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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 two recent articles that on EU governance in JHA and "internal security" and show how many of their observations can be fitted into the overview developed in the second part. Moreover I will briefly point to the fact that in these recent analyses the "politics" dimension is perhaps somewhat underemphasized. The conclusion points out that

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¹ Although the effectiveness of EU JHA policy-making is debatable, as will also be discussed by this paper, there seems to be a consensus that JHA, or the AFSJ, has joined the core activities of the Union. For the most far-reaching 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 on policies and have them implemented, assuming that such policies are passed with a common good or problem in mind.

⁵ To be precise, unanimity also still applies on questions of legal migration under the First Pillar (OJ L 396/45). At the time of writing, it seemed that the Reform Treaty would eventually abolish the distinctions between different pillars and the unanimity principle, but due to remaining disputes among and with member states, and long ratification and implementation periods (up to 2014), it still appeared useful to analyse the dynamics under the current institutional set-up.

⁶ A comprehensive explanatory account would require more information about the motivations, preferences and strategies of different actors as well as about contingent events

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 “left on the table”. Below I will rehearse Scharpf’s argument on joint decision traps (1988, 1997, 2006) to better conceptualize this problem. Even if the term of joint decision-trap is by now familiar, it often used as catch-word for blockade rather than as a permanent theoretical possibility, so that the following lengthy exposition is justified.⁹

In a second step I will present Héritier’s (1999) corresponding argument that the EU is inherently characterized by patterns of evasion and “subterfuge” that could avoid the ever-present threat of deadlock and joint decision-traps. This will serve as the stepping stone for the remainder of this paper. In a nutshell, it will be argued that the range subterfuge tactics listed by Héritier needs to be extended and systematized to understand the dynamics of EU JHA governance. This abstract and more systematic analysis can only list the possible channels and strategies for creating EU JHA governance capacity, while cases studies cannot be presented for reasons of space. However, this paper hopes to clarify the background to future empirical work in this area.

⁷ Here I cannot even begin to enter the complexities of the general literature on governance (Van Kersbergen and Van Waarden, 2004) or EU governance in particular (Kohler-Koch and Rittberger, 2006). In the third part of this paper a typology of JHA governance modes will be briefly presented.

⁸ However one defines governance, this mutual interdependence of actors underpins almost any attempt at steering, regulation, coordination or governing.

⁹ That is, it does not matter too much whether joint decision traps can be empirically identified or not – the question is under what conditions is there a threat of joint decision-traps and how this threat can be averted. In any case, the debate on joint-decision traps continues today (Scharpf, 2006).

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 important as the production of common goods leads to "games of collaboration", in contrast to games of co-ordination: During games of co-ordination cooperation is relatively easy to achieve as all actors merely need to adjust their independent efforts to each other, whereas during games of collaboration they have to negotiate over the each other's respective contribution to the common good and to monitor compliance.¹² 'Governance capacity' can only properly be defined against the harder case of collaboration, whereas coordination is achievable by lighter regulatory regimes that only need to provide mutual information about each interdependent actor.¹³

Following on from these assumptions, one can argue that the desired common good in JHA is mainly security.¹⁴ Yet although all member states may be willing to collaborate to improve the security of each, it is not clear that each will contribute a fair share, as the cost and benefits tend to be spread unevenly. Moreover, member states have incentives to misrepresent or twist these respective costs and benefits to their own advantage. Finally, some member states may also be in a position of strength and extract concessions from others. In short, policy-makers are faced with a "mixed motive" game, whereby there is more than only one issue dimension: both the relative benefits and costs have to be considered alongside the overall utility of joint cooperation. Unless there is a perfect process of information processing and deliberation, which could eliminate distortions to a 'fair' and mutually beneficial agreement, games of collaboration generate a so-called "negotiator's dilemma":

In having to solve simultaneously the problems of production and of distribution, the parties are confronted with another Prisoner's Dilemma: The successful joint search for better overall solutions requires creativity, effective communication, and mutual trust, whereas success in the distributive battle depends on the strategic, and even opportunistic, communication and withholding of available information-and a good deal of distrust against potential

¹⁰ The following exposition specifically draws on the book "Games Real Actors Play" (Scharpf, 1997) that situates the argument in the wider theoretical approach of 'Actor-centred institutionalism'.

¹¹ Several authors have argued that both spill-overs and external shocks have shaped and driven the EU's JHA policy. A good summary is provided by Mitsilegas *et.al.* (2006: 16-31). For a recent attempt to provide a unified theory perspective on EU JHA integration, see Niemann (2006).

