

Communitarization of the Justice and Home Affairs Policy Sector. A Historical Institutional Approach

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Abstract

This thesis analyzes the gradual process of supranationalization of the European Union Justice and Home Affairs policy area. It argues that the European Commission, by taking advantage of both its position in the European political arena and of the changes in the post Cold War external environment, played a significant role in the development towards more Community competence in this high politics, hard case policy area. Using the Historical Institutionalist theoretical framework, this research looks at this policy sector in a timely perspective and explains why Member States of the European Union gradually lost control over the decision-making process and allowed supranational decision-making rules in this area which is closely related to the question of sovereignty and statehood.

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Introduction

Statement of the problem

Freedom of movement of persons inside the European Union (EU) is the most visible outcome of the European integration process. For an EU citizen, the unrestricted right of travel within the Community territory and the rights of establishment and residence in any Member State are unparalleled in international law. No other form of international co-operation offers such a degree of freedom or a comparable right.¹ By the same token, third country nationals benefit from more mobility rights as physical barriers at the internal frontiers are dismantled and checks on persons, irrespective of their nationality, abolished.²

The creation of an area free of controls on persons is the outcome of a unprecedented and surprising development of the Member States' legislative provisions related to population movements. This fairly recent process of internal liberalization³ implied the gradual harmonization of immigration and asylum policies throughout the Union. Unfortunately, harmonizing such policies inextricably linked to the notions of statehood and sovereignty was a painfully slow and complicated task, for the reason that Member States were not able to agree on the shape of the future common policies in the field: supranational or intergovernmental, inside or outside

¹ Ministry of Internal Affairs of Romania, *Press Release no. 647*, 11th of November 2006, <http://www.mai.gov.ro>. (Checked in December 2006)

² At the moment of writing this thesis, third country nationals could travel by virtue of having only one visa in 15 countries that completely implemented the provisions of the Schengen Agreement, thus abolishing all checks on persons at the internal frontiers. At the end of the year, as some of the countries that joined the EU in 2004 will enter the Schengen Area, this number will rise to 26 countries.

³ It was only at the Single European Act of 1986 when leaders of the then European Community pushed for the creation of a Single Market, which would naturally entail an area without any internal frontiers.

the formal treaty structure?⁴ More than twenty years after the first steps towards harmonization, this dilemma still dominates Member States' attitudes and preferences while bargaining for new policies in this area.

This thesis aims to take a closer look at the development of EU-level immigration and asylum policies. Examining developments which started with the 1992 Treaty of Maastricht and until the 2004/927/EC Council Decision⁵, my goal is to explain how the process of communautarization of this policy area was initiated and evolved, in spite of the fact that there was no clear compromise among Member States in this direction. I shall argue that the role played by the European Commission (EC) was important in shaping the outcomes of the bargaining over decisions in this area, although supranational institutions' leverage was severely restricted by the persistence of strict intergovernmental procedures and decision-making rules.

I chose this twelve year time frame for the reason that the gradual supranationalization of immigration and asylum policies started with their incorporation in the Justice and Home Affairs (JHA) pillar of the newly created framework by the Treaty on the European Union and reached an unprecedented level once the Council of Ministers agreed to inject more supranationality in JHA area by issuing the 2004/927/EC decision. Nevertheless, my work focuses essentially on the 1997 Treaty of Amsterdam reforms and on follow-up developments, since Community competence in the field of JHA was confirmed at that time, even if

⁴ Adrian Favell, Andrew Geddes, *European Integration, immigration and the nation state: institutionalising transnational political action* (European University Institute, Working Paper of Robert Schuman Centre, Florence, No. 32, 1999), pp. 16.

⁵ OJ L 396, 31.12.2005, pp. 45-46: Council Decision providing for certain areas covered by Title IV of Part Three of the Treaty establishing the European Community to be governed by the procedure laid down in Article 251 of that Treaty.

Member States were still reluctant to completely renounce “the reassuring paraphernalia of intergovernmentalism”.⁶

Debate and theoretical framework

The main International Relation theoretical frameworks used by scholars for explaining the supranationalization of the JHA acquis inside the European Union have been realism and liberalism. Realism, rooted in state-centrist philosophy,⁷ incorporates the concepts of state sovereignty and internal security. Liberalism emphasizes the humanitarian notions of freedom of movement and protection of refugees.⁸

By far the most successful realist theory in explaining the European integration process is Liberal Intergovernmentalism (LI) (Moravscik, 1991, 1993, 1995, 1998).⁹ Drawing on the intergovernmentalist school of thought (Hoffmann, 1964, 1966, 1995; Garrett, 1992, 1993; Grieco, 1995), LI sees states as unitary and rational actors, acting in an anarchic environment, lacking a supranational authority enforcing political decisions.¹⁰ The EU becomes an intergovernmental polity, whose institutions are subordinated to Member States’ interests and preferences, which use their strength to achieve political goals.¹¹ Thus, the process of European integration is explained by looking at Member States as main actors and at the process of

⁶ Andrew Geddes, *Immigration and European integration. Towards fortress Europe?* (Manchester University Press, Manchester and New York, 2000), pp. 110.

⁷ Sandra Lavenex, *Security Threat or Human Right? Conflicting Frames in the Eastern Enlargement of the Asylum and Immigration Policies* (European University Institute, Working Paper of Robert Schuman Centre, Florence, No. 7, 2000), pp. 14.

⁸ *Ibid.*, Abstract.

⁹ Michelle Cini, “Intergovernmentalism”, in Michelle Cini, *European Union Politics* (Oxford University Press, New York, 2005), pp. 103.

¹⁰ Frank Schimmelfenning, “Liberal Intergovernmentalism”, in Antje Wiener, Thomas Diez, *European Integration Theory* (Oxford University Press, New York, 2004), pp. 76.

¹¹ Neil Nugent, *The Government and Politics of the European Union* (Palgrave Macmillan, Hampshire and New York, 2003), pp. 482.

preference formation, which has its roots in the domestic political arena's pressures and interactions.¹²

Liberal intergovernmentalism minimizes the importance and the role played by the supranational institutions, as they are merely considered as some administrative tools in the hands of their creators. This is the main shortcoming of LI,¹³ as this assumption can simply not hold true in every policy area.¹⁴ Political scientists have acknowledged the role of the Commission in most policy fields, and even some intergovernmentalists like Hoffmann have done so, although considering it more plausible in less controversial areas.¹⁵ Nevertheless, I argue that, when using different theoretical tools, the influence of the supranational institutions can be demonstrated even in a high politics, hard case policy area, like the JHA. Otherwise, a credible explanation for the piecemeal communautarization of the immigration and asylum acquis is difficult to construct.

It has been argued that our understanding of the bargaining that takes place inside the EU is incomplete if the approach is based only on Member States' preferences and power.¹⁶ Therefore, in my thesis I shall use the theoretical framework provided by Historical Institutionalism (HI) (Pierson, 1996, 2004; Aspinwall and Schneider, 2001; Hall, 1996; Peters, 1999; Pollack, 2004; Thelen and Steinmo, 1992; Bulmer and Burch, 2001), which takes a different view of the European integration process.

¹² Ibid.

¹³ The alleged minimalist role of the Commission and the European Court of Justice (ECJ) in the integration process is one of the most often formulated critiques of LI theory. See, for example, Anne-Marie Burley and Walter Mattly (1993) on the influence that the ECJ has when pushing for further integration or Alec Stone Sweet and Wayne Standholtz (1995, 2001) on the role played by the Commission.

¹⁴ As a matter of fact, another critique of Liberal Intergovernmentalism states that the theory can be proven accurate only when examining certain policy areas. (Michelle Cini, *op. cit.*, 105.)

¹⁵ See Michelle Cini, *op. cit.*, pp. 93-108.

¹⁶ Ulf Sverdrup, *An institutional perspective on treaty reform: contextualizing the Amsterdam and Nice Treaties* (Journal of European Public Policy, Vol. 9, No. 1, 2002), pp. 121.

It may sound surprising that I chose not to use the neofunctionalist framework for assessing the role played by the Commission in the communautarization of the JHA acquis. It is nevertheless true that neofunctionalism, as a general theory of integration, underlines the role played by supranational institutions in the integration process and can explain the general trend of supranationalization of EU-level policies. Unfortunately, neofunctionalism has its limitations, for the reason that it ignores every day politics inside the EU and focuses only on grand treaty architecture. Neofunctionalism cannot succeed in pointing out all the details of integration dynamics. I stress the fact that HI can better explain the extension of supranational competence in specific policy areas by emphasizing institutional conditionality while, at the same time, it shares some of its assumptions with neofunctionalism.¹⁷

HI's origins date back to the 1980s, when three new institutionalist theories (rational-choice, historical and sociological institutionalism) accounted for the role that institutions – constitutionally created bodies, as well as the totality of rules and procedures to be observed in certain circumstances – play in politics.¹⁸ I argue that HI is the most appropriate framework to be used when analyzing the developments of the JHA acquis, the reasons being threefold. First, HI takes into account the historical dimension of the integration process, considering that past choices influence the way that the policy will actually develop in the future.¹⁹ Secondly, HI argues that the evolution of the political process can lead to unexpected and undesired consequences, like, in the case of JHA, the erosion of Member States'

¹⁷ Mark Aspinwall and Gerald Schneider, "Institutional research and the European Union: mapping the field", in Mark Aspinwall, Gerald Schneider (ed.) *The rules of integration. Institutional approaches to the study of Europe* (Manchester University Press, Manchester and New York, 2001), pp. 12.

¹⁸ Mark A. Pollack, "The New Institutionalisms and European Integration", in Antje Wiener, Thomas Diez, *European Integration Theory* (Oxford University Press, New York, 2004), pp. 137.

¹⁹ Ben Rosamond, "New theories of European integration", in Michelle Cini, *European Union Politics* (Oxford University Press, New York, 2005), pp. 115.

control over this policy area.²⁰ Thirdly, when trying to explain policy outcomes, HI goes beyond simply considering Member States as the only powerful actors that count during policy-making and analyzes the circumstances in which principals can gradually lose control over a certain policy area in favour of supranational institutions, in spite of the fact that they were in a strong initial position.

The choice of case study

My research will focus on the gradual communautarization process of the JHA acquis, with an emphasis on the constraints that Member States had to face when they tried to keep in place intergovernmental practices for the decision-making process. I decided to focus my research on this particular area for two reasons. First, the research on the emerging European acquis in JHA related matters has been so far undertaken by legal scholars dealing with the judicial implications of its supranationalization (Noll, 2000; Legomsky, 2003; Gilbert, 2004; Battjes, 2005; Lynskey, 2006). An historical and timely approach to the JHA evolution has been up to this moment ignored, which constitutes a gap in the study of the Union's migrationist regime. Secondly, looking at the JHA sector through the lenses of political science theoretical approaches can help us answer broader questions on the nature of the European integration process and EU decision-making.

Puzzle, Research question and hypotheses

Supranationalization in any policy area (i.e. Qualified Majority Voting (QMV) as a voting rule in the Council of Ministers, the Commission's exclusive right of initiative and the European Court of Justice's (ECJ) jurisdiction)²¹ can be seen as contrary to Member States' interests, since their control over EU policy outcomes is diminished.

²⁰ Neil Nugent, *op. cit.*, 489.

²¹ See the introduction of the second chapter for a more detailed explanation.

This is particularly true for the JHA sector, which has always been perceived as an area of national sovereignty. It is extremely puzzling that even in this sector, closely related to issues like statehood, internal security and security of a country's own citizens, Member States were not able to stem the spread of supranationalism.

All that being said, my main research questions are the following:

(1) How was the gradual supranationalization of Justice and Home Affairs *aquis possible*?

(2) How did institutions (with a special emphasis on the Commission) influence and constrain the Council of Ministers – thus the Member States – and their room for manoeuvre?

My hypotheses are twofold. First, I argue that the European Commission has constantly tried to obtain more influence in JHA matters, being aware of the fact that the construction of a European Union without internal barriers would be a difficult and a painstaking task if dealt with only on an intergovernmental basis. The Commission gradually put pressure on Member States' governments, by organizing, taking part and pushing for more favourable outcomes in the Intergovernmental Conferences (IGC) preceding major treaty reforms. But the preparation of the IGCs were not the only playground for the EC. Especially after the entering into force of the Amsterdam Treaty, the Commission has actively put pressure on the Council of Ministers to adopt the necessary measures for more supranationalism in the JHA decision-making process. Secondly, I consider that institutions – now as rules, procedures and organizational constraints – must have shaped the environment in which the general trend towards *communautarization* has developed.

In order to answer the aforementioned questions, I shall structure my work as follows. The first chapter will point out the most important moments of the JHA

acquis' evolution towards a more communautarized decision-making process, demonstrating that the development towards more Community competencies has been slow and gradual, but nevertheless steady. Chapter 2 will deal with Historical Institutionalism, by underlining those specific assumptions that can help us test its validity against the aforementioned empirical facts. In the last chapter I shall use the HI approach for explaining how the Commission and the rules of the game gradually constrained Member States and reduced their leverage in the decision-making process.

Methodology and Sources

In this research work I use both primary and secondary sources. As concerns the latter, newspapers²² and scholarly articles will be very useful to “map” the policy area and to discover the actions undertaken by various political actors involved in the decision-making process. Primary sources, like Commission or Council official documents, communications, draft texts, and statements will be extremely useful in order to understand the position of institutions, their preferences and strategies. Interviews with Commission officials will provide first hand information and an insight on how policies are negotiated at the European level. Using such a variety of sources will allow me to cross-check information and to provide an accurate and detailed description of the balance of power within the JHA decision-making process.

²² I chose mainly British newspapers. Britain is well known for its reluctance to transfer decision-making to the Commission in the Justice and Home Affairs sector and is very keen to keep its sovereignty intact. Therefore, I assume that the Commission's strive for maximizing its competencies have been accurately reflected and commented in the British press.

