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Mdladla, Gugulethu Delisile

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IS THE EUROPEAN UNION A POLITICAL UNION?

AN ANALYSIS OF THE POLICY AREA OF FREEDOM, SECURITY AND JUSTICE

Gugulethu Delisile Mdladla

A research report submitted to the Faculty of Humanities, University of the Witwatersrand, Johannesburg, in fulfilment of the requirements for the degree of Master of Arts.

Johannesburg 2007

ABSTRACT

The purpose of this research report is to investigate whether the European Union has begun to take the form of a political union, both in terms of the policy areas it has expanded its activities into and the nature of this activity in these areas. It examines the decision-making, in particular, type, range and ramifications thereof, in the area of freedom, security and justice, which is a controversial and political policy area, in order to determine how pre-emptive the action emanating from the supranational is in relation to national governments. If the decisions are substantially pre-emptive, then it can be concluded that the European Union has gained authority and power in an important area and thus in general, has a political character and is in the process of becoming a political union.

DECLARATION

I declare that this research report is my own work. It is submitted for the degree of Master of Arts at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in any other university.

_____

Gugu Mdladla

29 February 2008.

DEDICATIONS

For He knows the thoughts and plans he has for me; thoughts and plans for welfare and peace. He giveth me hope in my final outcome, always and through all things.

See what the LORD has done. Great is Your faithfulness Father...

My boundless gratitude goes out to friends and family who have concerned themselves with my progress throughout this report. You have all been so genuine and sincere. Thank you for your prayers, encouragement, enlightenment, and at times, much-needed distraction. May each of you be blessed exceedingly and beyond all measure.

PREFACE

The research report is important insofar as it contributes to the academic debate about whether the European Union is a political union. Over the years, its organisational powers have steadily increased and it has begun to take decisions in some areas, which have historically been the preserve of states, thus leading many to conclude that it has become truly supranational and more powerful than member states. At face value, this may seem true, but it is important to examine the functions of the European Union in detail, through its decision-making in order to assess the real extent of this power. The use of theories such as neo-functionalism and intergovernmentalism is also helpful in explaining the processes observed throughout its [European Union] development and by combining theory with observation, a conclusion can be made about whether the European Union is indeed a burgeoning political union or not.

Sincerest thanks to my supervisor Natalie Zähringer. I appreciate your commitment, hard work, interest and encouragement. Your guidance truly made all the difference.

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LIST OF ABBREVIATIONS

AFSJ	Area of Freedom, Security & Justice
CCI	Common Consular Instructions
CELAD	European Community to Combat Drugs
CEPOL	European Police College
CFSP	Common Foreign & Security Policy
DG	Directorates-General
EC	European Community
ECJ	European Court of Justice
ECSC	European Coal and Steel Community
EEC	European Economic Community
EJN	European Judicial Network
EMCDDA	European Drug and Drug Addiction Monitoring Centre
EMU	Economic and Monetary Union
EP	European Parliament
EU	European Union
Euratom	European Atomic Energy Community
Eurojust	European Union's Judicial Cooperation Unit
Europol	European Police Office
JHA	Justice and Home Affairs
QMV	Qualified Majority Voting
SEA	Single European Act
SIS	Schengen Information System
SIS II	Schengen Information System II
TEU	Treaty on the European Union
WWII	World War II

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INTRODUCTION

AIM

The purpose of this research undertaking is to try to determine whether the European Union, commonly known as the EU, displays the characteristics of a political union. This will be done by focusing on the decision-making capabilities of the system and not necessarily its governing structure or powers thereof because the former will reveal more about the actual influence of the system vis-à-vis policy formulation than the latter. The enquiry will look at issues such as the nature of decisions taken and their effect insofar as they pre-empt national action. For practicality, the study will focus on a specific policy area as a microcosm of the whole EU decision-making system in the hope that the results will allow us to make conjecture about the general development of the EU's authority in political policy areas. The hope is that it will be shown that, despite current obstacles and shortcomings, the EU is emerging as a decision-making system, whose decisions and growing influence and authority in certain policy areas is indicative of development towards a political union.

The case study will focus on an area which, for long, has been identified as being fundamental to statehood; a controversial policy area where consensus has been elusive, but in which, if cooperation is productive and relatively pre-emptive, it can be concluded that this is indicative of a real transference of political power to the EU and of its overall movement towards eventually becoming a political union. The policy area in question is that of the *Area of Freedom, Security & Justice (AFSJ).*

RATIONALE

The motivation behind the study stems from the current debate in EU studies concerning political integration. Scholars and practitioners are calling for a solution to the current leadership and institutional impasse that exists between the 'supranational' EU and national governments, an impasse that recently culminated in the rejection of the EU

Constitution in 2005.[1] Some even argue that the collapse of the economic and monetary union is imminent within the next 20 years if a clear and effective transfer of power to the supranational does not occur.[2] Economic integration, out of which the EU was born, has largely been a successful undertaking. EU founding fathers had originally envisioned the political integration of member states evolving out of the economic integration project and current events suggest that this development may already be underway. Over the years, the EU has steadily moved into acting in more controversial areas, such as defence policy, citizenship and voting rights and certain aspects of social welfare. These areas are considered as traditionally more 'political' than the areas where integration initially started because they are either concerned with resource allocation or involve some functions which are intrinsic to the existence of states. Furthermore, the structures and processes employed have slowly evolved to such a degree that they have increasingly given more authority to the supranational, thus the need to begin a serious debate about the existence of a political union. This research report will therefore focus on issues such as the types of decisions the EU makes, and their effect in the chosen policy area, in an effort to determine whether this supposed politicisation of the EU is superficial or actually extends beyond appearances to influence policy outcomes.

Differing theoretical persuasions will no doubt lead to different assumptions and conclusions about the process or expected end-point of political integration. In integration studies, it seems that no one school of thought has been able to fully capture the essence of European integration, thus not only are definitions of political integration as divergent, they are difficult concepts to grasp because of the sheer complexity of trying to define such a phenomenon. Out of the differing persuasions, neo-functionalist scholars have, in my opinion, most appropriately defined integration as it is currently unfolding and it this conception of political integration that I will base my perspective and conclusions on in this report. The aim is to contribute to the neo-functionalist argument that as integration unfolds, it spills over into even more controversial and

[1] Mahony, H., 'Germany sends letter to salvage constitution'. EUObserver.com, 23 April 2007, http://euobserver.com/18/23921.
[2] Kubosova, L., 'Economists call for political union to prevent euro collapse', *EUobserver*, 24 April 2006, http://euobserver.com.

political policy areas, thus eventually creating a political union. Through the examination of the decision-making in the AFSJ, the argument will be that the EU is indeed becoming a political union, albeit one that is still at the very early stages of such development. Furthermore, it is hoped that the report will confirm the neo-functionalist argument that integration is a process and not an instantaneous occurrence.

The report will now move into the first chapter, which provides the theoretical and analytical framework on which this work is based.

CHAPTER I

THEORETICAL & ANALYTICAL FRAMEWORK

INTRODUCTION

This chapter will examine the different theoretical aspects relevant to a study such as this and will attempt to make the argument that the school most suited to deconstructing and understanding current and past EU integration is neo-functionalism. It will also provide a brief explanation of the variables chosen for examination and will show how these are helpful in revealing the extent of the evolution of a decision-making system, which, in this case, is being taken as an indicator of the political character that such a system ought to have.

NEO-FUNCTIONALISM

Neo-functionalism is most associated with Haas, its leading exponent, and is thought to have been the school that most influenced the founding fathers of Europe.[3] Essentially, neo-functionalists hold that integration in certain sectors, brought under a central authority, will rouse the interest of other interest groups across society, leading to further integration and a shift in loyalty from the national to the supranational.[4] Harrison adds:

> [T]he sector chosen must be important and controversial, but not so controversial that the *vital* interests of the states are immediately affected, nor so that political elites feel that their power and vested interests are seriously threatened.[5]

Given the importance of coal and steel production in Europe after World War II (WW II), one can argue that the decision to integrate these industries reflected neo-functionalist

[3] Pinder, J., *European Community: The Building of a Union*, Oxford University Press: Oxford, 1991, p. 12.
[4] Harrison, R. J., *Europe in Question: Theories of Regional International Integration*, London: George Allen & Unwin, 1974, p. 76.
[5] *Loc. Cit.*

logic. According to neo-functionalists, the state is not primary to integration, although it is an important actor. Different types of self-interested actors operate within the pluralist setting alongside states, to drive the process.[6] The eventual transference of loyalty to the newly created central bodies leads to their becoming the new centres of authority.[7] Eventually, integration reaches that seemingly impenetrable dimension of the political via the process of spillover.[8]

Spillover was described as the condition whereby "policies made pursuant to an initial task and grant of power can be made real only if the task itself is expanded, as reflected in the compromises among the states interested in the task."[9] Lindberg simplified it by saying:

> [A] given action, related to a specific goal, creates a situation in which the original goal can be assured only by taking further actions, which in turn create a further condition and a need for more action, and so forth.[10]

Lindberg later admitted, "[T]he evidence suggests that governments can avoid the logical consequences of integration for an unexpectedly long time."[11] This led to the furious revision of the concept of spillover in an effort to reconcile it with the reality, which was that further integration was more actor-driven than automatic, as the concept of spillover had initially suggested.[12]

Has the EU reached the political dimension of integration according to a neo-functionalist perspective? One could easily argue that it has. There is the on-going constitutional debate; the achievement of a single market and several other achievements in different policy areas, which, if we use neo-functionalist reasoning, require cooperation that is more political and transference of actual authority to the EU. These all

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[6] Rosamond, B., *Theories of European Integration*, Macmillan, 2000, p. 55.
[7] *Loc. Cit*.
[8] Harrison, R. J., *Op. Cit.*, p. 77.
[9] Haas, E. B., (1) 'International Integration: the European and the Universal Process', *International Organization*, 15, 1961, p. 368.
[10] Lindberg, L., (1) *The Political Dynamics of European Economic Integration*, Stanford: Stanford University Press, 1963, p. 10.
[11] Lindberg, L., (2) 'Decision making and integration in the European Community', in *International Political Communities*, New York: Doubleday, 1966, p. 228.
[12] Rosamond, B., *Op. Cit*., p. 63.

point to the emergence of a political union. Therefore, a critical analysis of the EU decision-making processes in the AFSJ will prove useful because it will reveal the extent and depth to which the EU has actually gained power in these new areas of activity. Only then can a real conclusion be made about the emergence of a political union. In arguing that the EU is a political union, a neo-functionalist approach will be adopted. The argument will be that spillover has created a supranational body, which has taken over the governing of some of the policy areas of national governments within the EU and thus accrued the powers associated with governing such areas.

INTERGOVERNMENTALISM

The other school of thought, intergovernmentalism, will be used to explain the outcome should the research show that the EU is clearly still in the throes of intergovernmental cooperation and decision-making. Intergovernmentalism, at different points of European integration, has held more explanatory power than neo-functionalism. It is an important theory to use because it helps us to understand the hesitancy states sometimes display and may account for what neo-functionalists see as integration of fits and starts. Of course, intergovernmentalists do not see the EU as supranational or as more powerful than national governments; they see it as an intergovernmental organisation whose powers are controlled by states. In other words, it is not an autonomous/independent body nor can it ever be a political union.

> [T]he joining together of distinct historically constituted polities through a politics of accommodation, institutionalized compromise and an informal culture of consensus-building at the highest political level…is part of a wider political evolution that poses no direct challenge to the constitutional conditions of sovereignty itself.[13]

According to intergovernmentalists therefore, all joint action is a way of fulfilling certain interests which, according to the reasoning of national actors, are better met through such a setting rather than through individual national action. States therefore compromise and negotiate on issues until consensus is reached, and this, according to intergovernmentalists, is the only function of such a polity.[14] It is not the creation of a

[13] Chryssochoou, D., *Theorizing European Integration*, Sage Publications, 2001, p. 26.
[14] *Loc. Cit*.

supranational body, which then dictates policy, and this ought to be achieved, to member states.[15] If the EU is completely dependent on member states for dictating its activities and most bargaining involves agreeing on lowest common denominator solutions, then intergovernmentalists are right. However, the development of decision-making in the EU has not always been of the lowest common denominator kind. Initially it may start that way, but over time, and through the process, it develops and eventually new and pioneering decisions are made and agreement is reached in areas of high politics. An example of such development has been the development of economic and monetary policy in the EU. This is why, although neo-functionalism cannot explain all of integration, the theory holds real power in its assertion that integration is a long, and sometimes overdrawn process. In that time, some intergovernmental processes will clearly be observable, but the theory [intergovernmentalism] does not sufficiently explain the development of the EU over time into increasingly more controversial areas nor does it explain the increments of power and authority that have gradually accrued to its supranational bodies. For this, it is necessary to refer to neo-functionalism.

If the argument is that there is a process of political integration leading to a political union, occurring, then it ought to be clear as to exactly what both those term means.

WHAT IS POLITICAL INTEGRATION?

The exact definition of political integration has for decades, remained elusive to EU scholars thus enabling several definitions to vie for recognition as the most fitting one. Of course, different starting points and theoretical viewpoints lead to different conclusions. Is integration the replication of traditional Westphalian forms of governance, albeit at a supranational level, or is it the dissolution of these traditional forms of governance and the creation of completely new forms, which nonetheless, qualify as instances of political union? If integration results in the latter, what criteria do we use to determine the existence of these new political configurations?

[15] *Loc. Cit.*

The study of the formation of political unions such as the EU is problematic because there are not very many such unions. The United States is one example, albeit a federal one, while any other such comparable regional undertakings are of an economic nature. Schmitter argues therefore, that what is emerging is something unlike a state, and we must not look to compare it with one in our appraisals.[16] He argues that the EU lacks the following, thus disqualifying it from being classified as a state:

> [A] locus of clearly defined authority, a central hierarchy of public offices, a distinct sphere of competence, a fixed territory, an exclusive recognition by other polities, an overarching identity, a monopoly over legitimate coercion and a unique capacity to impose its decisions.[17]

Caporaso argues that what is emerging is an entity that resembles a regulatory post-national state form rather than a traditional Westphalian state.[18] Therefore, in evaluating the EU entity, its structure and resources cannot be compared with those of a state. There will be aspects of it however, which will resemble a state in terms of its competence to govern and regulate certain areas. As Chryssochoou notes:

> Given the various conceptual and analytical difficulties involved in reaching an authoritative statement on the political and constitutional nature of the Union, we suggest that instead of placing undue emphasis on the peculiarities of its defining properties, it is perhaps more profitable to examine those aspects of its political organization which can be paralleled,…with already existing familiar models of governance.[19]

It is for this reason therefore, that decision-making was chosen as the focus of the report because it is one of few properties of a governing body, which can be paralleled to other existing models of governance and a conclusion made about the authority of that governing body without comparisons having to be drawn about the structure and organisation.

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[16] P. Schmitter, 'Some Alternative Futures for the European Polity & their Implications for European Public Policy' in Mény, Y. et al., (eds), *Adjusting to Europe: The Impact of the European Union on National Institutions and Policies*, London & New York: Routledge, 1996, as quoted in Chryssochoou, D., *Op. Cit.*, p. 20.
[17] Chryssochoou, D., *Op. Cit*., p. 20.
[18] Caporaso, J., 'The European Union & Forms of State: Westphalian, Regulatory or Post-modern?', *Journal of Common Market Studies*, 34, no. 1, 1996, pp. 29-52.
[19] Chryssochoou, D., *Op. Cit*., p. 24.

Many scholars have sought to describe the outcome of political integration by comparing it to federalism. In this instance, federalism is held up as the 'ideal type'.[20] Because it involves the merging of independent states to form a single one, it is bound to offer valuable insights into the process of integration. Federalism however is a solution, which results in instant and immediate political unity, whereas the route chosen in the case of the EU is more of a process. In addition, a federation is an explicit nation-state form of governance, whereas the current integration of the EU is not particularly headed towards statehood. It is these fundamental differences therefore, that limit the similarities and useful comparisons we can draw from federalism and the path that West European integration has taken.

Two scholars who wrote extensively on political integration as witnessed through the EU experience are Deutsch (from a sociological perspective) and the neo-functionalist Haas. Haas defined political integration as

> *the process whereby political actors in several distinct national settings are persuaded to shift their loyalties, expectations and political activities toward a new centre, whose institutions possess or demand jurisdiction over the pre-existing national states.* The end result of a process of political integration is a new political community superimposed over the pre-existing ones.[21] (emphasis in original)

Deutsch defined political integration in terms of the communication that took place among amalgamating states. By applying the following premise of national interaction to an international arena, he argued that political integration could be measured by the volume, content and scope of transactions among states.[22]

> [W]henever it is the case that a population shares values, preferences, life-styles, common memories…loyalties and identifications, it is also the case that people within this population communicate with one another (i.e. transact)

[20] Puchala, D. J., 'International Transactions and Regional Integration' in L. N. Lindberg & S. A. Scheingold, (eds), *Regional Integration: Theory and Research*, Cambridge: MA, Harvard University Press, 1971, p. 150.
[21] El-Agraa, A., "A History of European Integration and the Evolution of the EU", in E. El-Agraa, (ed.), *The European Union: Economics & Policies*, (7th ed), Prentice Hall, 2004, p. 16.
[22] K. W. Deutsch, (1) *Political Community at the International Level: Problems of Definition and Measurement*, Garden City: NY, Doubleday & Co., 1954 as paraphrased by Puchala, D. J., *Op. Cit.*, p. 138.

> frequently, rapidly, clearly and effectively, in balanced manner over multiple ranges of social, economic, cultural and political concerns.[23]

Clearly, for Deutsch, integration was dependent on an already existing shared sense of identity, values, and desires. He also held that integration was pursued in order to create security communities or zones of peace among states in a region.[24] This definition ties in with the socio-historical period in which it was proffered. Europe had just experienced the devastating effects of WW II, and in recovering, many quarters of society argued that lasting peace lay in a Europe unified across all strata. Such a definition clearly has a different focus from that of Haas.[25] For Haas, only certain actors mattered in the integration process.

> The initiation of a deliberate scheme of political unification, to be accepted by the key groups that make up a pluralistic society, does not require absolute majority support, nor need it rest on identical aims on the part of all participants.[26]

Seemingly, for Haas, it would have been enough if this commonality existed only among certain people: "[T]he acceptance of such a scheme is considerably eased if among the participating industrial, political, or labour groups there is a tradition, however vague, of mutual consultation and of rudimentary value sharing."[27] As far as Haas was concerned therefore, the actors who mattered were those who actively participated in integration as opposed to the people who actually experienced the effects of integration, i.e. the wider population.

Etzioni argued that a political community has

> an effective control over the means of violence; it has a centre of decision-making that is able to affect significantly the allocation of resources and

[23] Pinder, J., *Op. Cit.*, p. 6.
[24] Deutsch, K. W. et al., (2) *Political Community and the North Atlantic Area: International Organization in the Light of Historical Experience*, Princeton, NJ: Princeton University Press, 1957, p. 5.
[25] It is important to note however that Haas also argued that the motivation behind integration was the search for lasting peace. The only difference is that his argument was limited to institutions, the political elite, and government structures as opposed to society as a whole. E. B. Haas, (3) 'The Study of Regional Integration: Reflections on the Joy and Anguish of Pretheorizing' in Lindberg, L. N. & Scheingold, S. A., (eds), *Regional Integration: Theory and Research*, Cambridge: MA, Harvard University Press, 1971, p. 4.
[26] Haas, E. B., (4) *The Uniting of Europe: Political, Social and Economic Forces, 1950-1957*, Stanford: CA, Stanford University Press, 1958, p. xiii.
[27] *Loc. Cit.*

> rewards throughout the community and it is the dominant focus of political identification for the large majority of politically aware citizens.[28]

Etzioni's definition focused on both the new central authority and the shifting of loyalties of the wider population. He also argued that the new governing structure ought to control the means to violence. All that this would be however, is a replication of a state structure as states are the entities most often concerned with military capability.

Another theorist to define integration was Harrison who argued that

> [t]he integration process…may be…defined…as the attainment within an area of the bonds of political community: of central institutions with binding decision making powers and methods of control determining the allocation of values at the regional level and also of adequate consensus-formation mechanisms.[29]

His definition touches on important issues of effective governance; central institutions must function efficiently and their decisions taken seriously and enforced. Etzioni's focus on 'political identification' is important if representative legitimacy is chief to our determination of political unity, because it essentially brings to the fore the question of the relationship between the governor and the governed.

Lindberg defined political integration as the

> evolution over time of a collective decisionmaking system among nations. If the collective arena becomes the focus of certain kinds of decisionmaking activity, national actors will in that measure be constrained from independent action.[30]

In this volume of work, Lindberg goes on to outline the properties of a decision-making system that are characteristic of a political union.

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[28] Etzioni, A., *Political Unification: a Comparative Study of Leaders and Forces*, New York: Holt, Rinehart and Winston, 1965, p. 4.
[29] Harrison, R. J., *Op. Cit.*, p. 14.
[30] Lindberg, L. N., (3) 'Political Integration as a Multidimensional Phenomenon', in L. N. Lindberg & S. A. Scheingold, (eds), *Regional Integration: Theory and Research*, Cambridge: MA, Harvard University Press, 1971, p. 47.

Clearly, the above scholars have differing conceptions of what the crux of political integration is. For Lindberg it is the decision-making capabilities of the new central institution, particularly the level and scope (the extent to which members participate in joint problem solving), the demands made on the decision-making system by political actors and the consequences of the decisions made.[31] Haas, however, sees the identification with, and shifting of the loyalties of political actors to the new central institution as the main indicator of the occurrence of political integration.[32] Deutsch determined political integration by focusing on the intensity and frequency of transactions, among various groupings within the member states, both governmental and non-governmental.[33]

As different as the foci above are, the definitions have some points of convergence. Firstly, **integration is regarded as a process and not an instant solution**. Secondly, it **involves cooperation in the solving of common problems** or pursuit of common interests, which, according to Hass, Etzioni, Harrison and Lindberg, **occurs within a new central institution**. Haas adds that **political actors begin to identify with this new central body** as their loyalty shifts from the national to the 'supranational'. Etzioni and Harrison also mention the fact that the new central body must be able to **affect the allocation of resources at the lower levels**, such that its authority is visible and perceptible. As Lindberg notes, this signifies the diminished autonomy of national governments, thus pointing to a new supranational structure. Because the report specifically focuses on the decision-making system, it will not take into consideration the effects and implications of the governed (i.e. the demos) as Deutsch and Etzioni's definitions suggest.