¹² This will be elaborated further below

¹³ In EU studies, such an argument for the sufficiency of "light institutions" has, for instance, been argued in relation to the CSFP external crisis-management (Wagner, 2003)

¹⁴For an extended analysis on policing as a public good, which could be seen as a subset of the public good of security, see Loader & Walker (2001). The freedom and justice are much harder to define as public goods, or they become easily entangled in processes of securitization (Monar 2006a, 4-6). While "justice" may perhaps be somewhat approximated, if one takes a certain set of standards that should be extended and guaranteed, freedom is most problematic to conceptualize as a common good that is to be "produced". This would merit a much more extensive discussion than can be given here, however. Much of it relates much to the question whether governance capacity can really be instrumentally be defined as a collective problem-solving capacity, but whether it should not rather be put into a much more complex context of competing values, aspirations and debates about the adequate roles of governments.

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-making may approximate the mode of “problem-solving”, if it is high, then interactions can be described as “positive coordination”.

A problem-solving mode of interaction is straightforward to understand: There is a collective search for the optimal solution. This mode is possible if concerns about relative costs and benefits are low or can be subordinated to a commitment to the common good. Yet either option for achieving problem-solving, which would maximise collective governance capacity, is unlikely to be present in EU JHA policy. First, security policy usually entails pronounced concerns with relative costs, as will also be elaborated further below. Second, the prioritization of the common good requires a transformation of the identity of policy-makers. This is unlikely to occur in the EU in the foreseeable future, even if the ongoing development of a shared security identity,¹⁶ strategic culture (Cornish and Edwards, 2005; Meyer, 2005) or security community (Ekengren, 2004: 1-5) could be interpreted as steps in this direction. In any case, security communities attenuate concerns about relative gains (Adler and Barnett, 1998), but do not necessarily lead to full solidarity and cost-sharing.¹⁷

So although constructivist approaches can add important insights to detailed case studies,¹⁸ I would, therefore, contend that EU JHA may still be traditionally regarded as an intergovernmental policy area¹⁹ that is riddled by national sovereignty concerns and the persistence of national identities and legal traditions (Mitsilegas *et al.*, 2003: 6-18). Consequently, the policy-making mode of “positive coordination” is the norm, even if this is not overtly recognized. Scharpf sums it up like this:

In the general case, parties to a negotiation (...) are simultaneously engaged in Distributive Bargaining and in Problem Solving. If they succeed, this mode of interaction is being described here as “Positive Coordination”. (...) This [mode] is by no means generally assured.

¹⁵ This discussion does not cover the additional problem of free-riding. Yet incentives to free-ride may be lower in the case of common good of security, as any defection not only increases production costs to others, but potentially undermines the value of the good for everyone – i.e. the chain is only as strong as its weakest link. Therefore, the issue of free-riding will be left aside in the general structural analysis of this paper, even if it may remain an empirical problem in some JHA policy areas.

¹⁶ For the most comprehensive treatment that also deals with JHA Third Pillar cooperation, and not merely with a military European Security and Defence Identity, see Müller-Wille (2003), especially pp.135-185

¹⁷ An illustration of this point would be the practical irrelevance of the EU “Solidarity declaration” to debates about the member states material and financial contribution to the ESDP.

¹⁸ Take, for instance, Aus (2006a, 2006b) highly detailed case studies of EU biometrics and asylum policies that demonstrate that the ‘logic of appropriateness’ play an important part in explaining outcomes during late stages in the policy-making process, particularly in COREPER.

¹⁹ To be precise, it may be more accurately described as built on intensive transgovernmentalism (Wallace And Lavenex, 2005). However, for the purposes of the decision-making analysis presented here this distinction is not particularly relevant. Compare Monar (2006a, 500).

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.

(Scharpf 1997: 132-33)

This clearly matches the case of EU security policy, including JHA. For instance, one can find increasing common rhetorical commitment to jointly tackle shared security threats, such as the European Security Strategy. However, the actual EU policies usually fall far short of these declarations, leading to a significant "expectations/capabilities gap" (Hill, 1998). While this gap was first identified in the Second Pillar, it clearly extends to the Third Pillar as well.

