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EU Justice and Home Affairs in the Eastward Enlargement: The Challenge of Diversity and EU Instruments and Strategies

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EU Justice and Home Affairs and the Eastward Enlargement: The Challenge of Diversity and EU Instruments and Strategies

I. Introduction: the AFSJ as a special challenge for enlargement

With the entry into force of the Amsterdam Treaty on 1 May 1999 the development of EU policies in JHA was transformed into a fundamental treaty objective, Article 2 TEU providing for the maintenance and the development of the European Union as an "area of freedom, security and justice" (AFSJ). This new integration objective was at the same time strengthened by the introduction of a range of new policy objectives, the communitarisation asylum, immigration and other issues of the former "Third Pillar", the incorporation of the Schengen acquis, new and more appropriate legal instruments and improved judicial control. This, and the results of the Tampere European Council of October 1999, led to a further expansion of the scope of policy-making in justice and home affairs, with dozens of new legislative acts being adopted, a considerable number of new legislative initiatives and even the establishment of new bodies - such as the prosecution agency Eurojust and the European Police College. There is no other example in the history of EC/EU integration process of an area of previous loose intergovernmental cooperation only having made its way so quickly to the top of the Union's political and legislative agenda.

The major and rapidly developing integration project that the AFSJ has undoubtedly become has also emerged as a formidable new challenge for the eastward enlargement. There are four problem factors which make this challenge different from those in other EU policy-making areas: The first of these factors is *the security rationale of the AFSJ.* Both the AFSJ and the incorporated Schengen system are implicitly based on the concept of an emerging common single internal security zone which introduces a new powerful dividing line between countries inside and outside of this security zone. This clearly results from the way in which the two key concepts of the AFSJ, "freedom" and "security", and their interrelationship are defined in the main texts adopted by the Union so far. As regards the concept of 'freedom' the 1998 Vienna Action Plan emphasises that the new Treaty opens the way to giving freedom "a meaning beyond free movement of persons across internal borders" and that includes the "freedom to live in a law-abiding environment" protected by effective action of public authorities at the national and European level.[1] The Tampere Conclusions continue this line of thought by describing it as the "challenge" of the Treaty of Amsterdam "to ensure that freedom, which includes the right to move freely throughout the Union, can be enjoyed in conditions of security and justice accessible to all", a project of which it said that it corresponds to "frequently expressed concerns of citizens".[2] The main emphasis here is obviously on a concept of freedom based on internal security provided through effective law enforcement and access to justice. This is very much in line with the new EU Treaty objective of Article 29 TEU that the Union shall "provide citizens with a high level of safety" within the AFSJ. The underlying idea of guaranteeing citizens' freedom through a high level of safety has clearly major implications: It implies a fundamental distinction between a "safe(r) inside" and an "unsafe(r) outside" with the EU's frontiers as the dividing line and law enforcement as the key instrument to maintain and further enhance this distinction. The reference to European citizens' "concerns" adds a powerful legitimacy claim to the "area of

1 Vienna Action Plan (OJ No. C 19/1 of 23.1.1999), paragraph 6.
2 Tampere Presidency Conclusions (Council document SN 200/99), paragraph 2.

security" and its full implementation.[3] The implication for the applicant countries is that if they cannot fully operate according to the rules and standards of this "area of security", they endanger the "safe(r) inside" and therefore provide a justification for the EU to keep them (in whatever form) outside of the AFSJ. This rationale is particularly developed in the context of the Schengen group in which uniformity in the implementation of minimum standards and standard procedures have become a crucial issue, supported by many forms of mutual and collective evaluation, and this obviously increases further the pressure on the applicant countries. The second factor, partially related to the security rationale just mentioned, is the *particular sensitivity of justice and home affairs in the national political context*. Policy areas such as asylum, immigration, border controls and the fight against crime and drugs are issues of major concern to citizens in the current Member States and consequently also of considerable importance for political parties and elections. Whereas the governments of the current EU Member States may be able to count on a certain degree of passive acceptance of the economic and financial costs of enlargement any costs in terms of increased internal security risks would be extremely difficult to justify and sustain. Reports in the media on potential enlargement related problems with illegal immigration and organised crime, whether exaggerated or not, attract considerable attention and are eagerly seized upon by political forces opposed to the enlargement and/or pursuing xenophobic objectives. As a result concessions to applicant countries in the areas of justice and home affairs carry the risk of appearing as a compromising on citizens' safety for the benefit of an anyway so far not overwhelmingly popular eastward enlargement, a risk which few, if any, of the current EU governments will want to take. The fact that both Italy and Greece - in spite of being longstanding EU members - had to wait seven years after their accession to the Schengen[4] before they were declared "Schengen mature" and finally fully admitted to all the operational parts of

3 This rationale is also taken up in the Tampere Conclusions - and even with a slightly populist undertone - which state that "people have the right to expect the Union to address the threat to their freedom and legal rights posed by serious crime" (Tampere Presidency Conclusions, paragraph 6).

4 From 1990 to 1997 and 1992 to 1999 respectively.

the system indicates that justice and home affairs are not an area prone to compromises for the sake of political integration. Several Schengen members, most prominently Austria and Germany, have already made clear that such compromises are not on offer during the accession negotiations[5] and it seems increasingly evident that the Schengen countries are preparing themselves for maintaining the Schengen external border controls vis-à-vis the new eastern Member States well beyond the time of accession.

The third factor is that *preparations for accession in the areas of justice and home affairs started relatively late*. Still five years ago few EU experts would have predicted the huge new integration project of the AFSJ as it has emerged since Amsterdam. These rapid developments came all the more as a surprise to the eastern applicant countries which well into the second half of the 1990s continued to regard the old Third Pillar with its relatively limited intergovernmental acquis as a rather marginal issue in the accession process. During 1997, however, they had to realise - especially because of the decision on the incorporation of Schengen - that they were facing a formidable new hurdle, and adaptation to the EU acquis in justice and home affairs started to rank much higher on the agenda for both pre-accession related internal reform and requests for EU support. The Union itself did little to bring the accession preparations in the areas of justice and home affairs to an earlier and more effective start. Only in 1997 a reorientation of the PHARE programme allowed for the first time the financing of more substantial measures in the areas of justice and home affairs and only from the beginning of 1998 enlargement problems in these areas started to be treated with a sense of urgency in the Council. Even then, however, the EU added to the problems of preparation of the applicant countries because it was not able to finally define the (limited)

5 Giving evidence on 5 July 2000 before Sub-Committee F of the European Union Committee of the House of Lords Dr. Gerald Lehnguth, Ministerialdirektor at the German Ministry of Interior, declared that it was the German position that "there can be no dropping of security standards and that the newcomers must keep to the standards laid down by the old members" and that "no exceptions can be made for any particular country" (House of Lords Select Committee on the European Union: Enlargement and EU External Frontier Controls, Session 1999-2000, 17th Report, October 2000, Minutes of evidence, para. 270-271).

