation of agreed objectives during the Tampere Programme period. The result was the introduction in 2000 of a half-yearly "Scoreboard" reports which listed progress made and further steps needed against all agreed objectives.[21] Yet the effects of this instrument were limited, this only because the Council felt not obliged to act on each of the "Scoreboard" reports but also because the Commission abstained from any "naming and shaming" of Member States bearing responsibility for veto positions and delays in implementation. After June 2004 this first "Scoreboard" mechanism was discontinued.

The growing implementation problems in the JHA domain and an explicit mandate from the European Council then led the Commission to a major reconsideration of its approach. The result was the introduction in 2005 of both an improved mechanism of monitoring implementation and of a new mechanism of evaluation of results. In the explanatory part of its proposals the Commission made a sensible distinction between the *monitoring of implementation*, consisting of reviewing progress against objectives set in the Hague Programme, and *evaluation of the results*, focusing on the impact and the assessment of policies:[22]

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[20] Finnish Ministry of Justice and Ministry of Interior: Improvement of decision-making in justice and home affairs, note for the Informal JHA Ministerial Meeting in Tampere, Helsinki, 30 Aug. 2006, 1-2.

[21] The complete texts of the "Scoreboard" Reports are available from the Commission's website under http://ec.europa.eu/justice_home/doc_centre/scoreboard_en.htm.

[22] Commission Communication "Evaluation of EU Policies on Freedom, Security and Justice", COM(2006) 332 of 28.06.2006, p. 3.

The *improved monitoring mechanism*, the so-called "Scoreboard Plus" for the implementation of the Hague Programme, resulted in a first report presented in June 2006.[23] The "Scoreboard Plus" provides much more detail on the follow-up ("state of play") given to both objectives and measures adopted under The Hague Programme than its predecessor.[24] It also has a stronger focus on implementation deficits, including respected or missed deadlines, and gives precise data on implementation failures by the individual Member States regarding each adopted measure both with regard to failures to communicate national implementation measures to the Commission and cases of non-compliance or invalid application, a "naming and shaming", which, inter alia, made Luxembourg and Greece appear as the biggest "sinners" in the JHA domain in 2005.

Regarding the *evaluation of results*, the Commission proposed - together with the submission of the first "Scoreboard Plus" - an ambitious mechanism for evaluating the actual results achieved by EU JHA policies on the basis of three steps and resulting "deliverables":

(1) the setting-up of a system of information gathering and sharing on results achieved by JHA instruments (legislative acts, funding programmes etc) in the different policy-fields which would result in "fact sheets" based on policy objective linked indicators to be filled in by the Member States;

(2) under a new "reporting mechanism" the Commission will then collect the fact-sheets, validate the facts provided, consult stakeholders (e.g. NGOs) and, on the basis of this, produce "evaluation reports" for each of the policy fields;

(3) once all "evaluation reports" have been drawn up, and after further consultations, "in-depth strategic policy evaluations" are to be produced for selected areas aimed at "producing useful and timely information as inputs for political decisions in each policy area".[25]

The Commission therefore proposed a fully recursive cycle with decision-making being followed-up by an in-depth evaluation of results identifying deficits and further needs which in turn would impact on decision-making with the cycle then starting again. The Commission based this on a broad concept of "stakeholders" to be consulted, comprising not only national authorities and EU agencies such as Europol, Eurojust and Frontex but also civil society actors. Crucial to the operation of the mechanism will be a network of designated national contact points coordinating procedures at the national level and cooperating with the Commission.[26] The Commission underlined also the importance of the generation of currently – with the exception of the drugs field – largely non-available statistics on evolution of the needs addressed by JHA policies will be required as baseline data to assess whether existing needs are attenuated or aggravated by a policy over time and, ultimately, to be able to draw conclusions about the impact of policies.[27]

The heavy procedures and extensive reporting duties imposed on the Member States in the context of the new evaluation mechanism as well as questions about the evaluation methodol-

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[23] Commission Communication "Report on the Implementation of the Hague Programme for 2005", COM(2006) 333 of 28.06.2006.

[24] The tables giving these details are – slightly confusingly - provided in two annexed documents to COM(2006) 333, SEC(2006) 813 and SEC(2006) 814 of 28.06.2006.

[25] COM(2006) 332 of 28.06.2006, in particular pp. 6-10.

[26] No doubt similar to the existing "National Contact Points on Integration" which monitor progress at the national level in the field of integration of immigrants.

[27] Ibid., pp. 5-6.

ogy led to a less than enthusiastic reception of the Commission proposals by the Member States. On 5 December 2006 the Council adopted "Conclusions" on the review of the Hague Programme in which it accepted that existing mechanisms of evaluation could be improved but also emphasised that the "administrative burden" on Member States should be limited and "duplication of efforts at EU and the national level" avoided, the latter a clear indication that Member States would not like the Commission to interfere too much with implementation monitoring and evaluation at the national level. Yet the Council gave green light to further discussions on the "future mechanism" and accepted the principle of establishing the proposed contact point network in view of launching the first round of evaluation "as soon as possible".[28]

Overall the June 2006 Commission proposals on monitoring and evaluation in the JHA domain can be regarded as an attempt to "harden" the existing "soft" governance framework based on the extensive use of non-binding programme objectives in conjunction with monitoring and evaluation as primary instruments to improve on implementation. In this case the aimed at "hardening", although heavy in procedural terms, remains limited and well within the "soft governance" range. The Commission has, for instance, not 'threatened' to make enhanced use of formal infringement proceedings, which it could have done at least for the 'first pillar' areas, has not hinted at any other form of sanctioning of Member States and has also not suggested that there might be a problem with the proliferation of non-binding objectives in the programme documents – often without clearly set priorities - which are afterwards not matched by a corresponding performance on the implementation side. By contrast, the other set of the Commission's June 2006 proposals go much further in terms of "hardening":