Chapter 1: Gradual communautarization of the Justice and Home Affairs policy area

1.1 What is communautarization?

There are three important indicators of the degree of supranationalization in a given policy-area: qualified majority voting, as opposed to the unanimity voting rule, exclusive right of initiative belonging to the Commission, as opposed to shared or even non-existent right of making legislative proposals, and European Court of Justice competence over the adopted decisions as opposed to its exclusion. QMV instead of unanimity voting rule forces the Council of Ministers to take decisions in a more expedient manner, since Member States cannot veto proposals, thus removing the danger of reducing texts to be negotiated to the lowest common denominator. However, national governments are unable to totally control the outcome of the bargaining and can see their positions becoming victims of the majority. QMV combined with the Commission's exclusive right of initiative makes the Commission a very strong player. The Commission may indeed use this right and send proposals to the Council that are very attractive to a sufficient number of Member States in order to reach the necessary majority for an agreement to be obtained within the Council. ECJ's jurisdiction over a policy-area can be a source of constraints for the Member States' governments wishing to transfer the decision-making outside the remit of national courts. If the ECJ is fully competent, it subjects decisions to the same kind of judicial scrutiny as in the domestic realm.²³ In sum, the existence of the three

²³ Virginie Guiraudon, *The constitution of a European immigration policy domain: a political sociology approach* (Journal of European Public Policy, Vol. 10, No. 2, 2003), pp. 271.

aforesaid criteria is seen as "a corrective to lowest common denominator restrictive policies made in the Council of Ministers".²⁴

This chapter aims to show that all three characteristics of supranationalism gradually gained ground in the decision-making rules applied to JHA matters. National governments have been therefore unable to indefinitely perpetuate plain intergovernmental co-operation as a "conventional shelter of national interests"²⁵ and had to accept the constraints imposed by the supranational institutions.²⁶

1.2 Early stages in JHA co-operation and the issue of statehood

The need for common action in the field of immigration, visas, asylum, border controls, police and customs co-operation arose from the moment in which the Single European Act of 1986 (SEA) called for the creation of a Single Market free of internal border controls. Article 8a of the SEA states:

The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty.²⁷

According to Brochman, after the entering into force of the SEA on July the 1st, 1987, Member States had to deal with the problem of "controlling the movements of non-EC nationals without simultaneously controlling those of EC citizens".²⁸ The existence of twelve different immigration regimes concerning third country nationals rendered the implementation of Article 8a SEA impossible. Thus, the necessity for co-operation and co-ordination between Member States emerged from this innate

²⁴ Andrew Geddes, *op. cit.*, pp. 7-8.

²⁵ Nicholas Moussis, *Access to European Union: law, economics, policies* (European Study Service, Rixensart, 2006), pp. 9.

²⁶ See the Appendices for a complete overview on the development of the JHA policy sector through the Maastricht and Amsterdam treaty revisions.

²⁷ Single European Act, OJ L 169, 29.06.1987.

²⁸ Grete Brochman, *European Integration and Immigration from Third Countries* (Scandinavian University Press, Oslo, 1996), pp. 77.

problem of a border-free internal market.²⁹ The construction of the Single Market made it necessary to build a single immigration policy as well.³⁰ Having as an objective the dismantling of border control points along the internal frontiers, Member States suddenly became contingent on each other in as far as immigration policies are concerned.

Considering the aforementioned factors, population movement policies were prone to supranational decision-making procedures. In spite of the fact that every Member State became interested in the immigration policies of its peers,³¹ one should not forget that the issues at stake are directly related to notions like internal security, political legitimacy of the state and sovereignty.³² Control over a territory and over a defined population is what makes a state. It is therefore not surprising that “the slightest renunciation of national control over state instruments in this area seems to question the nation-state in one of its most essential functions”.³³

Contrary to all expectations, the first stages of co-operation in this field were not only intergovernmental in nature, but also taken outside the treaty framework. The SEA recognizes the Member States as fully sovereign when legislating the movements of third country nationals.³⁴ Its Final Act reads:

In order to promote the free movement of persons, the Member States shall co-operate, without prejudice to the power of the Community, in particular as regards the entry, movement and residence of nationals of third countries.³⁵

²⁹ Ibid.

³⁰ Andrew Geddes, *op. cit.*, pp. 3.

³¹ Ibid., 75.

³² Jörg Monar, “European Union – Justice and Home Affairs: A Balance Sheet and an Agenda for Reform”, in Geoffrey Edwards, Alfred Pijpers (ed.), *The Politics of European Treaty Reform: the 1996 Intergovernmental Conference and Beyond* (Pinter, London and Washington, 1997), pp. 326.

³³ Ibid.

³⁴ Gregor Noll, *Negotiating Asylum. The EU Acquis, Extraterritorial Protection and the Common Market of Deflection* (Martinus Nijhoff, the Hague, 2000), pp. 123.

³⁵ Single European Act, Final Act, OJ L 169, 29.06.1987, pp. 25.

Member States have therefore initiated co-operation in a myriad of intergovernmental bodies,³⁶ but without a treaty basis, regular meetings, legally binding instruments and lacking supranational oversight for decisions' implementation, the "post-SEA period demonstrated an intergovernmental brake on immigration."³⁷

The SEA failed to provoke the unification of the Community's immigration policies as Member States fiercely opposed to delegate authority to the supranational institutions. Nevertheless, the importance of the SEA is not to be underestimated: it represented the first steps towards a more sustained co-operation in the field of immigration and asylum, as conditioned by the institutionalization of the freedom of movement as a key element in the creation of the Single Market.³⁸

1.3 Institutionalizing JHA: the Treaty of Maastricht

In the beginning of the 1990s it was obvious that intergovernmental co-operation was not producing the expected results.³⁹ The 1992 Maastricht Treaty, within its Title VI, dealt with the inefficiency of the intergovernmental decision-making procedures by creating under the EU framework, but alongside the already existing EC structure, a separate third pillar dedicated to Justice and Home Affairs. The third pillar did not mean supranationalization,⁴⁰ but by bringing Union competence over matters defined as being of common interest,⁴¹ it constructed a tighter institutional structure.⁴² New instruments of decision-making have been put in place,⁴³

³⁶ For an analysis of their work, see Grete Brochman, *op. cit.*, pp. 82-87 and Andrew Geddes, *op. cit.*, pp. 67-85.

³⁷ Andrew Geddes, *op. cit.*, pp. 67.

³⁸ *Ibid.*

³⁹ Andrew Geddes, *op. cit.*, 87; Gregor Noll, *op. cit.*, 132; Jörg Monar, *op. cit.*, 327.

⁴⁰ Adrian Favell, Andrew Geddes, *op. cit.*, 17.

⁴¹ Valsamis Mitsilegas, *The Implementation of the EU acquis on illegal immigration by the candidate countries of Central and Eastern Europe: challenges and contradictions* (Journal of Ethnic and Migration Studies, Vol. 28, No. 4, 2002), pp. 666.

⁴² Gregor Noll, *op. cit.*, 132.

⁴³ Joint positions, joint actions, and conventions in international law. (Article K.3, Paragraph 2, Indents a, b and c.)

unfortunately lacking the strength of being automatically binding, as opposed to regulations and decisions available under the Community pillar.⁴⁴

Although the decision-making remained intergovernmental in the third pillar, supranationalism started to make its way into the JHA area. The Treaty on European Union (TEU) split in two the JHA acquis, transferring for the first time two visa-related issues under the Community legal competence.⁴⁵ Article 100c TEU reads:

1. The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, shall determine the third countries whose nationals must be in possession of a visa when crossing the external borders of the Member States.

3. From 1 January 1996, the Council shall adopt the decisions referred to in paragraph 1 by a qualified majority. The Council shall, before that date, acting by a qualified majority on a proposal from the Commission and after consulting the European Parliament, adopt measures relating to a uniform format for visas.⁴⁶

The Commission thus received an exclusive right of initiative on two visa-related issues: measures relating to a uniform format for visas and the drawing of a negative visa list. The decision-making process related to the former measure was fully supranationalized from the moment the TEU entered into force, while for the latter, unanimity was still required in the Council. Nevertheless, the treaty guaranteed that, after a transitional period up to 1st of January 1996, all visa-related decisions in the Council would be taken by QMV and not by unanimity.

But Member States have secured a strong position in all other JHA areas constituting the third pillar, where there was no provision for QMV and the Commission's powers were limited. In six areas it had to share the right of initiative with the Member States and in the remaining three only Member States could initiate legislative proposals.⁴⁷ The ECJ had no jurisdiction for the measures adopted under

⁴⁴ Sandra Lavenex, *Safe Third Countries* (Central European University Press, Budapest, 1999), pp. 44.

⁴⁵ Grete Brochman, *op. cit.*, 88.

⁴⁶ Treaty on European Union, Article 100c, OJ C 191, 29.07.1992.

⁴⁷ Andrew Geddes, *op. cit.*, 96.

the third pillar.⁴⁸ For supranationalists, the persistence of the unanimity voting rule and the Commission's shared right of initiative were two huge imperfections of the third pillar. They believed Member States were impeding the Commission from playing its traditional role of pushing the integration forward.⁴⁹ Some scholars argued that the third pillar was missing the driving force for moving things ahead in JHA issues.⁵⁰ In contrast, other scholars viewed the third pillar more optimistically, as being subjected "to the presumption of temporariness and the likelihood of closer integration in the future".⁵¹ This point of view is worth taking into consideration for two reasons. First, the drafters of the TEU inserted in the text an obligation to review the Treaty in 1996 at the latest,⁵² making further change almost a certainty. Secondly, the TEU institutionalizes the possibility – but not the obligation – for the Council to further supranationalize six areas of concern under Title VI. Article K.9 reads:

The Council, acting unanimously on the initiative of the Commission or a Member State, may decide to apply Article 100c of the Treaty establishing the European Community to action in areas referred to in Article K.1(1) to (6), and at the same time determine the relevant voting conditions relating to it. It shall recommend the Member States to adopt that decision in accordance with their respective constitutional requirements.⁵³

Known in the Euro-jargon as a *passerelle*⁵⁴, the mere existence of this provision inside the Title VI of the Treaty shows that Member States were willing to accept further communautarization in the future, but nevertheless wanted to decide on the moment in which such change was appropriate, as well as upon its magnitude. The procedure is cumbersome, since it necessitates not only unanimity in the Council, but also a ratification stage in every Member State, if not through a popular referendum,

⁴⁸ Gregor Noll, *op. cit.*, 133.

⁴⁹ Jörg Monar, *op. cit.*, 330.

⁵⁰ *Ibid.*

⁵¹ Andrew Geddes, *op. cit.*, 90.

⁵² Article N, Paragraph 2 of the TEU reads: "A conference of representatives of the governments of the Member States shall be convened in 1996 to examine those provisions of this Treaty for which revision is provided, in accordance with the objectives set out in Articles A and B."

⁵³ Treaty on European Union, Article K.9, OJ C 191, 29.07.1992.

⁵⁴ Gregor Noll, Jörg Monar, and Grete Monar use this term.

at least through parliamentary procedures, depending on the existing constitutional provisions. It is therefore not surprising that it has never been used.⁵⁵ As we shall see later, the Treaty of Amsterdam incorporates a similar provision, which can be considered a source of pressure on the Council to continue supranationalization of the JHA acquis.

In sum, Title VI of the Treaty of Maastricht did not supranationalize the JHA acquis, but marked an important novelty in the decision-making process. By institutionalizing the shared right of initiative of both Member States and Commission, and in two visa-related issues even exclusive right of initiative of the Commission, the Treaty designated the EC as an actor in this policy area, along with the Member States and the Council of Ministers.⁵⁶ Taking into account the *passerelle* and the compulsory revision of the Treaty through the 1996 IGC, “further extension of EU competence for immigration and asylum”⁵⁷ was an expected consequence of the Treaty on the European Union.

1.4 The reforms of the Amsterdam Treaty

At Amsterdam, Member States agreed upon a major reform of the JHA acquis. Two main reasons stood behind their political will. First, the European Parliament, the Commission and even the majority of the Member States agreed that the third pillar framework “was unable to deal efficiently with the existing workload”.⁵⁸ Secondly, with the future eastern enlargement of the Union becoming a palpable project on the

⁵⁵ Gregor Noll, *op. cit.*, 134.

⁵⁶ Emek M. Uçarer, *From the Sidelines to Center Stage: Sidekick No More? The European Commission in Justice and Home Affairs* (European Integration online Papers, Vol. 5, No. 5, 2001), pp. 6.

⁵⁷ Andrew Geddes, *op. cit.*, 94.

⁵⁸ Emek M. Uçarer, *op. cit.*, pp. 8.

medium term, the need to construct a clear legal basis in JHA issues to be adopted by the candidate countries arose.⁵⁹

The Treaty of Amsterdam (ToA) partially communautarized the JHA field. Scholars agree that the entire transfer of asylum and immigration – but not the issues pertaining to police, customs and judicial co-operation – from the third to the first pillar was the most “striking change”.⁶⁰ All measures related to the abolition of the internal border controls, visas, asylum, refugees, management of the external borders, legally residing third country nationals were now part of EC law.⁶¹ From the moment in which the ToA entered into force, all the aforementioned provisions were subject to the efficient legislative instruments available under the Community pillar, i.e. regulations, directives and decisions, offering “undisputed bindingness, justiciability and (...) even direct effect”.⁶² The ambiguity of the Maastricht era legislative tools was a thing of the past.

This reform, at first glance very bold, was shadowed by the Member States’ ever existing reluctance to set free the JHA area from the typical intergovernmental constraints. Intergovernmentalism crept into the first pillar, at least for a transitional period of five years.⁶³ Article 67, Paragraph 1, of the ToA provides:

During a transitional period of five years following the entry into force of the Treaty of Amsterdam, the Council shall act unanimously on a proposal from the Commission or on the initiative of a Member State and after consulting the European Parliament.⁶⁴

⁵⁹ Sandra Lavenex, *Migration and the EU’s new eastern border: between realism and liberalism* (Journal of European Public Policy, Vol. 8, No. 1, 2001), pp. 28.