The following section will articulate the variables chosen for study out of the ones that have just been discussed. It will also make clear the analytical foundation and framework of this work, thus setting out the manner in which the research will be conducted.

[31] *Ibid*, pp. 48-58.
[32] Haas, E. B., (4) *Op. Cit.*, p. xv.
[33] K. W. Deutsch, (1) *Op. Cit.*, p. 138.

ANALYTICAL FRAMEWORK

In general, integration scholars have failed to operationalise the variables often discussed in the area. "A fully operational definition is one 'which actually spell(s) out the procedures used in measurement' and which provides 'a detailed set of instructions enabling one to classify…unambiguously.'"[34] In general, the complexity and idiosyncrasy of the concepts in EU studies precludes most operationalisation and consequently, most conclusions are based on theoretical speculation which, often is not based on the operationalisation and study of variables in the field.

It is important however, to begin to break the mould and try to study integration phenomena in an empirical manner, in as much as is realistically possible. This may lead to a better understanding of relevant variables and how these may be ranked based on their effect on the speed of integration. In this case, I acknowledge that the decision-making system is not the only facet of integration, but I believe that it is the fundamental basis upon which, other facets of integration grow out of. The decision-making system is the central locus of joint activity and thus any enquiry into the nature of the polity as a whole, ought to include considerations of this structure.

LINDBERG'S MODEL

Out of all the scholars mentioned above, Lindberg is one scholar who sought to operationalise the study of the variables he had identified as important in determining political integration. He formulated a method through which the decision-making capabilities of central institutions can be studied to determine their efficacy. He tries to formulate an inclusive model, which examines all aspects of a decision-making system, thus allowing for a rich and extremely detailed analysis. His model includes a detailed operationalisation of the variables highlighted at the end of the previous section. These are, in my opinion, the most important variables to be studied in integration studies, because they focus on the central decision-making system. It is for this reason therefore,

[34] Blalock, Jr., H. M., Social Sciences, New York: McGraw-Hill, 1960, p. 9, as quoted in Lindberg, L. N., (3) *Op. Cit.*, p. 47.

that Lindberg's model will inform the analytical framework of this research report. In his method, Lindberg specifies three sub-headings through which the different variables of a decision-making system can be studied. They are the ***level of collective decision-making, animators of collective decision-making activity,*** and ***consequences of collective decisions***.[35]

A study into each of these variables would no doubt reveal different things about the decision-making system of the EU. Examining the consequences of collective decisions can reveal how effective these are at shifting or altering resource allocation at the national level. A study into the animators of the system may reveal the power dynamics at play between bargaining parties or highlight the intricacies and complexities of having national government representatives double up as supranational actors. Such a comprehensive study, i.e. one that encompasses all three facets of the joint system would be most interesting to conduct as it would give a rich and multifarious picture of the EU, which would allow for more accurate conclusions about the current status of the body. However, such a study would need to be conducted on a wider scope than that of this research report, as it would no doubt in some cases include the gathering of evidence from individual member states. Because of the limitations of the research report therefore, the focus will remain solely on the first sub-heading, that of ***level of decision-making***.

The following therefore, is a discussion of Lindberg's model vis-à-vis level of decision-making as described in his article '*Political Integration as a Multidimensional Phenomenon.*'[36]

LEVEL OF DECISION-MAKING

This criterion helps establish how evolved the joint decision-making mechanisms are and therefore how advanced the cohesion of the collective. Several issues fall under this heading such as scope of areas of joint action, range and depth of that action and how

[35] Lindberg, L. N., (3) *Op. Cit.*, pp. 45-120.
[36] *Loc. Cit.*

pre-emptive the collective decisions are vis-à-vis national policy. Easton argues that the individual members need not "form a community in the sociological sense of a group of members who have a sense of community or a set of common traditions."[37] In addition, the wider community need not share sentiments of community vis-à-vis the central authority. This is the same point made above about Haas' distinction between the actors who matter within the decision-making system and those merely affected by it.

Lindberg notes:

> It seems to be important to me to maintain these analytical distinctions between the division of political labor itself, sentiments about it (support), the specific forms it takes (e.g., supranationality), and sense of socio-historical community. There is no necessary reason to assume that they must exist together or that they are causally interrelated in any standard and predictable fashion.[38]

For Lindberg, these criteria are better classified as variable resources which are either available or unavailable to the decision-making system and which affect the turnaround of demands into palpable decisions as opposed to the actual functioning of the system.[39] As Haas argued, mass support was not necessary in order for political integration to occur and Fisher, an integration scholar, found that in the European case the two were not closely correlated.[40]

Lindberg's model looks at the level of collective decision-making by further sub-dividing the criterion into three, more focused and workable criteria. These are:

FUNCTIONAL SCOPE OF COLLECTIVE DECISION-MAKING

The aim here is to establish the extent to which decisions are made collectively, and in effect, how many areas that are the exclusive remit of national governments have now been introduced at the supranational level and therefore become areas of common policy. "Getting at this presumes some method of listing scopes of activity or functions

[37] Easton, D., *A Systems Analysis of Political Life*, New York: John Wiley & Sons, 1965, p. 177 as quoted in Lindberg, L. N., (3) *Op. Cit.*, p. 51.
[38] Lindberg, L. N., (3) *Op. Cit.*, p. 52.
[39] *Ibid*, pp. 48-49.
[40] Fisher, W. E., 'An Analysis of the Deutsch Sociocausal Paradigm of Political Integration', *International Organization*, Vol. 23, No. 2, Spring 1969, pp. 254-290 as quoted in Lindberg, L. N., (3) *Op. Cit.*, p. 52.

performed by collective decision-making systems, tabulating these lists, and comparing them both over time and across systems."[41] We already know that there are many policy areas handled, to varying extents, through the EU and thus if the report were focused on scope of decision-making (i.e. how many areas are subject to collective decision-making) it would be easy to list and tabulate these. However, because our scope is specifically focused on one policy area, it is not necessary to compile a whole list of policy areas falling under EU jurisdiction.

RANGE OF DECISION STAGES INVOLVED

In this instance, the aim is to determine at which stages collective processes are invoked along a continuum of increasingly meaningful joint action. This helps us to determine the number and nature of decisions made collectively with regard to any particular policy issue. If decisions are made at predecisional stages that only involve the hammering out of a skeletal framework, which individual member states can follow as they wish, then we are more likely to conclude that the system is rudimentary. Likewise if the opposite is true and decisions are made collectively right through to implementation and enforcement, then collective processes show that there is a decision-making system with a highly evolved political character to it. In the study therefore, I will conduct a detailed analysis of the various decisions taken with regard to the AFSJ to determine whether these merely consist of general policy outlines or are detailed and involve the joint implementation of common operational measures. An ordinal scale devised by Lindberg to measure range will be employed. At one end of the scale is represented the least range, i.e. simple collective problem recognition and at the opposite end, the greatest range of decision-making in the form of collective implementation and enforcement.[42]

RELATIVE DECISIVENESS OF COLLECTIVE ARENA

This criterion serves to illustrate the pre-emptiveness of decisions made in the collective arena. Within a given policy area, does the collective make decisions on areas of substantive weight or is decision-making limited to technical and non-controversial matters in that policy area, and to what extent do these decisions preclude national policy measures? The variable therefore aims to determine the importance and effectiveness of the decisions of the collective system with regard to a particular policy area. Is the EU

[41] Lindberg, L. N., (3) *Op. Cit.*, p. 59.
[42] *Ibid*, pp. 66-67.

only taking decisions vis-à-vis visa regulations among member states or with respect to third-country nationals? Are judicial cooperation measures limited to the fair and identical treatment of litigants or do they affect crucial judicial procedures? It will be necessary therefore to devise a list of the different topical issues within the AFSJ and to rank these in order of importance vis-à-vis national sovereignty and then assess the pre-emptiveness of decisions taken therein. If the important decisions are taken within the collective arena and they considerably preclude national action, then one can conclude that the EU displays authority that is more political over because of its ability to limit action that emanates from the national government.

CONCLUSION

In conclusion therefore, the ***independent variables*** in this study will be:

- **The stages at which collective processes are invoked.**
- **Relative decisiveness of the collective arena.**

The ***dependent variable*** therefore, as stated at the beginning of the proposal, is to determine whether the EU is growing into a political union according to its decision-making system as examined through its decisions and mechanisms employed in a particular policy area traditionally identified as the exclusive remit of national governments. Neo-functionalism will be used to explain observed results and in particular instances, this may be off-set by a reliance on intergovernmentalism, should the chosen theory clearly be unable to explain some observations.

In the following chapter, the report will give a brief description of the history of the EU, the relevant governing bodies that play a role in decision-making and a detailed discussion of the evolution of the area of the AFSJ thus far, including the different focus areas of this portfolio, discussion of which is important as the report will mainly be structured as an examination of the decision-making in these different focus areas.

CHAPTER II

PART I

THE HISTORY & ORGANISATIONAL STRUCTURE OF THE EUROPEAN UNION

BRIEF LEGISLATIVE HISTORY OF THE EUROPEAN UNION

The historical context out of which the EU was borne was one of war and turbulence. WWII had ravaged the industries of the Axis countries and the Allies' resources were all but depleted. Continental Europe suffered the consequences of the war more than any other geographical region and France was particularly concerned about the threat that Germany posed. Both countries had engaged each other in war at least three times in the space of a century and France was worried that Germany would re-arm herself, leading to another war.[43] Germany's military might could not be under-estimated; its industries were geared specifically to produce military means and they did so at an alarming rate.[44] Some leaders in France found that the answer lay in linking, inextricably, the industries of the two countries so that war between the two would become virtually impossible.[45] The ingenious idea, spearheaded by Jean Monnet, known as the founding father of European integration, took root in 1950 and ultimately led to the creation of what would come to be known as the *European Coal and Steel Community (ECSC)*. Monnet introduced the idea to the then French Foreign Minister, Robert Schuman, who further articulated it in what is known as the *Schuman Plan*. Schuman therefore presented Monnet's idea to the relevant political leaders of the time, highlighting the plan's strategic advantages, and they in turn endorsed and adopted it.

[43] Pinder, J., *Op. Cit.*, p. 1.
[44] *Ibid*, p. 3.
[45] El-Agraa, A., *Op. Cit.*, p. 27.

In 1951, when the idea had received enough support, a treaty was signed, known as the **Treaty of Paris**, which then established the ECSC. The original signatories, known as the *Original Six*, were Germany, France, Italy, Belgium, the Netherlands and Luxembourg. The treaty aimed to remove all trade barriers in coal and steel like customs duties, non-tariff barriers, import quota restrictions and all impediments on factors of production.[46] More importantly, it also created a unique and free standing set of governing bodies whose duty it was to ensure the smooth application of and adherence to the treaty and its derivative directives.

Throughout the years, several treaties continued to expand both the remit and authority of the EU as cooperation increasingly deepened and solidified the unit as a single body. The union gradually entered the realm of the economic through the **Treaties of Rome** (1957), which created the *European Economic Community (EEC)*, which introduced a customs union among member states. This project nearly failed, but was subsequently resuscitated years later, in the late eighties, by the **Single European Act** *(SEA)*.[47] The SEA concretised the commitment to a single market by lifting passport controls, removing monopolies on industry and technology, bringing new policy areas under the responsibility of the EC governing bodies, and extending their powers.[48] In addition, it made achieving a monetary union, known as the *Economic and Monetary Union (EMU)*, an objective and introduced *Qualified Majority Voting (QMV)* as normal Council practice, thus restricting the scope of the unanimity principle.[49]

The Treaty on the European Union (TEU) also known as the **Maastricht treaty** was signed in 1991, came into effect in 1993, and introduced the current EU. It laid down a timetable for the realisation of the EMU and the adoption of the single European currency.[50] It also created the three pillars of the EU; the first consisting of EEC, ECSC and the *European Atomic Energy Community (Euratom)*; the second, the *Common*

[46] El Agraa, A., *Op. Cit*., p. 27.
[47] *Ibid*, p. 30.
[48] McCormick, J., *Understanding the European Union: A Concise Introduction*, (2nd ed), Palgrave, 2001, p. 75.
[49] Pinder, J., *Op. Cit*., p. 13.
[50] Blair, A., *The European Union since 1945*, Pearson, Harlow, 2005, p. 70.

Foreign and Security Policy (CFSP), and the third, the area of *Justice and Home Affairs* (JHA), which today is known as the AFSJ.[51] The first pillar issue areas were defined as Community areas, meaning that decision-making under these was made using QMV, whereas the second and third issue areas fell under the intergovernmental approach and thus decisions thereof were taken according to the unanimity principle.[52] El-Agraa notes that Britain's inability to agree with the other states on the changes made in the social field brought about the separation of Community functions into these three pillars.[53]

The subsequent treaties, **Amsterdam** (1997) and **Nice** (2000), were both revisions of the Maastricht treaty and contained some changes. In particular, Amsterdam extended the scope of QMV to 16 more areas, whilst also extending co-decision vis-à-vis the *European Parliament (EP)* to the new and already existing Community areas.[54] Important changes were made to the CFSP and, more importantly the AFSJ, a large part of which was brought into the first pillar.[55] Nice tended to concentrate on the areas neglected by Amsterdam, such as reinforcing institutional reforms (e.g. QMV and the future composition of the Commission) in light of impending enlargement.[56] In general, however, both treaties have been accused of lacking focus and a determination to solve the EU's institutional problems. The changes that these treaties introduced were both insufficient and did not specifically address the mounting institutional crisis.[57]

Besides the institutional reforms, Nice also managed to set up a Convention, which met in 2002 to discuss creating a more democratic Europe, resulting in a draft constitution for the EU in 2003.[58] By the time the European Council had reached agreement on the draft constitution in June 2004, the EU had become a 25-member bloc, with 10 countries having acceded the previous month.[59] The Constitution, among other things, proposed to

[51] *Ibid*, p. 72.
[52] *Loc. Cit.*
[53] El Agraa, A., *Op. Cit.*, p. 34.
[54] Blair, A., *Op. Cit.*, p. 76.
[55] *Ibid*, pp. 76-77.
[56] *Ibid*, p. 78-79.
[57] *Ibid*, pp. 76 & 79-80.
[58] El Agraa, A., *Op. Cit.*, p. 36.
[59] Blair, A., *Op. Cit.*, p. xxx.

simplify the voting procedure, accord greater representation within the Union to the larger countries and also aimed to introduce an EU President and Foreign Affairs Minister.[60]

At the time of the French and Dutch referenda (2005), the Constitution had been signed by all and ratified by twelve member states. As is common knowledge, the rejection of the document by the French and Dutch citizenry dealt a somewhat deadly blow to any realistic adoption of the Constitution by the agreed time of two years since its 2004 adoption. Currently therefore, it is not in effect but its content is an indicator of what Europe envisions itself as in the future. In general, the Constitution aimed to simplify the progression of integration into the political realm but now that it hangs in the air, it means that political integration will proceed at a slower and more difficult pace for the EU.

Having looked at the important legislation upon which the EU was founded, the discussion now moves to the governing bodies that formulate policy and are what is referred to as the supranational. A discussion of these bodies will aid the understanding of how decisions are made in the EU, as they, principally, are the 'joint' system.

GOVERNING BODIES OF THE EUROPEAN UNION: ROLES & PROCEDURES

THE EUROPEAN COMMISSION

The Commission is charged with initiating policy, a process which starts in the lower levels of the different Directorates General (DGs) (depending on what policy issue is being discussed) and makes its way up to the senior levels until it reaches the College of Commissioners (body of Commissioners, each from the different member states) who then have final say over what is to be done regarding the proposal. Because the personnel employed in the various DGs have vast experience in and knowledge of their particular

[60] Nugent, N., *The Government and Politics of the European Community*, Basingstoke: MacMillan, 1993, pp. 81-82.

field, their expert opinion is of great importance in policy formulation.[61] The Commission is also charged with overseeing the Community budget, playing an advisory or mediatory (if the Council is at a deadlock), acting as the Union's external representative and ensuring that the Union's legal framework is adhered to and respected.[62] In years when the Council of Ministers has failed to reach decisions or lead effectively, the Commission has steered the Community/Union towards reaching its goals. The Commission also has a monitoring and evaluation role where it oversees the implementation of EU policy in individual member states.[63]

THE COUNCIL OF MINISTERS & THE EUROPEAN COUNCIL

The major role of the *Council of Ministers* is to take decisions using unanimity, qualified majority voting or simple majority voting, which then become Union law. Although the Commission also has legislative powers, these are severely restricted compared to those of the Council as all major decisions which have political ramifications have to be taken by the Council.[64] However, the Council decisions must be taken based on Commission proposals, as it [Council] does not have initiatory powers. Under the Merger Treaty, there is only one Council of Ministers but because of the diversity of policy areas and portfolios under the Union, the reality is that there are several groupings depending on the policy area being dealt with. The Council of Ministers is also composed of representatives from each member state, for each of the EU policy areas.

The *European Council* consists of the Heads of Government or State of the EU member countries. They meet on a bi-annual basis, the meetings having been institutionalised in 1974 in Paris.[65] It was felt that such a body was necessary to provide leadership of the Community as both the Commission and the Council of Ministers, hampered by the intergovernmental mentality of the era (i.e. late seventies and early eighties), were unable to do so. It was hoped therefore, that, because the European Council could by-pass the

[61] *Ibid*, p. 65.
[62] *Ibid*, pp. 74, 87 & 94.
[63] *Ibid*, p. 82.
[64] Ibid, p. 101.
[65] *Ibid*, p. 193.

Council of Ministers, it would do so often whenever the need arose, thus speedily making decisions of substance and authority.[66]

The European Council has a wide range in terms of what it can and cannot do. There are no legal provisions setting out its mandate except for a communiqué and recognition of its existence in the SEA.[67] "As a result, the activities undertaken by the European Council have tended to vary, according both to the preferences of the personalities involved and changing circumstances and requirements."[68] Although the European Council makes big, weighty decisions, it has not totally taken over the role of the Council of Ministers. At the end of the day, the Council of Ministers still makes the final decisions concerning what becomes EU law.[69]

THE EUROPEAN PARLIAMENT

The purpose of the *European Parliament* (EP) is to give the EU a democratic character by ensuring that the citizens have an input into its dealings.[70] Direct elections to the Parliament (then Assembly) were introduced in 1979 to ensure that the EP was truly democratic and free of influence from the Council of Ministers.[71]

The EP's influence is felt in several ways. The first is through legislative procedure, in which it plays an important role in policy discussions and decisions either by way of the Commission bringing before it some form of proposed policy or it [EP] bringing before the Commission some proposal for policy.[72] The Council cannot take steps to declare a motion law before the EP has voted on it, and if this is done (i.e. the Council acts prematurely) the Court of Justice can pronounce such motion invalid.[73] The EP also influences Union action via its ability to propose modifications and inclusions to the budget, which both the Commission and Council must consider. It can also by "a

[66] *Loc. Cit.*
[67] *Ibid*, pp. 194 & 195.
[68] *Ibid*, p. 201.
[69] *Loc. Cit.*
[70] *Ibid*, p. 37.
[71] *Loc. Cit.*
[72] *Ibid*, p. 129.
[73] *Ibid*, p. 131.

majority of its members and two thirds of the votes cast"[74] reject the budget outright and ask for a new draft to be submitted.

The EP votes on Commission proposals in two ways. The first is the single reading where the EP announces its decision on any proposal handed to it by the Commission and the Commission can then take whatever steps it deems necessary by amending the proposal to include the EP's suggestions, ignoring the EP's suggestions or completely reformulating the proposal such that it becomes a new piece of work.[75] The second, more effective mechanism is known as the cooperation method whereby the Council is obliged to adopt common positions after the EP has offered its first opinion on an issue which must then be sent back to Parliament for a second reading.[76] Although final legislative powers lie with the Council, the cooperation method still forces it to take seriously the input and suggestions of the EP.[77]

THE COURT OF JUSTICE

The role of the European Court of Justice (ECJ) has been to ensure that the Union's laws are properly applied and that disputes between the institutions of the Community and states and the institutions are resolved.[78] Like all judiciaries, the Court of Justice is independent of all the other organs of the Union and seeks to protect the citizens of the Union while setting out the powers of the organs and their responsibilities thereof. It is the Court for instance which has urged the Union to harmonise some of its practices vis-à-vis social security systems.[79] The Court can also pronounce that a state or states have failed to meet obligations in certain areas and can even impose penalties for such behaviour.[80]

[74] Article 203 (8) of the EEC Treaty.
[75] *Ibid*, pp. 131-132.
[76] *Ibid*, p. 132.
[77] *Loc. Cit*.
[78] *Ibid*, p. 38.
[79] *Ibid*, p. 179.
[80] *Ibid*, pp. 181-186.

PART II

THE EUROPEAN UNION POLICY AREA OF FREEDOM, SECURITY & JUSTICE

INTRODUCTION

The scope of work covered in the AFSJ is wide and encompasses a whole range of issues relating to home affairs (e.g. border access and control), security (illegal human trafficking, terrorism) and cooperation in criminal and civil justice matters. The European Commission DG for Freedom, Security and Justice is therefore broken down into three technical directorates, with a fourth one specifically dedicated to attending to the administrative and institutional issues of the DG. It is known as Directorate A: *General Affairs*. Directorate B is called *Immigration, Asylum and Borders*, Directorate C, *Civil Justice, Rights and Citizenship* and Directorate D, *Internal Security and Criminal Justice*.[81] The titles themselves point to the wide array of issues handled under AFSJ; issues which can only be tackled and effectively managed within such smaller institutional groupings. In conducting the research, the same titles and headings will be adopted in determining the range, nature and implications of decisions taken in the area.