EU acquis in justice and home affairs before March 1998 and the (much more considerable) Schengen acquis in various steps until May 1999. A crucial document on the Schengen acquis - the Common Manual on Checks at External Borders - was only made available to the applicants in September 1998 and even then without some of the confidential annexes.[6] As a result the applicant countries only gradually arrived at a complete picture of what would be asked from them during 1998/99, with corresponding delays in preparations and the development of more specifically targeted EU support measures. Overall, therefore, effective preparations for taking on the justice and home affairs acquis started - at least in the Luxembourg Six - more than half a decade later than for the internal market acquis.

The fourth factor is the *rapid growth of the EU acquis following to the entry into force of the Treaty of Amsterdam*. While the applicant countries had not yet fully finished assessing all the implications of the incorporation of the Schengen acquis as at 1 May 1999 the EU was already well under way to expand all parts of the acquis on the basis of the new objectives and legal instruments introduced by the Amsterdam Treaty. In the first year after the latter's entry into force more than 20 important legally binding texts were adopted which automatically become part of the acquis which the applicant countries have to take over. As a result of the Tampere decisions, a more active role of the European Commission and the resolution of the most immediate problems between the United Kingdom and Spain over Gibraltar this pace could even further increase during the next few years. During 2000 the Council adopted no less than 75 texts which all add to the acquis the applicant countries are expected to take over and implement.[7] There is therefore a risk that in certain areas the combination of a late start for effective preparations and the speed of developments on the EU side may lead some applicant countries in certain areas to fall further behind the EU acquis rather than to catch up with it.

6 Decision of the Schengen Executive Committee of 16 September 1998 (SCH/Com-ex (98) rev 2).

7 The full list is available on the Council's justice and home affairs web site: http://europa.eu.int/comm/dgs/justice_home/index_en.htm.

While these problem factors make justice and home affairs a special kind of challenge for the enlargement process the central issue to tackle remains that of reducing or managing the diversity[8] which the eastward enlargement is likely to import into the AFSJ in such a way that it will not provide a justification for a lasting exclusion of new Member States from the AFSJ or endanger its further development. In the following we will first identify the main dimensions of this diversity and then indicate and evaluate some of the possible strategies and instruments to reduce or manage diversity before and after accession.

II. The main dimensions and problems of diversity in the context of the eastward enlargement[9]

1. The first dimension: diversity in legislation

Legislation on justice and home affairs matters is the dimension of diversity where differences between the EU acquis and the applicant countries are most "visible" and measurable.

Legislative alignment with the EU acquis has been the first priority for the applicant countries for many years now and continues to be the key element in the European Commission's annual reports on the progress made by the candidate countries towards accession. All applicant countries have made major efforts and - as this can be clearly taken from the 1998, 1999 and 2000 Commission reports - also considerable progress with bringing their legislation into line with the EU acquis. Nevertheless strong

8 The term "diversity" will be used in the following as a generic denominator for differences between the justice and home and home affairs systems of the eastern applicant countries on the one hand and the EU justice and home affairs acquis on the other.

9 This part of the report is to a large extent based on interviews with officials of national ministries, the Council of the European Union and the European Commission and the use of a large number of classified documents from national ministries and the Council of the European Union. The author was also able to draw on some information available to him in his function as specialist adviser to the Select Committee on the European Union of the House of Lords.

elements of diversity still exist with varying prospects for their removal until the time of accession.

Asylum policy. In this field some of the applicant countries, like Hungary, are already largely aligned with the EU acquis. Most of the Luxembourg Six[10] have adopted the main principles and structures of the EU acquis but that a certain degree of diversity persists as regards procedural guarantees for asylum seekers. It seems likely, however, that this diversity could be largely eliminated by 2003-2004 through additional legislation. In some of the other candidate countries there are still serious shortcomings such as the absence of effective appeal procedures and insufficient procedural guarantees during the initial application phase. The likely later accession date, however, should give those as well enough time to adopt the necessary legislation.

External border controls. This is a field where legislation plays a less prominent role than in other relevant justice and home affairs areas. The main and most relevant elements of diversity are to be found in the field of implementation (see below). Nevertheless it is of importance that at the time of accession the applicant countries have completed the legal transformation of the border guards or police forces into a professional non-military force compatible with EU standards. In the Luxembourg Six the necessary legislation is already now largely in place. As regards the Helsinki Group the picture is more varied with serious deficits especially in Bulgaria and Romania where even the demilitarisation process of the border guards has not yet been completed.

Visa policy. Diversity in legislation on visa policy is a major issue for the enlargement process in the areas of justice and home affairs. The full adoption of the EU's visa regime - which, because of the incorporation of Schengen, means the adoption of the more restrictive Schengen visa list - will force all eastern applicant countries to introduce visa requirements for most of their eastern neighbours which had previously exempt from such a requirement. This will not only contribute to the above mentioned disruption of existing cross-border economic relations but is also politically

10 Czech Republic, Cyprus, Estonia, Hungary, Poland, Slovenia.

sensitive because neighbouring countries are likely to regard this as an act of forced exclusion. Whereas some countries, such as Estonia, Slovenia and - more recently[11] - Slovakia, have made considerable progress with their alignment of visa legislation with the EU acquis others - especially those with larger ethnic minorities on the other side of the borders (such as Hungary) - have shown some reluctance to adopt the EU's visa regime. Poland is likely to fully legally adopt the EU visa regime only fairly close to or upon the date of accession which could lead to additional problems of implementation. Diversity in legislation on visa requirements could seriously disrupt the EU's visa regime and is unlikely to be negotiable in terms of granting temporary derogations to candidate countries. Yet the recent compromise reached in the Council on the lifting of the visa requirement for both Bulgaria and - under certain conditions - Romania should reduce problems in this area quite considerably.[12]

The fight against illegal immigration. In this field there is still a major degree of legislative diversity. Whereas the Czech Republic, Estonia and Hungary, for instance, have brought their legislation largely into line with the EU acquis there are still important differences in the relevant legislation of other applicants (especially as regards termination of residence, the implementation of expulsion orders, rules on entry for the purposes of gainful activity and the admission of third-country nationals for study purposes). The alignment with the EU acquis is not made easier by the fact that the latter is to a considerable extent based on soft-law instruments whose scope is sometimes open to different interpretations. To a varying degree all of the applicant countries also still have to negotiate a number of readmission agreements with third countries in order to bring their readmission policy into line with the EU's. Considerable differences also still exist as regards legislation against illegal employment. Overall, however, many applicant countries have already made substantial changes

11 Through a substantial revision of the Law on Refugees in September 2000.

12 On 16 March 2001 the Council adopted a Regulation determining a list of third countries whose nationals must be in possession of visas which provides that in the case of Romania the visa requirement will only be lifted on the basis of a Commission report on specific undertakings of Romania in the fight against illegal immigration (OJ No. L 81 of 21.03.2001).

to their legislation and it seems unlikely that any of them will have problems completing this process until the respective time of their accession. The real problems are again to be found in the area of implementation (see below section II.4.).

