

# **Policing Europe**

**EU Justice and Home Affairs  
co-operation**

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# Contents

About the authors

Acknowledgements

1	Introduction: Europe's big new project	1
2	JHA: a short history	3
3	Free to roam within Fortress Europe	13
4	Europe's single market in crime	27
5	The British dilemma	39
6	A summary of recommendations	46



# 1 Introduction: Europe's big new project

Most observers of the European Union see the single currency as the principal driving force of European integration in the coming decade. But another cluster of policy issues will also spur closer co-operation between national governments, and the pooling of sovereignty. Co-operation between police, customs, immigration and judicial authorities in the area known as 'justice and home affairs' (JHA) will drive a new wave of European integration.

A few years ago the notion that 'Brussels' might get its hands on policy matters as sensitive as immigration and criminal law was enough to send shivers down the spines of most national politicians and officials—and not only in Britain. But today, most national politicians realise that, by co-operating with their European partners, they can do more to combat crime and illegal immigration and can better provide protection for genuine refugees. More importantly they see JHA as an inherently popular sphere of European co-operation. Tackling international crime, in particular, has become a priority for a European Union that aims to deliver results on issues that are close to people's everyday lives.

This shift in attitude among political leaders has translated into new powers for the EU. The 1997 Treaty of Amsterdam—which was intended to rationalise decision-making procedures and prepare the EU for enlargement—brought significant changes to the justice and home affairs field, outlining clear objectives and providing for more efficient decision-making. It went much further than most people had expected, although for some it did not go far enough.

EU policy-makers are spending an increasing proportion of their time on JHA co-operation. It already accounts for a third of the paperwork passing through the UK permanent representation in Brussels. And Europe's leaders are beginning to invest political capital in it. Thus, hades

of government will hold a special summit on 15 October in the Finnish city of Tampere that is wholly devoted to justice and home affairs.

JHA broadly encompasses two very different sets of issues: migration, and the fight against international organised crime (for the purposes of this pamphlet we exclude civil judicial co-operation and questions of fundamental rights). The policy areas covered are often complex, technical and secretive. They are also riddled with unavoidable tensions and contradictions—between national and supranational; liberty and control; openness and exclusion. Thus a desire to create new freedoms for EU citizens—such as unhindered travel around the Union—collides with the commitment to law and order. Political leaders are notionally committed to equal access to justice, and its even application, throughout the EU. However, they retain strong preferences for their own national systems, a sort of legal protectionism that undermines the rule of law across the Union as a whole. As the number of migrants seeking asylum in western Europe has risen, member-states have begun to reconsider not only their liberal convictions but also their legal obligations to those seeking refuge from persecution. These tensions make EU justice and home affairs co-operation highly political.

The packaging of the two subjects, crime and migration, is also controversial. Non-governmental organisations (NGOs) have long argued that immigration and refugee issues should be treated separately from the fight against crime; after all, there is no necessary link between migrants and criminality. However, as the EU's political leaders are dealing with these issues together, this pamphlet addresses them accordingly. Our aim is to provide a guide to the principal issues involved in JHA co-operation; and to map out how the EU's biggest domestic project, other than EMU, may develop during the next five to ten years.

## 2 JHA: a short history

The European Union has been committed to the free movement of people from its outset. The 1957 Treaty of Rome dedicated its signatories to the creation of an internal market with free movement of goods, services, persons and capital. In the 1985 Single European Act, member-states resolved to make those four freedoms a reality by establishing a true single market by 1992. Britain, however, insisted on stopping short on the free movement of people. It had consistently argued that while EU citizens were free to cross its borders, it must be allowed to maintain its border controls in order to verify the rights of entry of non-EU citizens—known as third-country nationals. There was, Britain argued, nothing in EU treaties to prevent it from doing this.

Britain's dissent forced other member-states to pursue their commitment to the free movement of people outside the EU's formal legal framework. In 1985 France, Germany and the Benelux countries signed an agreement in the Luxembourg border town of Schengen to remove controls at the 'internal' borders between participating member-states, and to introduce 'flanking measures' to tighten up security at their common 'external' frontier. That meant establishing common policies on asylum, immigration and visas, police co-operation and the exchange of information between national immigration authorities.

In 1990 the Schengen states drew up a convention to implement their earlier commitment. It provided for the removal of passport controls, the operation of a common intelligence database and co-operation between police and immigration authorities. But it was not until 1995 that internal border controls were finally abolished between the five original Schengen participants, Portugal and Spain; and only in 1997, under the Amsterdam treaty, were the arrangements formally incorporated into the EU's legal framework.

Today all EU member-states apart from Britain and Ireland have signed up to the Schengen area, now officially known as the EU area of free

movement. But some are not yet full members. Greece has difficulties enforcing its (and therefore the EU's) external border, consisting as it does of many small islands and mountainous frontiers with Albania, Macedonia, Bulgaria and Turkey. The Greek government has recently created a special force of border police, and hopes to comply fully with the Schengen standards by 2001. But other member-states are likely to apply passport checks on arrivals from Greece for years to come. Sweden, Finland and Denmark have since the fifties had a Nordic passport union together with Norway and Iceland. All five countries will become full members of the Schengen area once an international agreement between the EU and the two non-member states comes into effect in autumn 2000.

Unhindered, passport-free travel is undoubtedly one way of making European integration a reality. The former German Chancellor Helmut Kohl has spoken of how, after the war, he needed a pass to move from one region of Germany to another. Now he can travel unchecked around

nearly all of Western Europe. As one commentator has noted, the commitment to free movement confers rights on EU citizens that are not applicable to other nationals, thereby helping to construct a sense of European nationality.<sup>1</sup> But there are also practical economic advantages to the removal of internal frontiers. Thorough passport controls, especially at land borders, can delay or even discourage cross-border trade and commuting to work. In any case, passport checks are becoming less cost-effective as a means of controlling illegal immigration and crime, given the rising numbers of people crossing borders

<sup>1</sup> See Ben Tonra 'The Politics of Justice' in Gavin Barrett (ed), *Justice Co-operation in the European Union*, Institute for European Affairs, 1997

for commercial or leisure reasons. Without a huge increase in resources, national immigration authorities would be unable to maintain effective standards of control.

## Factors driving JHA co-operation

There are four factors driving forward European co-operation in justice and home affairs.

### *A common approach to migration*

With free movement between member-states there has to be a common approach to admitting people to their territory. That means common visa, immigration, asylum and border-control policies. For the countries

most exposed to migration and refugee flows, this is an attractive prospect: EU-level policies on immigration and asylum are a first step towards sharing out migrants between member-states.

As the Austrian government observed in an EU strategy paper on migration which it produced in 1998, immigration to Western Europe at the end of the eighties and early nineties reached levels unprecedented since the Second World War. This was in large part the result of the collapse of Communist regimes in Eastern Europe and of the war in the former Yugoslavia. During this period almost ten million people left their homes and about four million entered Western Europe.<sup>2</sup> Between 1990 and 1996 nearly 1.5 million people applied for asylum in Germany alone. Germany has provided protection for by far the largest number of refugees from the wars in Bosnia and Kosovo. Austria, the Netherlands and Sweden have also received disproportionately large numbers, while France, Spain and Italy have taken relatively few.

<sup>2</sup> *Austrian Presidency's draft strategy paper on immigration and asylum policy, July 1998*

### *A single market in crime*

The increase in travel and trade since the end of the Cold War, coupled with advances in communications and information technology, has encouraged the globalisation of crime. Within the EU the success of the single market and the opening of borders has highlighted the need for rapid and substantial co-operation in law enforcement. The free movement of goods, services, capital and people provides new market opportunities for crime as well as for legitimate business. Deprived of the prop of internal border controls, governments will have to develop police and judicial co-operation so that they can better investigate and prosecute cross-border crime.

### *The prospect of enlargement*

The prospect of bringing the countries of Central and Eastern Europe into the EU is a further incentive to JHA co-operation. The breakdown of law and order in Russia since the collapse of the Soviet Union has led to the spread of violent organised crime across the region. With the opening-up of borders in Central and Eastern Europe, it is becoming easier for such organisations to establish operations throughout the continent. And many of the former Communist-bloc countries have had to establish completely new law-enforcement systems. So it is not

surprising that EU citizens, when questioned about enlargement, fear for the capacity of authorities in Central and Eastern Europe to tackle organised crime. In a *Eurobarometer* survey of public opinion across the EU in autumn 1998, 92 per cent of respondents regarded control of organised crime as a priority for countries wishing to join the EU, second only to the respect of human rights and the principles of democracy.

Some governments believe that by developing an *acquis* (a body of European rules) in police and judicial co-operation, the EU will be able to impose certain standards of law enforcement on applicant countries, which have to comply with all EU measures before they can join. The hope is that the applicants, equipped with some EU-harmonised rules and procedures, the best available techniques and expertise, and efficient mechanisms for cross-border co-operation, will be better able to stem the flow of organised crime. This is certainly a strong factor in French and German support for greater JHA co-operation.

### *A people's Europe*

National governments and EU institutions alike increasingly view JHA as one of the more popular forms of EU-wide co-operation. The fight against crime and a curb on illegal immigration are ubiquitous pledges among politicians seeking popular approval, and people are well aware that law enforcement requires national authorities to co-operate. For the UK courts to have the chance to try the suspected murderer Kenneth Noye—for a while tagged by the British media the country's most wanted suspect—Scotland Yard had to rely on the Spanish police to arrest him, and on the Spanish courts to ensure he was extradited.

In the same 1998 *Eurobarometer* survey, 89 per cent of respondents thought that fighting organised crime and drug trafficking should be EU priorities, and 72 per cent believed these were issues for joint EU (rather than national) decision-making. Paradoxically JHA integration has important implications for national sovereignty and civil liberties: few areas of public policy can be more central to the concept of state sovereignty than the right to determine a person's entry on to sovereign territory and the ability to maintain internal security.

