CENTRE FOR EUROPEAN REFORM
policy brief

JUSTICE AND HOME AFFAIRS: FASTER DECISIONS, SECURE RIGHTS

By Heather Grabbe

★ The EU should increase the efficiency of decision-making by using majority voting in more areas, starting with migration and asylum, and by making police and judicial co-operation in criminal matters a full competence of the EU's institutions.

★ To increase democratic accountability, the European Parliament should have co-decision in most areas of justice and home affairs, and the European Court of Justice should gain full powers to review legislation concerning internal security.

★ The EU needs to do more safeguard the rights of individuals affected by cross-border law enforcement. It should set up a Europe-wide legal aid fund, and give the European Ombudsman powers to pursue complaints about the violation of individual rights.

★ To prepare for enlargement, the EU should move ahead with plans for closer co-operation on guarding external borders, both to share the costs more fairly and to ensure uniformly high standards.

Justice and home affairs (JHA) has become the EU's most active policy area, but one of its least known or understood. It now accounts for about 40 per cent of the EU's new legislation. There is strong public support for European countries to work together more closely to deal with common concerns, such as illegal immigration, and common threats, like international terrorism and transnational crime. EU co-operation in tackling cross-border crime has grown remarkably quickly since September 11th 2001.

JHA co-operation has the potential to make the EU more popular, by showing voters that it gives them direct benefits. But if they think that 'Brussels' is responsible for allowing in foreigners and drugs, or for letting their fellow-citizens languish in foreign jails on specious charges and without legal services in their own language, they will become more wary of the EU.

There are at least two reasons why the EU needs to make a number of institutional changes at the inter-governmental conference due in 2004. First, decision-making processes in JHA are very cumbersome. Second, legislation in the field of justice and home affairs affects the balance of power between government and citizens, yet democratic oversight of the procedures and decisions taken by justice and interior ministers is sorely lacking. The point of institutional reform should therefore be to increase both the efficiency and the accountability of JHA co-operation, and to add new safeguards for the rights of individuals.

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More efficient decision-taking

When it started, governmental, without the involvement of the Commission, European Parliament or European Court of Justice. Therefore when the EU created its structure of three 'pillars' with the 1992 Maastricht treaty, JHA was given its own 'third pillar' (foreign policy made up the second pillar, and traditional Community business the first). At Amsterdam in 1997, the member-states agreed to move most of JHA ino the first pillar, but to leave police and judicial co-operation in criminal matters in the third.

What the EU calls justice and home affairs now covers a vast and diverse range of policies. The issues covered in the 'first pillar' extend from external border controls, to immigration and asylum, to judicial co-operation in civil matters. The EU also engages in police and judicial co-operation in criminal matters, but confusingly, these areas are still in the third pillar. The EU thus uses many different decision-making procedures for JHA, which makes deciding on and implementing coherent policies very difficult.

The obvious way of improving this situation would be to merge the third pillar with the first pillar. This would simplify the system, leading to more effective and rapid policy-making, and it would help to increase transparency by making decision-taking easier to follow. Although there are good reasons to give national governments a leading role in the EU's foreign and security policy, there are fewer reasons for a separate structure for JHA. Successful foreign and security policies depend on using the resources and credibility of member-states, so they cannot be run primarily by the EU's institutions. But one of the pre-requisites for progress in JHA co-operation is the making and implementing of laws, which the first pillar does relatively well.

There are strong reasons for the EU to manage many aspects of JHA policy. For example, now that criminals can operate across internal borders, unhindered by frontier checks, the EU needs solid cross-border law enforcement and judicial co-operation. However, a merger of the first and third pillars would not automatically mean the 'communitisation' of police and judicial co-operation – that is, putting them fully within the competences of the Commission, the European Parliament and the Court of Justice – as has happened with, say, single market legislation.

There is still a strong inter-governmental element in the JHA policies that have already moved to the first pillar, including asylum, migration, external border controls and civil law. In these areas, the member-states have limited the role of the European Parliament and the Court of Justice. Most important of all, decisions will be taken by a unanimous vote at least until 2004, not by a qualified majority.

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Therefore a shift of those policy areas which remain in the third pillar to the first would not do much good if decision-making in these areas were still hedged with restrictions on the role of the EU's institutions. There is not much point in moving the pillars around unless the member-states remove the special procedures that safeguard national interests. At the very least, they should negotiate transition periods, so that ultimately unanimity remains the rule in only a very few sensitive areas.

The inter-governmental aspects have long snarled up JHA policy-making. If a single member-state holds up progress, only the European Council has a chance of removing the obstacle. For example, the introduction of a common arrest warrant – one of the EU's main responses to the threat of terrorism after September 11th 2001 – was blocked by just one country. Italy's opposition could only be overcome when the prime ministers met in person to thrash out a deal. If the policy had been subject to qualified majority voting (QMV), the other countries could simply have outvoted Italy in the JHA Council.