Police cooperation. The applicant countries seem to be well under way to fully align their legislation with the EU acquis, with Slovenia apparently being in the leading position at the moment. This process has been made easier by the general overhaul of police legislation and organisation all applicant countries went through after the transition. Much progress has been made as regards the formal establishment of the national law enforcement contact points which are of crucial importance to effective police cooperation. Diversity continues to exist, however, in specific sectors of cooperation. All applicant countries still have, for instance, to bring their national provisions on hot pursuit and cross-border surveillance operations into line with the important Schengen acquis in this area. The same applies to a large extent to EU framework provisions on the exchange of liaison officers. Another area where there is still a considerable degree of legislative diversity is that of data protection where the EU acquis is quite demanding, especially with regard to participation in Europol. Some applicant countries still lack comprehensive legislation on the independence of the data protection supervisory authority and the respect for the data protection rights of the individual. Yet in these areas as well some countries have recently made considerable progress[13] and in all of the applicant countries preparations for appropriate legislation are under way and should be in place at the time of accession. Late adoption of the relevant legislation, however, could cause certain problems with effective implementation after accession (see section II.4.).

Judicial cooperation in criminal matters. Effective judicial cooperation in criminal matters is to a considerable extent dependent upon the compatibility of penal codes and codes of criminal procedure. Most of the

13 Such as the Czech Republic which in September 2000 signed the 1981 Council of Europe Convention on the protection of the processing of personal data and established the office for Personal Data Protection as an independent supervisory authority.

applicant countries either have already completed some substantial reforms in these areas or are close to completing them. Nevertheless considerable deficits still exist. Considerable gaps continue to exist, for instance, in the legal provisions relating to direct contacts with foreign judicial authorities for the purposes of mutual assistance in criminal matters and as regards the alignment of national legislation with the December 1998 EU Joint action making it a criminal offence to participate in a criminal organisation. Even among the Luxembourg Six there are still some countries which have not yet ratified all the relevant Council of Europe Conventions. Of crucial importance for the effectiveness of judicial cooperation in the fight against organised crime is legislation against money-laundering. In this area the applicant countries have all adopted basic legal instruments but the process of falling into line with the EU acquis is not yet completed. The overall picture in judicial cooperation in criminal matters is therefore still a rather patchy one with significant degrees of legislative diversity persisting in certain areas. This could mean that formal adoption of the acquis will be completed only very shortly before or upon accession which, again, could increase implementation problems (see section II.4.).

2. The second dimension: diversity in policies

The EU acquis is still far from comprising single common policies in central areas such as asylum and immigration. Yet on the basis of the existing formal acquis, the Amsterdam reforms, the Vienna Action Plan and the Tampere decisions the EU has recently increasingly moved towards a number of common objectives and priorities in these areas which are part of the "political" acquis the applicant countries will be expected to take over. Diversity in this area is much more fluid and less easy to establish and to measure than in that of the formal acquis, especially because there are still major divergences in justice and home affairs policies between the current 15 Member States. Yet additional diversity in policies imported by the next enlargement is quite likely and it could matter. Two examples may demonstrate this point:

The first example is that of external border management. During the 1990s the EU has moved more and more towards a tightening of external border controls. For some Member States (especially current "frontline" countries like Austria, Germany and Italy) border security through sophisticated and extensive checks is clearly a priority in the area of justice and home affairs. This will not necessarily be the same for future new eastern Member States. They may at the moment give a relatively high political priority to the upgrading of their eastern border controls because this is part of the conditions they have to fulfil for EU membership. They clearly also have an interest of their own in keeping illegal immigration and cross-border crime at their eastern borders under control. Yet for several of the applicant countries taking over the EU/Schengen external border regime entails major costs in form of a disruption of relations with ethnic minorities on the other side of the border, political relations with neighbouring countries and cross-border trade which, especially in the Polish case, is of considerable economic importance.[14] As a result the full implementation or even further development of the EU/Schengen external border acquis could become much less of a priority for some of the new Member States after accession, perhaps even an area where they would seek exemptions from the current acquis against established EU objectives and priorities. Such a diversity in fundamental policy orientations could obviously lead to major tensions in the Council.

The second example is that of the fight against money-laundering. Measures against money-laundering have become a core area of EU "policy" in the fight against organised crime and ranks high on the current Member States' agenda as this was again confirmed by the progress made during 2000 towards the adoption of the directive and - in the Third Pillar areas - the framework decision on money laundering. The applicant countries have not been left in any doubt about the importance the EU attaches to uniform and efficient measures against money-laundering and - as pointed out above - have already adopted a number of basic legal

14 See on this point House of Lords Select Committee on the European Union: Enlargement and EU External Frontier Controls, Session 1999-2000, 17th Report, October 2000, para. 10-12, 15 and 44-46.

instruments in line with the EU acquis. Yet for at least some of the applicants this area may be much less of a priority. One reason for that is their particular dependency - as economies in transition - on the influx of foreign capital. A very strict application (or even tightening) of the rules against money-laundering could have (or be perceived to have) a dampening effect on the inflow of capital. Prospective new Member States can therefore take the view that they can less afford this sort of restrictions than current Member States. Another reason is that the full implementation of the EU's acquis and objectives in this area requires quite considerable financial and administrative efforts (for the setting up of a special agency to monitor financial operations, for instance) which the applicant countries might prefer to reduce or postpone as far as possible. For both reasons the priorities of at least some of the applicant countries in this area, as well as in the fight against organised crime in general, could be quite different. The result would be a case of policy diversity which - after accession - would have its impact on decision-making in the Council.

