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EXPANDING FORTRESS EUROPE? ENLARGEMENT AND THE EU's JUSTICE AND HOME AFFAIRS POLICIES

Doktora Tezi

Catherine MacMillan

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ABSTRACT

The thesis attempts a neofunctionalist analysis of the development of the EU's JHA policies, and of the extension of these policies to the new MS and candidate countries, including Turkey. The purpose of this analysis is twofold:

Firstly, it aims to facilitate a better understanding of the processes contributing to the development of the current JHA *acquis*. Indeed, it appears that there are various forces behind the development of JHA, which roughly correspond to the neofunctionalist categories of functional, political and cultivated spillover. Although perhaps not perfectly, JHA seems to fit the neofunctionalist pattern closely enough to provide convincing support for the argument that JHA is not entirely in the hands of the Member States.

A second goal is a clearer comprehension of the enlargement process, particularly JHA, and its consequences for the new members and candidates. Here too, neofunctionalism provides a convincing framework. Moreover, the Copenhagen Criteria have a striking resemblence to the neofunctionalist background conditions, preparing fertile ground for integration in an enlarged EU.

However, over-stringent conditions may have the opposite effect, eventually leading to spillback (a reversal of integration). Indeed, an analysis of the effects of JHA on the new members and candidates reveals that, due to its unilateral imposition, these countries have been left with many difficulties in this area. If not tackled, these may lead to considerable disillusionment with JHA and the EU itself, and eventually increased spillback. For this reason, then, potential solutions are suggested in the thesis.

ÖZET

Bu tezin amacı, AB'nin Adalet ve İçişlerinde İşbirliği alanındaki politikalarını ve bu politikaların yeni üye ülkeler ve aday ülkelere genişletilmesini Yeni İşlevselcilik yaklaşımını kullanarak çözümlemektir. Bu çözümlemenin iki amacı vardır:

Birincisi, günümüzde geçerli olan Adalet ve İçişlerinde İşbirliği müktesebatının gelişimine katkıda bulunan süreci anlamaktır. Adalet ve İçişlerinde İşbirliği alanının gelişmesinin ardında çeşitli güçlerin olduğu görülmektedir. Bu güçler, yaklaşık olarak, Yeni İşlevselcliğin işlevsel, siyasal ve kolaylaştırılmış yayılma denen kategorilerine karşılık gelmektedir. Adalet ve İçişlerinde İşbirliği'nin gelişimi Yeni İşlevselci çerçeveye tam olmasa da büyük ölçüde uymaktadır. Bu da Adalet ve İçişlerinde İşbirliği'nin tamamen üye devletlerin ellerinde olmadığını kanıtlamaktadır.

İkinci amaç, genişleme sürecinin, özellikle Adalet ve İçişlerinde İşbirliği alanında olmak üzere yeni üyelere ve adaylara etkisini daha iyi anlamaktır. Burada da Yeni İşlevselcilik oldukça inandırıcı bir çerçeve sağlamaktadır. Ayrıca, Kopenhag Kriterleri ile Yeni İşlevselcilik'teki zemin koşulları (*background conditions*) arasında oldukça çarpıcı bir benzerlik vardır ve bu, genişlemiş bir AB'de bütünleşme için verimli bir zemin olduğunu göstermektedir.

Buna rağmen, fazlasıyla sert koşullar ters bir etki gösterebilmektedir. Bu da bütünleşmenin geriye işlemesi (*spill back*) sonuçlanabilir. Gerçekten, Adalet ve İçişlerinde İşbirliği'nin yeni üye devletlere ve aday ülkelerine tek taraflı olarak empoze edilişi bu ülkeler için çeşitli sorunlar yaratmaktadır. Bu sorunların çözümü bulunmazsa bu ülkelerde Adalet ve İçişlerinde İşbirliği ve hatta AB'ye yönelik bir hayal kırıklığı ortaya çıkabilir ve bu durum bütünleşmenin geriye işlemesi ile sonuçlanabilir. Bunun için, tezde olası çözümler önerilmektedir.

ABBREVIATIONS

AFSJ	Area of Freedom, Security and Justice
CEAS	Common European Asylum System
CEE	Central and Eastern Europe
CEECs	Central and Eastern European Countries
DG	Directorate General
EC	European Communities
ECJ	European Court of Justice
EEA	European Economic Area
EEC	European Economic Community
EFTA	European Free Trade Area
EP	European Parliament
EPC	European Political Co-operation
EU	European Union
HLWG	High Level Working Group
IGC	Intergovernmental Conference
JHA	Justice and Home Affairs
MEP	Member of the European Parliament
MLG	Multi-Level Governance
MS	Member State
NGO	Non-Governmental Organisation
PCG	Polycentric Governance
QMV	Qualified Majority Voting
SEE	South Eastern Europe
SEECs	South Eastern European Countries
SIS	Schengen Information System
TCNs	Third Country Nationals

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I. INTRODUCTION

Justice and Home Affairs (JHA) has been one of the fastest-growing policy areas in the EU in recent years. From its humble roots in the Trevi agreement of the 1970s, JHA is now at the forefront of EU activity, and is the policy area with the highest level of policy production. Moreover, JHA has become considerably supranationalised since the Maastricht Treaty, when decision-making was largely intergovernmental. This is almost astonishing when it is taken into consideration that, for centuries, internal security and border policies were considered to be an essential part of a nation state's sovereignty (Monar, 2005: 1).

Explaining the Member States' (MS) agreement, and sometimes enthusiasm, to hand significant sovereignty to the EU in an area that was considered 'high politics' until recently has therefore been a challenge for many students of European integration. Studies have been produced arguing that, among other things, the Commission's agenda-setting, public opinion, decisions of the European Court of Justice (ECJ), the Schengen agreement, the Single Market and external factors have been responsible for the extraordinary development of JHA.

In an attempt, then, to find a theoretical basis for the extraordinary development of JHA it was necessary to find a theory which could take into account these diverse explanations. Neofunctionalism, which explains how integration and supranationalisation can take place due to a combination of functional, political and institutional factors seemed, at first sight to be promising despite the fact that it has become distinctly unfashionable in recent years.

The main research aim of this thesis, then, is to undertake a neofunctionalist analysis of the developing Area of Freedom, Security and Justice (AFSJ) and its extension to an enlarging EU. The hypothesis is that neofunctionalist spillover has played a role in the development of JHA and in its expanison to the EU-27 and candidate countries, including Turkey. However, as the current JHA is largely restrictive in nature there are likely to be some problems in the willingness and ability of the new MS and candidate countries, which had more liberal border regimes prior to their candidacy. These difficulties, if they are not tackled, may result in neofunctionalist spillback.

First, JHA development is examined for evidence of the three major forms of neofunctionalist spillover: functional, political and cultivated. In addition to being a theory of integration, however, neofunctionalism is also a theory of disintegration. Therefore, a discussion of counterveiling forces to spillover and their application to JHA is also undertaken.

As Schmitter points out, enlargment also tends to have a negative effect on integration, particularly if the background conditions specified by neofunctionalists are not in place. The Copenhagen Criteria bear a remarkable similarity to the neofunctionalist background conditions[1], and their fulfillment may help to prepare a more fertile ground for integration (2002: 42-43)

However, as Schmitter argues, excessively stringent conditions may also result in a reversal of integration, particularly after accession, as the new MS become increasingly disgruntled and resort to the use of the veto and/or blocking minority (2002: 42-43). In this light, therefore, this thesis also undertakes a neofunctionalist study of the enlargement process, both that of the CEECs and Turkey, focusing on the adoption of the JHA *acquis.* In particular, the problems faced by these countries due to the implementation of JHA will be analysed, and their consequences and potential solutions discussed.

As has been mentioned above, JHA has developed at an extraordinary pace in recent years. However, another aim of this thesis is to examine the *nature* of the EU's emerging border policy. Border policies can be classified as *restrictive*, when their primary aim is to keep out unwanted immigration and crime from third countries, or *liberal,* concerned with issues such as rights for migrants and refugees or immigrant integration (Lavenex, 2001:26).

Border regimes dominated by intergovernmental bargaining are expected to be more restrictive in nature. Firstly, governments are answerable to electorates who tend to be wary of immigration and fearful of organised crime being imported from abroad. Secondly, intergovernmental bargaining tends to produce 'lowest common-denominator' outcomes

[1] These may be summarised as shared basic values, a certain degree of homogenity in levels of political, social and economic development, a network of transactions, comparable decision-making processes and compatibility of expectations (Moxon-Browne: 92).

(Lahav, 2004: 9-10) as states are eager to protect themselves from the illegal migration or international organised crime problems of their neighbours.

Supranational input, on the other hand, has been linked to the tendency to liberalise borders due to the perception of the need for increased freedom of movement (Lahav, 2004:7) and the relative protection of supranational institutions from public opinion, which tends to be wary of immigration.

The EU has often been accused of being 'Fortress Europe', with an exessively restrictive border regime. Indeed, the very epithet of the 'Area of Freedom, Security and Justice' can be construed as implying that the EU believes it is surrounded by a corresponding 'Area of Servitude, Insecurity and Injustice' which must be kept out at all costs.

One aim of this thesis, then, is to evaluate the claim that the EU is developing into a fortress Europe. It may be that, due to the fact that intergovernmental bargaining was the rule for much of the development of JHA, the policy will indeed be primarily restrictive in nature. However, as supranational institutions begin to play a more important part in JHA, there should be some signs that more liberal issues, such as immigrant integration and rights for Third Country Nationals (TCNs) are being discussed.

Another issue that will be discussed in this thesis is the adoption of JHA by the candidate countries and its implications from a neofunctionalist viewpoint. Since the early 1990s, the EU has enlarged three times, including the recent wave of enlargement to Romania and Bulgaria. Other candidate countries, including Turkey, Croatia and Macedonia, are likely to accede at a later date. Earlier enlargements, the 1973 enlargement to the UK, Denmark and Ireland, the 1980s Mediterranean enlargement and the 1995 enlargement to Austria, Finland and Sweden, themselves represented a challenge to the EU and to the new MS themselves.

While the 1995 enlargement, for instance, was probably the least problematic due to the fact that it involved just three small, wealthy states, these countries' tradition of neutrality, and the fact that their accession co-incided with the deepening of integration in the aftermath of the Maastricht Treaty still posed a significant challenge.

The recent enlargements of mostly ex-Communist, Central and Eastern Euopean countries (CEECs), as well as the forthcoming enlargements, have, however, posed a much greater challenge to both the candidate countries and the EU itself. This is for several reasons, including the size of the enlargement, the fact that the candidate countries have tended to be much poorer and more agricultural economies than the previously existing MS, and differences in political culture as a consequence of fifty years of Communism in Central and Eastern Europe (CEE).

These enlargements therefore require major concessions both on the part of the CEECs and on the part of the EU itself. The Copenhagen Criteria are the most stringent conditions for membership that have been imposed on any applicant countries so far (Schmitter, 2002). Moreover, the EU has had to reform both its policies and its institutions in preparation for the accession of so many new MS. Expanding JHA, where 'the EU wants to export its own stability to the CEECs, thereby also preventing the import into the EU of instability and insecurity' (Eisl, 1999: 169), has proved particularly problematic.

This has been due in part to the speed of development of JHA and the amount of legislation produced – JHA is the fastest developing EU policy area, so the candidate countries are effectively trying to keep up with a 'moving target'. Secondly, the lack of 'goodness of fit' between the EU border policies and those in the candidate countries and new MS, as well as the lack of flexibility in the Copenhagen Criteria, has ensured that they face some problems and dilemmas in adopting the *acquis* in this area.

Firstly, JHA, as a result of several factors, has been one of the most rapidly developing areas of integration in the EU since the 1990s, in particular since the Treaty of Amsterdam. This has made adoption of the *acquis* in this area particularly difficult for the CEECs, as they are constantly having to keep pace with new developments. From its origins in the 1970s as the Trevi group, an intergovernmental group focusing on co-operation in law and order, EU JHA co-operation is now supranational to a significant extent, and includes developing common immigration and asylum policies. As the following chapter argues, this can be explained, at least in part, by neofunctionalist theory.

Secondly, the prospect of extending the EU's border regime to the CEECs has been fraught with controversy. There has been a popular perception within the EU-15 that enlargement

represents a threat to Western Europe's hard-won peace and prosperity. This is based on a fear of mass migration from the CEECs on accession. Moreover, it has also been argued that, as a result of their position as neighbours of relatively unstable ex-Soviet states, they are faced with major pressures from organised crime and immigration (Eisl, 1999: 172-173), despite the fact that the threat posed in these areas by enlargement has been significantly exaggerated (Zielonka, 2001: 519).

There has therefore been particular pressure on the CEECs from Western European MS to implement the Schengen acquis on their Eastern borders before accession (Zielonka, 2001: 519). This was, however, not accompanied by any promise to remove internal borders before, upon or even soon after accession, with the result that many East Europeans see Schengen as principally a symbol of inequality, division and exclusion (Zielonka, 2001: 524).

The implementation of the Schengen *acquis* has proved a major task for the CEECs, which have different police and judicial traditions from the Western European MS, and often suffer from a lack of financial resources. In particular, CEECs, which now form the EU's easternmost border, have, over the past decade or so, had to transform the focus of their border regimes from preventing emigration to controlling immigration and cross-border criminal activity (Pastore, 2004: 129).

Moreover, as well as the financial and technical burden that this places on the CEECs, and the feeling of 'second-class citizenship' that it provokes there, the imposition of strict border controls along the Union's new Eastern border also potentially endangers the improvement in relations and increase in co-operation that the EU is trying to foster with its new neighbours. It may also endanger bilateral relations between the CEECs and their neighbours, particularly by forcing the CEECs to impose visa restrictions on neighbouring countries where none were previously required (Grabbe, 2000: 13).

In addition to this, JHA has several features which make its application difficult even among the Western European MS, and which are likely to be further exacerbated by Eastward enlargement. Firstly, even among the earlier 15 MS, the division between Schengen and non-Schengen states means that there are at least two *de-facto* EU internal security regimes. Moreover, the Schengen members have shown reluctance to accept EU members into the core

system which were considered unable to meet all of the Schengen standards. Italy and Greece, for example, were both kept waiting for seven years (Monar, 2000: 12).

Secondly, the fact that the decision to accept an EU MS into the Schengen acquis must be taken unanimously by all Schengen members means that the process is open to political manipulation. As an example, Spain has been vetoing the UK and Ireland's recent request to join considerable parts of the Schengen *acquis* as a means of pressurising the British government over the Gibraltar dispute (Monar, 2000: 12).

As has already been pointed out, although the new MS and applicant countries may not be granted opt-outs in the same way as the UK and Ireland, they are only expected to have achieved a high level of external border control upon accession, with the dismantling of internal border controls is to take place later according to a Council decision (Pastore, 2004: 131). This decision may, therefore, also be delayed for political rather than technical reasons, perhaps in response to electoral pressure in one or more Schengen member countries against the opening of borders with the CEECs (Pastore, 2004: 132).

