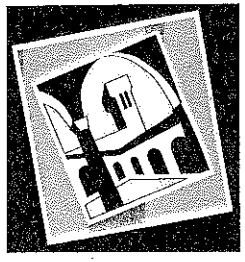


THE ROBERT SCHUMAN CENTRE
FOR ADVANCED STUDIES

POLICY PAPER

01/4

Chairman
HORST GÜNTER KRENZLER

EU Justice and Home Affairs in the Context of Enlargement

Rapporteur
KATARYNA WOLCZUK

EUROPEAN UNIVERSITY INSTITUTE

EUROPEAN UNIVERSITY INSTITUTE, FLORENCE

ROBERT SCHUMAN CENTRE FOR ADVANCED STUDIES

EU Justice and Home Affairs in the Context of Enlargement

Report of the Working Group

on the Eastern Enlargement of the European Union

Chairman: Horst Günter KRENZLER

Rapporteur: Kataryna WOLCZUK

Policy Papers, RSC No. 01/4

Printed in Italy in December 2001
European University Institute
Badia Fiesolana
I-50016 San Domenico di Fiesole (FI)
Italy

List of Working Group Participants
Brussels, 30-31 May 2001

Chairman: Dr.jur Horst Günter **Krenzler**
Former Director General for External Relations, EC Commission

Graham **Avery**, European Commission, Brussels
Eiki **Berg**, University of Tartu
Irena **Brinar**, University of Ljubliana
Grzegorz **Gromadzki**, Batory Foundation, Warsaw
Juris **Gromovs**, European Integration Bureau, Riga
Peter **Hägel**, Free University, Berlin
Vladimir **Kotulic**, Ministry of Interior, Bratislava
Anna **Krok-Paszkowska**, European University Institute, Florence
Jörg **Monar** (author of a background paper), University of Sussex
Zdzislaw **Najder**, Office for the Committee for the European Integration, Warsaw
Monica **Sie Dhian Ho**, Scientific Council for Government Policy, the Hague
Endre **Sik**, TARKI Institute, Budapest
Denis **Sorasio**, European Commission
Valentin **Stan**, University of Bucharest
Dariusz **Stola**, Institute of Political Studies, Warsaw
Judith **Toth**, Hungarian Academy of Sciences
Neil **Walker**, European University Institute, Florence
Renate **Weber**, Open Society Fund, Bucharest
Kataryna **Wolczuk** (Rapporteur), The University of Birmingham
Jan **Zielonka**, Robert Schuman Centre, European University Institute, Florence

Summary

The applicant states face huge political, administrative and financial hurdles in the course of implementing the JHA *acquis*, and at present lack the capabilities to overcome them.

The diversity of practices within the Union, the institutional complexity of JHA co-operation, the opaqueness and confidentiality of the *acquis* generate contradictions and uncertainty in the applicant countries, which further hamper the implementation of the JHA *acquis*.

The delay of enlargement on the grounds of slow progress in JHA would be too costly in political terms. This situation arouses anxiety in some Member States that they lack effective mechanisms to ensure the compliance in JHA by the applicant countries. The internal borders between the existing Members and the applicant countries will therefore be maintained after EU enlargement.

Even if it is recognised that the applicant states will not attain 'Schengen maturity' before accession to the EU, no comprehensive pre-accession strategy exists that would allow the differentiation of the parts of the *acquis* which must be implemented upon accession to the EU from those which must be adhered to in order to secure an admission into Schengen.

So far no sufficient consideration has been given to the question of procedural and political ramifications of the delayed membership of Schengen of the new Member States, despite the fact that no precedent exists, as previously Schengen was not part of the Union's *acquis* when new states were admitted into it.

Effective co-operation in JHA depends on mutual trust. Co-operation with the applicant countries starts from a very low level and is being fostered against a backdrop of deep-seated stereotypes and prejudice. Trust builds up gradually and requires time and effort. The Member States cannot wait for too long before they embark on meaningful co-operation in JHA with the applicant countries if they want to foster essential mutual trust.

While the angst of some Member States regarding increased labour migration from the new Member States must be taken seriously, the transition period is a blunt and inflexible policy instrument that causes much political aggravation in the applicant states. A more targeted and precise tool, such as a safety clause, would not only help placate the angst, but also would be politically more sensitive to the public perception of exclusion amongst the applicant countries. Focus on 'internal security' has dictated the insistence on securing a tight external border at the expense of a thorough consideration of the effects this has

on the existing pattern of relations in Central and Eastern Europe and achieving the objectives of the Common Foreign and Security Policy (CFSP). The 'transition period' between formal membership and full membership of Schengen may be used to ensure greater consistency of the Pillars of the EU by adjusting the Schengen policies to advance the aims of the CFSP simultaneously.

Introduction

In the Treaty of Amsterdam the EU proclaimed the development of an Area of Freedom, Security and Justice (AFSJ) as one of its integration objectives. According to article 29 of the TEU:

> ... the Union's objective shall be to provide citizens with a high level of safety with an area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial co-operation in criminal and judicial matters and by preventing and combating racism and xenophobia.

Thereby, the EU committed itself to delivering an important public good - internal safety for its citizens – by securing the external frontiers of the EU and the adoption of a number of legal instruments to ensure effective law enforcement and access to justice within the EU. As a result, the AFSJ denotes a 'safe inside' which is contrasted with an 'unsafe outside'. The creation of the AFSJ is one of the most rapidly developing political projects of the EU, and, as a result, Justice and Home Affairs (JHA) have risen to the top of its political agenda. Developments in the field of JHA have sped up and intensified by the fight against terrorism following the events of 11 September 2001.

