

Challenge Working Paper

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The politics of subterfuge and EU JHA governance capacity

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This paper starts out from a puzzle: Why is EU JHA characterized by frustrations and blockades, while it is at the same time one of the most dynamic policy-areas?¹

Posed in such general terms, this question is almost impossible to answer: Not only is EU JHA policy² a highly diverse, but has also seen phases of ambitious agenda-setting contrasted by periods of stagnation.³ Therefore, a convincing answer to the above puzzle would require an extensive historical exposition of this policy area, which is beyond the scope of this paper. Here I only intend to review some general factors that inform EU's current *governance capacity* in JHA,⁴ giving particular emphasis to the problems posed by unanimous decision-making in the Third Pillar.⁵ This structuralist approach cannot explain any particular instances of EU JHA policy-making on its own,⁶ but it aims to inform subsequent case studies.

The paper proceeds in four steps. In a first part, I will discuss the EU's structural obstacles to unanimous decision-making from a rationalist perspective. For this purpose I draw heavily on the work of Fritz Scharpf (1997) and Adrienne Héritier (1999) who have introduced many useful insights from comparative politics and policy analysis into EU studies. In the second part, I will survey different strategies for successful policy-making under extensive structural constraints to account for the dynamic development of EU JHA policy in recent years. This overview will be broken down into the classic dimensions of policy, polity and politics. In the third part, I will briefly review

¹ A consensus that to be reached, the JHA has to be more active. Unofficial statement of this latter point, see Kaunert (2005). Compare also Monar (2001, 2006a).

² or JLS, if one follows EU parlance more strictly. However, here I stick with the more common term JHA.

³ Take, for instance, the ups and downs of the implementation of Tampere or the aftermath of September 11.

⁴ Although the term governing capacity may merit a longer philosophical discussion, for the purposes of this paper I would simply equate it with the capacity of the EU to "solve problems", i.e. to realize common gains for its members. While it is a problematic move to evacuate the political and moral debate about what counts as a "problem" that needs to be "solved" by the EU in JHA, I will stick to a very general understanding of governance capacity as the ability to agree

enhancing JHA governance capacity in the face of extensive constraints comes at a price, such as institutional fragmentation, selective policy frames or an overly ambitious crisis-driven policy-making, while the implementation records remains also questionable.

1. GENERAL OBSTACLES TO, AND STRATEGIES FOR, JHA EU POLICY-MAKING

The term ‘governance’ is notoriously hazy and encompasses a wide range of formal and informal “steering” processes.⁷ However, the focus here is the *formal* policy- and decision-making process by the EU, so as to outline its ‘baseline’ governance capacity in JHA. While it is problematic to reduce governance capacity to formal policy-making, this simplification allows the most general assessment of how likely it is that actors “with very diverse interests [who] depend on each other to provide common goods” (Héritier, 2002:3) can cooperate successfully.⁸ So the question that will be addressed here is straightforward: what are the difficulties of formal EU JHA policy-making? The simple answer would be that the member states’ general reluctance to pool or delegate national sovereignty in JHA poses the fundamental problem, which is underlined and compounded by unanimous policy-making procedures. It seems to be an extremely widely shared consensus that unanimous decision-making only leads to lowest common denominator agreements (Fletcher, 2003: 541; Fortescue, 1995; Hayes, 04/2004; Nilson, 2002: 7-8; Uçarer, 1999:257).

However, if looked at in some more depth, the problem of unanimous decision-making is more complex. The challenge is not only to mediate between Europhile and Eurosceptic member states, but also how to reach agreements in cases when all member states would prefer more EU involvement but cannot agree on specific policies. Thus, common gains of intergovernmental cooperation - even if they are of the lowest common denominator kind - could be

1.1. The Joint-Decision Trap

Two assumptions need to be made at the outset of the following theoretical discussion, which is built on Fritz Scharpf's work.¹⁰ The first is that there is a shared preference among principal policy-makers (i.e. the member states) for more JHA cooperation, whatever the reasons for this may be, such as spill-over effects from the abolition of borders or common pressures or threats, e.g. terrorism or international migration.¹¹ The second assumption is that EU JHA policy needs to achieve the "joint production" of common goods. This terminology is

misinformation. This means (...) that the party that contributes most to the search for better solutions lays itself open to exploitation by a party that concentrates its efforts on the distributive dimension.