The problems faced by the CEECs regarding JHA also apply to Turkey. It, too, is unlikely to achieve free movement of workers in the Schengen zone until several years after accession. Given that accession before around 2015 appears to be extremely unlikely, going on the probable timetable for the CEECs free movement rights are unlikely to be granted before 2022.

It is very possible, however, that this will be delayed even further, as, as has been pointed out above, this decision is open to political manipulation. Moreover, Turkey's accession process, even if it is successful, may be put back significantly. The recent freezing of eight chapters in the EU-Turkey negotiations is perhaps an early indication that the Turkish enlargement may not be straightforward.

In part, this is due to a deep mistrust of Turkish accession on the part of EU publics. In particular, as in the case of the CEECs, there is a (probably unfounded) fear mass migration from Turkey. This is also compounded by Turkey's position at the hub of potentially unstable regions, the Middle East, the Balkans and the Caucasus. In this way, while Turkey proudly proclaims itself a cultural 'bridge between East and West' in order to attract tourists, more

sceptical Europeans may view it as a bridge between East and West for illegal immigrants and unwanted asylum seekers.

In addition, research indicates that immigration from Turkey is viewed more negatively, both by the EU public and the elite[2], than that from the CEECs. For instance, according to a 1998 Eurobarometer report, when asked to place their feelings about 10 ethnic groups[3] on a scale of 1 (unfavourable) to 10 (favourable), Turks were judged to be the most unfavourable of all groups, with a score of 5.79 (Lahav, 2004: 90).

Such prejudicies are not limited to the man in the street. According to a study of MEPs carried out by Lahav, MEPs from Greece, Belgium and Luxembourg chose Turkish immigrants as the most undesirable, ranking them more unpopular than migrants from often far poorer and more unstable regions such as Africa, Asia and North Africa (Lahav, 2004: 130). This, then, indicates that Turkey may face significant political obstacles in achieving free movement in the Schengen zone, or even to being removed from the Schengen 'blacklist'.

Therefore, although public support for further action in the area of JHA has clearly been growing since the mid-1990s (Hix, 1999: 324-325), rapid integration in this area, traditionally percieved as 'high politics', retains a degree of controversy, although it has already undergone a significant degree of supranationalisation. In consequence, integration in JHA, while one of the fastest growing EU policies in recent years, has not developed as quickly as many would like, or consider necessary in the face of the challenges posed by the changing security environment since the late 1980s/ early 1990s, and in particular since the terrorist atacks of 2001 and 2003.

It is possible that enlargement will slow decision-making, as it is clearly more difficult to reach agreement between 25 or more MS than between 15. Moreover, it is as yet unclear whether some of the new MS and candidate countries, particularly the larger ones such as Poland or Turkey, have the potential to develop, like the UK or Denmark into comparatively 'awkward partners', reluctant to hand over sovereignty in sensitive areas (Dunay, 2004: 41), (Walker, 2004: 20).

[2] In this case represented by MEPs
[3] Turks, North Africans, Asians, black Africans, S.E.Asians, W.Indians, Surinamers, Jews, S.Europeans, N.Europeans

Therefore, it is particularly important to ensure a successful extension of the ASFJ to the new and forthcoming MS, as, as has been pointed out, this is vital for the development of the JHA policies and for the AFSJ. In turn, as JHA is being increasingly put forward as one of the main *raisons d'etre* of the EU, a failure to do this could not only strain relations with neighbouring third countries, but potentially also put the entire European integration project at risk by reducing the legitimacy of the Union.

1.2. Purpose and Aims of the Research

The research aims to answer the following question:

- Can neofunctionalist theory explain the EU's emphasis on and the rapid development of JHA? If so, what consequences does this have for the extension of JHA policies and the ASFJ to the new Member States and candidate countries?

It also aims to answer these sub-research questions:

- What have been the main difficulties in reconciling the Area of Freedom, Security and Justice with the recent and forthcoming enlargements? How can they be best overcome?

- What are the criteria of a 'successful' enlargement of the AFJS?

- To what extent have the difficulties involved in extending JHA and the AFSJ to the CEE Member States and candidate countries been generic, and how far have they been specific to individual countries or groups of countries?

- What are the similarities and differences can be noted in the problems of extending JHA to the CEECs on the one hand and Turkey on the other?

1.3. Synopsis of chapters

Chapter 2: Theory Chapter

This chapter aims to appraise the developing AFSJ, and then its extension to the new MS and candidate countries, according to neofunctionalist theory. The hypothesis to be explored in the first part of this chapter is that a neofunctionalist explanation can account at least in part for the development of JHA.

Neofunctionalism is a complex theory, and has moreover undergone several 'incarnations'. Before attempting a neofunctionalist analysis of JHA, then, the development of neofunctionalism will be briefly outlined and the differences between the newer versions of neofunctionalism, particularly Schmitter's 'neo-neo functionalism', and earlier versions will be discussed.

The analysis of the development of JHA from a neofunctionalist point of view will be attempted using newer versions of neofunctionalism, most notably Schmitter's neo-neo functionalism. The analysis will be organised according to Tranholm-Mikkelsen's division of neofunctionalist spillover into three categories. Thus, evidence of functional, political and cultivated spillover in JHA will be explored. It is expected that all three forms of spillover have contributed to the development of JHA.

The second part of the theory chapter will focus on a neofunctionalist analysis of the enlargement process in general, and the enlargement of JHA in particular. Enlargement, despite its prominence as an issue since the collapse of Communism in CEE, has been almost ignored by theorists, including neofunctionalist scholars, although there are some notable exceptions.

After an overview of the application of neofunctionalism to the enlargement process, then, the analysis will once more be organised according to Tranholm-Mikkelsen's categorisation of spillover. However, new categories of spillover which have been proposed by neofunctionalist scholars especially in relation to enlargement will also be discussed. This includes Niemann's 'induced spillover', or exogenous functional pressures, and the 'institutional spillover' put

forward by Miles, Redmond and Schwock, as well as their division of external spillover into the categories of 'voluntary' and 'enforced'.

Again, the hypothesis here is that neofunctionalism can provide a convincing explanation for the enlargement process. Firstly, it is necessary to explain how the opposition of some of the MS to enlargement was overcome, as well as severe differences in MS opinions about the speed and scope of enlargement. Each section will be followed by a short conclusion analysing and summarising the neofunctionalist forces in action during the period in question.

Chapter 3: The Development of Co-operation in the Field of Justice and Home Affairs

The second chapter undertakes a more detailed neofunctionalist analysis of the development of JHA and is structured chronologically, beginning from the Trevi agreement of the 1970s to the latest developments, namely the Hague programme and the proposed changes in the Constitutional Treaty. The expectation is that neofunctionalist spillover has contributed to the significant increase in supranationalisation/Communitarisation in this area and its particularly rapid development.

The chapter will be structured chronologically, focusing on the main events and Treaty changes in JHA since the 1970s, including the Schengen agreements, the intergovernmental agreements of the early 1990s, the Maastricht and Amsterdam treaties, and developments at the Tampere Council and beyond. Moreover, the (as yet unratified) changes in the Constitutional Treaty will be discussed.

In addition, this chapter aims to tackle the question of whether the developing AFSJ is, in fact a developing 'fortress Europe'. In other words, it attempts to analyse whether the EU's developing border regime is of a primarily 'liberal' or 'restrictive' nature. In this context, a liberal border policy frame may be defined as a regime concentrated on individual and human rights and the situation of the individual, while a realist frame is one where illegal immigrants, refugees and asylum seekers are all viewed as a potential threat to the security and stability of the state (or, in this case, regional organisation), and whose entry must therefore be strictly controlled (Lavenex, 2001:26).

Increased supranationalisation is expected to result in a more liberal policy frame, both as a consequence of the need for increased freedom of movement (Lahav, 2004:7) and because supranational institutions are subject to lobbying from both from pro-free movement and migration business groups and from pro-migrant NGOs. Moreover, due to the 'democratic deficit' they are at the same time able to take a longer-term view than national governments and are comparatively protected from public opinion, which tends to be rather anti-immigration.
In contrast, a border policy that is based on intergovernmental bargaining is likely to lead to a more restrictive policy through 'lowest common-denominator' outcomes (Lahav, 2004: 9-10) as states are eager to protect themselves from 'importing' the illegal migration or international organised crime problems of their neighbours.

The hypothesis is, then, that, as JHA was largely intergovernmental in nature until the Amsterdam Treaty, the EU's developing border policy is largely restrictive in nature, focusing more on keeping out undesirable migrants, asylum seekers and organised crime rather than on more liberal issues such as the integration of TCNS. However, as the supranationalisation of JHA proceeds, there should be some signs of a progressive liberalisation of outlook. In other words, and echoing Geddes (2003: 7), the more the Europeanisation of JHA proceeds, there is less risk of the EU becoming a 'fortress Europe'.

Chapter 4: The Extension of JHA to the Central and Eastern European Member States and Candidate Countries

The next chapter will focus on the extension of JHA policies to the CEE MS and candidate countries. Firstly, the enlargement process will be analysed from the point of view of neofunctionalism. The hypothesis is that enlargement has not been exclusively in the hands of the MS, and that neofunctionalist spillover played a part both in the decision to enlarge, and throughout the enlargement process itself.

This will also focus on the development of the JHA *acquis* and its adoption by the candidate countries. It is argued that the relationship between the development of JHA and enlargement is complex. The CEECs were not merely passive recipients of the JHA *acquis* despite the fact that they were not allowed opt-outs from any part of it, unlike established MS such as the UK, Ireland and Denmark.

Indeed, the enlargement process provided an impetus for the development of JHA, due to (probably exaggerated) fears of organised crime and illegal immigrants seeping into the EU-15 from, and via, the candidate countries/new MS. Enlargement itself, then, can be viewed as an exogenous functional pressure, or, in Niemann's terms, as induced spillover, for the development (and Communitarisation) of JHA.

However, despite the fact that the CEECs had an unwitting part in its development, the JHA *acquis*, like the rest of the Copenhagen Criteria, has been imposed on the CEECs without taking their own circumstances or opinions into account. It can then be classified in neofunctionalist terms as largely enforced, rather than voluntary, spillover. Neofunctionalists, such as Schmitter, argue that conditions such as the Copenhagen Criteria are probably necessary if enlargement is to proceed without causing a disruption or reversal in regional integration (spillback) as they are directed towards helping the candidate countries fulfill the background conditions (in neofunctionalist terms) for integration.

On the other hand, Schmitter considers that the Copenhagen Criteria may in some cases be over- stringent, and that there has been little chance for derogation, opt-outs or compensatory measures. For this reason, once the candidate countries accede and play a full part in the decision-making process, this may result in spillback in some areas (2002: 42-43).

This chapter argues that JHA is one area where the adoption of the *acquis* has gone against the interests of the CEE candidate countries/MS in several domains, causing them severe difficulties, described by Geddes as 'Schengen-related strain'. The hypothesis is that if attempts are not made to accomodate the CEEC MS/candidate countries, this could lead to a disruption of integration in JHA in the form of spillback from the CEECs, either through the use of the veto or the blocking minority.

The second part of this chapter, then, gives an overview of the main areas of 'Schengen-related strain' and discusses their implications from the point of view of neofunctionalism. Moreover, suggestions are made as to possibilities of alleviating these problems within the current system.

Chapter 5: The Extension of JHA to Turkey

This chapter will focus on an analysis of Turkey's adoption of the JHA *acquis* from a neofunctionalist perspective. The first part of the chapter will attempt a neofunctionalist examination of Turkey's accession process so far. The basic argument is that neofunctionalist spillover, of all three basic types, can account largely for the progress that Turkey has made in its quest for accession so far.

However, it also argues that counterveiling forces[4], which may contribute to spillback, have also been present in the Turkish accession process to a much greater degree than in the case of the CEECs, and that they originate from sectors within Turkey as well as from within EU society.

This could account for the sometimes painfully slow way in which Turkey's membership bid has progressed when compared with the CEECs: while the CEECs which applied in the mid-1990s are already MS, Turkey, which applied for full membership in 1987 after an already long relationship with the EU, is still at least around 10 years[5] from accession.

Moreover, there is, as yet, no guarantee that Turkey will eventually accede to the EU: in a worst-case scenario contraveiling forces both within Turkey (public pressure on the governmet to slow down the reform process, a negative referendum) or from within the EU (a veto, a negative referendum result) may prevent Turkey's ever becoming a member of the EU.

In the second section of this chapter, then, a neofunctionalist analysis of Turkey's adoption of the JHA *acquis* will be undertaken. The chapter will begin with a discussion of Turkey's borders. Following this, it will explore Turkey's visa, asylum and migration policies and discuss the changes that the country is required to make in these areas in order to adopt the EU's *acquis*.

The hypothesis is that, while some of the adjustments imposed by the EU are in line with pressures from sectors of Turkish society, notably to fight illegal migration, others will

[4] Niemann (2006: 13) divides these countervailing forces into three main types. Firstly, they may originate from 'nationalist' leaders, such as De Gaulle and Thatcher who are wary of handing over too much sovereignty to supranational institutions. Secondly, even when the government itself is pro-integration, domestic forces, including opposition parties, public opinion or lobby groups, may prevent it from rising above a common denominatior. Finally, diversity may have a negative effect on integration

[5] Commission President Barroso recently cited '15-20 years' as a probable accession date for Turkey

effectively turn Turkey into a buffer-zone for illegal migration and asylum seekers otherwise headed for the EU.

1.4. Literature Review

As has already been discussed, the aim of the thesis is to undertake a neofunctionalist examination of the development of JHA and its extension to the new MS and candidate countries, including Turkey. The literature review therefore focuses on related areas, namely neofunctionalism, the development of JHA, the accession process of the CEECs and Turkey in general and their adoption of the JHA *acquis* in particular. In addtion to academic books and articles on these subjects, an extensive use has been made of the EU's own website, particularly of Eurobarometer surveys and of the Commission's regular reports.

A. Neofunctionalist Theory

Neofunctionalism is a theory which has undergone many alterations and incarnations since it was first proposed by Haas. While earlier versions of neofunctionalism have of course been examined, the focus of this thesis is on newer versions of neofunctionalism. These include that of Tranholm-Mikkelsen (1991), whose division of neofunctionalist spillover into functional, political and cultivated categories will form the framework of the neofunctionalist analysis of JHA in this thesis.

The focus of this thesis is, however, on Schmitter's 'neo-neo-functionalism' (2002). This differs from traditional neofunctionalism in several ways, the most notable of which are perhaps the following:

- It accepts that spillover is the exception rather than the rule, with the norm being 'encapsulation', or that a regional organisational's competences should remain entirely at intergovernmental level and limited in scope. However, it does argue that the existence of spillover makes further spillover more likely.

- In common with many newer versions of neofunctionalism it admits that spillover is reversible, i.e. that spillback may occur.

