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The Challenge of the Eastern Enlargement

The specificity of the challenge of enlarging the Area of Freedom, Security and Justice

The quite significant extension of EU action in the fight against crime and illegal immigration after the Treaty of Amsterdam has clearly added some substance to the EU's declared aim of establishing itself as an 'area of security' as a central element of the whole AFSJ treaty objective. This area – as any security zone – is to a considerable extent defined through the borderline it establishes between a secure (or to be secured) 'inside' and a (perceived) less secure 'outside'. The 'inside' currently consists of the 15 existing EU Member States, but – with the Union's first big enlargement to Central and Eastern Europe approaching fast – this 'inside' faces an extension to its current near 'outside' which could nearly double the number of countries making up the AFSJ within a decade.

It has become quite commonplace to describe the EU's eastward enlargement as one of the biggest opportunities but also one of the most fundamental challenges of European integration at the beginning of this century. The eastward enlargement brings its opportunities for the AFSJ as it will allow the Union to extend its emerging internal security system with its mechanisms and standards to much of the current non-EU Europe. There could be clear benefits for both 'old' and 'new' Member States from improved cross-border cooperation and a pooling of expertise and resources in the fight against organised crime and illegal immigration. Yet for the Union as an emerging actor in the domain of internal security – and more generally the whole AFSJ as a major integration objective – the challenge seems currently to be much greater than the opportunities. For the AFSJ enlargement means after all that new countries are going to be incorporated into the emerging 'area of security' which for years have

been regarded by law enforcement authorities of current Member States – and not a few politicians as well[1] – as being very much a part of the 'unsafe outside' against which the AFSJ should protect its citizens.

The perception of Central and Eastern European countries[2] as a source of internal security risks – especially as regards illegal immigration and organised crime – has led to some exaggerations and is easily instrumentalised as an argument against enlargement in general. Yet there can also be no doubt that many of the candidate countries have experienced a considerable growth of organised crime in their territories during the 1990s,[3] that two of the major routes of illegal immigration into the EU – the so-called Eastern and Balkan routes – pass wholly or partially through some of the current candidate countries[4] and that since the demise of the Iron Curtain Central and Eastern European countries have seen a significant increase in cross-frontier crime which includes the smuggling of stolen goods, drugs and all sorts of contraband, as well as trafficking in women and children.[5] To provide effective responses to these internal security challenges is a hard enough task for the current EU Member States. Yet for the prospective future members this task is all the more difficult because the transformation of key elements of their internal security systems, including border guards, police forces and the judiciary has not yet been fully completed, making them particularly vulnerable to these internal security risks because of organisational and structural deficits, lack of qualified staff and equipment, corruption and other problems. Whatever progress the candidates have already made – and the European Commission's annual reports testify to the very considerable efforts made by all of them – a major degree of diversity continues to exist between the internal security structures and capabilities of the candidates and those demanded by the rapidly developing *acquis* of the AFSJ and is likely to extend beyond the time of accession.[6]

As the political decision to go ahead with the eastward enlargement has already been taken by the EU the key question is not any longer whether or not enlargement poses major internal security risks but what primary problems the EU as an actor in the domain of internal security has to tackle in the context of enlargement and how it is responding to these. This chapter will try to provide an answer to this question and also to develop some thoughts on how the EU could further reduce the potential negative impact of enlargement on the future development of the AFSJ. Before looking at the primary problems, however, it seems useful to highlight four factors which make the enlargement of the AFSJ a special challenge for the EU, quite different from the challenges of enlargement the EU has to face in other major areas of EU policy-making.

The first of these factors is the security rationale of the AFSJ which has already been referred to in Chapter 1. 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.[7] 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 is said that it corresponds to 'frequently expressed concerns of citizens'.[8] 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, an objective which has been re-emphasised in even stronger language in the EU action plan of 20 September 2001[9] after the terrorist attacks in the US of 11 September. The underlying idea of guaranteeing citizens' freedom through a high level of safety clearly has major implications. It puts security at the centre of the AFSJ, with the EU's external borders implicitly becoming the dividing line between the 'safe inside' and the 'unsafe outside' and law enforcement as the key instrument to maintain and further enhance this separation. The reference to European citizens' 'concerns' adds a powerful legitimacy claim to the 'area of security' and its full implementation.[10] 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 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 all 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 of 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 JHA area carry the risk of appearing to compromise 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 treaty[11] before they were declared 'Schengen mature' and finally fully admitted to all the operational parts of the system indicates that JHA is not an area prone to compromises for the sake of political integration. Several Schengen members, most prominently Austria and Germany, have made it clear that such compromises are not on offer during the accession negotiations[12] and it seems now almost certain that the Schengen countries will maintain 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 JHA areas started relatively late. Still, in the mid-1990s, there were hardly any indications that cooperation in the JHA area would develop into a major EU integration objective with as extensive a range of objectives as the AFSJ of today. This development came all the more as a surprise to the eastern candidate countries which used 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 adaption 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

JHA area 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 did enlargement problems in these areas start to be treated with a certain 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) EU *acquis* in the JHA area 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.[13] This still did not answer all the questions of the candidates as to implementation requirements, and – rather amazingly – it took the Member States and the Council until February 2002 to approve a catalogue with recommendations for the correct application of the Schengen *acquis* and best practices in this respect.[14] As a result the applicant countries only gradually arrived at a complete picture of what would be asked of them, with corresponding delays in preparations and the development of more specifically targeted EU support measures. Overall, therefore, effective preparations for taking on the *JHA acquis* started in most of the candidate countries more than half a decade later than for the internal market *acquis*.

The fourth factor is the rapid growth of the EU *acquis* following 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. Already 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* that the applicant countries have to take over. As a result of the Tampere decisions, the more active role of the European Commission and the impact of the terrorist attacks of 11 September 2001, this pace could increase even further during the next few years. During 2001 the Council adopted no less than 99 new texts which all add to the *acquis* the applicant countries are expected to take over and implement.[15] 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 result in some or all of the applicant countries in certain areas falling even further behind the EU *acquis* rather than catching up with it.

While these problem factors make JHA a special kind of challenge for the enlargement process the central issue to tackle remains that of reducing or managing the diversity 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 what follows 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.