4. The proposed use of the "passerelle" provisions

In order to address both decision-making and implementation deficits in the JHA domain the Commission proposed on 28 June 2006, in a separate Communication from the one dealing with the monitoring and evaluation issues, to use Article 42 TEC to transfer matters currently falling under the 'third pillar' (Title VI TEU) to the 'first (Community) pillar' (Title IV TEC) and to use Article 67(2), second indent, TEC to bring legal migration under the EC co-decision procedure and to extend the powers of the Court of Justice.[29] In taking this initiative, the Commission could feel politically encouraged to do so not only by positive signals from the incoming Finnish Presidency but also by a proposal of the French Government of 20 April 2006[30] to activate the Article 42 'bridging clause' ('passerelle') to improve the EU's decision-making capacity regarding the AFSJ as well as by a European Parliament Resolution of 14 June[31] advocating the same step. Article 42 TEC provides that

> The Council, acting unanimously on the initiative of the Commission or a Member State, and after consulting the European Parliament, may decide that action in areas referred to in Article 29 [police and judicial cooperation in criminal matters] shall fall under Title IV of the Treaty establishing the

[28] Council document 15801/06 of 05.12.2006, p. 9.

[29] COM(2006) 331 of 28 June 2006, pp. 13-14.

[30] Letter of French Minister for European Affairs Catherine Colonna and French Foreign Minister Philippe Douste-Blazy to Austrian Foreign Minister Ursula Plassnik of 20 April and attached " Contribution française sur les améliorations institutionnelles à partir du cadre des traités existants" (//www.rpfrance.eu/article.php3?id_article=437#sommaire_2).

[31] European Parliament resolution on the next steps for the period of reflection and analysis on the Future of Europe, EP document no. P6_TA-PROV(2006)0263, 14 June 2006, paragraph 3.

> European Community, and at the same time determine the relevant voting conditions relating to it.

This 'bridging clause' allows for what can indeed be considered as a major change to the EU system without the need of a formal treaty revision Intergovernmental Conference. According to the Commission's proposal, the current 'third pillar' fields would be brought under the co-decision procedure – the most "communitarian" of the EU legislative procedures – with full co-decision by the European Parliament and qualified majority voting in the Council.[32] This would in fact amount to a full 'communitarisation' of the 'third pillar' and bring all matters of police and judicial cooperation in criminal matters under the higher degree of hierarchy and imposed uniformity of the "Community method" (a term explicitly used by the Commission). It adds to the political significance of this proposal that its implementation would actually put an end to the artificial 'pillar' divide of the AFSJ and implement one of the most substantial reforms of the currently blocked Constitutional Treaty.

Article 67(2), second indent, TEC provides that after the end of the transitional period (it ended in 2004),

> the Council, acting unanimously after consulting the European Parliament, shall take a decision with a view to providing for all or parts of the areas covered by this title [asylum, immigration, border controls and judicial co-operation in civil matters] to be governed by the procedure referred to in Article 251 [co-decision procedure] and adapting the provisions relating to the powers of the Court of Justice.

This other 'bridging clause' allows to apply the co-decision procedure with its full legislative co-decision by the European Parliament and – as proposed by the Commission - qualified majority voting in the Council to fields so far not subject to this procedure. It is to note that the Commission has only proposed to use this 'bridge' for legal migration and not judicial cooperation in family law matters where such a step would be much more controversial because of the political and cultural sensitivity of many matters (such as the question of the recognition of homosexual marriages) .

As far as the adaptation of the powers of the Court of Justice is concerned, the Commission has proposed – in a separate Communication of 28 June 2006 - to use Article 67(2), second indent to align the powers of the Court with respect to the fields of Title IV TEC with those it otherwise enjoys under the EC Treaty. This would mean, firstly, to remove the restriction currently provided for by Article 68(1) TEC which prohibits national courts other than those of final instance from applying to the Court for preliminary rulings. It would mean, secondly, to remove the restriction currently provided for by Article 68(2) TEC which excludes from the jurisdiction of the Court any measure relating to the maintenance of law and order and the safeguarding of internal security. It would mean, thirdly, to remove the restriction currently provided for by Article 68(3) TEC that applications for preliminary rulings by the Court must not apply to judgments of courts or tribunals of the Member States which have become *res judicata*.[33]

By bringing also legal immigration under the co-decision procedure with qualified majority voting and by significantly increasing the possibilities of the Court of Justice to ensure a uniform interpretation and application of EC law in the 'first pillar' areas the proposed use of the

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[32] COM(2006) 331 of 28 June 2006, at 13-14.

[33] COM(2006) 346 of 28 June 2006, at 14-15.

second 'bridging clause' of Article 67(2) would complement the move towards "harder" modes of governance with a distinctly higher degree of hierarchy and imposed uniformity proposed for the 'third pillar' areas. Taken together the use of the two '*passerelles*' would therefore amount to a major change of EU governance in the JHA domain.

In order to fully appreciate the political importance – and indeed sensitivity - of the Commission's proposals it is useful to consider that in some respects these would actually go even further in the move towards 'communitarisation' than this is foreseen by the blocked Constitutional Treaty:

(a) If the current 'third pillar' fields would be 'communitarised' through the use of the Article 42 TEU 'bridging clause', the powers of the Court of Justice as defined in the EC Treaty would automatically apply also to these newly 'communitarised' fields. This results in the inapplicability of the exception provided for by Article III-377 of the Constitutional Treaty, according to which the Court's jurisdiction would not extend to operations carried out by the police or other national law enforcement services and to measures under national law regarding the maintenance of law and order and the safeguarding of internal security. In other words, the Commission's proposal clearly goes further in extending the Court's powers than the Constitutional Treaty.

(b) The Constitutional Treaty provides that the Commission would still have to share its right of initiative in the areas of police and judicial co-operation in criminal matters with the Member States, although these would only be able to introduce collective initiatives with at least one quarter of their total number (Article III-264). A pure and simple application of co-decision to these fields would entail an exclusive right of initiative for the Commission, which amounts to a substantial strengthening of its position, which – arguably – contributes to the stronger degree of hierarchy this revision of the governance system would entail.

