

## Specific factors and development trends of modes of governance in EU Justice and Home Affairs

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### 1. Introduction

Since the entry into force of the Treaty of Amsterdam in 1999 EU Justice and Home Affairs (JHA) in the context of the “area of freedom, security and justice” (AFSJ) have developed into one of the major policy-making areas of the EU. The AFSJ is now not only one of the fundamental Treaty objectives (Article 2 TEU) but also one of the fastest developing EU policy areas, with the JHA Council having adopted on average each month ten new texts on JHA issues since 1999. Given the recent emergence of this domain of EU governance, its fast development and the political salience it has acquired with regard to issues such as the fight against terrorism and the management of migration challenges, it seems worthwhile to ask what specific factors influence its development and which trends can be observed so far.

### 2. Specific factors of EU governance in the JHA domain

One of the unique features of the JHA domain is its composition of a set of rather diverse policy fields: asylum, immigration, border controls, judicial cooperation in civil matters, judicial cooperation in criminal matters and police cooperation. The objectives pursued and the instruments used are necessarily rather different in each of these fields, so that EU governance in the JHA domain is necessarily more diverse than in more homogenous domains such as agricultural or environmental policy.

Furthermore, JHA touch upon core functions of the state: providing security and justice to citizens and sovereign control over the national territory are not only central

prerogatives of the modern nation-state but also essential elements of its reason for being and legitimacy. The principle that the exercise of law enforcement is strictly limited to national authorities within the national territory continues to be a major problem within the AFSJ. In addition some of the key JHA issues, especially internal security and migration management, are very sensitive in the domestic context and strongly influence national elections. Most EU governments have been reluctant to relinquish control over national instruments in the JHA domain.

The result of the above is a distinct preference for the use of “lighter” modes of governance. This is reflected in a focus on mutual recognition and minimal(ist) harmonisation as far as legislative action is concerned, instead of the pursuit of any major harmonisation project such as the gradual introduction of a European criminal or civil law code. It is also noteworthy that the Member States have so far not transferred any operational powers to the many special agencies they have set up in JHA (Europol, Eurojust, Frontex). Thus, in a domain where operational action is central to many objectives, especially in the area of law enforcement, the EU as such does not dispose of any operational capabilities so far.

Major differentiation in the JHA domain, such as the Schengen arrangements and the “opt-outs” also contribute to its uniqueness and has substantial implications for EU governance in the sense that some instruments of governments are designed to serve only part of the Member States (i.e. the Schengen countries) and that the form and the use (in a more or less binding way) of instruments can vary depending on whether all Member States participate or not.

The last, but certainly not least important factor concerns the Treaty architecture of the AFSJ. Although linked together by the common objective of the AFSJ and the common institutional framework (in particular the JHA Council) the “first pillar” fields (asylum, immigration, border controls, judicial cooperation in civil matters) are separated from the “third pillar” fields (police and judicial cooperation in criminal matters) not only by a different legal basis (Title IV TEC and Title VI TEU) but also by different decision-making procedures (mainly qualified majority under Title IV TEC and unanimity under Title VI TEU), separate decision-making structures in the Council below the level of the COREPER and different legal instruments. The artificiality of this divide becomes particularly clear when different procedures and instruments have to be used for the same objective, which is the case, for instance with “first” and “third” pillar legislative measures against illegal immigration. Yet, whether artificial or not, this legal divide is currently a major factor of EU governance in the JHA domain.

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### 3. Output Evolution

Council output in terms of numbers of texts has gone through one major cycle in the post-Amsterdam period. The Tampere European Council Conclusions of October 1999 established the first multi-annual programme for the development of the AFSJ, covering the period of 1999 to 2004, coinciding with the end of the five-year “transitional period” provided for by the Treaty of Amsterdam on 30 April 2004. Overall activity rose gradually from 1999 to 2002 - with a peak of regulatory texts reached in 2003 -, but dropped in 2004 and even more sharply in 2005. This can be primarily explained by the impact of the April 2004 deadline, which contributed much to the high output in 2002 and especially 2003. Multi-annual programming can be regarded as one of the specific governance features of the AFSJ, with the second of such programmes - the 2005 to 2010 Hague Programme – currently being in the course of implementation. From the above one can draw the conclusion that it is one of the effects of such programming that output increases towards the end of the programming period as Member States tend to postpone many decisions until the deadlines draw closer. The same is likely to happen towards the end of the current Hague Programme, and the statistics for 2006 indeed show a rise in activity.

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

## 4. The use of binding and non-binding instruments

Research results show that within the AFSJ domain the balance between binding and non-binding measures varies quite considerably from one JHA field to the other, as the following examples show:

*Visa policy:* Here binding texts exceed non-binding texts by a ratio of around 2:1. This can be explained by Article 62(2)(b) TEC providing for a minimum legal harmonisation of visa policy as well as the need to ensure legal certainty in a field where the EU is bound by internal legal instruments, especially the 1951 Geneva Convention.