Of course, positive coordination may be achieved if the allocation of costs and benefits among member states can be settled decisively by a majority vote. That is, only under unanimity decision-making the negotiator's dilemma described above truly bites. Yet in so-called 'joint-decision systems', the negotiator's dilemma also potentially turns into a 'joint-decision trap' (Scharpf, 1997: 143-45): A joint-decision system implies that all members should coordinate their policies, even if they may not be blocked from unilateral action. However, since members are not fully integrated into a hierarchical decision-making system and unanimous decision-making remains common, agreements are hard to reach. Meanwhile, once a unanimous agreement is reached, it is almost impossible to alter or repeal the policy, even if a large number of members subsequently change their preferences. Therefore, actors have fallen into a joint-decision trap. The next step in this argument - and the true problem - is that in the shadow of such joint decision traps it may be almost impossible to reach agreement. This is because any risks related to entering an essentially irreversible agreement have to be cleared in advance, which is impossible due to information constraints and uncertainty about the future. So the worst possible outcome in a joint-decision system is paralysis, as member states cannot "go-it-alone", while they cannot agree on collective policies either, as they fear falling into joint-decision traps.

To be fair, this is only a worst case scenario. A possible – though so far not sufficiently strong, as argued earlier - advantage of a joint-decision system is that distributional consequences tend to become less important among members due to a growing sense of trust and collective identity. The problems of joint decision systems could also be overcome by substantially deeper integration, as may eventually be achieved by Reform Treaty. As it stands, it would at least lead to consistent majoritarian decision-making in JHA, although not necessarily to a stronger common identity and trust. In any case, it is the aim of this article to analyse governance capacity under the *status quo*²⁰. There may also be good political and normative reasons to assume institutional stability over the medium-term.²¹ It is, therefore, more interesting to take note of Scharpf's conclusions that the negotiator's dilemma can be reduced if there is a respected impartial agenda setter,²² but is unlikely to be easily overcome:

In short, the inherent limitations of systems that depend on unanimous or near-unanimous agreement can be extended by the institutionalization of an agenda-setting function. However, even in the best of circumstances, joint-decision systems are cumbersome, difficult to manage, and easily blocked. Nevertheless, they may sometimes be the best that can be obtained, considering the difficulties of installing a majoritarian system that would have democratic legitimacy. Under such conditions, which may now exist in the European Union, it seems

²⁰ See *supra* note 5

²¹ It would go too far here to speculate on the reasons for the initial rejection and subsequent renegotiation or "watering down" of the original Constitutional Treaty. Take, for instance, Moravcsik's argument (2005) that the EU has entered a constitutional equilibrium which makes further substantial integration highly unlikely. At the time of writing, the Reform Treaty still needed to be ratified and implemented, and continued to face opposition from countries like the UK and Poland.

²² In EU JHA policy this applies to the quickly growing role of the European Commission (Uçarer, 2001).

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. Thus, there is a wide variety of strategies that could bypass decision-making deadlocks under *existing* institutional arrangements. In her view these strategies can be split into two groups, one derived from bargaining theory and one from sociological organization theory:

(B)argaining theory proposes that conflicting interests may be accommodated and gridlock avoided by forming package deals, paying compensation, making concessions and settling for framework solutions. (...) Sociological organisation theory points to more 'opaque' modes of accommodating conflicting interests: organisations will satisfy conflicting demands through 'talk', that is, broad political discussions resulting in vague decisions or even merely symbolic politics, and then proceed, separately, to satisfy particular demands selectively with concrete actions.

(Héritier, 1999: 19)

The next step in the argument is that these two strands of bargaining and sociological organization theory not only show how compromise is possible, but also indicate how policy innovation can occur. Policy innovation realizes higher joint gains as under ‘true’ problem-solving, while not having to assume that distributional conflicts are irrelevant. Héritier (*ibid.*: 10-11) also briefly discusses the relevance of ‘windows of opportunity’ to account for change and innovation. However, in her discussion these windows are only related to moments of constitutional reform or enlargement, which, while certainly important, do not constitute all relevant instances. This scant attention to windows of opportunity will be briefly redressed in the second part of this paper. Last but not least, Héritier (*ibid.*: 25-27) points out that the EU’s endemic legitimacy deficit - which is another barrier to deeper cooperation - may be attenuated by “substitute” legitimization strategies, such as peer-control in professional networks, wider debates among stakeholders and inter-institutional checks-and-balances. This makes policy-making possible even when traditional majoritarian structures cannot be put into place.

These numerous factors go a long way to explain why dynamic policy-making is possible in the EU. However, Héritier’s arguments need to be elaborated in relation to EU JHA policy, which presents a harder cases than market, environmental and technology policy she

discusses. Therefore, this paper aims to survey further strategies that are used to create governance capacity in the face of severe structural constraints. For instance, Héritier argues that there are complex connections between policy-making strategies at the policy level and the polity level, but only discusses the possibility of venue-shopping. In the case of JHA policy-making venue-shopping is important (Lahav and Guiraudon, 2006; Guiraudon, 2003), but there are obviously other polity-relevant variables such as flexible integration or enhanced cooperation. And as already mentioned, one needs to give greater emphasis on the concept of windows of opportunity, as JHA policy is intimately related to crises and processes of securitization.