⁶⁰ Gregor Noll, *op. cit.*, 136.

⁶¹ Monica den Boer and Gilles de Kerchove, “A hurdled admission: the integration of the candidate countries into the Area of Freedom, Security and Justice”, in Vincent Kronenberger (ed.), *The European Union and the International Legal Order: Discord or Harmony?* (Springer Verlag, Berlin, 2001), pp. 317.

⁶² Gregor Noll, *op. cit.*, 136.

⁶³ Emek M. Uçarer, *op. cit.*, pp. 11.

⁶⁴ Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts - Consolidated version of the Treaty establishing the European Community, OJ C 340, 10.11.1997.

Therefore, for the entire JHA field in the first pillar – except for the two instruments already communautarized by the Maastricht Treaty (the black visa list and the rules for a uniform format for a visa) – Member States secured themselves a tight grasp on the decision-making process. In the first five years, the Commission was not going to enjoy exclusive right of initiative and QMV was still not the way decisions were to be taken in the JHA matters. Member States managed to strike at the heart of the Union, by bringing intergovernmentalism into the Community pillar. This was by far the strongest criticism of the Amsterdam Treaty.⁶⁵

By way of continuing the tradition started at the Maastricht Treaty, the ToA incorporated a *passerelle* for more supranationalism in the decision-making process. The new *passerelle* is more complicated than the former one, but at the same time less demanding. Article 67, Paragraph 2 and 4, state:

Article 67 (2)

After this period of five years:

- the Council shall act on proposals from the Commission; the Commission shall examine any request made by a Member State that it submit a proposal to the Council;
- the Council, acting unanimously after consulting the European Parliament, shall take a decision with a view to providing for all or parts of the areas covered by this Title to be governed by the procedure referred to in Article 251 (...).

Article 67 (4)

By derogation from paragraph 2, measures referred to in Article 62(2)(b) (ii) and (iv) shall, after a period of five years following the entry into force of the Treaty of Amsterdam, be adopted by the Council acting in accordance with the procedure referred to in Article 251.⁶⁶

The *passerelle* provides two compulsory transitions towards communautarization and an optional possibility for the Council to act. After the five year period is over, the Commission automatically gains exclusive right of initiative in the entire JHA field and two measures will be automatically subjected to Article 251 procedure, i.e. co-decision, thus QMV. On top of this, the Council of Ministers may adopt a decision for

⁶⁵ Andrew Geddes, *op. cit.*, 130.

⁶⁶ Consolidated version of the Treaty establishing the European Community, OJ C 340, 10.11.1997.

transferring all, or parts of the remaining intergovernmental JHA acquis, under the remit of the co-decision procedure. Unanimity is necessary for such a decision, but, contrary to the Maastricht *passerelle*, ratification is not. I argue therefore that this *passerelle* had better chances of being used, and indeed it was.

In December 2004, thus only eight months after the expiry of the five year transitional period, the Council of Ministers issued the 2004/927/EC decision, this being so far the only decision related to the ToA *passerelle*.⁶⁷ The decision provides for certain areas of the JHA acquis to be governed by the procedure laid down in Article 251 of the Treaty establishing the European Community. Its first article reads:

1. As from 1 January 2005 the Council shall act in accordance with the procedure laid down in Article 251 of the Treaty when adopting measures referred to in Article 62(1), (2)(a) and (3) of the Treaty.

2. As from 1 January 2005 the Council shall act in accordance with the procedure laid down in Article 251 of the Treaty when adopting measures referred to in Article 63(2)(b) and (3)(b) of the Treaty.

As a direct consequence, five more measures of the JHA acquis have been communautarized. For the first time in the history of the JHA area, the Member States of the European Union unanimously agreed that the time had arrived for them to let go of some measures in the field of immigration and asylum.

Immediately after the drafting of the Amsterdam Treaty, many scholars criticised it for its failure to supranationalize the JHA policies. Geddes characterized the Treaty as an “unambitious document”.⁶⁸ Noll (2000), Uçarer (2001), den Boer (2001) and Lavenex (1999, 2000, 2001) accused the Member States of being unable to settle a deal on the definitive supranationalization of the JHA acquis. At that moment, these critiques were, undoubtedly, rightful. But in the meantime, during the five years transitional period, Member States became more and more constrained to give up their strong position in the decision-making process and to unanimously

⁶⁷ OJ L 396, 31.12.2004.

⁶⁸ Andrew Geddes, *op. cit.*, pp. 110.

adopt a decision which, according to the Treaty, was voluntary and entirely at their discretion. I argue that the Member States have been constrained both by institutions (as actors) and by the totality of the rules and procedures related to the JHA acquis constructed from the 1992 Treaty of Maastricht onwards.

Chapter 2: Historical Institutionalism

2.1 Overview of the chapter

If one takes into consideration Pollack's argument, that the European Union is "the most densely institutionalized international organization in the world, with a welter of intergovernmental and supranational institutions and a rapidly growing body of primary and secondary legislation, the so-called *acquis communautaire*",⁶⁹ it is easy to understand why, in the last decade, the theories of new institutionalism have become a reliable alternative to the classical frameworks like intergovernmentalism or neofunctionalism for explaining the political processes that give birth to policies at the European level.

Studying the role played by institutions in the political process, new institutionalist theories start from the "banal claim that institutions matter and (...) have an impact upon political outcomes".⁷⁰ In its early days, when the European Community was nothing more than an international organization, its institutions facilitated co-operation by constructing a political venue where the exchange of information was characterized by transparency and mutual trust.⁷¹ Back then, Community institutions offered a reassuring environment with the help of which the countries of a war-torn continent could intensify their co-operation. The rise in transnational exchanges eventually led to the creation of supranational modes of governance, through an institutionalization process.⁷² Its consequence was that supranational rules have been put in place, enhancing the EC's capacity to govern

⁶⁹ Mark A. Pollack, *op. cit.*, 139.

⁷⁰ Ben Rosamond, *Theories of European Integration* (St. Martin's Press, New York, 2000), pp. 113.

⁷¹ *Ibid.*, 114.

⁷² Alec Stone Sweet, Neil Fligstein, Wayne Sandholtz, "The Institutionalization of European Space", in Alec Stone Sweet, Neil Fligstein, Wayne Sandholtz, *The Institutionalization of Europe* (Oxford University Press, New York, 2001), pp. 2-3.

and shape outcomes through a web of institutions. The cross-border exchange have therefore been structured and brought to a unprecedented level by the creation of common policies in a wealth of domains.⁷³ Therefore, the EU is “an ideal testing ground for the various forms of institutional analysis”.⁷⁴

This chapter will review the main characteristics of Historical Institutionalism (HI) one of the three variants of new institutionalism. HI studies the EU integration process from a timely perspective and considers it a historical process.⁷⁵ Pierson states that our understanding of social and political outcomes is very much enriched when politics is placed in time and viewed from a historical perspective.⁷⁶ I argue that, when applied to a policy domain like Justice and Home Affairs – undergoing an incremental development towards supranationalization– HI can best reveal the institutions’ role in this communitarization process.

2.2 Defining institutions

Hall and Taylor define institutions as “formal and informal procedures, routines, norms and conventions embedded in the organizational structure of the polity or political economy”.⁷⁷ Although they consider institutions as primarily being the rules of the political game, Hall and Taylor also suggest that a broader definition may as well encompass the organizations which promulgated the aforementioned rules and conventions.

Thelen and Steinmo agree that historical institutionalists should include in their approach both “formal organizations and informal rules and procedures that structure

⁷³ Ibid.

⁷⁴ Ben Rosamond, *Theories of European Integration*, pp. 114.

⁷⁵ Mark A. Pollack, *op. cit.*, 148.

⁷⁶ Paul Pierson, *Politics in Time. History, Institutions, and Social Analysis* (Princeton University Press, Princeton and Oxford, 2004), pp. 2.

⁷⁷ Peter A. Hall, Rosemary C. R. Taylor, *Political Science and the Three New Institutionalisms* (Political Studies Vol. 44, No. 5, 1996), pp. 936.

conduct”,⁷⁸ while in the same time emphasizing that the definition should focus on the formalized structures as well, not only on the rules that they produce or employ.

Peters *et al* criticize the aforementioned approaches for being too wide for explaining a single term.⁷⁹ They state that institutions should be understood as the administrative units or agents deliberately created and having a durable character, and as the informal rules and procedures associated with certain organizations.⁸⁰

Rosamond limits his definition of institutions only to formal rules and procedures. Being closer to the rational choice institutionalist approach, he sees the interaction between political actors as *rule-bound* and argued that institutions are “formal legalistic entities and sets of decision rules that impose obligations upon self-interested political actors”.⁸¹

To conclude, when applying institutionalist theory to the JHA policies I shall regard institutions as both formal rules and informal routines, as well as the organizations that produce them. For that, I consider the definitions employed by Hall and Taylor, and as well as by Rosamond much helpful.

2.3 Path dependence

As the political process must be understood over time,⁸² the most important characteristic of the HI approach is the path dependence concept. The most basic statement made by scholars looking at the path dependence processes is that history matters and that early choices will have an influence on the subsequent development

⁷⁸ Kathleen Thelen and Sven Steinmo, “Historical Institutionalism in comparative studies”, in Kathleen Thelen, Sven Steinmo and Frank Longstreth, *Structuring Politics. Historical Institutionalism in Comparative Analysis* (Cambridge University Press, New York, 1998), pp. 2.

⁷⁹ Guy Peters, Jon Pierre, Desmond S. King, *The Politics of Path Dependency: Political Conflict in Historical Institutionalism* (The Journal of Politics, Vol. 67, No. 4, 2005), pp. 1286.

⁸⁰ Ibid.

⁸¹ Ben Rosamond, *Theories of European Integration*, pp. 115.

⁸² Paul Pierson, *The Path to European Integration. A Historical Institutional Analysis* (Comparative Political Studies, Vol. 29, No. 2, 1996), pp. 126.

of the policy.⁸³ In other words, once a policy has started on a path, it is very unlikely for the involved political actors to put an end to the normal and the expected development of the policy on the initial prescription, as the costs of reversal are very high.⁸⁴ Pierson speaks about the cost of switching to another available alternative, cost which rises over time.⁸⁵ The costs of reversal are not increasing only for the mere fact that the policy develops once the time passes by, but because early choices and events have a more important, and sometimes unforeseen, impact during a later stage, constraining the number of options available.⁸⁶ Political actors are not in favour of reversals, for the reason that they commit themselves to a policy having the perception that the rules agreed upon in the early stages will remain constant and unchanged.⁸⁷

Path dependence can be also explained through the concept of institutional inertia.⁸⁸ In the early stages of a policy development, certain institutional choices are being made and patterns of behaviour are thus created. Patterns originally formed tend to stay in place and reproduce themselves even if the original conditions have changed, for the reason that “the forces of inertia are likely to be substantial in government”.⁸⁹ Actors become thus locked or stuck in an institutional environment agreed upon in the past.

For explaining the concept of institutional inertia, Mahoney⁹⁰ considers two types of temporal sequences: self-reinforcing and reactive. The former deals with the long term reproduction of a institutional pattern, which delivers benefits when it is

⁸³ Mark A. Pollack, *op. cit.*, 140.

⁸⁴ Paul Pierson, *Politics in Time. History, Institutions, and Social Analysis*, pp. 20-21.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*, 45.

⁸⁷ Paul Pierson, *The Path to European Integration. A Historical Institutional Analysis*, pp. 144.

⁸⁸ Guy Peters, *Institutional Theory in Political Science. The New Institutionalism* (Pinter, London and New York, 1999), pp. 64.

⁸⁹ *Ibid.*

⁹⁰ James Mahoney, *Path Dependence in Historical Sociology* (Theory and Society, Vol. 29, No. 44, 2000), pp. 508-509.

maintained in place. It is therefore difficult for political actors to alter the already functional pattern by returning to previously available options. The reactive temporal sequence acknowledges the basic assumption that early policy choices have an impact on later decisions by explaining how chains of events are both temporally ordered and causally connected. A later stage in the development of a policy is a reaction to previous steps, thus it is dependent on them.

In sum, the path dependence framework helps us better understand the developments in the JHA area and the Commission's role. According to HI scholars, initial policy choices and institutional patterns matter and shape subsequent developments, determining later policy outcomes.⁹¹ Originally being an intergovernmental policy area, changes towards supranationalization in the JHA policy sector were expected to be difficult and progressive. As shown in the previous chapter, the JHA policy sector followed only one direction from its inception at Maastricht: slow and cumbersome transition from intergovernmentalism towards supranationalism.

In the same time, the role played by the Commission in initiating policies in a given policy sector as well as its capacity to influence the initial policy choices by defining the mandate of an IGC prior to a major treaty revisions is acknowledged by scholars.⁹² It can therefore be argued that the Commission influences the entire developmental pathway of a policy area through its original influence.

⁹¹ James Mahoney, *op. cit.*, pp. 507.

⁹² See Emek M. Uçarer, *op. cit.*, Christian Lequesne, "The European Commission: A Balancing Act between Autonomy and Dependence", in Karlheinz Neunreither and Anje Wiener (ed.), *European Integration after Amsterdam. Institutional Dynamics and Prospects for Democracy* (Oxford University Press, Oxford and New York, 2000), pp. 36-51 and Neill, Nugent, *The European Commission* (Palgrave Macmillan, London, 2001).