(c) The proposed passage to co-decision with qualified majority voting in the Council for matters currently under Title VI TEU would remove national veto possibilities in the fields of substantive and procedural criminal law without the safeguard provided for in the Constitutional Treaty by the so-called "emergency brake" of Articles III-270(3) and III-271(3). The proposals therefore go further in terms of the abolition of national veto possibilities.

(d) Article III-267(5) of the Constitutional Treaty provides that Member States will fully retain their right to determine "volumes of admission" of third-country nationals for work purposes, whether employed or self-employed. A complete 'communitarisation' of legal immigration with co-decision by the European Parliament and qualified majority voting, as proposed by the Commission, could arguably undermine this right.

The political importance and implications of the Commission's "passerelle" initiative led in the following months to a substantial debate and negotiations in the Council. The Finnish Presidency not only shared the Commission's analysis of current deficits in the JHA domain but it also broadly endorsed the Commission's proposals. In the aforementioned note for the Informal JHA Ministerial Meeting in September 2006 it came out strongly in favour of a transfer of all matters under the current 'third pillar' to the 'first' as well as the adoption of all future measures under the co-decision procedure with qualified majority voting. However, being aware of the reservations of some Member States (see below) the Finnish Presidency conceded that consideration should be given to requiring unanimity in the Council, after consultation of the European Parliament, for particularly sensitive issues, and it also pointed to the possibility of agreeing on a transitional period (of for example five years) for implement-

ing the move towards co-decision. The Presidency also backed the use of the second bridging clause regarding legal migration and the extension of the powers of the Court of Justice, this, however, with a more guarded language.[34]

While a majority of the Member States, including France, Spain and Italy, took a rather positive view of the Commission's proposals there was also right from the outset some serious opposition. The German Minister for Europe, Günter Gloser, rejected almost immediately the suggested use of the 'bridging clauses', saying that such a move amounted to "cherry picking" parts of the EU's Constitutional Treaty, which Germany intended to revive when taking over the EU's Presidency in 2008. There were also negative signals from Denmark, the Netherlands, Ireland and Sweden.[35] The British Government, traditionally a staunch defender of national veto possibilities in the 'third pillar' fields, indicated initially a more flexible attitude, mainly because of concerns about the effectiveness of EU action in the fight against terrorism. Yet in a report on "Developments in the European Union" adopted on 19 July 2006, the Foreign Affairs Committee of the British House of Commons came out sharply against the Commission's proposals, partly because of concerns about the undermining of British veto possibilities. Taking generally the view that the Constitutional Treaty was "comatose and on life-support" the Committee stated more specifically with regard to the AFSJ that it would oppose any "attempts to use the bridging clauses in the current treaties to introduce core objectives of the constitutional Treaty in the field of justice and home affairs".[36] In the run-up to the already mentioned Informal Ministerial Meeting in Tampere on 20-22 September 2006, both the German and the Irish position against the Commission's proposals hardened in spite of the strong backing by the Finnish Presidency, with the British Government also moving towards a more negative attitude. The German Government took the view that, by implementing elements of the Constitutional Treaty in a piecemeal way, the use of the '*passerelle*' clauses would undermine any efforts to revive the Constitutional Treaty as a whole – a priority objective for the upcoming German Presidency. It also became clear, though, that both the German and the Irish Government had major concerns about giving up national veto possibilities in the sensitive field of criminal justice cooperation, especially as the proposed use of the 'bridging clauses" for the AFSJ would not give them what they had obtained 'in return' in the Constitutional Treaty for accepting such a move.[37] In these circumstances the JHA ministers were unable to reach a consensus on the Commission's proposals at the already mentioned Informal Meeting in Tampere in September 2006. The Finnish Presidency did not give up and announced at the JHA Council of 5 October 2006 that it would bring the matter on the agenda of the December 2006 European Council.[38] But with the incoming Presidencies of both Germany and Portugal committed to a re-launch of the Constitutional Treaty project during 200739 and continuing opposition from several other Member States the 'bridging clause' proposal was at least temporarily put on the backburner at the European Council meeting of 14/15 December. Although the President of the European Parliament appealed to the Head of

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[34] Finnish Ministry of Justice and Ministry of Interior: Improvement of decision-making in justice and home affairs, note for the Informal JHA Ministerial Meeting in Tampere, Helsinki, 30 Aug. 2006, at 2-3.

[35] EurActiv: Barroso wants Member States to give up vetoes on justice and security, 29 June 2006.

[36] House of Commons Foreign Affairs Committee: Developments in the European Union, Sixth Report of Session 2005-06, HC 768, The Stationary Office, 26 July 2006, at 2 and 18.

[37] Euobserver.com: Berlin and Dublin prepare for EU justice veto fight, 20 September 2006.

[38] Finnish Ministry of Interior: Reinforcing the control of the EU southern external maritime borders, Press release of 5 Oct. 2006.

[39] Financial Times: Fresh push to end EU constitution deadlock,6 December 2006.

State or Government at the beginning of meeting to use the "passerelle" as proposed,[40] all that the Finnish Presidency could eventually get into the "Conclusions" was some rather vague reference to the need for the framework of the AFSJ of being "genuinely strengthened in order to meet present challenges" and an affirmation of the "principles acknowledged in the context of the Union's reform process".[41] This has left the door open to a reactivation of the "passerelle" reform option if current efforts to save all or parts of the Constitutional Treaty should fail, at the latest under the 2008 French Presidency which has staunchly advocated this step even before the Commission came up with its formal proposal.