- While earlier versions of neofunctionalism tended to argue, either implicitly or explicitly, that the *finalite politique* of the EC/EU was a federal state, in Schmitter's view it is more likely to be an entity dominated by multilevel governance (MLG) and to be polycentric (PLC) rather than to follow the centre/periphery division of a federal state.

B. Neofunctionalist Analyses of JHA

Despite the revival of neofunctionalism since the Single European Act (SEA) and Maastricht Treaty, very little literature has been found which deals directly with the main research question of this thesis, i.e. the development of JHA from a neofunctionalist point of view. A notable exception is a recently-published article by Arne Niemann (2006), in which he carries out a neofunctionalist analysis of the development of JHA focusing on developments in the Amsterdam, Nice and Constitutional Treaties.

Moreover, this work is particularly valuable from the point of view of this thesis in that, on the basis of interviews with Commission and national officials, it argues that a considerable amount of political spillover, particularly *engrenage,* may occur between officials *during* the IGCs themselves. He argues that the more open atmosphere of the European Convention was particularly conducive to both political and cultivated spillover.

In Niemann's view, the atmosphere of working groups contributed to the development of *engrenage* between officials (2006: 33-34), while cultivated spillover, particularly on the part of the Commission, was facilitated by the deliberative discussion style predominant at the Convention (2006: 40). He contrasts this with the the lack of supranationalisation of JHA in the Nice treaty as compared to the Amsterdam and Constitutional Treaties and cites the weakness of the Commission at the time, as a consequence of the 1999 resignation of the Santer Commission, as a contributing factor (2006: 38-39).

Another author who examines JHA, or at least one of its aspects, from a neofunctionalist angle is Adam Luedke (2004), (2005). He argues that the development of a specific issue relating to JHA (the integration and free movement rights of TCNs has been influenced by legal spillover, a form of cultivated spillover originating from the European Court of Justice

(ECJ). While Luedtke's work has been used to help support the thesis, this thesis attempts to take a much broader (if less detailed) examination of neofunctionalist processes in JHA.

Despite this, although there appears to be little work on neofunctionalism applied to JHA as such, there is a relatively large body of literature charting the development of JHA from an entirely national affair through intergovernmental co-operation to becoming a policy area that is at least partly supranational. Emek Uçarer (2001: 3), (2003), for instance, argues that the Commission has continually sought to – and sometimes succeded in – increasing its role in JHA despite the initial sanctions on supranational involvement on the part of the MS.

She identifies two variables which affect the Commission's agency and autonomy. These can be classified as *constitutional* factors – the Commission's legal rights and responsibilities according to the EU treaties and law, and *institutional* factors - the Commission's internal workings and organisation – that can also be impacted by constitutional issues. Therefore, the clearer the Commission's treaty mandate and the more effective its institutional structures the more likely the Commission is to show initiative and act independently of the MS.

Regarding JHA, then, Uçarer's basic argument is that the Commission, which started from a very weak base both constitutionally and institutionally, has been able to forge a greater role for itself through improvements in both its constitutional and institutional status, particularly in the post-Amsterdam period. In effect, then, from a neofunctionalist point of view, the processes she describes appear to have much in common with the concept of cultivated spillover.

In addition, Simon Hix also implies (although he does not name it as such) some neo-functionalist type processes occuring in JHA, particularly regarding the increasing role of the Commission and NGOs (Hix, 1999: 322-329).

Virginie Guiraudon (2001), on the other hand, argues that developments in EU immigration policy can be best explained by Cohen, March and Olson's 'garbage can' theory, according to which the elements of decision-making (problems, solutions, actors and opportunities) are thrown into the process as they appear in a 'garbage can'.

She considers that neofunctionalism is not a suitable explanation for developments in this area as it, like rational choice-theory 'makes outcomes seem inevitable' and does not allow for 'contingencies, reversals, incidents that closed certain roads along the way (Guiraudon, 2001: 8). However, this is open to contradiction because, as discussed in the theoretical chapter, neofunctionalism, or at least its later versions, *does* allow for different outcomes and reversals in the form, for instance, of spillback, spill-around or encapsulation.

Moreover, many of Guiraudon's examples appear to fit in with the neofunctionalist concepts of political and cultivated spillover. As she points out, 'Indeed the story of the rise of the immigration issue on the EU policy agenda is that of civil servants, NGOs, economic actors arriving on the European scene, escaping domestic constraints and opening up new spaces for action'. This could almost be a textbook description of neofunctionalist political spillover.

Andrew Geddes (2000), (2003), meanwhile, also focuses on the increased supranationalisation of JHA. However, he is also concerned with the issue, important to this thesis, of the extent to which the EU's developing border policy is restrictive in nature. He reaches the conclusion that an excessively restrictive border policy – 'Fortress Europe' - does not benefit the EU.

This is for two main reasons. Firstly, it does not have a significant impact on preventing illegal immigration, while endangering the rights of TCNs and the EU's relations with neighbouring countries. In addition, he argues that an increase in supranationalisation in JHA will promote a more liberal policy at EU level as the supranational institutions tend to favour a less restrictive policy than the MS.

Gallya Lahav (2004a) also examines the development of EU co-operation in the areas of immigration and asylum and its gradual supranationalisation. Moreover, she discusses the link between supranational/intergovernmental co-operation at EU level according to the restrictive/liberal paradigm of immigration and asylum policy.

Lahav's main focus, however, is on the role of public and elite opinion in determining immigration policy. She argues that public opinion may play a greater role in EU decision-making than was previously thought. As well as this, she points out that elite and public opinion may show less divergence than was previously assumed (2004: 13-17), and that while

elite opinion tends to play a refining role, public opinion may help to define the acceptable bounds of policies (2004a: 13).

Support for integration at mass level, however, appears to be most closely linked to *perceptions* of the effects of integration rather than objective conditions as pulic opinion may be distorted by political elites' attempts to gain credit and apportion blame for these developments

In conclusion, therefore, while there are relatively few studies of JHA explicitly from a neofunctionalist viewpoint, many authors do appear to provide supporting evidence, at least partially, for a neofunctionalist analysis of JHA through focusing on the factors behind its supranationalisation.

C. Neofunctionalist Analyses of Enlargement

With some exceptions, the enlargement process has generally not been much discussed by neofunctionalists. In fact, there appears to have been relatively little interest in theorising the enlargement process at all. However, some neofunctionalist scholars have attempted to adapt the theory in order to apply it to enlargement. In addition to examining how functional, political and cultivated spillover might work in the enlargement process, they have also proposed some new forms of spillover that may be applicable to enlargement.

The first is Miles, Redmond and Schwok's concept of *institutional* spillover, according to which enlargement creates pressure for an increase in supranational decision making. This is due to the fact that, as a result of the use of the veto, intergovernmental decision-making becomes more cumbersome the more the EU enlarges (1995: 189) However, while Niemann (2006), for instance, recogises this phenomenon, he prefers to classify is as a form of functional spillover.

Traditional neofunctionalist theory does not account for assymetries in bargaining power between MS and applicants (Gryzmala Buse, 2004: 17). However, Miles, Redmond and Schwok (1995) have argued that spillover in the enlargement process differs from that between MS in one important way: external, unlike internal spillover, may be of a 'voluntary' or an 'enforced' nature. While voluntary spillover originates from the candidate countries

themselves based on a perceived need for a closer relationship with the EU, enforced spillover occurs when the EU demands that applicants reform domestic processes in line with EU policy, usually as a prerequisite of accession (Miles, 2004: 256).

Induced spillover, proposed by Niemann[6] (1998) is, on the other hand, an attempt to explain both why the EU undertakes to enlarge and why much of the responsibility for handling the acession process falls on the Commission. He argues that external pressures, such as extra-Community demands or an unforeseen threat to Community interests may compel the MS to adopt common policies towards these countries. In order to do this, they will rely increasingly on the supranational institutions of the EU, particularly the Commission, which usually has an advantage either in knowledge or experience over the MS (Niemann, 1998: 432).

Schmitter also attempts to explain via neofunctionalism the mechanisms that provoke the EU to take the decision to enlarge. In his view, once integration is well advanced, the regional organisation will begin to be placed under pressure from neighbouring countries. These will first start to treat the region as an international bargaining unit, and perhaps insist that it takes on new resposibilities in areas such as defence and security. Eventually, such a region will enlarge, encouraged by efforts from regional bureaucrats on the one hand, and pressure from the neighbouring countries which, particularly given the negative consequences to them of regional discrimination, are likely to push for membership (Schmitter, 2002: 35).

In general, then, while there is still not a lot of work carried out on theorising enlargement, there have been several attempts to analyse the enlargement process from the neofunctionalist angle. Niemann and Schmitter coincide in arguing that the decision to enlarge tends to be in response to pressure, either direct or indirect, from neighbouring countries, and that responsibility for the enlargement process is likely to be largely handed over to the supranational institutions, particularly the Commission. Moreover, it has been argued that the categories of functional, political and cultivated spillover can be applied to enlargement, although some supplementary categories (induced, institutional, voluntary and enforced) have also been suggested.

[6] Later he classifies this same process as an *exogenous functional pressure*

D. Enlargement to CEE and JHA

Although a large quantity of literature exists both on enlargement and on JHA, there is relatively little which deals with the effects of JHA on the CEE candidate countries and MS. Some of the studies which do examine the effect of enlargement on JHA include the work of Jörg Monar (2003), Heather Grabbe (2003), and Elena Jileva (2003) which, in addition to describing the adoption of the JHA *acquis* by the CEECs, emphasise the potentially divisive effect that JHA policies could have on an enlarged EU and its immediate neighbours.

Monar, in particular, focuses on the effect of enlargement on the working of the AFSJ. His principal argument is that if the increased diversity that enlargement brings to JHA is not tackled the entire AFSJ project could be endangered. He divides this diversity into three categories; political diversity[7], structural diversity[8] and implementation capacity[9] diversity. He points out that this is 'a question of the system's efficiency and credibility as a whole as regards the delivery of internal security to the EU's citizens' (Monar, 2003: 3)

Monar argues that this will contribute to a lack of trust which, in turn will make decision-making more difficult, particularly as the EU's major diversity-management instruments, such as the Community method, enhanced co-operation or the open method of co-operation have their limitations or drawbacks.

He proposes that diversity can be lessened, if not overcome, by using and developing methods like collective evaluation and 'benchmarking'. However, he argues that common institutional structures and 'joint teams' may be the keys to developing trust and confidence on both sides as they foster regular encounters and co-operation between the new and old MS.

This argument is also developed, from a neofunctionalist stance, in this thesis. It argues that joint structures and teams, whether prior to or after accession, are likely to foster *engrenage* between the officials involved, and that therefore a more similar mindset may develop. This is also borne out, for instance, in Frank Gregory's (2001) study of the Estonian police, where

[7] In this case, a diversity of interests
[8] Compatibility of law-enforcement and administrative structures
[9] This covers matters such as corruption, data protection and so on

bilateral and multilateral co-operation with EU police forces encouraged the development of 'EU-like' attitudes in Estonia.

Both Grabbe (2002, 2003) and Jileva (2002, 2003) however, take a rather different view, as they concentrate on the effects that the JHA *acquis* is likely to have on the candidate countries and new MS. They point out that the EU JHA *acquis* can cause serious difficulties for CEEC MS and candidate countries on the one hand and their neighbours on the other, due to the fact that this has been unilaterally imposed on applicant countries without taking into consideration their needs and preferences.

This is in contrast, for instance, to the situation of EU-15 MS such as the UK, Ireland and Denmark, which have been allowed to opt-out of some of the JHA *acquis.* The EU can, therefore, be accused of double standards in this instance, which is important as these authors identify significant negative externalities to JHA.

These include the requirement to impose visa restrictions on neighbouring states. According to Grabbe in particular this can disrupt both trade relations and political relations in CEE. Moreover, this defeats the object of another EU policy for CEE, which is to encourage good-neighbourliness and integration in the region.

In conclusion, therefore, the body of work dealing with enlargement to the CEECs and JHA can be broadly divided into two groups. The first group focuses on the consequences of enlargement on the AFSJ. Conversely, the second group is more interested in how the adoption of the JHA *acquis* affects the new MS and candidate countries.

Both sets of studies, however, point out that the diversity between the EU-15 countries and the CEECs is significant in this area, and if the resulting issues are not tackled severe difficulties in the functioning of the AFSJ, and, indeed of the enlarged EU as a whole, could result. Moreover, the suggestions made for overcoming these discrepancies are remarkably similar – an increase in co-operation 'on the ground', whether bilateral or multilateral. From a neofunctionalist angle this can, in effect, be put down to a form of 'engrenage' between the relevant officials.

E. Turkey and JHA

The leading work regarding Turkey's adoption of the JHA *acquis*, particulaly in the areas of asylum and immigration has been undoubtedly carried out by Kemal Kirişçi (2003a), (2003b), (2004) (2005). He focuses especially on the difficulties that Turkey faces in adopting the *acquis*, and notably argues that some aspects of the *acquis* risk turning Turkey into a buffer-zone for irregular migrants and rejected asylum seekers who would otherwise be headed for the EU. He also points out that the adoption of the Schengen visa system will significantly disrupt Turkey's trade and tourism relations with neighbouring countries.

These themes have also been taken up by Lami Bertan Tokuzlu (2005) (2006) although he examines them from a legal, rather than political, point of view. Moreover, Ahmet Içduygu (2000) (2003), (2004), (2005) has provided detailed overviews of the migration situation (both regular and irregular) in Turkey. Like Kirişçi and Tokuzlu, he also points out, together with E. Fuat Kayman (2000), the risk of Turkey becoming a buffer-zone for unwanted irregular migration and asylum seekers unwanted by the EU.

These three authors in particular, while not denying that adoption of the JHA *acquis* may have some advantages for Turkey, also argue that it is likely to prove extremely problematic if Turkey's unique geographical position is not taken into account, and if sufficient burden-sharing resources are not made available

II. THEORY

2.1. In support of a theoretical analysis

In order to provide a background for the neofunctionalist analyses of JHA and the enlargement process which constitute the bulk of this chapter, this introduction aims to give a brief outline of the main developments in attempts to theorise the EU since the 1950s. It will be noted that neofunctionalism, being one of the earliest theories of European integration, is perhaps rather unfashionable these days (Schmitter, 2002: 1-3). The next sub-chapter, then, is concerned with an attempt to justify the choice of neofunctionalist theory for analysing JHA.

First, however, it is worth discussing the reasons for attempting to carry out a theoretical analysis of a policy area such as JHA at all. As Andersen points out, 'applying existing theory to various aspects of the EU is an attempt to make various institutions, functions, processes or outcomes 'understandable' (2003: 1). A theoretical analysis of JHA, then, may help to shed light on the processes behind the development of this policy area, providing a clearer understanding which may have practical consequences.

Different theoretical approaches to the EU may have different purposes, such as explaining, describing or assessing European integration, and they may do so in different ways (Cowles and Curtis, 2004: 298). The neofunctionalist anlysis in this chapter, for instance, aims to do all of these: both a description and explanation of the development of JHA and of enlargement will be carried out, and an attempt to assess the developing AFSJ.