2.4 Institutional stickiness: gaps in Member States' control

As Pollack⁹³ puts it, the process of European integration unfolds over time and, in certain policy domains, early policy choices not only influence subsequent action, but also have unintended consequences at a later stage that are neither expected nor easily accepted by the Member States. As already mentioned, path dependence offers an explanation for the principals' incapacity to control and to overturn later evolutions in a policy area, but, according to Pollack, the existing explanations do not take into account the actual role that institutions play in constraining the Member States by shaping historical pathways.⁹⁴

In relation to the EU polity, the question that remains unanswered is why Member States cannot very easily change the existing institutional arrangements to better suit their needs.⁹⁵ Pierson⁹⁶ employs the gap concept in order to explain the institutions' contribution to the longevity and stickiness of the institutional patterns already in place. After defining the gaps as being the "significant divergences between the institutional and policy preferences of member states and the actual functioning of institutions and policies",⁹⁷ Pierson mentions four factors that are responsible for the emergence of gaps in Member States' control: the autonomous actions of supranational institutions, the large potential for unintended consequences, the restricted time horizons of decision-makers, and the likelihood of changes in chief of governments' preferences over time. For our focus in the JHA acquis, the first three factors are of major importance.

Concerning the autonomy of European institutions, Pierson contradicts the main assumption of the intergovernmentalist approach, which considers the

⁹³ Mark A. Pollack, *op. cit.*, pp. 148-149.

⁹⁴ *Ibid.*, 409.

⁹⁵ Mark Aspinwall and Gerald Schneider, *op. cit.*, pp. 10;

⁹⁶ Paul Pierson, *The Path to European Integration. A Historical Institutionalist Analysis*, pp. 130-148.

⁹⁷ *Ibid.*, 131.

supranational bodies as being mere tools at the Member States' disposal. Focusing on the Commission, he argues that the EU's executive body has always striven for more power and has actually succeeded in gaining more influence. In those policy areas where QMV is now largely employed, the Commission managed to enhance its agenda-setting capacity and its role of a process-manager at the Community level. Therefore, supranational institutions have the capacity to constrain Member States and to define limits within which they can act.

A second problem that Member States have to deal with when trying to control the policy-making process is that unintended and unforeseeable consequences continue to appear and cause inconsistencies in Member States' control over policy process, while its development is ongoing. Pierson⁹⁸ identifies two causes for the emergence of unintended consequences. On the one hand, the EU polity is characterized by high issue density, where the huge number of issues to be decided upon and their heterogeneity place major hurdles on Member States political and cognizant capacity. On the other hand, Member States tend to concentrate their resources only on major treaty reshuffles, whereas in the in-between intervals their ability to influence the developments of policies is considerably weaker. Citing Marks, Pierson argues that the Commission is able to take advantage of its both better knowledge of the policy process and process-manager capacity in order to increase the influence it has over the Member States.⁹⁹

Going now to the Member States' political backyard, the occurrence of gaps in their control over the supranational political process is also facilitated by the domestic electoral cycles. Pierson explains that political actors take decisions only by having in mind their short-term political survival, thus completely ignoring the long-term

⁹⁸ Ibid., 136.

⁹⁹ Ibid., 137.

consequences of their choices: “(...) long term institutional consequences are often the by-product of actions taken for short-term political reasons”.¹⁰⁰ For this reason, state sovereignty vis-à-vis the ceding of competencies to the supranational venues of power is a victim of the quest for perpetuated domestic electoral success of national political elites.

Pierson’s argument explains why gaps occur and why it is difficult for the Member States to close them. From the three factors considered above, the most salient in relation to our research is the resistance of supranational actors over policy-making control and the institutional barriers they raise to a reform process contrary to their preferences. Institutions are sticky and design the rules of the game in such a way in order to “inhibit even modest changes of course and (...) to make previously enacted reforms hard to undo, even if those reforms turn out to be unexpectedly costly or to infringe on member-state sovereignty”.¹⁰¹

Summing up, Pierson’s approach on the loss of Member States’ control can be tested against our initial hypothesis, that the Commission played an important role in the supranationalization of the JHA policy sector, by taking advantage of the environment in which the JHA policy and decision-making processes took place, constraining the Member States and limiting their options. The Commission sought to enhance its power and its agenda-setting capacity in the JHA field by defining the rules of the game – pushing for the passerelle or for a compulsory treaty revision, as it has been the case with the Maastricht Treaty – and by using its unmatched power of drafting strong policy proposals, that require unanimity in the Council to be seriously altered. Thus, Member States could pick on alternatives within a range of

¹⁰⁰ Ibid.

¹⁰¹ Ibid., 143.

already limited political choices, all matching, at least up to a certain extent, the Commission's preferences.

2.5 HI and policy changes: the “critical junctures” theory

The main conclusion that can be drawn out of the previous assumptions on gaps and Member States' difficulties in closing them is that HI offers explanations for continuity rather than for changes that can occur in a policy.¹⁰² HI offers a framework managing to explain why once a set of institutions is set in motion, political actors strive to “adapt their strategies in ways that reflect but also reinforce the logic of the system”.¹⁰³ Therefore, the main challenge of HI is to accommodate the various shifts occurring during the policy-making process as well.

Historical institutionalists acknowledge that changes occur in institutional patterns, but consider them incremental, following the general path set out in the past, rather than radical. When analyzing variations in policies and their development, Pierson wrote: “(...) institutions will generally be far from plastic, and that when institutions have been in place for a long time most changes will be incremental”.¹⁰⁴

Bulmer and Burch¹⁰⁵ developed a very detailed analysis of policy changes by defining incremental, radical and incremental-transformative changes, having various degrees of institutional patterns' transformation. Nevertheless, as other HI scholars, they conclude that institutional change is usually incremental, not radical.¹⁰⁶

¹⁰² Kathleen Thelen and Sven Steinmo, *op. cit.*, 14.

¹⁰³ Kathleen Thelen, *Historical Institutionalism in Comparative Politics* (Annual Review of Political Science, Vol. 2, 1999), pp. 392.

¹⁰⁴ Paul Pierson, *Politics in Time. History, Institutions, and Social Analysis*, pp. 153.

¹⁰⁵ Simon Bulmer and Martin Burch, “The Europeanisation of central government: the UK and Germany in historical institutionalist perspective”, in Mark Aspinwall, Gerald Schneider (ed.) *The rules of integration. Institutional approaches to the study of Europe* (Manchester University Press, Manchester and New York, 2001), pp. 73-97.

¹⁰⁶ *Ibid.*, 81.

In explaining more important changes in policies and institutional settings, HI scholars argue that the historical flow of events is sometimes interrupted by “critical junctures”, i.e. a moment in which a window of opportunity is thereby created for various actors to operate some changes in the existing pattern.¹⁰⁷ Bulmer and Burch¹⁰⁸ go even further and distinguishes the very moment when a window of opportunity is created from a critical juncture. In their view, the critical moment occurs when the opportunity for change arises and political actors may or may not exploit it. The critical juncture represents the actual change in policies and “the departure from previously established patterns”.¹⁰⁹ Thelen considers the critical junctures as “the bread and butter of historical institutionalism”, for the reason that they can explain how decisive moments can send a policy on a new path, or at least significantly modify the already existing one.¹¹⁰ The main assumption that can be drawn out of the critical junctures theory is that the institutions, although reluctant to change, nevertheless react to exogenous changes in the environment.¹¹¹ But the main point that has to be remembered is that, irrespective of the fact that the transformation of a policy is incremental or radical, the institutions’ reaction is constrained by the already existing path and therefore will remain within the limits of past trajectories.¹¹²

Pierson develops the model of critical junctures and suggests three typical processes of institutional change: layering, functional conversion, and diffusion.¹¹³ Starting from the same assumption that institutions are under constant pressure to

¹⁰⁷ Peter A. Hall, Rosemary C. R. Taylor, *op. cit.*, pp. 942.

¹⁰⁸ Simon Bulmer and Martin Burch, “The Europeanisation of central government: the UK and Germany in historical institutionalist perspective”, in Mark Aspinwall, Gerald Schneider (ed.) *The rules of integration. Institutional approaches to the study of Europe*, pp.81.

¹⁰⁹ Ibid.

¹¹⁰ Kathleen Thelen, *Historical Institutionalism in Comparative Politics*, pp. 387-388.

¹¹¹ Kathleen Thelen and Sven Steinmo, “Historical Institutionalism in comparative studies”, in Kathleen Thelen, Sven Steinmo and Frank Longstreth, *Structuring Politics. Historical Institutionalism in Comparative Analysis*, pp. 15.

¹¹² Kathleen Thelen, *Historical Institutionalism in Comparative Politics*, pp. 387.

¹¹³ Paul Pierson, *Politics in Time. History, Institutions, and Social Analysis*, pp. 137-138.

adapt to the changes in social context, Pierson explains layering as “the partial renegotiation of some elements of a given set of institutions while leaving others in place”.¹¹⁴ Further on, layering may also involve the creation of a parallel institutional track, hoping that, over time, it will challenge the status-quo by acquiring more importance over the existing institutions which, at that time, could not be easily replaced.¹¹⁵

Functional conversion, the second model suggested by Pierson, refers to situations where “the existing institutions are redirected to new purposes, driving changes in the role they perform and/or the functions they serve”.¹¹⁶ Institutions may serve multiple purposes and actors may change their usage of existing institutions.

The third model proposed by Pierson, diffusion, envisages the most radical change, the wholesale replacement of institutions,¹¹⁷ but, as Thelen argues, this is rarely the case inside the European Communities where “pressures for change, whether generated externally or internally, usually lead to the adaptation of existing institutions rather than the creation of new ones”.¹¹⁸

HI has been criticised for not being able to address the initial formation of institutions and original policy choices.¹¹⁹ In other words, HI ignores the most important stage of the entire policy process, if judged after the main assumption that the path a policy follows is defined by the very first stage. However, the critical junctures theoretical model can be seen as an answer to this widespread critique of HI. According to Peters, “at the formative period of a policy, a critical juncture of forces

¹¹⁴ Ibid., 137.

¹¹⁵ Ibid.

¹¹⁶ Ibid., 138.

¹¹⁷ Ibid.

¹¹⁸ Kathleen Thelen and Sven Steinmo, “Historical Institutionalism in comparative studies”, in Kathleen Thelen, Sven Steinmo and Frank Longstreth, *Structuring Politics. Historical Institutionalism in Comparative Analysis*, pp. 16-18.

¹¹⁹ Guy Peters, *Institutional Theory in Political Science. The New Institutionalism*, pp.67.

and processes produces a particular outcome”.¹²⁰ In other words, in the same manner as a policy change, a policy inception can be explained through the then existing combination of events.

To conclude, HI can help us explain the development of the JHA acquis in three ways. First, HI argues that EU policy outcomes cannot be explained by merely looking at Member States’ preferences and power and “challenges the intergovernmentalist argument on member-state primacy by taking into account the way in which institutions structure collective policy choices”.¹²¹ Secondly, HI can explain why certain patterns characterize certain policy areas over time,¹²² and the JHA acquis is a policy field where the pattern of intergovernmentalism still haunts the decision-making process, even more than sixteen years after the original policy inception. Thirdly, the critical junctures theory can be tested against the JHA area development, if one agrees that communautarization, although slow and incremental, occurred due to changes in the environment. The Commission, in order to press for further communautarization and maximize its competences, created a propitious institutional setting by taking advantage of the critical junctures’ emergence.

¹²⁰ Guy Peters, Jon Pierre, Desmond S. King, *The Politics of Path Dependency: Political Conflict in Historical Institutionalism*, pp. 1283.

¹²¹ Ben Rosamond, *Theories of European Integration*”, pp. 116.

¹²² Guy Peters, Jon Pierre, Desmond S. King, *The Politics of Path Dependency: Political Conflict in Historical Institutionalism*, pp. 1287.

Chapter 3: The Commission and the communautarization of Justice and Home Affairs

3.1 Overview of the chapter

Institutions have a crucial role in the development of the unification project ongoing in Europe, for the reason that they create channels for collective action, broker the initiation of common policies, and provide a particular institutional context within which transnational action is facilitated.¹²³ The consequence of the existence and development of supranational institutions is that it has given birth to institutional conflicts between national and EU-level institutions.¹²⁴ In spite of the fact that Member States themselves have delegated their authority to the Commission for a number of reasons – reducing transaction costs, producing an information rich venue or preventing defection and incomplete contracting¹²⁵ – the most visible disagreements occur between national governments and the Commission, the former being sometimes unhappy with the scope and the pace of the integration process. The hard-line negotiations between the integrative Commission and the reluctant Member States governments are best reflected in the policy areas where Member States have very strong and clear preferences that do not necessary coincide with the Commission's point of view. JHA is one policy over which negotiations for control are ongoing since the 1992 Treaty of Maastricht.

It has been argued that the Commission's power is far less visible than that of the Member States and the only way of analyzing it is by examining the long-term

¹²³ Brigid Laffan, "The IGC and Institutional Reform of the Union", in Geoffrey Edwards and Alfred Pijpers, *The Politics of European Treaty Reform. The 1996 Intergovernmental Conference and Beyond* (Pinter, London and Washington, 1997), pp. 288.

¹²⁴ *Ibid.*, 299.

¹²⁵ Mark A. Pollack, *Delegation, agency, and agenda setting in the European Community* (International Organization, Vol. 51, No. 1, 1997), pp. 103.

developments inside the EU.¹²⁶ Therefore, the timely perspective employed by the HI theoretical framework offers a unique possibility for assessing the influence and the role played by the Commission in the piecemeal reforms of the JHA field. I will start by briefly underlining the Commission's main constitutional powers and its role as both a formal and informal agenda setter. Afterwards I will apply the HI hypothesis to the institutional developments of the JHA field, explaining how the Commission made use of its powers to constrain Member States to accepting a constant retrenchment of their say in this high politics, hard case policy area.