3. The third dimension: organisational diversity

Organisational diversity has to be regarded as a serious issue for the enlargement in justice and home affairs because the implementation of common principles, measures and standards of cooperation is in need of a minimum of compatibility and interoperability between national institutions and structures. During the 1990s the quickening pace of integration in justice and home affairs has led to a number of important organisational adaptations in the administrative, policing, border control and judicial structures of the current EU Member States. These have involved - and continue to involve - mainly restructurations in ministries, the creation of special units and contact points in police forces, border guards and the judicial administration as well as the creation of better supporting structures for judicial and police liaison officers, all this in order to facilitate effective cooperation in the different justice and home affairs areas. The applicant countries face the double challenge of still having to complete the process of reforming their law enforcement and judicial structures and to make further specific adjustments required by the EU

acquis. Substantial differences between institutions and structures in the current EU Member States, whose compatibility and interoperability have significantly increased during the 1990s, and those of the applicant countries could seriously reduce the latters' capacity to effectively implement the EU acquis after accession. Major diversity continues to exist primarily in four areas:

Border guard organisation. In most of the applicant countries external border controls were in the past largely a matter for the armed forces. This led to a border control system based on regular army patrols, watch-towers and "heavy units" in reserve positions in the rear. None of these elements fits with the Schengen external border control regime which is based on specially organised and trained border police units under full control by the ministries of interior, relies heavily on highly trained mobile units with sophisticated technical equipment and modern control techniques such as "risk-profiling" and "risk-testing". Although most applicant countries have by now made the transition towards a professional non-military border guard staff shortages, insufficient training and equipment problems still keep some elements of the old military border control system in being, including the occasional use of troops for border duties. Even those applicant countries which have made much progress towards the creation of professional modern border guards, such as Estonia, Hungary and Poland, still have considerable structural problems as regards effective interaction between border guards, police forces and customs authorities which is crucial for an effective border management according to the Schengen standards. The applicant countries also still have to struggle with rivalries between military and civilian structures in the control of external borders. An additional structural problem is posed by the fact that as a result of accession some of the applicant countries will have to shift the bulk of their border control operations from their traditionally strongly guarded western borders to their eastern or south-eastern borders to which much less attention had been paid in the past. In Poland, for instance, the border infrastructure in the sectors bordering the former socialist "brother states" is in many parts still severely underdeveloped and will require massive funding to be upgraded to the Schengen standards. The shift of

material and personnel from western to eastern or south-eastern border has already begun and will be reinforced by a new ambitious "Border Management Strategy" which was adopted in March 2000[15] but involves major challenges as regards financing, infrastructure and the reorganisation of border guard forces.

Organisational structures in the areas of asylum, immigration and visas. Most of the applicant countries have not yet completed the institutional and structural reforms needed to comply with the requirements of the EU acquis in the area of asylum. Concerns have been expressed on the EU side over an insufficient demarcation of competencies between asylum authorities, border guards and police and the lack of adequate reception structures. Understaffing of the relevant units is another serious structural problem in most applicant countries. It contributes to increasing backlogs of pending asylum applications. Most of the applicant countries have not yet made all necessary changes to effectively manage applications for visa and residence permits in foreign representations. The efficiency of visa issuing procedures in many applicant countries is reduced by the absence of computerised systems. Even where these exist other structural problems can seriously limit their effectiveness. The change of organisational structures in all these areas does not only require further legislation, restructuration and new approaches to inter-service cooperation but also a considerable financial effort which some applicant countries are unlikely to be able to afford in time before accession.

Organisation of police forces. Police forces in all the applicant countries have gone through several rounds of reform and adjustment during the 1990s. While these have generally helped to modernise policing structures and to put clear blue water between today's forces and their tainted past under the communist regimes, numerous reorganisations and frequent changes in senior positions have also created a certain instability and disorientation in many forces. This applies even to applicant countries which are well advanced with their restructuration efforts. As this was

15 Polish Ministry of the Interior: Polska Strategia Zintegrowanego Zarzadzania Granica, Warsaw, June 2000.

recognised in a Polish Government Report on the Security Situation of May 2000 Polish police forces suffer from a particularly complicated organisation, lack of inter-forces coordination and inadequate management structures which are an important factor of operational inefficiency and staff demoralisation. In many cases the reorganisation process is not yet completed. Further structural problems include a shortage of experienced senior officers due to the dismissal of officers with a questionable political past and major recruitment problems because of relatively low salaries and the better pay in private security services. In many cases effective coordination structures with other institutions involved in the fight against organised crime and money-laundering, such as the ministries of finance and the border guards, are still missing. As regards the internal structures required for integration into the EU police cooperation networks and structures the applicant countries are only introducing those at a relatively slow pace. The Slovenian government, for instance, has announced that some of the necessary steps such as the creation of the national Europol unit (which will provide liaison officers) and the unit for monitoring the implementation of Schengen provisions will only be implemented upon accession. The later these organisational change are introduced, however, the less likely they are to work effectively immediately after accession. Problems persist also in the organisation of the data-protection authorities which are of central importance for the participation in Europol and other computerised EU cooperation networks.

Organisation of the judiciary. A functioning and independent judiciary is not only a pre-condition for the effective participation in central parts of the EU justice and home affairs acquis but also part of the Copenhagen political criterion of the "rule of law". Since the Helsinki European Council of December 1999 all eastern European applicant countries are considered to have met the "rule of law" criterion but there are still considerable problems as regards their judicial systems. These include the overburdening of the judicial system in the applicant countries because of lack of staff, huge backlogs of cases, inefficient procedures and the unavailability in several applicant countries of alternative methods of dispute settlement (such as arbitration, mediation and reconciliation). Since

large numbers of the senior judges were removed from office following the transition all applicant countries also have difficulties with insufficient experience of mostly young judges. A further problem is corruption in the judicial system which flourishes under the impact of inadequate surveillance and low pay. A recent government commissioned survey in Slovakia indicated that about 20% of the parties involved in court proceedings experienced corrupt behaviour from judges.[16] Shortcomings have also been reported in terms of non-execution of sentences because of weaknesses in the organisation of the judiciary (Slovenia), deficits in fact/evidence-finding (Hungary) and absence of regular publication of case-law (Czech Republic) and serious problems with the quality of judgements at lowest-level courts (Estonia). Further reforms are under way in all applicant countries. Yet because of their considerable financial, administrative and training implications the ambitious organisational reforms introduced or under way could still take well beyond 2003 years to be effectively implemented. As experience in current Member States has shown new judiciary structures which are put into place normally need considerable more time before they work satisfactorily.

4. The fourth dimension: diversity in implementation

Diversity in implementation is likely to be the biggest challenge of the enlargement process in the areas of justice and home affairs. The applicant may well be able to bring all of their legislation into line with the EU acquis until accession, they may even fully align their policy objectives with those of the EU and be able to achieve substantial progress with their institutional and structural reforms. Yet all this will not be enough to ensure the effective practical implementation of the EU acquis which requires extensive training, high standards and consistency in the application of rules and procedures, an adequate technical infrastructure and vigorous action against specific dangers such as corruption and violation of data-protection rules. The EU acquis, as it has been transmitted to the applicant

16 European Commission: Regular Report on Slovakia's Progress Towards Accession, Brussels, 8 November 2000, p. 17.

countries, is much more precise on required legislative and organisational changes than on practical implementation standards where much more space is given for interpretation. The current EU Member States - and among those especially several Schengen members - have become increasingly concerned about this problem area of the enlargement process, taking even the view that the European Commission was not paying enough attention to implementation problems in its monitoring work. Concerns over the applicants' potential implementation deficits were actually the main reason for the establishment by the Council on 29 June 1998 of a special mechanism for the collective evaluation of the enactment, application and effective implementation by the applicant countries of the EU *acquis* in justice and home affairs.[17] Major diversity in implementation standards and capabilities could indeed seriously affect the functioning of core elements of the AFSJ after enlargement, and relatively high degrees of such diversity can be identified in all areas of justice and home affairs.