2.2. Changing Trends in Theoretical Views of the EC/EU

Theoretical attempts to comprehend and analyse the developing EC/EU date from the 1950s, from around the same time as the founding of the European Communities themselves. However, as the 'beast' itself has changed and grown over the decades, old theories have been re-examined and new theories developed in order to keep up.

Changes in the scholarly community also affect the development of theory: while American-based international relations scholars dominated the early days of EC/EU theory, later

theorists, often Europeans, have developed public policy and comparative theoretical approaches (Green-Cowles and Curtis, 2004: 296). While there is insufficient space here to carry out a comprehensive description of all EU theories since the 1950s, a brief overview of some of the main theoretical currents will be attempted.

However, every theory needs to be aware of the kind of animal with which it is dealing: as Rosenau points out, it is important for a theorist to ask the question'of what is this an instance?' (Rosenau and Durfee, 1995 cited in Rosamond, 2000: 14). Rosamond argues that, broadly speaking, there have been four major ways in which theorists have attempted to classify the developing EC/EU.

The first approach is to view the EU as an instance of an international organisation. While this may be useful, it is also clear that the EU differs from an 'average' international organisation, particularly in that it is more supranational in nature. The second is to treat the EU as a case of regionalism to be compared with other examples of regional integration. Thirdly, the EU may be studied as a suitable location for examining policy dynamics due to its complexity as a political system. Finally, the EU may be approached as a *sui-generis* phenomenon, a unique example in history, also known as the n=1 approach. This implies that broader generalisations cannot be made from theorising about the EU (Rosamond, 2000: 14-15).

The earliest, and perhaps most enduring, division of theoretical viewpoints regarding EU integration theory was between an *intergovernmentalist* and a *supranational* explanation of integration. Neofunctionalism, first developed by Ernst Haas in his 1958 work 'The Uniting of Europe: Political, Social and Economic Forces 1950-1957', was the first attempt at theorising the development of the European Communities, although it was originally intended to explain similar processes in other parts of the world (Stroby-Jensen, 2003: 80-81).

Although it fell in and out of fashion in the years and decades since it has been 'integral to the study of European unity in the second half of the twentieth century' (Rosamond, 2000: 50). While federalism and functionalism were primarily prescriptive theories which aimed at a more peaceful form of world politics, neofunctionalism, which sought to guide further empirical research by forming hypotheses, was a rather more descriptive theory. This was despite the fact that it was sometimes thought to be implicitly pro-integration (Stroby-Jensen,

2003: 80) . In this way, it can be said to have sprung out of a new social-scientific mindset which grew to fruition in the USA in the post-war period (Rosamond, 2000: 50).

Neofunctionalism stressed the importance of the supranational institutions, particularly the European Commission, which were expected to become increasingly independent and active over time. However, the stagnation in European integration which followed from the 1965 Empty Chair crisis discredited neofunctionalism, and was now viewed with scepticism even by Haas, its founder. However, the acceleration of integration fuelled by the Single European Act and the Maastricht Treaty in the 1980s and 1990s fuelled a revival of supranationalist theories. Despite this, the theory has undergone significant revisions and has never really recuperated its early popularity (Stroby-Jensen, 2003: 91).

In contrast, intergovernmentalism, which grew out of a critique of neo-functionalist theory and federalism in the 1960s, argues that EU integration proceeds mainly as a result of bargaining between MS governments and that supranational institutions have relatively little impact. The theory was first developed by Stanley Hoffmann, who, in retort to neofunctionalists, argued that states' interests could overcome the agendas of the supranational institutions, and also that the concept of spillover was something of a utopian ideal. Moreover, Roger Hansen (1969) argued importantly that neofunctionalists failed to take into account the global environment (Rosamond, 2000: 77-78).

Intergovernmentalism, which has its roots in realist or neo-realist theories of international relations, has been central in one form or another to the EU integration debate since the mid-1960s. It sees the EU as little different to other international organisations in that it views decision-making as dominated by the MS, which act in order to protect national interest (Cini, 2003: 94-95).

Co-operation, viewed as a zero-sum game, is according to intergovernmentalists 'driven by the interests and actions of nation states'(Hix, 1999: 15). Moreover, the intergovernmentalist view is that the MS participate in European integration without ceding sovereignty[10]: at most it is pooled or shared, and is not transferred from national to supranational level (Cini, 2003: 96).

[10] Sovereignty can be defined as 'the legal capacity of national decision-makers to take decisions without being subject to external restraint' (Nugent, 1999: 502).

Moravcsik, writing in the 1990s, developed a two-stage approach emphasising the importance of the effect of domestic groups on state leaders in his liberal intergovernmentalist theory (Green Cowles and Curtis, 2004: 299). If this theory were to be applied to JHA then, as will be discussed further in this chapter, policy developments in this area would result from domestic groups putting pressure on MS governments. These, in turn, would dominate decision-making at EU level with very little involvement at supranational level. This is in contrast to a neofunctionalist analysis which emphasises the role of the supranational institutions, particuarly the Commission.

From the mid 1990s, however, the dominance of the dichotomy of neofunctionalism and intergovernmentalism has increasingly been replaced by a variety of theoretical perspectives, often based on comparative politics and public policy perspectives (Green Cowles and Curtis, 2004: 300). Many of these can be included under the general umbrella called 'institutionalist' approaches, including constructivism and multi-level governance (Andersen, 2003: 4) as well as the perhaps more 'obviously institutionalist' theories such as historical, sociological and rational choice institutionalism.

Constructivism can be divided into two main schools; social constructivism and theoretical constructivism. According to constructivists, international reality is ideational as well as material; it is something that does not merely exist but is constructed. In other words, actors' identities are not given but are created as a result of social interaction (Rosamond, 2000: 198). Constructivists also propose that ideational factors have normative as well as instrumental dimensions and that they express not only individual but also collective intentions. Moreover, constructivism argues that the meaning and significance of ideational factors are not independent of time and place (Ruggie, 1998: 33).

Constructivists may typically carry out research in areas such as the effect of EU norms on the MS and vice versa, the consequences of social interaction of states on the international system and the relevance of images of governance on political elites in the EU. A constructivist explanation of the development of JHA, then, would perhaps result from the social interaction of political elites at EU level.

Multi-level governance can be described as‘institutionalist’ in the sense that it aims to develop a theoretical model to capture what it claims is the complex structure of EU governance processes (Andersen, 2003: 4). It argues that decision-making takes place at various levels in the EU, that their competencies overlap and there is significant interaction between officials at the different levels of governance. In other words, the decision-making actors are politically independent but otherwise interdependent. There is no exclusive policy competence allocated at any level, nor is there a fixed hierarchy of authority (Schmitter, 2002: 5)

While ‘new institutionalism’ is a family of theories rather than a single theoretical framework, they are all constructed around the idea that 'institutions matter'. Their importance lies in the ways in which institutional configurations can affect political outcomes (Rosamond, 2000: 113). These theories have become increasingly popular in recent years, and can now be said to be a ‘mainstream approach’ in EU studies (Miles, 2004: 260).

Thus, an institutionalist view of the development of JHA would argue that it results from the MS, whether they intended to or not, following patterns set by the institutions. In this way, although there are significant differences which will be discussed later in this chapter, institutionalism is not entirely alien to neofunctionalism in that the MS are, to some extent, constrained in their behaviour by the supranational institutions.

According to rational choice institutionalists, institutions are formal legalistic entities and sets of decision-making rules. While states create institutions because they assume they will benefit from them, they soon find their behaviour constrained by the institutions and have to adapt to them (Rosamond, 2000: 115-116). In some ways, therefore, it overlaps with liberal intergovernmentalism in that it emphasizes ‘unitary actors, marginalist calculations and credible commitments’ (Schmitter, 2002: 5).

Historical institutionalists, however, have a wider definition of what an institution is, to include informal, socially defined behavioural patterns and rules as well as formal decision-making rules and structures (Miles, 2004: 261). Historical institutionalists argue that institutional choices can have long-term effects as although institutions are designed for particular purposes in particular sets of circumstances, because the actors involved are not

fully knowledgeable about the institutions in question they may have unforeseen consequences (Rosamond, 2003: 115)

Finally, sociological institutionalism attempts to understand the processes behind the development of institutional cultures. Unlike rational choice institutionalists, who see institutions largely as reflections of actors' preferences, sociological institutionalists believe that more complex social processes are behind the sources and consequences of institutionalisation (Andersen, 2003: 16). As Schmitter points out (2002: 5), it overlaps with neofunctionalism in its emphasis on transnational associations.

2.3. Reasons for Choosing Neo (Neo) Functionalism[11] as a Basis for Understanding JHA

The following section aims to examine the development of JHA according to neofunctionalist theory. However this choice of theory deserves an explanation because, as can perhaps be inferred from the previous sub-chapter, neofunctionalism is distinctly 'untrendy' among students of EU integration these days, although, as Schmitter points out, '… neo-functionalist thinking turned out to be very much alive, even if it was usually being rebranded as a different animal' (2002: 2).

JHA is the fastest growing policy area in the EU. Moreover, in the years since the Maastricht Treaty it has become increasingly supranationalised, despite the fact that border control and internal security have traditionally been considered a vital, even defining, competency of the nation state. Neofunctionalist theory, then, a theory which predicts a tendency to supranationalisation, was chosen in an attempt to explain the MS' willingness to delegate sovereignty to a significant extent to the EU in this sensitive area.

Seeking to explain this surprising communitarisation of JHA[12], studies have been produced arguing that, among other things, the Commission's agenda-setting, public opinion, decisions of the European Court of Justice (ECJ), the Schengen agreement, the Single Market and

[11] Neo(neo)functionalism refers both to traditional forms of neofunctionalism and Schmitter's neo-neo version.
[12] This is surprising particularly when compared with the much slower supranationalisation that is taking place, for instance, in CFSP, another policy area that is traditionally seen as an important part of the nation state's sovereignty.

external factors have been the driving forces behind the quick pace of supranationalistation in this policy area. Another reason for choosing neofunctionalism as a basis for analysis, then, was that such a diversity of factors could potentially fit into the neofunctionalist scheme of functional, political and cultivated spillover. The first part of this chapter, then, focuses on evidence of functional, political and cultivated spillover in JHA development.

However, when choosing a theoretical framework, it is perhaps difficult to decide what constitutes a 'good' theory. Scott Burchill suggests six criteria in order to evaluate theories, and the rest of this chapter aims to show that neofunctionalism, or at least its revised versions, broadly fulfills these:

1. a theory's *understanding* of an issue or process
2. a theory's *explanatory power*
3. a theory's success at *predicting* events
4. The theory's intellectual *consistency* and *coherence*
5. The *scope* of the theory
6. The theory's capacity for *critical self-reflection* and intellectual *engagement* with contending theories (1996: 24)

In the early days of neofunctionalism, the last point was perhaps lacking, but the theory has shown that it is able to transform itself in tandem with developments in the EC/EU. The 1965 Empty Chair Crisis and the resulting period of stagnation in EC integration was, as shall be discussed further in this chapter, a crisis point in neofunctionalism.

However, the theory's capacity for self-reflexion and adaptability was shown with its transformation from a theory of merely integration to one which sought to encompass both integration and disintegration (Schmitter, 2002: 4). It has also proved itself able to engage with the main family of contending theories, intergovernmentalism, in that it concedes that national governments do play an important role in integration and, as Niemann, for instance, (2005) (2006) argues forcefully, in disintegration.

While the analysis is carried out from a neofunctionalist (and neo-neofunctionalist) perspective, it is always worth briefly examining contending theoretical outlooks for the sake of perspective. In this case, historical institutionalism and liberal intergovernmentalism (LI), chosen as they are two leading contemporary integration theories, are also used as points of

comparison. After a short description of these theories, they will occasionally be mentioned especially when they diverge from the neofunctionalist view of the development of JHA.

In stark contrast to neofunctionalism, LI, as its name suggests, focuses on an intergovernmentalist explanation of integration, although it also focuses on the domestic pressures which influence the development of a national position. As Schmitter points out despite great differences at first glance, LI is perhaps influenced by neofunctionalist thinking:

> If Moravcsik were to concede that the calculation of member-state strategies was affected not only by 'domestic interests' but also (and even increasingly) by transnational firms, associations and movements working through domestic channels, then his approach would be virtually indistinguishable from neo-functionalism – just much less specific in its assumptions and hypotheses (2002: 2)

Historical institutionalism, which allows for greater input on the part of institutions, is even at first sight less directly opposed to neofunctionalism and, to a degree, is compatible with it, although it tends to ignore functional and external pressures as an impetus for policy development.

The second part of the chapter attempts a neofunctionalist analysis of the enlargement process, particulary focusing on the adoption of the JHA *acquis.* Moreover, the hypothesis is that, if neofunctionalist theory does provide an important contribution to explaining the development of JHA policies, this may have important implications for the functioning of the policy in an enlarged EU.

Later versions of neofunctionalism, particularly in an attempt to explain the relative stagnation in European integration in the 1970s and 1980s, have proposed that neofunctionalist spillover may be stopped, and even reversed (a process known as spillback), if opposed by some, or even one of the MS. Therefore, if the EU's border policies do not adequately take into account the needs of the new MS and candidate countries, these countries may, in due course, hinder the widening and deepening of these policies.

This would be particularly worrying from the point of view of EU legitimacy in general. Firstly, if neofunctionalist processes have been at least partly responsible for the development

of JHA as part of cultivated spillover we would expect to see the promotion of JHA as the EU's new '*raison d'etre'*, especially by the Commission. In consequence, any perceived failure, or even slow decision-making in JHA, would undermine the EU's legitimacy as an effective and capable organisation.

Moreover, as is discussed further below, the EU general public has given the organisation a clear mandate to become more active in this area, and can even be said to be demanding more EU involvement in JHA. For this reason, a lack of EU activity in JHA would, by adding to the widespread perception of a democratic deficit and of Eurocrats isolated from the public, damage the EU's legitimacy among the (West) European public. This would, meanwhile, go against the EU's attempt, especially via the Constitutional Treaty, to build an EU that is seen as more democratic, transparent and closer to its citizens.

2.4. Differences between Mitrany's Functionalism and Neofunctionalist Theory

Neofunctionalism was an attempt to adapt functionalism to the context of European integration. Functionalism, a theory proposed by David Mitrany in his 1943 book 'A Working Peace System', was originally conceived of as a way of achieving peace by uniting people across state boundaries via the provision of common needs (Evans and Newham, 1998: 187). The aim of functionalism is not to create a world state, but rather to create a network of transactions and organisations, each of which would function at its optimum functional level. The optimum level for a railway network, for instance may be continental, while air transport may best be controlled at global level.

Functionalist integration, in contrast to federalism, is driven by economic, social and technical co-operation rather than political forces. It argues that, as states co-operate with each other, they become increasingly willing to extend co-operation into new areas (a process known as spillover). In addition, as co-operation develops, there is an increasing demand for supranational institutions to exercise control in these areas (Bainbridge, 2002: 299). People, in turn, eventually switch their loyalties to these new supranational bodies as they realise the new arrangements are acting in their best interests (Evans and Newham, 1998: 187).

