

# **AN AREA OF FREEDOM, SECURITY AND JUSTICE IN EUROPE?**



**A FEDERAL TRUST REPORT**

**JULY 2007**

### **About the project**

The Federal Trust convened in late 2006 a Working Group to examine Justice and Home Affairs in the European Union.

This report arises from the Working Group's discussions, but the Trust and rapporteur are alone responsible for its analysis and conclusions.

### **Working Group**

Chair, Rapporteur - Professor Jo Shaw, Edinburgh University

Members - Dr Frank Gallagher, Dr Valsamis Mitsilegas,  
Professor Steve Peers, Professor Wyn Rees

### **Secretariat**

Jonathan Church, Brendan Donnelly - The Federal Trust

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*enlightening the debate on good governance*

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## Introduction

No area of the European Union's activities has been over the past fifteen years more legally and politically complicated than its policies and legislation relating to questions of justice, internal security and civil liberties. When these questions were first brought systematically within the ambit of the European Union by the Treaty of Maastricht in 1993, they were made subject to the innovative regime of the so-called 'Justice and Home Affairs' (JHA) pillar of the Union. This regime differed substantially from the 'Community' decision-making and institutional structures laid down by the Treaty of Rome in 1957, notably in the limited role it accorded to the central institutions of the Union and the types of legal instruments which could be adopted under it. Without the development of this new intergovernmental legal structure for the 'third pillar' it would probably have been impossible to persuade all the signatories of the Maastricht Treaty to accept in 1993 the extension of the Union's activities to questions of Justice and Home Affairs.

Many of those who signed the Maastricht Treaty in 1993 undoubtedly believed that the JHA pillar was an inherently unstable construction, which in due course would come to exhibit ever more features of the traditional 'Community method', based on regular qualified majority voting in the Council of Ministers, important legislative roles for the European Commission and the European Parliament, and judicial recourse before the European Court of Justice. Many of the JHA areas originally found in the third pillar have indeed come over the past decade to take on more features of the "Community method," particularly as a result of the Amsterdam

Treaty in 1997. But this development has sometimes been uneven and fitful, with many legal, political and institutional cross-currents militating against linear change. Even the European Constitutional Treaty of 2004, which envisaged the substantial transfer of JHA areas to the first, "Community" pillar, contained an "emergency brake" mechanism for governments hesitant in this area. This "emergency brake" has been taken up in the "Reform Treaty" provisionally agreed at the European Council of June 2007 to replace the moribund Constitutional Treaty. If the Reform Treaty is brought into force as expected, a more coherent and more 'communitarised' constitutional landscape in JHA will result, and the third pillar will essentially disappear.

Since 1999, the European Union has preferred to describe 'Justice and Home Affairs' by the broader and more ideological concept of an "area of freedom, security and justice," towards which the European Union is supposedly aspiring. This change of terminology reflects at least partly a fear of some in the European institutions that their activities in Justice and Home Affairs were viewed by ordinary Europeans as repressive and excessively constraining of individual liberties. This report will consider from a number of complementary perspectives the progress the European Union has made over the past fifteen years towards realising an EU-wide 'area of freedom, security and justice.' Its main focus is on the institutional structures the Union has given or may give itself in the future for the construction of this area, rather than the detailed content of policy.

## Institutional developments since Maastricht

The creation of the intergovernmental “pillar structure” for JHA (together with a similar pillar for Common Foreign and Security Policy) under the Maastricht Treaty of 1992 was a symptom of the tension – existing then as it does now – between advocates and opponents among national governments of the extension of supranational governance into areas of such acute national sensitivity as domestic security and national foreign policy. The pillar structure therefore represented something of a compromise, allowing new areas to be brought within the European Union while permitting the retention of decision-making procedures which were essentially intergovernmental – that is, more akin to the interaction of independent national governments. This new structure of decision-making was particularly congenial to the British Conservative government of John Major, which hailed the evolving “pillar structure” for new areas of European competence as a bulwark against the pervasive encroachments of European federalism.

In the mid-1990s, however, there was considerable pressure on Mr. Major’s and other initially reluctant governments to review the arguably unsatisfactory working of the JHA pillar. Mr. Major’s government remained inflexible on this issue, but his successor, Tony Blair, was, in the first months of his Premiership, eager to be seen as a constructive participant in European negotiations. He signed in 1997 the Amsterdam Treaty, which pruned back the JHA pillar’s field of application, transferring a number of its elements to decision-making under the “Community method,” and thereby limiting the third pillar to matters of “Police and Judicial Co-operation in Criminal Matters”. Those who saw the JHA pillar as essentially a transitional arrangement derived understandable encouragement for their views from the provisions of the Amsterdam Treaty.

Indeed, the Amsterdam Treaty was doubly encouraging for those sceptical about the merits of the JHA pillar set up in 1992. Not merely did the Treaty limit the applicability of the intergovernmental third pillar. It also looked forward to a further deepening of “communitarisation” in those JHA elements newly transferred from the intergovernmentalist third pillar to the ‘Community’ first pillar. Member States were urged by the Treaty to review regularly the decision-making procedures they employed for JHA. 2004 saw the fruition of a least some of these hopes. In response to a proposal from the European Commission, the Council of Ministers agreed to extend the scope of co-decision and Qualified Majority Voting to all those areas originally under the JHA pillar which, even though partially communitarised, had remained subject to unanimous voting procedures (with the exception of legal migration and family law). 2004 also saw the end of Member States’ right of initiative for JHA measures in the ‘Community pillar’, something until then shared with the Commission.

## The European Constitutional Treaty, the ‘Reform Treaty’ and the Passerelles

On the face of it, the Constitutional Treaty signed in 2004 by the heads of state and government in Rome marked a further decisive step along the road of JHA communitarisation. At least potentially, it envisaged the complete end of the third pillar as an intergovernmental phenomenon with a structure distinct from that of the ‘Community method’. But even in the text of the Constitutional Treaty, important differences of emphasis between the various signatories were observable, with some Member States clearly envisaging the rapid and wholesale communitarisation of the third pillar, while others, such as (but not only) the British, were coming to adopt a more cautious and restrictive stance.

Despite its generally ‘communitarising’ tendency, the Constitutional Treaty also contained definite signs of real differences of approach and aspirations between the twenty seven Member States on the most sensitive questions of internal security. These differences were highlighted by the discussion in 2006 about the possible use of a “passerelle” clause which would have allowed the governments of the Union, if they wished, to implement at least some of the ‘communitarising’ provisions contained in the Constitutional Treaty without waiting for the Treaty’s ratification, a prospect made wholly uncertain by the French and Dutch referendums of 2005. The striking reluctance of the Member States to make use of the procedure envisaged by this clause when invited to do so by the Finnish Presidency in 2006 appeared at the time to be an unfavourable augury for the capacity of the European Union to resume its apparently unstoppable path towards greater ‘communitarisation’ of Justice and Home Affairs. At the September 2006 Council meeting to consider recourse to the Amsterdam “passerelle”, not even a bare majority of states could be assembled for the Presidency’s proposals. Even such traditionally integration-minded states as Germany were reluctant to acquiesce in the de facto abolition of the intergovernmental third pillar, while Britain, Ireland and Denmark made known their opposition to the use of the “passerelle” at any time in the foreseeable future. The apparent constitutional impasse was reflected in the language of the German Interior Minister, Wolfgang Schäuble at the start of his country’s Presidency of the Union. Mr Schäuble stressed the need to “strengthen and consolidate practical cooperation ...[and] make effective use of existing instruments and expand them as needed rather than constantly developing new initiatives”.