(Scharpf 1997: 124)

So even if member states agree on the need to jointly “produce” European security, it often remains difficult to agree on the terms and forms of collaboration for fear of exploitation or unfair distributional outcomes.¹⁵ Scharpf goes on to distinguish between four different forms of interaction in such a situation of joint production, based on a matrix of two criteria. These criteria are, firstly, the salience of production and secondly, the salience of distribution. To repeat, the assumption here is that there is a strong shared preference for more EU security cooperation, so that the production dimension is salient. This allows one to leave two cases aside, i.e. where salience is low and cooperation unlikely due to a lack of need. The question, then, is whether the other distributional dimension is also salient or not. If the distributive dimension is low, policy-makers

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Often (...) considerations of individual or institutional self-interest are delegitimated and, as it were, driven underground where they become a "hidden agenda" that distorts and corrupts arguments that are explicitly presented as contributions to Problem Solving.

more worthwhile to explore institutional solutions that would make the existing joint-decision system more effective, rather than to call for majoritarian reforms

(Scharpf, 1997: 145)

1.2. First steps to escape the joint-decision trap

Such an exploration of institutional and other factors that make the EU joint-decision system more work is precisely what Adrienne Héritier undertakes in her book “Policy-making and Diversity in Europe” (1999). Héritier basically accepts the argument that one could expect stalemate and joint-decision traps in the EU. She even adds to the complexity of the negotiators dilemma: On top of the two conflicting motives, namely to find good policy solutions and tilt the distributional effects in one’s advantage, she adds two further types of costs that need to be considered: the loss of decision-making powers (sovereignty) and the adjustment costs to any new policy (*ibid.*, p.15). Héritier further points out that domestic political constraints often lead to more narrow negotiating position than what would be necessary to reach agreement. Therefore, “stalemate is virtually unavoidable and deadlock - in terms of an explanation - overdetermined, implying that the decisional process is likely to stall in practically all policy cases.” (Héritier, 1999: 16)

However, Héritier aims to solve the puzzle of continuous EU policy-making in spite of these obstacles. As a starting point she regards the EU as a ‘polity in flux’ that allows for a softer understanding of structural constraints.

requirement

form of the negative “principle of availability” seems motivated to facilitate agreement in the Council, even though it throws up substantial legal, moral and practical problems when it comes to putting the principle into practice (Hijmans, 11/2006).

On the vertical dimension, the table allows one situate the role of the various softer instruments that the EU has used in JHA policy-making. These will be briefly discussed in the third part of this paper, when reviewing the recent work of Jörg Monar (2006b, 2006c). Suffice it to state here that Monar distinguishes four “modes of governance” in EU JHA: tight regulation, framework regulation, target setting and convergence support. These different modes change the expressions in each of the fields in the above table, such as the distributional effects, adjustment and competence costs and, correspondingly, the legitimacy requirements of each policy. Thus, even highly costly or controversial policies may be passed in an attenuated or “softer” mode of governance.

In sum, on top of making cross-issue linkages and side-payments, there are two fundamental ‘subterfuge’ moves in the policy dimension to extend the EU’s governance capacity, one on the horizontal axis of policy framing, and one along the vertical axis by choosing different kinds of governance instruments that change the costs, benefits and legitimacy requirements of policies. Meanwhile, the “vertical” moves of changing the costs of policy-making already draw quite directly on the polity dimension, in so far as different modes of governance imply changes in the institutional and decision-making structure. I would, therefore, turn next to the polity dimension.