Characterised by specific institutional structures and procedures as well as a mix of inter-governmental and supranational features, JHA represents a special regime within the EU. In particular, Schengen, which became part of the *acquis* as a result of the Treaty of Amsterdam, represents a closer co-operation framework. It aims to minimise risks stemming from the abolition of internal border controls by adopting measures such as visa requirements, asylum policies, external border control, an electronic information exchange system (Schengen Information System), and police and judicial co-operation in criminal matters.

The EU's eastern enlargement is the first enlargement to include a vastly expanded JHA *acquis*. This implies that in order to protect the EU's emerging internal security zone the inclusion of new members can only take place if all the EU's rules are adopted and effectively implemented. In other words, the 'internal security' model implies that if new members cannot operate according to the rules and standards of such a community, their membership threatens the 'safe inside'. Therefore, prior to enlargement, the EU has endeavoured to 'export' its growing governance structures and its concept of 'internal security' to the candidate states.

In negotiations with the applicant countries, the Schengen *acquis* is defined as one block; it is non-negotiable and has to be adopted in full (article 8 of the Protocol integrating the Schengen *Acquis* into the Framework of the

European Union). Therefore, the adoption of common legal instruments and policies in JHA is no longer a matter of choice, i.e. there is no possibility of a full or partial opt-out. The applicant countries have to meet all criteria before being allowed into Schengen without being allowed the flexibility that the Member States allowed themselves. The Treaty of Amsterdam allowed opt-outs for the United Kingdom, Ireland and Denmark. The position on the JHA *acquis* in the enlargement negotiations is, thus, clear insofar as applicant countries are required to adopt it in full as soon as possible; any derogations have been ruled out for them. This rigid approach reflects a particular sensitivity of JHA for the existing Member States, which fear the increased threats to EU's 'internal security' emanating from the applicant states. They are also driven by the desire to avoid cumbersome negotiations and exemptions that could undermine the whole endeavour to create the AFSJ.

While JHA issues remain particularly salient for the Member States, the adoption of the *acquis* poses a major challenge for the applicant countries. It is a complex and rapidly expanding part of the *acquis*, the implementation of which requires huge administrative, technical and financial effort. In many areas the shortcomings in the implementation of the *acquis* are only too evident. At the same time, the specific nature of JHA the standards, which the applicant countries are expected to reach, and the evaluation criteria, upon which they will be judged, are not clearly defined and articulated. These ambiguities generate the suspicion amongst East-Central European states that in this policy field the Member States may exercise arbitrary decision-making vis-à-vis the applicant countries. There is a danger of the political instrumentalisation of the JHA, something which clouded the previous admissions into Schengen by, for example, Italy and Greece.

The sensitivity of JHA for the applicant countries is exacerbated by political contingencies, above all, the issue of free movement of labour, which the EU proposes to postpone by introducing transition periods. *Sensu stricto,* the free movement of labour between East-Central Europe and the Member States remains outside the remits of this report as it is not part of JHA. Yet if the Schengen border control is not lifted upon enlargement, the maintenance of the internal borders will coincide with the restriction on the free movement of labour. Therefore, from the point of view of the applicant countries, JHA and the issue of the free movement of labour are interwoven, as they indicate the underlying apprehension about the admission of the new members from East-Central European into the EU.

The adoption of the Schengen *acquis* by the applicant states will profoundly re-shape relations with those countries which do not join the Union at the same time. While the Schengen *acquis* is non-negotiable, the candidate

states are forced to confront the challenge of being required to adopt it even if they regard it as running counter their vital interest of keeping the borders with their Eastern neighbours 'open'. Therefore, having to adopt measures detrimental to their own interests, some of them perceive the Schengen *acquis* as a symbol of the self-interest of the Member States and point to the lack of consistency between the promotion of 'internal security' and the pursuit of the Common Foreign and Security Policy (CFSP). The latter aims to foster co-operation with and stability in EU's Eastern neighbours, something which is one of the measures to reduce threats to 'internal security' of the Union.

JHA and the Process of Enlargement

The development of JHA is taking place in the context of tensions resulting from the changing mode of governance and diverse aims of the Member States. Firstly, the Treaty of Amsterdam introduced the partial 'communitarisation' of JHA, so that the European Commission and Community legal instruments began to play a greater role, even if in practice decision-making is still predominantly inter-governmental and will remain so for some time. Secondly, while inter-governmentalism prevails, different approaches are advocated by the Member States. Some of them favour a higher degree of centralisation, that is the building of strong central co-ordinating and operational agencies and at least some degree of harmonisation of relevant national legislation, while others prefer a de-centralised approach under which the exchange of information, co-ordination between national authorities and the mutual recognition of judicial decisions would remain the essence of the JHA while European agencies would play a limited supportive role. Debates over the control of EUROPOL vividly exemplify diverse preferences. Because of its ramifications for the institutional balance in the Union, the shifting mode of governance entails protracted deliberations on competencies.[1] As far as the enlargement process is concerned, this hybrid and complex system of governance is one of the key sources of problems in bringing the applicant countries in.