The main dimensions and problems of diversity in the context of the eastward enlargement[16]

The use of the term 'diversity' in the context of an analysis of the challenge of enlarging the AFSJ may not be an obvious choice and is in need of some explanation. The term will be used as a generic denominator for differences between the justice and home affairs systems of the eastern applicant countries on the one hand and the EU JHA *acquis* in the context of the AFSJ on the other. Using it in this restricted sense means to proceed on the basis of two major simplifications which are in need of a justification.

The first is that, of course, such 'diversity' does not only exist between applicant countries and the EU *acquis* but also between current EU Member States themselves and even between their national systems and what the EU *acquis* provides for in terms of structures, policies and policy implementation. As has been pointed out in Chapter 1, diversity between national systems has indeed been – and still is – one of the major obstacles to further progress in the construction of the AFSJ and is therefore an 'old' problem of integration in EU justice and home affairs. Some elements of the existing intra-EU diversity – such as the differences between the civil and common law legal systems – are of such an important nature that they will continue to be major problems for many years or even decades. The (now) partial opt-outs of Denmark, Ireland and the United Kingdom are another striking feature of current intra-EU diversity. Yet for the purposes of enlargement the EU Member States have decided to present the EU/Schengen *acquis* as a single block to be taken over in its entirety by the applicant countries, regardless of any persisting intra-EU diversity, and this is indeed the position they are adopting in the current accession negotiations.

The second simplification is that of treating justice and home affairs in the eastern applicant countries as being broadly similar from a

systemic point of view in the process of trying to establish their different dimensions of diversity with regard to the EU *acquis*. There are, of course, many forms and elements of diversity between the eastern candidate countries themselves such as differences in policing structures, asylum procedures and organisation of the legal systems. Yet officials in the EU institutions and ministries of the Member States tend to agree that this intra-applicant countries diversity is both less pronounced and less of a problem in view of the enlargement than the diversity which still exists between their systems and the EU JHA *acquis*. According to interviews carried out at the European Commission, the Council and several national ministries, there are in general more similarities than differences between the individual applicant countries as regards their diversity from the EU *acquis*. With the EU *acquis* having been 'imposed' by the EU as a non-negotiable condition of entry, all of the applicant countries are also striving – with, of course, varying degrees of success – to adapt their systems to this *acquis*, which has entailed a certain degree of convergence in the main development tendencies of the national systems.[17] As a result it seems justified to limit the following analysis to the main dimensions of diversity which can be identified between the JHA systems of the eastern applicant countries taken as a group and the EU JHA *acquis*.

The first dimension: diversity in legislation

Legislation on JHA matters is the dimension of diversity where differences between the EU *acquis* and the applicant countries are most 'visible' and measurable. The target, after all, is clear enough in the sense that it consists of all legally binding and some other texts in the areas of justice and home affairs which have been identified by the Council as those the applicant countries have to comply with upon accession. This *acquis*, it is true, is a moving target for the candidates as the EU constantly adds to it through the adoption of new legally binding acts. Yet the candidate countries are kept informed about additions to the *acquis* – although occasionally with some delays – and the General Secretariat of the Commission also produces an annual overview of the total *acquis* for the purpose of the enlargement process.[18] It should be noted that the *acquis* as defined by the EU also comprises major Council of Europe Conventions on the basis of which important parts of the EU *acquis* has been developed since the 1990s.

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 can be clearly seen from the 1998, 1999, 2000 and 2001 Commission reports – also considerable progress in bringing their legislation into line with the EU *acquis*. Nevertheless strong elements of diversity still exist with varying prospects for their removal until the time of accession. In order to arrive at a reasonably complete picture in the areas of relevance to internal security one has to look at four interrelated areas: the fight against illegal immigration, external border controls and – each with a focus on elements relevant for the fight against organised crime – police cooperation and judicial cooperation in criminal matters.

The fight against illegal immigration. In this field most of the applicant countries have made significant progress during 2000/2001 with bringing their relevant legislation into line with the EU *acquis* which is anyway still rather limited.[19] Of importance in this context is not only basic legislation on immigration as such but also legislation governing various aspects of the status of aliens such as termination of residence, the implementation of deportation and expulsion orders, rules on entry for the purposes of gainful activity and the admission of third-country nationals for study purposes and so on. Examples for the recent adaption of national laws to the EU *acquis* are the new Czech Act of Residence of Aliens of 2000, the amendments to the Slovenian Aliens and Refugee Acts adopted in January 2001 and the amendments to the Polish Aliens Act which entered into force in July 2001. Yet a certain degree of diversity still exists: for example in Slovenia where the 1999 Law on Aliens provides only for fines in cases of illegal entry or stay and the Criminal Code deals only with 'forced or armed' illegal crossings. In Slovakia short-stay visas can very easily be extended, and several categories of foreigners do not need a work permit. Latvia still lacks a comprehensive Immigration Law covering all aspects of the fight against illegal immigration. Even those countries which have adapted their legislation to the main principles of the EU *acquis* still have some gaps to fill as regards implementing legislation. The alignment with the EU *acquis* is not made easier by the fact that the EU *acquis* is to a considerable extent based on soft-law instruments whose scope is sometimes open to different interpretations. 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 that of the EU. Several differences also still exist as regards legislation against illegal employment. Overall, however, the substantial

changes already made by the applicant countries to their legislation and further changes which are being prepared should enable all of them to complete their alignment without problem until the time of accession. In this field, as in others, the real problems are to be found in the area of implementation, as we shall discuss.

External border controls. This is a field where legislation plays a less prominent role than in other relevant JHA areas. The main and most relevant elements of diversity are to be found in the field of implementation (see below). Nevertheless it is of importance that at the time of accession the applicant countries have completed the legal transformation of the border guards or border police forces into a professional non-military force compatible with EU standards. In the Luxembourg Six the necessary legislation was already adopted during the second half of the 1990s. The 1997 Hungarian Act on Protecting the Borders and the Border Guard, for instance, is fully compatible with EU expectations in the field, and since amendments to the Border Guard Law enacted in April 2001 the Polish Border Guard is operating on a legislative basis very similar to that in current EU Member States. In April 2001 even in Slovakia, which had repeatedly been identified as one of the primary laggards, provisions on a new organisation of the Border and Aliens Police entered into force, which brought the country a big step closer to a unified and specially trained border police compatible with the Schengen standards.[20] Yet there are still shortcomings in terms of the necessary legislation in several countries, in particular as regards Bulgaria, where the demilitarisation of the border police had not yet been completed in 2001, and in Romania where some of the necessary new provisions were introduced only through emergency ordinances in June 2001. It should also be pointed out that in some cases the necessary legislation to create modern Schengen-compatible border guards has entered into force only very recently. In the Czech case, for instance, the new integrated Alien and Border Police was created as lately as 1 January 2002. This means that these candidate countries will not have much time to test and adapt the new provisions and structures and to sort out implementation problems before accession.