2. MAPPING EU JHA GOVERNANCE CAPACITY

The following mapping exercise represents the main theoretical argument of this paper and is sub-divided into the three classic dimensions of policy, polity and politics. Under each dimension I will first identify key factors that impact upon governance capacities, before discussing various options to undercut structural constraints.

2.1 The Policy Dimension

The policy dimension is mainly driven by the fact that different kinds of policies place different kinds of demands on decision-makers. The summary table below aims to give an overview of some of these different demands.²³ However, I would like to stress that this is only a very rough typology that only serves heuristic purposes. To begin with, it is not clear in how far any policy can be neatly located into only of the four different policy categories (columns), as will be touched upon later. Furthermore, the division into separate form of costs and legitimacy requirements, as presented in the various rows, is somewhat arbitrary as clearly in most real-live situations it would be extremely difficult to draw clear distinctions between disagreements on policy substance, its legitimacy requirements or adjustment costs. Nevertheless, despite these numerous caveats, the following table should broadly summarize the relationship between policy content and the possibility for agreement.

Table 1

	Type of integration policy			
	Negative/market making	Negative/market corrective	Positive/distributive	Positive/Redistributive
Substantive policy agreement	Eased by use of general liberal principles and win-win assumption	Eased by spill-over effect from negative integration	More difficult due to independent need for individual justification and specific standards	Most difficult due to intensive discussion about “deservingness”
Distributional effect	Medium	Low	Medium	High
Competence costs	Medium-low (for liberal states)	Medium-Low (e.g. regulatory agencies)	Medium-High, depending on domestic position of policy-makers	High, relating to core responsibilities of welfare state
Adjustment costs /	Low, depending on use of general principles	Medium, depending on degree regulatory competition	Depending on ‘Goodness of fit’, tending towards high	High
Legitimacy	Output – Low, as	Output – Medium, as	Input & Output as	Input & Output high,

²³ This partly draws again on Héritier (1999, 27-29).

requirement	long as general principles are clear and distributional effects are not too severe	success more precisely measured for market-correction than for market-making	both the inherent standards as well as outcomes need to be considered	justification for solidarity and demand for effective use of redistributed resources
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What can be read off this table? On the horizontal dimension it summarizes the common place that the EU is better at negative rather than positive integration. More generally, the more policies gravitate towards the left, the more we can surmise the EU has considerable “governing capacity” in relation to the issue that they are meant to address.²⁴ However, JHA policy can mostly be located under the second and third column, i.e. “correcting” for consequences of the abolition of borders as well as setting more “positive” standards of police and security agencies cooperation. It may even contain some elements of redistributive policies, when it comes, for instance, to “burden sharing” of illegal migration or asylum-seekers. Unsurprisingly, these redistributive policies have proved to be highly contentious and tended to remain symbolic (Thielemann, 2005). So while there are spill-overs from the EU’s powerful negative market integration, - *ceteris paribus* - the EU may be expected to face persistent difficulties in agreeing on JHA policies.

However, the question here is how the EU can overcome such constraints. One methods of extending the zone of possible agreement have already been mentioned by Héritier: Package deals, cross-issue compensations and compromise solutions are ways of changing and lowering the barriers to agreement. Such negotiation strategies can be found almost everywhere in policy-making, and heavily so at the EU-level. That is, political ‘horse-trading’ is usually to be understood to be an essential and – within reason – normal part of political decision-making. Therefore, such day-to-day compromising and compensating tells one little to address the particular case of EU JHA governance in the face of structural obstacles.²⁵ In any case, JHA policies may be somewhat more difficult to handle in this way, as they mostly relates to non-divisible standards and the “public good” of security, where numerical compromises or financial compensations may not be readily available.

There is also the option of strategically reframing policies so that EU initiatives would fall under a less demanding policy category. For instance, the exchange of data on the basis of the principle of availability arguably represents an instance of negative integration or at least negative/corrective as this may be seen to fill the security ‘gap’ created by the abolition of border controls. Yet this reading of data exchanges can only be accepted if the principle of availability could be defined in a highly restrictive sense that would aim to maximise “access” to a common “market” of data set that would help to maximise arrests. Instead, data exchanges should also be governed on the basis of a range of other more positive criteria, such as data protection and civil rights. The European Commission initially envisaged a corresponding data protection regime at the European level²⁶, but has been unable to make progress in the Council.²⁷ So the current dominant framing of criminal data exchanges in the

²⁴ However, this leaves out the complication that some forms of negative integration may abolish governance capacity altogether by curtailing the future options for political intervention. Nevertheless, the initial “market-making” at the supranational level could be said to represent an important instance of governance.

