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**ENLARGEMENT-RELATED DIVERSITY
IN EU JUSTICE AND HOME AFFAIRS:
CHALLENGES, DIMENSIONS AND
MANAGEMENT INSTRUMENTS**

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PREFACE

This working document in the WRR series on EU enlargement has two objectives. Firstly, it aims to identify the ways in which enlargement towards Central and Eastern Europe may contribute to increasing 'diversity' within the policy areas of justice and home affairs. Secondly, it evaluates strategies for managing those types of policy diversity that are considered potentially disruptive. The author urges the EU to prioritise enlargement-related problems to enhance the credibility of the 'area of freedom, security and justice'. He concludes that the EU should not shy away from more 'rigorous' policy strategies.

This working document has been written for the project 'Enlargement of the EU to Central and Eastern Europe', which the Netherlands Scientific Council for Government Policy (WRR) is currently undertaking. As such, it contributes to answering the central questions of this project: to what extent will enlargement increase diversity within the Union, and, hence, to what extent will reform of existing institutions and practices be needed to maintain their effectiveness, legitimacy and cohesion?

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1 INTRODUCTION

At the beginning of this new century justice and home affairs are the most rapidly growing policy-making area of the European Union. As a result of the massive treaty changes introduced by the Treaty of Amsterdam, the incorporation of Schengen and of the strategic guidelines provided by the Vienna Action Plan (December 1998), and the Tampere European Council (October 1999), the Union's *acquis* is likely to grow considerably over the next year, making the "area of freedom, security and justice" (AFSJ) one of the most ambitious integration projects of this decade.

The different approaches of the current Member States to such sensitive subjects as asylum and immigration policy, border controls, judicial cooperation in civil and criminal matters and police cooperation have already led to a considerable degree of differentiated integration within the new AFSJ. The Schengen framework, the British and Irish opt-outs, the special Danish position and the introduction of the possibility of 'closer cooperation' within the 'Third Pillar' (Title VI TEU) have made EU justice and home affairs the EU policy area with the highest degree of 'flexibility' so far.

The eastern enlargement is likely to add considerably to the existing diversity – even if the EU *acquis* is adopted in full upon accession – because of the applicant countries' different institutional and structural basis, implementation capacity and standards, and policy orientations. At present, it seems unlikely that the candidate countries will be able to adopt and implement effectively all parts of the EU and Schengen *acquis* as this is required by the Treaty of Amsterdam. As a result, it is necessary to think about ways and means how the EU could effectively manage this increasing diversity. Diversity in itself is not necessarily *per se* a negative factor. A certain degree of diversity in justice and home affairs may be both inevitable and desirable as an expression of the variety of European legal, judicial and law enforcement cultures. Yet the Union is now for the first time moving towards a gradual integration in internal security and judicial matters and a failure to control and reduce the growth of diversity could jeopardise this most recent and ambitious integration project. It could not only undermine the development of the AFSJ but also cause serious disruption in the enlargement process. As a result, the identification and analysis of forms of diversity and diversity management tools is based on the general assumption that suppressing or at least diminishing diversity has to be regarded as an objective. This, because it is both crucial for the functional effectiveness of the emerging AFSJ and politically desirable in that it favours the legal, structural and political coherence within the AFSJ. Without this coherence both the political momentum and the credibility of the AFSJ integration process could be lost.

This report pursues two interrelated objectives. The first objective is to identify and assess – on the basis of a survey of the current state of development – the

main factors of increasing diversity in EU justice and home affairs which is likely to result from the eastern enlargement. In the light of these this study will then, as the second objective, identify possible strategies to manage these factors of increasing diversity in order both to safeguard the continuing development of the AFSJ and to prevent a permanent exclusion of some Member States. The pros and cons of these strategies will be evaluated on the basis of their functional effectiveness and political desirability.

The following analysis will focus on six areas which are considered to be of particular importance in the light of the next enlargement:

- 1 asylum policy,
- 2 external border controls,
- 3 visa policy,
- 4 the fight against illegal immigration,
- 5 police and
- 6 judicial cooperation in criminal matters.

Other questions of migration policy (on which the EU acquis is rather limited at the moment) and the internal market related area of judicial cooperation in civil matters will only be referred to very briefly. As regards the types of diversity, the study will concentrate on the main dimensions of diversity which enlargement will add to current diversity rather than on the analysis of differences in justice and home affairs policies between individual applicant countries.

In its analysis of existing and potential future factors and sources of diversity in the applicant countries this report will limit itself to those in six of the current eastern European candidate countries: The Czech Republic, Estonia, Hungary, Poland, Slovakia and Slovenia. This choice has been determined by the fact that the EU's evaluation of the state of justice and home affairs in these applicant countries has progressed furthest, but also by Slovakia's geographical position which places it in a special situation vis-à-vis the applicants of the 'Luxembourg' ('first wave') group.

Justice and home affairs are a particularly dynamic and fast developing EU policy-making area. This report therefore not only takes into account – as far as this has been possible – developments until 15 November 2000 but also the most important future developments which are likely to happen up to the time of the first round of the next enlargement. It is based on the assumption that the first accessions will not take place before 2004. This time horizon has been chosen both because it lies in the middle of recent estimates of the European Commission¹ and because it is the year in which the important transitional period, established by the Treaty of Amsterdam, will end for various areas of justice and home affairs.

Finally, it needs to be emphasised that this report focuses on problems of enlargement related *diversity* in justice and home affairs rather than on elements of ex-

isting or developing *convergence*. As a result, it will necessarily bring out much more the still existing deficits in the applicants' adaptation to the EU/Schengen rules and standards, and much less so the enormous efforts and the considerable progress they have already made on their way to joining the AFSJ.

NOTES

- ¹ In March 2000 Commissioner Verheugen described the target date 2003 chosen by the Luxembourg Group as “extremely ambitious, but still possible.” In May he described 1 January 2005 as the latest date possible for the first accessions (Agence Europe 29 March 2000 and 13 May 2000).

2 THE DEVELOPMENT OF EU JUSTICE AND HOME AFFAIRS AND THE EASTERN ENLARGEMENT

2.1 THE NEW SITUATION CREATED BY THE TREATY OF AMSTERDAM

Rarely in the history of the European integration process has an existing EC or EU policy-making EU justice and home affairs. As a result of the Treaty of Amsterdam, which entered into force on 1 May 1999, EU justice and home affairs are now partly communitarised, governed by a range of new objectives, equipped with new and more appropriate instruments and strengthened by the incorporation of the Schengen acquis – to name only the most important reforms. All of these elements not only set the context for the future development of EU policies in the areas of justice and home affairs but also for the process, the potential and the problems of the eastern enlargement in this new major field of EU policy-making. They therefore merit a closer look.

2.1.1 THE PARTIAL COMMUNITARISATION

The Treaty of Amsterdam made a major move towards communitarisation by the transfer of matters of asylum, immigration, external border controls and judicial cooperation in civil matters into the new Title IV of the EC Treaty. Only judicial cooperation in criminal matters and police cooperation remain within the intergovernmental domain of Title VI TEU. The communitarisation of major, formerly intergovernmental, areas of cooperation of the third pillar is of considerable importance from both a political and a legal point of view. Its political significance lies in the fact that Member States have for the first time accepted to bring key areas of justice and home affairs – some of which, such as asylum policy, are politically highly sensitive – within the remit of the most supranational of the European treaties. It is true that no provision has been made in the Treaty for the establishment of any 'common policy' in these areas. However, their transfer into new Title IV TEC certainly represents a major step in this direction which could be completed by the establishment of real 'common policies' in not too distant a future. The partial communitarisation is at least as significant from a legal point of view because it makes all measures adopted in this area part of the EC legal acquis. This not only makes a major contribution to the coherence of the EC legal order but also allows for the use of the well-established EC legal instruments (see below section 2.1.3.), the application of the principles of direct effect and direct applicability, and a higher degree of judicial control by the Court of Justice of the European Communities.

Yet the Amsterdam communitarisation remains 'partial' in a multiple sense. Not only remain two substantial areas – police and judicial cooperation in criminal matters – in the intergovernmental context of the 'Third Pillar' but the move towards communitarisation was also bought at some price. Opt-outs were granted

to the United Kingdom and Ireland¹, a special position was granted to Denmark² and two intergovernmental features of decision-making were maintained in the newly communitarised areas. The first of these intergovernmental features results from the fact that by virtue of Article 67(1) TEC the Council will continue to vote by unanimity on the communitarised matters during a transitional period of five years (i.e. until 2004). After this period it shall then take unanimously a decision with a view of making all or parts of Title IV TEC governed by the Article 251 co-decision procedure which provides for qualified majority voting. It seems far from certain, however, that this unanimity will be reached in 2004. Several German Bundesländer raised already during the last IGC objections against majority voting in justice and home affairs and the current Austrian Government seems to be extremely reluctant to move into that direction. The second intergovernmental feature results from the provision of Article 67(1) TEC that for the duration of the transitional period the European Commission will have to share its right of initiative in the communitarised areas with the Member States – a highly unusual weakening of the Commission's role in the context of the EC Treaty.

The various aspects of this partial communitarisation have three main implications for the next enlargement. The first is that the Treaty of Amsterdam has created the political and legal context for the build-up of a substantial and coherent EC legal acquis in matters of asylum, immigration, external border controls and judicial cooperation in criminal matters. The more this context will be filled in during the next few years the higher will be the hurdles for the applicant countries and the bigger the pressure on them to adapt their own legislation, policies and implementation practices to this growing EC acquis. The demands on the applicant countries in the areas of police and judicial cooperation are likely to grow at a slightly slower pace because of the continuing intergovernmental context and the maintenance of unanimity beyond the transitional period in these areas.

The second is that opt-outs granted to Denmark, Ireland and the United Kingdom as a condition for their acceptance of the partial communitarisation have clearly shown the current applicant countries that the EU has ceased to move ahead as a unitary actor in the areas of justice and home affairs. These have also illustrated that there are obvious possibilities to have special national positions and interests protected through exemptions codified in the Treaties. Although no similar opt-outs are on offer to the applicant countries in the current accession negotiations, the credibility of the EU's insistence on the applicant countries taking over the whole of the EC/EU acquis has clearly suffered. Applicant countries may well feel encouraged to ask for their own opt-outs after they have joined the 'club'.

The third implication is that if the first applicant countries – as it seems likely at the moment – will not join already in 2003, they are unlikely to be able to take part in the decision whether or not qualified majority voting should be applied in the communitarised areas. Should the Council decide in 2004 before any accession

to move towards qualified majority voting applicant countries could be outvoted on measures affecting their interests in sensitive areas such as asylum standards and procedures and external border control standards. If the Council fails to reach a unanimous decision, any of the new eastern Member States would be in a position to block measures with which it disagrees.

2.1.2 THE NEW RANGE OF OBJECTIVES

The first and most important of the new Amsterdam objectives in justice and home affairs is enshrined in amended Article 2 TEU, fourth indent, which elevates the maintenance and the development of the Union “as an area of freedom, justice and security” (hereinafter AFSJ) to one of the main objectives of the Treaty. Whatever meaning one might attach to the ringing words of “freedom, security and justice”, the establishment of the AFSJ as a central treaty objective is of considerable political significance because it places all other justice and home affairs related provisions in the EC and EU Treaties under a common rationale which – as an objective of the “process creating an ever closer union”³ – now ranks at least formally at the same level as, for instance, Economic and Monetary Union and the Common Foreign and Security Policy.

Linked to the AFSJ as a central treaty objective are a host of new and detailed policy objectives which have been included under both new Title IV TEC and amended Title VI TEU. Article 61 TEC links the general objective of progressively establishing an “area of freedom, justice and security” with a whole range of measures to be adopted in the areas of justice and home affairs. According to Article 61(a) the Council shall adopt measures aimed at ensuring the free movement of persons in accordance with Article 14 TEC in conjunction with “directly related flanking measures”, a formulation which betrays the influence of the Schengen countries on this part of the Treaty. The ‘flanking measures’ are divided into two groups. The first group consists of measures with respect to external border controls, conditions of travel of third country nationals within the territory of the Member States and asylum and immigration. These are to be adopted on the basis of the new EC Treaty provisions of Articles 62(2) and (3) and 63(1)(a) and (2)(a). The second group comprises measures to prevent and combat crime which will have to be taken on the basis of new Article 31(e) TEU within the Third Pillar. Each of these provisions governs selected issues of justice and home affairs such as standards for carrying out checks at external borders, minimum standards for giving temporary protection to displaced persons from third countries, and the adoption of minimum rules relating to the constituent elements of criminal acts in the fields of organised crime, terrorism and drug trafficking. In addition, Article 62(1) provides for measures ensuring, in compliance with Article 14 TEC, the absence of any controls on persons, be they citizens of the Union, or nationals of third countries, when crossing internal borders.

Of major importance here is the fact that for the first time measures in the areas of justice and home affairs are not only linked to specific objectives but also that the adoption of these measures must be completed within a clearly set deadline. Under Article 61(a) TEC, the Council has to act within five years. This means that the Community method of combining integration objectives with deadlines for their achievement, used successfully, for instance, in the case of the common commercial policy and the completion of the Single Market, is for the first time applied to justice and home affairs.

Articles 61(b) to (e) TEC require the Council to take measures in other fields of justice and home affairs which are not explicitly linked to the aim of free movement. Each of these provisions refers to other Treaty provisions, which define further objectives in the individual areas. The most important in our context are the following.

Asylum, immigration and safeguarding the rights of third country nationals

Article 63 TEC⁴ provides in considerable detail for a range of measures, all to be adopted within the five year deadline. These include

- 1 the establishment of criteria for determining which Member State is responsible for considering an application for asylum,⁵
- 2 the definition of minimum standards on the reception of asylum seekers,
- 3 standards on the qualification of nationals of third countries as refugee,
- 4 standards on procedures in the Member States for granting or withdrawing refugee status and for giving temporary protection to displaced persons,
- 5 measures on conditions of entry and residence for third country nationals, and
- 6 measures against illegal immigration.

Taken together this list bears much resemblance to an extensive legislative programme and as such it is likely to bring the EU much closer to a common approach to major issues of asylum and immigration policy before the 2004 deadline expires. It should be noted, however, that Article 63 does not provide for the establishment of a 'common' asylum and immigration policy – a denomination which would have provoked too much resistance in some capitals – and that it does not create a general policy-making competence for the Community.

Judicial cooperation in civil matters

Article 65 TEC⁶ provides for measures to be adopted in five different areas:

- 1 improvement of the system for cross-border service of judicial and extrajudicial documents,
- 2 cooperation in the taking of evidence,
- 3 the recognition and enforcement of decisions in civil and commercial cases,
- 4 the promotion of the compatibility of the rules applicable under national law concerning the conflict of laws and of jurisdiction and

5 the elimination of obstacles to the good functioning of civil proceedings. Measures are, however, limited to those having ‘cross-border implications’ – quite a substantial restriction – and are not subject to the five year deadline.

Police and judicial cooperation in criminal matters

Police and judicial cooperation in criminal matters remain within the intergovernmental context of Title VI TEU. Yet in order to establish a link between those and the communitarised areas of justice and home affairs Article 61(e) TEC contains a cross-reference to police and judicial cooperation in criminal matters stating that these are “aimed at a high level of security.” This general objective – which is significant in that it identifies the EU framework for the first time as a potential provider of internal security – is taken up in almost identical terms by Article 29 TEU which defines the general aims of cooperation under Title VI TEU and provides for closer cooperation between police forces, judicial authorities and other competent authorities as well as “where necessary” – approximation of rules on criminal matters. Articles 30 and 31 TEU specify in more detail the elements of ‘common action’ (not – one has to note – ‘common policy’) by the member states in matters of police and judicial cooperation in criminal matters respectively. As to the former, a broad range of areas are listed in Article 30(1) which include, for instance, operational cooperation, data collection, training and common evaluation of investigative techniques. Action in these areas is not subject to the 2004 deadline. Article 30(2) deals mainly with cooperation through Europol. Although the Amsterdam provisions do not provide for the introduction of operational powers for Europol, they nevertheless represent a clear step forward because a number of clear and deadline linked objectives (five years) are set for the further development of Europol. By virtue of Article 30(2)(a), (b) and (c) Europol should be enabled to:

- 1 ‘encourage’ (given the national sensitivities in this area, an appropriately careful term) the coordination and carrying out of specific investigative actions by competent authorities of the member states,
- 2 to ‘ask’ the competent authorities of the member states to conduct and coordinate their investigations in specific cases and to develop specific expertise which may be put at the disposal of Member States to assist them in investigating cases of organised crime, and
- 3 to promote liaison arrangements between prosecuting and investigating officials specialising in the fight against organised crime.