Police cooperation and the fight against organised crime. As regards police cooperation most applicant countries seemed at the beginning of 2002 to be well under way to fully align their legislation with the EU *acquis*. This process has been made easier by the general overhaul of police legislation and organisation all applicant countries went through after the transition. Most of the candidate countries have set up national criminal

police centres with specific legal competences for the fight against organised crime. Examples are the Polish Central Bureau for Investigation set up in 2000, the Czech National Police Criminal Office established in January 2001 and the new Slovenian Criminal Investigation Police Directorate. Much progress has also been made concerning the formal establishment of the national law enforcement contact points which are of crucial importance to effective police cooperation in the fight against organised crime. Examples are the International Law Enforcement Cooperation Centre created by Hungary in 1999 and the Slovak Office for International Police Cooperation established in January 2001. Hungary has even adopted a separate law on the establishment of a special Coordination Centre against Organised Crime. Yet some major deficits in alignment persist. Most of the applicant countries still have, for example, 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* has become quite demanding, especially with regard to participation in Europol. Several 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 which will reduce their chances to enter into effective cooperation with Europol as well as national police forces in the current Member States. Yet others have adopted the necessary legislation and procedures which have, for instance, enabled Poland and Slovenia to sign in October 2001 Association Agreements with Europol which allow their law enforcement authorities to have access to certain criminal intelligence information held by current Member States.[21] While the candidate countries are catching up fast on the EU legal *acquis* in matters of police cooperation in the fight against organised crime it should be noted that in this area as well relevant legislation has in most cases only be adopted very recently, or is still in the process of being prepared, which may limit implementation capabilities at the time of accession.

Judicial cooperation in criminal matters and the fight against organised crime. Effective judicial cooperation in criminal matters is to a considerable extent dependent upon the compatibility of relevant provisions in penal codes and codes of criminal procedure. The major reforms of the national codes after the end of the communist systems in the 1990s

have considerably increased their compatibility with the EU *acquis* in the judicial cooperation sphere. Problems persist, however, on a number of specific substantive and procedural issues of judicial cooperation such as the existence of major gaps in several of the candidate countries in the legal provisions relating to direct contacts with foreign judicial authorities for the purposes of mutual assistance in criminal matters and extradition procedures. In the case more specifically of the fight against organised crime, Latvia, the Czech Republic and Slovakia, for example, at the beginning of 2002 still needed to align basic definitions of their legislation with the December 1998 EU Joint Action making it a criminal offence to participate in a criminal organisation. Most of the applicant countries have ratified or at least signed most of the relevant Council of Europe Conventions forming part of the EU *acquis* such as the European Convention on Extradition and the European Convention on Mutual Legal Assistance. There are some notable exceptions, however. Poland, for instance, has not yet acceded to the 1972 Council of Europe Convention on the Transfer of Proceedings in Criminal Matters, nor the Czech Republic and Latvia to the European Convention on the International Validity of Criminal Judgments. 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 in some the process of falling into line with the EU *acquis* is not yet completed. Whereas all necessary instruments are in place, for instance, in Slovenia, the Czech Republic still lacks an adequate definition of money laundering in the Penal Code and Romania still needs to introduce major changes to national legislation and has not yet ratified the Council of Europe Convention on Laundering, Search, Seizure and the Confiscation of the Proceeds from Crime. In some cases, such as Estonia, Hungary and Slovakia, relevant legislative changes were only introduced or even only submitted to Parliament during 2001 which will give the judiciary and police forces little time to adapt to the new legislation before accession. The EU has been putting considerable pressure on the candidate countries to strengthen their legislative basis for the fight against corruption, which is seen as an essential element in the fight against organised crime. Whereas in some candidate countries, such as Estonia and the Czech Republic, nearly all of the relevant EU-compatible legislation was in place by the end of 2001, others, such as Latvia and Bulgaria, still needed to make substantial changes to their legislation. It should also be noted that some of the candidates had by that time not yet ratified, in some cases even not yet signed, the Council of Europe Criminal Law Convention on Corruption or the Council of Europe Civil Law Convention on Corruption. The overall picture in the judicial aspects of the fight against organised crime 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, as discussed.

The second dimension: diversity in policies

The EU *acquis* does clearly not (yet) provide for anything which comes near to a common 'policy' on internal security. 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 policy objectives and priorities in these areas which are part of the 'political' *acquis* the applicant countries will be expected to take over upon accession. Diversity in this area is much more fluid and less easy to establish and to measure than in that of the formal *acquis*, especially because there are still major divergences in JHA policies between the current 15 Member States. Yet additional diversity in policies imported by the next enlargement is quite likely and it could have implications for the further construction of the AFSJ. Two examples may demonstrate this point.

The first example is that of external border management. During the 1990s the EU 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 JHA area. 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 the 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 in several eastern border regions is of considerable economic importance.[22] At the end of 2001 Poland, for instance, still raised a number of 'questions' about the implementation of the Schengen *acquis* at its eastern borders, a clear indication of the Polish government's concerns about the negative impact of the application of the Schengen regime on economic and political relations with its eastern

neighbours. A similar case is that of Hungary which in 2001 still had agreements in place on simplified border crossing with its neighbours that were clearly not in harmony with the Schengen approach.[23] 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 a revision of the current *acquis* against established EU objectives and priorities. Such 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 was again confirmed by the Conclusions of the Tampere European Council. The applicant countries have been left in no 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 instruments in line with the EU *acquis*. Yet the perspective of applicant countries of this area as a policy priority is not the same. One reason for that is that all the applicant countries are for their economic development heavily dependent on the influx of foreign capital. A very strict application (or even further tightening) of the rules against money laundering could have (or be perceived to have) a dampening effect on the inflow of capital, and the prospective new Member States could well take the view that they can less afford this sort of restriction than can the fully developed economies of the current Member States. Another reason is that the full implementation of the EU's *acquis* and objectives in this area requires quite considerable financial and administrative efforts (for the setting up of a special agency to monitor financial operations, for instance) which the applicant countries with their huge needs in other areas might prefer to 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 new case of policy diversity which – after accession – would clearly have implications for the EU's decision-making capacity in this area.