However, Germany’s opposition to the use of the Amsterdam passerelle clause in 2006 – arguably driven by its Interior Ministry – seems to have been based primarily on its wish to rescue the Constitutional Treaty in as complete a form as possible. The “Reform Treaty” agreed at the end of the German Presidency in June 2007 appears to go a long way towards achieving this goal, in substance if not in form. If this treaty is signed and ratified in the expected manner, the third pillar

will, after all, find itself amalgamated into a combined “area of freedom, security and justice”. In this area of freedom, security and justice, with few exceptions (already envisaged in the Constitutional Treaty), the European Commission will gain exclusive right of initiative, the European Court of Justice will have normal jurisdiction, the European Parliament will gain equivalent law-making powers to the Council of Ministers through the expansion of co-decision, and qualified majority voting will replace unanimity in the Council.

The Reform Treaty therefore promises to bring about the kinds of communitarising changes which the passerelle clauses would have done had support for their use been found. In fact, what has provisionally been agreed to at the June European Council involves a greater and more coherent communitarisation of JHA than could likely have been achieved ‘case-by-case’ by the use of the passerelle clauses in the existing treaties. Each of the two existing passerelles are able to bring about a range of constitutional results; for example by making provision for the powers of the ECJ simply to be “adapted” or for “relevant voting conditions” to be determined. Rather than transform the current constitutional patchwork to a new form of similar complexity, the Reform Treaty will have the effect of communitarising JHA ‘as one’, although with isolated policy areas remaining as exceptions - such as family law, which will continue to be decided by unanimity

From the view of the British government, any acceptance of an increased communitarisation of JHA under the “Reform Treaty” to enable the quicker agreement of cross-border security measures for example - was accompanied by a need to ensure for domestic political reasons that the new treaty was seen to protect British autonomy in traditionally sensitive areas such as criminal justice. The Constitutional Treaty included and the Reform Treaty will include an ‘emergency brake’, enabling any member of the Council to suspend for four months the legislative procedure for any measure ‘affecting fundamental aspects of its criminal justice system’. (At the end of this time period, the legislative procedure will be reinstated provided there is consensus in the European Council. If there is not, provision is made in the Treaty for the establishment of enhanced co-operation in the relevant area if a third of member states are so inclined). That the passerelle clause debated in 2006 did not foresee the inclusion of such a brake was perhaps one reason why the British government was so hostile at that time to its implementation.

Underlying all the British government’s negotiating posture on matters of JHA leading up to the recent European Council was its obvious desire to avoid holding a referendum on any successor document to the Constitutional Treaty. To this end, Mr Blair had outlined four “red lines”, ostensibly to ensure that British sovereignty would not be sacrificed in key areas. In JHA, there was a promise not to “give up our ability to control our common law and police system”.

This red line was arguably disingenuous, in that it had never been in doubt - either in the Constitutional Treaty or since - that the UK would retain control over its common law and police system. The ‘emergency brake’, retained in the Reform Treaty from the Constitutional Treaty, is almost an explicit statement of this fact, operating “where a member of the Council considers that a [directive] ... would affect fundamental aspects of its criminal justice system”.

Nor was the Protocol which currently allows the UK to opt in or out of first pillar JHA areas ever seriously endangered. It was perhaps not entirely clear that the European Council would decide, as it has, that the Reform Treaty would extend the British opt-in to the newly communitarised areas of criminal justice and policing, thereby sustaining its coverage of all first pillar JHA areas. But given that the passerelle clauses - had they instead been used to communitarise third pillar areas - would certainly have extended likewise the British opt-in to all such new first pillar JHA areas, this ‘coup’ of the British Government was to be expected.

Generally, indeed, the Conclusions of last month’s summit seem to bear the marks of the British Government’s preoccupation to present, for consumption by a sceptical domestic audience, any changes as being within the boundaries of Mr Blair’s ‘red lines’. For example, a Protocol states explicitly that the Charter of Fundamental Rights will not affect UK law, even though such an instrument is arguably of negligible legal consequence.

Although the media did in general report the June Council meeting in the terms that Mr Blair’s strategy intended - the Financial Times describing him as “fighting a rearguard action to stop [the new treaty] encroaching on national sovereignty in areas of ... criminal law”, not all observers were so complicit. “Having drawn up artificial ‘red lines’, he has flown home to trumpet a disingenuous victory in defending them”, said Liberal Democrat leader, Sir Menzies Campbell.

It is possible tentatively to draw a number of more general conclusions about June’s agreement in the context of mechanisms of the EU’s constitutional development.

Simultaneous change in many policy areas seems preferable to their separate advancement. The 27 member states have different approaches and aspirations, particularly in Justice and Home Affairs. It is therefore easier to agree upon a raft of measures - where the disbenefit to certain member states of some changes will be compensated for by more agreeable changes in other areas - than it is to make isolated steps, as the use of the Passerelle in 2006 would have involved. It must similarly be supposed that a national leader would sooner agree to changes uncongenial to a domestic audience as part of a broad package, than if they had to be presented discretely.

The Presidency can have a real impact. Angela Merkel's determination to agree a successor to the Constitutional Treaty, and her skill in accommodating the at-times fractious views of member states, have been widely praised as having been central to the "political" agreement of a Reform Treaty.

The changes prospectively agreed to in the Reform Treaty are on any analysis significant. While Tony Blair may have 'fought' to retain the 'emergency brake' and extend the British opt-in/opt-out to all JHA areas, the scope of communitarisation is nonetheless extensive. Unanimous decision-making will remain only in the area of family law, while the 'ordinary legislative procedure' (QMV and co-decision) will be expanded to cover the current third-pillar areas of police and judicial co-operation in criminal matters (where admittedly the emergency brake will apply) as well as legal migration. National parliaments and the ECJ will gain powers, and extra provision is made for enhanced co-operation. In addition to these changes proposed in the Reform Treaty, agreement was also found in June that the Prüm data-sharing initiative would be transposed into the Union *acquis*.

The institutional evolution of the EU has always proceeded unevenly, with times of important institutional change alternating with periods where the Member States and the European institutions digested and implemented the consequences of the changes they had agreed among themselves. The political environment against which major changes take place is of course decisive. The coming together of political forces in this case included Mr Blair's freedom to take decisions whose consequences would not be felt by him personally, but by his successor, the new approach of Mr Sarkozy after Mr Chirac's departure, the conciliatory talents of the German Presidency, and a general commitment among the Union's leaders, whatever their technical disagreements, to draw to a close the period of self-examination which, since 2003, had been so damaging for the Union's image in the eyes of its citizens.

In fact, many of the implications of the political and institutional advances made in the Amsterdam Treaty and as a consequence of the September 11 attacks are themselves yet fully to emerge, but they will probably now do so with the additional impetus from a more communitarised constitutional framework. Organisations to strengthen security in the absence of internal borders - such as Frontex - continue their development, important measures such as the Asylum Procedures Directive will soon come into force. In light of uncertainty over the dividing line between the third and first pillars (see p. 15) a backlog of legislative proposals on JHA matters also exists. Progress on these measures is dependant, in the shorter term, on the ECJ clarifying their most appropriate legal bases. However, there is little danger of long-term stagnation, the Reform Treaty rendering obsolete any distinction between the third and first pillars.

The constitutional peculiarities of Justice and Home Affairs first agreed at Maastricht appear to be approaching their

end. The end of the JHA pillar structure would represent a significant practical and symbolic evolution in the Union's development. This new constitutional form will itself surely evolve, but, should the Reform Treaty be enacted as expected, it is likely to be a long time before the practical need and the political will for further development combine again to give rise to another move forward of such magnitude. For now, a large legislative and political agenda remains to be fulfilled.