This goes clearly beyond the rather passive role – largely limited to information exchange – which Europol has had so far. As for judicial cooperation in criminal matters, Article 31 TEU provides for ‘common action’ (without deadline, however) in a number of areas which include cooperation between ministries and judicial authorities, facilitating extradition, preventing conflicts of jurisdiction, and the progressive establishment of minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and drug trafficking. While not covering explicitly all issues which are relevant for the creation of a comprehensive European ‘judicial area’ the list is extensive enough to allow for substantial progress, especially as regards cross-border judicial coopera-

tion and further moves towards common minimum rules on crimes with particular cross-border relevance.

This host of new objectives has two primary consequences for enlargement. The first and long-term effect is that it puts the EU firmly on the path towards more integration in the areas of justice and home affairs. This includes some strategic objectives (especially in the areas of asylum policy, judicial cooperation and the role of Europol) which the applicant countries will have to accept and adapt to before and after accession. The second, short-term consequence is that the five year deadline set for the achievement of a substantial part of these objectives is likely to lead to a rapid growth of the *acquis* up to the year 2004, i.e. before the first accessions are likely to take place. This will add to the demands and pressure on the applicant countries as well as potential problems with diversity after the enlargement.

2.1.3 THE NEW INSTRUMENTS

The extensive range of new objectives also needed more effective instruments for their implementation than the singularly inadequate ones introduced by the Maastricht Treaty which had largely been taken over from the Common Foreign and Security Policy. The Treaty of Amsterdam has brought major improvements in this respect. In the newly communitarised areas the former Third Pillar instruments have now been replaced by the well established EC legal instruments, and EC 'regulations' and 'directives' have become the new standard instruments for measures under Title IV TEC. Yet there are also new instruments available in the intergovernmental domain of Title VI TEU. The 'framework decisions' of Article 34(2)(b) TEU are to be used for the purpose of "approximation of the laws" which shall be "binding upon the member states as to the results to be achieved but shall leave to the national authorities the choice of form and method." Any direct effect is explicitly excluded. This means that 'framework decisions' are rather similar to EC directives, except in that they are legal acts outside of the Community legal order and do not entail any direct effect. This instrument is likely to become increasingly appreciated by the Member States because of the greater margin of discretion it leaves them in the implementation. Article 34(2)(c) TEU now provides for the new instrument of 'decisions' to be used for any other purpose than approximation of laws which is consistent with the objectives of Title VI. 'Decisions' are to be binding on the member states, but, again, any direct effect is excluded. As general purpose instruments 'decisions' are emerging as the standard instrument for matters of limited scope requiring legal action. The traditional and – because of the need for national ratification – rather cumbersome instrument of 'conventions' is still available under Title VI TEU, but some effort has been made to shorten the period between their adoption and their entry into force. Article 34(2)(d) TEU provides that Member States shall begin ratification procedures within a time limit set by the Council. It is also stipulated that, unless conventions provide otherwise,

they shall enter into force as soon as they are adopted by at least half of the Member States. It should be added that one of the weaker instruments of the old Third Pillar, the legally non-binding 'common position', has survived. In Article 34(2)(a) only a limited effort has been made to clarify the scope of 'common positions' of which it is said that they "defin[e] the approach of the Union to a particular matter."

Overall, however, the reformed instruments – both under Title IV EC and Title VI TEU – have brought considerable progress in terms of the legal quality and potential effectiveness of instruments in EU justice and home affairs. This set of Amsterdam reforms as well has its implications for enlargement. By the time of accession the applicant countries will have to take over a legal *acquis* in justice and home affairs which will be much clearer defined both in its substance and its legal effects than before the entry into force of the Treaty of Amsterdam. The availability of more appropriate legal instruments is also likely to lead to the adoption of a much higher number of legally binding acts than this was the case under the 'old' Third Pillar (1993-1999) when most texts adopted were of a non-binding nature ('resolutions', 'declarations', etc.).

2.1.4 THE INCORPORATION OF SCHENGEN

The incorporation of Schengen⁷ not only represents a major success for the countries of the Schengen group but also provides a much more substantial basis for the development of the AFSJ than the rather limited legal *acquis* of the 'old' Third Pillar. When the Treaty of Amsterdam entered into force on 1 May 1999, the Schengen system ceased to exist as a separate structure outside of the EU framework. On the institutional side this was a fairly straightforward affair. The Schengen Executive Committee met for the last time on 27 and 28 April 1999 and was then formally replaced by the EU Justice and Home Affairs Council. A number of other bodies and working groups of the Schengen system, including the former Schengen Secretariat, either merged with existing EU bodies or were transferred into the EU Council structure. On the legal side the incorporation proved to be much more difficult. It took the Schengen members more than a year and a half of intense negotiations to identify, firstly, all the legally binding elements of their *acquis* that needed to be incorporated, and then to agree on the appropriate legal bases under the EC and/or EU Treaties for each of the parts of this *acquis*. It was only on 20 May 1999 that the Council was finally able to adopt both a Decision concerning the definition of the Schengen *acquis*⁸ and a Decision determining the legal basis for each of the provisions of the *acquis*.⁹ Yet the latter remained incomplete because the Schengen members had failed to reach an agreement on the legal basis for the Schengen Information System (SIS). While some of the Schengen countries took the view that the SIS was primarily a police cooperation instrument and therefore required a legal basis under Title VI TEU, others saw it as an instrument relating primarily to the free movement of persons with rele-

vance to asylum and immigration issues which would require a legal basis under Title IV TEC. As a result of the failure to reach an agreement the provisions on the SIS were provisionally based on Title VI TEU.

The hundreds of pages of Schengen acquis which have been incorporated cover mainly the following areas:¹⁰

- 1 the abolition of controls at internal borders,
- 2 the conditions of movement of third country nationals within the Schengen zone,
- 3 external border controls,
- 4 visa policy,
- 5 judicial cooperation,
- 6 police cooperation,
- 7 measures against illegal drug trafficking,
- 8 measures of control as regards firearms and ammunition,
- 9 the organisation and the functioning of the SIS.

The core piece of the Schengen system remains area (1), but Schengen measures in areas (2) to (9), originally only described as 'compensatory' measures for the abolition of internal border controls, have grown so considerably during the 1990s that in a number of fields (such as external border controls, conditions of movement for third country nationals, cross-border police cooperation and the information exchange among law enforcement authorities) they far exceed in substance and extent the acquis which had been built up in the EU context before the incorporation of Schengen. As a result, the incorporated Schengen acquis now constitutes in many areas of justice and home affairs the 'core' of the existing EC and EU acquis.

The incorporation of the Schengen acquis has two major consequences for the enlargement process. The first is that by virtue of Article 8 of the Protocol integrating the Schengen acquis the applicant countries will have to adopt this acquis in full upon accession. Because of the advanced state of development of the Schengen acquis and its provisions on matters of justice and home affairs where the applicant countries have particular deficits (such as external border controls), the incorporation of Schengen has added a particularly high new hurdle for the applicant countries. The second consequence, now that Schengen countries can develop their acquis further within the legal and institutional context of the EU, is that any measures they adopt, building on the incorporated Schengen acquis, become automatically part of the EU acquis. The applicant countries have to accept this extended acquis. This 'addition' to Schengen is likely to grow considerably over the next few years as the new EC and EU instruments and the ambitious objectives within the context of the AFSJ provide the Schengen countries with additional incentives to deepen their system. This, too, will add to the demands on the applicant countries.

2.2 THE PROGRESS MADE SO FAR WITH THE IMPLEMENTATION OF THE AMSTERDAM POTENTIAL

The Treaty of Amsterdam has now been in force for little more than a year. It is difficult to predict to what extent the huge potential it has created for further integration in justice and home affairs will be implemented over the next few years. Yet a number of programmatic texts and decisions have already been adopted by the EU institutions which indicate at least some strategic lines for the further development of the AFSJ.

2.2.1 THE VIENNA ACTION PLAN OF DECEMBER 1998 AND THE RATIONALE OF THE 'AREA OF FREEDOM, SECURITY AND JUSTICE'

On the basis of a Commission Communication on the development of the new 'area of freedom, security and justice' submitted on 14 July 1998,¹¹ the Member States agreed on 3 December 1998 on an 'Action Plan'. This Plan sets out how the provisions of the Treaty of Amsterdam on an 'Area of Freedom, Security and Justice' can best be implemented.¹² It provides a first framework and a list of concrete aims for the development of EU justice and home affairs during the five year transitional period up to 2004.

The Plan clarifies, first, the rationale of the 'area of freedom, security and justice' which is only vaguely described in the Treaty of Amsterdam. With regard to the concept of 'freedom', the Action Plan emphasises that the new Treaty opens the way to giving freedom "a meaning beyond free movement of persons across internal borders." That includes the "freedom to live in a law-abiding environment" protected by effective action of public authorities at the national and European level. This marks a clear step beyond the old Schengen rationale with its focus on free movement and mere 'compensatory measures'.

On the meaning of 'security', however, the Action Plan takes a less progressive view, reflecting the concerns of several Member States about retaining control over internal security instruments. It explicitly states that the new Treaty – although aimed at developing common action in the fields of police and criminal justice cooperation and offering enhanced security to Union citizens – does not pursue the intention to create a 'European security area' in the sense of uniform detection and investigation procedures. The Action Plan also provides that the Member States' responsibilities to maintain law and order should not be affected by the new provisions.

On the concept of 'justice' the Action Plan is significantly more ambitious, declaring that Amsterdam is aimed at giving citizens "a common sense of justice throughout the Union" with an impact on day-to-day life which includes both access to justice and full judicial cooperation among Member States. The wording

which was agreed here may fall short of the idea of a 'European judicial area', but clearly goes beyond judicial cooperation merely accompanying the process of economic integration.

The second important element of the Action Plan is the 'priorities and measures' listed in part II. These comprise both a number of strategic objectives (such as the development of an 'overall migration strategy') and a broad range of more concrete measures in each of the main fields of justice and home affairs, most of which have to be taken either within two or within five years.

In the area of asylum and immigration policy the Action Plan focuses largely on restrictive measures such as the implementation of the EURODAC Convention on electronic fingerprinting, the limitation of secondary movements of asylum seekers between Member States, the common assessment of countries of origin in order to design common prevention strategies, and a coherent readmission and return policy. Measures to combat illegal immigration are added to this. There are some elements, such as the definition of minimum standards on the reception of asylum seekers, which go slightly beyond the pre-Amsterdam acquis. However, some major issues, such as the social integration of legally resident immigrants along with accepted asylum seekers and refugees or the potential use of external economic and CFSP measures to reduce immigration pressure, were not addressed by the Action Plan. It should also be mentioned that due to the opposition of France and Spain precise objectives regarding the difficult question of burden-sharing in the area of asylum policy had to be dropped from the Plan. There is only a vague reference to a "balance of effort between Member States" in bearing the consequences of receiving displaced persons which left Germany, Austria and Italy in particular, deeply dissatisfied. The Action Plan uses the term 'European migration strategy'. Yet it is difficult to see such a term having any meaning without adequate policies on prevention, integration and burden-sharing.

In the area of police cooperation and judicial cooperation in criminal matters, the Action Plan envisages a number of measures to improve the position of Europol. Examples are the examination of Europol access to investigation data of the Schengen Information System, the European Information System or the Customs Information System and a stronger focus of its work on operational cooperation. Still, on some of the more sensitive issues, such as the nature and scope of the new power of Europol to ask competent authorities of the Member States to conduct and coordinate their investigations, the Action Plan remains vague and evasive. The same applies to the new possibility for Europol to participate in "operational actions of joint teams" (Art. 30(2)) TEU).

Positive elements in other areas of police cooperation are the renewed emphasis placed on the evaluation of investigative techniques in relation to the detection of serious forms of organised crime and on the expansion of operational cooperation

between law enforcement services. Yet the Action Plan becomes again vague (and even rather tortuous in its wording) when it comes to the sensitive issue of cross-border law enforcement. The Plan speaks only about “consideration” to be given to the “determination of the conditions and limitations under which the competent law enforcement authorities of one Member State may operate in the territory of another Member State, in liaison and agreement with the latter.” This formulation reminds one of the very beginnings of the Schengen process in the mid-1980s.

The emphasis on judicial cooperation in criminal matters is largely on the implementation and the improvement of instruments and mechanisms which have already been adopted such as the further development of the European Judicial network and the effective implementation of the two existing conventions on extradition. As regards the crucial issue of the mutual recognition of decisions and enforcement of judgements in criminal matters the Action Plan only provides for the “initiation of a process with a view to facilitate” such recognition. The Action Plan is hardly more concrete on the question of the approximation of criminal law. It is true that the Plan provides for the identification of behaviours in the field of organised crime, terrorism and drug trafficking for which it is urgent to adopt measures establishing minimum rules relating to the constituent elements of crime and to penalties. Yet no time limit is set for the adoption of such minimum rules, and as regards such important areas as rules on counterfeiting and fraud (important for the protection of the Euro) the possibility to approximate is only to be “examined.” All this is not to say that the Action Plan is devoid of substance in the areas remaining under Title VI TEU. It provides for a whole range of measures that are likely to improve significantly data exchange, speed up and improve mutual assistance, and allow for better training and analysis of investigative techniques. Nonetheless, the overall approach of the second part of the Action Plan is rather conservative and even falls short of some of the more ambitious ideas about the development of the AFSJ contained in the Plan’s first part.

2.2.2 THE TAMPERE EUROPEAN COUNCIL

It may be that the Heads of State or Government felt themselves that more was needed than the ‘Vienna Action Plan’ to make some progress towards the build-up of the AFSJ. At the end of the Austrian Presidency of 1998 they agreed on the convening of a special European Council dedicated to justice and home affairs – the first ever in the history of European integration. After extensive preparations under both the German and the Finnish Presidencies this summit meeting took place in Tampere on 15 and 16 October 1999 with the clear intention to provide some strategic guidelines for the implementation of the Amsterdam potential in justice and home affairs. The decisions adopted by the Tampere European Council¹³ focus on three priority areas which had been identified during the preparatory phase.

1 *The development of a common EU asylum and migration policy.*

During the last few years EU action in this sphere had concentrated on reducing the number of asylum applicants and immigrants by restrictive control, adjudication and returning procedures. This 'fortress Europe' approach had been criticised by human rights groups and the UNHCR. The Tampere summit agreed on a more comprehensive strategy which combines preventive measures outside of the EU with a greater emphasis on common standards and minimum rights for asylum seekers and immigrants. On the external side the Tampere Conclusions give green light for the use of EU external economic and political instruments for the purpose of cooperating with countries of origin in order to reduce asylum and immigration pressure. On the internal side the Tampere Conclusions note agreement on the establishment of a 'Common European Asylum System' providing for common standards for the examination of asylum applications, minimum conditions of reception for asylum seekers and the approximation of rules on the refugee status. This will be accompanied by a more active EU policy on the integration of third country nationals. This policy aims to improve their rights and legal status and introduces measures against racism and xenophobia. More ambitious proposals aimed at creating a 'single' asylum policy with harmonisation of basic national rules failed, however. Germany struggled in vain to secure an agreement on a system of burden-sharing in situations of mass influx of refugees.