The salience of JHA stems both from the nature of provisions aiming to ensure 'internal security' and the timing of their introduction into the *acquis*. Quite late into their preparations for enlargement, the candidate states were confronted with a new area of huge importance for the Member States (the old Third Pillar with its limited intergovernmental *acquis* was not perceived as important). So upon the ratification of the Treaty of Amsterdam in May 1999, the applicant countries faced a new hurdle which rapidly moved to the top of the Union's agenda. At the same time, being pre-occupied with internal

[1] Jorg Monar, "Justice and Home Affairs in a Wider Europe: The Dynamics of Inclusion and Exclusion", *Working Paper of ESRC "One Europe or Several?" Programme*, No. W7/00 (July 2000).

developments, the EU did not use its time and resources efficiently to reflect the dramatically increased salience of this area in the enlargement process. As the JHA *acquis* was only defined in 1999, the candidate states were presented with a fuller picture of the *acquis* rather late into preparations for membership.

The challenge is compounded by the complexity and opaqueness of legislation. Upon their inclusion in the EU's *acquis* under the Treaty of Amsterdam, Schengen regulations were divided between the First (visa, asylum and immigration policies) and Third (police and judicial co-operation) Pillars. As a result, the issue pertaining to the free movement of persons, which were brought into orbit of supranational Community competence, were separated from matters related to security matters, as these remained under the auspices of the intergovernmental European Union Treaty framework.

While already far from transparent, the JHA *acquis* continues to expand as a result of the introduction of new objectives and legal instruments. A large number of new ideas have been floated in the EU with several hundred new proposals already in the Council. An avalanche of new legislation is to be added before the 2004 deadline. The threats from terrorism, as exemplified by the attack on the U.S. on 11 September, provided a powerful impetus to strengthen co-operation in JHA. So while the *acquis* as a whole consists of an evolving set of legislation, the rapid expansion of the JHA *acquis* makes it, in particular, a 'moving target' for the applicant countries.

The JHA *acquis* pertains to wide-ranging issues, such as asylum, criminal investigation, immigration, external border control, visa policy, and as such has profound implications for the functioning of all law enforcement agencies, including border guards, police, customs and judiciary. In order to comply with the *acquis* the applicant countries are required to adopt comprehensive legislative reforms, align their policies, acquire new equipment, embark on institutional and organisational changes, and implement new procedures.

While there are evident differences in the progress made by the applicant states, many areas are particularly problematic. Organisational structures of law enforcement agencies and level of training of police, border guards and legal personnel often remain inadequate to capacity to control illegal immigration, organised crime, money laundering and terrorism. The poor technological and organisational infrastructure at the future external border is a major shortcoming that particularly is frequently identified across the region. Also corruption remains a serious malaise of law enforcement agencies.

The necessary reforms have been hampered and delayed for a number of internal obstacles, such as politically motivated delays, financial constraints and administrative inefficiencies, but in addition exogenous factors also play a role.

The adoption of the *acquis* requires both the adoption of legislation and its effective and comprehensive implementation. Even though perceived as a relatively straightforward requirement, enactment of legislation can also be controversial for the candidate states. For example, many institutions concerned with criminal justice feel constrained by EU legislation. Requirements pertaining to ensure the compatibility of penal codes and codes of criminal procedures are regarded as out of touch and irrelevant or even exacerbating the problems and challenges facing East-Central Europe in the post-communist transition. Yet the candidate states face considerably greater problems in the implementation of the *acquis*, which is hampered, in addition to the numerous domestic factors mentioned above, by exogenous factors such as the diversity that persists among the Member States.

The Vienna Action Plan, adopted by the Member States in December 1998, states explicitly that the Amsterdam Treaty does not aim to create a 'European security area' through the unification of detection and investigation procedures. So internally, the Union remains an area of interlocking but diverse and separate national security zones with their own distinct historical traditions, structures, and approaches to law enforcement. For example, even if considerable standardisation of policing is achieved through organisational changes and training, the EU does not aspire to create a European 'domestic police force' for the time being (although such proposals have already been articulated). This diversity poses a dilemma for the candidate states with regard to which national models are to be emulated in preparation for accession so that their institutions, management systems and administrative arrangements can meet the 'Union's standards'. The diversity of domestic policing systems within the Member States means that no single model is or can be advocated as the blueprint of an 'EU standard'; and yet diversity in JHA at the national level is singled out as a source of weakness that needs to be eradicated by the candidate countries. In a similar vain, the *acquis* is still far from comprising single common policies in central areas such as asylum and immigration; these are only being developed after the decisions taken in the Amsterdam Treaty, the Vienna Action Plan and Tampere European Council (of October 1999). One of the aspects facing any country of immigration is how to best integrate the newcomers into its society. Facing labour shortages, the Czech Republic is considering a policy for labour immigration, but remains uncertain as to the EU recommendation on how to integrate migrants into society. Amongst the Union's members, Sweden and the Netherlands favour a pluralistic model, whereas France pursues the integration model. For the Czech Republic, as a candidate state, the choice is particularly vexed as the country may entail consequences regarding the way in which its treatment of ethnic minorities is evaluated by the individual Member States.

The multitude of unresolved issues surrounding JHA in the process of enlargement breeds confusion and frustration in the applicant countries. The implementation of the *acquis* confronts the candidate states with more questions than the Commission and the Member States collectively and individually can answer in *ad hoc* meetings. The usefulness of the 'Collective Evaluation Group' (see below) is hampered by the secrecy of its work. Yet no permanent platform for discussion of JHA exists, despite the salience of this policy field for the Member States and the challenges it poses for the applicant countries. A case could be made for the creation of a dedicated, purpose-built body – an Institute of JHA - equipped with permanent structures in order to facilitate discussion, accumulate EU-wide expertise and offer advice on 'best practice'. Such an Institute could go a long way towards dealing with the challenges that JHA poses in the process of enlargement.