3.2 The constitutional powers of the European Commission

The Commission is very well positioned inside the institutional structure of the EU for exercising an important role in the decision-making process.¹²⁷ According to Dinan,¹²⁸ its main resources are the two constitutional powers that do not vary across different policy areas, as they are directly mentioned in the founding treaties. The first one is spelled out by Article 211 of the amended EC Treaty, which provides for the Commission "to ensure the proper functioning and development of the common market".¹²⁹ Thus, the Commission can bring forward communications and policy proposals on every single issue related to the single market. When pushing for more supranationalism in a given policy area, the Commission has done nothing else but fulfilling its role, as defined by the aforementioned article. The second empowerment derives from Article 236 of the Treaty Establishing the European Community, providing that the Commission has the right to submit proposals to the Council for

¹²⁶ Janne Haaland Matláy, "The Role of the Commission: A Theoretical Discussion", in Neill Nugent, *At the Heart of the Union. Studies of the European Commission* (Macmillan Press LTD., London, 1997), pp. 281.

¹²⁷ Neill Nugent, "At the Heart of the Union", in Neill Nugent, *At the Heart of the Union. Studies of the European Commission* (Macmillan Press LTD., London, 1997), pp. 12.

¹²⁸ Desmond Dinan, "The Commission and the Intergovernmental Conference", in Neill Nugent *At the Heart of the Union. Studies of the European Commission* (Macmillan Press LTD., London, 1997), pp. 245-264.

¹²⁹ Consolidated Version of the Treaty Establishing the European Community, OJ C 325, 24.12.2002, pp. 119.

treaty amendments. The Commission is therefore an important actor in the whole process preceding major treaty reforms, as it has the right to make proposals and formulate its opinions on a future treaty:

Usually, the IGCs have a mandate. This is very important, as it contains the purpose, sometimes the deadlines, the timing and so on. The Commission has influence when it draws the main guidelines of the future IGC.¹³⁰

In sum, the two aforementioned constitutional provisions offer the Commission the possibility to shape the decision-making process in the long run, by drawing general guidelines within which the Council of Ministers may act. Having provided that the Commission is involved in the decision-making of the initial policy choices and keeping in mind HI's path dependence hypothesis – subsequent developments and later policy outcomes are influenced by original policy decisions –, we can argue that the Commission has put its mark on the entire evolution of the JHA acquis.

The Commission enjoys a second array of instruments for putting its mark on the policy outcomes, the so-called formal and informal agenda-setting powers. They differ from the already mentioned powers in that they are dependent on the decision-making rules existent in every policy area. The Commission can make use of its formal agenda-setting power in those policy areas where it has the monopoly on the right of initiative. The Member States can only ask the Commission to come up with a proposal. It is the Commission which prepares the draft, acting as a gatekeeper for future policies.¹³¹ Because the Council can substantially modify the original proposal only by the use of unanimity, the mandate it receives from the Commission is a very important part of the entire legislative process:

This is a key role. Once the Council has received a written text, it cannot change it completely. They can add something, they can try to take away something, small modifications can occur, but the text

¹³⁰ Interview with Prof. Peter Balázs, former Commissioner in charge of EU regional policy, May 2007.

¹³¹ Susanne K. Schmidt, *Behind the Council Agenda: The Commission's Impact on Decisions* (Max Planck Institut für Gesellschaftsforschung, Discussion Paper No. 4, Köln, 1997), pp. 6.

remains 90% the same. This is why this is a key role, drafting the paper.¹³²

The Commission's formal agenda-setting powers are very much enhanced if the voting rule in the Council is QMV and not unanimity. In this ideal case, besides the fact that a proposal can be adopted much more easily than it can be altered,¹³³ the Commission can be strategic and initiate a proposal that will obtain support from a qualified majority of states.¹³⁴ Thus, the Commission has always asked for exclusive right of initiative and QMV in the legislative process being aware of the fact that this is one way of controlling the decision-making in the Council of Ministers.

Next to the policy areas where it enjoys exclusive right of initiative, the Commission has to deal with fields where its participation is limited and constrained by existing institutional rules. This has been the case in most areas within the JHA field until 1st of May 2004. When it cannot rely on the right of initiative, the Commission makes use of its informal agenda-setting powers, i.e. trying to set the substantive agenda of the Council through its ability to define issues of interest and rally consensus among the decision-makers.¹³⁵ Given that the high density and heterogeneity of the issues considered at the EU level create an environment of uncertainty within which the national representatives' informational needs make them dependent on the supranational institutions, the Commission takes advantage of this difficult environment and "sets the agenda by constructing focal points for bargaining".¹³⁶ A frequently used tool for informally setting the agenda is the publication of non-binding communications, since

¹³² Interview with Prof. Peter Balázs, former Commissioner in charge of EU regional policy, May 2007.

¹³³ Susanne K. Schmidt, "The European Commission's powers in shaping European policies", in Dionyssi G. Dimitrakopoulos (ed.), *The Changing European Commission* (Manchester University Press, New York, 2004), pp. 105-106.

¹³⁴ Susanne K. Schmidt, *Only an Agenda Setter? The European Commission's Power over the Council of Ministers* (European Union Politics, Vol. 1, No. 37, 2000), pp. 40.

¹³⁵ Susanne K. Schmidt, *Behind the Council Agenda: The Commission's Impact on Decisions*, pp. 7.

¹³⁶ Mark A. Pollack, *Delegation, agency, and agenda setting in the European Community*, pp. 123.

(...) a communication is the expression of the Commission's opinions which is influencing the Council's work, because the Commission has the expertise, has information, they know the matter, they have good experts, they indicate good solutions, so they do influence the Council through their work.¹³⁷

The JHA field is a policy area where the Commission's formal, but especially informal, agenda setting powers can be traced and analyzed. The Commission had to use its constitutional powers as well and had to take advantage of the institutional environment in order to enhance its competencies in JHA issues, otherwise it would have remained a very constrained actor.¹³⁸ With the entry into force of the Maastricht Treaty, the Commission had no competence over third pillar issues and it therefore had to rely mainly on its informal powers to push for more supranationality in the decision-making process. The Commission employed this strategy during the entire period that makes the subject of this research. At the same time, the Commission made use of its formal powers in those two areas which were already completely supranationalized¹³⁹ by the Treaty of Maastricht, the black visa list and the adoption of common rules concerning an uniform format for visas. Up to the entry into force of the Amsterdam Treaty in 1999, this led to the adoption of two regulations – binding legal instruments – in visa related issues, by comparison to the third pillar, under which not even a single piece of binding legislation has been produced.¹⁴⁰ According to Niessen, it has been thus demonstrated that the decision-making on the basis of the Commission's exclusive right of initiative and QMV as a voting rule in the Council is more coherent and productive, Member States being forced to acquiesce that "intergovernmental co-operation in the field of JHA is doomed to fail".¹⁴¹

¹³⁷ Interview with Prof. Peter Balázs, former Commissioner in charge of EU regional policy, May 2007.

¹³⁸ Emek M. Uçarer, *op. cit.*, pp. 2.

¹³⁹ See the first Chapter and the Appendices for more details on the the evolution towards supranationalism of the JHA policy field.

¹⁴⁰ Gregor Noll, *op. cit.*, pp. 134.

¹⁴¹ Jan Niessen, *European Community Legislation and Intergovernmental Cooperation on Migration* (International Migration Review, Vol. 26, No. 2, 1992), pp. 683.

3.3 Initial policy choices and pattern formation

The objective of this section is to show how initial choices in the JHA policy area had an impact on future ones. In other words, for obtaining a plausible explanation for the slow and piecemeal development of the JHA field towards communitarization, we have first to explain why the JHA was so deeply entrenched in the intergovernmentalist logic. HI can only explain why the intergovernmentalist logic had an impact on the entire evolution of the JHA field, and cannot account for the selection of initial policy choices. Yet, in order to guide the reader through the theoretical analysis that will follow, this section will first address the conditions in which the institutionalization of this new policy sector emerged before starting with the HI analysis of future policy development. Secondly, the challenge lies in proving that the Commission, although not a winner of the initial intergovernmental institutional settings, had nevertheless the necessary means to further push for subsequent reforms of the JHA area, by exploiting various windows of opportunity emerging in the second half of the 1990s.

The emergence of the JHA policy area in the European Union is a clear example of incremental institutional change,¹⁴² which could happen because both endogenous and exogenous factors simultaneously created a demand for harmonized policies at the Community level. The founding treaty of the European Communities provided for the free movement of EC nationals across the internal borders but did not envisage any supranational competence in the area of immigration rules towards third country nationals. The SEA set a deadline for the implementation of the Single Market Programme – having among other aims, the

¹⁴² Penelope Turnbull, Wayne Sandholtz, “Policing and Immigration: The Creation of New Policy Spaces”, in Alec Stone Sweet, Neil Fligstein, Wayne Sandholtz, *The Institutionalization of Europe* (Oxford University Press, New York, 2001), pp. 194.

elimination of physical internal borders – and “delivered an impetus to the creation of an European policy space in justice and home affairs”.¹⁴³ The policy makers implementing the Single Market Programme realized that the abolition of internal passport controls could not be achieved without a common policy on the movements of third country nationals within the Community. This endogenously created necessity coincided with the emergence of unprecedented migratory pressures on the Member States that raised the concerns of both governments and population. The Cold War had come to an unexpected end, adding to the migratory push factors from Africa, Magreb and Mashrek a huge migratory potential from the former communist states, whose newly liberated citizens could move freely across their countries’ frontiers. Therefore, the issue of abolishing person checks at the intra-Community borders became salient exactly in the middle of a very difficult time. This had two consequences on the future JHA policy-area. First, it became clear that a uniform regime of external frontier controls, offering a higher degree of security, was a prerequisite for the lifting of internal checks on persons. The only way of achieving a uniform, high-performance border system throughout all the Member States situated at the Community’s southern and eastern peripheries was through harmonization.¹⁴⁴ Secondly, the steps towards the full implementation of the Single Market provisions related to the free movement were expected to be slow and subject to security concerns and tight Member States’ control. Adding the fact that the renunciation of the national prerogatives over a country’s borders “undermined a fundamental cultural frame for the European nation-state”,¹⁴⁵ it is clear why the Member States were not willing to allow supranational competence into this area. Member States did

¹⁴³ Ibid., 199.

¹⁴⁴ Ibid., 212.

¹⁴⁵ Ibid., 199.

not challenge the need for common action, but they stressed the fact that the future co-operation should follow a tight intergovernmental structure.

When preparing the IGC prior to the Maastricht summit, the Commission has clearly realized that it simply stand no chance in front of the Member States if it wanted to press for directly communautarizing the future JHA policy area. When drafting the mandate for the 1990 IGC, the Commission was caught between the need for a genuine supranational policy and the fierce resistance of the Member States wanting to maintain their powers through an intergovernmental co-operation scheme.¹⁴⁶ Therefore, being aware of the difficulties inherent to securing a more ambitious integration of JHA issues, the Commission adopted a pragmatic stance and issued just one communication stressing the necessity for supranationalism in the future EU migratory regime.¹⁴⁷ It agreed that “measures associated with any programme for a frontier-free European Union would have to be drawn up by intergovernmental bodies”,¹⁴⁸ accepting its exclusion from the decision-making within the third pillar.

The Commission’s stance in the period preceding the Maastricht Treaty best characterizes its general approach to those issues where Member States have very strong preferences or to issues where the conditions are not ripe for a major leap forward. To avoid the costly imposition of sanctions,¹⁴⁹ the Commission assesses the mood in the Council of Ministers, and avoids coming with bold proposals, thus not risking a violent backlash from the Member States:

Sometimes, the Commission is finding out some genius things that are not realistic yet. The influence (between the Council and the Commission, n.a.) in this issues is reciprocal, we have expertise on the one hand and on the other there is political will and readiness.¹⁵⁰

¹⁴⁶ Adrian Favell, Andrew Geddes, *op. cit.*, pp. 3.

¹⁴⁷ Andrew Geddes, *op. cit.*, pp. 87-91.

¹⁴⁸ Emek M. Uçarer, *op. cit.*, pp. 4.

¹⁴⁹ Mark A. Pollack, *Delegation, agency, and agenda setting in the European Community*, pp. 115.

¹⁵⁰ Interview with Prof. Peter Balázs, former Commissioner in charge of EU regional policy, May 2007.

Notwithstanding the political message emerging from the Council of Ministers in the pre-Maastricht negotiations on JHA matters, the Commission managed to secure the role of policy entrepreneur in the area, since it realized that in the post-TEU period it had the opportunity to influence the co-operation between the Member States towards a more integrative direction.¹⁵¹ The *passerelle* included in Title VI of the TEU, which provided for an optional injection of supranationalism in the third pillar, and the compulsory treaty revision planned by 1996 the latest, confirmed that the third pillar was surrounded by a consensus of temporariness and by the possibility of more integration in the future.¹⁵² The insertion in the TEU of these two provisions was the outcome of a turbulent external environment, in a moment in which war broke out in the Balkans and the USSR disintegrated.¹⁵³ The Commission was the institution that benefited the most from the two provisions that actually institutionalized the fact that the TEU would be subject to improvements in the future. Also to be mentioned here is the fact that the JHA issues were split in two parts, with two JHA areas¹⁵⁴ already subject to the first pillar decision-making rules, thus under direct Commission remit. All this formed the general impression that the Commission would therefore be marginalized from the decision-making only in the short run.¹⁵⁵ The consequences of this expectation were confirmed in a British newspaper citing Jean Monnet – “the Council of Ministers must be looked on as only a transitional form of government” –, in an article that criticized the justice and home affairs sector for becoming a common policy with a central role for the Commission.¹⁵⁶

¹⁵¹ Mark A. Pollack, “The Commission as an Agent”, in Neill Nugent, *At the Heart of the Union. Studies of the European Commission* (Macmillan Press LTD., London, 1997), pp. 121-122.

¹⁵² Andrew Geddes, *op. cit.*, 90.

¹⁵³ Desmond Dinan, *op. cit.*, pp. 252.