The focus of the report will be on the general area of the AFSJ to the exclusion of the issue areas of Rights and Citizenship, which are housed under Directorate C. The specificities associated with these two issues have been enshrined in the *EU Charter on Fundamental Rights* signed in 1997 at the same time as the Amsterdam treaty. In that respect therefore, they form a slightly different function and the EU usually handles its duties concerning them through the Charter. As such, decision-making duties thereof are somewhat idiosyncratic and will not be analysed.

[81] *Area of Freedom, Security & Justice*, Directorates-General & Services, European Commission website, http://ec.europa.eu/dgs/justice_home/index_en.htm.

THE PURPOSE OF THE AREA OF FREEDOM, SECURITY & JUSTICE

Originally, the area of freedom was brought into the fray of the EU because of the opening up of member states' markets and the eventual creation of a single market. In order for the economic unit to succeed, it was necessary to also open up channels of interaction to enable free/unhindered flow of goods, capital, services and labour.[82] Border control procedures had to be abolished, and a uniform manner of allowing EU member state citizens in and out of different countries had to be found. The EU had to become a visa-free travel zone so as to enable the seamless flow of transactions across member states.[83] The idea of EU citizens is derived from the need for free movement across borders. Citizens are no longer just nationals of a specific country; rather they are also citizens of a larger territory, where national lines are blurred.

Furthermore, the increased cross-border business dealings, economy synchronisation and movement of peoples in general meant that commercial and civil law had to keep up with this transformation. Commercial law and procedures had to be harmonised and approximated and eventually, civil law would also have to be conform.[84] The principle of mutual recognition of judicial decisions across the Union also had to be introduced in order to harmonise judicial functioning Union-wide. The rights and obligations created through the establishment of the Union had to be catered for in order to protect individuals from rights violations and to ensure that obligations were duly fulfilled.[85] The EU Charter of Fundamental Rights, which falls under Directorate C, was created for this very purpose.

The AFSJ (then known as the JHA) was therefore created to complement and assist the functioning of the common market. In this manner, it is evident how spillover from the economic integration project could possibly be responsible for creation of the AFSJ.

[82] El Agraa, A., *Op. Cit*., p. 30.
[83] 'Introduction', Summaries of Legislation, *Justice, Freedom & Security*, Activities of the European Union, EU website, http://www.europa.eu/scadplus/leg/en/lvb/l33022.htm.
[84] El Agraa, A., *Op. Cit*., p. 30.
[85] Chryssochoou, D., *Op. Cit*., p. 186.

Economic integration was an important and relatively controversial project, and it managed to bring an even more controversial area (a political one) into the collective (refer to definition of spillover). Thus, inasmuch as the move into political integration was corollary to economic integration, it is a move that is in keeping with the definition of spillover, which argues that as integration deepens, it does so into increasingly more controversial areas.

If the area of freedom was corollary to economic integration then the area of security is corollary to the former. The increased movement of goods, labour, capital and services also meant increased criminal activity because of porous borders and an extended field of operation. Consequently, it was important to provide not just freedom, but security as well. The area of security is therefore an attempt at coordinating policing and customs efforts in order to combat different forms of organised crime across the Union.[86]

HISTORY[87]

Prior to the Maastricht treaty, the AFSJ, then known as the JHA, was governed by intergovernmental mechanisms. The only common policies that existed vis-à-vis home affairs were those that dealt with the four freedoms: *free movement of goods, capital, labour and services.* Community legislation regarding these was enacted in 1986 via the signing of the SEA after it was realized that such movement was imperative to the success of the single/internal market which the EC sought at the time. Following this, member states set up new working parties in different areas as and when the need arose and these included the *immigration group* and the *European Committee to Combat Drugs (CELAD).*

Progressive joint cooperation in the area of border checks and visas eventually led to the signing of a document in 1985 whose aims were to make it easier to abolish internal border checks, improve controls at external borders and harmonise visa, asylum and

[86] 'Introduction: The Laeken European Council', Summaries of Legislation, *Op. Cit.*
[87] Information regarding the institutional proceedings in the area of justice and home affairs in the EU gathered from Freedom, Security & Justice, *Treaty of Amsterdam: a Comprehensive Guide (1997)*, Treaties and law, The EU at a glance, EU website, http://www.europa.eu/scadplus/leg/en/lvb/a11000.htm.

police and judicial policies. The *Schengen acquis* (as it came to be known) however, was signed on an intergovernmental basis and by a few member states, and because of this it perpetuated the difficulties already being experienced by the EC in dealing with JHA.

Agreements reached under the intergovernmental approach were not binding on states the way common EC policies were and, policy coordination was difficult as different delegations attended different committees and rarely met together to compile and present a single coherent EC JHA policy. As long as work was done on an intergovernmental basis, states could drag their feet and be non-committal. The United Kingdom was particularly adamant that the EC was unnecessarily fast-tracking its integration and that there was no need to delve into such matters as those under JHA particularly because of their importance to national security. Consequently, it was not party to the Schengen Agreement and has never fully participated in Community initiatives under this area.[88]

When the Maastricht treaty was signed therefore, it marked an important step as it secured a commitment from willing member states that they would foster 'close cooperation' in the field of JHA.[89] It was decided to form a pillar dedicated solely to JHA, albeit still coordinated on an intergovernmental basis. In essence, this move provided a focus and impetus, which had previously been lacking in the coordination efforts under this area.

When the Amsterdam treaty was signed in 1997, it effectively reshaped the broader area of justice and home affairs (i.e., the third pillar) by introducing different categories for the specific policy areas which fell under it. The result was the title *freedom, security and justice*.[90] The treaty relocated all the applicable provisions from Title VI of the Maastricht treaty to Title IV of the 1965 European Community treaty (EC treaty). The aim was to make the methods of the third pillar more effective and democratic, while giving the institutions a more balanced role to play. Title IV's main purpose is two-fold. It aims to improve the free movement of both EU citizens and third-country nationals and

[88] Nugent, N., *Op. Cit.*, p. 394.
[89] *Loc. Cit*.
[90] 'Introduction: The Amendments made by the Treaty of Amsterdam', Summaries of Legislation, *Op. Cit*.

simultaneously combat international crime. Various policy areas fall under the umbrella of these aims and they include:

- Visas, asylum & immigration policies
- Checks at external borders
- Judicial cooperation in civil matters
- Combating all forms of organised crime at the level of the Union (e.g. drug & human trafficking, terrorism) to ensure public security.[91]

The relocation of Title VI of Maastricht to Title IV of the EC treaty means that the above policy areas have now been brought under the first pillar and are therefore subject to the Community method. With regard to legislative authority, the Amsterdam treaty also stated that after five years, the Council of Ministers would only take decisions on proposals given to it by the European Commission and not member states as well. The EP was only to be consulted in the Council's adoption of policy, effectively meaning it was powerless to act apart from a late stage advisory role. Additionally, in the first five years, Council decisions were to be taken unanimously and the Community method (i.e. co-decision, which allows the EP real input and qualified majority voting) could only be applied via a unanimous vote taken by the Council agreeing to do so.[92] Amsterdam also gave the ECJ powers in an area in which it previously had none. The ECJ could answer questions from national governments vis-à-vis the interpretation of the Title and the validity of acts committed by Community institutions in applying the Title's provisions.[93] Amsterdam also incorporated the Schengen acquis into the EU framework, thus making it Community law, although Ireland, Denmark and United Kingdom chose to opt-out of it and any policy initiatives resulting from its applicability.[94]

With respect to guaranteeing public security, i.e. preventing and fighting organised crime at the Union level, the area falls under the legislative remit of both the Commission and member states. It is not subject to the Amsterdam treaty provision, which makes the area of free movement of EU and non-EU nationals in the Union the exclusive remit of the

[91] 'Introduction: The Amendments made by the Treaty of Amsterdam', Summaries of Legislation, *Op. Cit*.
[92] *Loc. Cit.*
[93] *Loc. Cit.*
[94] *Loc. Cit.*

Commission after five years. This area therefore remains one of shared responsibility in terms of legislating authority.

The policy areas remaining in the third pillar are police and judicial cooperation in criminal matters and the combating of racism and xenophobia. Under these areas, member states are allowed to forge closer cooperation amongst each other should they so desire.[95] Although the envisaged 'closer cooperation' is not tantamount to first pillar cooperation, it is encouraged among states who wish to establish further collaboration in the above mentioned areas so long as it promotes the larger aims of free movement and securing of public safety and security within the EU.[96] Consequently, states are welcome to lead the way in certain areas with the remaining states having the option of joining in those initiatives at a later stage. This later integration of interested states in closer cooperation initiatives is aided by the fact that all work is done according to the Community method and makes use of EU institutions and thus no special or unfamiliar practices are adopted. In particular, closer cooperation is to be used as last resort and must involve the majority of member states.[97] Decisions taken under this pillar are now called *framework decisions* and *decisions*, replacing the *joint actions* of the Maastricht treaty. These legal instruments are similar in weight and intent to directives under the Community method.

In general, Amsterdam covered a lot of ground in laying down provisions with regard to immigration and asylum policy, abolition of checks at borders, visa regulations vis-à-vis third country nationals and where it did not articulate provisions, it stipulated that the Council of Ministers would, within five years of the treaty coming into effect, lay down standards and procedures to be implemented and followed. As much as cooperation had been improved, the treaty held that states still maintained their prerogatives vis-à-vis free movement of persons and the ensuring of law and order and securing internal security.[98]

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[95] 'Introduction: Closer Cooperation between Police Forces & Judicial Authorities on Crime', Summaries of Legislation, *Op. Cit*.
[96] *Loc. Cit*.
[97] *Loc. Cit*.
[98] 'How Title IV of the EC Treaty Works: The Gradual Establishment of an Area of Freedom, Security & Justice', Freedom, Security & Justice, *Treaty of Amsterdam: a Comprehensive Guide (1997), Op. Cit*.

This reservation highlights the hesitancy with which consensus was achieved, in that states realised the magnitude of committing to such cooperation and thus chose to keep back some power vis-à-vis responsibility in the area of freedom, security and justice.

Subsequent to the Amsterdam treaty was the Nice Treaty of 2000, which held that the AFSJ policy areas falling under the Community method would no longer be subject to unanimous decision-making, but rather to the co-decision Community method.[99] There were conditions attached to this stipulation however, such as that co-decision vis-à-vis immigration policy would only come into effect in May 2004, and with regard to judicial cooperation on civil matters, co-decision would not be applicable to family law.[100]

Under the new, yet to be ratified Constitution, the third pillar is to be completely abolished, thus bringing the whole area of freedom, security and justice under the Community method.[101] This would mean that co-decision and QMV would be applicable to all decisions taken under the area. In the Constitution, national parliaments would be kept informed of supranational goings on through monitoring and evaluation practices. The Constitution also proposed the setting up of a new standing committee to focus exclusively on improving coordination and cooperation between officials concerned with policing and internal security. The ECJ will have the powers to review member states' compliance with legislation governing this field.[102] The Commission would also have sole legislative authority and would no longer have to consider proposals from member states. As noted above, QMV is to be extended to all areas except in the case of emergency measures, should a country experience an influx of immigrants.[103] In such a situation, the EP would merely be consulted. The Constitution, unlike Amsterdam, lays down all the principles and standards to be followed in each sub-sector under this field.

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[99] 'Introduction: Closer Cooperation between Police Forces & Judicial Authorities on Crime', Summaries of Legislation, *Op. Cit.*
[100] *Loc. Cit*.
[101] 'Introduction', Justice and Home Affairs, Policies of the Union, *A Constitution for Europe*, Treaties and law, The EU at a glance, EU website, http://www.europa.eu/scadplus/constitution/justice_en.htm.
[102] *Loc. Cit*.
[103] 'Borders, Asylum and Immigration', Justice and Home Affairs, Policies of the Union, *Op. Cit*.

It is clear that the Constitution plans to significantly increase the EU's powers in the AFSJ, pointing towards a power vacuum at the national level. However, it is important to critically analyse the decision-making system of the EU vis-à-vis the specific policy area as it currently stands. One needs to know the existing provisions under the policy area, their implications, actual effectiveness thereof and states' adherence to them. The Commission's role in monitoring and evaluating progress is crucial because the documents it produces in this regard are what will inform the content and nature of conclusion made in this study. These will help determine the extent to which work is being undertaken and achieved, both in EU institutions, and in individual member states to ensure that, the AFSJ is indeed a Community policy area whose laws and regulations are thoroughly executed and implemented.

Two helpful tools, which should make clear the progress of the EU in terms of reaching those minimum standards and the core objectives of the Amsterdam treaty, are the Tampere and Hague Programmes, adopted in 1999 and 2004, respectively, by the European Council. These programmes were adopted as a working framework and reference point for the work, which must be done under the AFSJ. Each programme is five years; The Tampere programme ran its course and ended in 2004, at which point Hague was adopted. The report will now briefly discuss Tampere, in terms of its significance, achievements and shortcomings.

THE TAMPERE PROGRAMME

In 1999, the European Council held a special meeting in Tampere, Finland, specifically geared towards establishing an area of freedom, justice and security in the EU. The Council held this meeting under the auspices of the Treaty of Amsterdam, which had already pronounced the EU's commitment to real progress in the area. Tampere was therefore a detailed articulation of the measures, which were to be adopted in fulfilment of the mandate of the AFSJ as detailed in the Amsterdam treaty. At this meeting, the

Council even vowed to keep the development of the AFSJ at the very top of its political agenda.[104]

The Council acknowledged that immigration was a global issue and that it affected the EU acutely because people from surrounding regions were undoubtedly attracted to the Union as it presented a chance at a better life. The Council also recognised that along with increased migration flows into the EU, there was also an increase in trafficking networks and migrants who sought to enter the Union illegally.[105] The aim of the EU therefore would be to come up with policies that left it [the EU] open to those who justifiably sought residence in it, yet simultaneously secure enough to protect its citizens. The Council established three areas of focus under the AFSJ and articulated specific issue areas under each of these where it instructed both the Commission and the Council to take the action necessary to institute measures that would ensure and enhance the harmonisation and cooperation among member states in the area.[106]

The mandate of the Tampere Programme expired in 2004 and was subsequently replaced (and improved upon) by the Hague Programme which is meant to run from 2005 to 2010. The Commission, in several of its bi-annual reports throughout the duration of the mandate, provided an analysis of the success of the Tampere Programme. Both the penultimate and final reports provide an accurate synopsis of how much was achieved. The scoreboards reveal a great number of things, among them the relative decisiveness of the decision-making system within the AFSJ, the Commission's ability (or lack thereof) to correctly and adequately capture national implementation measures and the range of decision-making, an enquiry that is the focus of the subsequent chapter.

[104] 'Presidency Conclusions', Tampere European Council, *European Council Summits*, European Parliament website, http://www.europarl.europa.eu/summits/tam_en.htm#c.
[105] *Loc. Cit.*
[106] These areas are further articulated in Chapter III, in the discussion of the Hague Programme. They were not changed from Tampere and thus most of the areas highlighted by the Tampere European Council were reiterated five years later in Hague.

ASSESSMENT OF THE TAMPERE PROGRAMME & FUTURE ORIENTATIONS

The European Commission produced the Communication containing its assessment of Tampere's achievements in February 2004 as part of its duty to monitor and evaluate the EU's achievements with regard to the implementation of Community legislation.[107] The Commission acknowledged that at Tampere, the political leadership of the EU had placed the development of the AFSJ at the top of its political agenda.[108] Despite these initial good intentions, the Commission concluded that the work achieved under Tampere's ambitious objectives was limited, as leaders skirted around the substantive issues and refused to show firm commitment to achieving common rules and procedures in those areas.[109]

"Compared to 1999, progress to date has been undeniable and tangible."[110] The addition of this statement in the report is rather confusing because in the assessment that follows, it is clear that Tampere did not achieve much. The Commission is aware of this but it, for some reason, tries to glide over the gross shortcomings of the Programme to present a less scurrilous picture. The Immigration Law Practitioners' Association (ILPA) in the United Kingdom took particular revulsion to the Commission's self-congratulatory tone in its report.

> The Commission's assessment of the Tampere programme is unacceptably lacking of substance. This is most evident in the absence of any meaningful evaluation of the measures adopted…Achievement appears to be measured solely in terms of meeting the objective of adopting the legislative programme called for while ignoring compliance with the fundamental principles set out in the Tampere Conclusions.[111]

Considering the aims embodied in the Hague Programme, the above is true because Hague reads as though the EU were only just beginning to do any work in the AFSJ. One would be inclined to think that the Tampere Programme never existed. Progress was slow

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[107] Communication of the Commission to the Council & the European Parliament (1), *Area of Freedom, Security and Justice: Assessment of the Tampere programme and future orientation*, COM (2004) 401 final, Brussels, 2004.
[108] *Ibid*, p. 3.
[109] *Ibid*, p. 4.
[110] *Ibid*, p. 3.
[111] *ILPA Response to the Commission's Communication: Area of Freedom, Security & Justice: Assessment of the Tampere Programme & Future Orientations, COM (2004) 401 final, 2 June 2004,* http://www.ilpa.org.uk/submissions/TampereII.htm.

and most measures adopted only came to fruition after the Tampere mandate had expired. The inability of the EU to work within a time-frame it had set for itself is a major reason why such a programme would be considered a failure. It is not that pioneering measures were not initiated in Tampere; it is simply that they were not adopted and the EU failed to show any real commitment to meeting deadlines. Subsequently in the Hague programme, the European Council appears anxious to make up for lost time and ground and thus its programme is even more ambitious and detailed that Tampere. Furthermore, ILPA was concerned that the Commission and the Council were going ahead and adopting the next instalment of an AFSJ programme (i.e. Hague) in the face of the analytical vacuum left by the Commission report.

> It is particularly worrying that the Council and the Commission are in the process of pursuing the objective of further developing a common area of freedom, security and justice in the vacuum of a substantive analysis of the impact of the measures so far adopted, some of which are severely frustrating the achievement of the Tampere objectives.[112]

Despite this analytical vacuum however, the EU proceeded with adopting the Hague programme even in the face of its failure to both meet the principles of Tampere and appropriately evaluate the outcome of the programme.

To some extent, the failure of the Tampere programme can be ascribed to the limitations of the decision-making system. The Commission also acknowledged this point when it made the fitting observation that "[t]he constraints of the decision-making process and of the current institutional context preclude the effective, rapid and transparent attainment of certain political commitments."[113] At that time, unanimous decision-making was still employed, as five years had not yet passed. Throughout its assessment, the Commission constantly referred to the Constitutional treaty, particularly the role it would play in simplifying and quickening the decision-making procedures in the AFSJ and the actual implementation of instruments and measures. In particular, the Commission expressed its delight at the Constitution bringing all issues in the AFSJ under qualified majority voting (QMV) as opposed to the unanimity process, which had until then hindered progress in

[112] *Loc. Cit*.
[113] Communication of the Commission to the Council & the European Parliament (1), *Op Cit*., p. 4.

the area.[114] Consequently, one wonders if it would not have been all the same, had Tampere not been adopted. It was only at the adoption of the Hague Programme that the five-year clause lapsed and thus only then would any real Community decision-making have been observable.

The following chapter will examine, in depth, the goals of and achievements under the Hague Programme. This is necessary in order to make clear the nature of the work of the EU in the policy area, its range, the relative decisiveness of the decision-making system vis-à-vis AFSJ and the general effect and ramifications of joint decisions.

[114] *Ibid*, pp. 5 & 7.

CHAPTER III

HAGUE: THE WORKING TEMPLATE OF THE AFSJ

THE HAGUE PROGRAMME

The European Council approved the Hague Programme in November 2004 and it reflects the aims embodied in the Treaty establishing a Constitution for Europe. It was therefore formulated in anticipation of the entry into force of the Constitution.[115] "It takes into consideration the evaluation by the Commission [and] the passage to qualified majority voting and co-decision as foreseen by Article 67(2) TEC."[116] The aims and objectives of the Hague Programme were therefore very political, in that whilst formulating them, the European Council was under the impression that these would be easily achieved under a new decision-making regime. This ambition somehow displayed a short sightedness on the part of the European Council as they failed to recognise that their mere support of the Constitutional treaty would not be enough to get the Constitution approved in countries where it had to go to referendum.[117] Subsequently, the EU decision-making system has struggled to make many ground-breaking decisions in the Hague Programme in the way in which it was predicted would happen under the Constitution.

The Hague Programme embodied the same objectives as the Tampere Programme, such as regulating migration flows, controlling external borders, fighting organised crime and terrorism and furthering the mutual recognition of judicial decisions among member states. In Hague, the European Council fine-tuned the focus of the mandate of the AFSJ by dividing the issue areas under each sub-sector into more specific and goal-oriented

[115] Council of the European Union , *The Hague Programme*, 16054/04, JAI 559, Brussels, December 2004, p. 3.
[116] *Loc. Cit.*
[117] Poggioli, S., 'Europe Stumbles on Path to Greater Integration', *National Public Radio*, 1 June 2005, http://www.npr.org/templates/story/story.php?storyId=4675597.

topics. In this regard therefore, new, improved Work Programmes and Action Plans were adopted, more legislation produced and where Tampere had laid groundwork, Hague continued that work. The more detailed outline of Hague will serve as our template for examining decision-making within the AFSJ. Actions taken during the Tampere Programme will also be noted, in order to create a picture of the gradual development of activity in the AFSJ since it was brought under the first pillar (with the exception of Directorate D, which is still under the third pillar). Legislation adopted before January 2005 should therefore be considered as falling under Tampere.