5. The pros and cons of the proposed "hardening" of EU JHA governance

As far as their impact on EU governance in the JHA domain is concerned the two sets of the Commission's proposals of June 2006 can be summarised as being aimed at "hardening" both existing soft governance instruments – the monitoring and evaluation mechanisms – and overall governance – through the communitarisation of the 'third pillar', a major move towards qualified majority voting and the strengthening of the role of the Court of Justice. Before discussing the pros and cons of the proposals it is useful to consider them briefly within the broader context of the evolution of EU governance in this domain:

One can in fact observe a longer term trend towards the enhanced use of "harder" instruments of governance in the JHA fields. Whereas during the period of the "old third pillar' (1993 to 1999) only close to 10% of the texts adopted by the JHA Council were legally binding[42] this figure has increased to 39% in the period from the entry into force of the Treaty of Amsterdam on 1 May 1999 to 31 December 2006.[43] It is also noteworthy that in the post-Amsterdam period most of the legally binding texts have fallen within the category of what in our earlier NEWGOV paper we have called the "tight regulation" mode,[44] i.e. the category of legal instruments which allow for little or no flexibility when it comes to implementation by the EU or its Member States. A look at the overall numbers of text adopted by the JHA Council in this period shows in fact that well over six times more "tight" regulation texts have been adopted than "framework" regulation texts – such as Directives and Framework Decisions – which allow for a wider margin of implementation through national legislation and that the "tight" regulation texts also constitute the largest overall category, exceeding – by a very slight margin – even the "target setting" category of texts (see Table 2).

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[40] European Parliament document 02/S-2006 of 16.12.2006 (Speech by Mr. Josep Borell Fontelles to the European Council).

[41] See paragraph 20 of the Presidency Conclusions, EU Council document no. 16879/06 of 15 Dec. 2006.

[42] See Jörg Monar: Justice and Home Affairs, in: "Justice and home affairs", in: L. Miles (ed.): The European Union. Annual Review of the EU 2003/2004, Journal of Common Market Studies, Oxford (Blackwell) 2004, p. 127.

[43] Calculations based on the annual lists of texts adopted by the JHA Council. The author thanks Hans Nilsson, Head of Unit in DG H of the General Secretariat of the Council, for making available to him the complete annual lists which are not all available on the Council's website. – The total of 39% in the post-Amsterdam period comprises both "tight" regulation and "framework" regulation texts which amount to a total of 252 out of 646. For the sake of a better comparison these figures exclude the significant number of texts dealing with purely administrative, financial and procedural matters as well as texts dealing with external relations, a dimension which was virtually non-existent in the pre-Amsterdam period. For our method of categorisation See the paper cited in footnote 1, pp. 8-12.

[44] See paper cited in footnote 1, p. 8.

A recent trend is also of interest: A survey of annual developments reveals that during 2006 – the second full year of the Hague Programme "cycle" - the use of "tight regulation" instruments sharply increased (see Table 3). A similar surge could also be observed in the second full year (2001) of the Tampere Programme "cycle", and can in both cases be explained by approaching deadlines provided for by the multi-annual programmes. Yet in 2006 nearly one third more "tight" regulation texts were adopted than in the comparison year 2001 (see again Table 3), which can be taken as an indication for a slightly greater willingness of the Member States in the Council to use "harder" regulatory instruments in the second multi-annual programme for the development of the "area of freedom, security and justice". Yet the trend remains slight and does not represent a fundamental change because most of the "tight regulation" texts focus on a relatively small number of often technical issues. In 2006, for instance, a significant number of the texts of this category focused on the putting into place of the second generation Schengen Information System (SIS II). The trend toward the use of more binding instruments is generally also uneven as in some fields – especially police cooperation – the Council continues to rely much more heavily on non-binding than on binding instruments (see Table 4).

In the light of the above one can say that the Commission's proposals are at least to some extent "in line" with a general trend towards the use of "harder" instruments in the JHA domain. Yet the proposals – especially the use of the 'bridging clauses' for the 'communitarisation' of the fields under Title VI TEU – go clearly much beyond this trend, and this brings us back to the question the pros and cons of the proposed "hardening" of EU JHA governance:

The proposed strengthening of the monitoring and the evaluation of JHA policies could make a contribution to both improved implementation and better policy formulation. In comparison with its predecessor the "Scoreboard Plus" – the only element of the Commission's reform package which has already been implemented - has the distinct advantages that it covers in detail the national transposition of JHA measures and identifies key problems, such as the current transposition notification deficits, as well as the main "sinners".[45] This no doubt increases the pressure on the Member States with the poorest records to address deficits and can help the Council to take into account identified problems in mutual evaluation procedures and potential policy revisions which could include, for instance, enhanced transposition notification obligations. The "Scoreboard Plus" is also more analytical and focused in its survey of progress and deficits at the EU level going well beyond of the mere checklist approach of its predecessor. Two aspects, however, are reducing its impact: One is the fact that the "Scoreboard Plus" – unlike its half-yearly predecessor – is established only on an annual basis. As the Commission also brings it out only six months after the end of the reporting year this means that responses to identified deficits can only be given in the second half of the year after – clearly not a way to react quickly to problems on the implementation side. The other effectiveness reducing element is that the "Scoreboard Plus" does not say anything about the reasons – or indeed the "culprits" - for certain measures being delayed. The Commission may well deplore that "more delays […] sadly arose"[46] but as long as those Member States maintaining reserves on largely agreed compromise texts are not identified expressions of sadness are unlikely to generate any additional pressure.

The proposed new evaluation mechanism has – at least in principle – much to recommend it. With a few exceptions – one is the quite systematic surveying of the success rates and application problems of the European Arrest Warrant – JHA measures are currently not subject to

[45] COM(2006) 333 of 28.06.2006, pp. 10-16.