Asylum policy. In the past the applicant countries had to process only very small numbers of asylum applications. Yet these numbers are likely to increase significantly over the next years, especially after accession to the EU. In some cases this is already happening, and serious backlogs are emerging in the respective countries. Hungary, for instance, has seen its asylum applications "explode" from 1998 onwards, which has led to administrative overburdening, inadequate legal procedures and a huge backlog in the treatment of asylum applications. Lack of staff training reduces both the effectiveness and fairness of asylum procedures even in countries where comprehensive and relatively generous legislation is now in place. Lack of adequate training also exists among the judges in charge

17 Joint Action 98/428/JHA, OJ No. L 191/8 of 7.7.1998. The core piece of the collective evaluation mechanism is a group of experts ('Collective Evaluation Group') which has the task - under the supervision of the COREPER and in close cooperation with the Article 36 Committee - of preparing and keeping up-to-date collective evaluations of the situation in the candidate countries on the enactment, application and effective implementation of the Union *acquis*. The Member States make available to this group all relevant material compiled by national authorities, including information on their direct experience of working with the candidate countries, reports from Embassies and intelligence services and reports from the Council of Europe.

of the judicial review of asylum cases. Further difficulties include inconsistencies in the application of deadlines for lodging applications, uncertainties as regards the interpretation of new legislation recently introduced in line with the EU acquis and a lack of communication of asylum authorities with their foreign counterparts. Lack of modern technical equipment and means of data-communication could also seriously hamper an effective implementation of the Dublin Convention - for instance in the area of electronic fingerprinting - if these shortages are not removed before accession.

External border controls. Of crucial importance for the functioning of the Schengen system is an equal degree of control at external borders and the carrying out of these controls in accordance with uniform principles.[18] Whereas some countries - such as Estonia - have made considerable progress with the adoption of EU/Schengen border control practices others still have to overcome serious deficits. Most of the applicant countries' border guards currently lack computerised central data search systems and sufficient "all weather" night and day observation equipment, and only a small minority of the border crossing points have on-line connections with other law-enforcement agencies. Currently none of them would be able to participate effectively in the SIS. Inter-agency cooperation (with customs authorities, police etc.) on border control issues - an important element in the EU/Schengen acquis - is in many cases poor and often affected by an unclear delimitation of tasks. The effectiveness of the border guards' work suffers in all applicant countries from a lack of systematic training in modern control and search techniques such as "risk profiling" and "risk testing". Cross-border cooperation with neighbouring countries - another important element of the EU/Schengen border regime - varies considerably depending on political factors and the willingness of local units to engage in such cooperation. A particular problem - which might however be resolved if Slovakia joins the EU at the same time as the Czech Republic - is the Czech-Slovak border which the Czech authorities - for understandable political and economic reasons - are reluctant to treat as an

18 See Article 6 of the Convention implementing the Schengen Agreement.

external one. There is only limited patrolling and considerable laxness in controls at crossing points, and the Czech-Slovak border has become a major thorough-fare for illegal migration. Observers from current EU Member States have also expressed concern over lenient controls at the Hungarian-Romanian and Polish-Ukrainian borders which can as well be explained by specific political (ethnic minorities) and economic (important cross-border trade) reasons.

Visa policy. Taking over the EU/Schengen visa regime will be a considerable challenge for the applicant countries in administrative and practical terms. As the result of the EU/Schengen "negative list" especially Hungary and Poland will have to issue much larger numbers of visas at consulates and ensure adequate checks of these visas at the borders or at the carriers' steps. All applicant countries will have to screen applications more thoroughly, introduce controls of visas inside the country, check on the required invitations and deal much more effectively with problems of overstay. The smooth operation of the EU/Schengen visa regime depends on a balance between a tough application of the rules towards undesirable aliens and a more flexible attitude towards families, businessmen and students. It took the current Member States a long time to arrive at - or at least to come reasonably close to - this balance. It seems therefore rather unlikely that the applicant countries will find it from one day to the other if - as this is the case for Hungary and Poland, for instance - they are planning to fully introduce the EU's visa policy acquis only shortly before or upon accession. Even those applicant countries which have made much progress with the formal alignment of their visa policies - such as Slovenia and the Czech Republic - are likely to proceed only gradually with the full implementation because of traditional political ties and economic links with other former socialist countries. Both experience and training is still lacking in crucial areas such as the issuing of consular visas. A considerable diversity in implementation could be the consequence, and this may well mean laxness, administrative disorder and additional risks of corruption well beyond the time of accession.

The fight against illegal immigration. In this area a strict and consistent application of legislation and established procedures is of paramount

importance. Yet even those applicant countries which have made considerable progress with aligning their legislation with the EU acquis still have considerable difficulties with effective implementation. In the Czech Republic, for instance, there was evidence in 2000 for a lack of consistency in the application of rules on entry, expulsion and residence as well as fines. In Poland shortcomings have been identified with the implementation of deportation and expulsion orders. So far the readmission policies of all applicant countries are largely focussed on readmission to neighbouring countries. Expulsions towards remote countries of origin, a standard practice in the EU/Schengen context, are in general not implemented. Of considerable importance in the EU approach towards the fight against illegal immigration are measures against illegal employment. All of the applicant countries have some legislation against illegal employment in place, but in many cases this legislation is not effectively implemented. In Hungary, for instance, immigrants seem to be able to find work without permits rather easily, and the relatively low fines imposed on employers seem to have little deterrent effect. A further problem for effective action in the fight against illegal immigration is document security. In many cases passports are easily forged and visas issued are neither machine readable nor equipped with holograms. The upgrading of enforcement practices and special measures such as increasing document security will all require considerable investments by the applicant countries some of which do not currently treat these as a priority. If these steps are only taken very close to the date of accession, however, lack of experience and training may reduce their effectiveness well beyond the time of accession. It should be noted that diversity in implementation standards as regards the fight against illegal immigration has given rise to particular concerns in some of the current Member States because the final destination of large numbers of immigrants entering illegally the applicant countries tends to be a current EU Member State.