These achievements are important to examine because they highlight the progress made in the AFSJ in the past ten years, i.e. since the adoption of the Amsterdam treaty. It is also important to keep in mind that the Hague Programme has only been in effect for two years and that the majority of new action threads introduced have not received the full decision-making system 'treatment' as they are only at its [system's] initial phase. Furthermore, the monitoring and evaluation role of the Commission vis-à-vis the Programmes is bi-annual, meaning that presently only the June 2006 Commission Communication evaluating the first year (i.e. 2005) of Hague is available. Publication of the Commission's reports is delayed by 6 months, meaning that annually, only one evaluation report is accessible. Surprisingly however, the 2005 Scoreboard report indicates a considerable amount of activity within the AFSJ in terms of decision-making and it is to the task of analysing these actions to which the report now turns.

ANALYSIS OF THE LEGISLATIVE ACHIEVEMENTS UNDER THE HAGUE PROGRAMME & THE AFSJ IN GENERAL

The analysis that follows is based on the actions of the EU as noted on the Commission's 2005 Hague scoreboards (in its monitoring and evaluation role),[118] the European Union website's SCADPlus section, as it relates to the AFSJ[119] and in some cases, the website of the Directorate-General of the AFSJ.[120]

DIRECTORATE B

Directorate B is concerned with the common EU asylum policy, visa policy and migration policy. In terms of the first issue area identified, i.e. ***partnership with third countries***, foundational steps were taken. These included the Commission producing several papers on migration and related issues, e.g., migration and development and adopting an Action Plan on establishing regional protection programmes and a resettlement scheme. The latter is an expression of the EU's commitment to ensuring that international protection is provided to all those who may need it. *AENEAS* is a programme that facilitates the cooperation with third countries in areas of asylum and migration. The implementation of the EU's asylum and migration policy requires that the EU collaborate with third countries in order to manage and understand migration flows and prevent disruptive ones. Consequently, this is not an area that relies heavily on legislation, but rather one that requires practical cooperation and the institution of programmes that will foster understanding with third countries and lead to a better management of migration flows.

Recently, the Council was mooting the idea of adopting a new programme in the area. Even if the programme was to be adopted, the EU certainly needs more than one programme to really improve its cooperation with third countries. More practical and legislative measures must be adopted before it can be argued that it has developed this

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[118] Communication of the Commission to the Council and the European Parliament (2), *Follow-Up of Measures Provided for under the Hague Action Plan in the Fields of Justice, Freedom and Security for 2005*, COM (2006) 333 final, Brussels, 2006.
[119] Summaries of Legislation, *Justice, Freedom & Security*, Activities of the European Union, EU website, http://www.europa.eu/scadplus/leg/en/lvb/l33022.htm.
[120] *Area of Freedom, Security & Justice*, Directorates-General & Services, European Commission website, http://ec.europa.eu/dgs/justice_home/index_en.htm.

area sufficiently from a supranational perspective. The area is thus lagging and in dire need of serious and effective decision-making from the EU. Currently, the EU's practical efforts fall short and are not significant enough to effect or bring about the desired outcome vis-à-vis creating lasting partnerships based on cooperation and understanding with third countries.

Where the second issue area, the ***common EU asylum policy***, is concerned, legislation has been passed regarding important matters within the field. These include common procedures in granting asylum status, reception conditions in the event of a mass influx, identification of peoples in need of international protection and determining the country responsible for processing an asylum application. The asylum policy area was a point of hard bargaining during the negotiations of the Amsterdam treaty. In particular, states wanted to maintain prerogative over the EU in terms of devising asylum and visa policies. Different member states have different reception capacities and different idiosyncratic economic environments and thus it was difficult to agree on one common asylum and visa policy. Additionally, the geographical positioning of some countries means that they are more (or less) susceptible to the effects of mass influx and general economic migration. However, in light of the very real need for an asylum policy that offers protection and assistance to displaced persons, the EU has not only set up a Refugee Fund, but also produced legislation to ensure fair and uniform asylum procedures across the Union.

Other practical measures include *ARGO*, which is a programme initiated to coordinate administrative cooperation in the field of external borders and *EURODAC*, which compares the fingerprints of EU citizens. More practical measures are necessary in order to fully coordinate the efforts of the EU in this issue area and thus a Communication on strengthening practical cooperation was adopted in 2006. This practical action must complement the existing legislation and enhance the uniformity of the overall asylum policy of the Union. Progress in the area is commendable and is indicative of the EU's willingness to legislate successfully, even on difficult topics such as asylum. Further

action must therefore, build on this success so as to solidify the EU's authority in decision-making in the area.

Under ***integration of third country nationals***, the third issue area, several Directives were adopted, one of which dealt with admission procedures with respect to the right to family reunification and another with the status of third country nationals who have been long-term residents of the Union. On a practical note, a programme *(INTI)*, which deals with the integration of third country nationals was operational, although from the scoreboard, it is evident that the EU needs more measures that are practical because integration is also a social issue that involves the assimilation of people into societies and cultural practices. Such assimilation cannot only be ensured through legislative means; other creative practical initiatives must be adopted both for third country nationals and for citizens, to teach the latter about diversity and openness to different cultures. The EU therefore needs a more aggressive policy, which covers the many different aspects of integration and does not just focus on the issue from one perspective.

Sometimes integration has involved illegal third country nationals and has been the centre of much controversy. One example is that of Spain which over the last few years has had two amnesty periods for mainly African nationals who had illegally entered the country. The move was heavily criticised by EU leaders such as President of the Commission, Mr. Jose Manuel Barroso and Vice President Franco Frattini who is also the Commissioner responsible for heading the AFSJ.[121] As a single economic unit, states are not at liberty to act as they will in matters that have economic ramifications for the whole Union. The EU must therefore also develop its capacity to define a common amnesty policy, because amnesty affects integration policy. If amnesty is to be granted at all, this must be done with the consent of all member states and with consideration of the consequences of such actions for the Union at large.

[121] Pantesco, J., 'Spain amnesty blamed for encouraging wave of illegal immigrants from Africa', Paper Chase, *JURIST: Legal News & Research*, University of Pittsburgh, School of Law, 2 September 2006, http://jurist.law.pitt.edu/paperchase/2006/09/spain-amnesty-blamed-for-encouraging.php.

Generally, progress in the area is mediocre, and simply needs commitment from the EU in order to develop into a more comprehensive integration policy as there are no other plausible explanations for the slow development of the issue area.

Migration Policy, the fourth issue area under Directorate B, covers issues such as fighting illegal immigration, monitoring migratory patterns and establishing a common migration information system. In terms of illegal immigration, the EU has only just begun to investigate ways of eradicating and managing the phenomenon. It produced a Report on illegal migration and causes thereof in 2001 and in 2002 the Council adopted an Action Plan on illegal immigration. The Plan set out short and medium term measures on illegal immigration and set deadlines on when points under each ought to be achieved.[122] The Plan included action in areas such as visa policy, information exchange, cooperation and coordination, border management, police cooperation, aliens law and criminal law and return and readmission policy. Extensive work has been done under these individual areas, such as establishment of common agencies *(FRONTEX)*, information networks *(ICONET)*, legislation on the definition of unauthorised entry and combating human trafficking, among other measures. Thus, the success of an EU strategy for combating illegal immigration depends on the successful implementation of policy measures in other areas, through which illegal immigration is fought.

The Commission adopted another Communication on illegal immigration in July 2006, as a means of building up on previous development in the field and encouraged that more rigorous action be taken in the areas that were the focus of the 2002 Action Plan.[123]

With respect to return policy, an Action Plan was simultaneously adopted with that on illegal immigration in 2001. An Action Programme was subsequently adopted in 2002, under which the Proposal for a Directive on common standards and procedures for a return policy was presented and submitted in 2005. Another Proposal for a Directive on

[122] 'Illegal immigration', Immigration, *Area of Freedom, Security & Justice*, Directorates General & Services, European Commission website http://ec.europa.eu/justice_home/fsj/immigration/illegal/fsj_immigration_illegal_en.htm.
[123] *Loc. Cit.*

the funding aspect of the return policy was also adopted, and both are currently awaiting adoption as Directives. Return policy is an important aspect of immigration policy and was highlighted by the Hague European Council as a specific area of focus. The Council stressed that common standards and procedures to be established for return of illegal immigrants must have due regard for the rights and dignity of those people and any deportation measures must be carried out in a humane way.[124] The Proposal for a Directive on common standards and procedures for a return policy is thus detailed in that it examines the ways in which such a policy can be brought about and it also discusses other issues related to return policy such as removal, use of coercive measures and temporary custody, among other things. Thus if it is adopted, it will be a comprehensive Directive regulating the most important aspects of return policy.

With respect to legal migration, a Policy Plan on the issue was adopted in 2005 although it is not binding on member states and is concerned with the actions the Commission intends to take in order to further develop the legal migration policy of the EU.[125] The EU must be able to balance the numbers and types of people they allow so as not to cause a brain drain in neighbouring countries. Equally, it must be mindful of the capacity of different member states as they each will have different numbers of immigrants coming in, for different reasons, and thus the migration policy must be such that the social welfare system of each member state is able to cope with the number of legal migrants. The EU migration policy is far from becoming this developed and current legislation covers issues such as mutual recognition of decisions of expulsions of third country nationals and a definition of unauthorised entry. Furthermore, a common information system on migration patterns and a network linking member states' migration services have only just begun to be debated within the decision-making system.

The foregoing does not signify a well-developed issue area, in terms of both legislation and the practical steps being taken to ensure harmonisation of measures vis-à-vis

[124] *Loc. Cit*.
[125] 'Immigration', *Area of Freedom, Security & Justice*, Directorates-General & Services, European Commission website, European Commission website, http://ec.europa.eu/justice_home/fsj/immigration/fsj_immigration_intro_en.htm.

migration issues. There are developmental holes in certain areas (e.g. lack of legislation vis-à-vis economic migration) and instituted measures must be further solidified (e.g. the Action Plan on illegal immigration) in order to create a seamless and effective migration policy. Currently, this issue area is disorganised and lacks a much needed focus and identification of priority action points. Supranational leadership and initiative is not forthcoming, thus in this issue area, the EU is lagging behind member states and has no real influence to speak of.

The final issue area under Directorate B is ***border management, biometrics, information systems and visa policy*** under which the EU continued with *Schengen Information System (SIS)* into its second phase, *SIS II*. The system is expected to be operational in 2007. The SIS is a portal through which member states have access to information on specific individuals (e.g. criminals, missing persons and people to be refused entry into the EU) and on stolen/lost goods. In general, SIS plays an important role in the supervision and management of border flows within and into the Union. Currently, the EU's legislation relating to border control is insufficient, despite the fact that the Schengen area was established more than 15 years ago. The only notable achievement was the adoption of a handbook for border guards in 2006. In order for border control to be synchronised, a database on EU citizens must be established (thus the need for biometric identifiers) and similar systems must be employed through which this information can then be shared. Currently, such measures are at the elementary stages of EU decision-making, and thus are not much to speak of. In light of an expanding Union, loopholes in border control procedures may present problems in terms of monitoring migration flows, stopping illegal migrants and may pose a security threat in general. Thus, legislation ought to be put in place for a uniform border control regime, and SIS II must begin with immediate effect.

In terms of visa policy, the EU managed to establish a visa reciprocity mechanism with some third countries and also investigated doing the same with other countries. Furthermore, a Proposal on a Community Code on for visas was adopted meaning that the *Common Consular Instructions (CCI)*, which currently regulate the issuing of visas

into countries of the Schengen countries of the Union, could be replaced. The Community Code would therefore be applicable in all member states thus truly harmonising visa policy across the Union.

Historically, some states, namely the United Kingdom, Ireland, and Denmark have been reluctant to participate in visa policy harmonisation measures, but this has not deterred the rest of the EU from developing a comprehensive common visa policy through Schengen and under its new housing within the first pillar issues. Furthermore, the reluctant states have found themselves in a position where participation is unavoidable and thus they have subsequently adopted some of the EU's visa policies.

Generally, the Schengen framework, which informs the EU visa policy, is well defined and has thus far been successful. The steps being taken to bring further uniformity in this area are indicative of deeper integration where visa policy is concerned and are laudable considering the primacy of visa policy to statehood. The EU has developed substantial authority vis-à-vis visa policy and is displaying a definite political character in the area. That states may reach a point where they all subscribe to one regime vis-à-vis the issuing of policies is as astonishing as countries adopting singular economic and monetary policies. However, this progress must be coupled with concerted legislating where border controls and biometric identifiers are concerned.

DIRECTORATE C

With regard to our enquiry, Directorate C covers practical judicial cooperation in civil matters, the drugs strategy and the approximation and harmonisation of civil and commercial laws.

With respect to the first issue area, ***judicial cooperation in civil matters***, the bulk of achievements are still at an elementary stage and include Green Papers on issues such as conflict of laws and jurisdiction in divorce and matrimonial property regimes. A Communication was passed regarding the adoption of a programme on judicial

cooperation in the area and a Regulation was adopted establishing a general Community framework of activities to enhance such cooperation.

Practical cooperation measures include the *European Judicial Network (EJN)* for civil and commercial matters whose aims are to improve judicial cooperation between the member states in civil and commercial matters whilst providing information to the public to facilitate their access to the member states' judicial systems when operating in the cross-border context.[126] There are no other supporting practical initiatives and the EJN seems like an isolated mechanism that cannot sufficiently manage to coordinate all the practical measures necessary to foster understanding among judicial authorities of the EU. The EU also planned joint judicial training initiatives and began preparatory action for these in 2006. Such an initiative is an example of the kind of activity that fosters understanding among judicial authorities and leads to the development of common judicial procedures in the area. There is a need for more such mechanisms as they play an important role in the development of the area, which cannot only rely on legislation and mutual recognition for its complete development.

The efforts that have just been discussed are still at an early stage and have not yet taken sufficient effect although, at first glance action in the area is unimpressive in terms of both the lack of legislation and the shortage of more practical measures to improve cooperation and understanding among judicial authorities of member states.

With regard to the second issue area, ***mutual recognition of judicial decisions in civil justice***, the decision-making body has managed to pass Regulations in areas as diverse as a European enforcement order for uncontested claims, matrimonial law and insolvency. The biggest achievement is the adoption of the Regulation on the jurisdiction, enforcement and recognition of civil and commercial judicial decisions across the Union. This effectively means that most judicial decisions in the areas under civil and

[126] 'European judicial network', Civil matters-judicial cooperation, *Area of Freedom, Security & Justice*, Directorates-General & Services, European Commission website, http://ec.europa.eu/justice_home/fsj/civil/network/fsj_civil_network_en.htm.

commercial law can now be enforced anywhere across the Union regardless of the presiding court or tribunal.

In terms of the third issue area, ***approximation of laws*** however, one finds that the level of approximation is relatively rudimentary, with the Council still debating several instruments relating to contract law and contractual and non-contractual obligations.

Other achievements are in the fourth and fifth issue areas which are ***better access to justice*** and ***standardised civil law procedures***, respectively. In the former issue area, a Directive on access to justice in cross-border disputes was adopted along with another Directive on the compensation of crime victims. In the latter issue area, a Regulation was passed regarding evidence taking in civil/commercial matters and another one concerning the service in member states of judicial and extrajudicial documents was also passed.

The final issue area under Directorate C is the ***EU Drugs Strategy***. The EU's Drugs Strategy, which entails two four year Action Plans was adopted in 2004 and its aims include reducing demand and supply of drugs, fighting against trafficking and participating in international efforts to reduce the scourge of drugs.[127] Action under the Drugs Strategy is taken according to third pillar mechanisms as it is not currently fully housed under the first pillar. Despite this, action has been extremely impressive and steadily deepening since Tampere. The current Action Plan has more than 80 action points directed at member states, which they must adhere to and comply with fully. It is a comprehensive and well-thought out Plan, which, if successfully implemented, will significantly improve the EU's abilities to tackle the many facets of the problem of drugs, from a health perspective, to more society based initiatives involving the *European Drug and Drug Addiction Monitoring Centre (EMCDDA)* and to a combative perspective which involves improved functioning of the joint police and customs agencies. Presently, the EU's efforts in the latter regard are not up to par, due to the poor coordination of policing and customs activities. A culture of information sharing among enforcement

[127] 'Drugs cooperation', *Area of Freedom, Security & Justice*, Directorates-General & Services, European Commission website, http://ec.europa.eu/dgs/justice_home/index_en.htm.

agencies must be established with respect to drug trafficking and the legislative framework deterring and punishing drug usage must be developed.

Perhaps when the mandate of the current drugs strategy expires (2012) definitive measures will have been achieved vis-à-vis actually reducing the availability of drugs and reducing dependence.

DIRECTORATE D

Under the first issue area, ***judicial cooperation in criminal matters***, several Proposals and Green Papers were submitted and adopted, ranging from topics such as presumption of innocence to double jeopardy and the exchanges of information on convictions among judicial authorities and the effect of such convictions. Another *European Judicial Network* (*EJN*) (for criminal justice authorities) was established in order to enhance practical cooperation among judges and prosecutors in cross-border investigations and prosecutions. Its contact personnel are each situated in their respective home countries and provide links to information relevant to conducting investigations.[128] *Eurojust* on the other hand was set up to assist in coordinating the investigation and prosecution of serious cross-border crime. It consists of senior magistrates, prosecutors, judges and other legal experts seconded from every EU country. Their purpose is to provide immediate legal advice and assistance to the investigators, prosecutors and judges in different member states.[129] The description of these two initiatives (EJN and Eurojust) sounds identical and it is uncertain if there is any substantive difference between them. It seems that there may be duplication of duties and one of these may eventually have to fold into the other. The EJN will most likely fold into Eurojust because the latter is a grander initiative and more well resourced than the former. It remains to be seen what the achievements of these bodies will be in enhancing cooperation and eliminating the obstacle of borders in crime investigation and prosecution.

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[128] 'Judicial Network', Criminal Justice, *Area of Freedom, Security & Justice*, Directorates-General & Services, European Commission website, http://ec.europa.eu/justice_home/fsj/criminal/network/fsj_criminal_network_en.htm.

[129] 'Eurojust', Criminal Justice, *Area of Freedom, Security & Justice*, Directorates-General & Services, European Commission website, http://ec.europa.eu/justice_home/fsj/criminal/eurojust/fsj_criminal_eurojust_en.htm.

With regard to the second issue area, ***mutual recognition of criminal judicial decisions***, a Council Framework Decision was taken regarding the European Arrest Warrant and surrender procedures. Other noteworthy areas where legislation was proposed include the issue of taking account of previous convictions from other member states in the course of new criminal proceedings and the enforcement and recognition of prohibitions arising from convictions for sexual offences committed against children. In general, the area needs further concerted action from the EU and the Communication on mutual recognition of judicial decisions in criminal law should be adopted sooner rather than later. In the ten years since the beginning of Hague, what has been achieved in this issue area is neither considerable nor remarkable and it pales in comparison to achievements both in other issue areas of Directorate D and in mutual recognition in judicial decisions in civil matters.

In terms of third issue area, ***the approximation of laws aimed at preventing and fighting against organised crime,*** there exists several Council Framework Decisions governing the combating of several forms of organised crime such as fraud, money laundering, human trafficking, corruption and counterfeiting. In addition to this, there have been several Proposals submitted for the reviewing and improvement of current legislation. Generally, the achievements under this issue area are, legislatively speaking, impressive. There are a considerable number of EU initiatives along with common legislation, and thus from a supranational perspective, it can be said that there is notable activity on its part. It is apparent that member states are eager to fight organised crime as it is a cross-border phenomenon and they only stand to gain by cooperating and harmonising applicable legislation. This effort however, can only be successful if police and customs cooperation is well established and capable of operating in the cross-border environment.

The EU has also shown considerable enthusiasm in the fourth issue area of ***police and customs cooperation*** where some of the practical measures include the creation on *Europol*, the *Police Training College (CEPOL)*, European Crime Prevention Network and the Senior Chief Police Task Force among others. Such action is indeed surprising given that states are wary of handing over any substantial powers and functions in the

area of internal security to the EU simply because of the sensitivity of the area to the integrity of a state and the safety of its citizens. In Chapter 5, the relative decisiveness of these actions and institutions will be examined in order to determine whether they really limit member states' actions vis-à-vis of policing functions. Where customs cooperation is concerned a Work Programme on enhancing customs cooperation was initiated. Joint investigative teams were established and short-duration joint customs and police operations were conducted in the hope that these would form the foundation of more such permanent initiatives in the future.

The EU is still in the process of discussing several legislative proposals aimed at further increasing procedures and understanding among law enforcement authorities and it remains to be seen how long it will be before these are binding legislation. On the surface, and with regard to the extent of decision-making, EU decision-making in the area appears to be well-developed, as evidenced by the existence of Europol and other such institutions. The development is all the more meaningful once more because this area is sensitive to states and was kept under third pillar mechanisms for those very reasons.

In terms of the last issue area under the Directorate, that of the ***fight against terrorism***, the EU's efforts have in recent years been increased, in light of the terrorist attacks on two EU countries and the general increased occurrence of terrorism. A Council Framework Decision was adopted on defining terrorist acts and combating terrorism. Recently, an Action Plan was adopted and member states were asked to comment on the establishment of an enforcement network, which would focus on creating an information network, act as an early warning unit and monitor suspicious behaviour. Such an initiative would be good for the EU, as it currently lacks that overarching structure to coordinate all preventative and combative measures. Most coordination of sharing of information is done through the different law enforcement agencies of member states, based on the principle of availability as established in the Directive on sharing of information regarding terrorist offences. The EU has also begun looking into coordinating activities under this issue area with Europol, although this may not prove

extremely useful until Europol is completely independent of the Council of Ministers of the JHA. There are several legislative Proposals in the pipeline as the EU broadens its scope on in terms of tackling the phenomenon.

In addition to maintaining and improving its capacity building measures in third countries, the EU will also need to diversify its combative efforts as terrorism takes many forms, and will therefore challenge member states to pool resources and intelligence and come up with a consolidated and comprehensive terrorism strategy. The aim is to have an effective preventative (and less reactionary) infrastructure from the level of the supranational and by adopting a comprehensive action plan and creating a network specifically dedicated to the work in this field, the EU's action in the field may just become authoritative.