[46] Ibid., p. 10.

an evaluation of their effectiveness, and new measures are often introduced without a comprehensive evaluation of the performance of previous ones. In a context of "soft" non-binding programme objectives an in-depth evaluation of the actual results achieved at both the EU and the national level with an extensive involvement of relevant stakeholders[47] could reinforce the pressure both to improve implementation and to make policy adjustments in the light of the agreed objectives. Yet the amount of comprehensive and reliable data needed for producing the high-quality evaluations will be enormous, and it is far from certain that the Member States are willing and/or capable of providing those. Having regard to the fact that many Member States already fail to simply notify to the Commission the formal transposal of EU legal measures in the JHA domain, it seems highly doubtful that they are prepared, or indeed have currently the administrative capacity, to carry out the in-depth survey of the effects of all EU measures in all JHA fields the Commission's scheme will require. The above mentioned less than enthusiastic reaction by the Council does not augur well in this respect, and the mechanism would lose much of its potential strength if some Member States would not fully cooperate. There are also questions about the methodology the Commission will apply to arrive at its final "strategic evaluations" as certain measures may be significantly more effective in some Member States than in others and may also require much greater adjustment efforts for relatively limited results in some Member States than in others. Finally, the impact of the mechanism is likely to be of a rather long-term nature as the Commission intends to carry it out every two and a half years.[48] With experience showing that the Council needs at least half a year – as in the second half of 2006 with regard to the Commission's June 2006 assessments – to deliberate on submitted reports and more to take any action the scheme would probably not allow for any policy adjustments within the current five-year programme cycle but only for the next one.

The advantages of the Commission's proposed use of the "passerelle" provisions from a governance effectiveness point of view are easy enough to identify:

Bringing police and judicial cooperation measures currently based on Title VI TEU under the 'first pillar' co-decision procedure with qualified majority voting would reduce the risks of blockages and least common denominator agreements in the Council, thereby increasing the Union's decision-making capacity and quality. The same would apply to the field of legal migration under the proposed move to co-decision with qualified majority voting. There would be clear governance "hardening" effects as Member States would need to submit to majority decisions and would have to give up their currently shared right of initiative in favour of the exclusive right of initiative of the Commission.

Of at least equal importance would be the strengthening of the implementation system. The 'communitarisation' of the current 'third pillar' fields would remove the current restrictions on the role of the Court of Justice under Title VI TEU and allow the Commission to use full infringement procedures in accordance with Article 226 TEC against Member States failing to comply with adopted JHA legislation. In case of non-compliance with a Court ruling finding that the respective Member State has indeed failed to fulfil an obligation under the Treaty the Commission could then, by virtue of Article 228 TEC, even request the Court to impose a lump sum or penalty payment. The "governance hardening" effect both in terms of hierarchical control of implementation and uniformity would be significant. To this one has to add the proposed removal of restrictions on the role of the Court of Justice in the 'first pillar' domain (Title IV TEC), in particular of the limitation of applications under the preliminary rulings

[47] COM(2006) 332 of 28.06.2006, in particular pp. 5-9.

[48] Ibid., p. 9.

procedures to national courts of last instance and of the restrictions on the role of the Court as regards measures relating to maintenance of law and order and internal security.[49] This would contribute to the uniform interpretation of AFSJ law as the preliminary rulings procedure has been central to the emergence and guarantee of a coherent EC legal order.

It should be added that in addition to the likely gains in effectiveness there would also be advantages in terms of democratic control – because of the expansion of the co-decision rights of the European Parliament – and of the judicial guarantees for individuals – because of the removal of the restrictions of the role of the Court.[50]

All these are significant advantages, and both the Commission in it its proposals and the supportive Finnish Presidency have not failed to bring them out very clearly. Yet there also some more problematic aspects:

One is that the proposals focus largely on procedural issues and do not deal in any way with the substantive issues which often – though not always – are behind delays in decision-making and implementation. If national delegations are "difficult" in negotiations they are so in many cases because certain JHA issues can be really very sensitive politically and/or legally in the domestic context. Any potential interferences of EU measures with national immigration systems can develop into a serious problem for a government – the German Government, for instance, has had to struggle constantly with the concerns of the German *Länder* in this field –, and the negative judgements of the constitutional courts in Germany, Poland, Cyprus and Finland on the application of the European Arrest Warrant[51] show how slight in the JHA domain the margin to manoeuvre of national governments at the EU level can be. To brush all this aside by resorting to the "good old remedy" of more majority voting seems not only rather simplistic but also counterproductive as it could not only lead to implementation problems of a different sort but also fuel the fears about and reactions against a centralising Union apparently oblivious of the diversity of situations in the Member States. Not without reason the move to qualified majority voting in the sensitive field of criminal law provided for by the Constitutional Treaty has therefore been balanced by certain safeguards for national positions such as the so-called "emergency brake", which allows to bring a contested legislative proposal before the European Council,[52] and by a general clause that that any minimum rules adopted in the criminal procedure domain shall take into account the differences between the legal traditions and systems of the Member States.[53] Whatever the practical implications of these rather tortuous provisions – if ever applied - would be, they have at least the merit to maintain at certain balance between a hierarchical harmonisation rationale and safeguards for national legal traditions and systems. The Commission's proposals, by contrast, do

[49] The Commission has rightly emphasized, for instance, that on the basis of current Article 62(1) TEC any judicial review of, for instance, Community rules on controls on persons at internal borders, would be excluded and that such a restriction of the Court's jurisdiction over public-policy measures is inconsistent with other parts of the Treaty. COM(2006) 346 of 28.06.2006, at 6-7.

[50] In its proposal the Commission elaborated at length on the importance of lower courts access to the preliminary rulings procedures for the judicial protection of individuals. Ibid., pp. 5-6.

[51] See on these problems of the European Arrest Warrant Elspeth Guild (ed.): Constitutional Challenges to the European Arrest Warrant, Nijmegen (Wolf publishers) Nijmegen 2006.

[52] Article III-270(3) and III-271(3) of the Constitutional Treaty.

[53] Article III-270(2) of the Constitutional Treaty. This provision was introduced, in particular, because of the concerns of Ireland and the United Kingdom about the implications of harmonisation for their common law systems.

not provide for any element of such a balance – which has certainly contributed to their at least temporary failure in December 2006.