Pre-accession Aid Instruments

The EU's assistance was directed towards JHA tasks rather late. Only in 1997 was the PHARE programme re-arranged to include substantial pre-accession help. Pre-accession aid instruments include the PHARE programme and specific Third Pillar JHA programmes such as GROTIUS (programmes of incentives and exchanges for legal practionners in criminal and civic matters), OISIN (programme to promote the exchange, training, and co-operation between law enforcement agencies) and FALCONE (programme for exchanges, training and co-operation to combat organised crime). Pre-accession aid consists mainly of funding the transfer of expertise (pre-accession advisers), twinning programmes and specific training. In particular, twinning programmes are seen within the Union as an especially focused way of providing support to the candidate states by individual Member States. Yet aid is concentrated mainly on training, whereas the upgrading of technical equipment - by far the most expensive component of implementation – is not targeted to the same extent, something which presents the applicant countries with a formidable difficulty (see below).

Some pre-accession aid instruments receive mixed reactions in the applicant countries. They often point out that, lacking any knowledge of their countries, EU experts spend a considerable share of their costly time in finding out basic facts about the country they are to assist. Also, assistance to the candidate states can be a source of confusion as law enforcement forces in the Member States have different philosophies and provide contradictory advice. In particular, the applicant countries tend to find themselves at the receiving end of competition between French, German and British efforts to export their own models in the course of pre-accession assistance, as each police force is convinced of the superiority of its particular model of policing.

The provision of aid instruments lacks an overarching, coherent strategy. Understanding of the requirements of the JHA *acquis* in the applicant countries has been hampered by what is often perceived as an *ad hoc*, fragmented approach by the Union. Not only is EU-level aid badly co-ordinated with bilateral assistance offered by the individual Member States but there is also a poor relationship between the Collective Evaluation of candidate states' Schengen preparedness and the design of EU pre-accession aid measures. Furthermore, too many projects and programmes from the Union underestimate the need for long-term reforms, especially in areas such as police co-operation. More continuity is required to build up good working relations over a longer period of time in order to implement the JHA *acquis* more effectively. This short-term perspective has been partially eliminated by recent PHARE programmes.

Pre-accession association is an instrument designed for the candidate states to gain practical experience in the functioning of EU institutions and procedures. So far this has included giving the candidate states an insight into the Union's decision-making processes in JHA at senior official level and their partial involvement in a number of specialised bodies like CIREA, CIREFI and PAPEG (concerned with asylum, immigration and organised crime respectively). The usefulness of this form of assistance is limited by a lack of reciprocity in the sharing of data between the Member States and the applicant countries. The Pre-accession Pact on Organised Crime remains a unique multi-disciplinary instrument of co-operation that works well despite lacking specific funding programmes. But there are no similar pacts on other JHA areas. In some cases pre-accession programmes were applied selectively, something which engenders a sense of inequality in the excluded candidate states. With regard to EUROPOL, the Council of JHA authorised the director of EUROPOL to negotiate agreements on the transmission of personal data only with Hungary and Poland. The applicant countries are excluded from many existing training, evaluation and pilot project programmes in JHA such as the STOP programme. Therefore, pre-accession association has limited scope and the applicant countries are denied an insight into operational elements of EU co-operation because of lingering fears of corruption and concerns over data protection.

Resources and Funding

In order to meet high legal, organisational and technical standards, the adoption of the *acquis* requires an enormous legal, organisational and financial effort on the part of the candidate states. In particular, policing of external borders presents a major hurdle for the applicant countries as developing implementation capabilities depends on the acquisition of modern equipment and technologies, 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.

The EU has endowed JHA with substantial pre-accession funds, but these are concentrated on the First Pillar, while the areas in the Third Pillar (police and judicial co-operation) have been allocated a relatively small budget. Yet even in the First Pillar assistance is earmarked for training rather than for the purchase of equipment, so the candidate states have to foot the bill for the latter. In cases when funding for equipment is available, the applicant countries still have to provide 25 percent of the costs. Taking into account the massive scale of the investment, this places a substantial burden on them. Moreover, the candidate states are not only asked to implement the existing *acquis* but are also expected to comply with future legislation, which is not yet known. However, the amounts available for aid programmes are based on the *acquis* that was in place when the planning took place. In other words, assistance programmes lag behind the rapid development of the *acquis* and, hence, the implementation needs of the applicant countries.

As it needs massive investment in infrastructure and technical equipment, the new external border of the EU will be demanding and costly to control. Despite massive financial support under the TACIS programmes, the Union's aid is small in proportion to the actual cost of strengthening and maintaining the border infrastructure. Full sharing of the costs of managing the Eastern frontier is not planned; the current approach places responsibility on each applicant state for its stretch of the border. In addition the ultimate location of the Union's external border remains unknown, so the actual costs of managing the respective stretches of the external border of the EU also remain unknown. While the shifting of the external border is politically sensitive for the existing Member States, the burden of its control – something which is in the interests of the whole EU - will fall on its economically weakest members. In other words, the applicant countries have to bear the costs of placating the anxieties of the Member States. Moreover, deficits in policing the EU's future border will lead to new members' delayed membership of the Schengen closer co-operation framework, and hence slow down the attainment of fully-fledged membership of the Union by the candidate states (see below). The proposed joint border control teams at the EU's future external borders would go some way towards alleviating this burden. According to these proposals, new Member States' guards would be assisted by their counterparts (and equipment) from one or several of the current Member States.[2]

[2] *Uniting Europe*, No.165, 19 November 2001

If the Member States really take the view that the insufficient implementation capability of the applicant countries jeopardises their own internal security, financial and organisational assistance should become a priority. In other words, if they do worry about internal security, speeding up the 'Schengen maturity' of the applicant countries argues logically for additional funding.