## Progress towards co-operation

### *The slow birth of Schengen*

The sensitivity of law-and-order issues and the secrecy surrounding much of the debate has meant that progress towards JHA co-operation has, until recently, been slow. EU home-affairs ministers rarely met until 1986, when they had to discuss the commitment under the Single European Act to remove internal border controls. Since the mid-seventies, the task of developing co-operation had been left to senior officials and law-enforcement officers—the so-called Trevi group. Trevi played a crucial role in breaking the taboo of European co-operation in matters of internal security and in improving contacts between national ministries. It also set the tone of JHA co-operation for years to come: informal, inter-governmental (being conducted outside the framework of the EU) and secretive.

These were also the characteristics of Schengen. The birth of the Schengen system was long and slow, hampered by logistical and political difficulties. Technical problems plagued the Schengen Information System, the intelligence database vital to immigration control at external borders. The French government was initially hostile to the prospect of foreign police engaged in ‘hot pursuit’ across its borders. For a while, France refused to implement parts of the Schengen agreement because of a long-running dispute with the Netherlands about Dutch drugs policy; it has also, on occasion, unilaterally re-imposed controls at the Belgian border to try to stop smuggling. The convention finally came into force in March 1995, but some states are still in the process of implementing parts of it.

### *A third pillar for JHA*

The first attempt to formulate a coherent EU policy on justice and home affairs was made at Maastricht in 1991. The result demonstrated the degree of sensitivity with which member-states continued to treat this whole area: the 1991 Treaty of Maastricht placed all JHA matters (apart from some visa issues)—asylum, immigration, border controls and co-operation between customs, police and judicial authorities—in a new ‘third pillar’, as opposed to the first pillar of normal EU business and the second for foreign policy. Henceforth JHA policy-making would take place within the European Union framework, but would remain inter-governmental; all decisions were to be made by unanimity in the Council of Ministers.

These institutional arrangements, and the complicated administrative procedures that flowed from them, have often been blamed for the subsequent patchy progress. The Commission was unable to drive forward the policy agenda as it does elsewhere in the EU, because of the limits placed on its role. There were no suitable legal instruments to facilitate co-operation: conventions—in effect international treaties—require national ratification by all signatories, which often takes years. The exclusion of the European Court of Justice (ECJ) from JHA matters meant that there was no mechanism for judicial review of EU agreements, or to ensure that member-states fulfilled their obligations promptly.

But the slow progress was also due to a lack of political will. Even in those countries that were committed to further integration there were (and still are) real domestic sensitivities about various aspects of JHA. One of the biggest shortcomings of the Maastricht arrangements was the failure to produce a list of policy objectives that could be used as a putative work programme. Instead there were only ‘matters of common interest’. That meant that each member-state tended to focus on its own particular bugbear during its six-month presidency of the EU. Thus for the Dutch

<sup>3</sup> *Val Flynn, ‘Europol—a watershed in EU law enforcement co-operation?’ in Gavin Barrett, ibid*

it was tackling the illegal arms trade; for Belgium child pornography; and for the Irish drug trafficking. EU policy-making was not conducted on the basis of a coherent strategy but according to the ‘politics of the latest outrage’.<sup>3</sup>

Under the Maastricht arrangements, JHA ministers did manage to produce hundreds of texts and dozens of joint positions and resolutions. Several conventions—the real legislative instruments—were also agreed, but only a few, such as the Europol convention, were ratified by all member-states, as is required before they can come into effect. The success of co-operation, however, should not be judged purely at the level of legislative activity. JHA is, more than most areas of EU policy, about promoting co-operation on the ground. In 1993 Kenneth Clarke, then Britain’s home secretary, famously declared that he had not bothered to read the Maastricht treaty. Meanwhile, his officials and law-enforcement officers were busy forging closer links with their European counterparts.

### *A leap forward at Amsterdam*

Reform of JHA co-operation became a principal theme of the inter-

governmental conference (IGC) of 1996-97. The Commission called for the free-movement policies—border controls, asylum and immigration—to be brought into the sphere of normal community business (the first pillar), which would allow the full involvement of the Commission, Parliament and Court, and possibly the use of qualified majority voting (QMV) for all decisions. But it felt that the delicate issues of police and judicial co-operation in criminal matters should remain in the inter-governmental third pillar.

Nearly all member-states had their own national sensitivities and political concerns, which are reflected in the numerous exemptions in the final wording of the Amsterdam treaty. Germany, Austria, the Benelux nations and Italy all favoured the proposed transfer to the first pillar; Britain and Denmark wanted to retain the inter-governmental third-pillar arrangements. France initially had reservations about transferring the free-movement aspects and, along with Finland and Greece, was reticent about incorporating the inter-governmental Schengen arrangements. Eventually these countries agreed to the transfer, but not until France's fears about the possible interference of the ECJ in matters of internal security had been allayed. Ireland also found itself in a tricky position. As the UK was determined to maintain its right to exercise passport controls, thereby opting out of the EU's free-movement provisions, the Irish were forced to do likewise. This was not for ideological reasons, as the Irish were keen to reassure their European partners, but in order to preserve the common travel area which allows for passport-free movement between the UK and the Irish Republic; 70 per cent of people travelling from Ireland are UK-bound.

In the last few weeks of the inter-governmental conference three factors helped the negotiators overcome these enormous differences of view. First, the newly elected Labour government brought a more flexible British attitude to the negotiating table. Tony Blair was, in fact, as committed as his predecessors to maintaining border controls. But in return for a watertight legal guarantee of Britain's right to continue its passport checks, plus the possibility of opting in to any of the JHA provisions at a later stage, the British accepted the transfer of free-movement issues to the first pillar. Second, Germany suddenly retreated from its commitment to the extension of QMV into these areas. Even though parliamentary elections were still 18 months away, Helmut Kohl was coming under considerable

pressure from his *Länder* (state) governments not to hand over more authority to Brussels. The German *Länder* have considerable immigration and internal-security powers, which they did not want diluted, especially if that would further expose Germany to immigration pressures. Third, the final text of the treaty was riddled with opt-outs and special arrangements which managed to accommodate the many national interests and sensitivities of the member-states.

The compromise agreed in the Amsterdam treaty shifted half of JHA—namely free-movement issues and judicial co-operation in civil matters—into the first pillar. In theory this will give policy-making greater coherence, clarity and momentum, and will push member-states into faster, more effective action. Police and judicial co-operation in criminal matters were left in a revised but still inter-governmental third pillar. The Schengen *acquis*—the original agreement, the convention, and all subsequent decisions on immigration, border controls, police and judicial co-operation—was incorporated into the EU framework, and subsequently split between the first and third pillars to match the appropriate parts of the treaty. The various bits of JHA are bound together under a new treaty objective:

*To maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.*

Not all first-pillar procedures, however, will apply to policies on borders, asylum and immigration. For five years all policy decisions will continue to be taken by unanimity (except on short-term visa issues, which have been subject to QMV since the Maastricht treaty). Thereafter member-states can choose to switch these policy areas to QMV and a full legislative role for the European Parliament, but only by a unanimous vote. Also, the Commission will for the first five years have to share with member-states the right to initiate legislation, so that it is unable to dominate the policy-making agenda in its usual fashion.

Policy-making on free-movement issues is now subject to better judicial control and to slightly more parliamentary oversight. The Maastricht

third-pillar mechanisms were condemned for not being transparent and for not allowing individuals to seek redress for human-rights infringements by way of judicial review. It is precisely for these reasons that some governments were, and remain, extremely wary of allowing too much say for the Parliament in policy formulation, and for the Court in its interpretation. So under the free-movement provisions of the Amsterdam treaty, the Council of Ministers is obliged merely to consult the Parliament, which then has up to three months to respond. The new powers given to the ECJ are also restricted. Partly through Dutch insistence, only the highest national courts will be able to request a preliminary ruling from the Court. This should limit the number of asylum and immigration cases referred to it. Neither will the Court have jurisdiction over measures to remove internal border controls that may relate to the ‘maintenance of law and order and the safeguarding of internal security’. In other words the Court will be unable to outlaw the re-imposition of border controls.

The UK and Ireland secured an opt-out from the free-movement provisions. They also won the right to opt in to aspects of immigration and asylum policy. In fact that right is not absolute: if London or Dublin wants to join in any pre-Amsterdam aspects of the Schengen arrangements, such as the Schengen Information System, they will need the unanimous consent of the other member-states (see Chapter 4 below). This will allow any single country to block their participation, a provision that will almost certainly cause Britain great difficulties. Indeed Spain has already hinted that it might oppose the UK’s request to join the Schengen Information System.

Under the Amsterdam treaty, police and judicial co-operation on criminal matters remains inter-governmental and subject to unanimity, but improved legal mechanisms and decision-making procedures should make co-operation more efficient. As with policy on borders, immigration and asylum, the European Parliament takes on a new consultative role. The Court is also given new powers. Some member-states are hostile to the prospect of ECJ jurisdiction over aspects of national law-enforcement policy, so the Court’s role is heavily constrained. First, the Court will only have jurisdiction where a member-state concurs. Second, governments can stipulate whether all their national courts will be allowed to request a ruling, or just their highest courts. Third, the Court will not be able to review the validity or proportionality of operations carried out by the

law-enforcement agencies of member-states, or of other actions undertaken to maintain law and order or to safeguard internal security. This latter restriction in effect provides member-states with a blanket exemption.

The treaty also clearly describes what co-operation between national governments and their agencies might consist of, and it lists the types of crime this co-operation will be used to tackle: terrorism, trafficking in persons, offences against children, drug trafficking, illicit arms trafficking, corruption and fraud. This should make it much easier for the EU to take a more coherent and strategic approach to co-operation in the fight against organised crime and terrorism.

JHA policy-makers are having to think long and hard about how to make the proposed area of freedom, security and justice a reality. In December 1998 the EU approved an action plan, which lists the main policy priorities and how they might be achieved in the next five years. The plan is huge, and highly ambitious, given the need for unanimity in decision-making and a likely staff of no more than 150 in the Commission's new justice and home affairs directorate. There are high hopes that the special European Council on JHA at Tampere in October 1999 will formulate a more coherent political strategy, and give some impetus to this new area of EU policy-making.