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2 *The 'European area of justice': access to justice and mutual recognition of judicial decisions.*

The complexity, cost and often enough also inefficiency of litigation which involves individuals or businesses from different EU countries remains one of the most glaring deficits of over forty years of economic integration within the internal market. At Tampere the Heads of State or Government agreed on a number of measures which should enhance both access to justice and the mutual recognition of judgements in cases of cross-border litigation.¹⁴ As regards access to justice the Tampere Conclusions request the Council to establish minimum standards for legal aid in cross-border litigation and for the protection of the rights of victims of crime. Further measures include the mandate to introduce common rules for simplified and accelerated cross-border litigation on small consumer and commercial claims and common minimum standards for multilingual legal forms and documents used in cross-border court cases. The Heads of State and Government have formally endorsed the principle of mutual recognition of judicial decisions as the future cornerstone of judicial cooperation in both civil and criminal matters. This was a major success for the British position. It is now explicitly extended to a number of other areas such as pre-trial orders and lawfully gathered evidence. A comprehensive programme of measures to implement the principle of mutual recognition will have to be adopted by Council and Commission by December 2000. Yet those Member States (like France) in favour of more EU

legislation and approximation and harmonisation of national laws also got some consolation prizes. The Commission has been invited to make proposals on fast track extradition procedures and on new procedural legislation in cross-border cases, including such important elements as the taking of evidence and time limits. The issue of the approximation of national legislation on civil matters will be the object of an overall study on which the Council will report back in 2001.

3 *The fight against organised and transnational crime.*

As regards crime prevention the Tampere summit was not able to agree on more than the exchange of best practices and the strengthening of cooperation between national crime prevention authorities. National priorities and strategies on prevention continue to be very different and prevented a more comprehensive common approach. Yet the Tampere Conclusions open the possibility to support cooperation between national crime prevention authorities by a specific Community project. The results regarding cooperation in the fight against crime are more substantial. The Heads of State or Government agreed on the creation of two new institutions. A unit called 'Eurojust', composed of national prosecutors, magistrates or police officers, will have the task to facilitate the coordination of national prosecuting authorities and to support criminal investigations in organised crime cases. The summit also decided to establish a European Police College for the training of senior law enforcement officials which will also be open to applicant countries. In addition, the European Council put pressure on national authorities to set up without delay the joint investigative teams foreseen by the Amsterdam Treaty and to create a special task force of European police chiefs for the exchange of experiences and for planning purposes. Money laundering is reconfirmed in the Tampere Conclusions as a crucial issue in the Union's fight against organised crime. The European Council decided that legislation should be adopted to enable financial intelligence units to receive information regarding suspicious transactions regardless of secrecy provisions applicable to banking or other commercial activity. It also came out in favour of the approximation of criminal law and procedures on money laundering and for including money laundering in the remit of Europol.

In all but name Tampere was a summit on the implementation of the Amsterdam provisions on justice and home affairs and the build-up of the AFSJ. The risk of the Council contenting itself with a mere reaffirmation of general principles and the resolution of some unfinished JHA Council business was averted. The Tampere decisions ended up being more substantial than many observers had expected. They provide the Union with a fresh impetus in major areas of the AFSJ. Substantial new legislation is to be expected over the next few years on asylum matters, access to justice, cross-border litigation and money laundering, and Eurojust could become the germ-cell of a European prosecution system.

2.2.3 DEVELOPMENTS AFTER TAMPERE

Almost immediately after Tampere the European Commission contributed to the new impetus through a number of initiatives. On 1 December 1999 it proposed a Directive on the right to family reunification¹⁵ and on 14 December it went a step further towards a system of burden-sharing by adopting a proposal for a Council Decision on the establishment of a European Refugee Fund¹⁶. This was followed on 24 May 2000 by a proposal for a Directive on temporary protection in cases of a major influx of refugees which provides for other burden-sharing mechanisms.¹⁷ Negotiations on all of these proposals progressed slowly but on 28 September 2000 the Council was able to reach agreement on the establishment of the European Refugee Fund with a total budget of 216 million Euro from 2000 to 2004.¹⁸ Major progress in other areas was achieved by the Justice and Home Affairs Council of 29 May 2000 which adopted a number of important legal instruments. These include the Convention on mutual legal assistance in criminal matters, a Framework Decision on penal sanctions against counterfeiting in connection with the Euro, and the 'Brussels II' Regulation on the jurisdiction, recognition and enforcement of judgements in matrimonial matters and matters of parental responsibility.¹⁹ A further positive note was set by this Council meeting through the formal acceptance of the request of the United Kingdom (initially made on 20 May 1999) to participate in substantial parts of the Schengen acquis, in particular the ensemble of the provisions regarding the establishment and operation of the Schengen information system. This became possible after Spain and the United Kingdom had agreed on a compromise on the thorny issue of the definition of the term 'competent authority' in relation to Gibraltar.

With respect to the Tampere programme more specifically, a substantial part of the negotiations in the Council focused on progress towards a common asylum system. At the Justice and Home Affairs Council of 28 September 2000, a Commission proposal for a Directive on minimum standards for granting and withdrawing refugee status was well received and a French Presidency document on conditions of reception of asylum seekers was accepted as a basis for negotiation.²⁰ Concerning the 'area of justice', Member States agreed already during the first half of 2000 to concentrate their efforts in the field of mutual recognition in judicial cooperation on the identification and definition of what should be considered as 'serious crimes', the question of direct and indirect mutual recognition, and minimum safeguards. A Portuguese Presidency proposal of April 2000 for a framework decision on the status of victims in criminal proceedings²¹ made slow progress because of differences over the conditions of compensation in the context of criminal proceedings and because of the constitutional difficulties of certain Member States in this field. Yet at the Council meeting of 28 September 2000 a political agreement was reached on most of the outstanding questions. Formal decisions on the competences, organisation and tasks of Eurojust and the extension of Euro-pol's powers to money-laundering, were expected before the end of the French

Presidency.²² It should also be mentioned that in June 2000 the General Affairs Council adopted a Report on external relations in the field of justice and home affairs²³ which had been commissioned by the Tampere European Council. It defines a number of priorities, objectives and primary partners for the development of the external dimension of the AFSJ.

2.3 FURTHER DEVELOPMENT OF THE AFSJ BEFORE ENLARGEMENT

There is necessarily a strong speculative element in any attempt to predict what progress will have been made with the development of the AFSJ at the time of enlargement. On the basis of the above mentioned texts and developments so far, however, some educated guesses can be made about developments before the end of the transitional period in 2004.

Asylum policy

This is an area in which considerable developments are to be expected before 2004. Not only because of the five year deadline for a number of important measures imposed by Article 63 TEC, but also because of the strong emphasis placed on a 'common asylum system' by the Tampere European Council and the growing realisation of all Member States that some of their problems in the field of asylum can only be tackled by effective common responses. It is to be expected that by 2004 there will be common standards for the examination of asylum applications, common minimum conditions of reception, a considerable degree of approximation of rules on the recognition and content of the refugee status and on temporary protection. At that time some progress should also have been made towards a common asylum procedure and a uniform status valid throughout the EU for those who are granted asylum.

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External border controls

The incorporated Schengen acquis includes already detailed rules on the crossing of external borders. As they did in the past the Schengen countries are likely to add to these until 2004, increasing the standards and further defining the procedures to be respected by external border controls. Since Article 62(2) TEC applies the five year deadline also to standards and procedures for carrying out checks on persons at external borders, new and potentially more extensive legislation is to be expected. The recent compromise on the status of Gibraltar in the Schengen context and the partial adhesion of the United Kingdom to substantial parts of the Schengen acquis, open also the possibility of an extension (partial or total) of the Schengen external border regime to all 15 Member States before the first accessions take place.

Visa policy

By virtue of Article 62(2)(b) the Council will have to take measures on short-stay visas (no more than three months) within the five year deadline. These measures

include a common visa list, procedures and conditions for issuing visas, a uniform visa format and rules on a uniform visa. The last two categories of measures are already largely in place. The big problem is the visa list where so far two different regimes co-exist within the EU. On the one hand there is a 'negative list' based on EC Regulation 574/99 which contains 101 countries or territories whose nationals need to be in possession of a visa when crossing the external borders.²⁴ On the other hand there is a Schengen list comprising 32 third countries not listed in the EC Regulation whose nationals are subject to a visa requirement in all Schengen countries which means that the Schengen 'negative list' contains 133 instead of 101 countries or territories.²⁵ The difference between the two is mainly due to the position of the United Kingdom which allows nationals of several Commonwealth countries to enter visa-free. While it seems unlikely that the United Kingdom will completely reverse its position before 2004, a certain approximation between the two lists seems probable. More progress should by then also have been made with common standards and procedures as regards the issuing of visa, comprising perhaps even the establishment of common EU visa issuing offices²⁶. It should also be noted that the Council has to adopt measures on standards on procedures for the issuing of long-term visas and residence permits before 2004.²⁷

The fight against illegal immigration

The Council is expected to adopt new legislation against trafficking in human beings and the economic exploitation of migrants before the end of 2000 and further measures against illegal immigration, illegal residence and the use of false documents are under consideration. The year 2004 deadline applies to these areas as well as to measures on the repatriation of illegal immigrants.²⁸ It is to be expected that by 2004 the EU will have made considerable progress with the conclusion of EC readmission agreements with major countries of origin and transit.²⁹ Because of the priorities set by the Tampere European Council new developments are also to be expected with respect to cooperation with countries of origin and the use of external economic instruments to reduce immigration pressure. The renewed emphasis the Tampere Conclusions have placed on "effective controls" by "specialised trained professionals" in the context of the management of migration flows³⁰ and particular German and Austrian concerns in this, suggests that standards and training requirements for border control measures specifically targeted at the fight against illegal immigration will be further tightened.

Police cooperation

By 2004 Europol – whose tasks and numbers of staff have been growing fast over the last few years – is likely to play a significantly stronger role than today. Although it seems doubtful that it will have acquired operational powers at that stage, Europol should by then be in a position to ask national police authorities to carry out specific enquiries, as envisaged by the Amsterdam reforms. In addition, Europol should then have full access to other relevant data-bases of which the SIS is of particular importance. Considerable progress should also have been made

with the formation of joint investigative teams,³¹ other forms of operational cross-border cooperation and common evaluation of techniques and procedures. The Schengen countries will no doubt continue to update and extend their rules on cross-border police cooperation³², thereby expanding an increasingly important procedural *acquis* with considerable implications for the work of national police forces.

Judicial cooperation in criminal matters

As a result of Tampere and the Amsterdam provisions the EU should by 2004 have made substantial progress in the areas of mutual legal assistance – including the strengthening of the European Judicial Network and the further facilitation of extradition procedures – and the mutual recognition of pre-trial orders, judicial decisions, judgements and evidence. The new Eurojust cross-border prosecution unit should be fully operational by then. Further progress could include the introduction of a European Enforcement Order and fast-track extradition procedures as envisaged by the Tampere decisions.³³ While it seems unlikely that much headway will be made on the harmonisation of national criminal law, some minimum rules relating to the constituent elements of criminal acts and penalties in the field of organised crime, terrorism and drug trafficking³⁴ could well be in place at the end of the transitional period.

2.4 THE RAPIDLY DEVELOPING AFSJ AS A MAJOR CHALLENGE FOR THE EASTERN ENLARGEMENT

The new Amsterdam provisions, the developments since Amsterdam and the further progress to be expected over the next years have made the integration of the applicant countries into the rapidly developing AFSJ one of the key tasks of the enlargement process. The EU is now obviously moving relatively fast in the direction of establishing a sort of common internal security zone. The idea of a single 'area' which lies at the heart of the concept of the AFSJ is very significant in this respect. The further build-up of the AFSJ will entail a steadily increasing degree of integration in a range of sensitive areas such as asylum and cross-border law enforcement. For at least four reasons this rapid development within the EU (the problems on the side of the applicant countries will be dealt with in the following part) constitutes a major challenge for the Union's eastern enlargement.

The first reason is that *preparations for accession in the areas of justice and home affairs started relatively late*. Only five years ago, few would have predicted the huge new integration project of the AFSJ as it has emerged since Amsterdam. These rapid developments came all the more as a surprise to the applicant countries which well into the second half of the 1990s continued to regard the relatively limited intergovernmental *acquis* of the old Third Pillar as a rather marginal issue in the accession process. During 1997, however, they had to realise – especially

because of the decision on the incorporation of Schengen – that they were facing a formidable new hurdle. Adaption to the EU acquis in justice and home affairs started to rank much higher on the agenda for both national reforms and requests for EU support. The Union itself did little to bring the accession preparations in the areas of justice and home affairs to an early and effective start. Only in 1997 a re-orientation of the PHARE programme for the first time allowed for the financing of more substantial measures in the areas of justice and home affairs and only from the beginning of 1998 the enlargement problems in these areas started to be treated with a sense of urgency in the Council. Even then, however, the EU added to the problems of the applicant countries because it was not able to define comprehensively the (limited) EU acquis in justice and home affairs before March 1998 and the (much more considerable) Schengen acquis in various steps until May 1999. A crucial document on the Schengen acquis – the Common Manual on Checks at External Borders – was only made available to the applicants in September 1998 and even then without some of the confidential annexes.³⁵ As a result, the applicant countries only gradually arrived at a complete picture of what would be required of them during 1998/99, with corresponding delays in preparations and the development of more specifically targeted EU support measures. It is therefore not exaggerated to say that effective preparations for taking on the justice and home affairs acquis started – at least in the case of the Luxembourg Six – more than half a decade later than for the internal market acquis.

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The second reason is the *rapid growth of the EU acquis following the entry into force of the Treaty of Amsterdam*. Whilst the applicant countries had not yet fully finished assessing all the implications of the incorporation of the Schengen acquis, at 1 May 1999 the EU was already well under way to expand all parts of the acquis on the basis of the new objectives and legal instruments introduced by the Amsterdam Treaty. In the first year after the Treaty's entry into force, more than 20 important legally binding texts were adopted which automatically became part of the acquis. As a result of the Tampere decisions, a more active role of the European Commission and the resolution of the most immediate problems between the United Kingdom and Spain over Gibraltar, this pace could even increase further during the next few years. There is therefore a risk that in certain areas the combination of a late start for effective preparations and the speed of developments on the EU side may lead some applicant countries to fall further behind rather than to catch up.

The third reason is the *particular sensitivity of justice and home affairs in the national political context*. Policy areas such as asylum, immigration, border controls and the fight against crime and drugs are issues of major concern to citizens in the current Member States and consequently also of considerable importance for political parties and elections. Whilst the governments of the current EU Member States may be able to count on a certain degree of passive acceptance of the economic and financial costs of enlargement, any costs in terms of increased in-

ternal security risks would be extremely difficult to justify and sustain. Reports in the media on problems with illegal immigration and organised crime which might result from the eastern enlargement, whether exaggerated or not, regularly attract considerable attention and are eagerly seized upon by political forces opposed to the enlargement and/or pursuing xenophobic objectives. Consequently, concessions to applicant countries in the areas of justice and home affairs carry the risk of appearing as compromising on citizens' safety for the benefit of an eastern enlargement which is not overwhelmingly popular anyway. This is a risk which few, if any, of the current EU governments will want to take. Both Italy and Greece – in spite of being longstanding EU members – had to wait for seven years after their accession to Schengen³⁶ before they were declared 'Schengen mature' and fully admitted to all the operational parts of the system. This indicates that justice and home affairs is not an area prone to compromises because of political integration objectives. Several Schengen members, prominently among those Austria and Germany, have already made clear that such compromises are not on offer during the accession negotiations.³⁷ Should some EU governments decide to hold national referenda on the issue of EU enlargement internal security issues could play a central role in national political debates and have a major impact on the outcome. Therefore, the accession process could either be delayed by unresolved problems of the applicant countries in justice and home affairs or – a more likely and 'softer' option – be overshadowed by the maintenance of external Schengen border controls towards the new eastern Member States well beyond the time of accession.

The fourth and final reason is that *unresolved problems of the integration of the applicant countries into the AFSJ could after accession seriously endanger its functioning and completion*. As an integration project the AFSJ is highly vulnerable to the failure of individual Member States to implement fully the *acquis* in accordance with common standards. Inadequate data protection in one Member State, for instance, could put into peril the functioning of the SIS and Europol, and inadequate border control procedures at one external border could lead to the re-introduction of internal border controls by other Member States. The Schengen system and increasingly also the AFSJ are conceived as single internal security zones in which all parts of the *acquis* are functionally interrelated and any failures of one member are very likely to entail negative consequences for others as well. It is for this reason that uniformity in the implementation of minimum standards has become a crucial issue in the development of the AFSJ, supported by many forms of mutual and collective evaluation. Any major failure of new Member States to implement these minimum standards could disrupt substantial parts of the entire emerging internal security system. It should also be recalled that the considerable progress which the EU has achieved so far (in terms of cross-border cooperation between law enforcement and judicial authorities and the build-up of the currently existing extensive information exchange mechanisms which are of crucial importance for the further development of the AFSJ) has only been possible on the basis of growing mutual trust in the reliability of partners, the ability to

respect confidentiality rules and the compatibility of basic standards for working procedures and the implementation of common decisions. Should the eastern enlargement lead to the import of too high a degree of differences in standards and capabilities this trust could well be lost. Subsequently, it could lead to protective measures by individual Member States or groups of Member States which would jeopardise both the current structure of the AFSJ and its further development.