Evaluation Mechanisms

JHA policy field is characterised by a special mechanism for collective evaluation of the enactment, application and effective implementation by the applicant countries of the JHA *acquis*. The traditional instrument - the regular annual reports of the European Commission on the progress made by the applicant countries - focuses mainly on the legislative aspects. Being too general, the reports can only serve as general signposts rather than guide specific policies. To compensate for this deficit, on a French initiative, the 'Collective Evaluation Group' was established in 1998 as the only body separate from the Commission that is authorised to assess the implementation of the JHA *acquis*. The Group came up with the Structured Check List for evaluating progress in fulfilling the JHA requirements. While it is regarded as sophisticated and authoritative, a number of issues have arisen from its functioning.

Assessments of progress in implementing the JHA *acquis* is handicapped by very uneven data amassed from diverse sources. The collective evaluation tends to focus on current deficits of the applicant countries and often fails to consider their potential to implement the *acquis* before accession. Its effectiveness as a political instrument is impaired by strict confidentiality and the paucity of clearly laid out recommendations on means and priorities for reducing the identified shortcomings. For example, it was pointed out to the Slovak government that its border control infrastructure was too 'old-fashioned' yet no explanation or guidelines to remedy the deficiencies were provided. The vagueness of recommendations makes it difficult to explain to domestic actors, chiefly law enforcement agencies in the applicant countries, what is actually expected of them and what actions they need to take to satisfy the Union's requirements.

The most pertinent problem underlying the evaluation mechanism is the vagueness of the evaluation criteria. In contrast to the criteria for joining EMU, which are clearly-defined and known, the criteria in the JHA field lack transparency and precision. The progress of adopting legislation is relatively easy to evaluate. For example, in external border control, legislation plays a relatively minor role (apart from the demilitarisation of border guards and the transition to a professional non-military force, something which has been largely

completed in the Luxembourg Six). In contrast, the criteria of achievement of 'implementation capabilities' is considerably more arbitrary. While the EU has not yet devised a satisfactory methodology for assessing progress in respect of the JHA *acquis*, the degree of perfection required of the candidate states remains a discretionary decision on the part of the Member States. This allows them to demand a higher degree of conformity from the applicant countries than from themselves if they act in bad faith. For example, the candidate states have been criticised for shortcomings in their fight against illegal migration i.e. rules on entry, residence, and expulsion. Hungary was singled out for being too lenient on illegal employment. Yet, illegal employment is a widespread phenomenon in the Member States, which is often tackled without much zeal. Italy, for example, would come to a standstill without a pool of illegal workers to perform domestic services being readily available as a result of the lax implementation of the regulations on the expulsion of illegal migrants. Similarly, a high level of dependence on illegal migrants characterises the economies of many other Member States, even if their governments and citizens are reluctant to openly admit this, let alone devise appropriate migration policies.

The Deficit of Trust

The problems with specifying clear-cut evaluative criteria stem at least partially from the lack of consensus amongst the Member States. While the supranational approach is mixed with inter-governmentalism in the governance of JHA, the Member States favour different models. Moreover, there are major disparities between the frontline states and those more distant from Central and Eastern Europe in the assessment of the risks. These disparities determine the degree of toughness demanded in the evaluation of the progress made by the applicant countries.

Most technical and legal requirements envisaged by the *acquis* are relatively easy to 'tick off'. Yet many aspects of JHA demand a more qualitative evaluation. The existence of implementation capabilities (expressed in words such as 'efficiently', 'effectively', 'ability') is of necessity a subjective criterion. Qualitative criteria in JHA are as political as are the Copenhagen criteria. As long as monitoring missions are instructed to be tough they can always find shortcomings in the implementation of the JHA *acquis*. Hence, the decision on 'Schengen maturity' remains a matter of discretion on the part of Schengen members, as has also been applied to EU Member States eg. Italy and Greece. And the use of this discretionary power ultimately depends on the Members States' development of trust in the applicant countries as partners reliable enough to protect adequately the 'internal security' of the EU.

Co-operation in the fields of crime prevention, policing, judicial affairs, and the administration of immigration and asylum policy has proved one of the

most sensitive aspects of EU integration for the existing Member States. As long as there is a diversity of national models and policies, respect for and tolerance of different policing models and a high degree of mutual trust are indispensable for co-operation. Yet this is what is still profoundly lacking in relations between the Member States and the candidate states. Attitudes to East-Central Europe are characterised by an endemic deficit of trust stemming from the propensity to invoke negative cultural stereotypes. As was pointed out, a large part of the implementation in JHA is not so much about legislation but about the introduction of new mechanisms and procedures. The assessment whether these are systematically adhered to is – to a large degree - a matter of trust and confidence.