## 3 Free to roam within Fortress Europe

### **In search of a migration policy**

Now that the EU has the means to develop common policies on border controls, immigration and asylum, attention has begun to focus on what kinds of rules it will create. The overall direction of EU policy and speed of its evolution is unclear. Yet this policy will not only determine the way in which member-states deal with foreigners wishing to come to the Union, but also help to define the type of European Union that will evolve in the 21st century. Europe could become a fortress behind an external frontier impermeable not only to illegal immigrants but also law-abiding migrants and asylum-seekers. Or it could embrace immigration, and with it an open, multicultural, multi-ethnic society, and it could protect refugees and develop a more coherent and long-term approach to migration and its causes. Given its ageing society, the EU may need to import large numbers of immigrant workers during the next few decades to serve its economic needs. If the EU tries to address the root causes of migration, a long-term, co-ordinated migration strategy centred on socio-economic development, the promotion of human rights and conflict prevention could be the centrepiece of the EU's common foreign and security policy.

The purpose of this chapter is to outline the main features of the EU's policy on border controls, asylum and immigration, and to examine how they might develop. It will also highlight some of the inherent tensions and contradictions in this new field of EU policy. Internal free movement comes at the cost of both tougher external controls and greater local checks, such as in the workplace. The EU now has a common external frontier, but for some countries it is much more difficult to enforce than for others. While in some ways the EU resembles a Fortress Europe, its external frontier controls may, in places, be unenforceable. The explosion in the number of asylum-seekers coming to Western Europe has forced political leaders to reconsider any liberal commitment they may have

had to offer protection to asylum-seekers at any cost. All member-states have agreed that there should be an EU policy on migration, but some are not willing to share the refugee burden, which for others is one of the fundamental aims of transferring this policy to the EU level.

Despite the strengthened decision-making powers in the Amsterdam treaty, progress could be slow. Decisions will still be taken by unanimity, and immigration is a highly sensitive policy area for all EU governments. Although most member-states have signed up to an area of free movement, some still seem reluctant to accept that this implies the need for EU-level immigration and asylum policies, especially if in consequence they are forced to accept greater numbers of migrants. Thus it is likely that the EU will end up with tighter controls on immigrants and asylum-seekers, as this may be the only type of EU policy that reluctant governments will accept.

However, the dominance of centre-left governments in the EU suggests that member-states may be less conservative on immigration questions than they once were. At least they recognise, according to some officials in the Commission, that a zero-migration policy is impossible. This makes it more likely that the EU will embrace the three-pronged approach to asylum and immigration policy first outlined by the Commission in 1994. This comprises: activities to counter migratory pressure; common border and visa policies; and a strengthening of the position of legal immigrants. If heads of government were to endorse this 'joined-up' approach to migration at their special summit in Tampere, it could set a clear policy direction for the Union.

### **Strengthening the external frontier**

Schengen did not so much abolish frontier controls as shift them away from internal borders. The external frontier has, in theory, been strengthened; co-operation between national police, customs and immigration authorities has been enhanced; and the powerful Schengen Information System database (as it involves police co-operation, the SIS is discussed in Chapter 3) is up and running. Internal controls have also been strengthened in certain respects: police and immigration officials may carry out random checks within 20km of the border, while hotel and campsite guests have to register their nationality and provide proof of their identity. National authorities remain free to determine their own domestic systems of control, such as identity cards and employment checks.

Member-states are expected to enforce their borders with third countries—now the common EU external border—according to uniform standards laid down in a confidential manual. The rules include minimum standards of control and surveillance of the external border, as well as common procedures for dealing with immigrants and refugees. Non-EU citizens are subject to rigorous checks on their travel and visa documents, the purpose of their visit, and whether they have adequate means of support for their stay.

But whether controls at the common frontier are truly effective is one of the biggest uncertainties about the viability of the Schengen area. When Italy was unable to prevent the entry of Albanian illegal immigrants during 1997, the French government temporarily re-introduced passport controls along its Italian border. There are fears that Greece, given the difficulties of enforcing its external border, will become a convenient entry point for illegal immigrants. Of particular concern are Greece's porous borders with Albania and Turkey, two of the most important sources of illegal immigrants, which are also transit states for refugees.

Since 1995, when the Schengen arrangements came into effect, anecdotal evidence suggests no great increase in illegal immigrants crossing the defunct internal borders. France and the Netherlands, for example, have not experienced a flood of illegal entrants. This is in part because the removal of passport controls at common borders has allowed national immigration and law-enforcement authorities to concentrate on other forms of control. In particular there is a much greater reliance on intelligence and surveillance techniques, and therefore on cross-border co-operation between law-enforcement authorities. The Schengen states have already started a process of peer review of their external border controls—a small revolution for such a sensitive policy area. This will help to highlight weaknesses and encourage improvements, and it is an initiative the Commission should encourage and bolster, given its role as enforcer of EU rules.

### **Enlargement and the external frontier**

The EU today has a long land border to the east with Poland, the Czech Republic, Slovakia, Hungary, Slovenia and Russia. Apart from Russia, these countries will most likely join the Union within the next five or six years, and their border-control standards are already being strengthened

as a condition of membership. But when they do join, they will undoubtedly face physical as well as political difficulties in enforcing rigorous controls on their own external frontiers.

A number of the applicant countries have borders that are difficult, if not impossible, to enforce fully. In an enlarged EU with no internal border controls, whoever enters Polish or Hungarian territory will be able to travel unhindered to Berlin or Paris. During much of the nineties (although to a lesser extent today), Poland and other Central and Eastern European countries became transit states for illegal immigrants from all over the world. Upon Poland's membership, likely within the next five years or so, its eastern edge will become the EU's external frontier: 1,000km of border with Russia, Lithuania, Belarus and Ukraine. Much of this territory is sparsely populated. Border guards will have to be concentrated in the remote and poorer eastern areas—and will need strong incentives to move there. And, as with other law-enforcement officials, they will need decent pay to deter them from becoming corrupt. To create even a semi-porous border is going to require a huge amount of money, and Poland's difficulties are replicated throughout Central Europe.

One way of strengthening Poland's frontier controls would be to erect border fences. But a 1,000km fence would inevitably be seen as another Berlin wall dividing the continent, and would reinforce the political impression that the EU was constructing Fortress Europe. Poland also has visa-free travel arrangements with Lithuania and Ukraine, and limited visa restrictions on Russians and Belorussians. The imposition of a full visa regime, in compliance with EU rules, will undoubtedly weaken Poland's otherwise close relations with these countries.

Enlarging the EU's area of free movement will also exacerbate the problem of minority populations in Central and Eastern Europe. When Hungary joins, its citizens will be able to travel freely around the Union. But the large Hungarian minorities in neighbouring Slovakia, Romania and Serbia, which have traditionally enjoyed visa-free travel to Hungary (as have all Romanians, Slovaks and Serbs), will in theory be subject to visa requirements. This is a matter of acute sensitivity for the government in Budapest; it may wish to negotiate some sort of derogation from these rules until its neighbours join the free-movement

area. In fact it may turn out that Hungary and other applicants will not join the area of free movement straight away, especially if existing EU members insist on a transition period before nationals of new members have full access to the EU labour market.

Some observers see JHA co-operation as a hurdle too high for the aspirant members of Central and Eastern Europe, and speculate that perhaps it has been set deliberately so, to delay enlargement. In fact most prospective members are committed to close co-operation because they see the potential benefits for their own law-enforcement efforts. But JHA is a moving target, and can operate with an unhelpful degree of secrecy. The applicant countries are expected, for instance, to meet Schengen border-control standards in order to join the EU; yet for a long time they were not allowed to see the confidential manual that set those standards.

During the mid-nineties, when the EU and the applicant countries were engaged in a 'structured dialogue' about criteria for membership, discussions on JHA were described by some participants as 'neither structured, nor a dialogue'. Latterly the Commission has taken a more coherent approach, assessing each applicant's needs and identifying areas that require most attention. It has also agreed that perhaps €150 million a year (10 per cent of the EU's PHARE aid programme for Eastern Europe) will go towards developing good governance, especially law enforcement. This will help fund training programmes and the exchange of best practice. To date the Commission has stopped short of making funds available for the operations of law-enforcement authorities. But as enlargement draws closer, it may come under pressure to do so.

### **Controlling immigration**

The first line of immigration control is not in fact the external border but the overseas embassies of the EU's member-states, where officials process visa applications. Until the Amsterdam treaty came into effect, the Schengen states had operated a system of mutual recognition of visas. Officials will begin to issue a uniform EU visa, according to common rules for each category of visitor. The conditions for issuing visas are likely to be strict. The EU has recently tightened up rules on short-term visits. The list of countries whose nationals require a visa for stays of up to three months—a list that the EU first drew up in 1995—was expanded in March 1999 to 101 countries.

Visa policy, of course, can only hope to control those who choose to take a legal route. A considerable amount of JHA co-operation will be devoted to measures to combat illegal immigration. The prospect of tightening up the rules at a European level is one way in which national politicians can sell the concept of surrendering national control over immigration. The Austrian presidency's draft migration strategy paper estimated that one million people, including refugees, legal and illegal immigrants, migrate to the developed world every year. It concluded: 'It must now be assumed that every other immigrant in the first world is there illegally.'

It is, unsurprisingly, difficult to provide accurate figures on the presence of illegal immigrants in EU member-states. Even if such statistics exist, national administrations are reluctant to publish them, both for domestic political reasons and to avoid the possibility of accidentally encouraging more illegal entrants (for instance by revealing the country to be a soft target). An essential task for the Commission is to draw together its own reliable statistics and to make member-states produce credible information. But whether or not the Austrian estimate is valid, no country in the EU would claim that it did not have a problem with illegal immigration of one sort or another.

The EU will need to fight illegal immigration on a number of fronts. Criminal gangs engaged in organised trafficking of human beings are an increasingly significant source of illegal immigration. The International Organisation for Migration, a Geneva-based NGO, estimates that organised traffickers may be responsible for the movement of up to one million people at any time in a multinational business with a global turnover of €7 billion. Europe's immigration and criminal intelligence authorities will have to work together closely to tackle this problem, and combating these networks has been officially added to Europol's list of tasks. The EU is also trying to establish common rules on carrier liability (penalties on airlines that carry passengers without the correct papers), and on arrangements for deportation. And it will negotiate re-admission agreements with third countries to make sure they take back nationals of theirs who have entered the Union illegally.