¹⁵⁴ Black visa list and of the rules concerning an uniform format for visas. See the first Chapter and the Appendices for more details on the the evolution towards supranationalism of the JHA policy field.

¹⁵⁵ Emek M. Uçarer, *op. cit.*, pp. 4.

¹⁵⁶ Sunday Telegraph, “United States of Europe”, 9th of February, 2003;

In sum, the construction of the third pillar outside the Community framework confirmed that a strong intergovernmental counterbalance to supranationalism always sat at the heart of European integration.¹⁵⁷ Member States secured a tight grip on the decision-making, the pattern of intergovernmentalism was set to overshadow future developments. HI's path dependence argument has thus been tested, if one takes into account the resistance of intergovernmental rules and procedures inside the JHA decision-making processes. Nevertheless, it has also been proven that, in spite of this strong intergovernmental scheme, the Commission had the capacity and ability to "get the ball rolling and set the terms for subsequent negotiations".¹⁵⁸ For the further communautarization of JHA policies, the Member States remained the key actors, but were no longer the only actors,¹⁵⁹ as the Commission already influenced the first steps of the policy.

3.4 Critical Junctures and the emergence of gaps in Member States' control over JHA

According to Pierson's institutional stickiness argument, after the entry into force of the Maastricht Treaty, the Commission must have been aware of the fact that "a return to some pre-Maastricht arrangements was impossible".¹⁶⁰ Therefore, it did not hesitate to employ all the strategies available for pushing the Council of Ministers to supranationalize the third pillar of the EU. Since the Commission was banned from the decision-making process, the only tools at its disposal were the informal agenda-setting powers and the two provisions of the TEU, paving the way for further reform.

¹⁵⁷ Adrian Favell, Andrew Geddes, *op. cit.*, pp. 6.

¹⁵⁸ Desmond Dinan, *op. cit.*, pp. 247-248.

¹⁵⁹ Andrew Geddes, *op. cit.*, 2.

¹⁶⁰ Penelope Turnbull, Wayne Sandholtz, *op. cit.*, pp. 217.

The institutional environment in which the JHA area was about to evolve had already been codified by the TEU, as “institutionalization at one stage shapes the nature of the problems, the range of options, and the institutional possibilities in subsequent periods”.¹⁶¹ Within the entire harmonization process that started at Maastricht, the third pillar was seen as a stopover until JHA issues were completely subsumed to the Community pillar. In spite of that, Member States were not expected to very easily give up their hold on the JHA field. Therefore, the Commission initiated its pressure towards maximization of its competencies in two major directions. First, it argued that JHA issues were, on the one hand, awkwardly split between the first and the third pillar, and, on the other hand, they were intrinsically interlinked with the single market, traditionally regulated by supranational provisions.¹⁶² Secondly, the Commission sought to rally those Member States unhappy with the pace of integration against the traditional enemies of supranationalization in JHA matters. By that time all the Member States acknowledged that intergovernmental co-operation in JHA was a failure,¹⁶³ the best argument being that “within the Schengen Group, the abolishment of border controls was no longer unrealistic, but within the EC, it certainly was”.¹⁶⁴ A Commission official, cited by the Financial Times, declared as early as in 1995:

There is not unanimous consensus but there is a large majority who believe the third pillar should be made a community matter. The current dependence on intergovernmental action had led to complete paralysis in policy making.¹⁶⁵

Even Jacques Santer, the Commission President, lobbied for the reform of the EU's decision-making process in JHA matters, by indicating the necessity for Member States to revoke their national veto, because

¹⁶¹ Ibid.

¹⁶² Andrew Geddes, *op. cit.*, pp. 92-93.

¹⁶³ Andrew Geddes, *op. cit.*, pp. 94, Emek M. Uçarer, *op. cit.*, pp. 8.

¹⁶⁴ Gregor Noll, *op. cit.*, 132.

¹⁶⁵ Financial Times, „EU's third pillar a failure“, 14th of September, 1995.

The third pillar of the justice and home affairs, designed to upgrade security cooperation, has failed to make any appreciable impact on the streets and the courts of Europe.¹⁶⁶

But it was not only within the press that Commission representatives chose to publicly state their opinions on the future of the third pillar. The 1996 IGC had been mandated by the Maastricht Treaty, thus “it was a good opportunity for the Commission and some other like-minded Member States to rectify what they considered to be a seriously flawed TEU”.¹⁶⁷ The Commission was of course involved in the drafting of the policy papers preparing the IGC preceding the Amsterdam Treaty and it took advantage of its role, succeeding in setting the agenda of the Council by creating a dialogue around the JHA framework and its problems.¹⁶⁸ The Commission issued two major papers in which it strongly criticized the functioning of the third pillar. In the 1995 “Report on the operation of the Treaty on European Union”, after summing up all the problems inherent to the intergovernmental decision-making scheme, it expressed its dissatisfaction with the failure to use the *passerelle*:

The possibility of using the “bridge” provided by the Treaty to apply Community rules to certain areas covered by the Title VI could be one solution to these problems. However, the procedure laid down is cumbersome: it requires the Member States’ unanimous approval and ratification in accordance with their respective national constitutional provisions.¹⁶⁹

In the second major work, an Opinion on “Reinforcing Political Union and Preparing for Enlargement”, the Commission first reiterated its right to deliver a point of view to the IGC and only afterwards contained punctual solutions for the JHA sector’s problems:

The Commission proposes that the shortcomings of the Treaty in the fields of justice and home affairs – notably its ineffectiveness and the

¹⁶⁶ The Irish Times, „Mr Santer’s Agenda“, 12th of September, 1995.

¹⁶⁷ Desmond Dinan, *op. cit.*, pp. 253.

¹⁶⁸ Emek M. Uçarer, *op. cit.*, pp. 6.

¹⁶⁹ European Commission, *Report on the operation of the Treaty on European Union*, SEC(95) 731, 10th of May, 1995.

absence of democratic and judicial review – be remedied by setting clear objectives and providing for appropriate instruments and methods. The unanimity rule generally applied at present either paralyzes the Council or reduces decisions to the lowest common denominator. The Commission believes it should as a general rule be replaced by qualified majority voting. Finally, the Commission should have the power of initiative in all the fields concerned.¹⁷⁰

Beside the aforementioned communications and opinions on the functioning of the JHA pillar – which, as argued in the second section of this chapter, helped the Commission to define the points of interest and to set the agenda of future negotiations around the particular issue of enhancing supranational competence within the JHA sector –, the Commission knew that one major window of opportunity had appeared and tried to exploit it in order to maximize its competencies: the prospect of enlargement. Although at that time just a remote possibility, enlargement of the Union with twelve former communist countries made it clear for every Member State that what they needed was a “workable institutional system and a durable policy framework”.¹⁷¹ As there was widespread consensus that such a significant enlargement would have clear repercussions on the existing institutional system and policies, the Commission took advantage of this window of opportunity and tried to “leverage an impending accession in an effort to promote deeper European integration”.¹⁷² Its 1996 Opinion contained no less than ten clearly defined points on the future institutional settings.

In the negotiations preceding the Treaty of Amsterdam the Member States were constrained, on the one hand, by an activist Commission that mainly built its approach on the failures of the intergovernmental co-operation in the third pillar, and, on the other, by the prospect of enlargement. Although the outcomes of the

¹⁷⁰ European Commission, *Reinforcing Political Union and Preparing for Enlargement*, COM(96) 90, 28th of February, 1996.

¹⁷¹ Desmond Dinan, *The Commission and the Reform Process*, in Geoffrey Edwards, Alfred Pijpers (ed.), *The Politics of European Treaty Reform: the 1996 Intergovernmental Conference and Beyond* (Pinter, London and Washington, 1997), pp. 198.

¹⁷² *Ibid.*, pp. 197-198.

Amsterdam Treaty only partially matched the Commission's proposals,¹⁷³ through the transfer of almost the entire JHA issues from the third to the first pillar, the Treaty offered for the first time an array of institutionalized opportunities for subsequent supranationalization: a very complex, but at the same time easier to apply, *passerelle*, and a compulsory five year transitional period towards the Commission's exclusive right of initiative in all JHA matters transferred to the first pillar.

After managing to secure the right of initiative in the majority of JHA issues, the Commission had only to make the Council apply the new *passerelle* and to accept QMV as the voting rule in as many areas as possible. Only at that moment could the formal agenda-setting powers over JHA issues be considered completed and intergovernmentalism banished from the first pillar. In spite of the fact that the *passerelle* could be used only after the expiry of the five year transitional period, i.e. the 1st of May, 2004, the Commission started as early as 2001 to press for its application and urged the Council to "move away from the unanimity rule in blocked areas".¹⁷⁴ But it was only in the second half of 2004, when the transitional period had already ended, that the Commission really started to demand the Council to apply the *passerelle*. After stressing in two different papers that there still were difficulties with the decision-making process in those areas in which unanimity was still the voting rule, the Commission explicitly asked the Council to act:

Article 67(2) (the *passerelle*, n.a.) of the EC Treaty provides that the Council, after 1 May 2004, is to take a decision with a view to providing for all or parts of the areas covered by Title IV to be governed by the co-decision procedure. It would be legitimate to make use of this facility immediately after 1 May.¹⁷⁵

¹⁷³ Please refer to the Second Chapter and to the Appendices for a detailed picture on the outcomes of the Amsterdam Treaty.

¹⁷⁴ European Commission, *Communication from the Commission to the Council and the European Parliament. Biannual update of the scoreboard to review progress on the creation of an area of Freedom, Security and Justice in the European Union*, COM(2001) 628, 30th of October, 2001.

¹⁷⁵ European Commission, *Communication from the Commission to the Council and the European Parliament. Area of Freedom, Security and Justice: Assessment of the Tampere programme and future orientations*, COM(2004) 401, 2nd of June, 2004.

To conclude, with the Council of Ministers unanimously adopting the 2004/927/EC Decision¹⁷⁶ in December 2004, the Commission, now able to fully exert its formal agenda-setting powers in nine JHA areas out of sixteen, demonstrated that it could successfully use its informal influence on the Council both when setting the agenda for a major treaty reshuffle, as well as in the periods between major negotiations. The outcomes of the twelve year long integration process in JHA matters matched the preferences of the Commission, which now became a strong player in the majority of the JHA areas. Its success can be explained through its perseverance, as well as through its influence:

The Commission has a very big influence. The texts that the Commission is sending to the Council contain a lot of political choices and incorporate a strong political message. Behind every solution picked by the Council lies the strong initial idea of the Commission.¹⁷⁷

The hypotheses drawn from the HI's critical junctures argument has been confirmed by the changes brought in the JHA area by the 1997 ToA reforms. Both the Commission and the Member States have reacted to the exogenous changes in the environment, i.e. the enlargement prospect. The shift in the policy has been significant, with the entire asylum and immigration matters being transferred from the third into the first pillar. The adoption of the 2004/927/EC Decision by unanimity in the Council proves that this subsequent development followed the new pattern towards supranationalism that had been created by the Amsterdam reforms, as predicted by the HI's path dependence argument.

Nevertheless, one thing cannot be ignored. Changes that have been decided both in the ToA and in the Council's 2004/927/EC decision have been more limited in scope when compared to the Commission's far reaching initial proposals. The

¹⁷⁶ OJ L 396, 31.12.2005, pp. 45-46: Council Decision providing for certain areas covered by Title IV of Part Three of the Treaty establishing the European Community to be governed by the procedure laid down in Article 251 of that Treaty.

¹⁷⁷ Interview with Prof. Peter Balázs, former Commissioner in charge of EU regional policy, May 2007.

incorporation of JHA matters into the first pillar did not bring supranational decision-making in the first five years and even after the expiry of the transitional period and the use of the *passerelle* by the Council, seven JHA areas¹⁷⁸ are not completely communautarized, as unanimity is still the required voting rule. Therefore, the fact that intergovernmentalism still haunts the JHA policy area can actually offer a second confirmation of HI's argument that past trajectories' influence matters when new choices are being made.

¹⁷⁸ See the Appendix VI for the decision-making configuration in the JHA policy sector after the transitional period envisaged by the Amsterdam Treaty and the adoption of the 2004/927/EC Council Decision.

Conclusion

Legal scholars have already analyzed the judicial implications of the JHA's supranationalization process. However, an approach to the EU immigration and asylum matters closer to political science can answer questions related to the balance of power between national and supranational institutions in a policy area of major importance for the Member States, as well as for the EU, when it comes to its capacity to produce uniform policies related to issues that have an important impact beyond its outer borders. This research dealt with the role that the European Commission played in a twelve year period of gradual communautarization in the JHA policy area and emphasized the constraints that national governments had to deal with when they tried to maintain their control over this field, by keeping in place the intergovernmental scheme for the decision-making process. The main hypotheses of the thesis is that the Commission has tried to maximize its competencies in JHA matters by systematically setting the IGCs' agenda before the two major treaty revisions at Maastricht and Amsterdam and as well as by putting a constant pressure on the Council of Ministers in the periods between major negotiations.

As we have seen, for achieving its aforementioned purpose, the Commission employed its constitutional prerogatives – which allow it to ensure the development of the single market – by submitting proposals to the Council for future treaty amendments. The Commission had therefore the capacity to set the agenda and to pinpoint the main issues around which negotiations would be held, offering in the same time worthy political solutions. The Commission used its formal and informal agenda-setting powers as well, by releasing communications, opinions and policy

proposals asking for the injection of more Community competencies into the JHA area. As demonstrated, all these instruments made the Commission a very strong player capable to influence the Council of Ministers and to send decisions on certain paths.