Police cooperation. Diversity in implementation standards in the area of police cooperation is to a considerable extent caused by the unresolved organisational problems of the applicant countries' police forces which have been mentioned earlier (see above section II.3.). Frequent shake-ups

in structures and senior positions, low pay and poor working conditions tend to demoralise staff and to increase recruitment problems which in turn reduce the effectiveness of policing work. Salaries and working conditions are not a formal part of the EU acquis but nevertheless important. Adequate and timely pay of police officers is not only an important element of EU policing standards but also of major importance for the fight against bribery and corruption. Practitioners in current EU Member States' ministries are concerned that organisational changes (adding "new boxes" to organisational charts) are not matched by the allocation of sufficiently experienced staff, adequate resources and effective management. International cooperation with other European police forces is often hampered by a unclear division of competencies, competition between national law enforcement agencies as well as the lack of foreign language skills. The effectiveness of national contact points and liaison officers in the context of the EU networks could be seriously reduced by a high degree of diversity in management techniques, procedures and working standards. Training is another crucial issue. Although all applicant countries have improved their training programmes specialised training is generally lacking as regards new types of crime such as money-laundering, intellectual piracy and high-tech crime. Diversity of implementation capabilities caused by a combination of lack of training, resources and equipment could have particularly negative consequences in the fight against economic crime where the ongoing liberalisation process in the applicant countries creates new opportunities for crime. In the area of data-protection - crucial for EU police cooperation - a relatively late adoption of the necessary legislation and organisational structures could result a lack of adequate experience and established confidentiality working standards at the time of accession and a correspondingly high degree of diversity in the application of the EU's data-protection acquis. Finally one also has to mention deficits in equipment as a major source of diversity in implementation. Some of the applicant countries have made much progress with the introduction of computerised police search systems and other modern equipment but major deficits continue to exist in all of them. Many of these sources of diversity in the implementation of police cooperation

standards taken individually may appear to be of limited importance but taken together they constitute a formidable challenge for the applicant countries as regards management, organisation, funding and training.

Judicial cooperation in criminal matters. In this area implementation is primarily affected by diversity in the application of established procedures. Cooperation with the Czech Republic, for instance, has encountered problems because of the slowness of judicial procedures, the lack of specialised knowledge and language skills among the mostly younger judges and weaknesses in the quality of application of procedural rules. Language problems, lengthy procedures and major delays in returning official are a common problem in current judicial cooperation with most of the applicant countries. The delays and weaknesses as regards procedures of cooperation are partly to be explained by the above mentioned organisational weaknesses of the judiciary (see above section II.3.), insufficient manpower and bureaucratic obstacles, but they are also caused by lack of adequate training of judges and officials in the specificities of international cooperation. Practitioners from current EU Member States have also reported considerable variations in the willingness of authorities in the applicant countries to effectively cooperate in legal assistance matters. Further delays in active participation in cross-border judicial cooperation could result in insufficient expertise at the time of accession and increase the risks of diversity after accession.

III. Instruments and strategies for reducing or managing diversity in the context of the eastward enlargement

1. Instruments and strategies before accession

Although the extent of the challenges of enlargement in the areas of justice and home affairs had already become fairly clear after the submission of the Langdon Report to the European Commission in October 1995[19] and

19 SEC(6)96, a consultancy report drawn up by the former British Home Office official J. Langdon.

although the "structured dialogues" with the applicant countries had led to little progress in this area it took the EU until 1997 to take the first substantial action on pre-accession help through a major reorientation of the PHARE programme. Since then a range of instruments aimed at reducing diversity have been adapted or newly introduced. They - and their respective problems - can be summarised as follows:

Monitoring instruments. Monitoring and evaluation of the applicant is obviously crucial to the identification of diversity problems and as a basis for EU pre-accession action and positions in the accession negotiations. The most sophisticated of the existing evaluation mechanisms is the already mentioned "collective evaluation" mechanism of the Council set up in 1998 which allows to identify major problems of diversity especially in the areas of implementation and organisational structures. The Regular Reports of the European Commission on the progress made by the applicant countries focus slightly more on the reduction of diversity in the legislative area.

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

Pre-accession aid instruments. These include measures under the PHARE programme and specific Third Pillar justice and home affairs programmes such as GROTIUS, OISIN and FALCONE. These aid instruments have so far focused on the transfer of expertise ("pre-accession advisers", twinning programmes), specific training measures and - to a lesser extent - help with the upgrading of technical equipment. Last year a Council Regulation[20]

20 OJ No. L 253 of 7.10.2000.

also enabled the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA) to transfer its know-how to applicant countries. The pre-accession aid instruments are in general highly appreciated by the applicant countries - especially as regards know-how transfer - and are making a substantial contribution to the applicant countries' understanding what will be required from them on the implementation and structural side.

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

Instruments of pre-accession association. The earlier applicant countries can gain practical experience with the functioning of EU institutions and procedures the easier it becomes for them to adapt their own structures and procedures in view of a more effective participation from the time of accession. Instruments of pre-accession association have so far included improved information of the applicants about EU decision-making in justice and home affairs at senior official level and their partial involvement in a number of specialised bodies like CIREA (asylum), CIREFI (immigration) and PAPEG (organised crime). As regards EUROPOL the JHA Council of 15 and 16 March 2001 gave green light for the Director of Europol to negotiate agreements with Hungary and Poland which will include the transmission of personal data to each of them.[21] The Council Decision of 22 December 2000 establishing the European Police College (CEPOL)[22] also emphasised the need for CEPOL to develop

21 Council document no. 6757/01.
22 OJ No. L 336 of 30.12.2000.

quickly a relationship with national training institutes in applicant countries in view of preparing the applicant's police forces for an effective participation in EU police cooperation. In March 2001 EU ministers also came out in favour of a participation of the applicant countries in the EMCDDA.

Problems: The current forms of association keep the applicant countries outside of all more operational elements of EU cooperation, mainly because of concerns over data-protection and corruption. This limits the learning effects and causes frustration on the side of participants from the applicant countries. Differentiation between candidate countries as regards the degree of association - such as the priority given to the association of Hungary and Poland with Europol - tends to create tensions over what is perceived as unequal treatment.

The 1998 Pre-accession Pact on Organised Crime.[23] This is a so far unique multi-disciplinary instrument of cooperation in the area of the fight against organised crime which is aimed at transferring both know-how and EU implementation standards to the applicant countries in order to reduce potential diversity in implementation problems after accession. Under the terms of the Pact the EU-15 and the applicants have agreed to develop, with the assistance of Europol, a common annual strategy in order to identify the most significant common threats in relation to organised crime, increased exchange of law-enforcement intelligence and mutual practical support as regards training and equipment assistance, joint investigative activities and special operations, facilitating trans-boundary law enforcement cooperation and judicial cooperation, and mutual exchange of law enforcement officers and judicial authorities for traineeships. The applicant countries have also undertaken to engage in further institutional adaptation to the EU acquis and to step up preparations for their accession to the Europol Convention at the time of accession. It has on the whole proved to be useful and could serve as a model for pre-accession pacts in other sensitive areas such as asylum or illegal immigration.