In contrast to neofunctionalism, however, functionalism is not a theory of regional integration. Instead, according to this theory, each form of functional co-operation has a logical geographical limit. Railways, for example, should be run on a continental basis, while co-operation in air travel should be at an intercontinental level. In fact, Mitrany was actually against regional integration projects such as the EC as he considered that they would face the same difficulties as nation states, only on a larger scale.

Neofunctionalism, on the other hand, first put forward by Ernst Haas in 1958, is a theory of regional integration, and was originally an attempt to explain the development of the European Coal and Steel Community (Evans and Newham, 1998: 358). It refers essentially to 'the use of functionalist techniques to secure federalist objectives' (Bainbridge, 2002: 299), and is intended both as a description of what is actually taking place and what should be done to further the integration process (Groom, 1994: 113). It is, therefore, both a descriptive and a prescriptive theory.

Unlike functionalism, however, according to which interest shifts automatically from the national to the supranational arena, neofunctionalism argues that this process requires a certain amount of political action. This may be in response to a crisis in the integration process, which national actors seek to resolve by spillover, or co-operation in new policy areas (Schmitter, 2002: 15). According to Haas' definition of spillover, increased integration in one economic sector would lead to pressure for further integration both in that and in other economic sectors. This, in turn, would lead to an increase in the authority of the institutions at EU level (Haas, 1968: 283-317 cited in Rosamond, 2000: 60).

According to neofunctionalism then, particularly the neo-neo version, the default outcome for integration between states in order to solve a common problem does not involve either a loss of state sovereignty or task expansion. This outcome, known as *encapsulation*, can be seen, for instance, in many international organisations, which remain strictly intergovernmental in nature (Schmitter, 2002: 15).

For this reason, then, according to neofunctionalism, certain background conditions are required for integration to break out of its capsule, such as shared basic values, a certain degree of homogenity in levels of political, social and economic development, a network of transactions, comparable decision-making processes and compatibility of expectations

(Groom, 1994: 114). Moreover, according to neofunctionalism it is important that the tasks assigned to the organisation are inherently expansive, as only in this way can spillover occur (Lindberg, 1994: 107).

Haas also established a series of 'indicators of community sentiment', which indicate how political elites such as interest groups, political parties and governments, who all affect the integration process considerably are expected to act in a supranational setting (Göral, 2002: 86). For instance, interest groups and political parties should start to organise and define their interests beyond their national spheres, and should come together around a common ideology despite differences in their national positions. In addition, they are expected to support the supranational organisation and comply with its decisions (Haas, 1968: 16)

There must also be a shared belief that integration will lead to an increased satisfaction of needs and a belief at both mass and elite level that problems can be solved in a mutually acceptable way (Groom, 1994: 114). Haas argued that spillover could occur if mass support was knowledgeable, and therefore supportive of, the benefits of integration, while national elites would support integration if they considered that it would serve their own best interest (Moxon-Browne, 2003: 93). This concept was later refined to suggest that the *perceptions* of the benefits, and of low costs, of integration were important, while the perception of an external threat could also be influential (Moxon-Browne, 2003: 93).

If intergovernmental co-operation were to prove ineffective, and these background conditions were fulfilled, then, the members concerned may decide to opt for new strategies[13] re-evaluating both the level and scope of co-operation and perhaps even adopting a new set of objectives, i.e. moving from economic to political integration. In other words, using the neofunctionalist jargon, *transcendence* has been achieved (Schmitter, 2002: 16).

In summary therefore, in common with functionalism, neofunctionalism predicts that, provided that these background conditions are fulfilled, co-operation in one area will produce a spillover effect resulting in co-operation in related areas. It differs from functionalism, however, in that according to neofunctionalism, spillover, as well as being 'semi-automatic',

[13] It should be reiterated here that, according to neofunctionalism, this is only one of the possible outcomes. In the case of an unsuccessful attempt at intergovernmental co-operation the participants may well decide, for instance, to withdraw from co-operation altogether, particularly if the background conditions are not satisfied.

may also be 'manually operated', as interest groups within MS push for further integration (Bainbridge, 2001: 299). The process involves three main components:

- Task Expansion: Increased co-operation in the same area
- Spillover: Co-operation in a new area
- Engrenage: a so-called 'locking-in' process (Groom, 1994: 117). This emerges as it becomes more difficult to keep policy areas separate as the polity becomes more complex (Schmitter, 2002: 12)

As neofunctionalism (and neo-neofunctionalism) argue, spillover is likely to result from a crisis in the integration process, which may arise from integration itself. If the performance of the regional organisation in fulfilling its objectives is insufficient, it will begin to search for new solutions, possibly leading to spillover into new areas (Schmitter, 2002: 14-15).

The spillover may involve the gradual transfer of competences to supranational institutions, which are then recognised by political actors and civil servants as the new centre (Groom, 1994: 114-115). Of all the Community institutions, therefore, the Commission is granted the most importance by neofunctionalists as, as the main supranational institution, it is likely to be the source of fresh initiatives for integration, as it seeks to expand its political role and legitimacy, and through recognition of spillover pressures (Evans and Newham, 1998: 359).

Early neofunctionalists pointed out that, a 'high authority' such as the Commission is necessary for integration, as intergovernmental bargaining alone would merely lead to a 'lowest common denominator' solution. Alternatively, governments may fail to reach an agreement, leading to the continuation of the status quo, which might not actually be the position desired by the governments (Rosamond, 2000: 61).

Despite its focus on supranational institutions, however, neofunctionalism does not entirely discount the role of the MS. Instead it argues that, although MS are important in setting the terms of the agreement, and because they try to influence subsequent events, they are not the only influence on the nature or extent of integration. The integration process, in other words, may escape their control, particularly if there is an organised and resourceful secretariat supported by organised interests (Schmitter, 2005: 257).

However, as Groom points out in the 1970s, if spillover is attempted too soon, as in the case of the attempt to set up a European Defence Community in the 1950s, political actors, civil servants and interest groups may actually obstruct, or even stop integration processes (Evans and Newham, 1998: 359).

This process of negative integration has since become known as 'spillback'. Moreover, Groom argues that European integration is particularly vulnerable to any lack of success as it lacks legitimacy at the mass level and even, to a lesser extent, at elite level (Evans and Newham, 1998: 116). To a certain degree, this is still a salient point today, perhaps underscored by the recent rejection of the Consititutional Treaty on the part of the French and Dutch publics.

2.5. Not Just Integration: Countervailing Forces in Neofunctionalism

This view of spillover as liable to obstruction, however, contrasted with the early views of Haas and Lindberg, who assumed there was no going back once the process of spillover had been initiated, and, moreover, that the process was bound to gain momentum. They certainly saw little evidence, in the early days of the European Communities, that the system was in any danger of collapse (Rosamond, 2000: 63).

By early 1965, then, prior to De Gaulle's Empty Chair Crisis, developments in the EC seemed to bear out the neofunctionalist hypothesis. Indeed, Haas was able to state that the EC had 'come close to voiding the power of the national state in all realms other than defence, education and foreign policy'(Caporaso and Keler, 1995: 36).

The stagnation in integration that began with the 'Empty Chair Crisis' and continued throughout the 1970s and early 1980s provoked a crisis in neofunctionalism, with even Haas himself describing the theory as 'obsolete'. It became clear, as a consequence of the 'Empty Chair Crisis' and the resulting Luxembourg Compromise, that governments could, and in some cases would, try to stop further attempts at integration.

This paved the way for intergovernmentalist critiques of neofunctionalism, perhaps most notably that of Stanley Hoffmann. While Hoffmann did not deny that integration, particularly

negative integration[14], between states was possible in technocratic and uncontroversial areas, he argued that it was more difficult in controversial, 'high politics' areas due to the diversity of both domestic pressures and positions in the international system of the states involved (Rosamond, 2000: 76-77).

This was because, according to Hoffmann, neofunctionalist spillover could only proceed if permanent gains to the participating parties could be guaranteed, something which, according to Hoffmann, was possible in the realm of economics but not in sensitive political areas due to the forementioned diversity of interests. Moreover, Hoffmann considered that, while the supranational institutions could become more independent and pro-active, an excess of zeal on their part could threaten national policy actors who might, in turn rebel, as in the case of the 1965 Empty Chair Crisis (Rosamond, 2000: 78)

Although it was premature to announce the demise of neofunctionalism, at this point the theory did lose some credibility, and it was significantly reworked as neofunctionalist scholars realised that they had underestimated the role of nationalism in defining European integration. One of the most important concepts to come out of these studies was that of 'spillback', a retreat of integration either at sectoral, or institutional level, or both (Rosamond, 2000: 64-65).

Niemann (2006: 13) suggests that spillback may result from three basic contraveiling forces to integration. Spillover may be stalled by leaders, such as De Gaulle and Thatcher, who are especially wary of handing over sovereignty to supranational institutions. Such an attitude may be cultivated, or it may result from national traditions and identities.

In addition, governments may be constrained by domestic groups, including lobby groups, opposition parties, the media or public opinion, as well as by structural limitations. As this may prevent the government in question, even if it is itself pro-integration, from rising above a certain common-denominator, this may have a negative effect on integration (Niemann, 2006: 13).

Finally, diversity may have a negative effect on integration as common positions or policies may require one or more MS to depart from deeply-rooted structures, customs or policies.

[14] Negative integration here refers to integration via the removal of barriers between states.

Such diversity is, of course, reinforced through the enlargement process (Niemann, 2006: 13-14).

As well as spillback, another alternative reaction to spillover was that of 'muddle-about', in which actors try to maintain their integration without institutional changes. Other possible outcomes include 'spill-around', the proliferation of functionally specialised, independent but strictly intergovernmental bodies and 'build-up', the granting, by MS, of greater authority to a regional organisation without expanding its mandate (Schmitter, 2002: 32).

Indeed, some later neofunctionalists such as Schmitter argue that spillover is fairly unlikely to result from a crisis in integration. According to this view, such a crisis is far more likely to result in *encapsulation*, or an intergovernmental solution, although the chances of spillover increase according to the previous level of integration of the regional organisation. Only if the background conditions are fulfilled and encapsulation fails to address the problem will other solutions (one of which may be spillover) be sought (Schmitter, 2002: 32).

However, with hindsight, it can be argued that neofunctionalism has actually been enriched by this challenge. As Schmitter points out;

> Any comprehensive theory of integration should potentially be a theory of disintegration: it should not only explain why countries decide to co-ordinate their efforts across a wider range of tasks and delegate more authority to common institutions, but also why they do not do so or why, having done so, they try to defect from such arrangements (Schmitter, 2002: 1).

2.6. Neofunctionalism Resurrected? A New Generation of Neofunctionalism

The acceleration of integration that began with the Single European Act in the mid-1980s, however, prompted a revival of interest in neofunctionalism, as, it was claimed, some signs of spillover could be seen in the process. The Single Market programme brought about expectations in some circles that deeper economic integration, such as a single currency and a centralised monetary authority, would follow. Indeed it did so, in the form of the Euro and the European Central Bank.

Moreover, because of fears that poorer regions would be at a disadvantage in a Single Market, it also necessitated a new 'social dimension', in order to alleviate the difficulties of those least able to compete in the Single Market (Rosamond, 2000: 99). In consequence, even Haas, by 2004, had conceded that neofunctionalism was no longer obsolescent (Rosamond, 2005: 251).

However, the new proponents of neofunctionalism used the theory in a much more circumscribed, cautious way than the early neofunctionalists. The new generation of neofunctionalists did not attempt to reinstate neofunctionalism as a 'grand theory', but rather were interested to see whether the theory could shed any light on the trajectory of integration. This meant either limiting the use of neofunctionalism to particular circumstances or policy areas, or accepting that elements of neofunctionalism could work together with elements of other theories (such as intergovernmentalism or interdependence theory) to explain integration (Rosamond, 2005: 100-101).

One of the major studies of neo-functionalism as an explanation for the 'new Europe' was published in 1991 by Jeppe Tranholm-Mikkelsen, who proposed a restructured version of neofunctionalism. According to Tranholm-Mikkelsen (1991), the central thesis of neofunctionalism is that integration in one area will tend to beget its own impetus and spread into other areas (spillover). In his paper he divides spillover into three basic types:

- Functional spillover: Projects of integration engender new problems which, in turn, can only be solved by further integration (Tranholm-Mikkelsen, 1991: 4-6). The basis of this is the interdependence of policy sectors and issue areas in modern polities and economies, so that it is difficult to isolate one sector or issue from the others (Niemann, 2006: 5).

Rosamond gives the example of a customs union, which could function more efficiently if exchange rates between the members were stabilised which, in turn, would necessitate further co-operation in monetary policy (2000: 60). Moreover, economic integration may foster not only deeper economic integration but may eventually result in political integration, as deeper economic integration would require a degree of supranational regulation (Rosamond, 2000: 60).

However, according to neo-neofunctionalism, perhaps the most recent 'incarnation' of neo-functionalism, and other newer versions of neofunctionalism such a process may also be set in

motion as a reaction to tensions in the global environment as well as previous integration projects, providing that the background conditions discussed earlier are suitably fulfilled (Schmitter, 2002: 32-33).

In this way, it attempts to account for the fact that supranational institutions can be influenced by the external economic and political environment. While such external pressures can sometimes act as obstacles to integration, they can frequently stimulate it. This is particularly true if it is construed as a threat, as this encourages the regional organisation to get together and attempt to find common solutions (Niemann, 2006: 5).

In addition, exogenous functional spillover may occur if an external event or phenomenon is considered to be too wide ranging to be tackled at MS level. For instance, problems such as migration, globalisation and environmental issues are often considered too broad for a single country to deal with. In an attempt to maintain the well being of their states and peoples in the face of a crisis of international scale, then, MS may decide to co-operate closely at EU level (Niemann, 2006: 6)

- Political spillover: In contrast to functionalists, neofunctionalists believe that politics is an essential ingredient of regional integration rather than something contrary to it. As Schmitter, for instance, states: 'Alone, functional interdependence based on high rates of mutual transactions is impotent. It must be perceived, interpreted, and translated into expressions of interests, strategies of influence, and viable decision-making styles' (1969, cited in Hooghe and Marks, 2004: 3)

Such political spillover, then, occurs when elites (both governmental, such as bureacracies and non-governmental, such as trades unions or leaders of political parties) begin to perceive that their interests may be better served by supranational institutions than by their nation states and, consequently, refocus their activities towards these institutions (Tranholm-Mikkelsen, 1991: 4-6). As a result, as the integration process develops, national actors appear to be less of a homogenous unit with a single integrative or disintegrative strategy, and seem to become fragmented into various negotiating units (Schmitter, 2002: 35) which may hold different positions during any integration crisis.