But the member-states will need to complement these activities by strengthening the rights of immigrants who have chosen the legal route into the EU. This will provide a greater incentive to future potential

migrants to travel the legal way. EU citizens have the right to move freely around any part of the Union, but nationals of third countries (ie, non-EU citizens) who are legally resident in one member-state may travel to another for a maximum of three months only. Under the Amsterdam treaty the EU will be able to set the rules on long-term residence and the conditions under which non-EU nationals resident in one member-state may live in another. This is tricky terrain for national governments: it could, for instance, give Germany's immigrant communities similar rights to other EU citizens to live and work in France. But if the Union wants to eliminate unfair discrimination, it should give equal rights to work and travel in the EU to non-EU citizens who were either born in an EU member-state or have been legally resident there for, say, ten years. If the EU were to confer on long-term resident third-country nationals the same rights as enjoyed by EU citizens, it would go a long way towards dispelling the perceptions of difference that fuel racism and xenophobia. Ultimately this may require similar rules on naturalisation in each member-state. Why, after all, should the millions of people of Algerian descent who have become French citizens, have different rights within the EU from the millions of people of Turkish descent living in Germany who have not become Germans?

### **The status of refugees**

As part of a coherent migration strategy, the EU will have to develop a common approach to the protection of refugees. During the late eighties and early nineties the numbers seeking asylum in Western Europe rocketed, largely as a result of war in the former Yugoslavia. Refugee flows have declined since their 1992 peak, but the recent war in Kosovo once again displaced hundreds of thousands more in the Balkan region. In addition, member-states are receiving increasing numbers of asylum-seekers from other points of the globe.

There are two motivations for pursuing a common EU asylum policy. First, as the table on page 20 shows, there is a very uneven spread of refugees between EU countries. Germany has consistently received the most, but others, notably Austria, Sweden and the Netherlands, have also taken disproportionate numbers. These countries therefore take on a financial and administrative burden, and also risk increased political tension such as the rise of far-right political parties or outbreaks of racist violence. The uneven spreading of the burden also leads to the danger of

### EUROPEAN ASYLUM APPLICATIONS (1989-JUNE 1999)

	1989	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999*
Austria	21,882	22,789	27,306	16,238	4,744	5,082	5,920	6,991	6,719	13,805	10,162
Belgium	8,188	12,945	15,444	17,398	26,281	14,456	11,648	12,412	11,575	21,965	12,654
Denmark	4,588	5,292	4,609	13,884	14,347	6,651	5,104	5,893	5,100	5,699	3,327
Finland	179	2,743	2,137	3,634	2,023	836	854	711	973	1,272	1,068
France**	61,422	54,813	47,380	28,872	28,466	25,884	20,415	17,405	21,416	22,375	12,984
Germany***	121,318	193,063	256,112	438,191	322,599	127,210	127,937	116,367	104,353	98,644	46,516
Ireland	N/A	N/A	N/A	39	91	362	424	1,179	3,882	4,626	1,975
Italy	2,240	3,570	24,490	2,589	1,571	1,844	1,752	681	1,712	6,939	3,268
Netherlands	13,898	21,208	21,615	20,346	35,399	52,576	29,258	22,857	34,443	45,217	17,431
Norway	4,433	3,962	4,569	5,238	12,876	3,379	1,460	1,778	2,277	8,277	4,450
Spain	4,077	8,647	8,138	11,712	12,645	11,901	5,678	4,730	4,975	6,639	4,001
Sweden	30,335	29,420	27,351	84,018	37,581	18,640	9,047	5,774	9,619	12,844	5,094
Switzerland	24,425	35,836	41,629	17,960	24,739	16,134	17,021	18,001	23,897	41,302	30,127
UK****	16,775	38,195	73,400	32,300	28,000	42,201	54,988	37,000	41,500	58,000	30,447
<b>Total</b>	<b>313,760</b>	<b>432,483</b>	<b>554,180</b>	<b>692,419</b>	<b>551,362</b>	<b>327,156</b>	<b>291,506</b>	<b>251,779</b>	<b>272,441</b>	<b>347,604</b>	<b>183,504</b>

\* Figures are for the first six months of 1999 only

\*\* The French data do not include accompanied minor dependants

\*\*\* The German data refer to principal applicants and do not include dependants

\*\*\*\* The yearly data for the UK (except for 1996) have been adjusted to include dependants

SOURCE: IGC-GENEVA, 1999

a ‘Dutch auction’ in which each member-state tries to outbid its neighbours in imposing ever-tighter restrictions on refugees. No member-state wants its asylum regime to be much more generous than those of its neighbours, for fear of being inundated with asylum-seekers.

Second, as governments throughout the developed world have tightened up their immigration rules, asylum has become one of the principal means of migration into the EU. In some EU countries asylum-seekers account for the majority of migrants. Of course, a proportion of these are genuine refugees. But national governments are also concerned about apparently large numbers of ‘economic migrants’ who abuse the asylum system in order to gain entry and residence. Thus the EU will face the same difficult challenge that national authorities are currently confronted with: developing an asylum policy that provides protection and decent standards of welfare for genuine refugees, but one that is secure against exploitation by ‘bogus’ asylum-seekers.

The main existing feature of EU co-operation on asylum policy, the 1990 ‘Dublin Convention’, should in theory help to address these two problems. It introduced rules to ensure that an asylum-seeker’s application would be dealt with at the point of entry to the Union. Its aim is twofold: to make sure that member-states take responsibility for refugees who seek their protection, and to stop asylum-seekers from ‘shopping around’ in other countries once their application has been turned down by one national authority. However, at present the convention is flawed in two ways. First, there is a technical problem: it is practically impossible to determine which member-state an asylum-seeker bereft of passport or travel documents (as many are) entered first. The Commission hopes to solve this problem in part with its proposed directive which will set up a database and fingerprint system for asylum-seekers and immigrants. The second problem is more fundamental: if an asylum-seeker arrives in Italy but indicates to the authorities that he wishes to travel on to Britain or Germany to lodge his claim, what incentive is there for the Italians to deal with his application? Indeed, if the convention were to work perfectly, the southern and eastern EU member-states, closest to unstable regions, may end up carrying a very disproportionate burden. Thus in the longer term, a mechanism for compensating the states that receive the most asylum-seekers may be the only way to make this system work.

## An EU asylum policy

Throughout the post-war era national governments have had international obligations towards asylum-seekers. Europe's own long history of co-operation started with the 1951 Geneva Convention on the Status of Refugees. This was supplemented by the 1967 New York Protocol, which extended the Geneva provisions to the rest of the world. Signatories to the convention, which include all EU member-states, are required to offer refuge to a person who,

*owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.*

Not all member-states interpret and apply the Geneva convention in the same way, though. According to one group of NGOs: 'Some EU states' interpretation of the law has no basis in the wording of the 1951 Geneva

<sup>4</sup> *European Council on Refugees and Exiles, 'Guarding Standards, Shaping the Agenda', April 1999*

convention, is not in the spirit of that convention and is in contradiction to United Nations High Commissioner for Refugees' official advice.<sup>4</sup>

Differing definitions of 'refugee' create different levels of protection and an uneven sharing of the responsibility. And most member-states have a range of statuses to confer on refugees, with varying socio-economic and judicial rights. In particular member-states differ sharply on whether to award refugee status (which confers full legal protection and access to social security and the labour market) in cases of persecution by non-state agents, such as war lords, paramilitary groups or mafia organisations. Germany, for example, does not confer refugee status on asylum-seekers from Somalia, whereas the UK does.

Under the Amsterdam treaty the EU has the power to establish 'minimum standards with respect to the qualification of nationals of third countries

as refugees'. Among member-states there is a growing conviction that the Geneva convention on refugees is out of date. The Austrian migration paper commented: 'It was unquestionably geared to refugees who were displaced by authoritarian government regimes (of the communist world or less-developed states), but it is not at all geared to the displacement by inter-ethnic conflicts or to coping with illegal immigration from many crisis regions, especially in the third world.'<sup>5</sup> Thus some EU governments think that the Amsterdam treaty provides an opportunity to create EU measures that replace, amend or supplement the Geneva convention.

*<sup>5</sup> Austrian Presidency's draft strategy paper on immigration and asylum policy, July 1998*

NGOs representing refugees do not share this view. They assert that there is plenty of scope yet in the convention—it is just the interpretation of it that needs updating. And they fear that governments will use the drawing-up of an EU-wide interpretation as a way to water down the convention. Indeed most EU governments have tightened up the granting of convention status to refugees. Increasingly refugees are instead granted a limited and discretionary status.

As the Austrians pointed out in their strategy paper, the proliferation of sub-state level threats is making it harder to check the veracity of any particular asylum claim. The original draft of the paper created controversy by suggesting that a new EU asylum policy be based on 'a political offer on the part of the host country', rather than on the established 'subjective individual right' of the refugee. In other words, a country would grant asylum to a refugee as a discretionary gesture of goodwill, rather than on the basis of a legal obligation to provide protection. Other governments have been less willing to voice such heresies, but the issue is very much at the heart of the debate on what kind of asylum policy the EU should develop. If the European Union considers itself a community of values that respects human rights, it should stand by its Geneva obligations and issue an updated interpretation of the convention that covers new forms of persecution.

The Amsterdam treaty also envisages minimum standards for the reception of asylum-seekers. This is another highly contentious area, given the wide variety of refugee rights and benefits across Europe, and the likely additional costs of any changes. In the Netherlands asylum-seekers are normally housed in reception centres. France makes cash

payments to them, for a strictly limited period. Some of the southern member-states make scant provision for reception or welfare. The EU is going to have to set standards that will establish a safety net for asylum-seekers, providing a minimum level of assistance while claims are being processed. Most national governments believe that payments should be made in kind via vouchers, rather than as cash benefits, so that they do not become a financial incentive to economic migrants. This type of arrangement exists in Germany, and is being introduced in Britain.

A uniform definition of a refugee, common procedures and minimum standards of reception will all help to create a level playing-field and a co-ordinated approach to the protection of refugees. But some countries will continue to carry a disproportionate burden. The Commission has proposed the creation of a European refugee fund to assist those member-states that receive the largest numbers of asylum-seekers. But the fund has a small budget, €12m a year, allowing it to finance only a series of pilot projects. It would need hundreds of millions of euros to provide realistic financial compensation for the countries that have to cope with the largest numbers of refugees.