²⁵ To be clear, this is with the big exception of the “grand bargains” during Treaty negotiations, where such trade-offs and issue-linkages are often decisive to secure agreement. But to repeat, it is not the aim of this paper to explain the course of JHA integration in total, but rather to assess potential for governance capacity under conditions of relative institutional stability, which excludes the IGCs.

²⁶ COM (2005) 475 final

²⁷ COM(2006) 331 final, para 2.6

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 that it may be possible to concentrate on three modes of governance, subdivided into decision-making and implementation. Particularly in the mode of flexible governance the distinction between decision-making and implementation is eroded, as the distance between policy-making actors and policy-implementing “subjects” diminishes or even completely disappears. It must be stressed, however, that the following table is extremely simplified and does not adequately reflect different legislating procedures, sociological or normative pressures for consensus-seeking. It also does not even begin to address the complexity of different multi-level governance arrangements. The following table, therefore, merely indicate some broad expectations about governance capacity from a polity perspective.

Table 2

	Majoritarian decision-making		unanimous Decision-making		Flexible or multilevel governance	
	<i>Agreement</i>	<i>Implementation</i>	<i>Agreement</i>	<i>Implementation</i>	<i>Agreement</i>	<i>Implementation</i>
Strongly overlapping Interest	Large winset or even bandwaggoning under minor concessions so as not to be outvoted by majority	Likely to be best, as policing instruments should be possible to agree on with majority	Lowest common denominator or some more advanced agreement if package deals or opt-outs are offered to diverging minority	Likely to be good, as unanimous agreement signals joint commitment, but this holds only <i>ceteris paribus</i>	Progressive but unable to wield much pressure against outliers; option to flexible integration boost agreement	Likely to be good, but possible lack of policing instrument if incentive to free-ride are high
Weakly overlapping Interest	Small winset with narrowing tendencies if informal consensus is sought to limit confrontation	Still possible to agree on policing instruments, but becomes more problematic if majority agreement was bought with side-payments	Lowest common denominator or no agreement due to fear of joint-decision trap	Low chances of success, and possible blockade in highly sensitive areas	Relatively weak agreement but potential for informal commitments above lowest common denominator	Trade-off between more binding instruments and ability to go beyond lowest common denominator

Unsurprisingly, a formal qualified majority vote should be the best solution for maximising governance capacity if there are strong common interests, as it does not only create a larger win-set, but also is likely to be accompanied by binding and formal monitoring and implementation mechanisms. This is what motivates recurrent calls to extend QMV to all JHA policy areas and that may eventually be answered by the Reform Treaty. Yet even if QMV may be legally possible, it remains problematic if there is no substantial convergence of interest among policy-makers. Apart from the fact that it remains demanding to assemble a QMV, formal outvoting of a dissenting minority may lead to subsequent implementation failures and is generally avoided to maintain a cooperative spirit. This leads to unanimous or consensus decision-making, even if formally a majority vote would be possible (Heisenberg, 2005). As joint-decision traps can also occur on decision-making under “consensus” rather than strict unanimity, a change towards QMV may, thus, be less effective than may be assumed. Meanwhile, if there are convergent interests among decision-makers, then decision-making by consensus or unanimity may still be more attractive than going for negotiated governance, in so far as coherence across the EU may be higher. Correspondingly, the last option of governance has the advantage of flexibility, opening room for more informal policymaking when deadlock looms or EU competence is strongly contested.

Generally speaking, there is one complex subterfuge move at the polity level that can improve governance capacity, namely to change the nature and/or shape of the polity. This can be done in two ways: either member states engage in flexible or enhanced integration, so that a smaller

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 formal governance capacities of the EU, whatever ways there to cooperate informally or unofficially among security experts and officials.