For all these reasons the identification of effective instruments and strategies to manage increasing diversity is of crucial importance not only for ensuring a successful enlargement in the areas of justice and home affairs but also for the further development of the AFSJ itself. Before we turn to these instruments and strategies we first have to look at the various dimensions and problems of increasing diversity.

NOTES

- ¹ The 'Protocol on the position of the United Kingdom and Ireland' guarantees the UK and Ireland a complete opt-out from Title IV TEC. At the same time, it offers both member states an opt-in possibility for the adoption and application of any measure proposed under this Title at the latest three month after the proposal has been made.
- ² The 'Protocol on the Position of Denmark' grants Denmark an opt-out from Title IV TEC which is in substance largely identical to the British and Irish opt-outs. However, the Danish case is more complicated because of Denmark's Schengen membership. Article 5 of the Protocol deals with this problem by providing that Denmark has six months to decide whether it will implement any Council decision building on the Schengen *acquis* into national law. If Denmark does so, this decision only creates an obligation under international law between Denmark and the other Member States.
- ³ Article 1 TEU.
- ⁴ Referred to in Article 61(b) TEC.
- ⁵ This takes up the purpose and content of the 1990 Dublin Convention which entered into force on 1 September 1997.
- ⁶ Referred to in Article 61(c) TEC.
- ⁷ Provided for by the 'Protocol integrating the Schengen *acquis* into the framework of the European Union' annexed to the EU Treaty.
- ⁸ OJ L 176/1 of 10.7.1999.
- ⁹ OJ L 176/17 of 10.7.1999.
- ¹⁰ See Council of the European Union: The Schengen *acquis* integrated into the European Union, Brussels, May 1999. The *acquis* will be published in the Official Journal only in September 2000.
- ¹¹ COM(1998) 459.
- ¹² OJ C 19/1 of 23. 1. 1999.
- ¹³ See the Conclusions of the Presidency of the Tampere European Council, Council Doc. SN 200/99.
- ¹⁴ Meaning litigation which involves parties from different states or cases in which evidence has to be received in a state other than where the proceedings take place.
- ¹⁵ COM(1999) 638.
- ¹⁶ COM(1999) 686.
- ¹⁷ COM(2000) 303.
- ¹⁸ Council document 11705/00.
- ¹⁹ Council documents 8832/00.
- ²⁰ Council documents 11622/00 ASILE 46, 11472/00 ASILE 20 and 11705/00.
- ²¹ Council document 10387/2/00.

- ²² Europe No 7812 of 4 October 2000.
- ²³ Council document 7653/00.
- ²⁴ See Council Regulation (EC) No 574/1999, OJ No. L 72/2 of 18.3.1999.
- ²⁵ See COM(2000) 27 final, p. 3.
- ²⁶ Envisaged by the paragraph 22 of the Tampere Presidency Conclusions (see footnote 14).
- ²⁷ Article 63(3)(a) TEC.
- ²⁸ Article 63(3)(b) TEC.
- ²⁹ Preparations for the negotiation of Community readmission agreements with Morocco, Pakistan, Sri Lanka and Russia started under the Portuguese Presidency of the first half of 2000.
- ³⁰ Paragraph 25 of the Tampere Conclusions.
- ³¹ The Tampere European Council decided that these should focus, as a first step, on combatting trafficking in human beings and terrorism (paragraph 43 of the Conclusions).
- ³² Codified in the Schengen *Handbook on cross-border police cooperation*.
- ³³ Paragraphs 35 and 37 of the Conclusions.
- ³⁴ As foreseen by Article 31(e) TEU.
- ³⁵ Decision of the Schengen Executive Committee of 16 September 1998 (SCH/Com-ex (98) rev 2).
- ³⁶ From 1990 to 1997 and 1992 to 1999 respectively.
- ³⁷ Giving evidence on 5 July 2000 before Sub-Committee F of the European Union Committee of the House of Lords, Dr. Gerold Lehnguth, Ministerial-direktor at the German Ministry of Interior, declared that it was the German position that “there can be no dropping of security standards and that the newcomers must keep to the standards laid down by the old members” and that “no exceptions can be made for any particular country” (House of Lords Select Committee on the European Union: Enlargement and EU External Frontier Controls, Session 1999-2000, 17th Report, October 2000, Minutes of evidence, par. 270-271).

3 THE EASTERN ENLARGEMENT AS A SOURCE OF INCREASING DIVERSITY: DIMENSIONS AND PROBLEMS¹

3.1 'DIVERSITY' IN EU JUSTICE AND HOME AFFAIRS

In a scientific context 'diversity' is not a frequently used term and therefore needs some clarification for our purposes. The term will be used in the following as a generic denominator for differences between the justice and home affairs systems of the eastern applicant countries on the one hand, and the EU justice and home affairs acquis on the other. Using it in this restricted sense means to proceed on the basis of two major simplifications which are in need of a justification.

The first is that, of course, such 'diversity' does not only exist between applicant countries and the EU acquis but also amongst current EU Member States themselves. Diversity also exist between the systems of the members and of the EU. Diversity between national systems has indeed been – and still is – one of the major obstacles to further progress in the construction of the AFSJ and is therefore an 'old' problem of integration. Some elements of the existing intra-EU diversity – such as the differences between the civil and common law legal systems – are of such a fundamental nature that they will continue to be major problems for many years or even decades to come. The (now) partial opt-outs of Denmark, Ireland and the United Kingdom are another striking feature of intra-EU diversity. Yet for the purposes of enlargement the EU Member States have decided to present the EU/Schengen acquis as a single block to be taken over in its entirety by the applicant countries, regardless of any persisting intra-EU diversity. This is indeed the position they are adopting in the current accession negotiations.

To a lesser but still considerable extent this situation is also to continue after accession. The new Member States which, as long as they have not yet been declared '*schengenreif*', will remain practically excluded from the Schengen zone. Their progress towards meeting the Schengen acquis will be monitored and evaluated against the Schengen acquis as a 'block' in a rather similar way as this is the case currently with the combined EU/Schengen acquis. On the one hand the new eastern Member States will by then in a sense simply add to the 'normal' diversity between EU Member States (caused by the differences in administrative capacities, geographical locations, legal frameworks, etc.). On the other hand, however, there will still be a dividing line between the group of countries (all 'old' Member States) to which all operational parts of the Schengen system apply and the new members. Since diversity between individual 'old' and 'new' Member States and indeed amongst the 'new' Member States will no doubt increase in importance after accession, it seems justified to take the whole existing EU/Schengen justice and home affairs acquis as the point of reference against which 'diversity' of the applicant countries is established and evaluated.

The second simplification is to take the justice and home affairs systems of the eastern applicant countries as a group to establish their different dimensions of diversity. There are, of course, many forms and elements of diversity amongst the candidate countries themselves such as differences in policing structures, court organisation, asylum procedures etc. Yet officials in the EU institutions and ministries of the Member States tend to agree that this intra-applicant countries diversity is both less pronounced and less a problem than the diversity which still exists between their systems and the EU justice and home affairs acquis. According to interviews carried out at the European Commission, the Council and several national ministries, there are in general more similarities than differences between the individual applicant countries. Because the EU has imposed the acquis as a non-negotiable condition of entry, all applicant countries are striving – with, of course, varying degrees of success – to adapt their systems to this acquis. This has entailed a certain degree of convergence in the main development tendencies of the national systems. It seems therefore justified to limit the following analysis to the main dimensions of diversity between applicant countries taken as a group and the justice and home affairs acquis.

3.2 THE FIRST DIMENSION: DIVERSITY IN LEGISLATION

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Legislation on justice and home affairs matters is the dimension of diversity where differences between the EU acquis and the applicant countries are most ‘visible’ and measurable. Legislative alignment with the EU acquis has been the first priority for the applicant countries for many years now. It continues to be the key element in the European Commission’s annual reports on the progress made by the candidate countries towards accession. All applicant countries have made major efforts and – as this can be clearly taken from the 1998, 1999 and 2000 Commission reports – also considerable progress with bringing their legislation into line with the EU acquis. Nevertheless, strong elements of diversity still exist with varying prospects for their removal until the time of accession.

Asylum policy

In this field some of the applicant countries have made so much progress that they are already almost fully aligned with the EU acquis. In Hungary, for instance, comprehensive legislation is in force since March 1998 which is in line with all substantial elements of the EU acquis as regards institutions, concepts and procedures in the asylum field. The same applies to the asylum reforms adopted by Estonia in 1997 and 1999, although it has still to introduce a number of necessary legal arrangements to fulfil the obligations arising from the Dublin Convention. Slovenia has introduced comprehensive legislation in 1999 which only deviates on some issues – such as the identification of ‘safe third countries’ – from the EU acquis. In other candidate countries there are more serious shortcomings, however. Current legislation in Slovakia, for instance, although largely adapted to the EU acquis, still

allows for the police to decide on the deportation of an alien if no asylum application has been made within 24 hours after crossing the border. This is not in line with essential procedural guarantees provided for by the 1992 *London Resolution on manifestly unfounded applications*. In addition, the administrative appeal body lacks the necessary independence and specialisation required by the EU acquis. The Polish Aliens Act fails to spell out the legal consequences of missing the deadlines set for applications for asylum and the Czech Asylum Act does not provide for an independent administrative appeals structure. Generally it can be said that the applicant countries – at least as far as the Luxembourg Six are concerned – have adopted the main principles and structures of the EU acquis but that a considerable degree of diversity persists in procedural guarantees for asylum seekers. It seems likely, however, that this diversity will be largely eliminated by 2004 through additional legislation.

External border controls

This is a field where legislation plays a less prominent role than in other relevant justice and home affairs areas. The main and most relevant elements of diversity are to be found in the field of implementation (see below). Nevertheless, it is of importance that at the time of accession the applicant countries have completed the legal transformation of the border guards or border police forces into a professional non-military force compatible with the EU standards. In the Luxembourg Six the necessary legislation is already largely in place. The 1997 Hungarian Act on Protecting the Borders and the Border Guard, for instance, is fully compatible with EU expectations in the field, and the Polish Border Guard is operating on a legislative basis very similar to those in current EU Member States. Slovakia, however, has so far failed to adopt legislation on the creation of an independent border police organisation. It should be noted, however, that such an organisation exists in an embryonic form in the Department of Borders and Foreigners in the Ministry of Interior. Slovakia should be able to transform this into a separate organisation through corresponding legislation over the next few years. In the Czech Republic the introduction of the new Police Act securing the autonomy of the border guard has been further delayed in 2000 because of the lack of parliamentary approval for certain elements of judicial reform linked to this Act.

Visa policy

Diversity in legislation on visa policy is a major issue for the enlargement process. The full adoption of the EU's visa regime – which, because of the incorporation of Schengen, means the adoption of the more restrictive Schengen visa list (see above) – will force all eastern applicant countries to introduce visa requirements for most of their eastern neighbours that had previously been exempt from such a requirement. This will not only contribute to the above mentioned disruption of existing cross-border relations but is also politically sensitive because neighbouring countries are likely to regard this as an act of forced exclusion. Whereas some countries, such as Estonia, Slovenia and more recently² Slovakia, have made considerable progress with their alignment of visa legislation, others – especially

those with larger ethnic minorities on the other side of the borders – have shown some reluctance to adopt the EU's visa regime. Hungary, for instance, continues to delay the introduction of visa requirements for Romania and the Ukraine where large numbers of ethnic Hungarians are living. Poland has a considerable economic and political interest in keeping its current liberal entry regime for nationals of Belarus, the Ukraine and Russia, although the Polish government has now started bilateral negotiations with these three countries on the abolition of visa free travel. Both countries are likely to adopt the EU visa regime fully only fairly close to or upon the date of accession. This could lead to additional problems of implementation (see below section 3.5). It is also possible that Hungary – which has so far failed to state unequivocally its willingness to adopt the EU visa policy acquis fully – will try to negotiate special arrangements during the accession negotiations if at the time of its accession Romania has not been taken from the EU/Schengen 'negative' list.³ Diversity in legislation on visa requirements could seriously disrupt the EU's visa regime and is unlikely to be negotiable in terms of granting temporary derogations to candidate countries.

The fight against illegal immigration

In this field there is still a major degree of legislative diversity. Whereas the Czech Republic, Estonia and Hungary, for instance, have brought their legislation largely into line with the EU acquis (the Czech Republic especially through its new 2000 Act of Residence of Aliens) there are still important differences in the relevant Polish legislation (especially as regards termination of residence, the implementation of deportation and expulsion orders, rules on entry for the purposes of gainful activity and the admission of third-country nationals for study purposes). The same applies to Slovenia where, for instance, the 1999 Law on Aliens provides only for fines in cases of illegal entry or stay and the Criminal Code only deals with "forced or armed" illegal crossings. In Slovakia short-stay visas can be very easily extended, and several categories of foreigners do not need a work permit. Even those countries which have adapted their legislation to the main principles of the EU acquis still have some gaps to fill as regards implementing legislation. Estonia, for instance, will have to clarify further rules on transit for expulsion and standard travel documents for expulsion, and Hungary still has to complete legislation on carrier sanctions and facilitators. The alignment with the EU acquis is not made easier by the fact that the EU acquis is to a considerable extent based on soft-law instruments whose scope is sometimes open to different interpretations. Also, all the applicant countries still have to negotiate, albeit to varying degrees, a number of readmission agreements with third countries in order to bring their readmission policy into line with the EU's. Considerable differences also still exist in legislation against illegal employment. Overall, however, all applicant countries have already made substantial changes to their legislation and it seems unlikely that any of them will have problems completing this process before accession. In this field, again, the real problems are to be found in the area of implementation (see below section 3.5).

Police cooperation

The applicant countries seem to be well under way fully to align their legislation with the EU acquis, with Slovenia apparently being in the leading position at the moment. This process has been made easier by the general overhaul of police legislation and organisation all applicant countries went through after the transition. Much progress has been made in the formal establishment of the national law enforcement contact points which are of crucial importance to effective police cooperation. A good example is the legislation enacted in Hungary in 1999 on the new 'International Law Enforcement Co-operation Centre'. Diversity continues to exist, however, in specific sectors of cooperation. All applicant countries still have, for instance, to bring their national provisions on hot pursuit and cross-border surveillance operations in line with the important Schengen acquis in this area. The same applies to a large extent to EU framework provisions on the exchange of liaison officers. Another area where there is still significant legislative diversity is that of data protection where the EU acquis has become quite demanding, especially with regard to participation in Europol. Many applicant countries still lack comprehensive legislation on the independence of the data protection supervisory authority and the respect for the data protection rights of the individual. Estonia, for instance, has not yet ratified the essential 1981 Council of Europe Convention on the protection of individuals with regard to automatic processing of personal data, and Slovenia still lacks an independent body for data protection. Yet in these areas as well, some countries have recently made considerable progress⁴ and in all of the applicant countries preparations for appropriate legislation are under way and should without major problems be in place at the time of accession. Late adoption of the relevant legislation, however, could cause certain problems with effective implementation after accession (see section 3.5).