The third dimension: organisational diversity

Organisational diversity has to be regarded as a serious issue for the enlargement of the AFSJ 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. Since the first half of the 1990s the quickening pace of integration in justice and home affairs has led not only to the creation of a number of new cooperation structures at the European level – such as Europol and Eurojust – but also to important organisational changes in the administrative, policing, border control and judicial structures of the current EU Member States. These have involved – and continue to involve – mainly restructuring 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 JHA 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 organisational adjustments required by the EU *acquis*. Substantial differences between institutions and structures in the current EU Member States, whose compatibility and interoperability have increased during the 1990s, and those of the applicant countries could seriously reduce the latters' capacity to effectively implement the EU *acquis* after accession. Major diversity continues to exist primarily in four areas.

Organisational structures in the area of immigration. While most candidate countries have gone through extensive structural changes in the management of migration, including the introduction of computerised databases on aliens, unclear competence demarcation lines, and inadequate cooperation between administrative and security authorities at the central and local level tend to reduce the effectiveness of the implementation of key legislation on immigration issues. Some countries, such as Romania, have not yet made all necessary changes to effectively manage applications for the issuing of residence permits or visa through consular or diplomatic representations in third countries. Understaffing of the relevant units within ministries and deficits in the organisation of the border guards is a serious structural problem in some applicant countries. The change of organisational structures in all these areas requires not only further legislation, additional restructuring and new approaches to interservice cooperation but also a considerable financial effort – including on training and equipment – which some applicant countries may be unable to afford in time before accession.

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, watchtowers 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, and 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, as in the case of Bulgaria and Romania, the occasional use of troops for border duties. Understaffing because of recruitment problems and financial difficulties is a serious problem in several of the candidates. In both Hungary and Poland, for instance, actual staff numbers of the border guards in 2001 fell around 30 per cent short of the official target numbers. Rises in pay can increase the attractiveness of serving as a border guard (and reduce the risk of corruption) but then generate additional financial pressures, which then often reduce the numbers of posts actually made available, as was the case in Poland in 2000 when wages were raised by 20 per cent.[24] In the Czech Republic the absence of resources for paying overtime meant in 2001 that control posts were understaffed at weekends and on holidays. Border surveillance is carried out by police units which are not always adequately trained for this duty. 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 the 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 most of the applicant countries will have to shift the bulk of their border control operations from their traditionally strongly guarded western borders to their eastern or south-eastern borders to which much less attention 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 investments to be fully upgraded to the Schengen standards. The shift of material and personnel from Poland's western to eastern or south-eastern border has been accelerated by a new ambitious Border

Management Strategy which was adopted in March 2000[25] but during 2001 serious financial shortfalls became apparent. During 2001 most of the candidate countries adopted special Schengen action plans which also provide for further organisational and structural improvements but these are unlikely to be effectively implemented before accession.

Organisation of police forces. Police forces in all the applicant countries have gone through several rounds of reform and adjustment during the 1990s. While these have generally helped to modernise policing structures and to put clear blue water between today's forces and their tainted past under the communist regimes, numerous reorganisations and frequent changes in senior positions have also created a certain instability and disorientation in many forces. This applies in particular to Estonia and Slovakia, but the problem also exists in other applicant countries. As was recognised in a Polish Government Report on the Security Situation of May 2000, Polish police forces suffer from particularly complicated organisation, lack of interforce coordination and inadequate management structures which are an important factor of operational inefficiency and staff demoralisation. In many candidate countries 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 several cases – including Hungary which otherwise has made much progress in the reorganisation of its police forces – there is still a considerable lack of effective interservice coordination in the fight against organised crime and money laundering. In Slovakia communication and coordination between police officers and investigators is overly complicated and ineffective, causing frustration and loss of evidence.[26] As regards the internal structures required for integration into the EU police cooperation networks and structures, the applicant countries are only introducing these 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 changes 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 precondition for effective participation in central parts of the EU JHA *acquis* but also part of the conditions that the applicant countries have to satisfy in order to fulfil the Copenhagen political criterion of the 'rule of law'. Since the Helsinki European Council of December 1999 all East European applicant countries are considered to have met the 'rule of law' criterion but there are still considerable problems as regards their judicial systems. In the case of Slovakia there is no effective self-government of the courts because of a high degree of subordination to the Minister of Justice, and the procedures concerning the selection of judges are not sufficiently protected against government influence. A common problem is the overburdening of the judicial system in the applicant countries, owing to lack of staff, inefficient procedures and the unavailability in several applicant countries of alternative methods of dispute settlement (such as arbitration, mediation and reconciliation). This has led to major backlogs – in Poland 1.81 million cases in 2000[27] – and in some cases (like in the Czech Republic) to unpredictable and divergent judicial decisions. Since large numbers of the senior judges were removed from office following the transition all applicant countries also have difficulties with insufficient experience of mostly young judges. These judges are not only often poorly trained – in Bulgaria, for instance, no systematic training at all was available in 2001[28] – but also often have insufficient time to concentrate on their main tasks because of the lack of administrative supporting staff and modern technological facilities. A further problem is corruption in the judicial system, which flourishes under the impact of inadequate surveillance and low pay. Still in 2000 a government-commissioned survey in Slovakia reported that 20 per cent of the parties involved in court proceedings experienced corrupt behaviour by judges.[29] 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 judgments at lowest-level courts (Estonia). Some countries, however, have already introduced substantial changes, such as Poland with its introduction since January 2000 of up to 200 civil–criminal chambers competent for petty cases and a simplification of procedures in civil matters. Further reforms are under way in all applicant countries: in Hungary, for instance, the introduction of a new tier of appeal courts at the regional level until 2003, and in Estonia a projected fundamental court reform to be completed by 2003. Yet because of their considerable

financial, administrative and training implications the ambitious organisational reforms introduced or under way could still take many more years to be effectively implemented. As experience in current Member States has shown, new judiciary structures which are put into place normally need considerably more time before they work satisfactorily.

The fourth dimension: diversity in implementation

Diversity in implementation is likely to be the biggest challenge of the enlargement process in the JHA areas. The applicant may well be able to bring all 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 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, accusing the European Commission even of focusing too much, in its regular reports on the progress made by the applicant countries, on formal legislative and organisational elements. Concerns over the applicant's 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 JHA *acquis*.[30] 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 JHA areas.