But the initial policy choice agreed upon at Maastricht of building a third pillar dedicated to JHA issues outside the Community framework sent the subsequent developments of the decision-making process on an intergovernmental path. As intergovernmental rules and procedures proved to be very resistant to change, the Commission had also to take advantage of external factors for obtaining more leverage over JHA matters. The enlargement prospect offered a window of opportunity to the Commission. Benefiting from the widespread consensus that the further communautarization of the third pillar would bring the necessary unity and coherence to such an important policy that was about to be negotiated with the candidate countries, and by rallying those Member States unhappy with the modest policy outcomes of the existing intergovernmental decision-making rules against traditional proponents of national primacy, the Commission offered no alternative to the Council of Ministers but to gradually supranationalize the rules of the game.

Therefore, as also shown by the fact that after two major treaty reshuffles and more than half a decade of constant development in the JHA field, the Commission's preferences and expectations were, in the majority of the issues within the JHA area, generally met by the outcomes of the entire reform process. Overall, the Commission succeeded in shaping the evolution of the JHA decision-making rules and procedures in the long term, emerging as a strong actor in a policy area over which Member States traditionally have had a very powerful influence.

As concerns the broader implications of this research, it can be argued that, even when applied to a high politics, hard case policy area, the Historical Institutional approach can offer a reliable framework for explaining policy outcomes. However, when it comes to its capacity of explaining the changes that occur in such a policy field, the main HI instrument employed for interpreting the why of policy changes, the critical junctures argument, has difficulties to accommodate the fact that the initial path has proven to be more difficult to be altered and the rules and procedures have been much more resistant than in other policies. This is clearly visible in the JHA sector, that still maintains intergovernmental decision-making rules in seven out of sixteen policy areas, thus limiting the impact of the changes in the external environment, which is given a lot of credit by historical institutionalists. Nevertheless, the fact that intergovernmentalism still haunts the JHA policy area after so many years of reforms, makes out of the HI's path dependence model a very strong argument when analyzing policies in a timely perspective.

Appendix I – Title VI of the Maastricht Treaty: Provisions on Cooperation in the fields of Justice and Home Affairs

Article K

Cooperation in the fields of justice and home affairs shall be governed by the following provisions.

Article K.1

For the purposes of achieving the objectives of the Union, in particular the free movement of persons, and without prejudice to the powers of the European Community, Member States shall regard the following areas as matters of common interest:

1. asylum policy;
2. rules governing the crossing by persons of the external borders of the Member States and the exercise of controls thereon;
3. immigration policy and policy regarding nationals of third countries:
 - (a) conditions of entry and movement by nationals of third countries on the territory of Member States;
 - (b) conditions of residence by nationals of third countries on the territory of Member States, including family reunion and access to employment;
 - (c) combatting unauthorized immigration, residence and work by nationals of third countries on the territory of Member States;
4. combatting drug addiction in so far as this is not covered by 7 to 9;
5. combatting fraud on an international scale in so far as this is not covered by 7 to 9;
6. judicial cooperation in civil matters;
7. judicial cooperation in criminal matters;
8. customs cooperation;
9. police cooperation for the purposes of preventing and combatting terrorism, unlawful drug trafficking and other serious forms of international crime, including if necessary certain aspects of customs cooperation, in connection with the organization of a Union-wide system for exchanging information within a European Police Office (Europol).

Article K.2

1. The matters referred to in Article K.1 shall be dealt with in compliance with the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and the Convention relating to the Status of Refugees of 28 July 1951 and having regard to the protection afforded by Member States to persons persecuted on political grounds.
2. This Title shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.

Article K.3

1. In the areas referred to in Article K.1, Member States shall inform and consult one another within the Council with a view to coordinating their action. To that end, they shall establish collaboration between the relevant departments of their administrations.
2. The Council may:

- on the initiative of any Member State or of the Commission, in the areas referred to in Article K.1(1) to (6);
- on the initiative of any Member State, in the areas referred to in Article K1(7) to (9):
 - (a) adopt joint positions and promote, using the appropriate form and procedures, any cooperation contributing to the pursuit of the objectives of the Union;
 - (b) adopt joint action in so far as the objectives of the Union can be attained better by joint action than by the Member States acting individually on account of the scale or effects of the action envisaged; it may decide that measures implementing joint action are to be adopted by a qualified majority;
 - (c) without prejudice to Article 220 of the Treaty establishing the European Community, draw up conventions which it shall recommend to the Member States for adoption in accordance with their respective constitutional requirements. Unless otherwise provided by such conventions, measures implementing them shall be adopted within the Council by a majority of two-thirds of the High Contracting Parties. Such conventions may stipulate that the Court of Justice shall have jurisdiction to interpret their provisions and to rule on any disputes regarding their application, in accordance with such arrangements as they may lay down.

Article K.4

1. A Coordinating Committee shall be set up consisting of senior officials. In addition to its coordinating role, it shall be the task of the Committee to:
 - give opinions for the attention of the Council, either at the Council's request or on its own initiative;
 - contribute, without prejudice to Article 151 of the Treaty establishing the European Community, to the preparation of the Council's discussions in the areas referred to in Article K.1 and, in accordance with the conditions laid down in Article 100d of the Treaty establishing the European Community, in the areas referred to in Article 100c of that Treaty.
2. The Commission shall be fully associated with the work in the areas referred to in this Title.
3. The Council shall act unanimously, except on matters of procedure and in cases where Article K.3 expressly provides for other voting rules. Where the Council is required to act by a qualified majority, the votes of its members shall be weighted as laid down in Article 148(2) of the Treaty establishing the European Community, and for their adoption, acts of the Council shall require at least fifty-four votes in favour, cast by at least eight members.

Article K.5

Within international organizations and at international conferences in which they take part, Member States shall defend the common positions adopted under the provisions of this Title.

Article K.6

The Presidency and the Commission shall regularly inform the European Parliament of discussions in the areas covered by this Title.

The Presidency shall consult the European Parliament on the principal aspects of activities in the areas referred to in this Title and shall ensure that the views of the European Parliament are duly taken into consideration.

The European Parliament may ask questions of the Council or make recommendations to it. Each year, it shall hold a debate on the progress made in implementation of the areas referred to in this Title.

Article K.7

The provisions of this Title shall not prevent the establishment or development of closer cooperation between two or more Member States in so far as such cooperation does not conflict with, or impede, that provided for in this Title.

Article K.8

1. The provisions referred to in Articles 137, 138, 139 to 142, 146, 147, 150 to 153, 157 to 163 and 217 of the Treaty establishing the European Community shall apply to the provisions relating to the areas referred to in this Title.

2. Administrative expenditure which the provisions relating to the areas referred to in this Title entail for the institutions shall be charged to the budget of the European Communities.

The Council may also:

- either decide unanimously that operational expenditure to which the implementation of those provisions gives rise is to be charged to the budget of the European Communities; in that event, the budgetary procedure laid down in the Treaty establishing the European Community shall be applicable;
- or determine that such expenditure shall be charged to the Member States, where appropriate in accordance with a scale to be decided.

Article K.9

The Council, acting unanimously on the initiative of the Commission or a Member State, may decide to apply Article 100c of the Treaty establishing the European Community to action in areas referred to in Article K.1(1) to (6), and at the same time determine the relevant voting conditions relating to it. It shall recommend the Member States to adopt that decision in accordance with their respective constitutional requirements.

Appendix II – Title IV of the Amsterdam Treaty: Visa, Asylum, Immigration and other policies related to the free movement of persons

Article 61

In order to establish progressively an area of freedom, security and justice, the Council shall adopt:

- (a) within a period of five years after the entry into force of the Treaty of Amsterdam, measures aimed at ensuring the free movement of persons in accordance with Article 14, in conjunction with directly related flanking measures with respect to external border controls, asylum and immigration, in accordance with the provisions of Article 62(2) and (3) and Article 63(1)(a) and (2)(a), and measures to prevent and combat crime in accordance with the provisions of Article 31(e) of the Treaty on European Union;
- (b) other measures in the fields of asylum, immigration and safeguarding the rights of nationals of third countries, in accordance with the provisions of Article 63;
- (c) measures in the field of judicial cooperation in civil matters as provided for in Article 65;
- (d) appropriate measures to encourage and strengthen administrative cooperation, as provided for in Article 66;
- (e) measures in the field of police and judicial cooperation in criminal matters aimed at a high level of security by preventing and combating crime within the Union in accordance with the provisions of the Treaty on European Union.

Article 62

The Council, acting in accordance with the procedure referred to in Article 67, shall, within a period of five years after the entry into force of the Treaty of Amsterdam, adopt:

- (1) measures with a view to ensuring, in compliance with Article 14, the absence of any controls on persons, be they citizens of the Union or nationals of third countries, when crossing internal borders;
- (2) measures on the crossing of the external borders of the Member States which shall establish:
 - (a) standards and procedures to be followed by Member States in carrying out checks on persons at such borders;
 - (b) rules on visas for intended stays of no more than three months, including:
 - (i) the list of third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement;
 - (ii) the procedures and conditions for issuing visas by Member States;
 - (iii) a uniform format for visas;
 - (iv) rules on a uniform visa;
- (3) measures setting out the conditions under which nationals of third countries shall have the freedom to travel within the territory of the Member States during a period of no more than three months.

Article 63

The Council, acting in accordance with the procedure referred to in Article 67, shall, within a period of five years after the entry into force of the Treaty of Amsterdam, adopt:

(1) measures on asylum, in accordance with the Geneva Convention of 28 July 1951 and the Protocol of

31 January 1967 relating to the status of refugees and other relevant treaties, within the following areas:

(a) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum submitted by a national of a third country in one of the Member States,

(b) minimum standards on the reception of asylum seekers in Member States,

(c) minimum standards with respect to the qualification of nationals of third countries as refugees,

(d) minimum standards on procedures in Member States for granting or withdrawing refugee status;

(2) measures on refugees and displaced persons within the following areas:

(a) minimum standards for giving temporary protection to displaced persons from third countries who cannot return to their country of origin and for persons who otherwise need international protection,

(b) promoting a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons;

(3) measures on immigration policy within the following areas:

(a) conditions of entry and residence, and standards on procedures for the issue by Member States of long term visas and residence permits, including those for the purpose of family reunion,

(b) illegal immigration and illegal residence, including repatriation of illegal residents;

(4) measures defining the rights and conditions under which nationals of third countries who are legally resident in a Member State may reside in other Member States.

Measures adopted by the Council pursuant to points 3 and 4 shall not prevent any Member State from maintaining or introducing in the areas concerned national provisions which are compatible with this Treaty and with international agreements. Measures to be adopted pursuant to points 2(b), 3(a) and 4 shall not be subject to the five year period referred to above.

Article 64

1. This Title shall not affect the exercise of the responsibilities incumbent upon Member States with

regard to the maintenance of law and order and the safeguarding of internal security.

2. In the event of one or more Member States being confronted with an emergency situation characterised by a sudden inflow of nationals of third countries and without prejudice to paragraph 1, the Council may, acting by qualified majority on a proposal from the Commission, adopt provisional measures of a duration not exceeding six months for the benefit of the Member States concerned.

Article 65

Measures in the field of judicial cooperation in civil matters having cross-border implications, to be taken in accordance with Article 67 and insofar as necessary for the proper functioning of the internal market, shall include:

(a) improving and simplifying:

- the system for cross-border service of judicial and extrajudicial documents;
- cooperation in the taking of evidence;
- the recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases;

(b) promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction;

(c) eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States.

Article 66

The Council, acting in accordance with the procedure referred to in Article 67, shall take measures to ensure cooperation between the relevant departments of the administrations of the Member States in the areas covered by this Title, as well as between those departments and the Commission.

Article 67

1. During a transitional period of five years following the entry into force of the Treaty of Amsterdam, the Council shall act unanimously on a proposal from the Commission or on the initiative of a Member State and after consulting the European Parliament.

2. After this period of five years:

- the Council shall act on proposals from the Commission; the Commission shall examine any request made by a Member State that it submit a proposal to the Council;

- the Council, acting unanimously after consulting the European Parliament, shall take a decision with a view to providing for all or parts of the areas covered by this Title to be governed by the procedure referred to in Article 251 and adapting the provisions relating to the powers of the Court of Justice.

3. By derogation from paragraphs 1 and 2, measures referred to in Article 62(2)(b) (i) and (iii) shall, from the entry into force of the Treaty of Amsterdam, be adopted by the Council acting by a qualified majority on a proposal from the Commission and after consulting the European Parliament.

4. By derogation from paragraph 2, measures referred to in Article 62(2)(b) (ii) and (iv) shall, after a period of five years following the entry into force of the Treaty of Amsterdam, be adopted by the Council acting in accordance with the procedure referred to in Article 251.

Article 68

1. Article 234 shall apply to this Title under the following circumstances and conditions: where a question on the interpretation of this Title or on the validity or interpretation of acts of the institutions of the Community based on this Title is raised in a case pending before a court or a tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

2. In any event, the Court of Justice shall not have jurisdiction to rule on any measure or decision taken pursuant to Article 62(1) relating to the maintenance of law and order and the safeguarding of internal security.

3. The Council, the Commission or a Member State may request the Court of Justice to give a ruling on a question of interpretation of this Title or of acts of the institutions of the Community based on this Title. The ruling given by the Court of Justice in response to such a request shall not apply to judgments of courts or tribunals of the Member States which have become *res judicata*.

Article 69

The application of this Title shall be subject to the provisions of the Protocol on the position of the United Kingdom and Ireland and to the Protocol on the position of Denmark and without prejudice to the Protocol on the application of certain aspects of Article 14 of the Treaty establishing the European Community to the United Kingdom and to Ireland.

Appendix III – Council Decision 2004/927/EC

Council Decision

of 22 December 2004

providing for certain areas covered by Title IV of Part Three of the Treaty establishing the European Community to be governed by the procedure laid down in Article 251 of that Treaty

(2004/927/EC)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular the second indent of Article 67(2) thereof,

Having regard to the Opinion of the European Parliament,

Whereas:

(1) Under the Treaty of Amsterdam the European Community acquired the power to adopt measures in the field of visas, asylum, immigration and other policies relating to the free movement of persons, as laid down in Title IV of Part Three of the Treaty establishing the European Community (hereinafter "the Treaty").