### **Temporary protection and burden-sharing**

The EU's most pressing refugee issue is temporary protection: the special status given to large groups of displaced people who are unable to return safely to their country of residence. Unlike asylum-seekers who have to apply individually, those people eligible for temporary protection are given refugee status, albeit a lesser one, *en masse*. The Commission has been trying since 1997 to set up a temporary protection regime, a task that was injected with a new sense of urgency by the war in Kosovo and the displacement of close to a million people to neighbouring countries. Its proposal would oblige member-states to give residence to a certain number of these de facto refugees, and would set minimum standards such as access to social security, education and housing, and permission to work. The Council would then decide, by QMV, which area or country's inhabitants qualified for temporary protection and for how long. Member-states would also jointly decide when to terminate the protection regime and organise the return of its beneficiaries.

Member-states have been unable to agree on the Commission proposal. Among several points of contention, the biggest obstacle has been the

insistence of some countries such as Germany and Austria (as well as the European Parliament) that any temporary protection regime should include a mechanism to ensure burden-sharing among member-states. Spain is opposed to burden-sharing in principle. Britain and France are also against it, although the French might contemplate some sharing, as long as it was of costs rather than numbers of people. Evidently domestic political sensitivities about immigration are an issue, but France and Britain consider that each situation should be treated on its own merits. They argue that they may make heftier contributions—military commitments in Bosnia and Kosovo, for example—that would not be reflected in a simple formula.

The Commission has been unable to forge a compromise and the burden-sharing proposal has stalled. Furthermore, the Kosovo experience showed that, despite the initial hesitation of some countries, the EU was able to provide protection to large numbers of displaced people without resort to a rigid formula. During the war the UNHCR, working bilaterally with national governments, sought 61,000 places for refugees within the EU. By the end of the conflict 56,000 refugees had been placed.

Europe does need to work out how to respond more coherently to refugee crises caused by sudden upheavals. That would enhance the status of the EU as a community of values, based on human rights and social justice. A common EU regime on temporary protection would enable the Union to respond quickly and collectively to emergencies, when individual treatment of asylum applications is inappropriate. But it is unlikely to come about until the member-states can agree on the need for some sort of burden-sharing mechanism, or until common EU policies on asylum bring about a more even spread of conventional refugees across the EU. In the meantime, the EU will need to find a way of dealing with emergencies on a case by case basis through discussion among member-states and with the UNHCR.

### **A long-term strategy on migration**

The EU's asylum and immigration policies, predictably, emphasise restrictive measures. After all, it is much easier for governments to swallow harmonisation of these policies if the net result is tighter controls. National authorities are also aware of the need to reduce the 'pull' factors that might encourage people to enter illegally; hence their attempts to

shorten asylum approval procedures from years to months, and the shift from cash payments to benefits-in-kind for those awaiting approval. Reassuringly, however, the EU is beginning to look also at how to reduce the ‘push’ factors that cause migrants to leave their homes in the first place.

An effective migration policy will rest as much on EU relations with third countries as on maintaining strict controls at the EU’s external border. The Austrians’ migration strategy paper suggested that policy should be based on a model of concentric circles of co-operation. The EU would comprise the inner circle. The applicant states of Central and Eastern Europe would lie in the next circle. Once themselves significant sources of illegal immigration—there is still a problem of minority groups migrating to Western Europe—some have become gateways for illegal immigrants from other parts of the world. Their immigration controls, and in some cases their treatment of minorities, have yet to be brought up to EU norms. In the third circle, the former Soviet Union, North Africa and Turkey should be targets for EU co-operation to combat criminal gangs that are engaged in the organised trafficking of migrants. And the EU will have to work with a fourth circle of countries—in Asia, the Middle East and sub-Saharan Africa—to tackle the causes of migration.

The EU has already created a high-level working group on migration and asylum which includes both interior- and foreign-ministry officials. The group is drawing up action plans for Afghanistan/Pakistan, Albania and its neighbouring region, Morocco, Somalia and Sri Lanka. The aim is to present a ‘joined-up’ response to migration and its causes, taking in political relations, development policy, human-rights improvements, and co-operation to control illegal immigration and organised crime.

In the long term, if the EU wants to reduce migratory pressures, it will have to provide more development aid, debt relief and fair trade in order to alleviate poverty in the most under-developed parts of the world. The nascent common foreign and security policy will have to prioritise better standards of human rights and an end to the persecution of minorities. And, having learnt the lessons of Kosovo, the EU must grow the military and diplomatic muscle to prevent and, when necessary, to intervene in conflicts that threaten to displace large numbers of people.

## 4 Europe's single market in crime

### **New markets, new opportunities**

Crime is increasingly international, and it is big business. The United Nations' 1999 *Human Development Report* estimates the global turnover of criminal organisations to be €1,500 billion a year, considerably larger than Britain's gross domestic product. Narcotics account for 8 per cent of world trade, worth €400 billion, akin to the global trade in oil and gas.

The latest advances in transport and telecommunications, the liberalisation of capital markets and the removal of barriers to trade have all boosted commerce, and illegal business is no exception. Criminals are becoming more sophisticated, using the internet with encryption technology to organise their activities abroad and to launder the profits.

With the end of the Cold War, crooks have discovered new market opportunities. The internal collapse of some states, the criminal collusion of others and the opening-up of the former Communist-bloc countries have provided criminal organisations with new sources and routes of supply, and with a greater variety of products: narcotics, nuclear, biological and chemical weapons components, conventional arms, counterfeit goods, pornography, women and children. For example, there has been huge growth in the trafficking of women for sexual exploitation. According to the UN's *Human Development Report*, half a million women and girls from developing and transitional countries are entrapped in the sexual exploitation 'slave trade' each year in Western Europe alone.

It is, of course, difficult to evaluate accurately the impact of international crime in each country. It may be that five per cent of crime is truly international; but a much greater proportion will have an international origin or connection. Think of how the smuggling of heroin from Asia plays itself out on British inner-city estates through murderous turf battles between rival gangs of drug dealers, or the epidemics of burglaries committed by addicts desperate to raise cash for their next fix. The distinction between international and domestic crime is increasingly blurred.

This is particularly true of the European Union, where the abolition of customs and passport controls at internal borders gives new freedom to those engaged in international organised crime. They, too, now have a single market. But the 15 member-states of the EU have more than 120 police forces, dozens of separate legal jurisdictions, and different judicial and policing traditions, a situation that criminals are only too happy to exploit.

When it comes to investigating and prosecuting crimes committed in more than one country, law-enforcement authorities face a range of obstacles, legal as well as practical. Police often find it difficult to coordinate investigations with their counterparts in another country, or to ask for their help in gathering evidence or intercepting communications. Rules differ on the admissibility of evidence: the British judicial system relies on evidence being given orally by a witness in court, for example, but there is no way to compel a witness from abroad to travel and give evidence in a British court. Where inter-governmental agreements are in place, as with extradition, they are often slow and unwieldy. This is because in some countries the judicial authorities do not give them much priority. It may take months for requests to be processed, hampering investigations and prosecutions or, at worst, making them impossible.

There are also rules that restrict international co-operation. For example, there are many limitations on extradition. One authority may not be able to agree to another's request for extradition unless the offence concerned is legally identical in both countries (this is the 'dual criminality' principle). A number of member-states, such as France and Germany, will not extradite their own nationals—a hangover from the days when governments sought to protect their own citizens from the vagaries of foreign justice, or lack of it. Elisabeth Guigou, the French justice minister, has complained that Europe is trying to combat 21st-century crime with 19th-century legal instruments.

To tackle these legal anomalies and improve international co-operation, member-states may need to review some of the fundamental principles underpinning national law-enforcement systems. Prime among these is the principle of territoriality: that a particular jurisdiction is exclusive in any given territory (usually national but sometimes regional). Indeed, in an integrated European Union that is itself built upon the rule of EU law,

why can there not be greater respect for the law-enforcement decisions of other member-states?

Since co-operation in law enforcement cuts to the bone of national sovereignty, governments are likely to proceed with caution. In some countries the system of administering justice is based on legal traditions and civil liberties older than parliamentary democracy itself. Furthermore, police and judicial systems are the mechanisms that underpin the authority of the state. It is for these reasons that police and judicial co-operation remain under the third pillar in the Amsterdam treaty, where policy-making is inter-governmental. But the treaty does provide new scope for co-operation. It highlights three methods: closer co-operation between police forces and customs, directly and through Europol; closer co-operation between national judicial authorities; and the general alignment (approximation)—where necessary—of rules on criminal matters.

National governments are increasingly committed to European co-operation in the fight against organised crime. They all share the goal of creating a 'European judicial space', to ensure that the diversity of law-enforcement systems does not create havens for criminals. But they are unclear about what the term means in practice. Some policy-makers in the countries that are keenest on European integration, such as Belgium and Italy, would like to see greater harmonisation of law and procedure, culminating, eventually, in a single criminal justice system. Most governments know that this would take decades. At present no EU treaty allows for such full-scale harmonisation. But a 1998 study commissioned by the European Parliament recommended the creation of a uniform body of law and the appointment of a European public prosecutor to combat fraud against the EU budget. That study, known as *Corpus Juris*, is a reminder that the centralising, Cartesian approach still has its proponents.

The alternative approach, strongly favoured by Britain, is for a series of practical steps to facilitate co-operation between police forces and judicial authorities, and in particular to enable the mutual recognition of law-enforcement decisions made by other states. The debate between those who wish to centralise and harmonise, and those who wish to develop mechanisms to allow diverse systems to co-exist, will dominate the future of European co-operation in the fight against crime.

## **Police co-operation and the Schengen Information System**

Member-states have made considerable progress in closer co-operation among police forces, particularly in the context of the Schengen arrangements. Most controversially Schengen allows for 'hot pursuit' from one member-state to another. Police may chase someone who has been caught committing a crime, or who has escaped custody, into a neighbouring state, where they may be allowed to apprehend or detain—national authorities can set out their own conditions for hot pursuit. A formal arrest, however, must be left to the local police. Schengen also provides for various kinds of bilateral co-operation. It lays down rules on surveillance and operations such as the controlled delivery of drugs (where the authorities secretly monitor the crime). It makes detailed provisions for mutual assistance between law-enforcement authorities in criminal matters and extradition.