## **Evolving policies within the Area of Freedom, Security and Justice**

The European Union's activities since 1992 in JHA and related fields can be reviewed under four main headings, namely the protection of the external borders of the Union in conjunction with the removal of internal borders; the standards and procedures applied to asylum-seekers; measures relating to immigration, both legal and illegal; and collaboration between EU Member States in the fight against crime, particularly serious crime and terrorism. These categories are interrelated, but each has a history and set of problems specific to itself.

### **The Union's internal and external borders**

In 1985, Belgium, the Netherlands, Luxembourg, France and Germany signed the first Schengen Agreement, leading, ten years later, to the abolition of their internal borders (though states retained some discretion to police or reinstate internal borders, for example in "times of emergency"). Since then, common procedures for new 'external' border checks and the uniform treatment of visa applications have been agreed.

The body of law developed among the Schengen states to facilitate and cater for the removal of borders - the 'Schengen *acquis*' - was incorporated into the Union's legal framework as a Protocol to the Treaty of European Union. The powers of the Schengen Executive Committee were transferred to the Council of Ministers.

By this time, the 'Schengen club' had expanded to include then-all 15 EU Member States except the UK and Ireland (with Denmark having special arrangements to opt-out of certain measures). Iceland and Norway also participate; they influence any new Schengen legal instruments adopted by the Union through a joint committee with the Council. The UK and Ireland are able to opt in to parts of the Schengen arrangements, with the unanimous agreement of the Schengen Member States. The UK currently opts in to police and judicial co-operation in criminal matters, the fight against drugs, and the Schengen Information System. The Commission has been eager to stress that the Schengen *acquis* - in effect the first example of enhanced co-operation in the Union - should not be undermined by the partial involvement of the UK and Ireland.

The Schengen common rules for visa applications, agreed in 1995, were incorporated into the Union *acquis* by the Treaty of Amsterdam, thereby forming - with provisions on visas newly transferred from the then-JHA pillar to the 'Community' pillar - part of the EU's traditional legislative framework.

The Union's common visa arrangements naturally reflect the nature of the current Schengen border arrangements. The UK and Ireland continue, for example, to retain independent visa systems, while full Schengen members issue joint 'uniform short-stay visas' valid for travel only within the borderless area. Union-wide action on visas is restricted to requiring third countries to offer visa-waivers consistently to the EU's Member States. (A notable exception to this policy is the United States, which continues to discriminate against the Union's newest Member States in its issuing of visas). A truly Union-wide visa would depend for its development on the geographical expansion of the Schengen area to all states of the Union, something not foreseeable in the immediate future.

While the 'new' Member States are bound by the Schengen *acquis*, they currently apply only certain Schengen provisions, such as those in police and judicial co-operation not bound up with border controls. 'New' Member States will have their borders with other member states abolished only when certain tests have affirmed their readiness.

With the increase in freedom brought by the *de facto* removal of internal borders has come a strengthening of the Schengen area's external borders and the (continuing) development of common facilities of administration and control. In the 1980s and 1990s, legal and surveillance co-operation was enhanced, and the Schengen Information System established to facilitate, *inter alia*, requests for cross-border surveillance. Since the incorporation of the Schengen *acquis*, development of the European Union's security-oriented functions has continued apace. While there is no doubting the rationale for such capabilities as internal borders are removed, there are concerns that these new capabilities go beyond the merely compensatory.

One such system whose functionality is being expanded is the Schengen Information System, a database recording basic details about individuals moving within the Union or attempting to enter at its external borders along with their need to be arrested, extradited, kept under surveillance, or refused an entry visa. It is to be succeeded by the more sophisticated and comprehensive 'SIS II' (currently under development), able to include biometric data such as fingerprints and photographs.

In its evidence to the House of Lords EU Sub-committee in August 2006, the human rights organisation, JUSTICE, expressed its concern not only that SIS II was being used to make these technical improvements, but also "extending its scope and purpose beyond that of merely compensating for the abolition of border controls". These concerns are

articulated in the context of a supposed broader trend towards a "comprehensive information exchange architecture", as a number of systems undergo development.

Other limbs of this expanding information-sharing 'architecture' are the Visa Information System (which will share the same technical platform as SIS II), intended to facilitate the exchange of visa data between Member States, and the Prüm Treaty, which facilitates closer co-operation between Member States in the fight against crime, including by the sharing of national police databases. The Prüm Treaty - currently extending to seven Member States - will be integrated into the Union's legal framework, a source of unease to some who identify its development outside the Union's legal structure as constituting a 'bypassing' of existing frameworks catering for such 'enhanced co-operation'.

Frontex, the agency whose task it is to co-ordinate the EU's external border controls, became operational in 2005. Based in Warsaw, it oversees the implementation of border-related EU rules, co-ordinates national border guards, and provides technical and operational assistance. Provisions such as the Schengen Border Code, adopted in February 2006, lay down procedural rules and safeguards for the operation of these external borders.

Agreement was found in June on a Regulation enabling the establishment of Rapid Border Intervention Teams (Rabits), teams of 'emergency' border guards drawn from a pan-European pool of some 200 personnel. The Eurodac system meanwhile, which facilitates the functioning of the Dublin Convention on the monitoring of asylum applications, constitutes a Union-wide database of the fingerprints of asylum-seekers.

Concerns that such developments might in fact lead not to an increase in the freedom of EU citizens but instead to the expansion of the punitive sphere, focus not only on the adequacy of data-protection safeguards built into individual systems, but particularly on the potential for the various systems to interact and lead to data being used for unanticipated or unintended purposes. It would be an irony indeed if the freedom of movement guaranteed to the European Union's citizens by the systematic abolition of restrictive border controls were replaced by an apparatus of control no less intrusive in the supposed interest of protecting the Union's external borders. Currently, concern about this issue is principally limited to specialists and non-governmental organisations such as JUSTICE. The Union's ability to resolve this potential genuine conflict of interest between security and civil liberties will be an increasingly challenging problem for its governance over the coming decade.

## Asylum

Asylum is an issue of rapidly increasing significance in humanitarian and political terms at the national and supranational level. Even a country politically unanimous in its approach towards asylum, with perfectly policed and administered borders, would be challenged by the task of constructing a transparent, effective and responsive legislative framework. In reality, the task of creating such a framework in respect of asylum (or indeed immigration) within any individual European country is greatly complicated by often polemical domestic political discourse and administrative difficulties. For many EU Member States this complexity is exacerbated by their belonging to a wider area of free movement of persons. When the Justice and Home Affairs pillar of the EU was reformed in 1997 by the Treaty of Amsterdam, asylum and immigration (and "other policies related to free movement of persons") were transferred from the then-JHA pillar to the Community method of decision-making under the first pillar. Member States were well aware that the European Union, by virtue of its relative wealth and proximity to the Middle East and Africa (and, significantly at that time, to the former Yugoslavia), would remain for many years to come an attractive destination for asylum-seekers.

There is an obvious incentive for common action in this area between the EU's Member States. The willingness of one country to pursue exceptionally restrictive or liberal asylum policies will have inevitable consequences for its neighbours. A common European approach to asylum-seekers would destroy any incentive for those seeking asylum to make repeated applications in various countries in the hope of a more favourable outcome after initial rejection. It would also guarantee, on the other hand, that all Member States of the Union applied common standards, thus ensuring the Union fulfilled its international obligations in an equitable manner between the Member States

### *A Common European Asylum System - the first phase*

At the European Council meeting in Tampere in 1999, EU governments committed themselves to "work toward the establishment of a Common European Asylum System" (CEAS), thus realising the vision of the Amsterdam Treaty. This common system would undermine the incentives for 'asylum-shopping' - whereby Member States with more favourable reception conditions receive disproportionately high numbers of asylum claims - and earn the confidence of citizens through fair and transparent procedures based on the full application of the Geneva Convention, to which all the Union's Member States are already signatories.