A Delay to Schengen Membership

Upon admission into the EU, the applicant states will sign up to the Schengen *acquis*. Yet the actual admission of new states into the operational aspects of Schengen can only take place by a unanimous vote of the 13 Schengen members. The Member States vary considerably in terms of their assessment of risk and the importance they attach to the implementation of the JHA *acquis* by the candidate states. Nevertheless, the implementation capacity of the applicant countries is viewed as falling short of required standards; none of the states in East-Central Europe is deemed to be ready for admission to Schengen at the moment. However, 'Schengen immaturity' cannot delay EU membership, because Schengen co-operation is an accepted case of 'closer co-operation' involving some but not necessarily all the EU members. As a result, accession to the EU is expected to take place earlier than the attainment of 'Schengen maturity' by the applicant states. They will become full members only after being monitored for a minimum of two years (in the case of Italy and Greece it took seven years). As a result this will become a *sui generis* 'transition period'.

For the population at large, the most tangible expression of 'Schengen immaturity' will be the continuation of current tight external border controls between the current Member States and the new Member States for at least several years. Yet, as Schengen now forms part of the *acquis*, the institutional, procedural and legal ramifications are more difficult to gauge.

Firstly, while it is recognised that the Schengen *acquis* is not going to be implemented in full before the accession, there is no comprehensive pre-accession strategy in place that would allow the differentiation of the parts of the *acquis* which must be implemented upon accession to the EU from those which must be adhered to in order to secure an admission into Schengen. At the moment there is no effective system of re-targeting and prioritising and the applicant countries are required to implement the JHA *acquis* in full even if they

evidently lack the capabilities to do so. Prioritisation of some areas of the *acquis* would give a clear message to the candidate states and allow them to concentrate and re-direct resources towards the areas defined as most important. Undoubtedly, it is more difficult to specify priorities in Schengen than in other areas of the EU *acquis*, such as the environment for example, because of the lack of consensus and conflict of interests between the Member States. Yet at present the scale of changes required outstrips the administrative, legislative and financial capacities of the applicant countries. Without setting out priority areas the applicant countries will continue to spread their efforts and resources too thinly. Slow progress in the fulfilment of the requirements will perpetuate anxiety amongst the Member States leading to a prolonged lack of trust in the candidate states, something which in turn may deepen disillusionment in the process of enlargement.

Secondly, the issue that needs to be considered is the kind of mechanism for decision taking on Schengen issues during the transition period, that is after the candidate states join the EU but before their full admission to Schengen. There is no precedent because during Italy's and Greece's 'transition periods' Schengen did not form part of the *acquis*. Therefore, specific questions need to be confronted as to how this 'transition period' is going to work from the institutional and procedural point of view. The new Member States will be excluded from the operational aspects of Schengen. But will they have a say on the matter of principles related to Schengen (such as, for example, majority voting)? If the answer to this question is 'yes', the ramifications of the resulting situation need to be considered from not only the legal but also the political points of view. Issues concerning the policing of the external frontier will be particularly sensitive to the new Member States, as the majority of them will become 'frontier states'. And yet they will not have full voting rights on Schengen issues, being excluded from operational aspects of the system. The delays in admission will pose the challenge of having to implement decisions without participating in taking them over several years; this will be especially challenging if the decisions are perceived as harmful to national interests.

Thirdly, how can the political instrumentalisation of Schengen be prevented or at least minimised? The evaluation criteria remain open-ended and discretionary. In the cases of Italy and Greece the prolonged waiting period caused frustration and – in the Italian case – led to political friction with some of the full Schengen members. So in the current enlargement, the evaluation process is vulnerable to political instrumentalisation and could prove very controversial as various Schengen members can veto membership single-handedly. So the powers of the insiders can be easily abused for political ends not necessarily concerned with JHA. The margin of appreciation in the interpretation of criteria for admission is likely to lead to accusations of a

deliberate delay as happened, for example, during the admission of Italy to Schengen.

The Free Movement of Labour

The applicant countries to the Union view the prospect of delay in their membership of the Schengen Group with dismay. However, from the point of view of the existing Member States, this focus on the negative seems unjustified because even though Schengen border controls will be maintained between existing and new Member States of the Union, citizens of the latter will enjoy full rights on a par with citizens of 'old' member states. Therefore – it is believed in the EU - shifting the emphasis to the benefits derived from membership would help to 'demystify' Schengen. But this is considerably more difficult if the maintenance of Schengen border control coincides with the imposition of restrictions on the free movement of labour. The contingent political relationship between these two issues merits the inclusion of labour migration in this report despite the fact that *sensu stricto* the movement of labour is not part of the JHA *acquis*.

At present the opinion prevails within the EU that mobility within the Union is 'too low' whereas mobility from outside is 'too high', and that the admission of the new members will increase the 'wrong' sort of migration. In particular, Germany and Austria fear an imminent immigration threat from the applicant countries. To placate such fears, Germany and Austria exerted heavy pressure for a transition period in order to curb the influx of labour migrants from Central and Eastern Europe on the grounds of 'political sensitivities'.

Although the fear of large increases in migration after enlargement shaped the negotiating position of the EU, the evidence is far from conclusive. Indeed, no convincing explanation of possible economic and political problems was presented to the candidate states. Because of the political salience of labour migration, a plethora of studies have been produced which indicate a substantial divergence between different projections. These divergent estimates can be explained by the political uses of such research, but also by ongoing disagreements within the academic community on theories of migration and methods of predicting future flows (i.e. estimates can be based on previous experience, labour migration theory, simulation, etc). Yet an understanding of the processes at work is a vital element in dispelling the fears that surround labour mobility in Europe. In particular, detailed micro-studies show that such fears are ill-founded, as the numbers involved are not large in relation to recipient populations, migration is short-term and there are benefits to both origin and destination states. So while the removal of restrictions to free movement will lead to an increase in migration, the level of flows will be lower

than widely predicted, especially if the already sizeable labour migration from the candidate countries is taken into consideration (for example, it is estimated that there are 200,000 Poles employed legally and 200-300,000 working illegally in Western Europe). In this situation, the proposed transition period will prolong existing illegal labour migration and hence make it vulnerable to abuse and criminalisation.