There is also a questionable assumption in the Commission documents that the use of the "Community method" on its own already guarantees more and better measures. As pointed out in section 2 above there have during the last few years also been decision-making and implementation problems in the "communitarised" fields of Title IV TEC. The balance-sheet of the 'third pillar' and its procedures is also not entirely negative, as major steps such as the setting-up of Eurojust in 2002 and the introduction of the European Arrest Warrant show. One should also not underestimate the potential negative effects the 'communitarisation' could have on the Member States' willingness to agree on substantial measures in sensitive fields. In a context in which the Commission disposes of an exclusive right of initiative, in which Member States can be outvoted, in which "hard" implementation discipline can be imposed through EC infringement procedures and in which an unrestricted role of the Court of Justice can subject national systems to a higher degree of uniformity in the application of agreed measures, even if those touch upon the maintenance of law and order and internal security, quite a few Member States might not be prepared to take the "risk" of new legislative measures in sensitive fields, reducing the critical mass for achieving any legislative progress at all.

While it is clear that there are some serious performance problems in the context of the 'third pillar' in terms of both decision-making and implementation a statistical breakdown of the texts adopted by the JHA Council since the entry into force of the Treaty of Amsterdam shows that the "output" in the fields of police and judicial cooperation in criminal matters since 1999 has at least in numerical terms been substantial both in binding and non-binding measures and certainly not lagging behind the one in the "communitarised" fields (see Table 4). What the statistics also show is that in the fields of police cooperation and horizontal matters under Title VI TEU a much higher use of non-binding texts has been made, which is partly due to the extensive use of target-setting texts as well as peer evaluation and reporting procedures aimed at enhancing convergence between the national law enforcement systems. "Hardening" governance modes in the JHA domain with the introduction of more hierarchical procedures and the imposition of greater uniformity, which the Commission proposals are clearly aimed at, could well decrease the use of these "soft" governance instruments without necessarily a corresponding increase of "harder" instruments as Member States might simply not be willing to subject themselves to more regulation and tighter implementation discipline. In that case the drive towards "harder" governance might well result in an overall reduction of policy output both in terms of objectives – which currently continue to be ambitious even in highly sensitive fields such as police cooperation[54] – and new legislation. It can also not be excluded that under conditions of majority voting outvoted Member States could seek special exemption clauses, refuse to implement certain sensitive decisions or at the very least delay implementation, al of which would reduce the overall effectiveness of measures.

Finally it seems also worth recalling that governance reforms on the decision-making and implementation side should always be seen in the context of wider governance issues. Any strengthening of EU decision-making capacity – especially in a domain such as justice and home affairs which raises important questions of legitimacy and protection of civil liberties – should be accompanied by corresponding increases of parliamentary control possibilities and the protection of the rights of individuals. In this respect the Commission's "passerelle" initia-

[54] An example is the implementation of the "principle of availability" foreseen by the Hague Programme for 2008 which means that throughout law enforcement officers can obtain any available information throughout the Union which might be helpful to their cases (Council document 16054/04 of 13.12.2004, p. 18).

tive also appears as significantly less balanced than the Constitutional Treaty which provides for a broadly similar degree of "hardening" of JHA governance. While the position of the European Parliament would be strengthened because of the extension of the "co-decision" procedure this would not go hand in hand with the strengthening of the role of the national parliaments which the Constitutional Treaty provides through its "early warning mechanism" on subsidiarity[55] and the enhanced information rights for national parliaments. This could limit national parliamentary control of positions adopted by national governments regarding the AFSJ and increase concerns of national parliaments about potential centralisation tendencies at EU level. The judicial protection of individuals would no doubt be strengthened by a use of the "passerelle" because of the enhanced role of the Court of Justice, but an important part of the protection of rights "deal" under the Constitutional Treaty – the legal codification of the Charter of Fundamental Rights – would remain unfulfilled.

6. Conclusions

Since the 1990s there has been an evolution towards the use of "harder" modes of governance in the JHA domain, but this evolution has been slow and has not put an end to the very extensive use of non-binding texts and procedures with a lower degree of hierarchy in decision-making and of uniformity in implementation. In spite of a proliferation of objectives and a considerable output over the last few years EU governance in this domain is clearly not an unqualified success story, and there are substantial performance problems both as regards decision-making and the implementation of adopted measures, especially at the national level.

The Commission's response to these – as developed in the proposals of June 2006 – is clearly aimed at an overall "hardening" of governance. The proposed tighter monitoring and evaluation could have a positive effect both on implementation and an adjustment of policies in the light of results achieved, while still remaining within an overall relatively "soft" governance framework based on non-binding objectives with monitoring and evaluation as key instruments to ensure proper implementation. The only major question here is whether Member States are willing and/or capable to engage in the very comprehensive reporting on the results of JHA measures at the national level the new evaluation mechanism will require. The initial reactions from the Council have not been too promising in this respect.

The proposed extension of the "Community method" to all JHA fields constitutes a much more radical step and would shift JHA "governance" to a significant extent towards "hard" governance. The generalisation of qualified majority voting in combination with an exclusive right of initiative for the Commission and full applicability of EC infringement procedures also in the current 'third pillar' fields would lead to a more hierarchical, rigid and uniform overall governance system in the JHA domain. While this might reduce some of the currently existing deficits in terms of decision-making and implementation it could also reduce the willingness of Member States to continue to agree on relatively ambitious objectives and to more legislation in the particularly sensitive fields of police and judicial cooperation in criminal matters. There is also the problem that the 'communitarisation' initiative comes without any "balancing" elements which would allow Member States to prevent the adoption of binding common measures incompatible with national constitutional provisions or fundamental principles of their legal system. The Constitutional Treaty provides an overall more balanced 'communitarisation package' as the enhanced decision-making and enforcement powers of

[55] In accordance with the „Protocol on the application of the principles of subsidiarity and proportionality" attached to the Constitutional Treaty, OJ C 310/207 of 16.12.2004.

Council and Commission are part of a new equilibrium because of the "emergency brake" in the criminal law field, the strengthened position of the national parliaments and legal codification of the Charter of Fundamental Rights.