Thus, the various governmental and non-governmental national elites become actors in their own right at the EU level, and may support integration strategies different from those upheld by their government. Rosamond gives the example of British businesses planning for the creation of a 'Euro-zone' in the late 1990s. Despite the fact that the government was reluctant to participate in EMU, the business sector's preparation (and, presumably, lobbying) for inclusion in the Euro-zone put pressure on the government at least to consider this option (Rosamond, 2000: 63).

Political spillover is also promoted by the complex system of *engrenage*, or actor socialisation, which has taken place between national and EU bureacracies, and which is difficult for national governments to control (Groom, 1994: 4-6). According to this idea, bureaucrats and other officials 'begin to develop new perspectives, loyalties and identifications as a result of their mutual interactions' (Lindberg and Scheingold, 1970: 119, cited in Laursen, 2002: 7)

Notably, the pro-European integration stance of officials tends to increase the longer they serve in Brussels, indicating a shift in loyalty over time. Niemann cites the example of Dietrich von Kyaw, the German Permanent Representative to the EU, who became known in Germany as the 'Permanent Traitor', due to his consistently pro-Brussels attitudes (Niemann, 1998: 436-437)

According to Niemann (2006: 7), the gradual increase in the number of working groups and sub committees at EU level has led to a situation where thousands of national officials frequently come into contact with their counterparts from other MS and with Commission officials. Such interaction tends to promote the development of mutual trust and the perception of belonging to an *esprit de corps,* which may lead them even to redefine their priorities.

Moreover, as nationally based interest groups realise that their interests are better served by Brussels, they also begin to lobby their governments accordingly. The net result would be an increase in support for integration on the part of national political systems (Rosamond, 2000: 59).

Although it has generally been assumed that political spillover was an exclusively elite phenonemon, it has more recently been suggested that public opinion may also play an important role in moving integration 'along the continuum from intergovernmentalism to supranationalism', or, indeed, the reverse. While it has long been taken for granted that policy making at EU level takes place behind closed doors, and that public opinion, due to the democratic deficit, therefore has little impact (Lahav, 2004a: 11-12), recent research has shown that elite and public opinion may show less divergence than was previously assumed (Lahav, 2004: 17).

It has been argued that while elite opinion tends to play a refining role, public opinion may help to define the acceptable bounds of policies (Lahav, 2004a: 13). Moreover, there is evidence that there has been a rise in salience in public opinion of European integration in the last 15 years as EU integration has increasingly touched areas that affect citizens' lives directly (Hooghe and Marks, 2004).

Support for integration at mass level, however, appears to be most closely linked to *perceptions* of the effects of integration rather than objective conditions as pulic opinion may be distorted by political elites' attempts to gain credit and apportion blame for these developments (Marsh, 1999: 198). For this reason then, public opinion, although it has generally not been taken into consideration significantly by European integration studies until recently, will also be taken into account in this evaluation.

In addition, political spillover may be centred on the other supranational institutions apart from the Commission. NGOs, for instance, may focus their lobbying on the European Court of Justice (ECJ) and European Parliament (EP) as well as the Commission. As Mattli and Slaughter point out, 'Pressure groups have made use of greater rights under Community law than under national legal rules to play a significant part in the development of substantive Community law, particularly in employment law and gender equality' (1996). Lobbying aimed at the EP, on the other hand, is usually carried out in areas where the EP has the right of co-decision, and therefore an effective veto (Wessels, 1999: 109).

- Cultivated spillover; Neofunctionalism supposes that, over time, supranational institutions are likely to develop an increasingly independent identity, with ideas of their own that cannot simply be reduced to the preferences of a single national or subnational group

(Schmitter, 2005: 260). Firstly, the MS may be unaware of the consequences of delegating tasks to supranational institutions. This encourages supranational institutions to develop a life of their own and escape the control of the MS (Niemann, 2006: 10).

As a consequence of this, the supranational institutions, particularly the Commission, may themselves seek to encourage further integration (and meanwhile strengthen their own power-base) by encouraging co-operation in areas which are perceived to have a common interest. They may do this by cultivating functional or political spillover or by cultivating integration more generally (Schmitter, 2005: 260).

Haas suggested that, while intergovernmental bargaining rarely went beyond a 'lowest common denominator' solution, the presence of an intermediary, such as the Commission, may result in 'upgrading the common interest' (Groom, 1994: 4-6). It may do this, for instance, by facilitating logrolling package deals. It may also use its superior expertise in order to promote integration. Finally, it may cultivate relations with national civil servants and interest groups in order to provoke integration (Niemann, 2006: 11).

However, it should be emphasised here that, while most cultivated spillover may be centred on the Commission, the role of the ECJ in this regard has been frequently underestimated. In reality, it favours integration as well as ruling on the basis of legal arguments (Stroby-Jensen, 2003: 87). Therefore, due to the primacy of EC law and the ECJ's frequently 'imaginative interpretations of specific treaty provisions' it has also had a significant influence in shaping policies (Schmitter, 2002: 12).

The EP is also expected, according to neofunctionalism, to have a supranational orientation and to develop loyalties to the EU which often override national interests (Stroby-Jensen, 2003: 87). According to Lahav's survey of MEPs this appears to be true, although she points out that while MEPs are generally pro-integration, they differ in the amount and speed of integration that they support (2004a: 165).

Moreover, although it can be argued that the power of the EP to cultivate spillover was severely curtailed until recent years by its lack of a decision-making role, the gradual introduction of co-decision since the Maastricht Treaty has given it new opportunities for action. In addition, despite the rejection of the Constitutional Treaty, the EU public appears to

continue to demand more transparency and democracy in decision-making, making it likely that the EP will become even more of a key player in the years to come.

As well as this, it has even been suggested that the Council Presidency sometimes has features of a supranational institution. Outside pressures, such as media and peer-group evaluation, as well as the wish to find solutions to concrete problems, mean that the government holding the Presidency has to put its national interests on hold for six months and act as a neutral mediator. In addition, national officials tend to undergo a rapid learning process during their government's Presidency, learning about the positions of the other MS, which encourages a more 'European' thinking (Niemann, 2006).

Moreover, the Council is also frequently the source of another form of integration pressure identified by neofunctionalists such as Lindberg and Scheingold (1970, cited in Laursen, 2002: 6-7) as *log-rolling and side payments.* This refers to package deals, which contain various elements, and are designed to facilitate decision-making.

Despite his attempt to revive neofunctionalism, Tranholm-Mikkelsen (1991), like many modern neofunctionalists, also accepts that the theory has its limits, and that integration could be halted if there is an excessive desire on the part of the MS to cling on to the symbols of sovereignty. He argued that this was an explanation for the stagnation in integration in the two decades following the Empty Chair Crisis.

Moreover, he predicts that enlargement will have the tendency of slowing integration, as a larger number of states will have more diverse interests. In other words, the revised version of neofunctionalism 'consists not of a single continuum or even of a multitude of continua, nor does it involve any assumptions about automatic, cumulative and irreversible progress toward a single goal'(Schmitter, 2002: 13).

This focus on a variety of possible outcomes has also been put forward in other revised versions of neofunctionalism. Philippe Schmitter's 'Neo-neofunctionalism'[15], for instance, also proposes that integration projects may have several different outcomes, of which the

[15] Although this theory was originally proposed in a 1969 article, Schmitter recently updated and renamed it 'Neo-neofunctionalism'

most likely is encapsulation. However, he also predicts that, as an organisation passes the early stages of integration, or, in the language of neo-neofunctionalism, proceeds from 'initiation cycles' to 'priming cycles', spillover becomes increasingly more likely. However, he also concedes other responses, such as 'spill-around', 'build-up' and 'spill-back' may also occur under certain circumstances (2002).

According to Schmitter, the final stage of integration is the 'transforming cycle', a development leading to the creation of a supranational polity, whose leaders, while being in control of the integration process, should also have a sense of a *finalite politique* (Andreev, 2004: 8). Schmitter argues that the EU, at present, has probably passed the priming cycles and is perhaps now progressing towards the transformation cycles. Interestingly, it is at this point that, in Schmitter's view, the regional bloc will begin to carry out wide ranging negotiations with outsiders and will become recognised as a legitimate international actor in the global system (Andreev, 2004: 8).

Another key difference between Schmitter's neo-neofunctionalism and more traditional versions of neofunctionalism is the nature of this *finalite politique.* While most neofunctionalists accepted that the end product of neofunctionalist spillover is a federal state, according to Schmitter, it may also be a polity characterised by poly-centric (PCG) and multi-level governance (MLG) He argues that a PCG and MLG polity is a more likely outcome than a federal state as he considers that earlier neofunctionalists were mistaken in assuming that political and cultivated spillover would accrue solely to the Commission, which they expected to form the 'nucleus of a future supra-national state (Schmitter, 2002: 18-39). Moreover, MLG may be considered desirable from a functionalist logic as externalities and economies of scale vary according to policy area (Hooghe and Marks, 2005)

This focus on MLG and PCG rather than a federal state as the *finalite politique* of the EU, then, gives neo-neofunctionalism more flexibility as compared with earlier versions of neofunctionalism. Moreover, it is more compatible with an EU of 27 plus, rather than six, members, in which each has their own cultural and political peculiarities.

Therefore, although 'real live neo-functionalists may [now] be an endangered species', neo-functionalism has proved to be a surprisingly resilient theory considering the dramatic changes and crises that the EC/EU has undergone since the early days of neofunctionalism and has influenced many other, newer theories of European integration (Schmitter, 2002: 18). It can thus be argued that, despite the words of Ernst Haas, the theory as such has never become completely obsolescent even in its most unpopular hours, namely during the stagnation period of the 1970s and, perhaps, the present day.

Part of neofunctionalism's tenacity may be explained by its ability to transform itself in adaptation to new circumstances, particularly by accepting that spillover and consequently supranational integration is not the only possible outcome of an integration project and accounting for other alternatives including encapsulation, spill-around or spillback.

It has also become more flexible in that it no longer claims to explain everything, and leaves some room for error. Moreover, Schmitter's hypothesis that the 'finalite politique' of integration may be a system characterised by MLG and PLC rather than a federal state also gives neofunctionalism a new flexibility.

Therefore, in the following attempts to apply neofunctionalist theory to JHA and to enlargement, the following hypotheses of neo and neo-neo functionalism will be taken into account:

- At the EU's present level of integration[16], if backgound conditions are fulfilled, and if the expectations of integration are positive, spillover is likely to occur. If the background conditions are not fulfilled, particularly if there are relatively few transactions, and if there is a negative perception of the outcomes of integration or a perception of inequity on the part of one/some of the participants, spillback (usually in the form of the veto) may be more likely.

- Spillover, when it occurs, is likely not to be only of a functional nature, but will also be political and cultivated. That is, according to neofunctionalism, spillover will be not only automatic but also manual in nature.

[16] i.e. having progressed from initiation cycles to priming cycles in Schmitter's classification

- There is room for error; while neofunctionalism may be a good explanation of the processes examined it is unlikely to be a perfect one. Therefore, it is probable that neofunctionalism will be unable to account for some of these processes, although it should be able to account for the majority of them.

2.7. The Application of Neo(neo)functionalist Theory to Justice and Home Affairs

2.7.1. Functional Spillover

As has been discussed in the earlier part of this chapter, according to neofunctionalist theory, functional spillover may occur when earlier integration initiatives have knock-on effects which also need to be tackled at the level of the regional organisation. In the case of JHA, then, when searching for functional spillover, the first step would be to examine if the development of such policies at EU level could be explained as a consequence of earlier EC/EU initiatives.

Indeed, it can be argued that, to a certain extent, the development of the EU's border policies is a direct result of earlier EC/EU integration policies such as the Single Market and the Schengen agreement. The decision to dismantle internal borders in the Schengen area can be viewed as an extension of the logic of the free movement of people, an inherent part of the concept of the Single Market (Walker, 2004: 19).

Meanwhile, particularly in the more unstable atmosphere following the collapse of Communism to the EU's East, it was perceived as necessary to compensate for the dismantling of internal borders with increased vigilance at the external borders, resulting in the creation of over 20 new intergovernmental bodies dealing with JHA issues between 1986-1991. Moreover, it was argued that, despite the completion of the Single Market, it was still difficult for businesses and individuals to gain access to adequate judicial representation in other MS (Monar, 2001: 754-755).

This situation meant that governments were increasingly affected by each others' decisions relating to immigration and border controls, and were therefore ready to co-operate in an area which had traditionally been seen as an area of 'high politics'. While the earliest attempts at co-operation were largely intergovernmental in nature, governments were gradually forced to acknowledge that effective decision-making in this area needed a more supranational approach.

On the one hand, the absence of the Commission as an independent agenda-setter meant that governments themselves had to come up with legislative proposals, which often promoted the narrow national interests of the governments concerned. On the other, it was becoming clear that the use of unanimity was hampering decision-making (Haas, 1999: 322-323) in an area where decisions often need to be taken quickly. Moreover, there was, and frequently still is infighting between government ministries, particularly foreign affairs and interior ministries, which made arriving at a coherent position on JHA issues difficult at times even for a single MS government (Guiraudon, 2001: 8).

In addition, the MS, particularly those participating in the Schengen Agreement, now recognised that they were affected by each other's choices regarding refugee, immigration and policing policies and therefore had an interest in developing a more supranational regime in order to avoid 'the pitfalls of collective action problems' (Lahav, 2004a: 50).

This, then, partly explains the willingness of the European Council at Amsterdam, Tampere and, later, in the negotiations for the Constitutional Treaty to accept an increasing communitarisation of JHA. As Niemann points out (2005: 25), dissatisfaction with goal attainment in JHA during the post-Maastricht period can also be cited as a functional pressure contributing to the considerable development and supranationalisation in JHA undertaken in the Amsterdam and Constitutional Treaties. This time, though, the functional pressure did not originate from a different sector but from within the same sector. This can, therefore, perhaps better be cited as a case of 'task expansion'.

Moreover, a rather more cynical view is the 'Europe to the Rescue', or what may also be dubbed the 'Blame it on Brussels' approach. According to this concept, MS governments are eager to hand controversial or contentious policies, such as migration or asylum policy in

particular, to the EU in order to escape attacks by their domestic adversaries or the general public (Lahav, 2004a: 49).

However, other, seemingly unlinked, policies have also resulted in functional spillover to JHA. An example is the introduction of the Euro, which resulted in Europol being granted more responsibility for tackling counterfeiting. In addition, the 1999 Helsinki summit's decision to speed up the creation of a European Rapid Reaction Force also spilled over into JHA as civilian police units were to carry out some of the Petersberg tasks relating to peacekeeping and nation-building (Occhipinti, 2004b: 187)

In addition, Niemann also considers the prospect of enlargement itself to be a form of 'exogenous functional spillover' which influenced the development of JHA, particularly in the IGCs for the Amsterdam Treaty and Constitutional Treaty (2005) (2006). In particular, it was a rationale for the communitarisation of decision-making rules, as unanimity would become increasingly clumsy within an enlarged EU. This phenomenon is referred to below as institutional spillover. Other forms of exogenous functional pressure cited by Niemann as affecting JHA development were the September 11 terrorist attacks, and increasing numbers of asylum seekers (2005: 29-31).