The centrepiece of Schengen's law-enforcement co-operation, however, is the Schengen Information System (SIS). The SIS is a network of national databases with a central secretariat in Strasbourg to ensure that information added by one member-state is accessible to all. There are 45,000 access points throughout the nine full members of Schengen. The SIS contains information on, for example, people sought for extradition, missing persons, stolen vehicles and individuals suspected of having committed or of being likely to commit 'extremely serious offences'. Under the Schengen agreement, if one member classifies a national of a third country as a threat to its public policy or national security, that person must be refused entry into any part of the Schengen area: these names are held on the SIS. All this makes it a powerful tool. It is also heavily used: by the end of 1997 it contained 14 million records; national authorities posted 5.5 million alerts in 1997 alone. Some speculate that the current system is overloaded and a second-generation information system will soon be needed.

It is clearly difficult to oversee effectively a very large database with so many access points and thousands of users authorised to enter and change records. This lends force to the fears of civil-liberty organisations that the SIS lacks adequate data-protection provisions and is open to abuse. The SIS is supposed to work according to national data-protection provisions, and individuals have the right to access their own files in

order to verify the accuracy of data. But human-rights groups believe the convention contains broad provisions that would block this right. The system has a central, 13-member supervisory body, but its powers are limited and it is under-resourced. Moreover, as the SIS sits within the EU's third pillar, there is limited scope for judicial review of its operations. If the public is to have confidence in European law-enforcement co-operation, the data-protection provisions for mechanisms such as the SIS will have to be improved. One answer would be to shift the SIS into the EU's first pillar and thus expose it to greater democratic and judicial control.

## **Europol**

The SIS has aided law-enforcement co-operation, but the birth of Europol, the European Police Office, has been altogether more tortuous. It was Helmut Kohl who, as German Chancellor, most vociferously supported closer police co-operation; his vision was of a European Federal Bureau of Investigation. In 1991 he proposed that a European Criminal Investigation Office be set up by 1993. Home-affairs ministers agreed to establish Europol in stages, starting with an analytical European Drugs Unit. Eight years on Europol has only just come into existence.

Europol is different from the SIS, which is a database of information on suspected criminals, stolen goods and illegal immigrants. Europol is a liaison body that collects, analyses and shares intelligence on international organised crime and terrorism in order to assist cross-border investigations. It is no FBI. It will have a staff of only 200 and an annual budget of €30m. It operates via national units (such as the National Criminal Intelligence Service in the UK) which supply information and intelligence upon request. Liaison officers seconded to Europol's headquarters in The Hague help with information exchange and the 'co-ordination of resulting measures'.

The aim is 'preventing and combating terrorism, unlawful drug trafficking and other serious forms of international crime where there are factual indications that an organised structure is involved'. While this is a broad remit, Europol is not an independent operational force. However, the Amsterdam treaty clarifies and expands its potential role. Member-states will have 5 years to introduce legislation enabling Europol 'to facilitate and support the preparation, and to encourage the co-ordination and carrying

out, of specific investigative actions by the competent authorities of the member-states, including operational actions of joint teams comprising representatives of Europol in a support capacity.’ And they will establish rules allowing Europol to ‘ask the competent authorities of the member-states to conduct and co-ordinate their investigations in specific cases.’

This latter role represents a significant extension of Europol’s power, signalling a shift from an information resource or database towards a body that instigates and co-ordinates investigations carried out by national authorities. Indeed Europol will itself undertake operations, in conjunction with national authorities.

Few policy-makers are calling for Europol to be given significant new powers beyond those in the Amsterdam treaty, let alone for it to become a European FBI. It will need some years to prove itself and develop a good relationship both with national authorities and with agencies outside Europe, such as the American FBI. It will take a number of years for the member-states to pass legislation giving Europol its full powers. The need for unanimity could make this a tortuous process. If Europol finds that its requests are not taken seriously by national police forces, a simple change to the treaty, replacing the word ‘ask’ (above) with ‘instruct’, would greatly increase Europol’s authority. But this in turn would require a greater role for judicial authorities, at both national and EU levels, in supervising Europol’s activities, just as public prosecutors oversee the work of the police in many European countries.

### **Judicial co-operation**

The advances in police co-operation highlight the need for parallel co-operation between judicial authorities. Police may be better able to work with their foreign colleagues, but they and the courts still face a range of obstacles to the conduct of cross-border investigations and prosecutions. If they need a witness summons, an order to compel somebody to produce evidence, a search-and-seizure warrant or an order to freeze assets, they may have to ask a court in another country to issue one. There are some international agreements, such as the 1959 Council of Europe Convention on Mutual Assistance in Criminal Matters, under which a judicial authority will consider a request for such an order coming from a central judicial authority in another country. But the processing of these requests is often so slow as to render them redundant.

Judiciaries have relatively little experience of co-operating with each other, and may be antagonistic to foreign jurisdictions, which they invariably see as inferior to their own. So to promote greater understanding the EU has created a European Judicial Network, a web of intermediaries in every member-state, with its own secure telecommunications system, to provide advice and points of contact on national legal questions.

In the fight against crime, administrative efficiency is as important as new institutional or legal arrangements. At the very least member-states need to do more to improve the way they deal with requests from abroad. One EU official pointed out that those countries whose ministers are keenest on centralisation and harmonisation, such as Italy and Belgium, are among the slowest and most bureaucratic in dealing with orders and decisions from other member-states.

In 1999 justice and home affairs ministers embarked on a process of peer review to examine how efficiently and rapidly each member-state processes requests from another's law-enforcement authorities. This process should be speeded up and the findings made public, so that JHA ministers have a chance of generating genuine political pressure for change. The open process of peer review, mutual surveillance and political pressure within the Council of Ministers has been used successfully to promote budgetary restraint and structural reform in the domain of economic policy. It should be used as a first step for improving judicial co-operation.

A lack of co-operation between judicial authorities could adversely affect Europol's task. In many member-states the courts have a significant role in the investigation and prosecution stages, sometimes overseeing police activities. So Europol operations carried out jointly with national police forces—such as telephone tapping, controlled deliveries of drugs, and so on—may require rapid judicial sanction in more than one state. One solution would be the creation of Eurojust, a Europol for judges. This would be a central body able to provide instantaneous approval for cross-border operations. Each member-state would delegate a judge, investigating magistrate or prosecutor to Eurojust. Their job would be to review and sanction any requests from Europol, or from national police forces, for operations in their own national jurisdictions, according to their own national laws. So, for example, a Europol operation involving

the controlled delivery of drugs in France and Belgium would receive simultaneous approval from the Belgian and French Eurojust representatives.

### **Approximation of law**

While administrative improvements and closer contact between national authorities will help, judicial co-operation can also be thwarted by legal differences between countries. Most member-states have 'dual criminality' requirements, whereby an offence must be the same in each country in order for a court to comply with a request from abroad. To overcome the hurdle of the dual-criminality principle, member-states will have to approximate certain aspects of their criminal law. Alignment may be particularly appropriate for multinational crimes (such as those involving mafia organisations or drug smuggling); crimes which, with new technologies, are easily committed remotely (money laundering, internet pornography); or for crimes committed in one country that have an EU-wide impact, such as counterfeiting of the euro. In practice this means, in the words of the Amsterdam treaty, 'establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and drug trafficking.' Member-states have already embarked on this route. They all agreed recently to create the same offence of participating in a criminal organisation, wherever in the EU that organisation is located or is active. But the approximation of criminal law will only happen very slowly, and in a piecemeal way, even with the new legal instruments provided by the Amsterdam treaty.

This has not stopped some policy-makers from aspiring to greater uniformity of legal systems. At the very extreme of the harmonisation route lies the concept of *Corpus Juris*, a single body of law and procedure to be applied in all member-states. This was the subject of a legal study commissioned by the European Parliament in 1997 to investigate ways of making the mosaic of criminal-law systems more equitable, more efficient and less complex. The study was confined to a specific element of criminal law: fraud against the EU budget. The report found that the only effective solution would be to unify the EU's criminal systems in this narrow area, introducing a single definition of the elements of a crime and of the penalties, and a uniform judicial procedure. Unification would require a European Public Prosecution Service to direct investigations and prosecutions. Cases would be heard in special national courts, but according to EU law.

*Corpus Juris* has provoked a predictable response from British Eurosceptics, who see it as another brick in the building of a single, centralised European state, robbing nations of their ancient freedoms. In fact *Corpus Juris* has done more to highlight the difficulties of harmonisation than to provide a blueprint for a system of European criminal law. In any case the EU has no competence to approximate judicial procedures, and is unlikely ever to have it. Nevertheless, policy-makers will continue to debate the merits of harmonisation and, in particular, the scope for a European Public Prosecutor to co-ordinate cross-border investigations and prosecutions.

### **Mutual recognition**

Even with administrative improvements, new mechanisms for mutual assistance and the piecemeal approximation of national laws, judicial co-operation is still likely to be hampered by many problems: delays, the lack of powers to enforce decisions, and legal restrictions. One way to leapfrog these obstacles would be through mutual recognition of judicial orders and decisions. This could mean eventually, for example, that a 'Eurowarrant' for the arrest of a suspect or fugitive would be issued by a court in Britain and then transmitted to Spain, where it would be immediately enforceable by the Spanish police. The Spanish courts would play no part.

The British strongly favour the principle of mutual recognition and have presented their EU partners with a discussion paper on the subject ahead of the European Council in Tampere. British officials point out that the single market was built upon the mutual recognition concept. Some EU member-states which have regional legal jurisdictions and even different legal systems (England and Scotland, for instance), manage to co-operate efficiently on this basis. The harmonisation of laws and procedures, even if politically acceptable as an objective, would take a very long time; so the EU will have diverse laws and legal procedures for many years to come. Mutual recognition overcomes the problems of diversity.

