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From ‘softer’ to ‘harder’ modes?**
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Summary

The extensive use of ‘softer’ modes of governance is one of the distinctive features of EU governance in the JHA domain. It can be regarded as one of the reasons for the EU’s current problems of effective implementation in the JHA domain. Yet other factors – such as an often lacking sufficient common political will – are at least equally important, and the less hierarchical and more flexible ‘softer’ modes of governance have contributed over the last few years to a significant extension of policy objectives and cooperation mechanisms in the most sovereignty sensitive fields of the JHA domain. An ambitious initiative of the European Commission of June 2006 aimed at a ‘hardening’ of EU governance, primarily through a ‘communitarisation’ of the current ‘third pillar’ fields, has been shelved. The Reform Treaty package agreed on in June 2007 goes a long way in the same direction, but it provides a number of checks and balances which mitigate the ‘hardening’ effect. The Reform Treaty provisions – if adopted as they currently stand – will mark a substantial step towards ‘harder’ governance in the JHA domain and may well increase the effectiveness of EU governance both in terms of decision-making and implementation, but they will come at a price in terms of further fragmentation, and any potential reduction in the use of ‘softer’ governance instruments is not necessarily going to be made up by an equivalent higher use of ‘harder’ instruments.

Contents

1. INTRODUCTION.....3

2. EFFECTIVENESS PROBLEMS OF CURRENT EU GOVERNANCE IN THE JHA DOMAIN.....3

3. THE PROPOSED USE OF THE “PASSERELLE” PROVISIONS.....4

4. THE REFORM TREATY PERSPECTIVE6

5. CONCLUSIONS.....7

1. Introduction¹

The extensive use of non-binding instruments can be regarded as one of the distinctive features of EU governance in the domain of justice and home affairs (JHA). There is in fact a wide variety of such instruments from programmes and action plans over guidelines and best practice manuals to the monitoring of implementation and mutual evaluation procedures.² Their common characteristic, besides not being of legislative nature, is that these instruments tend to be less hierarchical and rigid, leaving more flexibility for adaptation to changing priorities and circumstances as well as a wider margin for implementation by the Member States. Such ‘soft’ modes of governance are often being presented as alternatives to ‘hard’ modes, but at the same time also often criticised because of a lack of effectiveness. It seems therefore a worthwhile question to ask to what extent these criticisms are also justified in the JHA domain and whether the evolution in this still relatively young but rapidly expanding domain is in fact moving in the direction of ‘harder’ modes of governance as a result of current performance problems of EU action in this domain. Key points of reference in this context are the Commission’s June 2006 proposals for a number of important reforms with implications for ‘soft’ and ‘hard’ governance in the JHA domain as well as the perspectives offered by the June 2007 agreement on a framework for the new Reform Treaty.

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 on average ten new texts adopted by the JHA Council every month - cannot hide the fact that there are some problems which reduce the effectiveness of EU policies. These suffer in fact 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.

In its report on the implementation of the current multi-annual JHA programme, the “Hague Programme”, and a Communication on the “way forward” the Commission developed in June 2006 some arguments which would suggest that the ‘softer’ modes of governance in the JHA domain are part of the problem.³ A key point made by the Commission was that the use of unanimity in the fields of the ‘third pillar’ (Title VI TEU, police and judicial cooperation in criminal matters) but also some of the communitarised JHA fields (legal immigration and family law) reduces both the speed and the quality of decision-making because of the delays in reaching consensus and agreements on the lowest common denominator. The Commission also put a major emphasis on the lower implementation discipline resulting from the ‘third pillar’ legal instruments and the lack – under Title VI TEU - of formal infringement procedures to ensure proper transposition and implementation. It is difficult not to see here at least

¹ This policy memorandum is based on the NEWGOV Working Paper 01/D49 by Jörg Monar: *Governance in the Justice and home affairs domain: From ‘softer’ to ‘harder’ modes?*, May 2007 (available at http://www.eu-newgov.org/database/DELIV/D01D49_WP_Governance_in_JHA.pdf). More details, relevant statistics and bibliographic references can be taken from this paper.