The main objections are not coming from the usual suspects. The traditionally recalcitrant British are pushing for QMV on migration and asylum, whereas the integrationist Germans are very reluctant to see any reduction in their veto-rights.

The key to faster decision-making in JHA is to extend QMV to more areas. But no government wants to apply majority voting to everything: each finds one or another issue too sensitive and too close to the heart of national sovereignty. Interestingly, the main objections are not coming from the usual suspects. The

traditionally recalcitrant British are pushing for QMV on migration and asylum, whereas the integrationist Germans are very reluctant to see any reduction in their veto-rights. The EU should start with QMV on migration and asylum, where the public is demanding urgent and co-ordinated action, and then consider other suitable areas.

Another anomaly is that the Commission and the member-states share the right to initiate legislation on JHA matters, until 2004. The Commission has a sole right of initiative on other first pillar issues. Member-states are certainly capable of making well-prepared and timely proposals on JHA, and the Commission often suffers from overload, so this joint right of initiative has probably been useful in the pioneering years of JHA policy. But member-state initiatives have sometimes overlapped with or prevented discussion of Commission proposals. On the whole, the Council should set the overall direction and aims of JHA policy, and then leave the Commission to work out which measures are necessary, as happens in other areas of EU policy. In the longer run, it would be more efficient for one body to implement the Council's strategy, which means giving the Commission the sole right to initiate legislation.

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Finally, the EU should simplify the confusing range of different legal instruments that it uses for JHA at European level. It has so far used special instruments such as 'framework decisions', that make JHA harder to understand. The EU should work towards using the same legal instruments that are used in the rest of the first pillar, namely directives and regulations. Then the EU's legislative system would be less complicated and more transparent.

Single market methods for justice

One of the EU's greatest successes has been the single market project, steadily implemented since the 1980s. In order to advance JHA co-operation, it needs to use some of the same methods. A central principle of the single market is 'mutual recognition', which allows national authorities to recognise the work done and decisions taken by their counterparts in other member-states as valid in their own countries. This method obviates the need for extensive harmonisation of national systems of regulation. Another ingredient of the success of the single market was the widespread introduction of qualified majority voting.

The application of mutual recognition to JHA, together with an extension of QMV, would help to ensure that national systems could work together efficiently. There is little point in ministers agreeing to share information and work together if judges, police officers and officials do not want to work with their counterparts in other EU countries. So far, practitioners have been very reluctant to recognise other members' systems of justice and law enforcement as equivalent to their own. Another problem is that the various governments' IT systems and administrative frameworks are often incompatible. Ministers have tried to promote greater compatibility by using the 'open method of co-ordination' - that is, agreements on common targets, benchmarking and the application of peer-group pressure. However, the open method is not enough on its own, and governments will also need to step up their use of traditional, harder methods of decision-making.

One difference between JHA and the single market in that it is not feasible for the member-states to harmonise national legal systems in the way that they harmonised business regulations. Any attempt to change one part of a national legal system is liable to have knock-on effects on other areas. The 15 member-states have very different legal systems, and the accession of new members will bring further diversity. No country wants to give up its legal tradition in favour of another, which means that only a limited harmonisation of procedures is feasible. But they can and should start to recognise one another's judicial decisions.

Protecting freedoms

The EU responded quickly to the terrorist attacks of September 11th with new measures to track down and apprehend suspected terrorists. The most important of these were a common definition of terrorism, a common list of suspected terrorist organisations, and, especially, the December 2001 agreement on an EU-wide search and arrest warrant. Citizens will not be willing to accept free movement across the borders of the EU-25 if they fear that criminals and terrorists can easily take

refuge in another member-state. The common arrest warrant should thus be implemented as quickly as possible; but it needs to be accompanied by measures to ensure that standards of law enforcement and the protection of citizens' rights are equally high across the EU.

If the result of EU co-operation in JHA is an erosion of individual liberties, the EU could become even more unpopular than it is already.

Unfortunately, the recent moves to extend EU involvement in JHA have not been balanced by efforts to enhance the rights of citizens affected by EU policies and their implementation. So far, the public has been generally supportive of tighter European co-operation on security and crime, recognising that countries have to work together. But if the result is an erosion of individual liberties, the EU could become even more unpopular than it is already.

Oversight of the emerging European judicial system is woefully inadequate. Because many decisions are taken by ministers meeting behind closed doors, only national governments can monitor EU activities that may impinge on individual freedoms, and their monitoring is often poor. The EU has given Europol, its police liaison office, a new counter-terrorism mandate, that will include the exchange of information with the US authorities. This is a welcome step, but the activities of Europol and Eurojust – the EU's embryonic prosecutions agency – must be subject to independent oversight. National police forces are accountable to the courts, while the courts themselves operate within constitutional frameworks and are subject to parliamentary scrutiny. At European level too, the actions of the executive should be subject to the control of the other branches of government – the parliament and judiciary. For this reason, the European Parliament should have an extensive right of scrutiny over JHA, including the right of co-decision with the Council in all but the most sensitive areas, like intelligence-sharing.