Therefore, while these developments appear to be adequately explained by neofunctionalism, they do not fit so well with either the LI or the historical institutionalist hypotheses. LI assumes rational state behaviour; it is clear, however, that some of the consequences here were unintended. Historical institutionalism, perhaps due to the fact that it is principally a meso-level theory, also seems to ignore the phenomenon of functional spillover despite the fact that it seems to be central to the development of JHA.

2.7.2. Political Spillover

If we were to find evidence of political spillover in the development of JHA, we would expect to find national elites looking increasingly towards EU supranational institutions, rather than to their nation state, for leadership in this area. Moreover, neofunctionalism predicts that, 'as regional integration increases, it becomes contested among a widening circle of political actors' (Schmitter, 1969, cited in Hooghe and Marks, 2004: 2). Therefore, it is expected that,

as integration in JHA develops, a gradually broadening circle of political actors, NGOs, and, increasingly, the public will become involved.

A. Public Opinion

While there was little focus on public opinion by early neofunctionalists, Lindberg and Scheingold (1970, cited in Laursen, 2002: 6-7) argued that public opinion could influence integration through a process they called *feedback*. This refers to the impact of public reactions to integration: if the public has found the results of integration good and relevant it will support further integration; if not, decision making can become more difficult, even leading to systems collapse in a worst case scenario.

This may be more relevant today, as research has shown that both the salience and divisiveness in public opinion of European integration have increased in the years since the Maastricht Treaty. This increase in both the *controversiality* of joint decision-making and the consequent *widening of its audience* are, in fact, themselves predicted by neofunctionalists as integration progresses (Hooghe and Marks, 2004: 4). As Schmitter points out (2002: 21), 'Under these conditions even 'good' performance, e.g. more transactions, greater equality, more internal pluralism, etc. can become upsetting when it outruns expectations and the capacity to absorb change gradually'.

However, in addition, neofunctionalist theory foresees that, as integration develops, public opinion is likely to undergo a gradual shift in favour of further integration. It explains this by the development of a socio-psychological community, and the development of ties of mutual identity, loyalty and affection. While early neofunctionalists largely ignored public opinion, from the 1970s it became a point of interest when empirical evidence that young Europeans were beginning to show signs of developing a supranational identity appeared (Lahav, 2004a: 72).

It is apparent that, since the mid-1990s, there has been a significant change of voters' attitudes towards JHA. Whereas before it was largely viewed as a high-politics issue which should be left in the hands of the MS, since around the time of the Amsterdam IGC JHA has been perceived as an area in which the EU should take further action. This is borne out by a

Spring 1996 Eurobarometer report in which free movement of persons and internal security were high on the list of respondents' demands for more EU action (Hix, 1999: 323-324).

A more recent series of questionnaires carried out for Eurobarometer on the subject of JHA also backs up the idea that there is significant public support for integration in this area in comparison to other policy fields. Moreover, this support is extended both to the immigration and asylum policies and to co-operation in police and judicial affairs, with an overall approval rating of between 56% and 90% according to the question[17] (European Union, 2004).

In general, public opinion in favour of further EU involvement in immigration and asylum has tended to rise *following* major integration developments in these areas. For instance, in 1993-1994, the public generally agreed that immigration policies should be controlled by the national governments. However in 1994-1996, the years following the enactment of the Maastricht Treaty, this declined by 7%, indicating that the public was becoming more comfortable with the idea of EU involvement in immigration. A similar pattern can be seen in the years immediately preceding and following the Amsterdam Treaty (Lahav, 2004a: 55-56)

Although Lahav concedes that further analysis is required before a definite causal relationship can be established (2004a, 56), this does appear to back up the neofunctionalist hypothesis that public support for EU initiatives may follow closer co-operation. In other words, the more initiatives the EU takes, the more likely the public is to be willing to hand it further responsibilities in these areas (Lahav, 2004b: 1176).

While support for EU involvement in JHA, including immigration, has thus had a tendency to increase, public opinion appears to be wary of immigration from outside the EU. The degree of acceptance of non-EU immigrants appears to be linked to the MS of the respondents, in particular the relative numbers of resident TCNs. Therefore, nationals of MS with a large

[17] The highest approval ratings were for co-operation in civil and criminal law, with 90% agreeing that an accused should have equal rights of defence in all MS, and 89% agreeing that judicial decisions in civil rights should be recognised throughout the EU. 71% of respondents agreed that crime prevention and the fight against crime would be more effective at EU than at national level.
Support for increased measures to control immigration and asylum was high, with 85% in favour of common rules for asylum seekers, and 70% agreeing that the rejection or acceptance of an asylum seeker by one member state should apply throughout the EU, while 80% were in favour of strengthening entry controls from non-MS to the EU. Support for immigration and immigrants' rights, however, was comparatively low, with only 56% agreeing that immigrant labour was necessary in some sectors of the economy, and 66% concurring that legal immigrants should have the same rights as EU nationals (Eurobarometer, 2004).

proportion of TCNs are more likely to find immigrants problematic than citizens of other EU members (Lahav, 2004b: 1166-1169).

However, Lahav points out that this is more frequently due to a fear of destabilisation of their national and cultural identity than xenophobia *per se*: less than 20% of Europeans polled admitted to finding immigrants disturbing on a personal basis. An anti-immigration stance, then, tends to reflect sociotropic or national concerns rather than immediate personal ones. The more EU citizens are pessimistic about their country's future employment situation the more they tend to consider there are too many TCNs living among them. In contrast, unemployed respondents are no more likely to be anti-immigration than employed ones (2004b: 1166-1169).

While the public has been calling for action to control immigration and, increasingly, for futher EU involvement in JHA areas, it has also been argued that sectors of the European public have been critical of the secrecy and unaccountability which characterised JHA co-operation, at least up until the Amsterdam Treaty. As a result, and in tandem with institutions such as the EP, public dissatisfaction with the opaque nature of decision-making in JHA led to pressure for the creation of the AFSJ, which was supposed to be based on the principles of democracy and transparency (Eder and Trenz, 2003: 112-113). In this case, therefore, public opinion appears to have contributed directly to spillover in this area.

B. Elite opinion

As Lahav points out, while public opinion tends to define the acceptable boundaries of policy, elite opinion plays a refining role. In fact, elite and public opinion may frequently be fairly close (Lahav, 2004a: 13). However, elites are generally expected to be more in favour of European integration than the public at large (Hooghe and Marks, 2004: 6), as has been borne out by the recent negative results in the referenda on the Constitutional Treaty.

In fact, as Lahav's study shows, the European elite (in this case represented by MEPs), tend to share similar concerns to the European public in the area of JHA. Lahav's 1998 survey has shown that JHA, particularly judicial and police co-operation, is regarded as an area of priority for members of the EP. 39% of MEPs chose drugs and crime as a priority area for the

EU, second only to employment policy (49%). Immigration, however, was regarded as less urgent, with only 10% of MEPs identifying it as a priority (Lahav, 2004a: 79).

Interestingly, Lahav also finds a correlation between support for EU integration, support for a common EU immigration policy and acceptance of qualified immigration and immigrant rights among MEPs (2004a: 175). In fact, she argues that the effect is so strong that support for EU integration is a more effective predictor of attitudes towards immigration than even party affiliation.

However, she also emphasises that support for immigration even among those MEPs who are most in favour of integration is *qualified*, and that they tend to prefer a specific type of immigrant – Europeans. This, then, indicates that, among these MEPs, nationalist attitudes towards immigration are being replaced by pan-European ones, which, while less narrow, are also restrictive in their way (Lahav, 2004a: 176).

C. Officials and *Engrenage*

Pushed therefore either by public and elite opinion or other motives, various actors have been attracted to increased EU co-operation or integration in JHA. As Guiraudon points out regarding immigration policy, however, the actors involved and the policy outcomes they support are disparate:

> In this motley crew, we find law and order officials from Interior, Justice and Foreign Affairs ministries, international NGOs, activists and Commission fonctionnaires from different directorates. Although each in its own way came to believe that immigration policy should become 'Europeanized', they exploited different venues and policy frames resulting in a set of policy instruments involving varying degrees of supranationalization or decision-making rules (2001: 4).

The first group of actors to 'go transnational' were law and order officials in charge of border and migration control, who tended to favour migration control over positive migration or integration strategies. Guiraudon argues that, finding themselves increasingly constrained at national level due to an increase in pro-migrant legislation during the 1980s, they began to seek new policy venues, namely the Schengen agreement and the transgovernmental agreements on immigration and asylum of the early 1990s (2001: 8-9).

It has also been argued that the threat posed to interior and justice ministries by the relaxation of border controls as part of the Single Market programme also played a part in their switching attention to the European level. Faced, therefore, with a loss of resources and revenue from customs duties, interior and justice ministers across the EU produced reports arguing that there was a major danger of cross-border crime as a result of the Single Market[18]. These scaremongering reports were designed to frighten politicians into granting more resources to their ministries (Hix, 1999: 325).

Meanwhile, Guiraudon suggests that the decision to 'supranationalise' large sectors of JHA in the Amsterdam Treaty was actually partly due to 'revenge' on the Justice and Interior ministries on the part of Foreign Affairs ministries (which are, of course, responsible for negotiating treaty revisions). In other words, 'After having seen their negotiating role diminished during the Schengen process, Foreign Affairs were even keener to rein in transgovernmental processes dominated by law and order civil servants that had multiplied and ran amok' (Guiraudon, 2001: 11).

That is, there is evidence of competition between the Ministries of Foreign Affairs and those of Justice or the Interior for influence at the European level. Incidentally, it is interesting that this is exactly what Schmitter predicts will happen once the EU has entered a 'transformation cycle'[19]. In Schmitter's own words:

> A new regional change process could well emerge. Let us call it the Domestic Status Effect. The redefined scope/level of regional institutions will tend to affect relative status and influence in the domestic politics of its member states. Ministries, autonomous agencies, associations and parties that have 'gotten in on' the earlier rounds of regional decision-making will have acquired more resources (proportion of the budget, regulatory capacity, international status, votes, etc.). *This should cause other national institutions to try to 'get in on' the operation*[20], although not necessarily in support of it (2002: 35)

Moreover, as Geddes points out, iterative interaction, or a 'wining and dining culture' at a European level can affect the prefererences and identities of actors, both ministers and

[18] In fact, according to statistical evidence, there has only been a moderate increase of international crime and the movement of persons as a result of the Single Market.

[19] According to neo-neo functionalism, the final cycle of EU integration, according to which its *finalite politique* will be defined.

[20] My own emphasis

officials, who take part in EU level policy forums. In additon, in cases where actors, particularly judges and bureaucrats, are shielded from direct electoral pressure by the EU's 'democratic deficit' this may offer scope for more liberal outcomes, emphasising migrants' rights rather than immigration control (2003: 4-5).

IGCs may offer a particularly fertile ground for such engrenage to take place. Niemann cites several officials who took part in the pre-Amsterdam IGC and noted that the atmosphere of frequent meetings, informal dinners and 'working trips' encouraged the formation of trust relationships and a sense of collective responsibility for the outcome of the conference (2006: 32).

This phenomenon may have been even more marked during the European Convention as a result of its opening listening and reflection phase, perhaps contributing to the notable progress in integration in JHA in the resulting Constitutional Treaty. This early phase of the Convention encouraged a deeper understanding of other members' positions, while the focus on working groups later on may have also encouraged the development of an 'esprit de corps' and the sense of joint responsibility for the Convention's outcome (Niemann, 2006: 34-35).

As Niemann argues (2005: 36), as a consequence, perhaps, of this developing 'esprit de corps', 'powerful' actors did not prevail where their arguments were not solid enough. Although the German foreign minister (among others), for instance, called for a reinstatement of unanimity in immigration, it was not accepted due to the existence of powerful rationales for increased communitarisation.

D. NGOs

Neofunctionalism and its neo-neo version argue that interest groups, when they combine with officials at regional level, can have an important positive effect on integration. As Schmitter points out, 'The greater the coverage, density, participation, vitality and autonomy of regional interest associations, the greater the propensity for overcoming national resistance to expansions in scope and/or level' (2002: 29).

Perhaps as a reaction to the increasingly restrictive development of migration policy at European level, both national and Brussels-based NGOs have also been active in lobbying for

more supranational policy making in the areas of migration and internal security. Their argument is that intergovernmental decision-making is often secretive, and that this implies a lack of parliamentary and judicial control (Hix, 1999: 328-329), in other words a 'democratic deficit'.

Pro-migrant NGOs, such as the Migrants' Forum, Migration Policy Group and Starting Line have been particularly active at EU level. These organisations, which are relatively weak at national level due to the fact that public opinion across the EU tends to be anti-immigration, have increasingly turned towards the European Commission and ECJ, where, arguably, decision-makers are still relatively shielded from public opinion due to the democratic deficit. In this way, these NGOs aim to use the example of the EU, with the power and authority associated with it, to challenge national ways of dealing with immigrants (Geddes, 2003: 8-9).

Moreover, developments in the EU *acquis* can also help to account for the increase in lobbying at EU level on the part of these organisations. Firstly, with the Maastricht Treaty's granting of rights to EU citizens, it can be argued that the gap between EU citizens and resident Third Country Nationals (TCNs), who were not granted EU citizenship, has widened. Secondly, these groups have used the EU's 'war on social exclusion' to lobby for more rights for migrants, arguing that TCNs are among its prime victims (Guiraudon, 2001: 17-18).

Pro-migrant NGOs and human rights organisations such as Amnesty International have also lobbied the Commission on issues of anti-discrimination of TCNs and human rights for asylum-seekers. The Starting Line Group (SLG), for instance, produced a draft anti-discrimination proposal advocating equal treatment in areas including employment and working conditions, social security, education and training, housing and participation (Geddes, 2000: 146-147).

Many of these proposals were included in the Commission's proposals for expanded anti-discrimination legislation in the 1998-2000 SAP (Geddes, 2000: 146-147). Moreover, Niemann argues that pro-migrant NGOs and think-tanks had a significant impact on the European Convention, particularly in the early, agenda-setting stages (2005: 39).

In addition, a very different kind of NGO has also been active in lobbying for a decrease in barriers to free movement in the EU – big business. Notable in this is the European Services Forum, a Commission-sponsored network of key mutinational corporations, which argues that procedures to obtain work permits and visas for employees are overly complex and time-consuming. Although these corporations deny that they are interested in immigration *per se* as they are only concerned with the temporary consignement of workers abroad, the fact that they also wish family members to be able to join employees, for instance, pushes them deeper into the immigration debate (Guiraudon, 2001: 21).

E: Political Spillover and the Other Supranational Institutions: The ECJ and EP

While the Commission is the main focus for political spillover, it can be argued that political spillover has been centred on the ECJ and EP as well as the Commission. Regarding the ECJ, Mattli and Slaughter have suggested that NGOs tend to influence EC legislation by taking advantage of comparatively greater rights at EU than at national level (Mattli and Slaughter, 1996).