While the angst of the Member States must be taken seriously, the threat needs to be assessed on the basis of reliable evidence; only then can effective policy instruments be devised accordingly. The alarmist scenarios that drove the demand for a transition period are not supported by hard, convincing evidence. The transition period is a blunt and inflexible policy instrument that causes much political aggravation in the applicant states. A safety clause is a more sophisticated instrument as it allows the monitoring of the actual level of labour migration and adjustment of policy measures accordingly. When labour migration rises above a certain threshold restrictions can be introduced. Being a more targeted and precise tool, a safety clause would also be politically more sensitive to the public perception of exclusion amongst the applicant countries and hence help to offset it. However, the circumstances in which the EU's common position on this issue was adopted already exemplifies the political exploitation of the issue within the EU, something which hampers the pursuit of a more flexible approach.

Schengen and its Impact on Central and Eastern Europe

The Tampere Conclusions referred to 'an open and secure European Union', yet so far security prevails over openness. In particular, the Schengen *acquis* is permeated by fears of external threats and dangers to the Member States. It aims to achieve the uniform implementation of various measures designed to compensate for the abolition of internal border controls, such as visa arrangements, asylum policy, external border control, electronic information exchange (SIS) and police and justice co-operation in criminal matters.

The implementation of the Schengen *acquis* requires a massive legislative, administrative and financial effort, which is assumed to be beneficial for the countries that adopt them. Soon after, or even before, enlargement, the applicant countries are expected to appreciate the benefits of a 'safe inside', especially when, for example, they themselves become destination targets for illegal immigration. In other words, once their internal security is also endangered, the convergence of interests between the existing and new Member States will take place. However, the universal application of the Schengen *acquis* on the Union's future external borders evokes considerable apprehension in many applicant countries because the pre-occupation with minimising the

threat of crime and immigration overshadows the consideration of the role the border regime plays in relations with neighbours.

For future Members, the external border is not only the frontier of the zone of internal security but also the interface with non-members, including both applicant states and non-applicants in the East. The new Schengen border and the visa regime will rupture the existing pattern of historical, ethnic, political and economic ties. Hungary faces the prospect of being separated from its sizeable Hungarian minorities in Romania, Serbia, Ukraine and possibly Slovakia. Poland fears that its endeavours to build intensive co-operation with Ukraine will be jeopardised. For understandable political and economic reasons, the Czech Republic is refusing to treat its border with Slovakia as an external border, something which is reflected in limited patrols and lax control standards along it.

So far the question of the impact of Schengen on the 'outsiders' has been vastly under-researched. In this context, the real danger is that the EU visa policy in particular may generate unforeseen consequences or even provoke reactions, which will exacerbate the problems the policy is supposed to alleviate. Such reactions can already be observed in Central and Eastern Europe. Hungary is pre-occupied with a search for an instrument to retain links with ethnic Hungarians in the neighbouring countries and has adopted a piece of legislation, popularly known as the 'Status Law', which would challenge the traditional notion of citizenship. Romanian citizenship has been sought after by citizens of Moldova; it is estimated that up to 500,000 Moldovans have acquired Romanian citizenship because of the expected advantages of visa-free travel to the EU for Romanian citizens. As a result, upon Romania's accession to the EU, a considerable proportion of Moldova's citizens will become EU citizens, even if Moldova remains outside. In the case of Ukraine, it is estimated that 700,000 households will lose income when visas with Poland are introduced, something which may affect political stability within Ukraine, especially taking into account the lingering centrifugal forces in Western Ukraine.

While at the moment the Member States take a rigid approach to the non-negotiability of the Schengen *acquis*, for Poland and Hungary the visa regime is a particularly thorny issue. The Schengen Group insists on the application of the 'visa negative list' from the day of accession and, preferably, as soon as possible. Indeed, the functioning of visa arrangements needs to be tested before its effectiveness can be assured. Yet the current blanket policy of requiring visas for all citizens of 'black list' countries for every visit discourages Poland and Hungary from introducing visas until as close as possible to the moment of accession. Moreover, even upon EU accession, new Member States will not be granted the right to have a say on the EU's visa policy, as they will be excluded

from the operational aspects of Schengen, despite their vital interests in this area.

Therefore, as a minimum, the EU could explicitly encourage the applicant countries to adopt a more pragmatic approach in cases where there is a strong rationale for a special visa regime between the new members and their non-EU neighbours. There is the possibility of a multi-entry visa regime for certain categories of people such as academics, businesspeople or those who have relatives in the Member States. The Schengen *acquis* also allows some flexibility on border checks. People from different countries entering the Union may undergo different types of control; even random checks of some type of travellers are possible. But the question then is whether such kind of checks will be viewed as sufficient by the Schengen group, taking into account the lack of agreement on these issues in the Council.