Still, one needs to add the option of the geographical dimension of flexibility, i.e. the possibility of enhanced, flexible or multi-speed integration among a sub-set of member states.³⁰ Geographical as well as functional flexibility do not only evidently characterize EU JHA policy, but these two may interact in the form of so-called “laboratories of cooperation” (Monar, 1999; Monar, 2001). The Schengen agreement is of course, again the most prominent and successful example. Yet as is also well known, the use of flexible integration is problematic: It may lead to the fragmentation of policy areas and the division of member states into various circles and tiers. Currently, there is an renewed debate on the uses and abuses of flexible integration in JHA, which was mainly triggered by the Treaty of Prüm, which – with some minor exceptions - is due to be incorporated in the JHA *acquis* in late 2007. In so far as flexible integration initiatives are adopted into the *acquis*, it amounts to non-unanimous decision-making by detour, as over time other member states are either compelled or induced to support the vanguard initiative. Moreover, there are other sub-groups of member states, such as the G6 of the Interior Ministers of the six biggest member states that allegedly aim to overcome the enlarged EU’s “inability to decide” in JHA matters (Sarkozy, 16/02/2006).³¹ Whether successful or not, this clearly chimes with the argument here that many complexities of European JHA policy can be understood as the result of subterfuge strategies.

2.3. The politics dimension

²⁸ As already mentioned, these modes will be elaborated in the third part of this paper

²⁹ For some extended historical accounts of the development of EU JHA policy and/or the Third Pillar that bring out these points, see, for instance, Lobkowicz (2001) or Occhipinti (2003)

³⁰ It is beyond the scope of this paper to present the varieties of flexible integration. For the most authoritative and extensive discussion, see Stubb (2002).

³¹ For a recent discussion of both the Treaty of Prüm and the G6 and their likely effects on the EU, see Bossong (2007), which draws on the theory of flexible integration developed by Kölliker (2006).

If, simplistically speaking, policy deals with content, and polity with structure, then politics deals with process. Correspondingly, there are temporal dynamics in the politics dimension that render the likelihood of political change, and thus governance capacity, volatile. In particular, fluctuations in policy salience are crucial. Issue salience does not only imply heightened levels of attention, but also changes in issue dimensions (Jones, 1994: ch.3). For instance, if an issue is salient after a dramatic policy failure, the criterion of adjustment costs of policy change may temporarily fade against the drive and importance to reach a substantive agreement and “fix the problem”.

Generally speaking, issue salience is related to a number of contingent factors and events, such as crises, “focusing events”, political leadership³², media campaigns or election rhythms. As high issue salience is, thus, more likely to promote than to hinder change, it can be linked to the concept of “windows of opportunity”: contingent events and crises- facilitated by additional factors, such as deadlines or interest group pressure - open temporary opportunities for reform and policy entrepreneurship (Snare, 1995; Kingdon, 1995; Natali, 2004; Zahariadis, 1999). This is what is roughly summarized in the table below.³³

Table 3

‘Focusing’ events (crises) and political rhythms (presidencies, elections, etc.) and/or strong political leadership	Present	Absent
Issue salience	High	Low
Window of opportunity	Present	Absent
Policy entrepreneurship	Possible	Impossible
Interest group or outside country pressure	Facilitating	Facilitating
Time pressure/deadline	Facilitating	Facilitating
Outcome	Non-incremental change	Incremental or no change

Unfortunately it is impossible to discuss the theories surrounding the concept of window of opportunity or to go into each of the factors listed in this table in more detail.³⁴ Suffice it to state here that there should be ample possibilities for actors to improve EU JHA governance capacity under the politics dimension. Even if strong political leadership is very demanding at

³² Political leadership would denote the ability to drive issue salience as well as the saliency of a particular dimension of the policy issue also *in absence* of supportive factors, such as crises or particular political rhythms, such as elections or even the timing of EU presidencies. If political actors rather “go with the flow” of such events and crises, then leadership should rather be called entrepreneurship. For a recent discussion, see Heyse *et al.* (2006, ch.1)

³³ A flowchart diagram may perhaps be more appropriate to present the argument, as it deals with sequence and process. However, for reasons of rough comparability with the tables 1 and 2 and the very short presentation of the argument about windows of opportunity, this is not the done here.

³⁴ For instance, it would be interesting to ask why deadlines can be facilitating, rather than only speeding up agreements. This is mainly related to the fact that the rationality of decision-makers becomes more ‘bounded’ than usual, as time-pressure increases the constraints on evaluating and negotiating all costs and benefits.

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.

A more general point that follows from the argument on joint-decision traps is that the more difficult it is to achieve change under ‘normal’ political conditions, the more the effects of window of opportunity are likely to lock-in afterwards. This means that the political dynamics in EU JHA policy are likely to lead to a ‘ratchet effect’: over time numerous crises responses add up to a substantial level of EU integration, which may not have been intended by policy-making actors. This historical institutionalist sensitivity for unintended consequences (Pierson, 1996) complicates the rationalist argument developed in this paper: In how far the EU really be said to exercise much governance capacity, if it mostly responds to crises rather than deliberately pursuing the public goods of freedom, security and justice? This lack in strategic governance capacity is accentuated by serious implementation problems. The EU has passed ambitious Action Plans and work programmes during relatively short windows of opportunity, such as the Action Plan on Combating Terrorism (SN140/01), but they have been only very imperfectly or slowly put into practice.