OVERALL CONCLUSIONS

The EU has experienced commendable success in Directorates B and D, but more integrated and focused action is needed in Directorate B in order for the EU to solidify its authority in the sub-sector, specifically with regard to migration policy, partnership with third countries and border management. Currently, the picture that is emerging is one of a central decision-making body trying to get to grips with the complexity of the area and dealing with difficult issues (migration and asylum), although it is yet to solidify its authority in these areas and synchronise efforts across the whole sub-sector.

Directorate C has also excelled in the mutual recognition of judicial decisions aspect, better access to justice and is well on the way to developing a comprehensive procedural law regime. However, it lacks initiative in the all-important areas of approximation of laws and practical judicial cooperation mechanisms. It is for this reason that the overall achievements of Directorate C then pale in comparison to the other Directorates.

The work in Directorate D is comprehensive, yet this analysis has only been superficial and it cannot yet be determined whether these achievements signal a real transference of political authority to the EU as the mechanisms and institutions established may, in

reality, be relatively ineffective. It is interesting to note however, that such concerted action is taking place in an area that is still governed by third pillar mechanisms, and that such development is exceeding that of practical cooperation in civil justice matters. In as much as it is an area of intergovernmental cooperation, it is also showing signs of steadily progressing into becoming an area of Community cooperation. There are no signs that development in the area has been unusually slow (bearing in mind that slow processes are the norm in integration, especially when looked at from a neo-functionalist perspective). Instead, the developments have only increased and seemingly gotten more extensive and in the process, deepened; neither are there signs that development has stagnated and failed to push forward. In Directorate D, the EU continues to function in an intergovernmental perspective but the developments are indicative of deepening cooperation and willingness to assign the EU responsibility in the area and thus it would not be wrong to conclude that within another ten years, Directorate D may possibly be under first pillar mechanisms, regardless of whether the Constitution is passed or not.

As noted earlier, the achievements of Tampere are negligible, but from the foregoing, it is clear that Hague has tackled and taken ambitious steps towards creating an EU regime within AFSJ. Thus far, the achievements point towards real development and there are some successes, which lead to the conclusion that the EU is steadily developing political muscle and authority albeit at a slow pace and in patches. The outcome of the analysis alludes to some disorganisation and a failure to comprehensively coordinate all the efforts in a sub-sector. This ties in with the general theory of integration from a neo-functionalist perspective; as power and responsibility for these areas is slowly being transferred to the supranational, efforts will be haphazard and some areas will be more influenced from the supranational level and others will not.

The next chapter will examine in-depth, the range of decision-making within the sector in an attempt to reveal the level at which joint mechanisms are employed. It will help us determine whether joint action is primarily limited to early, problem recognition stages or also covers the whole range of possible joint activity, up to establishment of common

agencies or adoption of common programmes to solve problems. The results ought to add more texture to this analysis and illuminate how evolved the decision-making system is.

CHAPTER IV

RANGE OF DECISION-MAKING WITHIN THE AFSJ

INTRODUCTION

Lindberg argued that

> [t]he concept of the range of decision stages is designed to direct our attention to what we can conceive of as a vertical dimension. That is, how many different kinds of decision activities are performed in the collective arena.[130]

The horizontal aspect of the decision-making system then would be what he described as the '*Functional Scope of Collective Decisionmaking*' which involved looking at how many policy issues were dealt with using joint decision-making mechanisms. The argument is that the more issues that are dealt with jointly, the more likely we are to conclude that decision makers form part of an integrated political system. The current examination of the EU decision-making process however is limited in scope to just one policy area and is therefore not concerned with the horizontal scope of decision-making in the EU per se. Judging from the number of Directorates of the EU however, one can safely conclude that the EU is involved in a wide scope of policy activity albeit the importance and depth of involvement can only be determined by looking at other aspects of the decision-making system.

According to Lindberg's conception therefore, there are several stages of decision-making and these can be articulated such that they form a scale, starting from the early so-called 'problem-recognition' stage right through to the stage of final allocations.[131] He goes on to hypothesise that the range of decisions taken by a group of countries would be determined by

[130] Lindberg, L. N., (3) *Op. Cit*., p. 64.
[131] *Ibid*, p. 64

> how close together (or far apart) the nations are initially in terms of indicators of interdependency, mass and elite community formation, economic development, types of political system, and the content of public policies.[132]

He argues that too much difference and too much similarity would cause actors to limit the range of decision stages.[133] In the case of too much similarity, countries would not need to have an extensive 'supranational' element because cultures, trends and historical legacies would mean that policies would already be closely aligned and therefore individual implementation would result in the same outcomes.[134] In terms of the history of West Europe therefore, he argues that the Original Six countries were "too far apart and felt too compelling a need for rapid action to settle for the piecemeal, step-by-step harmonization of policy in non-controversial areas so characteristic of the Scandinavian approach."[135]

However, determining the similarity between the countries of Western Europe is not simple. On the surface, these countries seem to be alike, having experienced similar developmental stages at round about the same time. They all share a history of imperialism, having been colonialist nations and generally upheld and shared the same ideals and beliefs throughout modern history. However, the similarities seem to end there. The countries that make up Western Europe all have unique histories, legacies and traditions. Each nation has had its own distinct way of behaving and doing things and therefore, even though there may be general similarities, the specificities of each nation's historical development and psyche, so to speak, are different. Sometimes these differences led to divisions resulting in war, which for a long time in European history marked the relations between states. Lindberg is therefore correct in concluding that the countries of West Europe were too far apart at the inception of the ECSC.

Again, it is difficult to pronounce on whether the approach taken by the founding fathers of the ECSC was piecemeal or more holistic. Cooperation was founded on amalgamating

[132] *Ibid*, p. 65.
[133] *Loc. Cit.*
[134] *Loc. Cit.*
[135] *Loc. Cit.*

the coal and steel industries of the countries concerned and from the start, the organisational structure was supranational, differing from the intergovernmental setup of the Scandinavian countries. Eventually, cooperation expanded into other areas of importance such as the economy, access to markets, removing trade barriers and harmonising trade practices. On this point, therefore, I would argue that the method of integration was a piecemeal one, although the founding fathers had clearly envisioned an experiment whose processes would replicate themselves in other important policy areas, thus becoming self-sufficient. After all it is a well known fact that the intentions of the founding fathers were to start a process that would continue through time and eventually create a single highly integrated community.

The differences between the countries of Western Europe are therefore what brought them together, especially the need to prevent further dissension and wars. The countries were close, but not close enough to warrant any joint decision making futile. They all had similar interests and values they wanted to preserve and a concerted effort at integration seemed to be the best way of doing this. The process of spillover defined earlier, would therefore explain further integration into more controversial policy areas.

Lindberg further hypothesised that another determining factor vis-à-vis the range of decision-making stages was "the nature of benefits that political actors can reasonably expect to flow from integration."[136] His argument was that the range would be extended only if crucial elites were convinced of the benefits and these were major in the sense that not obtaining them would be detrimental to some form of national interest. This point will be discussed further in the conclusion to this chapter.

Turning to Lindberg's classification of the range of stages of decision-making, whose tool was based on the categories provided by Lasswell[137] who defined three different stages of decision-making; these are ***problem-recognition, decision*** and ***application***.

[136] *Loc. Cit*.
[137] Lasswell, H.D., *The Decision Process: Seven Categories of Functional Analysis*, College Park, MD: Bureau of Government Research, College of Business and Public Administration, University of Maryland, 1956 as referenced in Lindberg, L. N., (3) *Op. Cit*., pp. 64.& 66.

"Problem-recognition refers to those political activities involved in recognizing that problems confront the group as a whole, that some sort of concerted or coordinated or joint action is called for."[138] Decision involves choosing between different proposals and motivating for one alternative over another and bargaining among authorities in order to come up with decisive frameworks of what policies should be implemented or adopted. The last stage, application simply refers to the implementation of policies agreed to within the caucus and the ramifications thereof.[139]

Lindberg's table of range of decision stages is as follows:

RANGE OF DECISION STAGES

RANGE SCORE	*STAGE OF DECISION*	*CODING INSTRUCTIONS*
1	**Collective problem-recognition**	*Formal recognition by governments or their representatives that problems are common and that concerted, coordinated, or joint action might be desirable. Intergovernmental meetings are held or collective institutions meet to discuss ways and means of concerting, coordinating, or deciding jointly. Joint information gathering is initiated with object of concerting national policies as distinct from carrying out a service for one or more governments.*
2	**Specific action alternatives *defined* collectively**	*Some policy options are defined as acceptable, others as not. National decisionmakers agree to a range of compatible policies. Most politically relevant elites must be mobilized. Study sessions of civil servants are of little moment in fields where great interest group associations are dominant and decisive, unless their*

[138] Lindberg, L. N., (3) *Op. Cit.*, p. 66.
[139] *Loc. Cit.*

		leadership is also engaged in the process. On the other hand, the relevant elite for monetary policy or for capital movements will be smaller and the role of governmental actors more decisive.
3	**Collective decisions on policy guidelines**	*Intergovernmental bargaining and choice of a type of policy (e.g., anti-inflammatory economic policy), leaving up to national authorities to translate into policy (e.g., to hold government expenditures stable or freeze wages or prices).*
4	**Detailed collective goal-setting implementation by national rules**	*Choice of policy actually limits national authorities to passing legislation implementing a detailed collective decision. Some discretion due to interpretation.*
5	**Decisions on policies and rules *directly binding* on individuals**	*No national discretion since intergovernmental decision requires no translation into national law via national processes. Actual implementation and enforcement by national authorities.*
6	**Collective implementation and enforcement**	*Common institutions are created to administer and enforce detailed binding rules as adopted by collective decision.*

Fig. 1.[140]

The above figure therefore represents a way in which we can numerically calculate the extent of decision-making within a policy area, by calculating the score for each issue dealt with under the area.

DECISION TYPES OF THE EUROPEAN UNION

The goals and objectives of the AFSJ are contained in the relevant treaties and the programmes (e.g. Tampere & Hague). These are then realised through the Commission and Council of Minsters decision-making mechanisms. It is not possible to understand

[140] 'Range of Decision Stages', *Ibid*, p. 67.

the sequence of these decision-making actions without explaining each one in some detail. Therefore, the report will now turn to a discussion of the different types of decision actions employed by the EU. The following is based on the European Commission's succinct description of the decision activities of the EU as found on its website.[141] It is further supplemented where necessary by Nugent's description of the different types of EU actions as he also provides a concise explanation of what can potentially be a confusing array of deeds.[142]

RECOMMENDATIONS & OPINIONS

These have no binding force within the Union although as the title suggests, they may contain in them useful or insightful policy proposals and suggestions. The Commission, Parliament or even member states may submit recommendation or opinions on a particular matter. They may or may not inform future legislation, but they are mainly ways in which topics may be debated within the decision-making system.

STUDIES & REPORTS

These are conducted/compiled by the Commission, usually as a more detailed way of exploring a topic and the consequences of various policy choices. When a new area is being legislated, the Commission will commission either a study or compile a report, either of which may look at the policy choices or the current situation in different member states. These documents may go on to be turned into Proposals or Communications.

EXPERT (PREPARATORY) TALKS/CONFERENCES

These are usually held in preparation for Papers or Proposals and form and involve hearing expert opinion on different policy/plan choices. Symposiums/conferences allow relevant stakeholders to gather together in order to discuss pertinent issues and map out a possible way forward for member states to take.

The above types of action can be classified as the *problem recognition* stages according to Lasswell's classification because they all involve identifying common problem areas,

[141] 'Secondary legislation', Process and Players, About EU Law, EurLex, EU website, http://eur-lex.europa.eu/en/droit_communautaire/droit_communautaire.htm#1.3.
[142] Nugent, N., *Op. Cit*., pp. 168-172.

meeting of national authorities to discuss possible joint action as well as joint information gathering. In particular they can be classified as falling under **collective problem recognition** which corresponds to **a score of 1** on Lindberg's table.

COMMUNICATIONS

Communications are a part of the Commission's legislative process and usually mark the beginning stages of officially formulating Community legislation. Communications are often the foundation on which subsequent legislation is built. They may likely be informed by the findings of Green Papers or White Papers. They are not binding on member states as they are rudimentary and usually spell out the different policy choices available or the best way of proceeding in a particular policy matter.

PAPERS

These are also another form of Commission communication and usually contain the findings of the Commission on a given topic that has been opened for public discussion. They may also contain the findings of Studies or Reports and are relatively authoritative in as much as they contain thoroughly researched findings on a certain topic. There are two types of Papers, green and white, with the former preceding the latter.

PROPOSALS

The Commission mean Proposals for comment, either by the Council or, depending on the issue at hand, other relevant EU bodies. The Commission tables a proposal and the Council makes decisions concerning the content thereof. They may be amended, rejected or adopted for further action. Proposals are not legislation, but rather the framework upon which subsequent legislation will be configured. In that regard they are a step further than the preceding forms of actions.

Papers, Commission Communications and Proposals are important in the legislative process because they already contain and outline different policy choices, and serve to highlight the merits and faults of the different options. They still form *problem recognition* activity albeit those of a more advanced kind than the actions with a range score of 1. In terms of Lindberg's table they correspond with the second classification which is **specific action alternatives defined collectively** and have a **score of 2** on the table.

DECISIONS

"A decision shall be binding in its entirety upon those to whom it is addressed."[143] Decisions are taken as part of policy implementation measures within the Union and are therefore not necessarily legislative but administrative in form.[144] They enable the smooth implementation of policy usually as laid out in directives.

In terms of issues falling under third pillar mechanisms, ***Decisions*** "are used …for any purpose other than the approximation of the laws and regulation of the Member States, which is the preserve of framework decision."[145] They therefore have the same ranking as Decisions under first pillar mechanisms.

Decisions are specific in nature, are frequently taken with regard to specific entities/individuals, and are thus not generally applicable. A decision is simply a way of giving a ruling on a particular matter. The nature of Decisions is such that they are neither legislative like Directives nor exploratory measures like Proposals and Green Papers, which may eventually become Directives or Regulations. They are used for such measures as establishing an agency, adopting a particular viewpoint or giving a ruling on a particular matter. For this reason, they will not be given a ranking on the range score table because they are not an idiosyncratic part of the chain that leads to collective policy or implementation. Rather they are a facilitative tool and thus have no bearing in determining range of decision-making.

DIRECTIVES

Article 189 of the European Economic Community Treaty (EEC) states,

> A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and method."[146]

A directive is meant to ensure that the necessary steps are taken in order to achieve a common desired policy result. A directive can therefore be seen as an instrument laying out what the end/outcome should look like. In essence, directives are concerned with "the laying down of

[143] Article 189, EEC.
[144] Nugent, N., *Op. Cit*., p. 170.
[145] 'Secondary legislation', Process & Players, Abut EU Law, *Op. Cit*.
[146] Article 189, EEC.

policy principles which member states must seek to achieve but which they can pursue by the appropriate means under their respective national…legal systems."[147] They are general in nature and may not necessarily concern all member states. The Commission must be informed of all member states' implementation measures and these must comply with the terms of the directive otherwise the Commission can rule that a member state failed to comply correctly with a directive. Failure to comply before the due date can lead to the Commission bringing a case against the guilty state.

In terms of third pillar issues, ***Framework Decisions*** are the equivalent of Directives. "A framework decision is binding on the Member States as to the result to be achieved and leave to the national authorities the choice of form and methods."[148] Thus its applicability is exactly like that of a directive. Previously framework decisions were known as common positions but that term is no longer applicable, since the coming into force of the Amsterdam Treaty.[149]

In accordance with Lindberg's table, Directives are comparable to what he calls **collective decisions on policy guidelines** in that, although they outline a particular policy choice, states have discretion as to how to translate them into policy. There is bargaining in the Council as to the structure and content of a directive and they can be amended or may themselves be amendments to a particular policy plan or programme. Consequently, they may be classified with a range **score of 3**.

ACTION PLANS/PROGRAMMES

Plans are usually produced by the Commission and take their lead from the policy guidelines outlined in Directives/Framework Decisions governing the area. Action Plans and Programmes are not always adopted in every issue area, nor do they always follow on from Directives or Framework Decisions. They are not legislation, but each member state adheres to the action points and agenda thereof because they are agreed upon at the supranational level. Consequently whatever aims need to be achieved through these, they are the responsibility of the EU. Member states will therefore implement the programmes according to the detail contained in the guiding documents. Action Plans/Programmes are usually meant to achieve practical goals that may not necessarily warrant legislation or they may be the practical extension of legislation. Therefore,

[147] Nugent, N., *Op. Cit*., p. 169.
[148] 'Secondary legislation', Process & Players, Abut EU Law, *Op. Cit.*
[149] *Loc. Cit.*

they are not legislation but they are meant to enhance the uniform implementation of common legislation from the level of the Union. An action plan will typically be more detailed than a directive (thus the term 'action') in that it will denote how specific measures ought to be achieved, therefore limiting the type of legislation that can be passed vis-à-vis the matter at national level. Their aims may either be implemented by national authorities or supranational bodies, e.g. Eurojust.

MANUALS/HANDBOOKS

The production of manuals and handbooks by the EU is also the result of a particular policy action. Manuals and handbooks are uniformly applicable across the Union and cannot be changed or amended by national authorities to suit their desires.

This pair of preceding actions is an example of what Lindberg calls **detailed collective goal-setting implementation by national rules**. They are not laws but they are prescriptive and usually based on existing laws (most often Directives). If they are not based on legislation, they have previously been agreed to at the supranational level and are therefore binding on that basis. They leave very little room for national discretion and thus have the **range score of 4**.

REGULATIONS

> A regulation is directly applicable, which means that it creates law which takes immediate effect in all the Member States in the same way as a national instrument, without any further action on the part of the national authorities.[150]

Regulations are therefore the most powerful forms of EU law.

In terms of Lindberg's classifications the description most befitting a regulation is that of **decisions on policies and rules *directly binding* on individuals** because there is no national discretion as to how policy actions ought to be applied as they are already fully specified from the supranational and are directly applicable as they are. This is **range score 5** on the table.

[150] *Loc. Cit.*

COMMON AGENCIES

The creation of agencies signifies that the member states are delegating the main functions of policy implementation in a certain area to that agency or institution. These institutions apply and operate according to the laws that have been commonly agreed upon and do not necessarily make their own legislation vis-à-vis the issue area. The most powerful legislative act therefore is a regulation although the establishment of common agencies expresses the greatest form of joint action simply because of the creation of one agency to handle specific issue areas on behalf of all member states.

According to Lindberg, this type of action is ranked as having a **range score of 6**.

The above covers the majority of the most common actions taken by the EU and noted by the Commission in its first evaluation of the implementation of the Hague Programme.

CALCULATING FREQUENCY DISTRIBUTION

There are several ways to measure the frequency distribution of the scores, but not all of them are appropriate. In the first instance one may look at the mean, mode or median. The latter is inappropriate because in this case we do not need to know central/middle value. What is of more importance to us is the frequency of each range score, because this will indicate at what range most joint decision-making action is taking place. The higher the score, the more likely the conclusion that the decision-making system is a political one because action is taken jointly right up to the implementation stage. Therefore, in order to determine which range scores occur the most, the frequency variable of use in this case would be the mode. The mode can be calculated for each issue area and each sector (i.e. the separate headings under each directorate and the directorate respectively).

The average value, i.e. the mean will also not be helpful because the range score table is composed of discrete scores and attempting to calculate the mean would produce continuous variables, which would not fit in the range score table. Therefore it will, in this instance, not be used.

Additionally, the percentage frequency under each directorate can also be calculated in order to determine where the bulk of decisions range, percentage-wise. This can be repeated for the whole AFSJ and would also be useful in indicating the level at which decision-making is generally taking place.

Therefore, the mode for each issue area will be calculated, and emboldened within the frequency tables, in addition to the percentage frequency for each sub-sector. Finally, the percentage frequency for the whole sector AFSJ, will be calculated, as presented in the actions recorded and scored.

Once again, the analysis that follows is based on the actions of the EU as noted on the Hague scoreboards,[151] the European Union website's SCADPlus section, as it relates to the AFSJ[152] and in some cases, the website of the Directorate-General of the AFSJ.[153]

DIRECTORATE B

The first area of consideration is Directorate B, which deals with *Immigration, Asylum and Borders*.

The following was achieved under the *first issue area*, **partnership with countries of origin**:

- One Communication was adopted
- Renewal of the mandate for the AENEAS programme
- Action Plan concerning the establishment and operation of the Regional Protection Programmes

[151] Communication of the Commission to the Council and the European Parliament (2), *Follow-Up of Measures Provided for under the Hague Action Plan in the Fields of Justice, Freedom and Security for 2005*, COM (2006) 333 final, Brussels, 2006.
[152] Summaries of Legislation, *Justice, Freedom & Security*, Activities of the European Union, EU website, http://www.europa.eu/scadplus/leg/en/lvb/l33022.htm.
[153] *Area of Freedom, Security & Justice*, Directorates-General & Services, European Commission website, http://ec.europa.eu/dgs/justice_home/index_en.htm.

According to our classification system therefore, a programme and an action plan both have a score of 4 and a Communication has a score of 2. This means that we have **two instances of a score of 4** and one, instance of **the score of 2**.

In terms of the *second issue area*, **Common European Asylum System** the following was achieved:

- A Proposal was adopted
- A Communication was adopted
- Three Directives were adopted
- Two Regulations were passed
- A programme, EURODAC, was established
- Another programme, ARGO, was also initiated

This means that we have two instances of **range score of 2**. Additionally, there are **three instances of the range score of 3**, **two instances of range score 4** and **two instances range score of 5.**

Under the third issue area of **fair treatment and integration of third country nationals**, the Commission noted the following:

- A Communication was adopted
- A Green Paper was published
- Three Directives were adopted
- INTI Programme renewed
- A Regulation was passed

We therefore have **two instances of a range score of 2**, **three instances of range score 3**, a **range score 4** and one **range score of 5**.