23 Pre-accession pact on organised crime between the Member States of the European Union and the applicant countries [...], OJ No. C 220/1 of 15.7.1998.

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

The accession negotiations. These can also be regarded as an instrument in the sense that the EU uses the negotiations to put pressure on the applicant countries not to relent with their efforts of adoption of the EU acquis in justice and home affairs. There have been thinly veiled threats that failure to comply with the entire acquis could delay accession.

Problems: The accession negotiations are focused more on the adoption of the formal legal acquis than on the implementation problems which are much more difficult to assess and to negotiate on. This encourages applicant countries to concentrate on satisfying the EU's formal acquis demands rather than effective implementation capabilities and mechanisms. The EU's insistence on implementation capabilities is often seen as very imprecise criterion which can be rather softened or toughened rather arbitrarily.

The EU has never formally adopted a comprehensive pre-accession strategy for the areas of justice and home affairs encompassing all these instruments. On the basis of the large number of Council and Commission documents adopted on enlargement issues and of the action taken so far two basic elements of strategy can be identified:

(A) The central objective remains the full adoption and implementation of the EU/Schengen by the applicant countries upon accession.

(B) This objective is to be pursued both by putting pressure on the applicant countries (mainly in the context of the accession negotiations) and a combination of the main types of instruments mentioned above.

In order to be successful any enlargement strategy has to be realistic, credible and efficient as regards its means. Under each of these criteria current EU strategy shows certain weaknesses:

Is this strategy realistic? It seems quite likely that diversity in terms of legislation will have largely been eliminated upon accession. Because of the political pressure on the applicants during the negotiations diversity in policies will not come fully to bear before accession. The extent of organisational diversity may also be reduced to a significant before accession, especially if the EU steps up its pre-accession help. Yet the diversity in implementation capabilities is such that it seems totally unrealistic at this stage to expect even "first wave" candidate countries to meet all the implementation standards applied in the EU/Schengen context. Is this strategy credible? The applicant countries are well aware that there are differences of position within the EU on the acquis question. The British Government, for instance, as a non-member of the Schengen border control system is well known to favour a more flexible attitude as regards the adoption of the Schengen standards by the applicant countries. Even more important is that it has by now become fairly clear that the Schengen members are not going to lift their current tight external border controls towards the new Member States immediately at the time of accession. While this represents clearly a major blow for the applicant countries - they could regard the continuation of internal border controls on persons as a visible sign of continuing exclusion from Western Europe or even as a sign of a "second class membership" - it also constitutes an implicit admission that the Schengen group's insistence on a full Schengen implementation capability upon accession is not any longer a realistic objective. With this admission the current "maximalist" strategy loses a substantial part of its credibility.

Is this strategy efficient as regards its means? The problems indicated above show that there is at least considerable scope for improvement. Broadly speaking EU pre-accession instruments suffer from fragmentation, lack of coordination, different approaches of Member States which result in conflicting signals to the applicants and underfunding. In many areas there is no effective system of regular re-targeting, prioritising and target achievement evaluation. Instruments which have been relatively successful in one area - such as the Pre-accession Pact on Organised Crime - are not taken over in other areas.

Alternatives to the current strategy seem both possible and worthwhile to consider. One possible change could apply to the primary objective. Instead of aiming at the full adoption and implementation of the entire EU/Schengen acquis the Member States could prioritise certain parts of the acquis and leave others to be fully met only at different times after accession. This seems difficult to combine with the idea of a single internal security area where all elements are to some extent interrelated and one weak link is normally often perceived as endangering the security of the whole. Yet such a prioritisation becomes possible if the new Member States will indeed be kept outside of the operational elements of the Schengen border control system for some time after accession. As a result not only the core of the security zone element of the AFSJ would be temporarily taken out of the accession process and potentially negative effects of diversity - which should satisfy the internal security concerns of current Member States - but also the need for demanding the adoption and full implementation of all parts of the EU/Schengen acquis from day one of accession. This would give the new Member States not only more time - which especially the "first wave" candidates clearly need - but also the opportunity to concentrate their scarce resources more effectively on certain AFSJ acquis areas before accession and to shift them to other areas after accession. It would be for the EU to determine which parts of the acquis would need to be met by accession - constituting the "accession AFSJ acquis" - and which parts would only need to be fully met before the new Member States will be fully admitted to the Schengen system - constituting the "post-accession AFSJ acquis". The EU could then re-target its pre-accession aid measures accordingly, concentrating its own resources as well on the respective priority areas. The decision on what should belong to the "accession" and what to the "post-accession" acquis would no doubt be a controversial one, and the Schengen members having common borders with new Member States may well take the view that even with external border controls staying in place their security interests will be met best by insisting that the new Member States apply most of the acquis immediately upon accession. Yet it would appear sensible, for instance, to prioritise the new Member States' full implementation capability in the areas of judicial

cooperation and police cooperation rather than to insist on a full implementation capability as regards the Schengen external border control system and participation in the Schengen Information System (SIS).

Distinguishing between an "accession" and a "post-accession" acquis could also contribute to a higher credibility of the EU strategy. With a more limited and therefore more realistic set of objectives as regards implementation capabilities the EU's strategy would provide less potential excuses for applicant countries for not being able to meet objectives. The EU would be in a position to focus more effectively and credibly on a limited but substantial range of areas and standards to be achieved by the time of accession. With less extensive demands it would become more credible to actually treat these demands as real accession conditions, meaning that non-compliance would be taken as an actual ground for delaying accession.

Changes of strategy should also be considered by the EU as regards pre-accession aid. The applicant countries should be given access to all existing training, evaluation and pilot project programmes in the areas of justice and home affairs. Having regard to the fact that trafficking in human beings is to a substantial extent carried out through and in the territories of some of the applicant countries it seems quite extraordinary that they were not right from the beginning involved in the important EU STOP programme which finances projects in this field. It was only in the context of the informal EU/candidate countries ministerial justice and home affairs meeting in Brussels on 16 March 2001 that the EU ministers finally agreed on "looking into the possibility of associating the candidate countries" with the STOP programme.[24] Consideration should also be given to an upgrading of funding for specific pre-accession aid in the justice and home affairs field. Implementation capabilities of the applicant countries are to a considerable extent dependent on the introduction of modern equipment such as the computerisation of databases, the establishment of electronic data links between border posts, consulates and central databases, electronic fingerprinting devices, infrared and CO^2 detectors and

24 Agence Europe, no. 7925 of 17/03/2001, p. 7.

technology for producing counterfeit-proof documents. All this requires considerable investments which most of the candidates - because of their adjustment burdens in other enlargement relevant areas - are unlikely to come up with to the extent required for their effective integration into the AFSJ. If EU Member States really take the view that insufficient implementation capability of the new Member States might affect their own internal security it would seem sensible for them to upgrade funding for equipment in candidate countries as an investment into the future internal security of their own citizens. In this context it seems worth mentioning also that much of this equipment would need to be acquired in EU countries so that the funds would to some extent "return" into the EU.