Nevertheless, exploiting crises and political rhythms, such as changing presidencies or elections are part of the day-to-day activity of policy-makers. Political time and opportunity management is, thus, a crucial factor for understanding EU JHA governance, which is characterized by the heavy use of multi-annual work programmes, presidency priorities,³⁵ high profile crises, fluctuating issue salience (e.g. immigration) etc. Yet governing “by time” is perhaps one of the academically least-well theorized areas in EU studies (Goetz, 2006), even though many historical accounts of EU JHA policy are obviously sensitive to this dimension (e.g. Den Boer, 2003). This issue may need to be addressed in a more systematic fashion in future studies.

3. RECENT ANALYSIS OF JHA GOVERNANCE

The foregoing theoretical discussion will now be set in relation to two recent articles on EU JHA governance. First I will summarize the work of Jörg Monar (2006b, 2006c) in the context of an ongoing research project on new forms of governance in the EU. Then I will briefly turn to a recent article by Wolfgang Wagner (2006) on EU governance in matters of internal security. However, only more extensive case studies can fully test the plausibility and usefulness of the arguments developed in this paper.

3.1 Monar’s conceptualization of JHA governance

Monar distinguishes several modes of governance which are defined by “the different types of instruments (legislative or non-legislative) used for the steering and coordination of

³⁵ Take, for instance, the 2007 German presidency with its heavy emphasis on JHA issues (Bundesministerium des Innern, 2006)

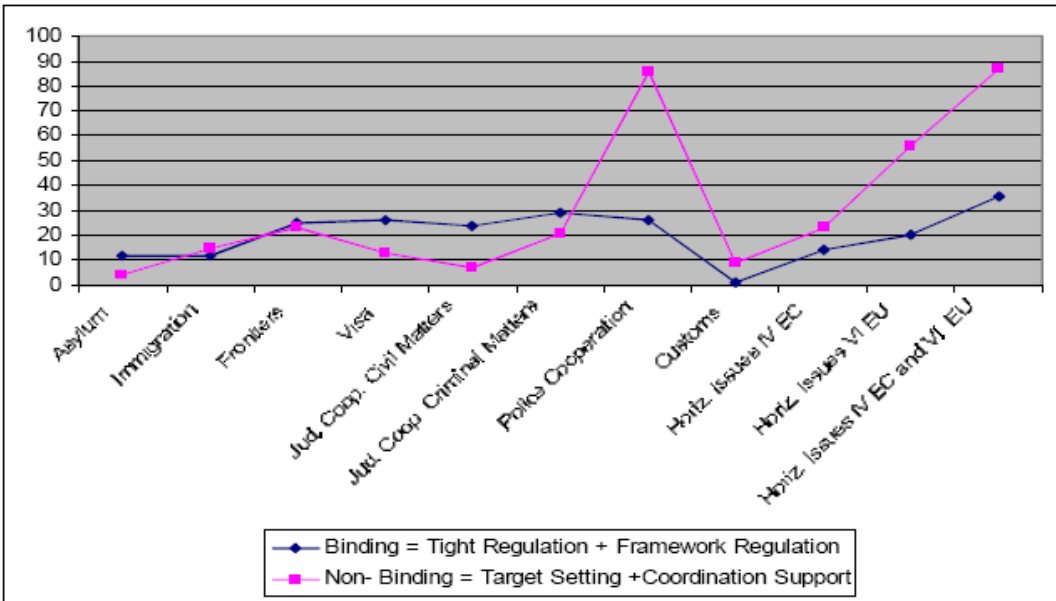
interdependent actors through institution-based internal rules systems.” (Monar 2006b, 4)³⁶ Four different modes of JHA governance can be distinguished: tight regulation, framework regulation, target setting and convergence support. These modes of governance are based on a more general typology (Treib *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>	Coercion <i>Tight regulation</i>

As already mentioned under the section on the policy dimension, different governance modes may be used to lower agreement costs. So with soft or non-binding governance modes it is possible to “intensify cooperation and coordination while leaving the national systems largely unchanged” (Monar 2006b, 6). Of course, member states have also agreed on “tight regulations” as well as on “framework regulations”, which unsurprisingly correlates to the voting rules in different JHA policy areas, as set out in the graph below (reproduced from Monar 2006c, 3). Yet there is also a connection to substantive policy content. For instance, due in judicial cooperation on criminal matters there is a higher requirement for binding standards and definitions, whereas police cooperation may be managed more flexibly.