With regard to *fourth issue area*, **management of migration flows**,

- A Report was published by the Commission
- Three Proposals were reviewed and adopted
- Three Directives were adopted
- Appointment of Commission Special Representative for common readmission policy

- Adoption of Four Funds under a general framework programme
- Establishment of ICONET
- Two Regulations ware passed

The above amounts to one instance of **range score 1**, **three instances of range score 2** and **three instances of range score 3**. The rest amounts to **six instances of range score 4** and **two instances of range score of 5**.

With regard to the *final issue area* **border management, biometrics, visas and Schengen**, the following was achieved:

- Expert hearings/meetings held vis-à-vis national ID cards
- One instance of Recommendations submitted to the Council
- A Report was adopted
- Six Proposals were adopted
- A handbook was endorsed
- Visa Reciprocity mechanism instituted
- Regulation regulating reciprocity mechanism passed

In this case there are **three instances of range score of 1** and **six instances of range score of 2**. Furthermore, there are **two instances of range score of 4** and one **range score of 5**.

The ***percentage frequency*** under this sub-sector:[154]

ISSUE AREA	SCORE 1	SCORE 2	SCORE 3	SCORE 4	SCORE 5	SCORE 6
1		1		**2**		
2		2	**3**	2	2	
3		2	**3**	1	1	
4	1	3	3	**6**	2	
5	3	**6**		2	1	
% FREQ.	**8.69**	**30.43**	**19.56**	**28.26**	**13.04**	

[154] Table 1.

ANALYTICAL INTEPRETATION

From the foregoing therefore, we can draw some conclusions about decision-making within Directorate B. It is important to note however, that the calculations may represent a different picture from what is actually going on in the sub-sector simply because peculiarities in one issue area may inflate the overall percentage of any given range score. It is important therefore to keep in mind the discussion in Chapter 3, which may explain any oddities.

With regard to the first issue area, one may be inclined to think that there is decision-making across the spectrum if we were only presented with the mode, which is range score 4. This would be misleading as is seen, through the help of the table. There is actually no legislation that has been adopted in the area and, in effect, the only substantial action has been the adoption of two programmes. Another oddity is the fourth issue area, which has a mode of range score 4. As discussed in Chapter 3, the EU's migration policy is extremely undeveloped and the range score of 4 is not indicative of extensive or in-depth decision-making, but rather is due to practical measures such as programmes and other non-legislative actions.

From the above it is evident that the bulk of action within the directorate lies in the legislative proposal stage (30.43%). There are not as many directives as there are programmes and action plans governing the area, which means that the EU is keener to coordinate practical efforts than create a legally binding regime of policy and how that policy ought to be implemented at a national level. The existence of these programmes brings to the fore the question of just how successful the EU is at meeting aims if they are articulated through mechanisms that do not have the binding power of legislation. The question also has bearing on the ability of the decision-making system to ensure that its decisions are implemented. This is more easily and effectively achieved if aims are articulated in the form of legislation as opposed to programmes as these are not binding and are more focused on achieving specific objectives within a short-term framework. A study of wider scope would be extremely helpful in assessing the implementation measures of each member state (or just a few) where programmes are concerned in order

to ascertain their level of effectiveness. Nonetheless the success of most of the programmes can only be determined at the end of the Hague Programme as it is still too early to try and do so now.

As a priority area [Directorate B], the EU is keen to put in place measures and develop legislation that will assist in regulating migration, produce a comprehensive and uniform asylum policy and harmonise visa and information-sharing policies. By and large however, the Directorate is lacking in legislative output (i.e. Directives and Regulations) and since these are the binding forms of action, they hold more power and do not have a termination date like programmes. Although these programmes may enhance and encourage deeper cooperation and eventually form bonds of trust among member states, their effectiveness may be brought into question if tangible and long-lasting results and change are not visible. With that having been said, the large percentage of range score 2 is indicative of the fact that the EU is currently working on a number of policy choices for the Directorate thus at the end of this year or 2008, one might find that the number of Directives has increased and the area is more legislatively regulated.

The issue area of least action is ***partnership with countries of origin***, a point that was made in the preceding chapter. Action here has not reached an impressive stage and cannot be compared to the progress that is steadily being achieved in the other issue areas and thus this is an issue area where the EU would do well to specifically and more concertedly focus on.

It is also important to note that where Schengen and the visa policy are concerned, the area is governed by the Common Consular Instructions as referred to in the preceding chapter. This document acts as a guide as to how the area is governed and its nature can be compared with that of a Regulation. It contains specific and binding guidelines on the issuing of visas into EU countries because the CCI constitute a legal instrument and thus contracting member states' actions in the area are limited to the specifications entailed therein. The CCI may therefore explain the absence of directives and regulations laying

down legislation in the issue area, but it does not mean that cooperation in the areas is rudimentary, because, to the contrary, it is.

The results above support the conclusions made in Chapter 3 about the overall progress in this Directorate. Development is patchy and generally insubstantial, especially in the important area of migration policy. However, the legislation in the second and last issue areas leads to the conclusion that not all the development within the Directorate is unremarkable. This is because these two areas are two out of three (the other being migration policy) of the most important issue areas of Directorate B. Action in the two areas does not give the impression of merely being governed by intergovernmental measures. It is therefore a promising sub-sector, whose development over the years will begin to show that the EU has a political character. Currently, that character has not been completely cemented but it is there, despite only still being at an elementary stage.

DIRECTORATE C

Directorate C is concerned with cooperation in civil justice, EU drugs strategy and mutual recognition of civil and commercial judicial decisions.

The *first issue area* is **judicial cooperation in civil matters** and the following was noted:

- One Communication were adopted
- Three Proposals were adopted
- Four Green Papers were adopted
- One Regulation was passed
- Establishment of European Judicial Network

This means that there are **eight instances of a range score of 2**, **one instance of range score of 5** and one **range score of 6**.

With regard to the *second issue area*, **mutual recognition of judicial decisions in civil justice**, the following was noted:

- Four Regulations were passed

The above therefore means we have **four instances of the range score of 5**.

Where the *third issue area*, **approximation of laws** is concerned:

- Two Communications were passed
- One Proposal submitted and adopted
- Convention in force

The above amounts to **three instances of range score of 2** and **one instance of the range score of 3**.

Under the *fourth issue area*, **better access to justice**, the following was achieved:

- Two Directives adopted

The above amounts to **two instances of the range score of 3**.
Under the *fifth issue area*, which is **standardised civil law procedures**, the following was noted:

- Two Regulations were adopted

The above amounts to **two instances of the range score of 5**.

With regard to the *sixth issue area*, the **European Drugs Strategy**, the following was achieved:

- Two instances of a set of recommendation that were adopted by the Council
- Two Proposals adopted
- Drugs Strategy
- One Framework Decision adopted
- One Action Plan
- Mechanism for rapid exchange of information adopted
- Programme for Community action adopted
- Three Regulations passed
- Establishment of EMCDDA

There are therefore **two instances of range score of 1**, **two instances of range score of 2** and **three instances of range score of 3**. Additionally, there are **three instances of range score 4**, **three instances of range score 5** and one instance of **range score of 6**.

The ***percentage frequency*** under this sub-sector:[155]

ISSUE AREA	SCORE 1	SCORE 2	SCORE 3	SCORE 4	SCORE 5	SCORE 6
1		**8**			1	1
2					**4**	
3		**3**	1			
4			**2**			
5					**2**	
6	2	2	**3**	**3**	**3**	1
% FREQ.	**5.55**	**36.11**	**16.66**	**8.33**	**27.77**	**5.55**

ANALYTICAL INTERPRETATION

The above scores are perhaps the most representative out of the sets of scores as a depiction of activity in any of the sub-sectors. The modes accurately represent the range score where most action lies in the different issue areas. Judicial cooperation in civil matters, where most action is still relatively undeveloped has a mode of range score 2 and the mode for issue area two, mutual recognition of judicial decisions, is range score 4, an appropriate score given the fact that this is the area of most development in Directorate C. In as much as the action in the latter area represents considerable achievement, it does not mean that overall achievement in the sub-sector has been impressive. More action is needed in the first and third issue areas, which are primary to the portfolio of Directorate C.

Considering the period of our analysis, one would expect that more had been done to harmonise and approximate laws, in addition to establishing more practical aims to enhance joint cooperation among judicial authorities. Instead, over the last ten years, achievement has been mediocre, although this situation could easily be remedied by

[155] Table 2.

concerted action on the part of the EU because it has shown an ability to legislate in the sub-sector (as seen in some of the other issue areas) and thus the mediocrity can only be due to foot-dragging. This is most likely due to the fact that the areas civil and commercial law are not perceived with the same sense of urgency as cooperation in criminal law because states do not perceive that they may lose anything by not cooperating. This is the point made by Lindberg, and noted above, that range of decision-making will be determined by the benefits actors expect from joint action. The more benefits perceived as flowing from joint action, the greater the range of the joint action will be. However, harmonised civil and commercial law is intrinsic to the survival of the economic and monetary union as it provides a legal framework from which all actors in the EU (individual persons and companies) can interact freely. Thus the inaction displays a short sightedness on the part of member states. Perhaps, when the area becomes one of critical action, we may witness renewed interest and zeal in legislating on the area on the part of the EU.

The EU Drugs Strategy is an area of close cooperation and is therefore governed according to third pillar mechanisms. Despite this however, the EU has managed to bring into force some considerable legislation that covers the many varied aspects of the scourge of drugs over the past ten years. Action in this field has been extensive and is commendable for an area governed by third pillar mechanisms and the Action Plan should achieve even more measures to eradicate the scourge of drugs over the next couple of years.

DIRECTORATE D

This directorate is concerned with internal security and criminal justice. This is an area of shared responsibility for member states and the EU.

Under the *first issue area*, **judicial cooperation in criminal matters**, the following was achieved:

- One Proposal was adopted
- Three Communications were adopted

- An Initiative was submitted for discussion (range score 2)
- Two Green Papers adopted
- One Council Framework Decisions adopted
- A Work Programme initiated
- Establishment of Eurojust

The above amounts to **seven instances of the range score of 2**, **one instance of range score 3**, an **instance of range score 4** and **one range score of 6**.

The second issue area, **mutual recognition of judicial decisions in criminal matters**, had the following achievements under it:

- One Communication was adopted
- An Initiative was submitted for discussion (range score 2)
- Two Proposals were adopted
- Two Council Framework Decisions adopted

This means that there are **four instances of the range score of 2** and **two instances of range score 3**.

With regard to the *third issue area*, **the approximation of laws aimed at preventing and fighting against organised crime**:

- A Study was conducted
- An Expert group on trafficking established
- Two Reports were compiled and adopted
- Three Communications were submitted and adopted
- Two Proposals were adopted
- One Directive adopted
- Eight Council Framework Decisions were adopted
- Convention in force
- Framework for the use of liaison officers abroad established (range score 4)
- Action Plan adopted

The above amounts to **two instances of range score of 1**, **seven instances of range score 2** and **ten instances of range score 3**. The remainder amounts to **two instances of range score 4**.

With respect to the *fourth issue area*, **police and customs cooperation**:

- Six Proposals were adopted
- Three Communications were adopted
- One Directive adopted
- Two Conventions in force
- A Common Position articulated [similar to a Directive]
- A Council Framework Decision was adopted
- Two Programmes were adopted and established
- SIRENE Manual was adopted
- Short-duration joint operations (range score 4)
- Europol established
- CEPOL established

The above amounts to **nine instances of range score 2**, **four instances of range score 3**, **four instances of range score 4** and **two instances of range score 6**.

Under the **fight against terrorism**, the *final issue area*, the following actions were noted:

- Recommendations vis-à-vis establishment of Law Enforcement Network against terrorism
- A conference establishing partnerships between private & public sector was held
- Five Communications were adopted
- Two Proposals were adopted
- Two Directives were adopted (one Council Framework Decision & a Directive)
- Common Position on freezing assets of terrorist groups
- An Action Plan adopted
- Capacity building measures (Action Plan) being carried out
- A Regulation was passed

This means we have **two instances of range score of 1**, **seven instances of range score of 2**, **three instances of range score of 3**, **two instances of range score 4** and **one of range score of 5**.

The ***percentage frequency*** under this sub-sector:[156]

ISSUE AREA	SCORE 1	SCORE 2	SCORE 3	SCORE 4	SCORE 5	SCORE 6
1		**7**	1	1		1
2		**4**	2			
3	2	7	**10**	2		
4		**9**	4	4		2
5	2	**7**	3	2	1	
% FREQ.	**5.63**	**47.88**	**28.16**	**12.67**	**1.40**	**4.22**

ANALYTICAL INTERPRETATION

What is immediately observable about the scores is the high percentage of actions that are still in the proposal stage (47.88%) and have not yet been approved as Council Framework Decisions or adopted as programmes. In general, there is a hive of legislative activity in the area as the EU is in the process of generating and submitting Proposals for legislation in many different areas. The only area where there is a noticeable lack of action is the second issue area, which as noted in Chapter 3 is the only area under Directorate D where the EU has not been forthcoming.

When viewed as a whole, range score 3 legislation amounts to about 28% of action within the sub-sector. This is in contrast to the 16.66% of action of range score 3 in Directorate C, a result which supports the conclusion that in general, both legislatively and in terms of practical measures, Directorate D is a more developed area. The percentage scores in Directorate C are more evenly spread out over the whole range of the system, whereas in Directorate D, they are concentrated in two range score areas. Despite this distribution of scores, more meaningful decision-making activity is still taking place in Directorate D.

[156] Table 3.

In terms of the range of decision-making in this Directorate, the EU is most likely to act only in as far as laying down collective decisions on policy guidelines (i.e. Council Framework Decisions), therefore leaving it up to states to determine how policy will be implemented. Lindberg describes this stage as involving intergovernmental bargaining and it aptly describes the type of action witnessed in the sub-sector. Despite this however, the EU is making full use of the decision-making instruments available to it and also extending its reach into cooperation measures that involve the establishment of common agencies. The results here indicate that the EU has definitely extended its supranational character into intergovernmental areas, and in this case, the range of decision-making is impressive, leading to the conclusion that it [EU] has definite political influence, not only in 'EU' policy areas, but also in some 'intergovernmental' ones. The development here leads us to conclude that this area may very well accede to the Community method and become a fully fledged EU issue area.

The report will now focus on calculating the scores for the whole sector of the AFSJ in order to determine the range in which the most decisions are taken.

CALCULATIONS FOR THE WHOLE AFSJ

The ***percentage frequency*** scores for the whole AFSJ:[157]

DIRECTORATE	SCORE 1	SCORE 2	SCORE 3	SCORE 4	SCORE 5	SCORE 6
B	4	**14**	9	13	6	0
C	2	**13**	6	3	10	2
D	4	**34**	20	9	1	3
% FREQ.	**6.53**	**39.86**	**22.87**	**16.33**	**11.11**	**3.26**

ANALYTICAL INTERPRETATION

In general, the above results highlight the fact that decisions in the EU take a long time to be 'processed' and remain at the proposal stage for a considerable amount of time. Another reason for the large bulk of decisions at range score 2 could be the fact that the

[157] Table 4.

Hague Programme is currently in infant stages, having only come into effect in 2006. A bulk of this evidence is taken from the 2006 Hague scoreboards, which would only have noted a year's work. Consequently, my conclusions may be unnecessarily negative when the fact of the matter is that at the time of this enquiry, the EU was only just beginning to act upon the Hague mandate. However, it is the other decisions that were taken before Hague that also lead us to conclude that the timing of the report is not necessarily to blame, as even there, it is evident that the EU takes a long time to pass decisions and implement agreed to measures. Proposals on legislation are plentiful but the turnover of those proposals into legislation is slow. The system seems unable to progress with relative ease and swiftness further than decision-making stage 2. It is uncertain whether this is due to a lack of political will on the part of the Council of Ministers to take issues further through the whole range of stages, or it is a general fault of the system. However, first pillar mechanisms are specifically crafted to prevent such occurrences of 'failure' or issues being stuck in the system and not progressing. It is important to bear in mind however, that these mechanisms have not been refined to make them operate better, as was anticipated that the Constitution would do. With the absence of improved decision-making mechanisms, the system's inherent faults have become apparent as the EU progresses into more complex and demanding policy areas, areas for which the current decision-making mechanisms are ill-suited.

Of the two causes identified as the probable cause for relative inaction within the AFSJ, the lack of political will, or influence of the actors, seems to be the most plausible explanation. This is so because it is evident that the EU is able to make decisions of a highly evolved nature even when using the intergovernmental approach. There also appears to be reasonable explanations as to why the EU would not consider action in certain areas as a priority, thus leading to a display of political inertia. These results, and consequent conclusions, therefore, highlight the fact that spillover is indeed not automatic.

The report will now turn to a discussion of theoretical implications of the results.

CONCLUSION & THEORETICAL CONSIDERATIONS

Neo-functionalism did emphasise the centrality of actors (the political elite) as the primary driving force behind integration. This specifically excluded the need for any form of democratic or identitive support of the emerging supranational body.[158] In this respect therefore, whether this be detrimental or beneficial to the overall development of the EU, it can be said to be developing along neo-functionalist norms. This type of integration is a technocratic form of social engineering, an attribute of neo-functionalist theory adopted from its predecessor, functionalism.[159] However, the role of actors was secondary to that of the decision-making system, which was the primary focus of neo-functionalist theory. "An essential part of the neo-functionalist strategy was the identification of the Community method as the new *modus operandi* of the general system."[160] As the actors' loyalties shifted, the supranational body would become more powerful, and the role of actors in determining the pace and nature of integration would decrease. Neo-functionalism therefore emphasised the development of a decision-making system that progressively became sophisticated and efficient vis-à-vis the allocation of basic values in the community.[161] However, this has not happened within the EU, mainly because of the failed Constitution. The Constitution would have been complementary to development in the AFSJ. Subsequently, because the system has not evolved to keep up with the new areas of action, actors still have more influence than they ought. The supranational aspect of governance in these new areas has not adequately developed and thus bargaining still shows many signs of intergovernmentalism. Neo-functionalists had originally posited that the relationship between scope and level of decision-making was generally automatic; an increase in the number of joint policy areas automatically translated into increased range of decision-making. As these results show, and other scholars have found in the past, the relationship is not so straightforward. As the areas covered by the EU have increased, the decision-making system has relatively stayed the same, with a reluctance on the part of actors and the governed to give the EU more power. At this specific juncture in the development of AFSJ decision-making, it can be

[158] Chryssochoou, D., *Op. Cit.*, 2001, p. 55.
[159] *Ibid*, p. 40.
[160] *Ibid*, p. 54.
[161] *Ibid*, p. 53.

argued that intergovernmental processes are more likely to be employed in reaching agreement although it does not mean that all cooperation in the AFSJ has and will always be characterised by intergovernmental processes. Intergovernmental processes do not allow for the growth and expansion of joint cooperation in the way it has been witnessed in the AFSJ. Parties to an intergovernmental body would not need to have institutions such as Europol or Eurojust. Looser and more informal measures such as the EJN would suffice. Instead, development has gone beyond intergovernmental cooperation into supranational cooperation. This supranational character however, is currently still rudimentary and developing, and thus the conclusion that intergovernmental processes are still more prominent.

Having examined one aspect of the level of the decision-making system, it can be tentatively concluded that the EU is showing signs of developing a political character and thus may be at the very early stages of a political union. However, there are several factors limiting swift development of this supranationality, without which, the EU would most likely have already developed a more pronounced political character in the AFSJ. The focus now turns to the last independent variable, relative decisiveness, in an attempt to discover the importance and effectiveness of the decisions made in the different issue areas.

CHAPTER V

THE RELATIVE DECISIVENESS OF THE DECISION-MAKING SYSTEM

INTRODUCTION

Relative decisiveness is perhaps the most revealing variable when examining the functioning of a decision-making system because it sheds light on the effect of joint decisions vis-à-vis national policy measures. It reveals whether decisions are being taken in areas of prime importance within a sub-sector or in comparatively non-controversial/non-influential matters. Matters of prime importance are those which, among a set of issues relevant to a particular policy, largely determine or shape the final/overall outcome of that policy. It is also those issue areas which, depending on the form they take, will influence or dictate the choices available within the scope of the less important topics during policy making. In other words, the choices made in fundamental areas may also preclude certain choices for the other secondary areas of a policy area.[162]

The other aspect of relative decisiveness is the pre-emptiveness of decisions taken.[163] Some collective decisions may still leave room for national choices to be implemented whilst some may exclude any additional action from the national level. In the case of the EU, this enquiry may be determined by examining the kind of legislation passed vis-à-vis an issue area, e.g. a Directive will leave more scope for national action, whereas a Regulation will not. The task is to therefore determine what the aim of each sub-sector (i.e. Directorate) is. Once the aim is known, one can then determine which issue areas are of importance and which ones are of a more secondary nature. The next step is to then list these areas, in order of importance, and then proceed to examine what action is being taken with relation to their development at the supranational level. We can also determine

[162] Lindberg, L. N., (3) *Op. Cit.*, p. 68.
[163] *Loc. Cit.*

how pre-emptive decisions and actions are by looking at the provisions provided for each i.e. assessing the looseness or restrictiveness thereof.

Regarding the outcome of the examination, several pictures may transpire. One may be of a decision-making body that has reached a stage of joint implementation of policies, but this may be occurring in largely nominal or procedural issues and not in weighty, decisive ones. It may also be that there is joint decision-making occurring in areas of importance, although the level of pre-emptiveness may not be so great. Depending on the outcome, different conclusions can be drawn from the assessment regarding the political character of the decision-making system.