Mutual recognition cannot be achieved through a single all-embracing legal convention, but is rather a principle to be applied to various types of decision and judgement. The British are particularly keen to introduce it at the investigation and prosecution stages, where arrangements are most flawed, as well as after conviction. This could mean applying mutual recognition to arrest warrants, orders for the tracing and seizure of

evidence and for the freezing of assets. It would also help with the enforcement of criminal sanctions issued in another country or financial penalties against companies that have assets in the EU but not in the member-state where the crime was committed.

By definition mutual recognition would also do away with the dual-criminality requirement. This would greatly facilitate the process of extradition, the judicial process that allows a suspect to be arrested and returned to face trial in the state where the offence was allegedly committed. The point of extradition proceedings is to ensure that the suspect will receive a fair trial, and that the charge is a legitimate one. Therefore in the UK, under the 1989 Extradition Act, a magistrate has to check that there is sufficient evidence to commit the accused; that the suspected offence corresponds to an offence under UK law (dual criminality); and that in the UK such an offence is punishable by a prison term of at least 12 months.

Various European conventions have made extradition procedures less onerous. A magistrate no longer has to decide that there is a *prima facie* case against the accused before remitting him into custody. The process can be speeded up when the suspect consents to extradition. The EU's 1996 extradition convention will, when ratified, reduce the maximum sentence for a crime to qualify as extraditable from 12 to six months. It will also make exceptions to the dual-criminality rule and limit the definition of 'political offences' to exclude terrorism. Nevertheless, many extradition cases, even if ultimately successful, are subject to very lengthy delays.

Under the principle of mutual recognition, there should be no grounds for refusing extradition. There should be no exceptions for 'political offences', no dual criminality requirement, and fewer restrictions on a member-state extraditing its own nationals. This last point would be particularly sensitive. Eventually the mutual recognition of arrest warrants could replace the extradition process altogether. But there would have to be sufficient public confidence in the legal systems of other member-states for that prospect to be acceptable.

As with the single market, if the concept of mutual recognition is to work it will require some minimum standards: on the collection and

admissibility of evidence, for example, and on the rights of defendants. So it is not a way of avoiding all harmonisation. In some respects mutual recognition is more radical than comprehensive harmonisation. It would override fundamental legal concepts relating to international co-operation, such as dual criminality. And it would transform the territoriality of law, because national judicial decisions would be recognised and implemented across 15 member-states, not just one. Some states may have to amend their constitutions to make it work.

### **Access to justice**

Another theme of the Tampere summit will be how to improve citizens' access to justice in civil proceedings, such as consumer protection within the single market. Indeed, the British government believes the EU should make it as easy to go to court in another member-state as in your own.

The principle of equal access to justice does not appear to apply to criminal proceedings. Given that the EU is going to facilitate cross-border investigations and prosecutions, it should improve standards for defendants charged with a crime outside their own member-state. Fair Trials Abroad, a British NGO, believes that in some member-states foreign defendants are clearly discriminated against in two respects. First, the standard of legal interpretation is often inadequate. If the accused does not understand the proceedings, he may not be able to defend himself. He should have the services of a competent legal interpreter both when under questioning and in court. Second, Fair Trials Abroad estimates that foreign nationals are roughly twice as likely to be held on remand as are native citizens. This is because a judge will find it impossible to assess a defendant's 'community ties' (job, family circumstances, community status), which are among the criteria for bail. More importantly it is much more difficult to seek the return of a defendant who has jumped bail and fled the country.

With easier cross-border investigations, extradition and prosecutions, the numbers of foreigners held on remand are likely to increase. The EU must therefore develop a Union-wide bail system. One idea is that a foreign judge would ask a court in the defendant's own local jurisdiction, via the national central authority, to set bail conditions. If bail were granted, the defendant would be sent home. The domestic local court would then be able to compel the defendant to return abroad (using the reformed extradition process) when his case came to court.

Greater access to justice implies higher standards of justice. The EU is a community of values committed to democracy and the rule of law, with each member-state a signatory to the European Convention on Human Rights. But the Council of Europe, which monitors standards of democracy, human rights and the rule of law across the continent, has reported that there are wide variations in standards of justice in EU countries. Some member-states' legal-aid systems are unable to field competent lawyers either for native citizens or foreigners, because of limited resources. In some member-states magistrates and judges are badly paid, of low calibre and open to corruption. There are also problems of political interference. The gaps in standards are likely to widen upon the accession of Central and Eastern European nations, with their brand new legal systems. The EU should aspire to bring each member-state, including new members, up to the level of the best. And the best way of doing this, given the diversity of legal traditions, is through extensive use of peer review.

## 5 The British dilemma

Britain has always had an ambivalent attitude to justice and home affairs co-operation. For many years it opposed giving the EU more power. Even now Tony Blair's government prefers to operate through inter-governmental arrangements, and is particularly reluctant to concede too much of a role to the European Court of Justice.

At Amsterdam in June 1997 the new Labour government secured its immediate objective: a watertight legal guarantee of its right to maintain controls at its borders. The UK had consistently interpreted the free-movement aspects of the Single European Act differently from other member-states. It maintained that passport-free travel applied only to EU nationals, so that Britain had the right to control the entry of non-EU citizens and thus to verify the right of EU citizens to enter UK territory. The treaty opt-out not only made that interpretation explicit, but was designed to shield the British position from any contrary interpretation by the ECJ. Under the opt-out the UK is wholly exempted from EU provisions removing passport controls at internal borders, and from those on immigration and asylum. In these latter two areas, however, Britain retains a right to opt in to EU arrangements at a future date.

Justice and home affairs is of tremendous political significance to Britain's EU policy. Alongside the decision to stay out of the first wave of EMU, the opt-out from free-movement arrangements has come to symbolise Britain's position outside the European Union's mainstream. Given the prime minister's aspiration to be one of the leading partners in Europe—for Britain to carry as much clout as France and Germany in eight to ten years' time—the British government will want to opt in to as many of the free-movement policies as possible. This will give it some say in the formulation of a migration strategy for the EU.

Britain will also want to demonstrate the strength of its commitment to police and judicial co-operation in the fight against organised crime, parts

of the Amsterdam treaty in which it participates fully. The British government sees itself at the forefront of efforts to create a Union-wide judicial space. With its relatively effective law-enforcement agencies and professional judiciary, Britain is well disposed towards international co-operation. The decision to extradite General Augusto Pinochet to Spain—or at least to allow the judicial process to take its course—sent an important signal that the government is willing to take sensitive decisions in order to allow justice to follow its course abroad.

Undoubtedly there are disadvantages to opting out of the free-movement provisions. Britons will not enjoy passport-free travel to the rest of the EU. If a specifically British visa regime deters business-people from using Britain as their European base, there may be adverse economic consequences. Britain's abstention from the free-movement provisions may undermine its influence in those initiatives that combine immigration and police co-operation, such as the Schengen Information System. Britain will be less authoritatively placed to argue for improved immigration-control standards in the EU and among aspirant members, even though the effects may have a direct impact on the UK.

### **Should Britain give up its border controls?**

The important question is whether Britain would have a more effective immigration policy if it were to abolish internal border controls and sign up to EU rules on visas and borders. British officials argue that as nearly all arrivals are via the same few points—sea crossings, airports and the Channel tunnel—it is still far more efficient and cost-effective to carry out external border checks than to rely on forms of domestic control such as identity cards. Most other EU member-states have long land borders that are impractical, if not impossible, to police. Few illegal immigrants cross the cold waters of the North Sea and the English Channel in small open-topped boats, in the manner that they steal into Greece, Italy or Spain. One senior British official says his European colleagues concede that the UK would be foolish to give up the advantages of its island geography.

According to the Home Office there were 44 million passenger arrivals to the UK in 1998. This is projected to rise to 97 million by 2002. In the past five years arrivals have grown by 50 per cent, while staffing levels at ports of entry have risen by just 10 per cent. The government's own 1998 immigration white paper accepted that 'without modernisation and

greater operational flexibility, so that resources are targeted more effectively on tackling abuse and clandestine entry rather than routine work, it will become increasingly difficult to maintain effective frontier controls, cope with passenger growth, deliver the kind of service standards that facilitate trade, tourism and education and maintain the UK's position as international hub.'

The government acknowledges that its controls on EU citizens entering the UK are a 'very light touch', often just a cursory glance from immigration officials. And for UK citizens passport controls are a minor inconvenience, given that all departing passengers have in any case to go through check-in procedures and perhaps security screening at ports, airports and railway stations. Travel from Britain to the continent, as from Greece to the rest of the EU, is not as easy as driving across a border, so passport controls are not considered as great a hindrance. In most EU countries passport controls are still relatively light on arrivals from the UK. However, for ethnic-minority British citizens, who are more likely to be stopped and questioned, passport-control procedures in some EU countries can be deeply frustrating.

UK entry checks on non-EU citizens, whether arriving from Europe or from farther afield, are more rigorous. But border controls can only be at best a filter and a deterrent to those seeking to enter illegally. Of the 10.9 million non-EU citizens arriving in the UK in 1997, 24,000 were refused entry and deported. In that same year the authorities identified 4,000 who had entered the country illegally. They also found that 14,300 people in Britain had over-stayed their visas, thus becoming illegal immigrants well after passing through passport control. And we can safely assume that the real number is much higher than this.

Clearly other forms of control are needed to keep illegal immigration in check. Consulates and visa offices around the world provide the first line of defence, enforced in theory by the carriers under threat of hefty fines. Intelligence—on people-smuggling networks, their routes and techniques—is increasingly vital. This requires close co-operation between different national police and immigration authorities.

Invariably, however, attention turns to forms of internal control. The most obvious is personal identity cards. This issue goes to the heart of

Britain's debate about border controls, for it has a tradition of external controls but no identity cards. It is often assumed that if Britain were to join the free-movement arrangements, it would have to introduce compulsory ID cards. In fact there are no EU rules to this effect. Most member-states have ID-card schemes, but while France and Belgium make it compulsory for people to carry their cards at all times, Germany does not. And while the British may not have ID cards, most of them have passports, driving licences, credit cards and security passes for the workplace.