² See the earlier NEWGOV Working Paper 1/D17 by the same author on *Specific factors, typology and development trends of modes of governance in the EU Justice and Home Affairs domain*, May 2006 (available at http://www.eu-newgov.org/database/DELIV/D01D17_Emergence_NMG_in_JHA.pdf).

³ COM(2006) 331 and 333.

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.

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, bureaucratic obstacles and other unhelpful phenomena at the national level. Yet the points raised by the Commission are sufficiently backed by evidence to suggest that the deficits at EU level are one important – although not the only - factor of the effectiveness problems in the JHA domain.

In order to tackle the identified effectiveness problems the Commission proposed two different but complementary sets of reforms: A strengthening of current monitoring and evaluation mechanisms and the use of the “passerelle” provisions for the purpose of ‘communitarising’ the ‘third pillar’ fields. While the first of those constitutes a strengthening of existing “soft” governance mechanisms, the second would mark a decisive shift towards “harder” governance.

3. The proposed use of the “passerelle” provisions

In order to address both decision-making and implementation deficits in the JHA domain the Commission proposed to use the ‘bridging clause’ of Article 42 TEC to transfer matters currently falling under the ‘third pillar’ (Title VI TEU), i.e. police and judicial cooperation in criminal matters, 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.⁴ This would in fact have amounted 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 added 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 original Constitutional Treaty. In addition, the proposed use of Article 67(2) TEC would have allowed qualified majority voting in the sensitive domain of legal immigration as well as removed remaining restrictions on the role of the Court.

The advantages of the Commission’s June 2006 proposals from a governance effectiveness point of view are easy enough to identify:

Bringing police and judicial cooperation measures would reduce the risks of blockages and least common denominator agreements in the Council, thereby increasing the Union’s decision-making capacity and quality. 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

⁴ COM(2006) 331, pp. 13-14.

comply with adopted JHA legislation. The “governance hardening” effect - both in terms of hierarchical control of implementation and uniformity - would be significant.

While certain gains in effectiveness could be expected from the proposed reforms, there are 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 very sensitive politically and/or legally in the domestic context. The negative judgements of the constitutional courts in Germany, Poland, Cyprus and Finland on the application of the European Arrest Warrant 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 the Community method seems not only rather simplistic but also counterproductive as it might add to the concerns about a centralising Union apparently oblivious to the diversity of situations in the Member States and generate some more serious resistances against implementation.

There is a questionable assumption in the Commission proposals that the use of the “Community method” on its own already guarantees more and better measures. On the one hand there have during the last few years also been decision-making and implementation problems in the ‘communitarised’ JHA fields of Title IV TEC. On the other hand the balance-sheet of the ‘third pillar’ 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 would dispose of an exclusive right of initiative, in which Member States could be outvoted, in which “hard” implementation discipline could be imposed through EC infringement procedures and in which an unrestricted role of the Court of Justice could impose a higher degree of uniformity in the application of agreed measures even if in the sensitive domain of internal security, at least some Member States might not be prepared to engage in substantial measures, reducing the critical mass for achieving any legislative progress at all.

While it is clear that there are some serious performance problems especially in the context of the ‘third pillar’ in terms of both decision-making and implementation a statistical analysis 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. ‘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 and Member States at risk of being outvoted seeking ‘opt-outs’, refuse to implement certain sensitive decisions or at the very least delays in implementation, all of which would reduce the overall effectiveness in the JHA domain.

Finally one has to take into account that governance is not only an issue of effectiveness. 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. While the proposed ‘communitarisation’ would strengthen considerably the role of the European Parliament by extending its co-decision powers, it would not improve the position of national parliaments as this had been foreseen in the stalled Constitutional Treaty. 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.

4. The Reform Treaty perspective

The Commission’s “passerelle” proposal received strong support from the Finnish Presidency, several Member States and the European Parliament. Yet in December 2006 it was practically shelved by the Council, this both because of the concern of the incoming German Presidency about negative implications for its efforts to relaunch the Constitutional Treaty and because of objections from Ireland, Denmark, Sweden and the United Kingdom. With the agreement reached at the June 2007 European Council on the framework for the new Reform Treaty the “passerelle” option seems now obsolete, unless another accident happens to the new Treaty during the IGC or the ratification process.