The 1999 Tampere summit laid out specific goals for the achievement of the 'first phase' of the development of the CEAS by 2004, corresponding to the objectives of the Area of Freedom, Security and Justice as set out in Article 63 of the Amsterdam Treaty. This article commits Member States in

particular to: first, establish criteria for determining the Member State responsible for an asylum application; and, second, agree among themselves minimum standards for the reception of asylum seekers, for the qualification of third-country nationals as refugees, for the granting and withdrawal of refugee status, and for the temporary protection of displaced persons.

Between 2003 and 2005, the Union has sought to meet these goals principally by the adoption of the Dublin Regulation, the Reception Conditions Directive, the Qualifications Directive, and the Asylum Procedures Directive.

### *The legislation*

The Dublin Regulation of 2003 lays down rules governing which Member State should process the asylum claims of third-country nationals, and restricts the possibility for multiple asylum claims to be made in different states of the Union in order to combat the practice of 'asylum-shopping'. The Regulation (also known as Dublin II) effectively brings into the legal mechanism of the Union the Dublin Convention - agreed by the Schengen members in 1990 - with a small number of improvements, such as shortened delays for the processing of applications, and measures aimed at protecting the unity of families. It outlines a hierarchy of priorities, in order that the appropriate Member State for the processing of an asylum application can be determined on a consistent basis. For example, if an asylum-seeker has family members in one Member State with legalised refugee status, and relatives resident in a different Member State who have entered illegally, his or her application will be dealt with by the former state.

The Qualifications, Reception Conditions, and Asylum Procedures Directives each lay down minimum standards with respect to the processing of asylum seekers. Together they set standards for the full length of an asylum-seeker's claim; their reception (the Reception Conditions Directive controls the time within which asylum-seekers must be informed of their status in their own language); their processing (the Asylum Procedures Directive); and what requirements must be met by the applicants to achieve refugee status (the Qualifications Directive).

The Qualifications Directive entrenches, and to a degree goes beyond, the Geneva Convention standards already owed by all Member States to third country nationals attempting to qualify for refugee status. For example, the Directive explicitly covers the case for the recognition as a refugee of someone with a well-founded fear of persecution on grounds relating to sexuality or gender. Furthermore, it introduces standards for 'subsidiary protection'; guarantees to those in need of protection who, by virtue of falling outside the definition of a refugee, might otherwise not benefit from any such safeguards. Critics of the Qualifications Directive argue nonetheless that standards of protection should have been raised further. Much of the Directive's impact will inevitably depend

upon the way the ECJ comes to interpret it. For example, how widely it interprets the definition of 'refugee', will determine the proportion of applicants qualifying only for subsidiary protection. Moreover, the relative generosity of the supplementary protection offered by Member States may continue to provide an incentive for "asylum-shopping."

The Asylum Procedures Directive, which took five years to come to fruition, being finally adopted at the end of 2005, outlines a number of fundamental rights to be afforded asylum-seekers in the European Union, such as the right to an interpreter, the right to remain in the country pending examination of an asylum claim, (usually) the right to a personal interview and (usually) free access to a lawyer, and the right to be kept informed of one's legal position. It aims to harmonise these aspects of asylum processing, and to do so in accordance with international human rights obligations, replacing the great variation of procedures existing in different Member States.

The Directive's late adoption is testament to the difficulty experienced in its agreement. Discussion of the Directive pitted against one another those whose priority was the agreement of a high standard of protection for asylum seekers, and those whose priority was the agreement of some common standards. Those Member States with formerly the lowest levels of protection were reluctant to reform their procedures, and those with higher levels were unwilling to see the agreement of common lower standards. In the event, the Directive was subject to widespread criticism for the many exceptions to fundamental procedural rights it included, such as the incomplete nature of the right to a personal interview and free legal representation.

The most controversial aspect of the Asylum Procedures Directive is arguably the broad use of the 'safe country of origin' principle. In particular, the fear has been expressed that applicants coming from countries deemed 'safe' might be denied the right to argue that their specific cases constitute an exception to a general 'presumption of safety.' Criticism has also been expressed by organisations such as Statewatch of international 'readmission agreements,' whereby barriers to automatic repatriation to countries of origin are removed. According to Statewatch, these agreements are "unbalanced, inhumane, and internally contradictory", and are secured by "harsher and harsher rhetoric and threats" being employed towards third countries. Such an approach would appear to be contrary to the spirit of the Hague Agenda, which calls for constructive collaboration with third countries.

Yet, although concerns such as these were shared by the European Parliament, only very few of the EP's more than 100 tabled amendments to the Council's proposal were taken up in the final text of the Directive. Being a 'first phase' measure (i.e. one initiated before the shift to QMV and co-decision brought by the Amsterdam Treaty), the Parliament had the right only to be 'consulted' and had in consequence to content itself with a marginal role in the legislative procedure.

### The first phase: an assessment

The Dublin Regulation sits somewhat incongruously with those Directives which, together with it, make up the 'first phase' of the CEAS. Whereas the Dublin Regulation aims to regulate the interplay of interdependent but functionally separate asylum systems, the other Directives work towards the harmonisation of the various aspects of Member States' asylum procedures, theoretically in anticipation of a single European system of reception and processing. By contrast, the Dublin Regulation, with its origins in the 1980s, appears a pragmatic attempt to regulate applications until such a goal is realised.

The Dublin Regulation aside, the various strands of asylum policy - which are effective together in catering for the whole process of an application for asylum - have been harmonised by a process of establishing 'minimum standards' in each area. Harmonisation by establishing minimum standards can be - and is, particularly in the case of the Asylum Procedures Directive - criticised for its tendency to bring about convergence not to the 'average' standard of Member States, but rather to a 'lowest common denominator' of standards.

In fact, an asylum-seeker will experience different treatment between Member States according to the degree to which Member States' protections remain or go beyond those minimum standards. An apparently counterproductive effect of this is that those states with national standards higher than the agreed common standard may become more conspicuously generous to asylum seekers, thereby exacerbating, rather than addressing the problem of 'asylum shopping' and creating an incentive for some states to lower their standards. On the other hand, the defining of minimum standards at the European level relating to the granting and withdrawing of refugee status might be considered in any event an improvement on the present arrangements, particularly if it in time becomes the first of a number of steps raising these common minimum standards.

### The second phase

The 'second phase' of the establishment of the Common European Asylum System was envisaged by the Hague Agenda in 2004 (before the first phase Asylum Procedures Directive had been agreed) to be completed before the end of 2010. It urges first the speedy implementation of measures under the first phase and then, based on a "thorough and complete evaluation" of these measures, the completion of the CEAS, comprising a system of uniform procedures for the reception of asylum seekers and uniform status throughout the Union for those granted asylum or subsidiary protection. Further, it invites the Commission to investigate the possibility of the joint processing of asylum seekers, including extra-territorially (outside the Union) and envisages, ultimately, the creation of a central administrative body for a CEAS.

For understandable reasons, the contents and even the concept of a 'second phase' for the Union's asylum policy have attracted widespread criticism. Indeed, the very rhetoric of the 'second phase' seems to many premature. The Asylum Procedures Directive will be due for implementation this year at the earliest, while the Qualifications Directive only became applicable in all Member States in October 2006. Delay in Member States' implementation of the Qualification Directive was described by Commissioner Frattini as "particularly regrettable, given that this Directive is a cornerstone of the first phase of the Common European Asylum system". To proceed rapidly now with a further legislative programme in the field of asylum is, on the face of it, the polar opposite of the "evidence-based" approach to these delicate questions which on other occasions the Council has said that it favours. To allow so little time for the evaluation of existing measures while initiating debate about such politically controversial long-term goals as extra-territorial processing of asylum applicants will inevitably fuel accusations against the Commission of ideological zeal unrestrained by political or administrative realism.