*Civil law cooperation:* In this field binding texts exceed non-binding texts at a ratio of around 3:1. The main reason for the more extensive use of legislation in this field is that civil law cooperation has had a close link with the internal market where the use of binding instruments has always been seen as necessary for creating sufficient legal certainty for cross-border economic activities.

*Police cooperation:* Here the situation is the reverse from that of civil law cooperation, with the use of non-binding instruments exceeding that of binding ones by a ratio of over 3:1. Because of the sensitivity of police cooperation from the national sovereignty and territoriality points of view, Member States have tended to be highly reluctant to use binding instruments which might interfere with the autonomous control and organisation of their police forces.

As regards *horizontal issues* stretching across the Title IV TEC/Title VI TEU “pillar divide” the comparatively high number of non-binding instruments used in this field can be explained by the fact that many of the reports adopted or taken note of by the Council apply to both the Title IV TEC and the Title VI TEU fields – for instance all evaluation reports on candidate countries.

The analysis of the texts adopted in the JHA domain contradicts to some extent the traditional assumption that “communitarisation” tends to lead to a greater use of binding instruments than is normally the case in “intergovernmental” areas of cooperation. There are indications for a rather pragmatic attitude of the Member States: rather than having a systematic preference for non-

binding measures in the “intergovernmental” context of Title VI TEU they are prepared to make a significant use of binding instruments if they are dealing with a field which is more appropriate for legislative action – which is the case, for instance, for judicial cooperation in criminal matters – and if there is sufficient common political will. If the political will is weak then binding instruments are rarely used even if the field has been “communitarised”, for which the limited action in the field of legal immigration is a case in point.

Overall non-binding “target-setting” texts, such as action plans, programmes, Council recommendations, guidelines and best practice manuals constitute the biggest single category of texts adopted in the JHA domain. This is clearly the result of Member States’ preferences for “lighter forms” of governance that leave wider margins of autonomy to the national systems.

### Further reading

This policy brief is based on research carried out within the NEWGOV project no. 1 on “The Evolution and Impact of Governing Modes”. The scientific objectives of this project are to map, measure and classify governing modes; to explain why and under what circumstances and conditions new governing modes emerge; to identify common patterns and theorise about how they interact and evolve to form new governing mixes and macro-systems; and to find criteria and parameters by which the emergence and evolution of new modes of governance may be evaluated in a comprehensive way and against the background of different theoretical and conceptual approaches.

Further information can be found on the NEWGOV Website in the [special section](#) of cluster no. 1.

## 5. Conclusions

Can the JHA domain be regarded as a rather specific area of EU governance? In at least two respects the question can be answered affirmatively.

First, there is a distinct preference for “lighter” forms of governance which is shown, in particular, by the extensive use of non-binding “target-setting” texts and the use of the special agencies Europol, Eurojust and Frontex, to facilitate and support cooperation between national authorities, but without giving them any operational powers. The particular sensitivity of the JHA domain from a sovereignty and domestic politics point of view makes many Member States generally reluctant to accept hard legal and institutional governance which has led to a proliferation of “soft governance” features.

Second, there are a number of factors – such as the diversity of the fields, the particular national sovereignty sensitivity of some of them and the strong operational dimension – which have significant implications for the choice of governance modes. The JHA domain, although regrouped under a single treaty objective (Article 2 TEU) – and a single decision-making authority – the JHA Council – shows in fact a significant degree of heterogeneity in the use of governance modes. Whereas some fields show a 2:1 or even 3:1 ratio of usage of binding against non-binding texts, other show an inverse ratio. Field specific practical and political considerations clearly account for this variation, which also reflects the diversity of the JHA fields which are covered by the AFSJ as a political project. That this variation between the fields does not follow the logic of the divide between the “first pillar” fields on the one hand and the “third pillar” fields on the other clearly adds to the distinctiveness of the JHA domain.

Given these particular elements, EU governance in the JHA domain appears as

somewhat like a laboratory for EU governance: What we are looking at is in fact a still rather young policy-making domain with a considerable degree of complexity due to its diversity, its “pillar divide” and its differentiation. Rather than sticking to any notion of “purity” in applying “communitarian” or “intergovernmental” methods and instruments and restricting themselves to traditional ‘hard’ and ‘soft’ instruments of governance, the Member States have pursued a rather pragmatic path, adapting existing instruments or even engaging in the development of new ones. There may be some lessons to be taken from this flexible and partially innovative evolution of EU governance for other domains of EU policy-making.

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