Judicial cooperation in criminal matters

Effective judicial cooperation in criminal matters is largely dependent on the compatibility of penal codes and codes of criminal procedure. Most of the applicant countries either have already completed some substantial reforms in these areas or are close to completing them. Nevertheless considerable deficits still exist. In Estonia, for instance, there are still substantial gaps in the legal provisions relating to direct contacts with foreign judicial authorities for the purposes of mutual assistance in criminal matters. Other examples are the absence under Slovak law of a definition of extraditable offences and the Czech Republic, Hungary, Poland and Slovakia still need to align basic definitions of their legislation with the December 1998 EU Joint action that made participation in a criminal organisation a criminal offence. The applicant countries have ratified or at least signed most of the relevant Council of Europe Conventions that form part of the EU acquis, such as the European Convention on Extradition and the European Convention on Mutual Legal Assistance. There are some notable exceptions, however. Poland, for instance, has not yet acceded to the 1972 Council of Europe Convention on the Transfer of Proceedings in Criminal Matters and the Czech Republic not to the European Convention on the International Validity of Criminal Judgements. Of

crucial importance for the effectiveness of judicial cooperation in the fight against organised crime is legislation against money-laundering. In this area the applicant countries have all adopted basic legal instruments but the process of falling into line with the EU *acquis* is not yet completed. Slovakia, for instance, has not yet ratified the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and Poland still has to align its legislation with the 1998 EU Joint Action on money laundering. The overall picture in judicial cooperation in criminal matters is therefore still a rather patchy one with significant degrees of legislative diversity persisting in certain areas. This could mean that formal adoption of the *acquis* will be completed only very shortly before or upon accession which, again, could increase implementation problems (see below section 3.5.).

3.3 THE SECOND DIMENSION: DIVERSITY IN POLICIES

The EU *acquis* does not (yet) provide for anything that comes near to a single justice and home affairs policy and is still far from comprising single common policies in central areas such as asylum and immigration. However, on the basis of the existing formal *acquis*, the Amsterdam reforms, the Vienna Action Plan and the Tampere decisions, the EU has recently increasingly moved towards a number of common policy objectives and priorities in these areas which are part of the 'political' *acquis* the applicant countries will be expected to take over upon accession. Diversity in this area is much more fluid and less easy to establish and to measure than in that of the formal *acquis*. Especially because there are still major divergences in justice and home affairs policies amongst the current 15 Member States. Additional diversity in policies imported by the next enlargement is quite likely and it could matter. Two examples may demonstrate this point.

The first example is that of external border management. During the 1990s the EU has moved more and more towards a tightening of external border controls. For some Member States (especially current 'frontline' countries like Austria, Germany and Italy) border security through sophisticated and extensive checks is clearly a priority. This will not necessarily be the same for future new eastern Member States. They may give relatively high political priority to the upgrading of their eastern border controls because this is part of the conditions they have to fulfil for EU membership. They clearly also have an interest of their own in keeping illegal immigration and cross-border crime at their eastern borders under control. Yet for several of the applicant countries taking over the EU/Schengen external border regime entails major costs. It could take the form of a disruption of relations with ethnic minorities on the other side of the border, of deteriorating political relations with neighbouring countries and of cross-border trade disruption which, particularly in the Polish case, is of considerable economic importance.⁵ As a result, the full implementation or even further development of the EU/Schengen external

border *acquis* could become much less of a priority for some of the new Member States after accession. Perhaps it may even be an area where they would seek a revision of the current *acquis* against established EU objectives and priorities. Such a diversity in fundamental policy orientations could obviously lead to major tensions in the Council.

The second example is that of the fight against money-laundering. Measures against money-laundering have become a core area of EU 'policy' in the fight against organised crime and ranks high on the current Member States' agenda, as again confirmed by the Conclusions of the Tampere European Council. The applicant countries have not been left in any doubt about the importance the EU attaches to uniform and efficient measures against money-laundering and – as pointed out above – they have already adopted a number of basic legal instruments in line with the EU *acquis*. Yet the perception of this area as a policy priority is not the same for applicant countries. One reason is that all the applicant countries are for their economic development heavily dependent on the influx of foreign capital. A very strict application (or even tightening) of the rules against money-laundering could have (or be perceived to have) a dampening effect on the inflow of capital. The prospective new Member States could therefore well take the view that they can less afford this sort of restrictions than the fully developed economies of the current Member States. Another reason is that the full implementation of the EU's *acquis* and objectives in this area requires quite considerable financial and administrative efforts (for the setting up of a special agency to monitor financial operations, for instance) which the applicant countries with their huge needs in other areas might prefer to minimise or postpone as long as possible. For both reasons the priorities of at least some of the applicant countries in this area, as well as in the fight against organised crime in general, could be quite different. The result would be a new case of policy diversity which – after accession – would have its impact on decision-making in the Council.

3.4 THE THIRD DIMENSION: ORGANISATIONAL DIVERSITY

Organisational diversity has to be regarded as a serious issue because the implementation of common principles, measures and standards of cooperation is in need of a minimum of compatibility and interoperability between national institutions and structures. During the 1990s the quickening pace of integration in justice and home affairs has led to a number of important organisational adaptations in the administrative, policing, border control and judicial structures of the current EU Member States. This involved – and continues to involve – mainly restructuring of ministries, the creation of special units and contact points in police forces, border guards and the judicial administration as well as the creation of better supporting structures for judicial and police liaison officers. All this is done to facilitate effective cooperation in the different justice and home affairs areas. The applicant countries face the double challenge of having to complete the pro-

cess of reforming their law enforcement and judicial structures and to make further specific organisational adjustments required by the EU acquis. Substantial differences between institutions and structures in the current EU Member States, whose compatibility and interoperability have increased during the 1990s, and those of the applicant countries could seriously reduce the candidates' capacity to implement effectively the EU acquis after accession. Major diversity continues to exist primarily in four areas.

Border guard organisation

In most of the applicant countries external border controls were in the past largely a matter for the armed forces. This led to a border control system based on regular army patrols, watch-towers and 'heavy units' in reserve positions in the rear. None of these elements fits with the Schengen external border control regime which is based on specifically organised and trained border police units under full control by the ministries of interior, and which relies heavily on highly trained mobile units with sophisticated technical equipment and modern control techniques such as 'risk-profiling' and 'risk-testing'. Although most applicant countries have by now made the transition towards a professional non-military border guard, staff shortages, insufficient training and equipment problems still keep some elements of the old military border control system in place, including the occasional use of troops for border duties. In Slovenia there is still no specifically trained and organised border guard and the government is not planning to adopt the necessary new law on border control before 2002. Border surveillance is carried out by police units which are not always adequately trained for this duty. Even those applicant countries that have made much progress towards the creation of professional modern border guards, such as Estonia, Hungary and Poland, still have considerable structural problems with the effective interaction between border guards, police forces and customs authorities. This interaction is crucial for an effective border management according to the Schengen standards. The applicant countries also still have to struggle with rivalries between military and civilian structures in the control of external borders. An additional structural problem is that most of the applicant countries will have to shift the bulk of their border control operations from their traditionally strongly guarded western borders to their eastern or south-eastern borders to which much less attention has been paid in the past. In Poland, for instance, the border infrastructure in the sectors bordering the former socialist 'brother states' is in many parts still severely underdeveloped and will require massive funding to be upgraded to the Schengen standards. The shift of material and personnel from western to eastern or south-eastern borders has already begun and will be reinforced by a new ambitious 'Border Management Strategy' which was adopted in March 2000.⁶ However, the strategy involves major challenges of financing, infrastructure and the reorganisation of border guard forces.

Organisational structures in the areas of asylum, immigration and visas

Most of the applicant countries have not yet completed the institutional and structural reforms needed to comply with the requirements of the EU *acquis* in the area of asylum. Concerns have been expressed on the EU side over the independence of the appeals structures in several applicant countries, an insufficient demarcation of competences between asylum authorities, border guards and police and the lack of adequate reception structures. Understaffing of the relevant units is another serious structural problem in most applicant countries. It contributes to increasing backlogs of pending asylum applications. Unclear competence demarcation lines and inadequate cooperation between administrative and security authorities at the central and local level tend to reduce the effectiveness of the implementation of key legislation on immigration issues. Some countries, like for instance Estonia and the Czech Republic, have not yet made all necessary changes to manage effectively applications for residence permits in foreign representations. The efficiency of visa issuing procedures is in many applicant countries reduced by the absence of computerised systems. Even where these exist, other structural problems can seriously limit their effectiveness. In Estonia, for instance, foreign representations use a computerised system for processing visa applications but they lack, as do the border-guard posts, on-line access to data-bases on personal details or for criminal investigation purposes. The change of organisational structures in all these areas does not only require further legislation, additional restructuring and new approaches to inter-service cooperation but also a considerable financial effort which some applicant countries may be unable to afford before accession.

Organisation of police forces

Police forces in all the applicant countries have gone through several rounds of reform and adjustment during the 1990s. While these have generally helped to modernise policing structures and to put clear blue water between today's forces and their tainted past under the communist regimes, numerous reorganisations and frequent changes in senior positions have also created a certain instability and disorientation in many forces. This applies in particular to Estonia and Slovakia, but the problem also exists in other applicant countries. As was recognised in a Polish Government Report on the Security Situation of May 2000, Polish police forces suffer from a particularly complicated organisation, lack of inter-forces coordination and inadequate management structures which are an important factor of operational inefficiency and staff demoralisation. In many cases the reorganisation process is not yet completed. In the Czech Republic, for instance, new comprehensive legislation providing for a further major reorganisation has been delayed in parliament and is only to enter into force in 2001 or 2002. Further structural problems include a shortage of experienced senior officers due to the dismissal of officers with a questionable political past and major recruitment problems because of relatively low salaries and the better pay in private security services. In many cases effective coordination structures with other institutions involved in the fight against organised crime and money-laundering, such as the ministries of finance and the border guards, are still missing. The same applies to

effective liaison with counterparts in other countries. Estonia, for instance, still does not have a liaison officer in any other country. With regard to the internal structures required for integration into the EU police cooperation networks and structures, the applicant countries are only introducing those at a relatively slow pace. The Slovenian government, for instance, has announced that some of the necessary steps such as the creation of the national Europol unit (which will provide liaison officers) and the unit for monitoring the implementation of Schengen provisions will only be implemented upon accession. The later these organisational change are introduced, however, the less likely they are to work effectively immediately after accession. Problems persist also in the organisation of the data-protection authorities which are of central importance for the participation in Europol and other computerised EU cooperation networks.

Organisation of the judiciary

A functioning and independent judiciary is not only a pre-condition for the effective participation in central parts of the EU justice and home affairs acquis but also part of the conditions which the applicant countries have to satisfy in order to fulfill the Copenhagen political criteria of the 'rule of law'. Since the Helsinki European Council of December 1999 all eastern European applicant countries are considered to have met the 'rule of law' criterion but there are still considerable problems as regards their judicial systems. In the case of Slovakia there is no effective self-government of the courts because of a high degree of subordination to the Minister of Justice. The procedures concerning the selection of judges are not sufficiently protected against government influence. A common problem is the overburdening of the judicial system in the applicant countries which is due to lack of staff, inefficient procedures and the unavailability in several applicant countries of alternative methods of dispute settlement (such as arbitration, mediation and reconciliation). This has led to major backlogs⁷ and in some cases (like in the Czech Republic) to unpredictable and divergent judicial decisions. Since large numbers of the senior judges were removed from office following the transition, all applicant countries also have difficulties with insufficient experience of mostly young judges. These judges, in addition, often have not enough time to concentrate on their main tasks because of the lack of administrative supporting staff and modern technological facilities. A further problem is corruption in the judicial system which flourishes under the impact of inadequate surveillance and low pay.

A recent government commissioned survey in Slovakia indicated that about 20 per cent of the parties involved in court proceedings experienced corrupt behaviour from judges.⁸ Shortcomings have also been reported in terms of non-execution of sentences because of weaknesses in the organisation of the judiciary (Slovenia), deficits in fact/evidence-finding (Hungary), absence of regular publication of case-law (Czech Republic) and serious problems with the quality of judgements at lowest-level courts (Estonia). Some countries, however, have already introduced substantial changes, such as Poland with its introduction since January 2000 of up to 200 civil-criminal chambers competent for petty cases and a simplification of

procedures in civil matters. Further reforms are under way in all applicant countries. In Hungary, for instance, a new tier of appeal courts is to be introduced at the regional level before 2003 and in Estonia a planned fundamental court reform is to be completed by 2003. Yet because of their considerable financial, administrative and training implications the ambitious organisational reforms introduced or under way could still take well beyond 2003 to be effectively implemented. As experience in current Member States has shown new judiciary structures which are put into place normally need considerable more time before they work satisfactorily.

3.5 THE FOURTH DIMENSION: DIVERSITY IN IMPLEMENTATION

Diversity in implementation is likely to be the biggest challenge of the enlargement process in the areas of justice and home affairs. The applicant may well be able to bring all of their legislation into line with the EU *acquis* before accession, they may even fully align their policy objectives with those of the EU and be able to achieve substantial progress with their institutional and structural reforms. Yet all this will not be enough to ensure the effective practical implementation of the EU *acquis* which requires extensive training, high standards and consistency in the application of rules and procedures, an adequate technical infrastructure and vigorous action against specific dangers such as corruption and violation of data-protection rules. The EU *acquis*, as it has been transmitted to the applicant countries, is much more precise on required legislative and organisational changes than on practical implementation standards where much more space is given for interpretation. The current EU Member States – and among those especially several Schengen members – have become increasingly concerned about this problem area of the enlargement process, even accusing the European Commission of focusing too much on formal legislative and organisational elements in its regular reports on the progress made by the applicant countries. Concerns over the applicants' potential implementation deficits were actually the main reason for the establishment, by the Council on 29 June 1998, of a special mechanism for the collective evaluation of the enactment, application and effective implementation by the applicant countries of the EU *acquis* in justice and home affairs.⁹ Major diversity in implementation standards and capabilities could indeed seriously affect the functioning of core elements of the AFSJ after enlargement, and relatively high degrees of such diversity can be identified in all areas of justice and home affairs.

Asylum policy

In the past the applicant countries had to process only very small numbers of asylum applications. Yet these numbers are likely to increase significantly over the next years, especially after accession to the EU. In some cases this is already happening, and serious backlogs are emerging in the respective countries. Hungary, for instance, has seen its asylum applications 'explode' from 1998 onwards, and both the administration and the judiciary are currently overburdened. This has led

to inadequate legal procedures and a huge backlog in the treatment of asylum applications.¹⁰ In Slovakia, which is also experiencing a sharp increase in asylum applications, there are problems with the consistent assessment of refugee cases and the practical application of the 'safe third country' principle. Apart from the above mentioned structural problems, the capacity of the applicant countries to cope with these rising numbers in an effective and equitable way is reduced by inadequate procedures and training deficits. Lack of staff training reduces both the effectiveness and fairness of asylum procedures even in countries where comprehensive and relatively generous legislation is now in place. It was reported, for instance, that Slovenia, which acceded to the Geneva Convention already in 1992 and introduced relatively generous provisions, has granted formal refugee status to only three persons in almost ten years before new measures were introduced in 1999 and 2000. Lack of adequate training also exists among the judges in charge of the judicial review of asylum cases. Further difficulties include inconsistencies in the application of deadlines for lodging applications, uncertainties as regards the interpretation of new legislation recently introduced in line with the EU *acquis*, and a lack of communication of asylum authorities with their foreign counterparts. Lack of modern technical equipment and means of data-communication could also seriously hamper an effective implementation of the Dublin Convention – for instance in the area of electronic fingerprinting – if these shortages are not removed before accession.

External border controls

Of crucial importance for the functioning of the Schengen system is an equal degree of control at external borders and the carrying out of these controls in accordance with uniform principles.¹¹ Whereas some countries – such as Estonia and Slovenia – have made considerable progress with the adoption of EU/Schengen border control practices, others still have to overcome serious deficits. In Slovakia, for instance, the units in charge of the control of border crossings and those patrolling the 'green borders' are under separate management and operate alongside each other with little communication, a fact which is easily exploited by smugglers. Whereas Hungary has recently made much progress with upgrading its equipment in line with Schengen standards (the use of heat-seeking cameras, for instance), green border surveillance in the Czech Republic continues to be weakened by the lack of helicopters, means of technical surveillance and the inadequate equipment of mobile patrol units. 'All weather' night and day observation as required by the Schengen standards can therefore not be guaranteed. In Poland the limited equipment available is still more heavily concentrated at the western than at the eastern borders where some of the equipment appears to be more or less obsolete. Similar problems of redeployment from borders that will become EU internal borders to future EU external borders are likely to arise in Slovakia. Most of the applicant countries' border guards currently lack computerised central data search systems, and only a small minority of the border crossing points have on-line connections with other law-enforcement agencies. Currently none of them would be able to

participate effectively in the SIS. Inter-agency cooperation (with customs authorities, police etc.) on border control issues – an important element in the EU/Schengen acquis – is in many cases poor and often affected by an unclear delimitation of tasks. The effectiveness of the border guards' work suffers in all applicant countries from a lack of systematic training in modern control and search techniques such as 'risk profiling' and 'risk testing'. In Slovakia the training of the border police forces is still to a large extent following traditional army training models. Cross-border cooperation with neighbouring countries – another important element of the EU/Schengen border regime – varies considerably depending on political factors and the willingness of local units to engage in such cooperation. A particular problem is the Czech-Slovak border which the Czech authorities, for understandable political and economic reasons, are reluctant to treat as an external one. This situation might however be resolved if Slovakia joins the EU at the same time as the Czech Republic. There is only limited patrolling and considerable laxness in controls at crossing points, and the Czech-Slovak border has become a major thorough-fare for illegal migration. Observers from current EU Member States have also expressed concern over lenient controls at the Hungarian-Romanian and Polish-Ukrainian borders which can as well be explained by specific political (ethnic minorities) and economic (important cross-border trade) reasons.