It may be that, in the event, the 'second phase' of the European Union's Common Asylum Policy is a more modest affair than its title would suggest, seeking at least as much to improve existing legislation as to generate new initiatives. Particular scope for improvement exists in the minimum level of protection to be accorded by all Member States to asylum-seekers. These 'lowest common denominator' standards enshrined until now in the Union's legislation have been criticised by human rights organisations as leading even to the lowering of standards of protection ensured by some Member States. The European Commission, the Council and the Parliament may well conclude that the rectification of such perverse outcomes, where they exist as a result of already-adopted legislation, is a higher political priority than an intellectually seductive blueprint for the comprehensive settlement of all conceivable issues relating to asylum policy. A 'second phase' for asylum policy which essentially corrects the problems and incongruities arising from the first phase seems a more politically and administratively defensible next step than a 'second phase' which ushers in a raft of qualitatively new measures.

## Migration

### Legal (economic) migration

The European Union's population is ageing, and while immigration from third countries cannot on its own defuse Europe's 'demographic time bomb', there is a consensus that economic immigrants have a constructive and increasing role to play in the future growth of European economies. The assimilation of economic migrants into European societies is however the subject of intense current political debate. Member States' governments have not only to address such questions of

social integration, but also reassure their electorates that the introduction of foreign workers does not systematically undermine the economic opportunities of indigenous workers. Populist stereotypes of "Polish plumbers" in France and of Bulgarian or Romanian "gangsters" in the United Kingdom make clear how easy it is to conjure up fears in economically advanced Europe about even legal economic migration from elsewhere in the European Union. Similar demographic challenges facing the 'new' Member States are themselves exacerbated by emigration to 'old' Europe. Immigration will be needed from outside the Union, and the EU will need responsibly to manage the effect of 'brain drain' on developing countries from which immigrants will come.

It should, however, be stressed from the outset that the clear-cut arguments in favour of a common European asylum policy are much less powerful in regard to economic immigration. For any foreseeable future, different Member States will have different requirements for the kind of economic immigrants they will be seeking, reflecting their varying historical and cultural backgrounds and differences in their contemporary labour markets. In consequence, they are highly unwilling to accept any limitations upon their right to pursue differing national policies in the area of economic migration. The Hague Programme of 2004 echoes the European Council's view that "the determination of volumes of admission of labour migrants is a competence of the Member States." In its Communication on the results of the Tampere programme in January 2005, the Commission recognised that the Union had not yet been able to produce a common concept of admission for economic purposes.

For longer-term migrants, the Union's legislation has concentrated on attempting to regulate immigrants' rights and treatment through common definitions and procedures, rather than their admission to the Union. These rights are aimed for example at undermining a 'race to the bottom' between Member States in the treatment of third country economic migrants. Most notable among attempts to regulate the rights and treatment of economic migrants are the Long-Term Residents Directive and the Family Reunification Directive, both agreed in 2003. Neither is without controversy. The Family Reunification Directive was challenged (unsuccessfully) by the European Parliament before the ECJ on the grounds that in some respects it denies the 'right to family life' guaranteed by the European Convention on Human Rights. The Long-Term Residents Directive grants an immigrant long term resident status after 5 years' legal and continuous residence, allowing legal residence in that or any other Member State. A proposal to extend the Residents Directive to include refugees and those benefiting from subsidiary protection, (that is, protection where the specific situation of a person is not legislated for), was tabled by the Commission in June of this year.

### Illegal migration

In contrast to legal economic immigration, the field of illegal immigration is one where clearer scope exists for the European Union to be active. Article 63(3)(b) TEC calls for the adoption of measures related to "illegal migration and illegal residence, including repatriation of illegal residents". Even so, the Member States have not found it easy to come to substantial agreement in this area. The draft Returns Directive was not put forward until September 2005. It represents the first attempt to establish a common approach of Member States in respect of the treatment of illegal migrants and their subsequent return to their countries of origin, whether forced or voluntary.

The Directive proposes an EU-wide ban on return to the EU for any third country national found to be illegally resident within the EU. Any such regulation would be reliant for its success on the successful parallel development of information-sharing systems such as the Schengen Information System (SIS II). Certain of the Directive's provisions, such as setting a time limit on the period an illegal migrant can be detained before voluntary return, have been criticised by Home Office Minister, Tony McNulty, as "smacking of arbitrariness." It is feared in some quarters that the proposal to limit the period of detention of illegal migrants will have the effect of raising the number of unsuccessful asylum-seekers being forcibly removed rather than leaving voluntarily at a later date. Although the European Parliament and some civil liberties groups have welcomed the proposed Directive as at least providing some common standards for the detention and repatriation of illegal immigrants, prospects for the adoption of this Directive in the near future seem small. Member States remain to be convinced that the return of illegal migrants is not best governed by the Member State concerned, particularly in the absence of parallel common frameworks in the fields of economic migration and asylum.

### A European economic migration policy after all?

Even if until now the Member States of the Union have been more impressed by the arguments stressing the role of national governments in questions relating to legal economic immigration, it cannot be denied that the immigration policies of Member States have at least some impact upon one another. With the removal of the EU's internal borders, movement within the Union of a third country national is not limited to the Member State to which he or she was initially admitted. Even the means by which the migrant was originally admitted carries significance for other Member States. For example, Green Card systems (as used by Germany in 2000 to encourage the growth of its IT sector) might confer security of residence rights or rights to family reunification on its beneficiaries, thereby directly affecting their right of movement throughout the EU. Similarly the regularisation of illegal immigrants and the granting of citizenship remain the prerogative of

individual Member States. Any government which takes these steps does so with clear consequences for other Member States of the Union.

Since the Hague Agenda's adoption in late 2004, the Commission has pushed for more measures in the field of economic migration, releasing a Green Paper in January 2005, followed by a broad consultation, and a 'Policy Plan on legal migration', in December 2005. This document, noticeably alarmist in tone, predicted a fall of 52m in the working population of the EU by 2050. Commission proposals for two of five expected Directives aimed at regulating, inter alia, the entry and residence of highly-skilled workers are scheduled for September this year. One isolated agreement which arguably points towards some kind of common policy in economic migration is the Directive adopted in October 2005 encouraging, EU-wide, the immigration of workers in scientific research, by fast-tracking applications and granting a residence permit through an accelerated procedure. The Council continues for the moment to take decisions in the field of economic migration by unanimity, however, should the Reform Treaty come into force in the form mandated by the June European Council, this area will become subject to QMV, increasing the likelihood of future measures being agreed.

### **Criminal law and Mutual Recognition**

More than any single policy, a criminal justice system evolves to reflect a common conception of a nation's social and legal values. When, by the Treaty of Amsterdam, much of JHA was transferred to Title IV of the first pillar, criminal matters were left behind in the more intergovernmental surroundings of the re-cast third pillar. Criminal matters – specifically, Police and Judicial Co-operation in Criminal Matters – were thus protected from QMV and co-decision, and from the ECJ's full jurisdiction.

The acute political sensitivity of the sphere of criminal justice has made co-operation and integration between Member States difficult, even though it is widely accepted there is much sense in increased European co-operation in the fight against serious and international crime and terrorism. Until now, however, the EU's Member States have in general been reluctant to embrace anything smacking of the systematic harmonisation of their criminal law systems.