The measure of a decision-making system's political character can be found in it being able to deal with issues that either affect resource allocation or have a discernible effect on whom they concern so that their choices are limited or affected.[164] Thus, it would be erroneous to rely solely on Figure 1 in Chapter 4 and assume that actions with a higher score corresponded to increasing pre-emptiveness of those actions in relation to member states. The enquiry into the pre-emptiveness of the decisions taken at the supranational requires more insightfulness as to the actual functions of some of the common agencies and the repercussions of certain programmes. It may be that a programme (range score 4) does not necessarily affect what national governments may still choose to do vis-à-vis a particular issue area and as such an EU programme may actually only play a supplementary role to a government's own policies. Discerning this type of salience will undoubtedly be a difficult process, as it will require individual judgement and assessment of the situation in each issue area. The results obtained may suffer from subjectivity because no particular scale is being applied to the judgment on relative decisiveness, but rather the conclusions will be based on evidence presented. As Lindberg notes,

> The measurement problems here will be similar to those encountered in our effort to develop objective indicators of salience, and it is difficult to see how we can avoid a similar reliance on subjective coding and ordinal measures.[165]

[164] *Loc. Cit.*
[165] *Loc. Cit.*

The examination of each sub-sector will consist of an analysis of the legislation and measures existing in areas that are considered to be of relative decisiveness vis-à-vis the overall policy. In this way we should be able to determine the implications of the decisions taken at the collective level. This enquiry can be differentiated from that of the range of decision-making by asserting that the preceding analysis only seeks to examine the extent of the evolution of joint action whereas the current one seeks to assess the effect of joint decisions vis-à-vis issue areas.

The discussion will now turn to analyse the different Directorates, in the manner explained above. Once again, the analysis that follows is based on the actions of the EU as noted on the Hague scoreboards,[166] the European Union website's SCADPlus section, as it relates to the AFSJ[167] and in some cases, the website of the Directorate-General of the AFSJ.[168]

DIRECTORATE B: IMMIGRATION, ASYLUM & BORDERS

In this Directorate, the most important issue areas are ***migration policy, visa and border management policy and asylum policy***. These are the *fourth, fifth* and *second* issue areas of Directorate B, respectively. *Migration policy* is important because the EU is an attractive destination for both legal and illegal migrants. Migrants may upset or overburden the social system of a country, or they may affect an economy by providing cheap labour, which also has repercussions for citizens of a country. Because most aspects of EU member states' economies, including some aspects of their social systems, are synchronised, it is imperative that factors which may affect this synchronisation be commonly regulated. Migration policy therefore, is linked to sustaining economic synchronisation within the EU. The AFSJ exists to support and enhance the aims embodied in the economic integration project, and therefore the issue area which largely

[166] Communication of the Commission to the Council and the European Parliament (2), *Follow-Up of Measures Provided for under the Hague Action Plan in the Fields of Justice, Freedom and Security for 2005*, COM (2006) 333 final, Brussels, 2006.
[167] Summaries of Legislation, *Justice, Freedom & Security*, Activities of the European Union, EU website, http://www.europa.eu/scadplus/leg/en/lvb/l33022.htm.
[168] *Area of Freedom, Security & Justice*, Directorates-General & Services, European Commission website, http://ec.europa.eu/dgs/justice_home/index_en.htm.

determines how free movement, as a function of economic integration, is regulated, ought to be in my opinion, the area of chief importance in determining relative decisiveness.

Visa policy is concerned with determining how visitors and short-term residents are granted access into the EU. It does not fall under immigration because the issuing of visas has to do with temporary stays/short-duration visits into the Union, whereas migration often refers to long-term relocation to a territory. Nevertheless, success in the more short-term stay policy area is an indicator of how successfully member states can formulate a common long-term migration policy. *Border management* is concerned with synchronising the procedures employed at border check points. In order to ensure uniform free flow of movement within the Union and secure external borders, a common border management policy must be formulated. Therefore, the same systems must be used throughout the Union and border personnel must employ the same standards.

Asylum policy is concerned with regulating and standardising the flow of refugees and asylum seekers into the Union. The EU must therefore legislate on the area in order to ensure that such movement does not disrupt individual states and the Union as a whole and that there is agreement on other issues such as financial support and burden-sharing in the event of influxes and many other aspects related to granting asylum.

These are, in my opinion, the areas which largely define Directorate B and the matters in other issue areas will largely be decided upon according to the decisions made in these chief areas. Furthermore, an analysis of decisions made in the chosen portfolios will reveal how pre-emptive and therefore authoritative those decisions of the EU are. The first area of analysis will be immigration policy.

MIGRATION POLICY

With regard to economic migration, the most important aspect of a legal migration policy, the EU decided to adopt a policy plan in December 2005, as noted in Chapter 3. The *Policy Plan on Legal Migration* contains guidelines on how member states will address economic immigration. Nothing in the plan is legislatively binding and thus it is

only a guide as to how the EU ought to devise future legislative instruments regarding legal migration. Therefore, the Plan is yet to birth decisive legislation vis-à-vis the conditions and procedures of admission for third country nationals seeking employment. Previously (2001), the Commission presented a proposal for a Directive on conditions of entry for economic migrants before the Council, but it was not adopted as member states could not reach any agreement, much to the disadvantage of the EU's whole strategy on legal migration in general.[169]

Consequently, the conclusion is that even though there is activity in an area of relative decisiveness, there are currently no binding (or pre-emptive) decisions being taken with regard to it and thus no actual common EU policy on legal migration. Member states are therefore still free to determine their own policies vis-à-vis migration and other matters related to economic migration, in particular the integration of third country nationals. This may lead to uneven socio-economic patterns of development within the EU, an occurrence that may eventually derail efforts at creating a uniform socio-economic environment.

VISA & BORDER MANAGEMENT POLICY

Where visa policy is concerned, the Common Consular Instructions (CCI) were adopted in 2000 and have subsequently undergone several revisions, but are applicable to all contracting parties of the Schengen Agreement (not all the member states) when issuing visas for visits of a maximum of three months only. If visits are longer than this then national visas are issued and are only valid for stays in that issuing state's territory. The document covers airport transit visas, transit visas, short-term multiple entry visas and group visas. The CCI also stipulate the manner in which state responsibility for processing an application shall be determined. It is also detailed with regard to the actual application procedure (e.g. supporting documents to be presented and the conducting of interviews) and the organisation of the visa issuing sections of the contracting member states themselves especially to prevent against theft, falsifications, and corruption by visa

[169] 'Legal Migration', Immigration, *Area of Freedom, Security & Justice*, Directorates General & Services, European Commission website, http://ec.europa.eu/justice_home/fsj/immigration/work/fsj_immigration_work_en.htm.

issuing officials. Included are a set of regulations governing the movement of holders of diplomatic, official duty and service passports. The CCI also provides a list of the status of different third country nationals (i.e. whether or not they are entitled to visa exemptions and in which member states such waivers are applicable). The visas issued in third countries by the embassies, consulates or high commissions of contracting member states are all the same and there is also a visa reciprocity mechanism that has been established with certain third countries, thus attesting to the uniformity of the process of visa issuing within the EU. Currently, a Proposal has been put forth for the improvement of the CCI through the creation of a Community Code on visas, which will be more pre-emptive and applicable to all member states and not just the 'Schengen' states. Such a move would only strengthen the EU's already established political authority in the issue area. Reciprocity mechanisms have also been established with certain third countries in an effort to enhance relations and eliminate the often tedious process of issuing visas.

With regards to border management, the EU has adopted the second phase of the Schengen Information System (SIS II). SIS is a common information system employed throughout the Union by border and customs personnel in monitoring the movement of goods (e.g. lost or stolen) and people (e.g. criminals and missing persons). Additionally, a handbook for border guards was also adopted in an effort to coordinate the efforts of those responsible for physically manning borders, in particular the external ones.

In general, visa policy and border management policy within the EU is highly evolved, having been initiated over a decade ago through the Schengen acquis. It has subsequently been fine-tuned and the EU has managed to gain authority over more issue areas in the field, thus increasing its pre-emptiveness in the area as a whole. The governing document is mainly composed of a set of Regulations, which are in their nature restrictive in relation to member states' flexibility in an area governed by them. The legislation governing visa policy is therefore especially pre-emptive, thus meaning that the EU's policy in the area is highly evolved and dominant where the national level is concerned. Furthermore, the EU is steadily acquiring capabilities in securing its external borders because it already has an established border guard, which is often supported by the

national border guard of countries at the exterior of the EU. The handbook therefore further entrenches these capabilities and attests to the EU's well-developed authority in the issue area. Progress and development in this area may well lead to spillover in migration policy, which is currently still in its infancy.

ASYLUM POLICY

Where asylum policy is concerned, the EU managed to agree to the following legal instruments:

- ⇒ the Reception Conditions Directive
- ⇒ the Asylum Procedures Directive
- ⇒ the Qualification Directive and
- ⇒ the Dublin Regulation

The *Reception Conditions Directive* guarantees minimum standards for the reception of asylum-seekers, including housing, education and health. The *Asylum Procedures Directive* ensures that both accelerated and regular procedures provide the same safeguards for applicants – for example, the right to be invited to a personal interview – as well as the basic principles and guarantees relating to interpretation and access to legal aid. The *Qualification Directive* contains a clear set of criteria for qualifying either for refugee or subsidiary protection status and sets out what rights are attached to each status. It also introduces a harmonised regime for subsidiary protection in the EU for those persons who fall outside the scope of the Geneva Convention, but who nevertheless still need international protection, such as victims of generalised violence or civil war. The Dublin Regulation establishes criteria and mechanisms for determining which member state is responsible for processing an asylum application lodged in one of the member states by a third-country national.[170]

[170] 'Towards a common European Asylum Policy', Asylum, *Area of Freedom, Security & Justice*, Directorates General & Services, European Commission website, http://www.ec.europa.eu/justice_home/fsj/asylum/fsj_asylum_intro_en.htm.

The EU also instituted a European Refugee Fund to foster solidarity between member states and promote a balance in the efforts they make in receiving asylum seekers, refugees and displaced persons.[171]

The legislation passed in this area concerns pertinent issues of asylum policy and does not deal with peripheral or relatively unimportant issues. Furthermore, it is considerably pre-emptive. Directives may not be binding in implementation, but they are binding in the outcomes of policy implementation and thus, generally, asylum policy is well-developed.

DIRECTORATE C: CIVIL & COMMERCIAL JUSTICE

Directorate C serves the purpose of harmonising civil and commercial laws, in addition to the judicial procedures employed therein. In order to ensure the success of open markets and further solidify economic uniformity, laws across the Union must be uniform and predictable, to the extent that individuals and companies can reasonably expect the same outcomes when engaged in civic or commercial operations, regardless of their specific location within the Union. Consequently, ***approximation of laws*** becomes an important function of the decision-making system. If the quest is to create a seamless civic and commercial network, then the judicial decisions in the civil and commercial fields must also be transferable and enforceable throughout the Union, regardless of the court handing down the ruling. This requires that the EU apply the ***principle of mutual recognition of judicial decisions*** in Directorate C issues. These two issue areas (third and second issue areas of Directorate C, respectively) are, in my opinion, the areas of relative decisiveness within this portfolio. Therefore, it is here that analyses of pre-emptiveness of decisions will matter the most.

In Directorate C, there is another important corollary area, that of *civil and commercial judicial cooperation mechanisms* (the first issue area). It is important because it encourages understanding and fosters a culture of sharing of ideas and procedures among practitioners in the field and is an important step leading towards further approximation

[171] *Loc. Cit.*

of laws and application of the principle of mutual recognition. The following is a list, in descending order of importance, of the issue areas of Directorate C in which I consider decision-making to be most meaningful and relevant vis-à-vis the reason for the existence of Directorate C.

- ***Approximation of laws***
- ***Mutual recognition of judicial decisions***
- ***Improved civil and commercial judicial cooperation mechanisms***

APPROXIMATION OF LAWS

As noted in Chapter 3, development of the issue area of ***approximation of laws*** in Directorate C is still at an elementary phase. Below are some areas where the EU is currently debating legislation:

- ⇒ Green Paper on succession and wills
- ⇒ Communication to broaden the debate on European contract law
- ⇒ Proposal for a Directive on certain aspects of mediation in civil and commercial aspects[172]

In the Hague Programme, the European Council does not envisage the approximation and harmonisation of civil laws.[173] Instead, it focuses on commercial law, in particular contract law. Thus far, however, progress is slow; the processes of harmonisation of legal instruments, and in some cases codification of contract law have not yielded any substantial results in the form of a uniform code on contract law within the EU. Furthermore, there are many more aspects in commercial law (e.g. business law, company law), where legislative regimes also need to be formulated in order to begin to effectively create a common legal framework reference in commercial law.

The task is even harder in civil law, and perhaps this is the reason why the EU has instead decided to concentrate efforts in civil law under the principle of mutual recognition, rather than approximation of laws. Civil law canons and regimes are by nature extensive because they are responsible for overseeing the legal administration of numerous

[172] Communication of the Commission to the Council and the European Parliament (2), *Op. Cit.*
[173] Council of the European Union, *The Hague Programme, Op. Cit.*

domestic issues relating to the citizenry. The laws regulating daily human interaction are bound to be copious simply because of the abundance of different kinds of human civic interaction. Additionally, the laws in individual member states develop differently and are shaped and influenced by different factors. Thus, an attempt to try and create a single or common civil law regime is likely to be a difficult task that takes many years to develop, simply because of the nature of civil law. Currently, no approximation efforts within the Directorate have yielded substantial results; all action is still in the problem-recognition stage and in my assessment, will remain at the same stage for a long time.

MUTUAL RECOGNITION OF JUDICIAL DECISIONS

Where ***mutual recognition*** is concerned, the EU has extended the principle to cover several areas under civil justice. The decisions taken in these areas which are now governed by the principle of mutual recognition are now exempt from these additional processes (exequatur), should they need to be applied in a country other than that in which they were handed down.[174] These are the areas currently covered by the principle of mutual recognition:

- ⇒ Brussels I Regulation concerning jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
- ⇒ Brussels II Regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and parental responsibility
- ⇒ Regulation relating to insolvency proceedings
- ⇒ Regulation creating a European enforcement order for uncontested claims[175]

In terms of the first Regulation, i.e. Brussels I, relating to the jurisdiction of judgements in civil and commercial matters, it is structured such that it "shall apply in civil and commercial matters whatever the nature of the court or tribunal."[176] This means that all decisions in the areas that fall under the scope of these two areas of law are subject to the Regulation, which stipulates how recognition and enforcement of decisions will be

[174] 'Mutual recognition', Cooperation in civil justice, *Area of Freedom, Security & Justice*, Directorates General & Services, European Commission website, http://ec.europa.eu/justice_home/fsj/civil/recognition/fsj_civil_recognition_general_en.htm.
[175] *Loc. Cit.*
[176] Article 1, Chapter 1, *Jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, Council Regulation (EC) No 44/2001.

implemented in member states, in a bid to create a uniform area of laws and commonly acknowledged court decisions. The only areas exempt from the Regulation are status, legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession, bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings.[177]

The EU has therefore opted to harmonise civil law through the application of the principle of mutual recognition of decisions rather than approximation of laws. This is a much easier way of attempting to harmonise the laws, because it involves simply deploying judicial authorities to implement policy, and thus entrenching the somewhat technocratic nature of the EU. Perhaps this is indicative of the fact that in issue areas that have a direct and immediate effect on citizens, it is harder to impose a top-down method of policy making, because often those areas are more complex and require that policy be generated from a grassroots level through means more inclusive of those affected by that policy.

Whatever the motivation behind the move may be, the EU has nonetheless taken pre-emptive action in the area, in essence ensuring that civil and commercial judicial decisions are enforceable throughout the Union, and thus ensuring that judicial procedures are conducive to the continued success of a seamless economic and market environment.

JUDICIAL COOPERATION MECHANISMS

The establishment of the European Judicial Network (EJN), discussed in Chapter 3, is a measure aimed at improving practical judicial cooperation among member states. It is also meant to be a forum through which practices and ideas are exchanged in order to build trust and an understanding among judicial practitioners themselves. The problem with the EJN is that it is a small, decentralised initiative with no real organisational

[177] *Loc. Cit.*

structure to provide it with a mandate or oversee its functioning.[178] If no attention is paid to it or it is unable to sustain itself (since it is not an organisation with a governing structure) it may subsequently fail and die a natural death and presently, this is a real possibility.

Other practical initiatives thus far include joint judicial training initiatives. If these are entrenched into the EU's policy for the area, they will gradually, foster understanding among judicial authorities and lead to further synchronisation of civil and commercial law and the procedures thereof. The EU has already adopted two Directives in the area of civil law procedures and it is practical cooperation initiatives such as these, which will encourage more harmonisation in the field of civil justice procedures. Another development is the adoption of a Regulation establishing a Community framework of activities to facilitate implementation of judicial cooperation in civil matters was also established. Perhaps this Regulation will signal the start of more concerted efforts to create a culture of knowledge and skill sharing among judicial authorities because this will greatly assist and boost the development of creating common procedures in the field, in addition to encouraging approximation of laws.

DIRECTORATE D: INTERNAL SECURITY & CRIMINAL JUSTICE

There are, in my opinion, two important areas where attention ought to be paid in order to combat and manage crime within the Union. The existence of crime is inevitable; it cannot be eradicated, but it can be fought and legislated against. The first area of importance in such efforts therefore is the ***practical cooperation of policing agents*** (fourth issue area of Directorate D) across the Union. Such action is perhaps the archetype of what ideal cooperation under this sub-sector would consist of: coordinated policing efforts with a seamless transmittal of information and uniform standards of ensuring internal security. Coordinated policing efforts must however be complemented by a uniform legal code of crime prevention and thus the importance of third issue area, ***approximation of criminal laws***.

[178] European judicial network', Cooperation in civil justice, *Op. Cit*.

Secondary issue areas in the Directorate include *mutual recognition of judicial decisions*, the second issue area, and *criminal justice cooperation mechanisms*, the first issue area. The former is important because criminal justice decisions must be enforceable throughout the Union if it shares the same definitions of what acts constitute criminal behaviour. The latter is important in fostering understanding among law enforcement authorities by creating fora in which knowledge and skills can be exchanged in addition to creating a common EU law enforcement culture and institution. The following therefore, is a list of the areas of relative decisiveness of Directorate D, in order of descending importance:

- ***Joint practical crime prevention measures***
- ***Approximation of criminal laws***
- ***Mutual recognition of criminal judicial decisions***
- ***Criminal justice cooperation mechanisms***

One must keep in mind however that it is hard to apply the same standards applied to Directorate B and C because this Directorate is governed by the principle of unanimity and thus the core functions (i.e. what the ideal objectives of the area should be) may not be dealt with at the supranational level or may only be carried out in half measures because the area is not subject to the normal Community method, which applies a more even-handed manner of coming to conclusions about policy choices. Joint action may therefore be less ambitious and limited to the lowest common denominator of agreement.

PRACTICAL CRIME PREVENTION MEASURES

Under this area, the EU has adopted several measures, the most important one being the establishment of Europol. It aims to improve cooperation among law enforcement authorities in combating terrorism, organised crime and unlawful drug trafficking. Europol was established in 1994, as a Drugs Unit, but eventually expanded to cover combating serious forms of organised crime across the Union. Europol is under the leadership and supervision of the Council of Ministers and is thus inflexible in terms of

formulating its own agenda and having control over its budget.[179] Consequently, over the years, it has been limited vis-à-vis coordination of crime fighting and prevention measures because it is not autonomous and does not have sufficient resources to single-handedly carry out its own crime fighting operations independently of member states' crime fighting agencies.

Europol assists member states by facilitating the exchange of information, providing expertise, and technical support for investigations with a cross-border element and analysing and assessing security threats as part of intelligence, among other things.[180] Its role is more of a support organisation, which will perform the necessary work to generate intelligence, analyse crime patterns and pass on technical expertise to agents in national settings. Therefore, Europol does not necessarily coordinate policing efforts among member states to the extent that it can be called an authoritative organisation vis-à-vis policing efforts. Rather it facilitates coordination among member states that then make use of whatever information, resources and expertise Europol supplies them with. Its lack of real operational ability on the ground, has often led some to consider Europol ineffective.[181] However, over the years it has managed to lobby EU decision-makers to expand its remit to cover more forms of crime and possibly also allow it to be able to facilitate its own investigations in member states through the concept of the joint investigative teams.[182] It may soon also be able to request that member states "initiate, conduct or coordinate investigations in specific cases."[183] The decision on joint investigative teams was taken in 2000, meaning that Europol will also be able to participate in investigating certain leads, cases or suspects at a national level and will not be only limited to the role of providing and processing information.

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[179] 'Europol', Police cooperation, *Area of Freedom, Security & Justice*, Directorates-General & Services, European Commission website, http://ec.europa.eu/justice_home/fsj/police/europol/fsj_police_europol_en.htm.
[180] *Loc. Cit.*
[181] Hayes, B., 'The Future of Europol - more powers, less regulation, precious little debate', Statewatch Analysis, *Statewatch*, August 2006, http://www.statewatch.org/news/2006/oct/future-of-europol-analysis.pdf.
[182] *Loc. Cit.*
[183] *Loc. Cit.*

The establishment of CEPOL (Police College) may also play a major role in developing the character, and eventually credibility and ability of Europol, but only if its mandate is expanded to allow it to evolve into a real police training college and not the current short duration training centre it is. Additionally, the EU developed and managed to set up short-duration joint customs and police operations in collaboration with teams of national experts acting as contact points as part of its efforts to develop joint police operations and hopefully establish them as a more frequent or permanent fixture in the EU crime prevention landscape.

These developments signify a growth in the area of joint practical crime prevention measures although there is also a notable hesitancy on the part of member states to allow the more considerable initiatives to develop into independent crime prevention structures. In each of these, member states manage to retain power or influence; for example with Europol, the JHA Council of Ministers is responsible for political oversight of the organisation and CEPOL mainly facilitates understanding of the different national systems among EU police officers and provides specialist training, but it is only aimed at senior police officers.[184] However, despite, the hesitancy of member states, the existence of these initiatives speaks volumes about the development of the AFSJ. It is indicative of active, innovative and ambitious decision-making. Furthermore, it signifies that the policy area as a whole is leaning towards becoming more supranational as power gradually accrues to it [EU]. The actions are not pre-emptive vis-à-vis member states' policy choices, although they are significant, in the light in which they have just been discussed.