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 is evidence for a lack of consistency in the application of rules on entry, expulsion and residence as well as fines. This seems partially due to technical problems (such as lack of detention centres for deportees and adequate data collection and communication facilities) but partly also to politically and economically motivated concessions to 'neighbourliness'. In both Hungary and Poland similar concessions to nationals from neighbouring countries have been reported, and in Poland there are also serious shortcomings in the implementation of deportation and expulsion orders. So far the readmission policies of all applicant countries are mainly focused on readmission to neighbouring countries. Expulsions towards remote countries of origin, which are a standard practice in the EU/Schengen context, are in many cases not implemented. Even as regards expulsion to neighbouring countries major weaknesses continue to exist. Estonia, for instance, still had difficulties in 2001 in preventing expelled third-country nationals from re-entering its territory from neighbouring re-admission countries. Of considerable importance in the EU approach towards the fight against illegal immigration are measures against illegal employment which is one of the primary 'pull factors' of illegal immigration. All of the applicant countries have some legislation against illegal employment in place, but in nearly all cases this legislation is not effectively implemented. In Slovenia, for instance, employment inspection is weakly developed, police and judicial authorities seem to give only low priority to the fight against illegal employment and some of the tougher sanctions that would be possible under the Criminal Code are apparently not imposed. In Hungary immigrants seem able to find work without permits quite easily, and the relatively low fines imposed on employers seem to have little deterrent effect. Several of the candidate countries also have still to improve the security features of passports and visas (for example, through the introduction of holograms). The upgrading of enforcement practices and special measures such as increasing document security will all require considerable investment by the applicant countries, some of which do not currently treat them as a priority. If these steps are taken only 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 the applicant countries illegally tends to be a current EU Member State.

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.[31] Whereas some countries – such as Estonia and Slovenia – have made considerable progress with the adoption of EU/Schengen border control practices others still have to overcome serious deficits. In Poland, for instance, the units in charge of the control of border crossings and those patrolling the 'green borders' are organisationally separated and operate alongside each other with only limited coordination and communication, a fact which is easily exploited by smugglers. This is far from being only a marginal issue as the smuggling of alcohol and cigarettes across borders is prompting the growth of organised crime.[32] Whereas Hungary has recently made much progress with upgrading its equipment in line with Schengen standards (as regards the use of heat-seeking cameras, for instance) green border surveillance in the Czech and Slovak Republics continues to be weakened by the lack of helicopters and means of technical surveillance as well as the inadequate equipment of mobile patrol units. 'All-weather' night and day observation, as required by the Schengen standards, can therefore not be guaranteed. Several of the candidates' border guards still lacked, in 2001, computerised central data search systems, and only a small minority of the border crossing points had on-line connections with other law-enforcement agencies. These deficits in computerised infrastructure constitute a serious obstacle to their participation in the SIS. Interagency cooperation (with customs authorities, police) on border control issues – an important element in the EU/Schengen *acquis* – is in many cases poor and often affected by an unclear differentiation of tasks. The effectiveness of the border guards' work suffers in all applicant countries from a lack of systematic training in modern control and search techniques, such as 'risk-profiling' and 'risk-testing'. In both Romania and Bulgaria the training of the border police forces is still to a great extent based on traditional army training models. Cross-border cooperation with neighbouring countries – another important element of the EU/Schengen border regime – varies considerably, depending on political factors and the willingness of local units to engage in such cooperation. A particular problem – which might however be resolved if Slovakia joined 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 external one. There is only limited patrolling and considerable laxness in controls at crossing points, and the Czech–Slovak border has become a major thoroughfare 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 also be explained by specific political (ethnic minorities) and economic (important cross-border trade) reasons.

Police cooperation and the fight against organised crime. 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. 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, of course, not a formal part of the EU JHA *acquis*. Yet adequate and timely pay of police officers is of major importance in the fight against bribery and corruption. Practitioners in current EU Member States' ministries have also expressed concern about organisational changes in the candidate countries (adding 'new boxes' to organisational charts) 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 competences and even competition between national law enforcement agencies, as well as the lack of foreign language skills. The Czech Republic has been experiencing serious problems in this respect and responded to them with the establishment of a coordinating National Police Criminal Office in January 2001. Yet the build-up of a culture of interservice cooperation takes time. The effectiveness of national contact points and liaison officers – once inserted into the EU networks – could be seriously reduced by a high degree of diversity in management techniques, procedures and working standards. This applies in particular to Romania, where at the end of 2001 the demilitarisation of police forces was still far from complete. Training is another crucial issue. Although all applicant countries have improved their training programmes, both experience and specialised training are generally lacking as regards new types of crime which are of growing importance for organised crime such as money laundering, intellectual piracy and high-tech crime. Diversity of implementation capabilities caused by a combination of lack of training, resources and equipment could have particularly negative consequences in an area such as police cooperation in the fight against economic crime, where the ongoing liberalisation process in the applicant countries creates new opportunities for crime. Several applicant countries, such as Latvia and

Poland, have been very slow in reacting to significant increases in the number of economic crime cases which are in many cases linked to organised crime. In the area of data protection – crucial for EU police cooperation – a relatively late adoption of the necessary legislation (see above) and organisational structures could result in 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, deficits in essential equipment have to be mentioned as a major source of diversity in implementation. By the end of 2001, for instance, Lithuania was still lacking an integrated computerised network between the central police administration and regional commissariats.[33] Some of the applicant countries have made much more progress with the introduction of computerised police search systems and other modern equipment, but major deficiencies continue to exist in all of them. Even those which are more advanced have to struggle with different stages of progress in individual areas. In Hungary, for instance, all major police offices are now linked by a computer system but the effectiveness of this system is reduced by the lack of a uniform digital data network, which is due to a particularly complicated system of document classification. Many of these sources of diversity in the implementation of police cooperation standards, taken individually, may not appear formidable, but taken together they constitute a formidable challenge for the applicant countries as regards management, organisation, funding and training. It should be added that adaptation in the applicant countries' police forces is not made easier by the fact that there is no common EU model of policing, and that British, French and German pre-accession advisers on policing methods often compete in trying to implant their own respective model in the applicant countries.[34]