An alternative, more tentative approach to European integration in criminal and judicial co-operation was one lasting outcome of the British Presidency of the Union in 1998. 'Mutual recognition', a concept introduced for the single market – by which states accepted goods on the basis of their meeting the standards applied in another Member State – has since then been applied to Justice and Home Affairs. It is, according to the Hague Agenda, "the cornerstone of judicial co-operation".

In essence, mutual recognition introduces automaticity to the acceptance in one state of a judicial decision in another. As a concept, it has found favour both with those Member States enthusiastic about harmonisation in this field (who see it as bringing about de facto approximation of criminal law), and to those more inclined to protect their own judicial systems (who are reassured that harmonisation per se is off the political agenda).

The view of the German constitutional court – that mutual recognition is “a way of preserving national identity and statehood in a single European judicial area” – well captures, however, the uneasy mixture of philosophies at the heart of the concept of “mutual recognition” for criminal proceedings in the EU. While conceived as a way to avoid confronting difficult questions of sovereignty pooling in so sensitive an area, mutual recognition has on occasion simply served to reformulate these very questions in a recognisably similar fashion.

### The European Arrest Warrant

The European Arrest Warrant (EAW), the great ‘test-bed’ of JHA mutual recognition thus far, was agreed unanimously as an emergency Framework Decision in reaction to the 11<sup>th</sup> September attacks of 2001. While its operation has in some cases facilitated collaboration between judicial authorities, its workings have also highlighted the potential shortcomings of the legislative philosophy underlying it.

The EAW applies mutual recognition to procedures governing the surrender of an individual to another Member State to face particular criminal charges (not confined to those relating to terrorism). The executing country must, within two months, or three at the maximum, surrender a requested individual, or justify (on limited grounds, such as non bis in idem) its refusal to do so.

Traditionally, extradition has incorporated the principle of double criminality, whereby the offence to which a warrant applies must be an offence in both issuing and executing states. However, for 32 serious crimes, the EAW waives the need for double criminality to be established when their definitions differ between Member States.

Fears have been raised by some commentators that mutual recognition runs the risk of expanding the punitive sphere at the expense of the individual, by potentially making a criminal offence in one Member State actions also criminal in another. In fact, most Member States have insisted upon a permitted ground for non-application of the EAW, namely to refuse the surrender of a suspect when the alleged criminal act took place within the executing country, or, at least, outside the jurisdiction of the issuing country. Thus in reality, the dangers of a citizen being surrendered to a ‘foreign’ Member State to

be tried for an act committed at home which is not there defined as an offence are negligible. The EAW is then more akin to requiring the participation of one state in enforcing, as opposed to adopting the criminal law of another. The criminal justice systems of Member States become increasingly co-operative, rather than undergoing substantive harmonisation.

Nevertheless, certain unexpected and even paradoxical problems have arisen since the EAW’s coming in to force. Many Member States have reinforced their ability in effect to undermine the automaticity of the EAW by adding in their domestic implementing legislation extra guarantees for protecting the rights of the individuals whose transfer is requested. In 2005, the German constitutional court blocked the surrender of one of its citizens whose surrender had been requested by Spain. In a similar vein, the Cypriot Supreme Court late in 2005 delayed the surrender of suspects from Cyprus according to supposed incompatibilities with its national constitution. Agreement in the Council of Ministers on a further Framework Decision to ensure minimum common standards relating to those transferred by the EAW is proving difficult to agree. The ECJ is in any case constrained in its ability to police Member States’ interpretations of the European Arrest Warrant (as other third pillar provisions). Only when a Member State issues a declaration under Article 35 does the ECJ have this jurisdiction. Currently about half the Member States (including the UK) have made no such declaration. Furthermore, the Commission cannot bring a Member State before the ECJ on grounds of its failure to comply with the EAW. Concerns about the EAW have hindered the subsequent negotiation of the European Evidence Warrant, which extends the principle of mutual recognition to the transfer of evidence.

These difficulties and governmental hesitations in the EAW’s implementation and application suggest that its full potential as an integrating mechanism of European criminal justice is unlikely to be realised in the near future. The European single market in goods and services took as one of its central building blocks the concept of mutual recognition based on agreed common standards. It may well be that the Union has erred in attempting to implement the concept of “mutual recognition” in the sphere of criminal law without before agreeing common standards to underpin that mutual recognition. If such common standards had been agreed beforehand, they would admittedly have constituted demonstrable further sovereignty-pooling in a sensitive area of policy. The common standards would, however, have reassured courts and other interested national bodies that national constitutional guarantees were not being infringed.

### *The role of the ECJ in undermining the Union's pillars*

This report has already drawn attention to the hope of at least some governments when the Maastricht Treaty was signed that it might be possible to isolate the policies and activities of the JHA and CFSP pillars from the institutionally integrative effects of the "first pillar."

Over the past decade, the areas covered by the JHA pillar have been reduced, but doubt about the degree to which the current pillar structure anyway genuinely protects the area of criminal law from the integrative mechanisms of the first pillar has recently been raised by the ruling of the ECJ in September 2005 on the case of C-176/03, *Commission v Council*, which revealed that – according to the Lords' EU Committee's report of July 2006 – "Member States, or at least a majority of them, had seemingly been labouring under a misapprehension."

The case in question has its origins in a 2001 proposed Directive "on the protection of the environment through criminal law". In early 2003, a text very similar to that proposal was adopted by the Council. It was however adopted not as a Directive – a 'Community' legal tool – but instead as a Framework Decision – an instrument of the third pillar (thereby restricting the influence of the Commission, ECJ and EP). The Framework Decision stated that, in the prohibition of certain 'intentional offences', as defined, "Member States are required to prescribe criminal penalties".

The Commission, supported by the EP, argued that the Framework Decision could have been adopted as a Directive, and therefore should have been adopted under the first pillar, by the "Community method". The Council, supported by a majority of its Member States, argued that the proposal was rightly pursued through the third pillar's mechanisms, noting that the pillar's *raison d'être* was to deny the Community the competence to harmonise criminal laws through the provision of criminal penalties.

The ECJ ruled that "As a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence ..., [however] when the application of ... criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, [the Community legislature is not prevented] from taking measures which relate to the criminal law of Member States". It ruled that the majority of the Framework Decision could, on account of its 'aim and content', have been properly adopted under an environmental legal base of the first pillar, and therefore that the Framework Decision must be annulled.

The judgment refers specifically to environmental offences. However, by arguing that environmental protection "constitutes one of the essential objectives of the Community", it is

possible to conclude that the requirement for any policy area to be subject to the creation of criminal measures under the first pillar is that it constitutes one of the Union's 'essential objectives'. This has in effect been the approach of the Commission and the European Parliament when they have come to interpret the Court's findings, and it is difficult to see how environmental protection is demonstrably more essential an objective to the Union than, say, the free movement of persons and goods.

On the other hand, the judgment did stress the general rule that criminal law is a matter for the third pillar. The contention of those Member States which intervened in support of the Council is that the case has created first-pillar criminal law competence only in environmental measures. Whether the Court crystallised existing law, or genuinely rearranged the boundary between Community and Member State competence is a matter of natural, and continuing, legal dispute.

Decision-making reforms in the area of JHA proposed by the Reform Treaty will not come into effect before 2009 at the earliest, so this legal unclarity still has the potential to have a significant and detrimental impact on the agreement of new measures in this important field. It is hoped that a current case (C-440/05) on ship pollution will clarify whether the Court favours the narrow or wide interpretation. Until it does so, however, a number of first pillar legislative proposals brought forward by the Commission which envisage criminal sanctions for their implementation have little prospect of progress. Until the implications of the ruling in the environmental crimes case are clarified, the legislative impasse in this area seems likely to persist.