The crucial point is not the introduction of an ID card *per se*, but what powers the police are given to require identification. Stop-and-search powers that extended to ID checks could easily lead to greater harassment of ethnic-minority citizens. On the other hand, positive proof of immigration status—being able to show easily that you are lawfully resident—could also help to reduce harassment. As one Dutch expert explained earlier this year to a House of Lords committee looking at Schengen and UK border controls, discrimination begins where you have selective rather than universal control. Thus it is better to require proof of ID from all people who seek access to, say, (non-emergency) health care, social security, education, housing and employment, rather than to conduct random checks on the street.

Thus the question is whether the British government would consider it necessary to introduce ID cards to compensate for the loss of border controls, and if so, under what conditions. Since formal checks on people travelling from the continent are still considered an important asset for law enforcement and immigration control, it is likely that the government would feel it necessary to introduce some form of ID card. It is this association that will be the biggest obstacle to British participation in the area of free movement, at least in the short term. It would also be difficult for the government to abolish the border controls that it recently fought so hard to maintain. It would be electorally damaging to cede national sovereignty over an area as sensitive as immigration and to introduce ID cards in return for only modest tangible benefits for British citizens. Indeed it would be dangerous to do so when there are bigger battles to fight, such as a referendum on British membership of economic and monetary union.

Over time, though, the balance of pros and cons is likely to shift. The numbers travelling to and from Britain will continue to grow. As the quality of intelligence improves, and co-operation between national authorities intensifies, the relative value of border controls with other EU countries as a means of immigration control will diminish. Britons will then be more easily persuaded of the merits of unhindered travel around the Union.

### **Opt out, opt in**

Britain may yet be able to have its cake and eat it. The Amsterdam treaty allows Britain (and Ireland), without relinquishing border controls, to opt in to EU immigration and asylum measures. Britain has indicated to its partners which initiatives it wants to join. First, and most predictably, it wants to participate in the Schengen Information System. Access to this powerful database of criminal and immigration-related information will strengthen British border controls. And participation will allow Britain to play a role in the future development of the SIS, including beefing up its data-protection provisions.

Second, it wishes to co-operate in measures to control illegal immigration, including the development of the EU's long-term migration strategy. It is actively involved in the high-level working group of diplomats and interior-ministry officials that is devising a longer-term and more coherent strategy towards countries that produce the most migrants. There is also an ongoing debate in Whitehall about whether Britain could opt in to some aspects of EU visa policy, such as rules about which nationals require visas for longer visits or to work or study in the EU. One view is that the adoption of EU rules of this kind is incompatible with maintaining an independent immigration policy. In reality Britain already imposes similar visa restrictions to other EU countries, so joining a uniform EU visa policy would not cause major problems.

Third, Britain's home secretary, Jack Straw, has indicated that the British government intends to participate in EU asylum policy 'to ensure that similar standards are applied across the EU', as long as this is consistent with its own proposals to streamline the application and appeals procedure and to minimise the 'pull factors' for bogus asylum-seekers. Relative to some other EU countries, Britain offers decent standards of protection for refugees. Its courts are liberal in granting refugee status, and once

conferred this status offers full rights to work and welfare. It probably would have little difficulty in meeting European minimum standards. Europe-wide rules would dispel any perception among economic migrants that Britain was somehow a 'softer touch' than its EU partners. And common standards might mean that other member-states, particularly France, Italy and Spain, would begin to accept greater numbers of asylum-seekers. Britain must also push for effective mechanisms to make sure that member-states cannot pass the buck on asylum: each must take responsibility for the asylum-seekers on its territory. But in order to encourage those countries that are most exposed to refugee movements—Greece, Italy and Spain—to deal with asylum-seekers, the EU may well need to establish some form of financial burden-sharing.

Britain is mid-way in the EU league table of asylum applications (in proportion to total population), but the numbers of people seeking asylum in Britain are growing by the month. Paradoxically—given the UK's opposition to the concept—burden-sharing may work out to be advantageous to the British government. Meanwhile, it wants to deter economic migrants from abusing the asylum system and is legislating to speed up the application process and reduce the number of appeals an applicant may make. One aspect of EU asylum policy could undermine these efforts. UK participation would give an asylum-seeker recourse, albeit limited, to the European Court of Justice. Large numbers of asylum cases in Britain and across the EU could be put on hold as a test case made its way through the ECJ, a process that usually takes a minimum of 18 months. So Britain should propose either streamlined court procedures in such cases, or the creation of a specialist immigration chamber inside the ECJ.

Two arcane details in the Amsterdam treaty, however, could make life difficult for Britain. The treaty makes a distinction between those measures that have been incorporated into the EU as part of the original Schengen body of rules on borders and immigration, and new measures. With regard to the latter, the UK and Ireland merely have to notify the Council of Ministers that they wish to opt in. If they do not, the other member-states will simply proceed without them. The catch is a stipulation that the other member-states will also proceed if, after a 'reasonable period of time', the measure cannot be adopted with Britain or Ireland taking part. In other words, if Britain tried to withhold

approval from a particular measure in order to achieve a particular objective, the other member-states could go ahead without it. This will seriously undermine Britain's bargaining ability on these matters.

If the UK or Ireland sought to opt in to any measures that fall within the original core Schengen *acquis*—including, for example, the Schengen Information System—it would require the unanimous consent of the other member-states. This requirement was introduced via a Spanish amendment, although the British negotiators deny that they agreed to it, as it was never formally tabled. In order to rectify this 'misunderstanding', Britain has obtained a declaration that every country will make its best efforts to enable British and Irish participation. But the unanimity condition could still turn into a real obstacle for Britain. The Spanish have hinted that they might block UK participation in the SIS. And they could block British attempts to opt in to other Schengen policies that have implications for the administration of Gibraltar.

Britain will therefore not have complete *à la carte* freedom on justice and home affairs matters. Even though most member-states are well disposed towards British participation in immigration and asylum measures, they will want reassurance that the UK is not going to cherry-pick the easy parts of co-operation. This makes it essential that Britain works out a coherent strategy for how it wishes to see JHA develop in the coming decade. Such a strategy could be built upon the recommendations that follow.

## 6 A summary of recommendations

- ★ The EU should make full use of the peer-review process in justice and home affairs. This method is the most effective way of strengthening border controls and immigration and asylum procedures, of improving the way judicial authorities deal with requests from abroad and of raising standards of justice in general, especially the rights of defendants. The process of 14 member-states reviewing the other's closely guarded policies on law and order will have to be handled sensitively. But peer review has been a successful way of meeting broad targets in employment policy, and in the preparations for economic and monetary union. It also has the advantage of familiarising policy-makers with foreign administrations. The Commission—once it has the expertise—will be instrumental in making the peer-review process work, by providing analysis, recommending changes and making sure that member-states comply with their treaty obligations.
- ★ One of the priorities for the EU's common foreign and security policy should be to formulate a proactive strategy towards third countries on migration issues. The EU's High Representative for foreign policy (known as Mr CFSP) should play a key role in conflict prevention, in improving human-rights standards and in promoting social and economic development (together with the Commission) to reduce the causes of migration.
- ★ The EU must devise a coherent approach to the protection of refugees, including: the adoption of a single EU definition of 'refugee', updating the 1951 Geneva convention in recognition that the world has changed since it was drafted; the introduction of minimum standards of reception for refugees; a coherent yet flexible response to temporary protection in cases of mass exodus; an obligation on member-states to take responsibility for asylum-

seekers who enter their territory; and streamlined procedures (or even the creation of a specialised immigration and asylum chamber inside the European Court of Justice) to keep the asylum system free from delays and lengthy appeals procedures.

- ★ EU leaders must give a clear endorsement of the contribution that immigrant communities make to Europe's economy, society and culture. There must be equal rights for third-country nationals legally resident in the EU, including free movement, in order both to show that the EU does not discriminate against minorities and to encourage putative migrants to choose the legal route. The EU must not develop into 'Fortress Europe', not least because with an ageing society, Europe will need to embrace immigration if it is to preserve its economic and social wellbeing.
- ★ Europol is only just up and running. But it will probably need greater resources in order to enable it to carry out its functions properly, and to build good links with its much more powerful counterparts in other parts of the world, such as the US FBI. It is possible that the work of Europol in co-ordinating cross-border investigations and prosecutions will be hampered by a lack of prompt co-operation between national judicial authorities. After all, their consent may be needed for many of the operations that Europol will orchestrate. If that is the case, then the EU must consider the closer involvement of judicial authorities in the work of Europol, perhaps through a parallel central body of delegated national judges.
- ★ The EU should make the European judicial space a reality by applying the principle of mutual recognition of court orders and decisions, to facilitate cross-border investigations and prosecutions. But the EU should not attempt to centralise law enforcement through the creation of a European Public Prosecutor service or an FBI-style Europol. It will never be able to replace national law-enforcement authorities and judicial systems. It should not try to harmonise Europe's diversity of systems but rather develop ways of overcoming that diversity.
- ★ More effective co-operation on JHA will need some harmonisation, however, just as the creation of a single market in goods and services required some minimum standards. The EU should establish

minimum standards on rights for defendants, to protect the innocent as cross-border investigation and prosecution is made easier. There should be minimum standards of legal aid and interpretation in foreign courts, and a Europe-wide bail system.

- ★ Meanwhile Britain will need to take a pragmatic approach to the longer-term future of justice and home affairs co-operation. As preparations for the next inter-governmental conference (to be concluded in December 2000) get under way, there will inevitably be pressure from some governments, especially Germany, for an extension of majority voting in free-movement provisions. And some may seek to bring judicial and police co-operation into the “pillar” of normal EU business. The British government is understandably nervous about ceding too much power to the European Parliament and Court of Justice in areas that are so closely linked to national sovereignty. Some questions, such as the broad rules allowing police from one country to operate on the territory of another, or the harmonisation of national laws, will have to remain inter-governmental and subject to unanimity. But other measures, such as Europol and the Schengen Information System, whose powers are strictly limited in the treaty, should be transferred to the main pillar for EU business. The introduction of QMV would enable member-states to legislate more effectively with those powers defined in the treaty. Moving Europol and SIS to the first pillar would ensure that they are subject to proper judicial control. The public will not have confidence in this growing area of EU policy—especially if mutual recognition gives foreign authorities jurisdiction in other member-states—unless there is greater transparency in decision-making, more scope for judicial review and improved provisions for data protection.