2. Instruments and strategies after accession

The eastward enlargement will inevitably import additional diversity into the AFSJ. Substantial diversity exists among the current Member States and the new Member States will add to that. After accession it will also become more difficult to put effective pressure on new Member States to further reduce diversity on their side: They will be in a position to either "veto" EU measures or - in the (so far few) areas providing for qualified majority voting - participate in blocking minorities. They are also likely to be less willing to submit to special monitoring procedures. As a result the management of diversity in the sense of helping the EU to cope with persisting or even increased levels of diversity may well become as important as further efforts to reduce it. It seems therefore useful to have a brief look at some of the available instruments:

One "classic" instrument of diversity management and reduction is majority voting. It allows to bypass diversity related blocking positions and to proceed with diversity reduction even against individual national positions. The Treaty of Nice - although declared to prepare the EU for enlargement - has not brought a major breakthrough towards majority voting: Pursuant to new Article 67 (5) TEC the Council will be able to decide by qualified majority (under the co-decision procedure) on asylum and refugee policy measures, but only once "common rules and basic

principles" have been adopted by unanimity. Article 67 (5) extends majority voting also to judicial cooperation in civil matters, but with the very substantial exception of family law. In order to reduce the risk of national "vetoes" it would be important to use the possibility offered by Article 67 (2) TEC to pass at the end of the transitional period (May 2004) to qualified majority voting at least in the communitarised areas - which include border control issues - before the first accessions take place. Some of the new Member States may not be supportive of a move towards more majority voting in some areas of justice and home affairs after having joined.

Another "classic" instrument for accommodating temporarily enlargement related diversity are transition periods during which certain parts of the acquis are not applied to the new Member States. So far the applicant countries have neither formally asked for such transition periods in justice and home affairs nor has the EU indicated its willingness to consider such temporary arrangements. Yet a non-application of the operational parts of the Schengen acquis to new Member States after accession could well be regarded as a sort of transitional arrangement, although it would be an open-ended one with the Schengen countries being unlikely to commit themselves to a certain date for the full integration of the new Member States.

An instrument of diversity management rather than reduction is the principle of mutual recognition which was endorsed by the Tampere European Council as the cornerstone for the further development of judicial cooperation in civil and criminal matters. Mutual recognition - successfully applied in the context of the Internal Market - is based on the acceptance of a significant degree of diversity in the light of the obvious difficulties and delays resulting from "hard" diversity reduction through regulation. Yet it is a tool which cannot be applied to all areas of the AFSJ, and even in the judicial sphere effective EU action is likely to require a certain degree of harmonisation, such as minimum penalties for certain types of cross-border crime. One of the most innovative diversity management instruments is "closer cooperation". Introduced by the Treaty of Amsterdam and partially

reformed by the Treaty of Nice[25] which has removed the possibility of national vetoes against the setting-up of such cooperation frameworks, it appears very much as a double-edged instrument in the context of diversity in justice and home affairs. On the one hand, if a group of Member States is formed which use the institutions, procedures and legal instruments of the EU to develop a new acquis which applies only to those Member States participating this inevitably introduces a powerful new element of diversity into the political and legal system of the EU. Any potential benefit of the reduction or even elimination of diversity between some Member States only and in certain areas only has as its negative side the introduction into the EU system of new fault lines of exclusion and inclusion and additional elements of fragmentation of the legal order. "Closer cooperation" as a simple device to accommodate diversity carries a considerable risk of weakening the unity and effectiveness of the EU's political and legal system on a lasting basis and should therefore be avoided. Yet, on the other hand, it has also to be recognised that this form of differentiation can generate new legislation, mechanisms and standards which - if developed successfully and later taken over by most or all of the Member States - can both help with the management and the reduction of diversity in the EU as a whole. The basic principles of the 1990 Dublin Convention may be taken as an example in this context. They were first negotiated in the Schengen context and then taken over by all Member States as an EU Convention. Such "vanguard" or "laboratory" closer cooperation could therefore play a useful role if diversity problems in the context of the eastward enlargement would risk to paralyse the further development of the AFSJ. Nothing should prevent a number of Member States (the minimum will be eight after the Treaty of Nice) to go ahead, for instance, with the introduction and recognition of a European enforcement order or a European arrest warrant if not all of the Member States want or are able to take this step at the same time. It should not be excluded that some old Member States might set up "closer cooperation" frameworks on some issues which some new Member States find, for whatever reason, uncomfortable. Yet it would need to be

25 Articles 40 TEU, 43 TEU and 11 TEC (Treaty of Nice: Articles 40-40b and 43-43b TEU, 11 and 11 a TEC).

made sure that such "closer cooperation" is really only a measure of "last resort" - a condition which has been strengthened by the Treaty of Nice - after all efforts to proceed in common have failed and that there are no lasting exclusion effects.

As regards potential post-accession strategies on diversity management and reduction this is largely a matter for speculation at the present stage. The use of the above mentioned instruments - and possibly a range of others - will depend on the political will of the enlarged Union to proceed with deeper integration in the context of the AFSJ and the balance between diversity reduction and diversity toleration it will be aiming at.

IV. Conclusion

The development of the AFSJ has clearly become one of the most important and rapidly developing political projects of the EU, especially because it correlates to some of the primary concerns of European citizens. It is all the more important to arrive at an effective integration of the new Member States into this "area" which is dealing with essential public goods such as internal security. Whereas the EU might need to reconsider both its maximalist strategy and its approach to pre-accession aid, the applicant countries will have to accept that this is a very sensitive area for the EU in which not many compromises may be on offer and in which they will have to accept a substantial waiting period in the Schengen ante-room.

It may be appropriate to conclude this contribution on the issue of trust. The progress which the EU has achieved so far as regards cross-border cooperation between law enforcement and judicial authorities and the build-up of the extensive information exchange mechanisms which are central to the further development of the AFSJ has only been possible on the basis of a growing and often not easily acquired mutual trust in the reliability of partners, the respect of confidentiality rules and the compatibility of basic standards as regards working procedures and the implementation of common decisions. Should the enlargement lead to the import of too high a degree of diversity in standards and capabilities this crucial factor of trust could well be eroded. The result could be protective

measures by individual Member States or groups of Member States which would put into jeopardy both the current structure of the AFSJ and its further development. The loser would be the European citizen - in both the old and the new Member States.

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