Quite apart from the specific importance of the issues raised by this debate on the role of criminal sanctions in the pursuit of the Union's policies, the process described in the preceding paragraphs is profoundly illuminating of the European Union's deep structure and particularly of the central role enjoyed by its institutions. The European Union is an institutionally dynamic legal and political construction, the precise evolution of which cannot be dictated by any individual signatory of the treaties which govern the Union's workings. The judgments of the European Court of Justice regularly remind the Union's Member States of this occasionally painful reality. The Union's fiercest critics will, reasonably from their point of view, complain of the "ratcheting effect" towards further integration implicit in this situation. The Union's admirers will argue for their part that the autonomous institutional structure of the Union is the defining characteristic of the European Union as a legal and political enterprise. As long as that institutional structure remains in place, further "surprises" such as that of the ECJ's judgement in September 2005 can be confidently anticipated. Whatever attempts are made to expel it with a pitchfork, the ECJ can rarely be prevented from returning.

## Accountability<sup>1</sup>

Many commentators would argue that the European Union's existing and potential activities in the field of JHA pose particular problems for the Union's democratic accountability. At the national level, questions of criminal law, asylum and immigration are debated by national legislatures and in national media with particular vigour and even polemic. This broad public discussion and consequent decision-taking by appropriate national authorities serve to legitimise difficult and controversial policies in France, Poland or any other Member State of the EU. The expansion of the EU's activities in the areas originally covered by the JHA pillar of the Maastricht Treaty poses, it is frequently argued, unique and intractable problems for the uncertain processes of democratic accountability which the EU currently enjoys. This conventional wisdom, however, rests on a number of differing, even contradictory analyses. These analyses sometimes focus on the Union's obligations of accountability vis a vis its citizens, sometimes on the accountability of national governments towards national parliaments, and sometimes on the accountability of national governments towards their own citizens. The suggested remedies differ accordingly.

The most radical analysis would cast fundamental doubt upon the European Union ever to provide an acceptable degree of accountability to British, Czech, Maltese or any other citizens of the Union for what the Union does or aspires to do under the JHA agenda. On this view, questions of immigration, criminal law, judicial procedure and other similar topics of JHA are only capable of acceptable resolution at the national level, by nationally elected governments reporting to nationally elected parliamentarians, bolstered by other national instruments of scrutiny for the executive such as the media, interest groups and NGOs. For those holding this view, the appropriate question is not "How can the Union make what it does in the sphere of JHA accountable?" but rather "How can the Union ensure that in the sphere of JHA it only does those (very few) things for which it can be made appropriately accountable?" A rigorous application of this analysis would conclude that the Union has probably already gone too far down the road of communitarisation in the field of JHA and certainly should go no further. Despite the occasional reticence of governments and public opinion regarding the development of the JHA agenda since 1992, it seems unlikely that the EU's Member States will be willing to impose any such moratorium or legislative retreat in the foreseeable future.

A different critique is that which believes that the predominantly intergovernmental nature until now of the Union's JHA activities is the main locus of whatever deficiencies of

accountability may have arisen in this area. It holds that national governments meet together with little publicity, with, in general, little domestic scrutiny, to agree on (sometimes repressive) measures which have considerable impact on the lives of individual citizens. For advocates of this critique (to which the Commission and European Parliament are natural subscribers), full communitarisation, with, in particular the greatest possible involvement of the European Parliament, is the solution. Intergovernmentalism, it is argued, is inherently a process beyond the grasp of either national or European parliamentary scrutiny. Communitarisation of JHA is not merely an important step towards the greater political integration of the EU, but also a vital step towards its democratisation. European policies simply cannot be democratically scrutinised by a process geared only around national governments and parliaments.

Yet another analysis would stress that JHA touches on areas of political decision-making in which national political cultures, national legal systems and national expectations of the executive have played a determinant role and doubts in consequence that specifically European institutions such as the European Parliament can on their own perform the democratically essential role of holding the executive to account. A frequently-drawn conclusion from this approach is that national parliaments should be much more involved in matters of JHA legislation than they have been in traditional 'internal market' legislation. Their involvement will be a reassurance to an otherwise alienated and distrustful range of national "demoi" concerned that matters which have long been at the heart of democratic political discourse at the national level are not now being taken away to a more distant, remote and incomprehensible level of legislation and governance.

Although the debate about the Union's capacity to provide democratic accountability in the field of JHA is one which is currently pursued with particular vigour, it is not clear that it is fundamentally a debate confined to the area of JHA. As the legislative and political reach of the European Union increases, so these questions of democratic accountability are rightly posed with increasing urgency over the widest range of the Union's legislative activities and policies. But these questions are entirely general in nature and not in any sense limited to the areas of internal security or civil liberties. If, as some would argue, democratic accountability by definition is only conceivable at the level of the nation state, then all the communitarised JHA legislation must in consequence be incapable of acceptable democratic accountability, as must every other item of communitarised legislation under the first pillar. If on the other hand the European Parliament is or could become the authentic elected representative of an existing or potential "demos" for the European Union, then any enhancement of the Parliament's powers in the field of JHA to mirror its present powers in the field of 'internal market' legislation (broadly defined) can only be a gain for democratic accountability.

<sup>1</sup> This question of accountability in the EU is explored in depth in the recent Federal Trust Report, "Legitimacy, Accountability and Democracy" by Professor Vernon Bogdanor, available at [www.fedtrust.co.uk](http://www.fedtrust.co.uk)

It is indeed true that, quite apart from the underlying normative question of whether the European institutions or national institutions are the appropriate guarantors of accountability in JHA matters, the complexity of the JHA institutional system is itself a substantial barrier to public understanding of and consequent confidence in that system. This complexity is compounded in the case of the United Kingdom, where the government's ability to opt into or out of some JHA legislation acts as a further barrier to public and parliamentary scrutiny. But this institutional complexity of the JHA field is not simply to be understood as a contingent barrier to democratic accountability. It is itself a consequence of widely differing conceptions of the political nature of the European Union. The Member States of the European Union are generally agreed upon the increasing desirability of common action in the field of internal security. When, however, they come to apply this agreement to the sphere of action under the JHA provisions of the EU, their underlying different views of what the European Union is and the long-term goals to which it is tending can only at present be reconciled by systematically ambiguous and variable institutional arrangements. If and when, perhaps through the emergence of a 'core Europe', a more widely-shared institutional approach can be developed between the leading actors in the field of JHA, a more transparent and legible institutional structure will be the probable consequence. At that stage, shared European policies in the sphere of JHA may well cease to pose a problem for democratic accountability, but become part of the solution to this problem, contributing to the sense of European political identity which is a precondition of European democratic accountability.

## The United Kingdom in Justice and Home Affairs

In the Maastricht Treaty, the United Kingdom participated fully in the workings of the JHA pillar, the intergovernmental nature of which its government found highly congenial. When the Amsterdam Treaty communitarised parts of the JHA pillar, the British negotiated for themselves a Protocol which allows the UK (and Ireland) to opt in to Title IV (first pillar) JHA measures if they wish. If the UK or Ireland wants to participate in the discussions leading to the adoption of a specific measure, they must notify the Council within three months of the first proposal being presented to the Council. The UK or Ireland may opt in at any later stage to a measure already in force, with the Commission's approval (and in doing so may bypass effective domestic scrutiny). If they do not wish to opt in to a proposed piece of legislation, then Britain and Ireland theoretically do not participate in the negotiations which lead to its adoption.