Visa policy

Taking over the EU/Schengen visa regime will be a considerable challenge for the applicant countries in administrative and practical terms. As a result of the EU/Schengen 'negative list', especially Hungary and Poland will have to issue much larger numbers of visas at consulates and ensure adequate checks of these visas at the borders or at the carriers' steps. All applicant countries will have to screen applications more thoroughly, introduce controls of visas inside the country, check on the required invitations and deal much more effectively with problems of overstay. Officials in the current Member States point to the need for the applicant countries to find on all these points an appropriate balance between strict application of the rules and a certain degree of flexibility in order to control the movements of third country nationals without creating new walls. The smooth operation of the EU/Schengen visa regime is in fact dependent on a balance between a tough application of the rules towards undesirable aliens and a more flexible attitude towards families, businessmen and students. It took the current Member States a long time to arrive at – or at least to come reasonably close to – this balance. It seems therefore rather unlikely that the applicant countries will be able to find it within a few months or even from one day to the other if – as this is the case for Hungary and Poland, for instance – they are planning fully to introduce the EU's visa policy acquis only shortly before or upon accession. Even those applicant countries which have made much progress with the formal alignment of their visa policies – such as Slovenia and the Czech Republic – are likely to proceed only gradually with the full implementation because of traditional political ties and economic links with other former socialist countries. Both experience and training

is still lacking in crucial areas such as the issuing of consular visas. A considerable diversity in implementation could be the consequence, and this may well mean laxness, administrative disorder and additional risks of corruption persisting well beyond the time of accession.

The fight against illegal immigration

In this area a strict and consistent application of legislation and established procedures is of paramount importance. Yet even those applicant countries which have made considerable progress with aligning their legislation to the EU acquis still have significant difficulties with effective implementation. In the Czech Republic, for instance, there is evidence of a lack of consistency in the application of rules on entry, expulsion and residence as well as fines. This seems partially due to technical problems (such as lack of detention centres for deportees and adequate data collection and communication facilities) but partly also to politically and economically motivated concessions to 'neighbourliness'. In both Hungary and Poland similar concessions to nationals from neighbouring countries can be found, and in Poland there are also serious shortcomings with the implementation of deportation and expulsion orders. So far the readmission policies of all applicant countries are almost exclusively focused on readmission to neighbouring countries. Expulsions towards remote countries of origin, which are a standard practice in the EU/Schengen context, are in general not implemented. Of considerable importance in the EU approach towards the fight against illegal immigration are measures against illegal employment which is one of the primary 'pull factors' of illegal immigration. All of the applicant countries have some legislation against illegal employment in place, but in nearly all cases this legislation is not effectively implemented. In Slovenia, for instance, employment inspection is weakly developed, police and judicial authorities give only a low priority to the fight against illegal employment and some of the tougher sanctions which would be possible under the Criminal Code have apparently never been imposed. This could change, however, as a result of a new Law on Foreign Worker Employment and Labour which was adopted in July 2000. In Hungary immigrants seem to be able to find work without permits rather easily, and the relatively low fines imposed on employers seem to have little deterrent effect. A further problem for effective action in the fight against illegal immigration is document security. Passports of the Czech and Slovak Republics are easily forged and visas issued are neither machine readable nor equipped with holograms. The upgrading of enforcement practices and special measures such as increasing document security will all require considerable investments by the applicant countries some of which do not currently treat these as a priority. If these steps are only taken very close to the date of accession, however, lack of experience and training may reduce their effectiveness well beyond the time of accession. It should be noted that diversity in implementation standards for the fight against illegal immigration has given rise to particular concerns in some of the current Member States because the final destination of large

numbers of immigrants entering illegally the applicant countries tends to be a current EU Member State.

Police cooperation

Diversity in implementation standards in the area of police cooperation is to a considerable extent caused by the unresolved organisational problems of the applicant countries' police forces which have been mentioned earlier (see above, section 3.4). Frequent shake-ups in structures and senior positions, low pay and poor working conditions tend to demoralise staff and to increase recruitment problems which in turn reduce the effectiveness of policing work. Salaries and working conditions are not a formal part of the EU *acquis* but nevertheless important. Adequate and timely pay of police officers is not only an important element of EU policing standards but also of major importance for the fight against bribery and corruption. Practitioners in current EU Member States' ministries are concerned that organisational changes (adding 'new boxes' to organisational charts) are not matched by the allocation of sufficiently experienced staff, adequate resources and effective management. International cooperation with other European police forces is often hampered by the lack of foreign language skills and by an unclear division of competences and even (in the Czech Republic, for instance) competition between national law enforcement agencies. The effectiveness of national contact points and liaison officers – once inserted into the EU networks – could be seriously reduced by a high degree of diversity in management techniques, procedures and working standards. Training is another crucial issue. Although all applicant countries have improved their training programmes both experience and specialised training is generally lacking as regards new types of crime such as money-laundering, intellectual piracy and high-tech crime. Diversity of implementation capabilities caused by a combination of lack of training, resources and equipment could have particularly negative consequences in an area such as police cooperation in the fight against economic crime where the ongoing liberalisation process in the applicant countries creates new opportunities for crime. Several applicant countries, such as Estonia and Poland, have been very slow in reacting to significant increases in the number of economic crime cases. In the area of data-protection – crucial for EU police cooperation – a relatively late adoption of the necessary legislation (see section 3.2 above) and organisational structures could result in a lack of adequate experience and of established confidentiality working standards at the time of accession and a correspondingly high degree of diversity in the application of the EU's data-protection *acquis*. Finally, one also has to mention deficits in equipment as a major source of diversity in implementation. Some of the applicant countries have made much more progress than others with the introduction of computerised police search systems and other modern equipment but major deficits continue to exist in all of them. Even those which are more advanced have to struggle with different stages of progress in individual areas. In Hungary, for instance, all major police offices are now linked by a computer system but the effectiveness of this system is reduced by the lack of a national data bank which is due to a particularly complicated system of document

classification. Many of these sources of diversity in the implementation of police cooperation standards taken individually may not appear alarming but taken together they constitute a formidable challenge for the applicant countries as regards management, organisation, funding and training. It should be added that adaptation in the applicant countries' police forces is not made easier by the fact that there is no common EU model of policing and that British, French and German pre-accession advisers on policing methods often compete in trying to implant their own respective model in the applicant countries.

Judicial cooperation in criminal matter

In this area the implementation is primarily affected by diversity in the application of established procedures. Judicial cooperation of current EU member States with Hungary, for instance, has been occasionally affected by difficulties in areas such as service of documents, taking of evidence and recognition of judicial decisions. Cooperation with the Czech Republic has encountered problems because of the slowness of judicial procedures, the lack of specialised knowledge and language skills among the mostly younger judges and weaknesses in the quality of application of procedural rules. Language problems, lengthy procedures and major delays in returning official documents are common problems in current judicial cooperation with most of the applicant countries. The delays in and weaknesses of procedures of cooperation are partly explained by the above mentioned organisational weaknesses of the judiciary (see section 3.4 above), insufficient manpower and bureaucratic obstacles. But they are also caused by lack of adequate training of judges and officials in the specificities of international cooperation. Although more difficult to establish and measure, different attitudes within ministries and the judiciary are also a source of diversity. Practitioners from current EU Member States have also reported considerable variations in the willingness of authorities in the applicant countries to cooperate effectively on extradition issues and other matters of legal assistance. Substantial diversity also exists in the participation in judicial cooperation networks. Whereas Slovenia participates very actively in the exchange with EU Member States of liaison magistrates with special expertise in judicial cooperation, in the case of Slovakia, for instance, no arrangements have as yet been made for the exchange of such magistrates. The postponement of moves towards greater involvement in those judicial cooperation structures which are already open to applicant countries could result in insufficient expertise at the time of accession which in turn increases the risks of diversity after accession.

3.6 DEVELOPMENTS IN THE DIFFERENT DIMENSIONS OF DIVERSITY

The four different dimensions of diversity described and analysed above are likely to show different development tendencies in the time before, upon and after accession.

In the remaining years before accession legislative diversity is likely to be reduced to a level close to zero because of the formal accession requirement fully to adopt the EU/Schengen *acquis*. Having regard for the absence of any major requests for derogations (temporary or permanent) on the side of the applicant countries in the accession negotiations so far, legislative diversity should not any longer be a major issue upon accession.

In the other three dimensions of diversity, however, the tendencies are likely to be different. Organisational, implementation and policy diversity will no doubt be reduced considerably during the pre-accession process. Yet significant degrees of diversity are still likely to exist at the time of accession. The first reason for this is the fact that the EU's requirements for these three dimensions are much less clear-cut and precise than in the legislative domain. The second reason is that the applicant countries are facing huge administrative and financial problems in the organisational and implementation dimensions. And, last but not least, the fact that there are some justice and home affairs issues (such as eastern external border controls and the impact of certain restrictive justice and home affairs measures on the new Member States' economies) on which the political interests of old and new Member States are – to say the least – not fully coinciding.

After accession organisational and implementation diversity is likely to decline further, both because of pressure by the old Member States (which will still be able to deny the new Member States full access to the Schengen system) and because of the new Member States' own interest in drawing the maximum internal security benefits from their integration into the EU system. The pace of this further decline in diversity is difficult to predict. To a large extent it will depend on the general development of the AFSJ, the political priority given to a further reduction in diversity and the instruments and strategies available to that effect (see below part 4).

Diversity in policies, by contrast, could become a more prominent phenomenon. Once members of the EU 'club', the former applicant countries will no doubt become more assertive as regards their own interests and priorities in justice and home affairs. In that, they will not be different from current Member States which (such as the United Kingdom on the question of border controls or Denmark on the question of communitarisation) have their own record of staunchly defending specific national interests. This means, however, that in certain areas of policy-making in the AFSJ – some examples have already been given – new dividing lines, different priorities and special interests are likely to emerge in the Council which add to the current difficulties in compromise-building and decision-making.

NOTES

- ¹ This part of the report is based to a very large extent on interviews with officials of national ministries, the Council of the European Union and the European Commission and the use of a large number of classified documents from national ministries and the Council of the European Union. The author was also able to draw on some information available to him in his function as specialist adviser to the Select Committee on the European Union of the House of Lords. The interviewees wished to remain unnamed and for reasons of confidentiality the documents cannot be identified or be quoted from.
- ² Through the adoption of substantial amendments to the Law on Refugees in September 2000.
- ³ It should be noted, however, that Hungary has already concluded an Interim Compulsory Visa Agreement with Russia which entered into force in June 2000.
- ⁴ Such as the Czech Republic which in September 2000 signed the 1981 Council of Europe Convention on the protection of the processing of personal data and established the office for Personal Data Protection as an independent supervisory authority.
- ⁵ See on this point House of Lords Select Committee on the European Union: Enlargement and EU External Frontier Controls, Session 1999-2000, 17th Report, October 2000, para. 10-12, 15 and 44-46.
- ⁶ Polish Ministry of the Interior: Polska Strategia Zintegrowanego Zarządzania Granicą, Warsaw, June 2000.
- ⁷ In Slovenia, for instance, the Commission's 2000 Report noted for this year a backlog of over 100,000 cases older than one year (European Commission: Regular Report on Slovenia's Progression Towards Accession, Brussels, 8 November 2000, p. 15).
- ⁸ European Commission: Regular Report on Slovakia's Progress Towards Accession, Brussels, 8 November 2000, p. 17.
- ⁹ Joint Action 98/428/JHA, OJ L 191/8 of 7.7. 1998. The core piece of the collective evaluation mechanism is a group of experts ('Collective Evaluation Group') which has the task – under the supervision of the COREPER and in close cooperation with the Article 36 Committee – of preparing and keeping up-to-date collective evaluations of the situation in the candidate countries on the enactment, application and effective implementation of the Union *acquis*. The Member States make available to this group all relevant material on these issues compiled by national authorities, including information on their direct experience of working with the candidate countries, Schengen material, reports from Embassies and Commission delegations in the applicant countries, reports from PHARE missions and reports from the Council of Europe on the implementation by the applicants of Council of Europe Conventions.
- ¹⁰ See on this point European Commission: Regular Report on Hungary's Progression Towards Accession, Brussels, 8 November 2000, pp. 69-70.
- ¹¹ See Article 6 of the Convention implementing the Schengen Agreement.

4 INSTRUMENTS AND STRATEGIES FOR MANAGING DIVERSITY

4.1 FUNDAMENTAL DIFFERENCES BETWEEN THE PRE- AND THE POST-ACCESSION SITUATION

Before proceeding to the identification and evaluation of instruments and strategies for the management of diversity in justice and home affairs it is useful to point to some fundamental differences between the pre-accession and post-accession situation.

During the pre-accession phase the EU can still more or less 'impose' requirements and standards and rely on a relatively high degree of cooperativeness of applicant countries as regards both the adoption of these requirements and standards and the monitoring of the situation in these countries by EU missions. It will also still have specifically targeted accession preparation instruments, such as the horizontal PHARE programmes, at its disposal.

After accession the (first) applicant countries will be fully participating in EU decision-making, being able either to 'veto' proposed EU measures if unanimity voting continues to prevail, or to form blocking minorities if qualified majority voting would be extended. They will not be willing to submit any longer readily to special monitoring procedures and will have full rights of participation – even if there should still be doubts about their implementation capabilities – in all EU bodies and cooperation networks. Financial support for further adaptations/reforms is likely to require the design of completely new post-accession programmes which will have to compete for scarce resources with structural policy measures and other traditional EU instruments.

4.2 TYPES OF INSTRUMENTS AND STRATEGIES TO MANAGE DIVERSITY

As indicated in the introduction this report is based on the general assumption that suppressing or at least diminishing diversity in justice and home affairs has to be regarded as an objective. It is both crucial for the functional effectiveness of the emerging AFSJ and politically desirable in that it favours the legal, structural and political coherence within the AFSJ vital for its further development. This objective prioritises the pursuance by the EU of instruments and strategies which either suppress or diminish diversity and implies the rejection of three other possible types of instruments or strategies.¹

Instruments and strategies for trading-off diversity through concessions on different issues

Theoretically one could envisage the 'old' Member States 'buying' compliance of new Member States with the EU/Schengen acquis and the AFSJ objectives through substantial aid packages or financial equalisation mechanisms as this has happened previously in other policy areas. Yet taking into account the huge budgetary constraints of the EU and the unwillingness of most of the current Member States to upgrade their contributions this option seems financially unsustainable. Any 'buying-off' strategy would also have the disadvantage that it would in practice lead to 'old' Member States paying a premium to those of the 'new' Member States which for whatever reason are not complying with the acquis. This could result in a reduced incentive of new Member States to speed up compliance and lead to repeated rounds of buy-offs which current Member States seem determined to avoid. Even less likely is the potential use of trade-offs across different policy-making areas. Current Member States will certainly not want to 'buy' reduced diversity in justice and home affairs with major concessions in areas such as the internal market, social or environmental policy.