Figure 1: Texts adopted in the JHA area 1 May 1999- 31 December 2005 (post-Amsterdam period): Numbers of binding and non-binding texts per policy field



³⁶ In the context of JHA this means exclusively public actors, in contrast to private ones as is frequently the case in governance studies in other sectors

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.

However, I would point out that Monar’s classification of governance types may be somewhat misleading when it comes to “non-binding” decision-making.³⁷ Therefore, it is necessary to go into some more detail on the two respective cases. The mode of convergence support is straightforward. Under this mode one could classify various reports and peer review mechanisms on specific problems and policies that would entice, but not force, member states to come to more common problem assessments and action. This is clearly the least intrusive mode of governance, even though it still can influence member states over time. Therefore, it may be regarded as the default option if other forms of agreement remain out of reach and indicate a very weak governance capacity.

The case ‘targeting’ is more difficult, however. Monar distinguishes ‘functional targeting’, that focus on guidelines and best practices, from ‘programme targeting’ that comprise Action Plans and work programmes. Functional targeting clearly lowers agreement costs, as the exchange of best practices and the use of benchmarks is one of the ways in which otherwise too sensitive policy areas can be addressed at the EU level. By contrast, the multi-annual programmes and Action Plans that represent the mode of programme targeting in JHA imply very considerable costs and deep policy-change, which is not clearly spelt out in Monar’s original argument. Therefore, this mode of governance is intimately linked to timing, leadership and the skilful use of windows of opportunity. Work programmes and action plans often entail such harder forms of governance within them and draw on the political weight of the European Council whose regular summits represent the most dramatic and important political opportunity rhythm in the Union. Programme targeting may, thus, be more binding and costly than could be assumed at first and needs to be seen in the context of wider political dynamics, as previously outlined under the politics dimension.

3.2. Wagner’s critique of the bias of EU internal security governance

Wagner’s (2006) paper on EU internal security governance fits the argument of this paper even more closely: He also highlights that negative integration policies are much more readily agreed on in EU JHA policy and stresses the importance of transnationally linked experts, who have a shared professional outlook and shared interest in empowerment vis-à-vis the domestic level. Yet Wagner also discusses further normative implication that have not been drawn out by this contribution: both the structural advantage of negative integration over positive standard setting measures, and the venue-shopping of security officials lead to a selective “policy frame” (*ibid.*: 23) at the EU level that privileges restrictive security interests over other civil rights and freedoms. The latter are simply more difficult to agree on and mostly pursued by parliaments that are mostly excluded from EU JHA policy-making. As the growing debate in civil society testifies, such a biased policy frame undermines the legitimacy of EU security integration. Over the long term, it is also an important technical consideration when assessing the EU’s governance capacity, as a public and inter-institutional trust is vital in the creation and implementation of the Area of Freedom, Security and Justice.³⁸ While

³⁷ See left side of Table 4

³⁸ This shows most clearly in the extensive discussions on the European Arrest Warrant. See, for instance, www.eurowarrant.net

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-making actors, be they member states or supranational institutions,³⁹ while continuing EU JHA integration is the common outcome. It is, therefore, difficult to say which option accounts for most of the dynamism in EU JHA policy in recent years. Moreover, all available strategies for subterfuge heavily depend on actor's skill and interest. These latter fluctuate over time, e.g. by changes in national governments, so that one cannot derive reliable predictions when a dynamic phase of JHA integration is likely to take place. The 2007 German presidency certainly exceeded most expectations in terms of speed and scope of new agreements. However, one may also discern a general tendency for EU JHA policy to follow the "way of the least resistance". This means that that several rather than only one subterfuge strategy can be identified at the same time, e.g. the strategic framing of policies in terms of negative integration and the maximal exploitation of flexible integration initiatives. This is arguably what occurred in the case of the Prüm Treaty that broke down barriers between national databases without setting corresponding positive standards for the use of information, and that cleverly exploited the advantages of "moving first" as a small cohesive group in an issue area, where other member states also would like to cooperate, but failed to reach agreement. Thus, the "puzzle" of the dynamic development of EU JHA policy may be solved, but the question as to legitimacy and transparency costs needs to be posed all the more sharply.

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³⁹ i.e. the Commission and the Council Secretariat, although the European Parliament is slowly extending its role

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