The EU's decisions on matters of internal security have a direct impact not only on companies and governments, but also on the rights of individuals across Europe.

JHA decisions should also come under the full jurisdiction of the European Court of Justice. At the moment, the Court has only a limited mandate in JHA, so it has little scope to review legislation in this area. It has no jurisdiction to review whether Europol has exceeded its powers, or whether national enforcement agencies have stepped beyond their mandate in EU-approved operations. Nor can it force member-states to live up to their promises. If the Court had full jurisdiction over JHA, a member-state that dragged its feet over implementing EU legislation – as Italy is currently doing with the common arrest warrant – could be taken before it. An extension of the Court's remit would also help to protect individuals who may be affected by JHA measures. For example the Court could assess whether a new measure was compatible with the EU's treaties and its Charter of Fundamental Rights.

The EU's decisions on matters of internal security have a direct impact not only on companies and governments but also on the rights of individuals across Europe. At present, an individual may complain about the violation of his or her rights by another member-state or an EU institution through a national legal system, but this is a long and cumbersome procedure. The EU therefore needs to put in place additional safeguards for individuals.

The new EU arrest warrant will allow judges and police forces to extradite suspects automatically. But to ensure they are treated fairly, suspects need to have their rights to a fair trial strengthened. The EU should ensure that anyone sent for trial in another EU country has access to a competent lawyer and to an interpreter, so that he or she can follow court proceedings. All the member-states should set up a central fund for legal aid, and provide citizens' advice bureaux that can deal with cross-border cases. The EU also needs to create a 'Eurobail' system so that indicted suspects can stay in custody in their home country while waiting for their case to come to trial, instead of being held for a long period in a foreign gaol.

Data-protection is a sensitive issue for EU citizens. The EU has set up a number of vast databases – such the Schengen Information System (SIS) and the Europol databases – that contain information on EU and non-EU citizens alike. These databases are vital tools in fighting crime and terrorism. But the EU must ensure

uniform protection of all data, in accordance with the right to privacy articles of the European Convention on Human Rights, and the associated case law. Individuals can gain access to their SIS files only through national data protection laws, which differ between countries. In addition, it is difficult for a citizen to seek to amend incorrect information on his or her record. Given that the databases are held centrally, there should be an EU-wide mechanism for amendment through a central access-point.

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The EU needs to develop a more coherent framework for the protection of fundamental rights. There is currently a confusion of overlapping sources of authority. The EU treaties refer to the protection of fundamental rights in several places, without listing the rights themselves. In addition, all the member-states are signatories of the European Convention on Human Rights, which is an international convention outside the EU framework. Then at the Nice summit in December 2000 the EU's governments declared their support for the Charter of Fundamental Rights, but it remains a declaratory document without any direct legal force. It should be incorporated into the EU's treaties – a move which most member-states favour – but the legal framework as a whole should also be simplified. One way of achieving such a simplification would be to incorporate the European Convention on Human Rights into Community law. Then lawyers and judges could use the well-established case-law that is associated with the Convention to interpret the rights of individuals. In addition, the European Court of Justice should gain the power to annul measures that do not respect fundamental rights.

In defending its external borders more rigorously, the EU must make sure it does not cut off the countries that remain outside.

Individuals can already complain to the European Ombudsman if they suffer from maladministration on the part of the EU's institutions. However, few citizens know about the Ombudsman's existence, and he has only limited powers to propose changes to EU laws that affect fundamental rights. A first step would be for the Ombudsman to gain the power to request an opinion from the European Court of Justice in Luxembourg. In the longer term, he should also be able to bring cases to the Court. The remedies available to individuals for protecting their rights should be made much clearer in the treaties, and widely advertised throughout the Union.

Policing Europe's frontiers

The Seville European Council decided in June 2002 on further integration of external border protection. In addition to introducing measures to combat illegal immigration and making a further push towards a common policy on asylum, the EU's leaders endorsed a study from the Italian government on closer co-operation among the member-states' border guards. Under current plans, the EU has no intention of creating a whole new force to rival existing national border guards. But by the end of 2002, the member-states' national forces are supposed to be able to carry out joint operations at external borders. Now that the EU's external borders are effectively common to all member-states, the EU must work rapidly towards a consistently high standard of protection along the entire frontier.

The creation of a common strategy for managing external borders is a welcome step to protect the Union's residents from cross-border crime, terrorism and other threats. Now that travel in the Schengen area is free of passport checks, every country has an interest in the good management of the EU's external frontiers. The costs of policing the border should thus be borne by all the member-states and not just those on the front line. In addition, after enlargement, many of the front-line member-states will be poorer countries which will need help to meet the expense of tighter Schengen controls. But in defending its external borders more rigorously, the EU must make sure it does not cut off the countries that remain outside. The new controls must be balanced with measures to facilitate travel for legitimate business-people and tourists.

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