Instruments and strategies to accommodate diversity through 'flexible' solutions

Even in their most moderate form – if they consist only of a deliberate limitation of EU action to minimum standards and broad framework legislation – these instruments and strategies only tend to provide temporary solutions to diversity related problems of the build-up of the AFSJ. A good example in this context is judicial cooperation in criminal matters in the area of the fight against organised crime. The decision of the Tampere European Council to make mutual recognition of judicial decisions (clearly a diversity 'accommodating' instrument) for the time being the cornerstone of EU action in this area will allow for some increase in the efficiency of cross-border cooperation in this area. Yet organised crime will still benefit from fundamental differences between national legislation and judicial procedures in the individual Member States. Therefore, for the sake of effectiveness the EU will sooner or later have to go down the way of harmonisation of national laws and procedures, although this will not necessarily mean complete harmonisation (of national penal codes, for example). Forms of differentiation in participation in and application of the EU/Schengen acquis have to be considered as even more problematical. The whole concept of the AFSJ implies the build-up of a single justice and home affairs area based on common responses to the problems of asylum and migration policy, the development of a "common sense of justice"² among the EU citizens and a "high level of security"³. This concept would inevitably be undermined by accommodating diversity through further cases of opt-outs, *de facto* derogations on specific issues (such as the current special Belgian position on nationals from EU Member States seeking political asylum) and a proliferation of 'closer cooperation' frameworks. Further differentiation could also pose dangers to the coherence of the EU/EC legal order, increase problems of democratic and

judicial control and run against the idea of a meaningful Citizenship of the Union with uniform rights across the entire Union.⁴ It should also be noted that another type of flexible arrangements – the granting of transitional periods to applicant countries – has been ruled out in justice and home affairs by several of the current Member States because of the sensitivity of the internal security implications this could have.

Instruments and strategies to circumvent diversity

Such instruments and strategies would be aimed at circumventing diversity mainly by establishing forms of cooperation or even common policy regimes between certain Member States outside of the EU context. Such instruments and strategies would not only undermine the further construction of the AFSJ as a major intra-EU integration objective but also most likely create political suspicions and tensions between participating and non-participating Member States. This has been shown by previous negative reactions to ideas of establishing potential *directoires* of certain Member States. They could well turn out to be more disruptive for the further development of the AFSJ than the persistence of significant degrees of diversity.

As a result, all the instruments or strategies identified and analysed in the following are aimed at suppressing or at least diminishing diversity. Since measures aimed at diminishing diversity can also be regarded as making a contribution (at least in the long run) to the gradual suppression of diversity and those aimed at the suppression are likely to lead to a reduction in diversity even before full suppression is achieved, the border line between diversity suppressing and diminishing tools is inevitably a fluent one. Looking at the central purposes of the instruments and strategies which are identified below, however, numbers (5), (11), (12), (14) and (15) would primarily serve the aim of effectively suppressing diversity, whereas numbers (2), (3), (6), (9), and (10) would be primarily targeted at diminishing it. The other tools – (1), (4), (7), (8), (13) and (16) – could be used for both purposes.

4.3 EXISTING INSTRUMENTS AND STRATEGIES TO SUPPRESS OR DIMINISH DIVERSITY BEFORE ACCESSION

1 *Continuous evaluation of the applicant countries as a means for identifying diversity problems*

The most sophisticated of the existing evaluation mechanisms is the already mentioned 'collective evaluation' strategy of the Council set up in 1998 which allows to identify major problems of diversity especially in the areas of implementation and organisational structures. The Regular Reports of the European Commission on the progress made by the applicant countries focus more on the reduction of diversity in the legislative area.

Problems: The 'collective evaluation' of the Council tends to focus on current deficits of the applicant countries and often fails to take into account their potential to reduce diversity before accession. It also fails to provide any recommendations on ways and priorities for reducing the existing diversity. Its effectiveness as a political instrument is limited by the strict confidentiality of the reports produced. There is as yet little cross-fertilisation between the collective evaluation and the design and implementation of EU pre-accession aid measures. The impact of the collective evaluation on the current accession negotiations seems to be quite limited as well. The Commission Reports lack substance and are at best giving the applicant countries encouraging political signals to step up preparations in certain broad areas.

2 *PHARE aid and specific Third Pillar justice and home affairs programmes such as GROTIUS, OISIN, FALCONE etc.*

These aid instruments have so far focused on the transfer of expertise ('pre-accession advisers', twinning programmes) and training, to a lesser extent also on help with the upgrading of technical equipment. These instruments are highly appreciated by the applicant countries – especially the transfer of know-how – and are making a substantial contribution to the applicant countries' understanding of what will be required from them on the implementation and structural side.

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Problems: The use of these instruments is not part of an overall EU strategy, so that measures often respond more to fragmented interests of the individual applicant countries than to overall cross-country priorities (for instance, EU assistance for upgrading border post electronic data networks in Hungary but not in Poland or Slovenia). EU measures are also often badly coordinated with bilateral aid measures provided by individual Member States (e.g. Germany-Poland). Much of the PHARE funds used in the justice and home affairs area are devoted to internal market related reforms of the administrative and judicial systems rather than to specific diversity problems. The Third Pillar programmes are largely underfunded.

3 *Association of the applicant countries with EU structures in preparation for accession*

This association has so far taken the form of an improved flow of information to the applicants about EU decision-making in justice and home affairs, and partial involvement of applicant countries in a number of specialised bodies like CIREA (asylum), CIREFI (immigration) and PAPEG (organised crime). Agreements on their association with EUROPOL are currently negotiated, and the first of those could be signed before the end of 2000. These association measures have to be considered as very useful for the acquaintance not only with EU policies and implementation standards, but also with the mechanisms and constraints of EU cooperation and decision-making.

Problems: The current forms of association keep the applicant countries outside of all more operational elements of EU cooperation, mainly because of concerns over data-protection and corruption. This limits the learning effects and causes frustration on the side of participants from the applicant countries.

4 *The 1998 Pre-accession Pact on Organised Crime*⁵

This is quite a comprehensive multi-disciplinary instrument of cooperation in the area of the fight against organised crime which is aimed at transferring both know-how and EU implementation standards to the applicant countries in order to reduce potential diversity in implementation after accession. Under the terms of the Pact the EU-15 and the applicants have agreed to develop, with the assistance of Europol, a common annual strategy in order to identify the most significant common threats in relation to organised crime, increased exchange of law-enforcement intelligence and mutual practical support as regards training and equipment assistance, joint investigative activities and special operations, facilitating trans-boundary law enforcement cooperation and judicial cooperation, and mutual exchange of law enforcement officers and judicial authorities for traineeships. The applicant countries have also undertaken to consider further institutional changes in line with the EU acquis, and to make all necessary preparations for their accession to the Europol Convention at the time of accession. It has on the whole proved to be useful and could serve as a model for pre-accession pacts in other sensitive areas such as asylum or illegal immigration.

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Problems: The Pre-accession Pact is restricted to organised crime, it establishes not enough bridges to judicial cooperation and other cooperation areas relevant to organised crime, and it suffers from a lack of specific funding programmes.

5 *The accession negotiations*

These have to be regarded as a diversity reducing instrument. The EU's so far rather uncompromising attitude forces the applicant countries not to relent in their efforts to bring their systems into line with the EU acquis.

Problems: The accession negotiations are focused more on the adoption of the formal legal acquis than on the implementation problems which are much more difficult to assess and to negotiate. This encourages applicant countries to concentrate on satisfying the EU's formal acquis demands rather than on effective implementation capabilities and mechanisms.

4.4 POTENTIAL NEW INSTRUMENTS AND STRATEGIES TO SUPPRESS OR DIMINISH DIVERSITY BEFORE ACCESSION

6 *Encouraging applicant countries sharing common borders to start implementing the Schengen acquis between themselves already before accession*

This would have two benefits. The first would be the learning effect for the participating applicant countries how to manage the cross-border implications of the Schengen system. It could help to reduce implementation diversity after full accession to the EU Schengen system. The second benefit would be to spare applicant countries the cost and manpower of guarding part of their current external borders. Encouragement could be provided by a specific EU aid programme for applicant countries willing to engage in that exercise and the creation of specific Schengen advisory groups for that purpose.

Problems: This strategy could only be applied after it has become clearer whether and which applicants are going to join the EU simultaneously. The overall effectiveness of this strategy would be much reduced if Slovakia would join after the Czech Republic, Hungary and Poland.

7 *Conclusion of other pre-accession pacts in the areas of asylum, illegal immigration and fight against cross-border crime*

Each of these pacts should provide for specific information exchange, know-how transfer and training elements, annual targets, monitoring mechanisms, specific binding undertakings of the applicant countries and the setting up of joint co-operation bodies closely linked to the relevant working parties of the EU Council. PHARE aid should be reorientated to provide significant financial support to measures agreed on in the context of the pre-accession pacts. Parts of the results of the 'collective evaluation' mechanism should be published in annual reports to exercise additional pressure on governments in the applicant countries. All this would allow for a better targeting of pre-accession efforts to reduce diversity on crucial problem areas.

Problems: These pacts will inevitably overlap which could result in coordination problems. Some Member States may have problems with granting the coordination bodies real decision-making powers, whilst some applicant countries might not be happy with a further imposed reorientation of the PHARE budget lines.

8 *Accelerated integration of applicant countries into existing EU structures as soon as they satisfy certain minimum criteria*

Applicant countries could get increased access to some of the relevant EU structures and part of the confidential information these can provide (Europol and the SIS, for instance) as soon as they satisfy certain criteria agreed on by the Member States (on data-protection, equipment and organisation, for instance). They could

also be associated – initially only as observers – with certain operational activities, for instance of the planned Joint Investigative Teams, under the same conditions. All this would not replace but prepare their full participation. It could increase considerably the experience of the applicant countries with intra-EU procedures, favour adaptation to EU standards and encourage the completion of the restructuring of law enforcement authorities.

Problems: Some Member States are likely to be reluctant to increase access of applicant countries to sensitive information even if data-protection standards are met. Concerns over corruption may well last beyond the time when effective data-protection mechanisms have been put into place.

9 *Introduction of mandatory 'probation' periods in certain areas of justice and home affairs before accession*

As pointed out above (see section 3.5.) a considerable degree of organisational and implementation diversity could persist beyond the date of accession because of the late introduction of legislative, organisational and implementation practices. Visa policy may be taken as an example. If Hungary and Poland fully adopt the EU visa regime only upon accession they are likely to face considerable implementation problems because of their limited experience with issuing large numbers of visas in consular representations, visa controls inside the country and other areas of implementation. Therefore, in order to reduce implementation diversity as far as possible before accession it would make sense for the EU to consider the introduction of mandatory 'probation' periods. The applicant countries could be asked to start with the implementation of certain implementation sensitive parts of the acquis six to twelve months before the likely date of accession. In this way, they gain experience with the application of the new rules, test their changes in organisation and practices and adopt these if necessary. These 'probation' periods should be supported by specific EU programmes providing for monitoring and advice by national and EU experts, additional training courses and help with the adaptation of technical infrastructure. The non-fulfilment of essential 'probation' requirements could lead to the suspension of certain rights of membership after accession (see below strategy number 15).

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Problems: Applicant countries are likely to regard such mandatory 'probation' periods as just another burden imposed on them by the EU. This all the more so since these were not at an earlier stage declared to be part of the overall requirements. A potential suspension of membership rights after a failure to meet essential 'probation' period requirements could lead to serious political tensions.

10 *Creation of training institutions particularly for training sensitive areas*

Training was, is and will remain one of the key instruments in reducing diversity before and after accession. Occasional training programmes, often organised on an ad hoc basis, are not sufficient to satisfy the need for regular and specifically targeted training for officials, border guards and police officers in the applicant

countries. The Tampere European Council's decision to create a European Police Academy open to the applicant countries is a first step in the direction of a more permanent and systematic approach to training. It would make sense to consider the setting-up of further similar permanent training institutions, especially in the areas of border control and asylum where special professional training for a wide range of different tasks is crucial for the efficient implementation of the EU acquis.

Problems: This would require additional EU funding which can, most likely, not be covered by existing PHARE or Third Pillar programmes.

4.5 EXISTING INSTRUMENTS AND STRATEGIES TO SUPPRESS OR DIMINISH DIVERSITY AFTER ACCESSION

11 *Application of the two stage process of new Member States joining the Schengen system*

The Schengen system provides that Schengen members even after they have legally become a part of the Schengen system still need a separate Council decision before the Schengen acquis is fully brought into force, especially as regards the abolition of checks at internal borders. This two-stage process will keep the new eastern Member States under pressure to comply fully with the Schengen standards even after accession. As long as this Council decision is not taken – and it is likely to be taken only after careful monitoring by current Schengen members – external border controls to the new Member States cannot be lifted. This instrument should be quite effective because applicant countries' governments will be very keen on making the current 'iron curtain' of Schengen external border controls disappear as soon as possible after accession.

Problems: The maintenance of Schengen external border controls between old and new Member States after accession could entail political tensions between the new Member States and the Schengen group (or individual Schengen countries). As the example of the delayed 'Schengen maturity' of Italy and Greece has shown, this political cost is likely to increase with time and any new postponement of full integration into the Schengen system. Member States might regard a strict application of evaluation criteria as arbitrary and politically motivated. The continuation of Schengen external border controls could also have negative effects on cross-border economic activity.

12 *Use of Article 67 TEC in 2004 to apply the Article 251 co-decision procedure (including qualified majority voting) to all areas of justice and home affairs under Title IV TEC*

The new eastern Member States will bring into the EU their own specific national interests in a range of justice and home affairs areas (border controls, visa policy etc.). For domestic reasons or because of 'good neighbourly relations' with bor-

dering non-member countries they could well be opposed to certain measures aimed at the further development of the AFSJ. In order to remove the risk of national 'vetoes' it would be crucial to use the possibility of qualified majority voting offered by Article 67 TEC, at least in the communitarised areas, before the first accessions take place. Some applicant countries might not be supportive for such a measure after joining the EU.

Problems: It is far from certain that all EU Member States will be in favour of this co-decision procedure for all matters under Title VI TEU in 2004 since this will remove national 'blocking' possibilities.

4.6 POTENTIAL NEW INSTRUMENTS AND STRATEGIES TO SUPPRESS OR DIMINISH DIVERSITY AFTER ACCESSION

13 *Development of a comprehensive mutual evaluation mechanism*

The Schengen countries operate already a system of mutual evaluation which has the double benefit of identifying deficits in the implementation of Schengen measures in individual Member States and of 'naming and shaming' the respective Schengen member (at least within the group). Mutual evaluation results tend to generate political pressure to comply with Schengen standards. This mechanisms should be expanded to all EU Member States with annual evaluations in selected areas. It should be put into place before or upon accession, and is unlikely to be sensitive for the applicant countries because it would obviously apply to all Member States equally.

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Problems: Such an annual mutual evaluation exercise for 20 or more Member States would require a major administrative effort and it may not be easy always to sustain the necessary strictness of checks on national authorities.

14 *Identification of certain Schengen provisions which the applicant countries should fully implement immediately after accession to the EU and not only when the Schengen Implementing Convention is fully brought into force for them*

In line with the usual two-stage process of joining Schengen (see section 4.4 above) the applicant countries will join the EU first and start only afterwards with the full application of the Schengen acquis. This process, however, has the disadvantage that applicant countries – since they will be kept out of most of the operational parts of the Schengen system for some time anyway – could feel encouraged to postpone necessary changes in organisation and practices well beyond the time of accession. This would mean a continuing high degree of post-accession diversity in a number of sensitive areas of the AFSJ, such as external border management, which could have negative repercussions not only for the applicant countries but also for current Member States. As a result, the EU should consider identi-

fyng as soon as possible a number of Schengen requirements – most likely in the areas of external border management and police cooperation – which the applicant countries would be expected to implement immediately upon accession regardless of their continuing exclusion from the Schengen external border controls system. This would have the additional advantages of further familiarising them with essential parts of the Schengen system and facilitating an earlier⁶ full participation in the Schengen system.

Problems: Applicant countries are likely to regard this as an arbitrary addition to the already extensive demands they have to satisfy. They will very probably resent the fact of having to fulfil certain Schengen implementing requirements upon accession without any prospects of their immediate operational incorporation into the Schengen system with the corresponding abolition of checks at current external Schengen border controls towards their countries.