Overall the Commission's initiative to use the "passerelle" provisions can be seen as an attempt to replace the slow and uneven evolution from "softer" to "harder" modes of governance in the JHA domain by a sort of major regime change in favour of the latter. This appears not only as politically premature – at least as long as the fate of the Constitutional Treaty remains undecided – but also potentially counterproductive as forcing "hard" EU governance on Member States in highly sensitive policy fields might well reduce the willingness of at least several of them to develop and engage in substantial common policies. The currently best option for the EU therefore seems to be to improve monitoring and evaluation and to wait for the (uncertain) outcome of the relaunch of the Constitutional Treaty project. Should this fail it may make sense to reactivate the "passerelle" option, but this time with more safeguards for national positions in the most sensitive fields. "Soft" governance modes have contributed much to the development of the "area of freedom, security and justice", and even if there are problems of effectiveness in the JHA domain, they should only be replaced by "harder" modes when, where and to the extent to which the common political will of the Member States is sufficient to sustain their use.

Annexes: Tables

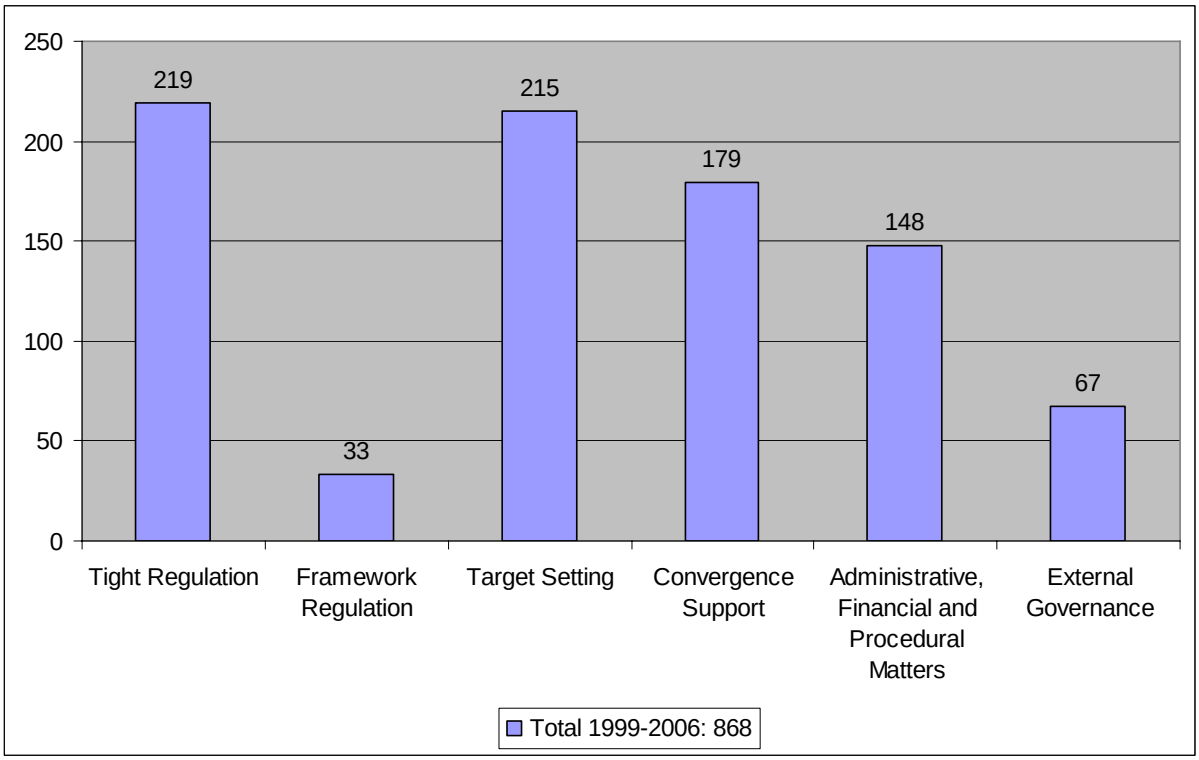
The author thanks Anya Dahmani, Research Associate of the NEWGOV Project at the Marie Curie Chair of Excellence (SECURINT) of the Université Robert Schuman de Strasbourg, for all her precious help with the tables.

Table 1: Aggregate national implementation deficits under the Hague Programme (end of 2005)

Total measures	**32**		**42**		**74**	
	%	**Communication of national measures to the Commission**	**%**	**Non compliance/ invalid application**	**Total**	**%**
Austria	6,25%	2	4,76%	2	4	5,41%
Belgium	21,88%	7	7,14%	3	10	13,51%
Cyprus	31,25%	10	4,76%	2	12	16,22%
Czech Republic	9,38%	3	4,76%	2	5	6,76%
Denmark	9,38%	3	4,76%	2	5	6,76%
Estonia	25,00%	8	4,76%	2	10	13,51%
Finland	15,63%	5	4,76%	2	7	9,46%
France	18,75%	6	4,76%	2	8	10,81%
Germany	21,88%	7	4,76%	2	9	12,16%
Greece	40,63%	13	7,14%	3	16	21,62%
Hungary	25,00%	8	2,38%	1	9	12,16%
Ireland	15,63%	5	4,76%	2	7	9,46%
Italy	25,00%	8	4,76%	2	10	13,51%
Latvia	15,63%	5	2,38%	1	6	8,11%
Lithuania	12,50%	4	2,38%	1	5	6,76%
Luxembourg	46,88%	15	9,52%	4	19	25,68%
Malta	34,38%	11	4,76%	2	13	17,57%
Netherlands	9,38%	3	7,14%	3	6	8,11%
Poland	3,13%	1	2,38%	1	2	2,70%
Portugal	21,88%	7	4,76%	2	9	12,16%
Slovakia	6,25%	2	2,38%	1	3	4,05%
Slovenia	12,50%	4	4,76%	2	6	8,11%
Spain	15,63%	5	11,90%	5	10	13,51%
Sweden	12,50%	4	4,76%	2	6	8,11%
United Kingdom	12,50%	4	9,52%	4	8	10,81%