Judicial cooperation in criminal matters and the fight against organised crime. In this area the implementation is primarily affected by diversity in the application of established procedures. Judicial cooperation of current EU Member States with Hungary, for instance, has been occasionally affected by difficulties in areas such as the service of documents, taking of evidence and recognition of judicial decisions. Cooperation with several of the candidate countries continues to encounter 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. Courts in the Czech Republic, for instance, were in 2001 reported as still having

serious difficulties with handling complex cases of economic crime, including money laundering and organised crime.[35] Language problems, lengthy procedures and delays in returning official documents affect current judicial cooperation with most of the applicant countries and are, for instance, a major problem in Bulgaria.[36] The delays and weaknesses in procedures of cooperation are partly to be explained by the organisational weaknesses of the judiciary (see above), insufficient manpower and bureaucratic obstacles, but they are also caused by lack of adequate training of judges and officials in the specificities of international cooperation. Although more difficult to establish and measure, different attitudes within ministries and the judiciary are also a source of diversity. Practitioners from current EU Member States have also reported considerable variations in the willingness of authorities in the applicant countries to cooperate effectively on extradition issues and other matters of legal assistance. Considerable diversity also exists as regards participation in judicial cooperation networks. Whereas Slovenia, for instance, participates very actively in the exchange of liaison magistrates with special expertise in judicial cooperation with EU Member States, this is far from being the case with several other of the candidate countries. The postponement of moves towards greater involvement in those judicial cooperation structures which are already now open to applicant countries could result in insufficient expertise at the time of accession which in turn increases the risks of diversity after accession.

EU responses to the challenge of enlarging the Area of Freedom, Security and Justice

Instruments and strategies for reducing enlargement-related diversity

The various degrees of diversity on the legislative, political, organisational and implementation sides mentioned above clearly pose a major challenge to the coherence and effectiveness of the EU as an 'area of security'. Although the extent of the challenges of enlargement in justice and home affairs had already become fairly clear after the submission of the Langdon Report to the European Commission in October 1995,[37] and although the 'structured dialogues' with the applicant countries had led to little progress in this area, it was not until 1997 that the EU took 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 countries 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. It allows the Council to identify major problems of diversity especially in the areas of implementation and organisational structures. The 'Regular Reports' of the European Commission focus, as their title indicates, slightly more on the progress made by the applicant countries during the last year. In addition, the Commission operates a PHARE programme financed system of 'Assessment Missions' in the JHA fields. These missions consist of small teams of experts from some of the Member States, and Commission officials who provide detailed reports of progress made and persisting deficits which are also passed on for comments to the authorities of the evaluated country.

These monitoring instruments also, however, have their shortcomings. The 'collective evaluation' of the Council tends to focus on current deficits of the applicant countries without assessing their potential capacity to reduce diversity before accession. Drafting the confidential evaluation reports is a time-consuming process involving the piecing together of information from various Member States and other sources, and several rounds of discussion in the relevant Council working group. Inevitably part of the information on which the 'collective evaluation' reports are based is therefore outdated by several months – in some cases over a year – by the time it is formally submitted to the Council, making them a far from ideal base for decision-making. It should also be added that the reports fail to provide any recommendations on ways and priorities for reducing the existing diversity. There is as yet little cross-fertilisation between the collective evaluation and the design and implementation of EU pre-accession aid measures. Although the Commission Regular Reports have become more detailed on JHA issues since 1999, their coverage of key issues is still uneven and often lacking depth on implementation capability problems. The tone has become more critical, but the applicant countries are in many cases not given precise points on which to act. The reports of the Assessment Missions are more useful in this respect but they are only drawn up at relatively long intervals. In the case of the Slovak Republic, for instance, the first Assessment Mission was carried out in 1998 but the second only in 2001.

Pre-accession aid instruments. These include measures under the PHARE programme and specific third-pillar JHA programmes such as GROTIUS, OISIN and FALCONE. These aid instruments have so far focused on the transfer of expertise, specific training measures and – to a lesser extent – help with the upgrading of technical equipment. In 2000 the Council also enabled the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA) to transfer its know-how to applicant countries.[38] The pre-accession aid instruments, to which from 1997 to 2001 a total of 541 million euros under the PHARE programme were allocated,[39] 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 of what will be required from them on the organisational and implementation side. Of particular use have been the PHARE supported bilateral 'twinning arrangements' between ministries of current Member States and the candidate countries. These include the delegation for a minimum of 12 months of police officers and other practitioners as 'pre-accession' advisers to the respective partner applicant countries, a detailed work programme of training events and missions of other specialists.

Although considerably extended since the end of the 1990s the set of pre-accession aid instruments suffers from a number of weaknesses: 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. Under the PHARE programme the EU has, for instance, provided Hungary with considerable aid for the upgrading of border-post electronic data networks, yet for reasons of different priorities and shortages of available funds this has not been extended to all other candidate countries. EU measures are also often badly coordinated with bilateral aid measures provided by individual Member States. The quite considerable bilateral aid provided by Germany to Poland for the upgrading of its external border control capabilities, for instance, has not been effectively embedded in and coordinated with EU pre-accession aid. Much of the PHARE funds used in the JHA area goes into internal market-related reforms of the administrative and judicial systems rather than being focused on specific JHA diversity problems. The effectiveness of the third-pillar programmes also suffers from relatively small budgets. The same applies to the PHARE Horizontal Programme Justice, and Home Affairs, which was equipped with a budget of only 10 million euros for the period 1999–2002.[40]

Instruments of pre-accession association. The earlier that applicant countries can gain practical experience in 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 JHA matters at senior official level and their part-involvement in a number of specialised bodies like CIREA (asylum), CIREFI (immigration) and PAPEG (organised crime). As regards Europol, the green light was given by the JHA Council in 2001 for the negotiation by the Director of Europol of association agreements with Estonia, Hungary, Poland and Slovenia. These were approved by the Council in September and signed by the Director of Europol in October 2001 and provide for the exchange of information and intelligence, including also certain types of personal data, and for the posting of liaison officers from the applicant countries to Europol. The Council Decision of 22 December 2000 establishing the European Police College (CEPOL)[41] also emphasised the need for CEPOL to develop quickly a relationship with national training institutes in applicant countries with a view to preparing the applicants' police forces for effective participation in EU police cooperation. The CEPOL work programme for 2002 indeed contains a first series of courses specifically designed for senior police officers from candidate countries.[42] There have also been several joint meetings with the ministers of the candidate countries on the occasion of JHA Council meetings such as, for example, on 16 March 2001 when ministers from both sides discussed cooperation in the fight against organised crime with a particular focus on trafficking in human beings.