In practice, British negotiators do seek to play a role, however diminished, in the formulation of Directives into which Britain has not opted. According to an April 2006 House of

Lords EU Committee report, the Home Office has said that British officials and ministers are present in such negotiations, and that they "will be able to seek to have changes made". It is however, according to Jonathan Faull, Director-General of DG Justice, Freedom and Security, "a great handicap, which everybody will be aware of...that [British representatives] are not part of the final legislative process".

While the Protocol allows the UK and Ireland (separately) to opt in to JHA measures where beneficial, the arrangement is usually perceived domestically as an opt-out, a way of retaining sovereignty in core areas of statehood otherwise shared through the mechanisms of the EU. Although the British government has not always been eager to advertise its decisions in this context, the UK has in practice tended to opt in to measures on asylum and illegal migration while remaining outside those relating to economic or other forms of legal migration. The proposed Reform Treaty will extend the communitarised areas of JHA, while extending the United Kingdom's opt-in/opt-out arrangement to cover all these 'new' first pillar JHA areas. For the UK's European partners, it appears the Protocol's retention and extension is a price worth paying to buy British acquiescence in the Union's further institutional development.

## The UK and Schengen

In addition to the possibilities of opting-out from new EU legislation derived from the Protocol to the Amsterdam Treaty, the United Kingdom and Ireland have also remained outside the system to abolish national frontier formalities instituted by the Schengen Group. Under Article 4 of the Schengen Protocol, the UK may participate in Schengen measures if this participation is approved unanimously in the Council, with the Commission being given an opportunity to express its opinion beforehand. No such agreement was forthcoming in 2004, when the United Kingdom wished to associate itself with the Regulation on the EU's External Borders Management Agency (Frontex). Traditionally, the British government has presented itself as being more interested in practical co-operation rather than legal structures. It expressed its regrets however, in December 2004, that it had been "denied the right" to participate in the Frontex Regulation (though it is able to take part in its activities, with the consent of the Agency), and has since challenged its exclusion before the European Court of Justice. There has not yet been judgement on this case.

The possible disadvantages arising from the UK's remaining outside the Schengen arrangement were further highlighted in a report by the House of Lords EU Committee in November 2005. That report warned that the British abstention from Schengen may compromise its ability to retain its opt-in/opt-out arrangement on asylum and immigration policy. It referred also to a "growing impatience" among other Member States with the UK's ambiguous position on JHA matters, particularly as compared to the newer Member States, which have

had to sign up to the JHA acquis in full. As for the general British opt-in to JHA areas, the mandate agreed in June for the Reform Treaty does not appear to give any effect to any such impatience; the Schengen opt-out looks set to remain, at least for the foreseeable future.

Despite the strictures of the House of Lords, it seems in the highest degree unlikely that the United Kingdom will join the Schengen arrangement in full in the foreseeable future or be prepared to accept any watering-down of the advantages it believes it derives from the Amsterdam Protocol. The most likely outcome of this refusal in the medium term is that what used to be the Schengen Group will continue to develop its activities without British or Irish participation and that deepening communitarisation among their partners will lead to a further divide between the European Union inhabited by the United Kingdom and Ireland and that inhabited by most of their neighbours. With the exception of the symbolically vastly important question of frontier checks, this divide will not primarily be one of day-to-day policies pursued by the British or its neighbouring governments. Advanced European democracies tend to confront similar policing and frontier-related questions and try to solve them in similar ways. The divide will rather be one of political and institutional structures, and the accompanying sense of identity and shared interests which accompany these structures. Of the likely British governments over the coming decade, some will no doubt regret and some will no doubt welcome this growing divide between the United Kingdom and its European partners. The objective outcome of their contrasting emotions is likely to be identical.

## Conclusions

Those who saw the creation of the JHA pillar in 1992 as a firm breakwater against the tide of European integration through the "Community method" have certainly been disappointed. The political analysis which lay behind the intergovernmentalism of that original pillar has retained its apparent persuasiveness in the United Kingdom, but almost nowhere else.

An illuminating comparison is that between the fate of the two intergovernmental pillars established by the Maastricht Treaty, the pillar for JHA and that for the Common Foreign and Security Policy. As we have seen, considerable inroads have been made into the intergovernmental nature of the former (and more must be expected), but the latter has remained predominantly intergovernmental in character, and would, according to the changes in either the Constitutional Treaty or the proposed Reform Treaty, have remained largely unchanged in this respect. The very existence of the European single market, with its free movement of goods and persons, reinforced as it has been by the development over the past decade of the Schengen area, acts as a continual incentive to the Union's Member States to resolve the common questions arising as a consequence of this single market. Among these consequences are precisely those topics covered by the JHA pillar of the Maastricht Treaty. No such powerful incentive exists in the Union's external action, the spheres of classical diplomacy and defence policy. The Iraq war of 2003 was an object lesson in the willingness and ability of the Union's governments to pursue national policies with little more than lip service to the need for any common approach by the Union as a whole. The reforms in the area of CFSP envisaged by the Constitutional and Reform Treaties will palliate, but not abolish such potential disunity for the future.

In Justice and Home Affairs, the Union seems to have overcome a number of factors which had threatened to frustrate the impetus of constitutional development, notably: the outcomes of the French and Dutch referendums; an apparent ebbing of the momentum given to the pan-European fight against terrorism by the events in America of 11th September 2001; the realisation that "mutual recognition" in matters of criminal justice can constitute an unexpectedly dramatic sacrifice of national sovereignty; the consciousness that little time has been allocated as yet to studying the effects of legislation already adopted since the Amsterdam Treaty; and the growing realisation that on some questions of the traditional JHA agenda (such as legal immigration) the Member States have highly differentiated interests and policies.

The attitude of future British governments to the evolving constitutional reality of Justice and Home Affairs over the coming years will be a significant element in both the Union's evolving institutional structures and in the United Kingdom's conception of its role within the European Union. In the years immediately following the terrorist attacks of 11th September,

2001 and particularly when Charles Clarke was British Home Secretary, the British government came to have a somewhat more tolerant attitude than it had traditionally exhibited towards the deepening of European integration through the application of the "Community method" in the Justice and Home Affairs pillar. This derived at least in part from the belief that greater use of qualified majority voting in the Council could be a useful weapon in facilitating the establishment of more coherent European anti-terrorist strategies. This revised attitude found expression in the willingness of the British government to sign the European Constitutional Treaty in 2004 and the Reform Treaty in 2007, both of which envisage a further 'assault' upon the intergovernmentalism of the third pillar; though significantly only with the retention of the UK's comprehensive system of opt-outs and opt-ins.

As this report has highlighted, the British Government's approach to constitutional reform has in public remained one of profound reluctance and defensiveness. It has arguably been disingenuous - not only in its defence of "artificial" red lines, but in giving the impression that the UK needs such protection at all against European partners apparently eager to legislate against British interests wherever the national veto is lost. In fact, the UK is often a quiet champion of law-making in JHA and in many cases stands to benefit from the greater ease of decision-making brought by qualified majority voting. The fifteen years since the Maastricht Treaty have seen a dramatic clarification of the JHA pillar's legal structures in the direction of traditional integration through the use of the "Community method." No such parallel clarification has occurred in British official or public attitudes towards the European Union, or towards the questions of Justice and Home Affairs which form so central a part of the Union's current agenda.

The Federal Trust for Education & Research  
7 Graphite Square  
Vauxhall Walk  
London SE11 5EE  
United Kingdom

Tel: +44 (0)20 7735 4000

[director@fedtrust.co.uk](mailto:director@fedtrust.co.uk)  
[www.fedtrust.co.uk](http://www.fedtrust.co.uk)

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