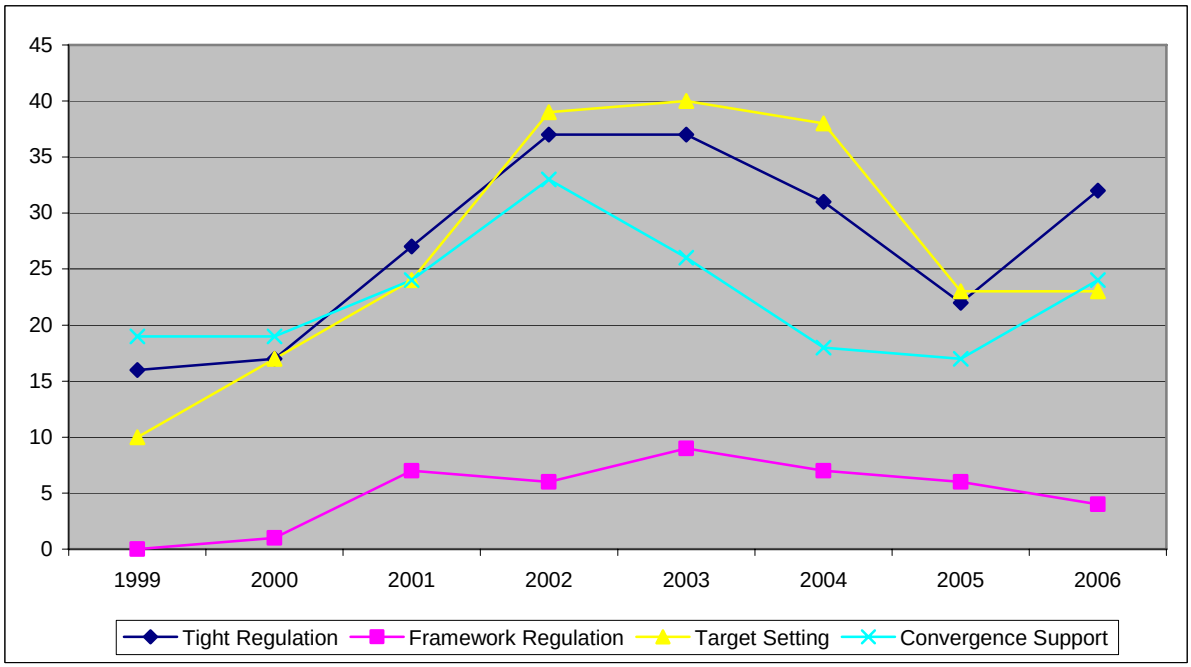
Source: COM(2006) 333 final and European Commission, Unit A.1, DG Justice, Freedom and Security, see note 11

Table 2: Texts adopted in the JHA area 1 May 1999- 31 December 2006 (post-Amsterdam period): Total numbers of all categories



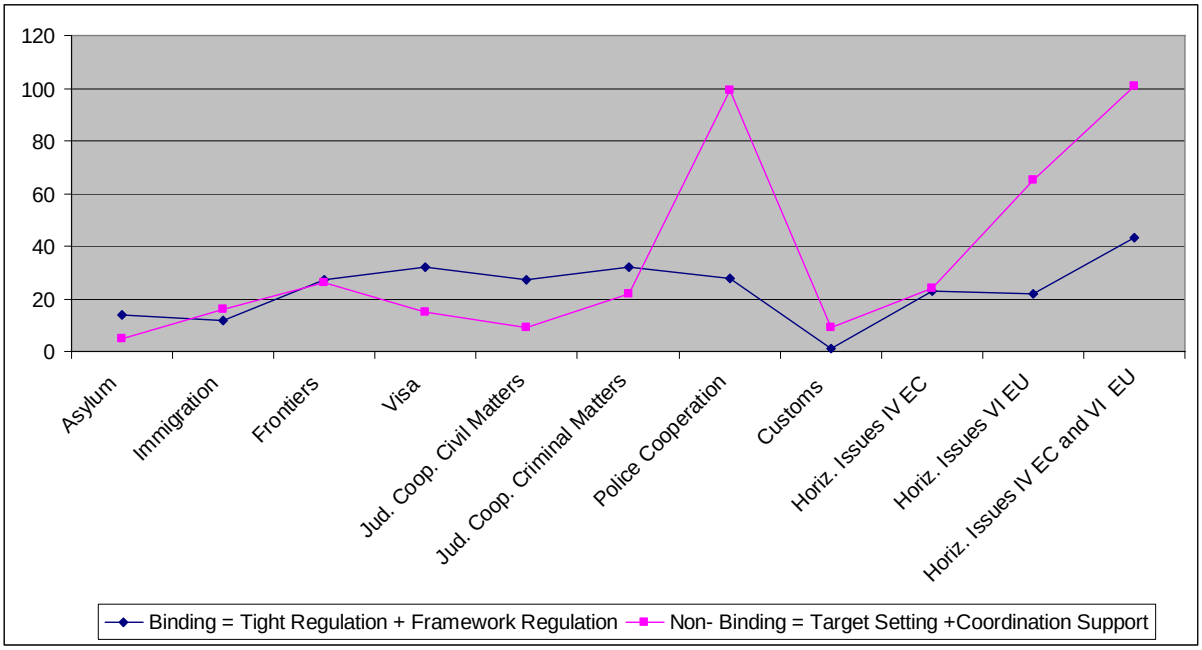
Source: DG H of the Council of the European Union, see note 43

Table 3: Texts adopted in the JHA area 1 May 1999- 31 December 2006 (post-Amsterdam period): Evolution per year under the four "governance modes"



Source: DG H of the Council of the European Union, see note 43

Table 4: Texts adopted in the JHA area 1 May 1999- 31 December 2006 (post-Amsterdam period): Numbers of binding and non-binding texts per policy field



Source: DG H of the Council of the European Union, see note 43