One has to be aware, however, that concerns about the applicant countries' security deficits seriously limit the extent of current forms of association. The applicant countries are in fact kept outside of all more operational elements of EU cooperation, mainly because of concerns over data protection and corruption. This limits 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 initial priority given to the association of Hungary and Poland with Europol – also tends to create tensions over what is perceived as unequal treatment.

The 1998 Pre-Accession Pact on Organised Crime.[43] This is a so far unique multidisciplinary 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. 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.

This instrument has its limitations too. The Pre-Accession Pact covers only the fight against organised crime, establishes not enough bridges to judicial cooperation and other organised crime-relevant cooperation areas – such as, for instance, the fight against illegal immigration – and suffers from a lack of specific funding instruments. Meetings under the Pre-Accession Pact have also tended to take place only at relatively long intervals.

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 in their efforts of adoption of the EU JHA *acquis*. The EU has not offered any derogations or transitional periods, and there have been only thinly veiled threats that failure to comply with the entire JHA *acquis* could delay accession.

Yet the usefulness of the accession negotiations as an instrument for a 'bringing into line' of the candidates should not be overestimated. 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 a very imprecise criterion which can be softened or toughened rather arbitrarily, and some candidate countries have complained that it is not

altogether clear to them what the EU is expecting from them in certain areas. The threat of delaying accession over deficits in the JHA area – although still invoked by some of the Schengen members – has become less and less credible, as the political cost of such a step would clearly be very high, especially following the general progress made by the applicant countries, and the prospects that existed for a first major round of enlargement including up to ten of the CEECs as early as 2004 opened by the Helsinki (1999) and Laeken (2001) European Councils.

The effectiveness of the above instruments depends not only on their respective strengths and weaknesses but also on their use as part of an overall approach. The EU has never formally adopted a comprehensive pre-accession strategy for the JHA areas 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 *acquis* 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 instrument mentioned above.

In order to be successful any strategy on enlarging the AFSJ should be realistic, credible and efficient as regards its instruments. Under each of these criteria current EU strategy shows certain weaknesses. First, 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. Organisational diversity may also be reduced to a significant extent before accession, especially if the EU steps up its pre-accession help. Yet the diversity in implementation capabilities is such that it seems rather unrealistic at this stage to expect even 'first wave' candidate countries – which according to the conclusions of the Laeken European Council might comprise all CEECs with the exception of Bulgaria and Romania – to meet all the implementation standards applied in the EU/Schengen context.

Second, 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 by the end of 2001 it had become fairly clear that the Schengen members were not going to lift their current tight

external border controls towards the new Member States immediately at the time of accession. This clearly represents a major blow for the applicant countries, and some of their governments continue to insist that they will be able to meet the entirety of the *acquis* upon accession so that controls can be lifted. Their citizens may indeed 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', which will not help governments trying to win a referendum on accession. Yet the de facto acceptance on the EU side of a two-step approach to enlargement as regards the Schengen border control system has also taken away some of the pressure on the candidate countries and has deprived the original 'maximalist' strategy of some of its credibility.

Third, 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 up in other areas.

In the light of the above, the strategy the EU has pursued on enlarging the AFSJ appears to be lacking in realism, credibility and effectiveness. One also cannot help getting the impression that while in internal EU policy-making internal security concerns have played an increasingly important role in shaping the project and agenda of the AFSJ, these concerns have played a much more limited role in the enlargement process which has so far been dominated by the big economic, financial and institutional issues. Only on the issue of external border controls has the EU – under the impact of the Schengen group – adopted a more forceful and clearly defined position, leaving much of the rest of the *acquis* of the AFSJ to fragmented and often underfunded pre-accession measures without a coherent strategy. This is clearly a surprising picture, as the whole idea of the EU as an 'area of security' could obviously be put into jeopardy by an enlargement which would increase rather than reduce internal security risks and generate a new wave of distrust between EU Member States as to their effective capabilities to live up to the requirements of the AFSJ.

Meeting the challenge: before and after accession

The EU has clearly not taken the challenge of enlargement as seriously as it should have done in the light of its own ambitions in constructing

the AFSJ and developing its role as an actor in internal security. Yet it can still recover some of the lost opportunities and try to transform the risks into opportunities. The move towards a two-stage approach on the Schengen *acquis* represents a first important step in this direction. If implemented it would have the double advantage of not only temporarily exempting the core of the security zone element of the AFSJ from the accession process and potentially damaging diversity – which should satisfy the internal security concerns of current Member States – but also of reducing the need for a full 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. The EU could then re-target its pre-accession aid measures accordingly, concentrating its own resources as well on the respective priority areas. Determining what should belong to the 'accession' and what to the 'post-accession' is clearly a crucial issue in this context.[44] In July 2001 the European Commission made a first proposal in this respect which contained a list of provisions of the Schengen *acquis* which are directly connected to the abolition of internal border controls and should therefore, according to the Commission, only be implemented by the candidate countries when internal border controls are lifted, that is, after the candidates have been declared fully 'Schengen-mature'. This list – which was still under discussion in the Council at the time of writing – included not only *acquis* relating to border controls and visas, but also substantial elements of police cooperation and the SIS.[45] As the latter is not only used for controls at borders but has also become a crucial instrument for internal police activities, this list of temporary exclusions of candidate countries – which could well become longer depending on their progress up to accession – would de facto create a two-tier zone of internal security. This would clearly not be in line with the idea of single and coherent AFSJs but it could well be the only realistic response to the challenge of integrating new countries which still have some way to go to meet essential implementation capabilities.

Changes of approach 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 JHA areas. 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.[46] Consideration should also be given to an upgrading of funding for specific pre-accession aid in the JHA 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 technology for producing counterfeit-proof documents. All this requires considerable investment, and most of the candidates – because of their adjustment burdens in other enlargement-relevant areas – are unlikely to come up with this 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.

Eastward enlargement will inevitably import additional diversity into the AFSJ. Substantial diversity continues to exist even 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 either to '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 useful, therefore, to have a brief look at some of the available instruments.