(2) Under Article 67 of the Treaty, as introduced by the Treaty of Amsterdam, most of those measures were to be adopted by the Council acting unanimously after consulting the European Parliament.

(3) Under the second indent of paragraph 2, of the same Article 67, the Council, acting unanimously after consulting the European Parliament, shall take a decision, after a transitional period of five years following the entry into force of the Treaty of Amsterdam, with a view to providing for all or parts of the areas covered by Title IV to be governed by the procedure referred to in Article 251 thereof.

(4) Pursuant to Article 67(5) of the Treaty which was added by the Treaty of Nice the Council shall, in accordance with the procedure laid down in Article 251, adopt the asylum-related measures provided for in Article 63(1) and (2)(a) provided that the Council has, unanimously and after consultation of the European Parliament, adopted Community legislation defining the common rules and basic principles governing those issues, as well as the measures on judicial cooperation in civil matters provided for in Article 65 with the exception of aspects relating to family law; those provisions are not affected by this Decision.

(5) Moreover, pursuant to the Protocol on Article 67 of the Treaty, annexed to that Treaty by the Treaty of Nice, as from 1 May 2004 the Council shall act by a qualified majority, on a proposal from the Commission and after consulting the European Parliament, when adopting the measures referred to in Article 66 of the Treaty; that Protocol is not affected by this Decision.

(6) In addition to that which follows from the Treaty of Nice, when approving "the Hague Programme": "Strengthening Freedom, Security and Justice in the European Union" at its meeting on 4 and 5 November 2004 the European Council asked the Council to adopt a decision based on Article 67(2) of the Treaty no later than 1 April 2005 to the effect that the Council is required to act in accordance with the procedure laid down in Article 251 when adopting, in conformity with the case law of the Court of Justice relating to the choice of legal basis for Community acts, the measures referred to in Article 62(1), (2)(a) and (3) and Article 63(2)(b) and 3(b) of the Treaty.

(7) However, the European Council took the view that, pending the entry into force of the Treaty establishing a Constitution for Europe, the Council should continue to act unanimously after consulting the European Parliament when adopting measures in the field of the legal migration of third-country nationals to and between Member States referred to in Article 63(3)(a) and (4) of the Treaty.

(8) The transition to co-decision procedures for the adoption of measures referred to in Article 62(1) of the Treaty is without prejudice to the requirement for the Council to act unanimously when taking the decisions referred to in Article 3(2) of the Act of Accession of 2003, Article 15(1) of the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the, implementation, application and development of the Schengen acquis [1], Article 4 of the Protocol annexed to the Treaty on the European Union and to the Treaty establishing the European Community integrating the Schengen acquis into the framework of the European Union and any future accession treaty.

(9) The transition to codecision procedures for the adoption of measures referred to in Article 62(2)(a) of the Treaty is without prejudice to the competence of the Member States concerning the geographical demarcation of their borders, in accordance with international law.

(10) Incentive measures to support the action of Member States regarding the integration of third country nationals residing legally in their territories might be adopted by the Council acting in accordance with the appropriate legal basis provided for in the Treaty.

(11) As a consequence of the transition to co-decision procedures for the adoption of measures referred to in Articles 62(2) and (3) of the Treaty, the Regulations reserving to the Council implementing powers with regard to certain detailed provisions and practical procedures for examining visa applications and for carrying out border checks and surveillance should be amended so as to require the Council to act by qualified majority in those cases.

(12) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark does not take part in the adoption of this Decision and is not bound by it or subject to its application.

(13) In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and to the Treaty

establishing the European Community, those Member States have notified their wish to take part in the adoption and application of this Decision,

HAS DECIDED AS FOLLOWS:

Article 1

1. As from 1 January 2005 the Council shall act in accordance with the procedure laid down in Article 251 of the Treaty when adopting measures referred to in Article 62(1), (2)(a) and (3) of the Treaty.

2. As from 1 January 2005 the Council shall act in accordance with the procedure laid down in Article 251 of the Treaty when adopting measures referred to in Article 63(2)(b) and (3)(b) of the Treaty.

Article 2

Article 251 of the Treaty shall apply to opinions of the European Parliament obtained by the Council before 1 January 2005 concerning proposals for measures with respect to which the Council shall act, pursuant to this Decision, in accordance with the procedure laid down in Article 251 of the Treaty.

Article 3

1. In Article 1(1) and (2) of Council Regulation (EC) No 789/2001 of 24 April 2001 reserving to the Council implementing powers with regard to certain detailed provisions and practical procedures for examining visa applications [2] the words "acting unanimously" shall be replaced by "acting by qualified majority" with effect from 1 January 2005.

2 In Article 1(1) of Council Regulation (EC) No 790/2001 of 24 April 2001 reserving to the Council implementing powers with regard to certain detailed provisions and practical procedures for carrying out border checks and surveillance [3] the words "acting unanimously" shall be replaced by "acting by qualified majority" with effect from 1 January 2005.

Done at Brussels, 22 December 2004.

For the Council

The President

C. Veerman

[1] Council doc. 13054/04 accessible on <http://register.consilium.eu.int>

[2] OJ L 116 of 26.4.2001, p. 2.

[3] OJ L 116 of 26.4.2001, p. 5.

Appendix IV – Overview of the JHA decision-making rules after the entry into force of the Maastricht Treaty (1st of November, 1993)

- **Third Pillar (intergovernmental)**

Art.	Provision description	Right of initiative	Voting rule in the Council	ECJ jurisdiction	Passerelle available (Article K.9)
K.1(1)	asylum policy	Shared (Commission + MS)	Unanimity	No	Yes (unanimity + national ratification)
K.1(2)	rules governing the crossing by persons of the external borders of the Member States and the exercise of controls thereon	Shared (Commission + MS)	Unanimity	No	Yes (unanimity + national ratification)
K1.(3)	immigration policy and policy regarding nationals of third countries: (a) conditions of entry and movement by nationals of third countries on the territory of Member States (b) conditions of residence by nationals of third countries on the territory of Member States, including family reunion and access to employment; (c) combatting unauthorized immigration, residence and work by nationals of third countries on the territory of Member States	Shared (Commission + MS)	Unanimity	No	Yes (unanimity + national ratification)
K1.(4)	combatting drug addiction in so far as this is not covered by 7 to 9	Shared (Commission + MS)	Unanimity	No	Yes (unanimity + national ratification)
K1.(5)	combatting fraud on an international scale in so far as this is not covered by 7 to 9	Shared (Commission + MS)	Unanimity	No	Yes (unanimity + national ratification)
K1.(6)	judicial cooperation in civil matters	Shared (Commission + MS)	Unanimity	No	Yes (unanimity + national ratification)
K1.(7)	judicial cooperation in criminal matters	Only Member States	Unanimity	No	No
K1.(8)	customs cooperation	Only Member States	Unanimity	No	No
K1.(9)	police cooperation (...)	Only Member States	Unanimity	No	No

- **First Pillar (supranational)**

Art.	Provision description	Right of initiative	Voting rule in the Council	ECJ jurisdiction	Passerelle available (Article K.9)
100c	black visa list	Exclusive (Commission)	Unanimity (QMV from 1 st of January 1996)	Yes	Not necessary
100c	rules concerning a uniform format for visas	Exclusive (Commission)	QMV	Yes	Not necessary

Appendix V - Overview of the JHA decision-making rules after the entry into force of the Amsterdam Treaty (1st of May, 1999)

Art.	Provision description	Right of initiative**	Voting rule in the Council	ECJ jurisdiction	Passerelle available (Article 67(2), Second Indent)
62(1)	Measures with a view to ensuring the absence of any controls on persons, be they citizens of the Union or nationals of third countries, when crossing internal borders.	Shared (Commission + MS)	Unanimity	Yes	Yes (unanimity)
62(2)(a)	Standards and procedures to be followed by Member States in carrying out checks on persons at the external borders.	Shared (Commission + MS)	Unanimity	Yes	Yes (unanimity)
62(2)(b)(i)*	The list of third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement.*	Exclusive (Commission)	QMV	Yes	Not necessary
62(2)(b)(ii)	The procedures and conditions for issuing visas by Member States.	Shared (Commission + MS)	Unanimity	Yes	Automatic transfer to QMV after five years
62(2)(b)(iii)*	A uniform format for visas*	Exclusive (Commission)	QMV	Yes	Not necessary
62(2)(b)(iv)	Rules on a uniform visa	Shared (Commission + MS)	Unanimity	Yes	Automatic transfer to QMV after five years
62(2)(3)	Measures setting out the conditions under which nationals of third countries shall have the freedom to travel within the territory of the Member States during a period of no more than three months.	Shared (Commission + MS)	Unanimity	Yes	Yes (unanimity)
63(1)(a)	Criteria and mechanisms for determining which Member States is responsible for considering an application for asylum submitted by a national of a third country in one of the Member States.	Shared (Commission + MS)	Unanimity	Yes	Yes (unanimity)

63(1)(b)	Minimum standards on the reception of asylum seekers in Member States.	Shared (Commission + MS)	Unanimity	Yes	Yes (unanimity)
63(1)(c)	Minimum standards with respect to the qualification of nationals of third countries as refugees.	Shared (Commission +MS)	Unanimity	Yes	Yes (unanimity)
63(1)(d)	Minimum standards for granting or withdrawing refugee status.	Shared (Commission + MS)	Unanimity	Yes	Yes (unanimity)
63(2)(a)	Minimum standards for giving temporary protection to displaced persons from third countries who cannot return to their country of origin and for persons who otherwise need international protection	Shared (Commission + MS)	Unanimity	Yes	Yes (unanimity)
63(2)(b)	Promoting a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons	Shared (Commission + MS)	Unanimity	Yes	Yes (unanimity)
63(3)(a)	Conditions of entry and residence, and standards on procedures for the issue by Member States of long term visas and residence permits, including those for the purpose of family reunion.	Shared (Commission + MS)	Unanimity	Yes	Yes (unanimity)
63(3)(b)	Illegal immigration and illegal residence, including repatriation of illegal residents.	Shared (Commission + MS)	Unanimity	Yes	Yes (unanimity)
63(4)	Measures defining the rights and conditions under which nationals of third countries who are legally resident in a Member State may reside in another Member States.	Shared (Commission + MS)	Unanimity	Yes	Yes (unanimity)

* Provisions already in the first pillar since the entry into force of the Maastricht Treaty.

** According to the *passerelle* (Article 67(2), First Indent), the Commission shall gain the exclusive right of initiative in all areas after a five year transitional period.

Appendix VI – Overview of the JHA decision-making rules after the expiry of the five year transitional period envisaged by the Amsterdam Treaty and after the application of the *passerelle* by the Council of Ministers through the 2004/927/EC Decision

Art.	Provision description	Right of initiative	Voting rule in the Council	ECJ jurisdiction	Passerelle used (Article 67(2), second indent)
62(1)	Measures with a view to ensuring the absence of any controls on persons, be they citizens of the Union or nationals of third countries, when crossing internal borders.	Exclusive (Commission)	QMV	Yes	Council Decision 2004/927/EC 22.12.2004
62(2)(a)	Standards and procedures to be followed by Member States in carrying out checks on persons at the external borders.	Exclusive (Commission)	QMV	Yes	Council Decision 2004/927/EC 22.12.2004
62(2)(b)(i)*	The list of third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement.*	Exclusive (Commission)	QMV	Yes	Not necessary
62(2)(b)(ii)	The procedures and conditions for issuing visas by Member States.	Exclusive (Commission)	QMV	Yes	Automatic transfer to QMV after five years
62(2)(b)(iii)*	A uniform format for visas*	Exclusive (Commission)	QMV	Yes	Not necessary
62(2)(b)(iv)	Rules on a uniform visa	Exclusive (Commission)	QMV	Yes	Automatic transfer to QMV after five years
62(2)(3)	Measures setting out the conditions under which nationals of third countries shall have the freedom to travel within the territory of the Member States during a period of no more than three months.	Exclusive (Commission)	QMV	Yes	Council Decision 2004/927/EC 22.12.2004
63(1)(a)	Criteria and mechanisms for determining which Member States is responsible for considering an application for asylum submitted by a national of a third country in one of the Member States.	Exclusive (Commission)	Unanimity	Yes	Not yet used

63(1)(b)	Minimum standards on the reception of asylum seekers in Member States.	Exclusive (Commission)	Unanimity	Yes	Not yet used
63(1)(c)	Minimum standards with respect to the qualification of nationals of third countries as refugees.	Exclusive (Commission)	Unanimity	Yes	Not yet used
63(1)(d)	Minimum standards for granting or withdrawing refugee status.	Exclusive (Commission)	Unanimity	Yes	Not yet used
63(2)(a)	Minimum standards for giving temporary protection to displaced persons from third countries who cannot return to their country of origin and for persons who otherwise need international protection	Exclusive (Commission)	Unanimity	Yes	Not yet used
63(2)(b)	Promoting a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons	Exclusive (Commission)	QMV	Yes	Council Decision 2004/927/EC 22.12.2004
63(3)(a)	Conditions of entry and residence, and standards on procedures for the issue by Member States of long term visas and residence permits, including those for the purpose of family reunion.	Exclusive (Commission)	Unanimity	Yes	Not yet used
63(3)(b)	Illegal immigration and illegal residence, including repatriation of illegal residents.	Exclusive (Commission)	QMV	Yes	Council Decision 2004/927/EC 22.12.2004
63(4)	Measures defining the rights and conditions under which nationals of third countries who are legally resident in a Member State may reside in another Member States.	Exclusive (Commission)	Unanimity	Yes	Not yet used

* Provisions already in the first pillar since the entry into force of the Maastricht Treaty.

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