Rather than complementing the Union's foreign and security policy, the visa policy appears to run counter to it, thus exposing the lack of co-ordination between the First Pillar and CFSP. Schengen could be used to improve the infrastructure on the external border to facilitate cross-border traffic and stimulate the countries outside the Union to embark on internal reforms to promote stability on the outer rim of the Union. In Ukrainian-EU relations, the blanket visa policy threatens to damage ties which could be utilised to build patterns of co-operation with neighbours to the East in order to better control the threats to internal security. Indeed, as is demonstrated by the example of the Russian-Finish border, frontiers are best controlled from both sides, so co-operation with the non-applicant countries to the East is a vital pre-condition for effectively tackling 'soft' security threats, above all illegal migration and organised crime. Also, more wide-spread use and effective functioning of re-admission agreements offers, at least, a partial solution to the problem of illegal migrants, and hence, could mitigate the need for exclusionary visa policies.

Moreover, the *sui generis* 'transition period' between the date of signing up to Schengen and the attainment of 'Schengen maturity', i.e. the period when the internal Schengen border will be maintained between the existing and new Member States, presents an opportunity as it makes the testing of new solutions a less risky enterprise. The new and 'old' Members could use this period to work together on such adjusting the Schengen system that it would bring greater consistency with the broader objectives of the EU's foreign policy. Thereby, the EU could move closer to promoting good partnership relations with Russia, promoting stability in Ukraine and provide support for the tenuous state of affairs in Serbia and Balkans at large.

Focus on the creation of the EU as a community of 'internal security' dictates the pre-occupation with securing a tight external border at the expense of thorough consideration of the effects this has on the existing pattern of relations in Central and Eastern Europe. Unless this issue is openly addressed and solutions are found to the problem of preserving ties with non-applicant neighbour countries of the enlarged EU, Schengen risks being perceived as a system driven by the anxieties of the existing Member States and ignoring legitimate concerns of the applicant countries. The creation of the new dividing line in Central and Eastern Europe would jeopardise the process of knitting the populations together and reducing socio-economic disparities with the aim of stabilising this part of Europe.

Conclusion

The objective of the JHA *acquis* in the enlargement process is to keep the 'inside safe' upon the admission of the new members into the Union. In other words, the Member States seek assurances that the admission of new members will not compromise the 'internal safety' of the EU. The events of 11 September prompted even a stronger drive in the EU to effectively control 'soft' security risks. This is why the candidate countries are being asked to implement the JHA *acquis* without the flexibility that some Member States have secured for themselves.

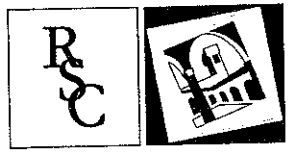
The applicant states face formidable political, administrative and financial hurdles in the course of implementing the JHA *acquis*. The scale of the challenge is augmented by the diversity of practices within the Union, the institutional complexity of JHA co-operation, the opaqueness and confidentiality of the implementation measures of the *acquis*, and discretionary evaluation criteria. These factors can generate contradictions, uncertainty and confusion, which further hamper the implementation process.

Shortcomings in the implementation of the JHA *acquis* by the candidate states are only too evident, and many of them are unlikely to be dealt with in the short- or even medium-term. At the same time, however, the delay of enlargement on these grounds is unlikely as it would be too costly in political terms. This disparity between political imperatives for enlargement and deficits in the implementation puts sever strains on the current 'take-it-or-leave-it' strategy towards the JHA *acquis*. This situation arouses anxiety in some Member States that they lack effective mechanisms to ensure the compliance in JHA by the applicant countries. Therefore, there is a need for differentiating and prioritising various parts of the JHA *acquis* in order to give the applicant countries more clear guidelines of what is expected and when.

In the light of the qualitative nature of the evaluation criteria, the decision on 'Schengen maturity' of the applicant countries will be largely based on trust, i.e. that rules and procedures are adhered to by their law-enforcement agencies. And yet trust is something which so far has been largely missing. It is argued that the lack of trust between the Member States and the applicant countries in the JHA field reflects a distrust which lingered amongst the Member States themselves when they ventured into this new avenue of European integration – the traditional stronghold of national sovereignty. Whereas the Member States are building on a long-standing tradition of co-operation in other areas, co-operation with the applicant countries starts from a very low level and is being fostered against a backdrop of deep-seated stereotypes, prejudice and suspicion, which still permeates post-cold war Europe. And yet trust and confidence can only be built up gradually – it requires time, effort and good will. The Member States cannot wait for too long before they embark on meaningful co-operation in JHA with the applicant countries.

The 'Schengen transition period', during which the internal borders between the 'old' and new Member States will be maintained, offers the possibility of ensuring greater consistency between the First Pillar and the Common Foreign and Security Policy with the aim of stabilising Central and Eastern Europe. It can be used to apply and test new solutions in border controls and the visa policy in order to prevent the severe disruption of existing relations between the new Members and non-applicant countries.

The creation of the AFJS has become a novel, ambitious dimension of European integration. Yet, being highly sensitive in political terms, laden by public anxieties in the Member States, and complicated by the nature of the JHA *acquis*, it poses profound challenges for the enlargement process. Unless these challenges are openly recognised and addressed, problems and tensions in the field of JHA may cast a long shadow over the enlarged Union, despite the progressive aims of this part of the *acquis*.



RSCAS POLICY PAPERS

RSCAS Policy Papers are published and distributed by the
European University Institute, Florence

Copies can be obtained free of charge
– depending on the availability of stocks – from:

Robert Schuman Centre for Advanced Studies
European University Institute
Convento
Via dei Roccettini 9
I-50016 San Domenico di Fiesole (FI)
Italy

Please use order form overleaf