2.2. The Polity Dimension

It is difficult to summarize the essential features of the polity dimension in a convincing way, as the complexity of the EU polity is often overwhelming. Nevertheless, for the purposes of this paper I would contend the

Table 2

Majoritarian
making

decision-

subset of states with more convergent preferences can cooperate; or professional or officials may be allowed to come together as a more “functional” polity that has more convergent interests. This latter option can either come about by strategic venue-shopping that is driven by professionals from the bottom-up, or by politicians deliberately fostering informal or softer modes of governance²⁸. In any case, policy-making in more functionally than nationally defined expert networks may be said to amount to a change in decision-making and preference aggregation, which are the defining characteristics of any polity. This dynamic has fuelled the long-standing debate over the dynamics and legitimacy of the network or “field” of professional actors and institutions (Bigo, 2005) that cut across EU policy-making and that animate the “multi-level governance” of European security (Krahmann, 2001; Krahmann, 2005; Webber et al., 2004; Den Boer, 2004). Not only are there a variety of relatively independent EU bodies that shape this process of European security governance at the operational level, such as Europol or Frontex, but one has also to take a very large number of other bodies, groups and organizations into account that originate before or outside the EU, such as Interpol, the Police Working Group on Terrorism, the Group Pompidou, etc. All interact with the highly complex system of working groups in EU JHA policy-making, which also has mostly grown out of a number of non-EU expert groups, as was the case with TREVI and Schengen.²⁹ Unfortunately, here I cannot further develop the complexities of this multi-level European security governance outside or below the formal decision- and policy-making capacities of the EU. Even if this may be a serious omission, this paper contends itself to mapping the more forking

the EU level due to its fragmentation and diversity, the frequency of politically salient crises in JHA creates numerous opportunities for policy entrepreneurship. JHA issues like immigration, organized crime and terrorism – or whatever else is put on the ‘security continuum’ (Bigo, 1994: 164) – obviously lend themselves to ‘securitization’ (Loader, 2002; Huysmans, 2000), i.e. to ‘extreme forms of politicization’ (Buzan et al., 1998: 23). As is well known, securitization dynamics allow for exceptionalist political process and non-incremental change. This is facilitated by the typically high sense of urgency about securitized issues.

interdependent actors through institution-based internal rules systems.” (Monar 2006b, 4)³⁶ Four different modes of JHA governance can be distinguished: tight regulation, framework regulation, target setting and convergence support. These modes of governance are based on a more general typology (Treib *et al.* 2005) that distinguishes between the strictness of decision-making as well as implementation instruments. The typology of Treib *et al.* is set out below, with Monar’s adaptation for JHA written in cursive.

Table 4

		Decision-making	
		Non-binding	Binding
Implementation	Non-binding	Voluntarism <i>Convergence Support</i>	Framework regulation <i>Framework Regulation</i>
	Binding	Targeting <i>Target setting</i>	

Thus, EU JHA policy is generally characterized by a mixture of “hard” and “soft” modes of governance (*ibid.*, 3), and there is a distinct predilection of “pragmatic solutions” irrespective of legal provisions (Monar 2006b). This again chimes with the perspective adopted by this paper, namely that policy-making actors are operating flexibly within the existing institutional framework.

unfortunately this question about the legitimacy of the EU's involvement in JHA or internal security policy cannot adequately addressed here anymore, there is a vibrant academic debate to refer to (e.g. ELISE Consortium, 2006).

4. CONCLUSION

In summary, one may discern five main options of undercutting the structural constraints on EU JHA policy-making. Under the policy dimension one may lower the costs of agreement by using less binding forms of decision-making and less rigid specifications for implementation, or by strategically framing controversial policies in terms of negative integration. At the polity level there are two further options, namely either promoting transnational and functionally specialized governance networks by experts and officials, or by using flexible integration, which can lead to vanguards or directorates of member states that can set the agenda for the entire EU. The fifth option, which arguably has been theorized least, but which features extensively in historical accounts of JHA policy, is to make use of recurrent politically- or crisis-driven windows of opportunity. This last option is particularly important if windows of opportunities are used introduce ambitious long-term agendas, such as the Action Plan on Combating Terrorism, even if implementation process may be slow and imperfect.

All these 'subterfuge' options are used at different times by policy-ma

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