APPROXIMATION OF LAWS

Under ***approximation of laws***, the EU has managed to cover numerous areas under organised crime, which now have legislation governing them from the supranational level. The areas where the decision-making body took decisions on the definition and sanctioning of crimes include drug and human trafficking, financial crime, money

[184] 'Cepol', Police cooperation, *Area of Freedom, Security & Justice*, Directorates-General & Services, European Commission website, http://ec.europa.eu/justice_home/fsj/police/college/fsj_police_college_en.htm.

laundering and terrorism among others. Currently, approximation in this sphere is more focused on organised crime as opposed to more general forms of crime such as murder and theft. The EU has chosen to focus on international organised crime because it is more relevant in the case of the Union the establishment of free movement across territorial state lines has led to the rise of cross-border crime, which is more often than not in the form of organised crime. It is in this area therefore, that crime fighting efforts ought to be combined. Accordingly, the EU has thus excelled in legislating in these areas, laying down common definitions of crimes and the applicable sanctions thereof.[185]

MUTUAL RECOGNITION OF JUDICIAL DECISIONS

Where ***mutual recognition*** is concerned, the EU adopted a programme containing several measures in 2000, and subsequently only a few of those measures have been implemented, thus hindering the development of mutual recognition in the area.[186] Some of the other measures currently being negotiated by the Council of Ministers under the principle include the Council Framework Decision on the application of the principle of mutual recognition to financial penalties, a green paper on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union and a Proposal on procedural rights during criminal proceedings. A significant achievement under the field is the European arrest warrant which replaces all extradition requirements and instead allows for the capture and arrest of peoples wanted for crimes in any member state of the Union.

Generally, the EU has not been forthcoming in terms of bringing more criminal justice matters under the principle of mutual recognition. An explanation could be the fact that it has managed and excelled in approximating criminal laws (including harmonising sanctions against crime) and thus the mutual recognition of judicial decisions is implied in the fact that the EU has legislated on both the definition of crime and the sanctions thereof such that, wherever a crime were to occur in the EU, the same judicial standard

[185] Communication of the Commission to the Council and the European Parliament (2), *Op. Cit.*, & Summaries of Legislation, *Op. Cit*.
[186] 'Mutual recognition', Criminal justice, *Area of Freedom, Security & Justice*, Directorates-General & Services, European Commission website, http://ec.europa.eu/justice_home/fsj/criminal/recognition/fsj_criminal_recognition_en.htm.

would be used in determining the accused's punishment. Although this may be true, it is also necessary that a criminal judicial policy be developed through measures created specifically for that task and independently of legislative efforts. The conclusion thus is that the EU has displayed a lack of willingness to actively pursue development in the area and thus it has yet to develop a significant authority in criminal justice.

JUDICIAL COOPERATION MECHANISMS

The most prominent judicial cooperation measures are Eurojust and the European Judicial Network (EJN). The former was established in 2001 in a bid to combat serious forms of organised crime from a judicial perspective i.e. by assisting in the investigation and prosecution of those crimes across the Union.[187] It is staffed by magistrates, judges, prosecutors and various legal experts from all the member states who still retain association with whatever national department they were seconded from. Eurojust personnel know the legal and judicial systems of their country, and thus in this way are able to play a facilitative role among member states during any investigation or request for information. Because of their supranational positioning, they are better suited at monitoring cross-border cases and conveying relevant information to different countries.[188] Some of the aims of the EJN are embodied in the mandate of Eurojust, and thus the former seems to somewhat duplicate what the latter does, thus leaving the purpose of the former unclear. The two however, are linked and often work together, with the EJN forming a less centralised and autonomous arm of Eurojust.[189]

In addition to the above, a *European judicial training network* has also been established. Its main aims are to "improve mutual understanding of Member States legal systems among judges and prosecutors and enhance the practical implementation of judicial cooperation within the European Union."[190] In the process, it will also encourage

[187] 'Eurojust', Criminal justice, *Op. Cit*.
[188] *Loc. Cit*.
[189] *Loc. Cit*.
[190] 'Training network', Criminal justice, *Area of Freedom, Security & Justice*, Directorates-General & Services, European Commission website, http://ec.europa.eu/justice_home/fsj/criminal/training/fsj_criminal_training_en.htm.

establishment of more focused judicial training programmes and a common curricula for judicial authorities.[191]

Compared with the practical cooperation measures under civil justice, more has been achieved under criminal justice. One wishes that the EU would take a leaf out of its actions in this Directorate and apply this to Directorate C, which has a paucity of practical judicial cooperation mechanisms. Within the Directorate, which is marked by numerous practical cooperation measures, Eurojust may stand more of a chance of being effective in its field (judicial cooperation) compared with its counterpart in police cooperation, Europol, because it is independent and not subject to the orders of the JHA Council of Ministers.

In general, practical cooperation measures are meant to foster collaboration among member states and not necessarily limit their [states'] action in those areas. The more pre-emptive measures are usually in the form of legislation and not practical measures. In the case of practical cooperation measures therefore, the enquiry of pre-emptiveness becomes inapplicable and instead we only enquire as to whether there is action in areas of relative decisiveness. In this case, therefore, i.e. practical crime prevention measures and judicial cooperation mechanisms, the conclusion is that measures are serving the purpose, based on the reason for existence of Directorate D, which is ensuring internal security by combating crime. The question can then be phrased as follows, 'do the solutions seem fitted to the problem?' and in this case, the question may be answered in the affirmative.

OVERALL CONCLUSIONS

This chapter sought to focus only on those areas I considered to be of chief importance to the overall policy of a particular Directorate. Despite this, there is still a disparity within the Directorates, with some important issue areas being more developed than others. For instance, asylum policy and visa policy are well established areas of EU action, where pre-emptive decision-making is taking place, but migration policy lags behind and is relatively undeveloped. Furthermore, the individual Directorates display different

[191] *Loc. Cit.*

developmental patterns thus making it difficult to conclude on the relative decisiveness of the joint decision-making system as a whole, vis-à-vis the AFSJ. Overall, decision-making in Directorate D is more concerted and comprehensive than in Directorate C. It becomes necessary therefore to look at the Directorates individually and draw conclusions for each one, based on the evidence thereof.

With regard to Directorate B therefore, the results show that, thus far, visa policy and asylum policy have evolved and decision-making has become more pre-emptive. Employing neo-functionalist reasoning, I would conclude that, over time and with continued decision-making, the EU will formulate a comprehensive and effective migration policy. In the same way that the development of the visa policy gradually developed from its inception in 1985, through the Schengen Agreement, migration policy will also reach those levels of authoritativeness. Insofar as relative decisiveness is concerned in this Directorate, I would conclude that the EU decision-making system is indeed acting in areas of importance and is making pre-emptive decisions which support the argument that the EU is gaining authoritative control of political policy areas and thus is actually developing a political character.

The situation in Directorate C, is perhaps less straightforward. The EU has avoided legislating in the area, preferring instead to apply the principle of mutual recognition of judicial decisions. It also has not shown significant commitment to developing practical cooperation mechanisms for judicial authorities within the EU. The difficulty of harmonising civil law canons was briefly discussed above. In general, the EU tends to skirt around and avoid legislating on difficult or important issues for as long as it can. In my opinion, the EU currently feels that it can allay action in this Directorate because it is not intrinsic to its function. By this, it is meant that the EU believes that there is no urgent need to harmonise civil laws because currently existing civil law regimes in the member states are capable of regulating civic interactions, without the input of the supranational. Directorate B is concerned with policies that govern movement within and in and out of the EU and its existence is therefore intrinsic to the project of economic integration. Directorate D exists largely to deal with the criminality arising out of the situation of

porous borders and open markets. Both these Directorates are specifically focused on playing a supportive role to the economic union. Directorate C deals largely with civic matters, i.e. the demos, which in neo-functionalist theory, is relatively unimportant to the development of or successful creation of a union.

> The initiation of a deliberate scheme of political unification, to be accepted by the key groups that make up a pluralistic society, does not require absolute majority support, nor need it rest on identical aims on the part of all participants.[192]

Even this report focused specifically on the decision-making body's capabilities to formulate policy in supposedly political areas. The evidence suggests that the EU is able to efficiently execute its duties, albeit to varying extents, in the different sub-sectors and because of this therefore, one may subsequently conclude that the EU has political authority. However, in light of the development in Directorate C, such a conclusion begs the question of whether such a conclusion is warranted if the EU has not sufficiently developed beyond being function or policy area driven. Although the EU may have authority in political areas, it clearly lacks political support and basis among its governed, and thus its unwillingness (or inability) to act in matters that do not necessarily involve easily importable function areas. "Integration has not fostered the normative qualities needed for the nurturing of a common European civicness, itself a prerequisite for a shared civic identity at the grassroots."[193] This does not mean that the EU needs to develop along federalist lines, effectively becoming a new state, which then adopts the democratic functions of a government at the supranational level. Instead, what I am alluding to is the creation of a sense of community, which then gives legitimacy to the existence of the EU, much in the same way that Deutsch spoke of in his definition of a political union.

> Deutsch was aware of the fact that a sociopyschological community would have to be based on 'a sense among the individuals forming it of belonging together'…so that the tasks performed within its structures stem from stem from 'a feeling of contributing something worthwhile to the good of the whole.'[194]

[192] Haas, E. B., (4) *Op. Cit.*, p. xiii.
[193] Chrysssochoou, D.N., *Op. Cit.*, p. 183.
[194] *Ibid*, p. 51.

This sense of Community was what he called *Gemeinschaft*. It is different from building a sense of oneness through nation-building because

> although both nation-building and demos-formation can lead to political integration, the former aims to achieve a natural 'community of fate' whose constituted unity lies in the conception of one 'nationality', while the latter purports to lay down the foundations for a self-conscious and civic-minded citizen body capable of identifying with the institutions of governance operating above or alongside the traditional state.[195]

For Deutsch, this was the end-point of integration because he acknowledged that such a sense of community would take generations to materialise and would not happen overnight. In my opinion therefore, the EU cannot taken decisive actions in certain areas because this phenomenon of Gemeinschaft is necessary in order for the EU to be successful in those policy areas. It cannot manufacture this sense of community and attempts at involving itself in those policy areas at this early stage of development are likely to fail. "Arguably, should a demos-oriented 'arrangement' fail to materialize, then the social legitimacy of the polity is challenged, and a corresponding sate of 'illegitimacy' prevails."[196] In the long run, if this illegitimacy is not corrected, and the EU remains a largely technocratic undertaking, it will hamper any further deepening. Furthermore, its foray into political policy areas must therefore, not be seen as the end of political integration. Instead, this foray should be viewed as the beginning of a long process that still has to play itself out, and one that currently diminishes the weight of any conclusions vis-à-vis a real political union. In this Directorate therefore, the EU has failed to impress because it has failed to legislate on or take enough practical action where civil law is concerned. If the preceding Directorate is indicative of the EU's ability to deal with function areas, this one is indicative of the EU's inability to transcend that mould and become adept at issues that have to do more with the demos and political legitimacy.

The action in Directorate D also alludes to another peculiar characteristic of the EU. The non-pre-emptive practical measures act as further proof, in my opinion, that development of the EU is more concerned with policy formulation as opposed to trying to reach the

[195] *Ibid*, p. 191.
[196] *Ibid*, p. 183.

greatest range of joint action, which usually involves policy implementation. The action of the EU therefore, will most usually extend only as far as is necessary to endow it with an effective ability to coordinate a policy area from its level. It will not unnecessarily extend further, simply in an effort to assume all responsibility for a policy area and thus render member states redundant. Thus in Directorate D, effective action requires that the EU adopt more practical measures and these may not necessarily be pre-emptive vis-à-vis member states but they accomplish the task.

> [T]he conception of the Union as a form of polity, refers 'to a venue where interested actors pursue their goals and where authoritative actors deliver policy outcomes.' Underlying these new European polity dynamics was a firm commitment to institutional innovation linking together multiple arenas of governance.[197]

This is proof therefore, that the EU is not trying to develop along traditional nation-state building patterns. Through Directorate C, one sees that the EU is certainly not developing according to nation-building norms, because it currently lacks a certain sense of community among the demos and through Directorate D, one also sees that it is not attempting to become a super-state.

> European polity-formation can also be seen as an exercise in enlarging the operation of social engineering while creating new structures of opportunity above the state level, without conforming to the contours of a system-wide hierarchy that is typical of the component polities.[198]

In the future therefore, it may be that the EU will develop this characteristic further and become a more defined yet diverse arena, with a mixture of actors (not just the political leadership) and many levels of communication and bargaining avenues, eventually becoming a multi-level governance system. In Directorate D therefore, my conclusion is that the EU has made great strides in achieving authority in the area because it is making decisions in areas of relative decisiveness and these are, in some cases (e.g. legislation), pre-emptive and in other areas not pre-emptive to the exclusion of states, but effective nonetheless, in fulfilling the mandate.

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[197] *Ibid*, p. 96.
[198] *Ibid*, p. 97.

To conclude therefore, this chapter has revealed much about the nature of the EU as a polity. The actions are indicative of 'typical' evolution of a policy area within the EU, in that according to neo-functionalist theory, development takes place over a long period and capabilities are achieved in instalments or series of growth spurts. Development in Directorate B is especially indicative of this in that the visa policy and border management, started over 20 years, through the Schengen acquis, has developed in similar patterns and has evolved into a definitive area of EU action. The other issue areas in the Directorate also show signs that eventually, they will become as developed, because action there is forthcoming, despite the fact that there are still inconsistencies in how this is happening. Directorate C and D highlight some of the peculiarities; Directorate D is definitely an actor-driven sub-sector because so much action is taking place there that one may even forget that it is still governed according to the principle of unanimity. As noted in Chapter 4, states are forthcoming because they are convinced that joint action in the area can and will fulfil mutual interests. Consequently, we may see the sub-sector eventually fall under the Community method. However, the Directorate has also highlighted that pre-emptiveness is not always a measure of effectiveness. Perhaps students of integration must develop new measures of effectiveness that do not always involve comparing the accretion of power at the national level with the accrual of power at the supranational because the process is a little more complex than that. Development however, is taking place in areas of relative decisiveness and like the development observed in Directorate B, it indicates that the EU is slowly building a political character upon which further and deeper integration will be based. The developments in Directorate C point to a weakness of the EU, which, in future, will become more significant and corporeal, if the EU does not take steps to resolve it. Development here therefore, indicates that the EU's authority in areas that concern the demos, areas which are perhaps more political, is not as established.

CONCLUSION

The Hague Programme was adopted in November 2004, meaning that it has been the working template of the AFSJ for only two and a half years. Academic enquiry into its successes and failures is most likely to happen after 2009, which is when its mandate expires. Consequently, these results cannot be used to either prove or disprove anything about the successes and failures of Hague. It remains to be seen however, whether future analytical works based on Hague will support the conclusions reached herein.

Based on the evidence accumulated, the report has consistently shown that the AFSJ is an active area of decision-making in the EU. The historical assessment of the area in Chapter II shows how over the years, decision-making has expanded to cover more areas where cooperation was initially only focused on ensuring freedom of movement. The Chapter also discusses how decision-making procedures affected development of the area until gradually agreement was reached in 1997 to bring a majority of the issue areas in the AFSJ under the Community method. Since then, the actions noted in this report represent the nature, scope and depth of cooperation within the AFSJ. The results help to shed light on the debate about the EU's political character. Recently, some EU scholars and practitioners claimed that, because the EU had attempted to pass a Constitution and there was a notably increased amount of action in political policy areas such as the CFSP and the AFSJ, the EU was now a political union. However, these claims seemed unfounded and based only on superficial observations and not in-depth analyses. It was important therefore to qualify these assertions by conducting research into the political integration of the Union and this was done by assessing the decision-making in one of the political policy areas.

It is difficult to assert boldly that the decision-making in the AFSJ is comparable to decision-making in other political policy areas because the concerns and interests in each of the portfolios are different and thus actor behaviour (which influences decision-making) will also be different. The development of the individual EU policy areas has

always been unique because of the idiosyncrasies of each portfolio. Thus, there is no particular, or specific pattern that is consistently observable throughout the development of the different policy areas; what they do have in common is simply that, development in all of these areas has taken a long time, and often stalled along the way, but the EU rarely shows signs of regression when it begins to take action in a particular policy area. Decision-making in the political areas may therefore not be comparable, and it may even be inconsistent within the sub-sector (e.g. Directorate C), and this may hinder one from making definite conclusions about the general political character of the EU, but observing development in one of the areas will nonetheless allow for founded conclusions to be made concerning the political character of the EU.

Furthermore, my research is not definitive vis-à-vis the effectiveness of the EU decision-making system because there are more variables that can be studied than the ones chosen here. As stated in Chapter I, several considerations need to be taken into account when studying political unions and this report has only looked at one aspect of the formation of political unions and that is the decision-making system. Another interesting thread of research would involve widening the scope (what Lindberg calls the functional scope) of political policy areas covered. If this were done in addition to adopting the rest of Lindberg's other variables that can be studied, then a more definitive conclusion on whether the EU is a political union could be made. In my opinion however, based on the evidence I have gathered of decision-making in the AFSJ, I believe that the EU is not a political union. If we were to generalise decision-making in the AFSJ to other political policy areas, one would conclude that decision-making there is still unforthcoming in certain important issue areas, rudimentary and often based on intergovernmental processes. However, when one begins to zoom in on certain issue areas within a given sub-sector, one sees indications that the EU is slowly, yet gradually, gaining authoritative control of important issues and the control is substantial enough for us to conclude that the EU is progressively developing its political character, albeit with a few missteps along the way.

It is important therefore to contextualise the pace of development in the EU; most EU policy areas develop at a slow pace. It is for this reason that neo-functionalism holds more explanatory power than intergovernmentalism. In neo-functionalism, the end-point is the political arena. The actions of the EU thus far also lend strength to the conclusion that it is headed towards such an end-point. Essentially, intergovernmentalists hold that cooperation is mutually beneficial and states engage in it insofar as it is a self-preservation measure. States would therefore not engage in cooperation that threatened to make them obsolete or reduce their influence (i.e. national governments) in their territory. Political integration however involves some power accretion at the national level, a shifting of loyalties to the newly created institutions and the development of policy formulation capabilities in the new structure. Although intergovernmentalism may explain the recurrent halts, it cannot explain how, if states are intent on holding on to the forms of power most important to them, these end up either being jointly exercised with the supranational or in some cases exclusively by the supranational. In as much as there may be some intergovernmental practices in EU decision-making, even the current development of the EU, in my opinion, supports a neo-functionalist explanation of development over time.

With that said, the results indicate that much has been achieved in the AFSJ over the last ten years. However, they also indicate that the EU has not yet gotten complete authority and influence over the area. In terms of the range of decision-making, the results show that a majority of decisions are still at the problem recognition stage (score 2) and decision stage (score 3). As the range of decision-making becomes more involved, scores show that the percentage of activity in those range scores (4 to 6) steadily decreases. Therefore, the current authority of the supranational is not extensively pre-emptive. Range score 3 legislation consists of Directives and Council Framework Decisions which are only binding in the outcomes and not implementation. The range of decision-making would be most impressive if there were a higher percentage of range score 5 activity. These are Regulations and they are the most restrictive kind of legislation within the EU. What is interesting however, is the inconsistency between Chapter IV conclusions and Chapter V conclusions. In the former, I concluded that the results showed that action was

limited and the EU was generally non-committal in extending its joint action beyond the decision stage. I therefore concluded that this showed a diminished political character. In Chapter V however, the conclusion was optimistic and I asserted that, upon closer inspection of the EU's decisions in select areas, the action was evidence that it was actually developing a political character. I would further assert that the results in Chapter IV support the conclusion that development in the AFSJ is still a long way from reaching the full scope of joint action. The results are not necessarily indicative of inaction, as they may seem to suggest. Instead, range of decision-making is helpful in determining at which stage of joint action the system is. In this case, the results support my conclusion that the EU is only at the very early stages of developing a political character or even becoming a political union. Most decisions are still located in the problem-recognition stage and thus, the holistic picture presented by looking at the range, situates the current development of the EU for us. The Chapter V results however, are more incisive, in that they were obtained through closer inspection of the decisions being taken in important issue areas. Although the overall picture painted through Chapter IV is one of a union only just approaching the political frontier, Chapter V demonstrates that the EU is already taking decisive action even at this early stage of political integration. It is because of the detail that relative decisiveness reveals that I stated at the beginning of Chapter V that I believed it to be the most telling variable of the two. Neither do we observe uniform development when we apply the variable to the AFSJ. The EU pays more attention to certain issue areas, some Directorates are generally more developed than others and in all that, we have been able to make conjecture about the findings and thus draw certain conclusions based on that.

Insofar as the theory is concerned, neo-functionalists must re-examine the significance they have assigned (or failed to assign) to the role of the demos. Perhaps one could not have predicted that the evolution of the EU would exceed its purely functional role, even within the political sphere, or gain such importance in the discourse of EU member states to the extent that it would become necessary to consider the demos, but it has exceeded those barriers and in order to remain relevant, neo-functionalism must, also evolve.

In fairness to neo-functionalism, the development of the EU has thus far belied the explanations of the majority of theories and thus, to a certain extent, much of what is made of or theorised about the EU happens after the fact.

As is its nature, in future, the integration of the EU will require that the groundwork laid by Hague be further solidified and entrenched through the making of even more pre-emptive decisions. Where the EU is currently experiencing difficulties with decision-making, I envisage that it may, as it has in the past, through several pivotal treaties, and more recently through the Constitution, refine its institutions and decision-making mechanisms to allow for the making of these pre-emptive decisions. Inasmuch as the evidence and research contained herein cannot be generalised to other political policy areas, it still allows for a conclusion to be made about the political character of the EU, based only on a study of the AFSJ. As has been stated in Chapter V, the EU is indeed developing a political character, one whose future development will, more and more, begin to depend on the involvement of the demos, and yet still one that is intrinsically different from that of a state. In future therefore, the EU will need to reconcile its development with the involvement of the demos if it is to integrate to the full extent of political unity it desires.

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