The Reform Treaty provisions, as far as they result from the June 2007 compromise,⁵ also constitute a ‘governance hardening’ package for the JHA domain: The abolition of the ‘pillar’ structure will result in a ‘communitarisation’ of the current ‘third pillar’ fields in all but name in the context of the new Title IV on the “Area of Freedom, Security and Justice” of the “Treaty on the Functioning of the European Union”. Community legal instruments as well as treaty infringements proceedings will become universally applicable in the JHA domain, and under the name of the “ordinary legislative procedure” the current “co-decision procedure” with qualified majority voting will become the standard legislative procedure. Unlike the June 2006 Commission proposal, however, the Reform Treaty compromise provides for some ‘balancing’ checks and balances, mostly taken over from the failed Constitutional Treaty, which mitigate slightly the overall move towards a more hierarchical decision-making:

While qualified majority voting – surely a hierarchical governance element as it forces out-voted Member States to comply with a majority decision – becomes the rule, provision is made for what is often referred to as the “emergency brake” regarding legislative action in the domain of criminal law under which any Member State refer the act in question to the European Council which will then decide by consensus on its fate. A unanimity requirement is also maintained for police cooperation as well as measures in the field of family law. In both police cooperation and judicial cooperation in criminal matters the Commission will have to continue to share its right initiative with the Member States which, however, can only use it with at least a quarter of their number. In the field of migration policy Member States will retain their right to determine volumes of admission, an important check on EU legal immigration measures.

On the legitimacy side the foreseen legal codification of the EU’s Charter of Fundamental Rights constitutes a balancing element for the extension of Union powers especially in the criminal justice and police cooperation fields. As far as democratic control is concerned the Reform Treaty ‘package’ also goes beyond the Commission’s 2006 initiative because of its strengthening of the role of the national parliaments through the introduction of the “early

⁵ See Council document CIG 1/07 of 23 July 2007.

warning mechanism” on subsidiarity and the – protocol regulated - enhanced information rights of national parliaments, which comes on top of extended co-decision by the European Parliament.

In spite of these checks and balances the ‘governance hardening’ package of the Reform Treaty has been of enough concern to the United Kingdom, Ireland and Denmark to not only maintain their current ‘opt-outs’ but also to extend them to future Union action in the fields of police and judicial cooperation in criminal matters. The details of these extended ‘opt-outs’ will be regulated in still to be negotiated protocols. In addition, Member States keen on pressing ahead on certain aspects of police and criminal justice cooperation have been opened up a facilitated recourse to “enhanced cooperation” in cases where either the “emergency brake” stops a legislative measure from passing or – in the field of police cooperation – unanimity cannot be reached in the Council. In both cases it will be sufficient if one third of the Member States wishes to engage in such a cooperation. These extended ‘opt-outs’ and enhanced cooperation possibilities, with their increased potential of fragmentation of the “area of freedom, security and justice”, must be regarded as part of the price to be paid for a move to ‘harder governance’ in line with the Community method which is clearly not supported by all of the Member States.

5. Conclusions

The extensive use of ‘softer’ modes of governance can be regarded as one of the reasons for the EU’s current problems of effective implementation in the JHA domain. Yet other factors – such as an often lacking sufficient common political will – are at least equally important. It should also be emphasised that the less hierarchical and more flexible ‘softer’ modes of governance have contributed over the last few years to a significant extension of policy objectives and cooperation mechanisms in the most sovereignty sensitive fields of the JHA domain.

While the Commission’s ambitious June 2006 push towards a ‘hardening’ of EU governance, primarily through a ‘communitarisation’ of the current ‘third pillar’ fields has been shelved, the Reform Treaty package agreed on in June 2007 goes a long way in the same direction, although it provides a number of checks and balances which mitigate the ‘hardening’ effect. The Reform Treaty provisions – if adopted as they currently stand – will mark a substantial step towards ‘harder’ governance in the JHA domain and may well increase the effectiveness of EU governance both in terms of decision-making and implementation. Yet a price in terms of further fragmentation will have to be paid, and any potential reduction in the use of ‘softer’ governance instruments is not necessarily going to be made up by an equivalent higher use of ‘harder’ instruments.