15 *Introduction of the possibility of a suspension of rights of membership in case of a major failure to implement the EU acquis in justice and home affairs*

As pointed out earlier the AFSJ has to be regarded as an emerging internal security zone in which the failure of one Member States to implement adequately common measures and standards can easily have negative internal security implications for some or all other Member States. Because of the extreme sensitivity of internal security issues the EU could consider the introduction of a provision which allows for the temporary suspension of certain membership rights (participation in certain EU bodies and information systems, for instance) if a Member State's failure to apply the acquis fully is collectively seen as a threat to the internal security of other members. A simplified version of the procedures of Article 7 TEU⁷ could serve as model. The mere existence of such a suspension procedure could exercise already considerable pressure on Member States, new and old, to maintain high standards in the implementation of measures in the areas of justice and home affairs.

Problems: The insertion of such a suspension clause would be a major and most likely very controversial innovation in the context of the EC legal order. Its application would almost inevitably lead to major political tensions within the EU.

16 *Use of 'closer cooperation' to allow for the development of new diversity diminishing or suppressing acquis*

The instrument of 'closer cooperation', which was newly introduced into the areas of justice and home affairs by the Treaty of Amsterdam⁸, is very much a double-edged sword in the context of diversity in justice and home affairs. If a group of Member States is formed which use the institutions, procedures and legal instruments of the EU to develop a new acquis which applies only to those Member States participating, this inevitably introduces a powerful new element of diversity into the political and legal system of the EU. Any potential benefit of the reduction or even elimination of diversity between some Member States in certain areas

through 'closer cooperation' has downsides in the introduction of new fault lines of exclusion and inclusion and additional fragmentation of the legal order. 'Closer cooperation' for the sole purpose of accommodating existing diversity, leading to the formation of different groups of Member States cooperating indefinitely in different areas with different degrees of integration, is likely to weaken the unity and effectiveness of the EU's political and legal system on a lasting basis and should therefore be avoided. If, however, 'closer cooperation' is aimed at reducing rather than only permanently accommodating diversity, it can lead to new legislation, mechanisms and standards. These – if developed and successfully tested as model for the EU and later taken on by most or all of the Member States – can over time make an effective contribution to diminish or even eliminate diversity in the EU as a whole. A good example in this context would be the basic principles of the 1990 Dublin Convention which were first negotiated in the Schengen context and then taken over by all Member States as an EU Convention. Such 'vanguard' or 'laboratory' closer cooperation could therefore play a useful role if diversity problems in the context of the eastern enlargement would risk to paralyse the further development of the AFSJ. The current provisions on 'closer cooperation' would need to be amended, however. Some of the existing material conditions constraining the authorisation of the use of 'closer cooperation' appear unduly restrictive and should be revised.⁹ On the other hand, however, having regard for the risks of 'closer cooperation' only destined to accommodate diversity, authorisation should be subject to a *nihil obstat* opinion by the ECJ on their compatibility with the EU acquis and the objectives of the construction of the AFSJ, to adequate control by the European Parliament and to regular monitoring of the effects by the European Commission. In order to avoid politically motivated exclusions Member States should also have a possibility to go before the ECJ in case their request to participate in an existing form of 'closer cooperation' is rejected.

Problems: The Schengen system constitutes already one major framework of 'closer cooperation' within the EU. Its effectiveness could be reduced by the creation of other 'closer cooperation' frameworks. Coordination and interaction between different 'closer cooperating' groups could create considerable problems of management and transparency within the EU decision-making system. The Schengen experience has also shown that it may take a very long time before models developed by a group of Member States are taken over by all others.

4.7 OVERALL EVALUATION OF THE FUNCTIONAL EFFECTIVENESS AND POLITICAL DESIRABILITY OF THE INSTRUMENTS AND STRATEGIES

The instruments and strategies described and analysed above may be regarded as 'functionally effective' if they are likely to suppress or at least diminish problems of diversity between the EU/Schengen acquis and the applicant countries before or

after accession. They can be regarded as politically desirable, if the political benefits outweigh the political costs.

All of the aforementioned instruments and strategies are likely to satisfy the criterion of 'functional effectiveness', but this to varying degrees. The more traditional monitoring, training, aid and association instruments (numbers 1, 2, 3, 10 and 13) are expected to be less effective than those instruments which would allow to 'impose' certain targets and standards on the applicant countries (5, 11, 12, 14 and 15). Most of the remaining tools (4, 6, 7 and 8) seem to be of a medium level of functional effectiveness because they provide for some, but limited undertakings of applicant countries (4 and 7), are based on certain conditions which the applicant countries would have to fulfil in order to benefit from further EU measures (6 and 8) or are of a mandatory nature (9). The functional effectiveness of 'vanguard' or 'laboratory' closer cooperation (16) is potentially very high but depends on so many other factors (such as general political developments within the EU and the successful implementation of closer cooperation by the respective Member States) that it does not really fit into any of the previous groups of tools.

As regards the criterion of 'political desirability' the political cost/benefit assessment varies considerably depending on the respective tools. The more traditional monitoring, training, aid and association instruments (1, 2, 3, 10 and 13) involve on the cost side primarily administrative and financial efforts on the EU side. The cumulative effect of these tools – if all of them would be used – should not be underestimated. The EU institutional and Member States have already problems to free enough staff for providing pre-accession advice to the applicant countries and the budgetary constraints are unlikely to ease during the next years. Yet since part of these efforts are already undertaken by the EU and the Member States, the benefits should significantly outweigh the costs if reducing diversity in justice and home affairs is given the political priority which it should have. Additional financial help for the upgrading of technical equipment may anyway be inevitable.

The higher functional effectiveness of target and standards 'imposing' tools (5, 11, 12, 14 and 15) will have to be bought at the price of political tensions with the applicant countries which in some cases (in case of the use of instruments 14 and 15, for instance) could be major. Depending on the importance attached to a smooth enlargement process and to their exposure to potential internal security problems after enlargement some Member States might take the view that this price is worth paying for, others may not. Using one or more of these instruments would ultimately require the Member States to be willing to accept a delay or partial disruption of the enlargement process if applicant countries do not accept certain diversity suppressing or diminishing targets and standards. At the moment few Member States seem to be willing to go as far as that.

As regards the tools of medium functional effectiveness (4, 6, 7 and 8) they will require additional EU funding and considerable efforts in terms of negotiations with the applicant countries, but the benefits should still outweigh these costs if a sufficiently high importance is attached to the reduction of diversity. The political costs of 'vanguard' or 'laboratory' closer cooperation (16) would be very high should it result in a lasting further fragmentation of the AFSJ and a *de facto* exclusion of non-participating Member States. Yet if successfully taken over by all other Member States within a relatively short period of time the political benefits would far outweigh the costs. The cost/benefit ratio will therefore very much depend on the concrete case and the final results achieved by the respective closer cooperation.

The above mentioned tools are, of course, not the only ones which could be taken into consideration for diminishing or suppressing diversity. Yet other solutions tend to have the disadvantage of being either ill adapted to the specific needs of justice and home affairs or politically far too ambitious for the current development perspectives of the AFSJ. Three examples may be given.

In theory implementation diversity could also be reduced through improved judicial enforcement procedures. There is no lack at the moment of proposals how to reform the ECJ to that effect, for instance, through a partial decentralisation of the EU's judicial architecture. Yet the necessary judicial proceedings will always take their time, and questions of the effectiveness of implementation are difficult to evaluate for any court. As a result, the traditional EC enforcement procedures are unlikely to be quick and effective enough to respond adequately to the more problematic failures of Member States to implement parts of the EU/Schengen acquis which are likely to arise in such sensitive areas as external border controls, fight against organised crime or measures against illegal immigration. Far too much (and often enough irreparable) damage is likely to have arisen before the judicial procedures would come to their first results.

Another, at first sight, quite sensible idea would be a redefinition of the acquis to reduce the number of the binding obligations candidate countries have to meet at the time of accession. Instead of obliging them to adopt the acquis immediately and in its entirety it could, for instance, be limited to certain initial 'core areas' and/or in part be replaced by models or bench-marking targets to which the applicant countries would have to adapt potentially over a longer period of time and with greater flexibility. The difficulty with such re-definitions of the EU/Schengen acquis is twofold. Not only does this acquis so far only consist of a rather limited number of legally binding acts (which mostly constitute lowest common denominator and in that sense 'minimum' solutions), but most of these acts are also essential and often closely interrelated elements of the overall functioning of the AFSJ as an emerging single internal security 'area'. This makes it quite different, for instance, from the Internal Market acquis with its proliferation of legal rules even on secondary functional aspects. Making some parts of the EU/Schengen justice and

home affairs acquis non-binding for the sake of enlargement would undermine the new priority given to the use of binding legal instruments – highly necessary for an intrinsically legislative area like justice and home affairs and only very recently achieved by the Treaty of Amsterdam – and could put at risk the effective functioning and further build-up of the AFSJ by thinning out an in many areas still fragile and even rudimentary acquis. For reasons of effectiveness the AFSJ should be treated as indivisible as this is in fact done in Article 8 of the Amsterdam Protocol integrating the Schengen acquis into the European Union. This does not exclude, however, giving applicant countries some access already before their accession – in form of an observer status, for instance – to relevant EU structures and information (as suggested in strategy number 8) nor forcing them to comply with certain parts of the Schengen acquis already before the Schengen Implementing Convention is fully brought into force for them (as suggested in strategy number 14). In both cases the indivisibility of the acquis would be maintained because the new Member Status would only become operationally integrated into the AFSJ after having complied with the entirety of its acquis.

One of the more ambitious ideas which has recently been put forward is that of the development of a common external border management policy of the EU. This should involve multilateral EU border patrols along the eastern and southern borders as well as joint immigration and customs services.¹⁰ Such a common border management would, of course diminish, or even largely eliminate, diversity in external border controls. Unfortunately few – if any – of the Member States seem so far willing to consider handing over their external border controls to any form of common authority, let alone border guards from other countries. The applicant countries themselves are unlikely to adopt a very different position on this issue.¹¹ One should bear in mind that border controls – as indeed many other areas covered by the AFSJ – are extremely sensitive from the national sovereignty point of view. The United Kingdom, for instance, maintains its stance on the maintenance of internal border checks on persons – a less sensitive issue than external border controls – in spite of more than a decade of massive pressure by several Schengen members and the European Commission. It illustrates the immense resistance more radical steps of integration are likely to face in this and other areas of justice and home affairs. Whereas diversity is all too real a problem, the search for solutions can easily drift off into the fertile cloud-cuckoo-land of ‘optimal’ solutions.

NOTES

- 1 See the extremely lucid identification and analysis of these strategies in Eric Philippart and Monika Sie Dhian Ho (2000) 'From Uniformity to Flexibility. The management of Diversity and its Impact on the EU System of Governance,' pp. 318-326 in Grainne de Burca and Joanne Scott (eds.) *Constitutional Change in the EU. From Uniformity to Flexibility?*, Oxford.
- 2 An aim defined by the 1998 Vienna Action Plan.
- 3 Article 61(e) TEC.
- 4 See on these risks Jörg Monar (1997) 'Schengen and Flexibility in the Treaty of Amsterdam: Opportunities and Risks of Differentiated Integration in EU Justice and Home Affairs', pp. 13-18 and 24-27 in Monica den Boer (ed.) *Schengen, Judicial Cooperation and Policy Coordination*, Maastricht.
- 5 Pre-accession pact on organised crime between the Member States of the European Union and the applicant countries of central and Eastern Europe and Cyprus, OJ No. C 220/1 of 15.7.98.
- 6 It should be recalled here that in the case of Italy and Greece the "waiting period" before the full integration into the Schengen system lasted no less than seven years after their adhesion to Schengen.
- 7 Allowing for the suspension of certain rights of EU membership in case of serious and persistent breaches of the fundamental and human rights principles mentioned in Article 6(1) TEU.
- 8 Articles 40 TEU, 43 TEU and 11 TEC.
- 9 See on this point recommendations number 6 and 9, in Eric Philippart and Monika Sie Dhian Ho (2000) *The Pros and Cons of Closer Cooperation within the EU*, Scientific Council for Government Policy, Working Document W 104, The Hague, pp. 43-44.
- 10 See Giuliano Amato and Judy Batt (1999) *The Long-term Implications of EU Enlargement: The Nature of the New Border. Final Report of the Reflection Group*, Florence (European University Institute), pp. 60-61.
- 11 Giving evidence in Warsaw on 19 June 2000 before Sub-Committee F of the European Union Committee of the House of Lords, General Marek Bienkowski, Commander-in-Chief of the Polish Border Guard, clearly rejected the idea of a potential multinational European control of Polish external borders, emphasising that these were 'Polish borders' after all.

5 CONCLUSIONS

Enlargement related diversity in EU justice and home affairs has to be considered as a major challenge in the enlargement process. If not addressed by adequate management instruments and strategies it could both undermine the functional effectiveness of the AFSJ – with negative internal security consequences for both old and new Member States – and threaten the further development of the AFSJ which has become one of the core integration objectives of the EU at the beginning of this new century. The rapid development of the AFSJ during the last few years – which is likely to continue and perhaps even to accelerate before the first accessions take place – could increase the burden of adaptation for the applicant countries and exacerbate existing and prospective diversity problems.

Finding adequate responses to this challenge is made more difficult by the fact that the AFSJ covers very sensitive policy-making areas such as asylum, immigration, border security and the fight against crime which rank high on the list of citizens' concerns and are favourite subjects of national politics and the media, often enough in a polemical and even demagogic context. This is not only true for the current EU Member States – where developments in these areas can easily mobilise the 'law and order' instincts of major political parties and the xenophobic tendencies of vociferous political minority groupings – but also, though from a different perspective, for the applicant countries themselves where the feeling is increasing that the EU is in the process of imposing an internal and border security system which runs against their specific needs and interests in maintaining existing links with their eastern neighbours.

It is hardly surprising that facing this potential political minefield, EU institutions and national governments have so far preferred to give a low public profile to the enlargement related problems in the areas of justice and home affairs. Whilst at the same time they kept the applicant countries under pressure by a strict insistence on the full adoption of the EU/Schengen acquis, using largely traditional and uncontroversial pre-accession instruments for helping them with their preparations for joining the AFSJ. Yet it seems less and less likely that this will be enough for dealing with the enlargement related challenges in justice and home affairs. As our analysis of the different dimensions of diversity has shown, legislative diversity may well no longer be a problem at the time of the first accessions, but serious difficulties are likely to persist (or even to surface only after accession) in the areas of organisational and implementation diversity. Since the AFSJ – as an emerging functional single internal security zone – depends to a very large extent on the effectiveness of organisational structures and implementation practices this should on the EU side be regarded as a disquieting prospect indeed. More EU action is therefore clearly needed, both during the pre-accession phase and in view of the situation after accession.

The possible instruments and strategies for suppressing or diminishing diversity described and analysed in this report range from rather 'soft' (such as monitoring mechanisms and additional training and aid instruments) to very 'hard' tools (such as the possibility of a suspension of rights of membership in case of a major failure to implement the EU acquis in justice and home affairs). The 'softer' tools will require additional financial and administrative efforts whose cumulative burden could be quite considerable. The 'harder' tools are more likely to entail substantial political costs, such as tensions with the applicant countries over the 'imposition' of new requirements during the pre-accession process and major political controversies over the potential use of some of these instruments after accession. At least one of the 'harder' tools – the two stage process of joining the Schengen system – seems already unavoidable because of the widespread concerns among Schengen countries about standards and capabilities of many applicant countries in areas such as border controls and the fight against illegal immigration and organised crime. Several others of the 'harder' tools, such as the passage to qualified majority voting in the communitarised areas of justice and home affairs at the end of the transitional period in 2004, are likely to be quite controversial among the current Member States.

Trade-offs between different objectives and priorities will of course be inevitable during the enlargement process. The EU and its Member States will ultimately have to ask themselves whether the major political objective of the AFSJ and the "high level of security" for European citizens this integration project is aiming for, should not be regarded as so important for the development and the credibility of the integration process, that the diversity suppressing or diminishing effects of these instruments and strategies are well worth their political, financial and administrative costs. National governments tend to give internal security considerations a very high priority on their agenda. There is no reason why the EU should not do the same. Consequently, Commission and Council should consider the use of the full range of the 'hard' instruments suggested, including mandatory 'probation' periods before accession and suspension of membership rights in case of non-compliance with parts of the AFSJ acquis. This strengthens both the efficiency and the credibility of the EU as an 'area of freedom, security and justice' and the benefits would be reaped by the citizens not only of the current but also of the future Member States.