One 'classic' instrument of diversity management and reduction is majority voting. It allows diversity-related blocking positions to be bypassed, and diversity reduction to be proceeded with 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 to include 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 seem essential to use the possibility offered by Article 67(2) TEC to pass to qualified majority voting at the end of the transitional period (May 2004) at least in the communitarised areas – which include border control issues – before the first accessions take place. Having regard to potentially divergent political approaches, some of the new Member States may not be supportive of a move towards more majority voting in some JHA areas.

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 neither have the applicant countries formally asked for such transition periods in the JHA fields, 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,[47] 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 partly reformed by the Treaty of Nice,[48] 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 on by most or all of the Member States – can help with both the management and the reduction of diversity in the EU as a whole. Such 'vanguard' or 'laboratory' closer cooperation could therefore play a useful role if diversity problems in the context of the eastward enlargement risked paralysing the further development of the AFSJ. Nothing can prevent a number of Member States (the minimum will be eight after the entry into force of the Treaty of Nice) going ahead with, for instance, the harmonisation of legislation relating to the fight against organised crime or the introduction of common border-guard units with special training for the fight against illegal immigration. It cannot be excluded that some of the old Member States might set up 'closer cooperation' frameworks on certain issues which some new Member States would find, for whatever reason, uncomfortable. Yet in order to avoid unnecessary fragmentation of the AFSJ and to reduce political tensions it would need to be made sure that such 'closer cooperation' is really only a 'measure of last resort' – a condition which has been toughened by the Treaty of Nice – after all efforts to proceed in common have failed and there are no lasting exclusion effects.

The question of the EU demanding too much, and the issue of trust

Potential post-accession strategies on diversity management and reduction are largely a matter for speculation at the present stage. The use of any of the above-mentioned instruments – and possibly a range of others – will ultimately depend on the political will of each of the Member States in the enlarged Union to proceed with deeper integration in the context of the AFSJ. This political will has never been present to the same extent and with the same priorities among current Member States; it is even less likely to be so in an enlarged EU. Yet the very idea of the

Union as an 'area of security' rests on the achievement of a sufficient degree of convergence and coherence in key areas such as the fight against organised crime and illegal immigration. This requires a realistic reconsideration of the approach to enlargement in the JHA area by both future and current Member States. The current candidates will have to accept that the price for non-compliance with the AFSJ *acquis* is to be exclusion from it in one or the other form; the current Member States will have to realise that the new Member States might not for a very long time become full and reliable partners in the development of the AFSJ if the EU does not keep up the pressure while at the same time providing much more substantial help than has been available to the candidates so far.

Some representatives of the candidate countries have complained about the EU demanding more from them in the JHA area than from some of the current Member States and that by continuously denouncing illegal immigration, organised crime and corruption problems in the candidates a false impression is created, as if these problems only existed in the candidate countries. These reactions are understandable: two of the current EU Member States, Ireland and the UK, are still not participating in the Schengen border regime, there are implementation problems also within the EU, and serious weaknesses, including border control standards, also exist within the EU and are indeed regularly identified in the various collective evaluation mechanisms to which the current Member States are subjecting themselves. Yet all these are not valid arguments against the EU adopting a tough position on the full adoption and implementation of the JHA *acquis* before and after accession. Internal security with all its corollary elements is an essential public good on which the EU, now that it has assumed an increasing role in this area, has to deliver. Making an effective contribution to safeguarding the security of its citizens is a question of its credibility and legitimacy as a political community. A failure of the EU on this account because of enlargement-related internal security problems could well cast a shadow over the whole future of the integration process. This clearly justifies a demanding attitude towards the new Member States and, in extremis, even a potential delay of the accession of a candidate not making sufficient efforts to adapt to the requirements of the AFSJ.

One should not underestimate, however, the extent to which the CEEC candidate countries themselves have an interest in becoming an effective part of the EU's emerging internal security zone. Their attractiveness as target countries for illegal immigration and organised crime – as a doorstep to Western Europe and the Internal Market – is anyway likely to rise with accession but could do so even more if they appeared

a 'softer' target because of lower internal security standards and capabilities. The candidates might not like all parts of the JHA *acquis* and might take the view that the EU is asking too much from them and providing not enough help. Yet the national action plans adopted by most of the candidate countries on the upgrading of border controls, the fight against illegal immigration problems and measures against corruption should not be seen only as a response to EU pressure but as an indication of a growing concern about their own internal security situation which should make them more inclined to accept certain EU 'imposed' approaches and standards than might otherwise be the case.

This chapter may find an appropriate conclusion on the issue of trust. The progress that 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 internal security element of the AFSJ has been possible only 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 regarding working procedures and the implementation of common decisions. This trust has just started to emerge also between law enforcement authorities in current and future Member States and has made it possible, for example, to conclude the first association agreements between the candidates and Europol. However, trust is a precious and fragile commodity. 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 could well endanger both the current structure of the AFSJ and its further development. On the losing side would be the European citizen – in both the old and the new Member States – and the credibility of the European Union as a political community.

Conclusion

The EU's emerging role as an internal security actor has been one of the most notable developments of the past decade. The extraordinary pace of this development since the early 1990s would have been impossible without the precursory roles played by the Council of Europe, TREVI and Schengen. Yet the main impetus for the rapid development has come from a combination of increasing transnational challenges, a powerful spillover effect from economic integration, national interests in a 'Europeanisation' of certain national problems and the emergence of the AFSJ as a major political project in its own right with its own legitimising rationale. These dynamics are likely to continue to drive the Area of Freedom, Security and Justice forward. The spillover effect from economic integration may have already peaked, but the transnational challenges of organised crime and illegal immigration crime are evolving. EU Member States will continue to be confronted with certain national problems in these areas which they would like to solve, or at least defuse, by moving them upwards to the European level. Furthermore, the AFSJ is generating a dynamic and logic of its own, regularly flagged up by the Heads of State and Government, driven forward by a constant flow of new legislative initiatives from both capitals and the European Commission and supported by a variety of monitoring mechanisms.

There can be no doubt that a major breakthrough has been achieved with the entry into force of the Amsterdam Treaty and the adoption of the Tampere agenda in 1999. The large number of new initiatives launched since, and the shift from soft to hard law instruments, justify the expectation that the AFSJ will become more of a reality over the next few years. The prioritisation of internal security as an aim of European integration has been sustained since the Amsterdam Treaty and has led to the adoption, in a short period of time, of a plethora of measures