Luedtke has argued that this is what has happened regarding TCNs. As some TCNs have been granted the right of free movement as a consequence of being married to an EU national, working for an EU firm or because of association agreements[21], NGOs have argued that it is unsustainable to exclude other TCNs from this right (2005).

As well as this, NGOs have sometimes turned to the EP which, despite its relative weakness in JHA decision-making until recently, is perceived as a potential ally. A recent example of this is when pro-migrant NGOs sought the support of the EP in their attempt to have the Directive on Asylum Procedures abandoned, the so-called 'nuclear option'[22]. This particular attempt was unsuccessful, although the EP offered 102 amendments to the Draft Directive based on NGO proposals, as in this case the EP's power was limited to the consultation procedure (Uçarer, 2006a: 13-14). However, it clearly shows how powerful the NGO/EP combination could be under the co-decision procedure.

[21] For further discussion of these issues, see the following section
[22] See the following chapter for details of the Directive and the controversy surrounding it

In conclusion, then, there has been considerable political spillover in the area of JHA, with the general public, officials and lobbies increasingly acting, and calling for more action, at European level. However, while there is almost unanimous support among these groups for more action at EU level, there is disagreement on the *nature* of the kind of action to be taken. While sectors of the general public and law and order officials are calling for a security-oriented, restrictive border policy, officials more shielded from electoral pressure, as well as NGOs, tend to support more liberal policy outcomes which focus on migrants' rights. This dichotomy, and its implications, will be discussed further in the following chapter.

Although this is consistent, at least in part, with neofunctionalism, it is extremely difficult to explain these factors using LI. According to LI, domestic pressure can shape states' goals. However, notably in the 'cold war' between the interior ministry officials and the foreign ministry officials, there is *fragmentation* and *competition* between different actors from a single MS.

These actors compete, and seek to increase their own power and influence *through acting directly at EU level*, rather than merely through influencing the national government. While this is compatible with neofunctionalism, paticularly its neo-neo version, it is not so with LI, although it seems to fit reasonably with the historical institutional hypothesis.

In addition, a liberal intergovernmentalist view has difficulty in explaining the lobbying of the Commission and the other supranational institutions on the part of pro-migrant NGOs. If the supranational institutions, as Moravcsik argues, are merely facilitators of positive-sum bargaining and all of the real power remains with the MS, it would seem to make more sense for these NGOs to limit their lobbying activities to the national level.

2.5.3 Cultivated Spillover

A. The Commission

Finally, the development of JHA also shows some evidence of cultivated spillover. Despite the fact that it was almost excluded from JHA decision-making according to the Maastricht arrangements, the Commission has continuously lobbied for more power in this policy area. It has done this largely by aiming to persuade governments to delegate the right of initiative to it

by consistently coming up with policy proposals and ideas. Moreover, the Commission successfully put pressure on the MS to give it more authority by arguing that its lack of an agenda-setting role was a major contributor to the lack of progress in this area (Hix, 1999: 327-328).

An example of this is the Commission's proposals regarding the reform of the JHA pillar, presented to the Amsterdam IGC. In these, it particularly criticised the use of unanimity in JHA decision-making, arguing that this was slow and cumbersome. Moreover, it argued that the limitations on the Commission's right of initiative[23] made it reluctant to use it, thereby further slowing policy development. Therefore, it advocated qualified majority voting (QMV) and an exclusive right of initiative for the Commission in order to speed up policy-making progress while, of course, giving the Commission itself a more active constitutional role in JHA (Uçarer, 2001: 9).

The result of this is that the constitutional powers of the Commission as an agenda-setter in JHA have gradually increased. Starting from practically no involvement at all in the Trevi group or the intergovernmental agreements on asylum in the early 1990s, it progressed to a shared right of initiative in the Maastricht Treaty, to sole right of initiative in some areas today. As expected, the Commission has generally shown a more pro-integration stance than the MS themselves, with, so far, only relatively few of the Commission's proposals being translated into law (Apap and Carrera, 2003: 8). This new burst of activity was particularly in evidence under the Prodi Commission (Monar, 2002: 201).

Notably, the Commission was particularly passive during the 2000 Nice Treaty ICG, in which little progress on JHA was made. The Commission, itself an item on the agenda during the IGC following the 1999 resignation of the Santer Commission, was in a particularly weak position, and, due to the necessity of solving its own problems, was in an especially introspective phase. Thus, for instance, the Commission did not produce a paper during this IGC to push for an extension of QMV in JHA although such a move may have had an important effect on the argument (Niemann, 2006: 38-39)

[23] According to the Maastricht Treaty arrangements, the Commission shared the right of initiative with the Member States

In addition to its formal agenda-setting powers, the Commission has also been adept at using its informal agenda-setting powers, defined by Geddes as including the highlighting of problems, advancing proposals, and identifying the possible material benefits of integration (2003, 6). Moreover, the Commission's capacities as an informal agenda setter have gradually increased as its institutional ability to deal with JHA has increased, particularly with the creation of the JHA DG (Geddes, 2003: 6).

An example of informal agenda-setting is the Commission's emphasis, even in the post-September 11 atmosphere of increased securitisation of immigration, on co-ordination of labour migration rules between MS, and on the development and co-ordination of integration policies for immigrants. This is reflected, for instance, in its 2003 communication on immigration, social policies and integration (Moraes, 2003: 124-127).

In this context, the Commission has argued, with some reason, that it has taken both a longer-term and a wider view of migration policy and has paid more attention to maintaining human rights standards in this area (Moraes, 2003: 122). This is despite the fact that, from the point of view of most national governments and the majority of the European public, preventing illegal immigration has been seen as much more of a priority, particularly since September 11, as was in evidence in the 2002 Seville Council.

Moreover, the Commission has sought, arguing that common problems need Europe-wide solutions, to 'advertise' itself as the co-ordinator for national action plans for 'positive' migration, including the management of migration flows, admission of economic migrants, partnerships with third countries and the integration of TCNs. This can be seen, for example, in its proposal to co-ordinate migration policies included in its July 2001 communication. In this way, then, the Commission can be seen to attempt to increase its power in this area by offering its services as an information store and co-ordinator (Geddes, 2003: 7).

Indeed, the Commission's activism regarding immigrant integration, almost ignored at EU level until recently, appears to be paying off. For the first time, in the Hague action plan which is in force between 2005-2010, integration of immigrants is mentioned as a goal of EU policy (Van Selm, 2005).

Moreover, it begins to focus on the opening up of legal migration possibilities, another favourite theme of the Commission previously neglected at EU level, both as a way of contributing to economic development and as a means to combat illegal immigration (Van Selm, 2005). Although these are still relatively undeveloped in the Hague programme[24]the fact that they are now officially cited as goals of JHA facilitates future development in these areas.

Acting as a knowlege store is also a tactic frequently used by the Commission in order to gain power and legitimacy. The Commission tends to present itself as having privileged access to data on all MS, whether they be related to economic performance, population statistics or legislative agreements. As a result, it claims to have a cross-border international perspective which is unavailable to national governments, and, as a result, to be in a special position to identify common problems and highlight areas suitable for further integration (Boswell, 2006: 9).

The Commission has also aimed to increase its influence in JHA by funding national and sub-national lobby groups representing migrants, and thereby adding to them a European, supranational dimension. For instance, during the period 1991-1993, when the Maastricht Treaty had not yet been signed and European immigration and asylum co-operation was, in theory, entirely intergovernmental, the European Commission was already funding 500 such projects (Geddes, 2000: 143-144).

In addition, the Commission's activism in JHA has not been limited to migration and asylum policies. The Commission has also pushed for a certain amount of supranationalisation in police co-operation, an area that, due to the association of the use of force with national sovereignty, is still very much intergovernmental in nature. In a 2002 communication, for instance, the Commission argues that a common framework for both international police and judicial co-operation is necessary. Moreover, although it considers that co-operation between national police forces is sufficient to reach *most*[25] of the goals, it points out that the issue of the democratic and judicial control of Europol must also be resolved (Fijnaut, 2004: 278).

[24] Although the Commission is asked to come up with an action plan on legal migration, for instance, this will not be legally binding

[25] Author's own emphasis

In this case, then, although it uses a rather diplomatic language which appears to support the idea that police co-operation should remain intergovernmental in nature, the Commission actually appears to be arguing here for a certain amount of supranationalisation of police co-operation. By suggesting that co-operation between national police forces is enough to achieve most goals, it is also hinting that it is not sufficient to reach all of them. As well as this, by bringing up the issue of democratic and judicial control of Europol, it seems to be advocating the involvement of the ECJ and EP.

Moreover, the Commission, along with some of the more pro-integrationist political leaders[26], has, in the face of declining support for the EU, been keen to 're-legitimise' the European integration process by promoting JHA co-operation as the new 'big idea' motivating integration, replacing the earlier 'big idea', peace and prosperity, which has lost its immediacy for much of the EU population as the Second World War fades into history (Walker, 2004: 13-14).

Commissioner Antonio Vitorino, for instance, underlines this attitude in his 2001 speech to the Migration Policy Seminar; 'Questions concerning immmigration are at the top of the political agenda in Europe. We also see a real need for more Europe in this field.' (Vitorino, 2001, cited in Geddes, 2003: 1)

B: The ECJ

Although the Commission has been the most active of all the supranational institutions in this field, there is also evidence for some limited cultivated spillover on the part of the Court of Justice. This is despite the fact that the MS specifically did not grant the ECJ jurisdiction in JHA.

As Mattli and Slaughter point out, there are two ways in which Community law can penetrate into the domestic law of the MS. The first of these, known as formal penetration, involves the expansion of areas covered by supranational jurisdiction. The second results from the spillover of Community legal regulation from the economic domain to social and political issues. According to Stone Sweet, rights enforcement in particular is a key mechanism for

[26] Chancellor Kohl, for instance

legal spillover, as it implies 'implicit delegations of enormous discretionary authority to constitutional judges' (cited in Luedtke, 2005).

As has already been mentioned, the ECJ still has relatively little formal power in the area of JHA, although it was granted a limited jurisdiction in the Amsterdam Treaty. Firstly, the ECJ does not have direct effect in matters relating to TCNs. Secondly, the ECJ was also denied jurisdiction in all areas of border control relating to internal security and law and order, although the ECJ can define what fits these criteria itself (Luedtke, 2004: 14). After the Amsterdam Treaty the ECJ was given jurisdiction when national courts of 'final instance' requested rulings (Stone Sweet, cited in Luedtke, 2005) [27], although this still implies a limited role.

However, Luedtke argues that despite the limitations of the ECJ's formal role in JHA, the institution has managed to gain some some power to legislate over TCN immigrants due to its jurisdiction over free movement of workers. This is, then, spillover from the economic domain to social and political issues. As Luedtke points out, 'If we can find evidence of the Court making use of this role to eventually grant TCNs free movement rights against the wishes of national politicians, then we can say that spillover ... has occurred' (2004: 10-11).

Firstly, according to the ECJ, TCN family members of EU nationals are entitled to the same residence, work and welfare rights as EU citizens. Moreover, the ECJ may interpret 'spouse' to include same-sex partners, in which case free-movement rights could be extended to TCN same-sex partners of EU citizens, which is explicitly against the wish of many MS (Luedtke, 2004: 16-17).

Secondly, the ECJ has ruled in the 1990 *Rush-Portugesa* case that TCN employees of EU companies cannot be refused entry to another EU MS on the grounds that immigration from non-EU states is a matter of national sovereignty. In this way, then, TCNs gain free-movement rights if they are employed by an EU firm (Luedtke, 2005). Moreover, in addition to using its capacity to legislate on the Single Market in order to grant TCNs free-movement rights, the ECJ has also used, in some cases, association agreements to grant TCNs the rights to free movement and social entitlements.

[27] This is not, however, equivalent to direct effect, according to which *any* national court can request an ECJ ruling.

The ECJ has been able to do this as association agreements have direct effect, and some, such as the agreements between the EU and Turkey, or some North African countries, have established the right to free movement and the transferability of social entitlements. This has led to cases such as *Sevince* (1990)[28], *Kaiber* (1991) or *Kus* in which the ECJ granted TCNs the right of residence, social security or the right to renew work and residence permits after divorce on the basis of Association Agreements (Luedtke, 2004: 17-18) (Geddes, 2000: 52-53).

In the *Kus* case, for instance, the ECJ ruled that Turkish nationals admitted for the purpose of family reunion[29] were to gain the status of 'worker', and that this status would not be affected by divorce. In the *Sevince* case, for example, the ECJ decided that Article 13 of the 1/80 Association Council Decision preventing further restrictions on access to employment of Turkish workers and their familes had direct effect.

Moreover, it can be argued that this also applies to restrictions on residence as this is a prerequisite of employment. In addition, the ECJ ruled in cases including *Nazli* (1997) and *Bikaci* (2000) that family members of Turkish workers were covered by protection against expulsion from the moment they join the worker, and that such restrictions had direct effect (Peers, 2004: 176-177).

Moreover, although these rulings on the part of the ECJ seem to have a very limited effect as they only apply to a relatively small proportion of TCNs, their actual consequence may turn out to be greater. This is because pro-migrant NGOs are arguing that it is untenable to extend rights of free movement to one group of TCNs while excluding the rest.

C: The EP

Finally, there has also been some evidence of cultivated spillover on the part of the EP in the area of JHA. Neofunctionalist theory expects the EP to be a supranationally oriented

[28] In this case, the ECJ argued that the right of residence could be inferred from the Association Agreements as a right to work was meaningless without a right of residence.
[29] This case involved a marriage to a national of the host MS, but there is no reason to believe that the result would have been different if it had involved a marriage to a resident Turkish national or a resident of any other nationality

institution, in favour of European integration (Stroby-Jensen, 2003: 87), and therefore a potential source of cultivated spillover.

However, as has already been pointed out, Lahav has shown that, while this is generally true, the speed and amount of integration desired varies among MEPs. Moreover, interestingly, she has shown that there is a positive (although not complete) correlation between MEPs' support for European integration and support for immigration. Overall, the EP emerges as an institution in favour of *qualified* immigration, with a preference for European migrants (2004a: 165-176).

The EP, then, has generally been in favour of increased supranationalisation of immigration and asylum policies and also of less restrictive policies. It can therefore be said to be a natural ally of the other supranational institutions, most notably the Commission, and lobby groups in aiming towards this goal (Geddes, 2000: 143). However, due to its relatively limited official powers in JHA, the EP has mainly had to resort to putting pressure on national governments and other EU institutions to act. In the late 1980s, for instance, the Commission's passivity in this area in the face of burgeoning intergovernmentalism led to 'scathing' attacks on the part of the EP (Monar, 2002: 200).

This is not to say that the EP has not sought greater power for itself in this area. It has particularly focused on the fact that decisions in JHA can have major implications for EU citizens, even potentially infringing their rights (Monar, 2002: 203), while there is a democratic deficit as decision-makers are no longer accountable to national parliaments.

In consequence, it has frequently demanded more powers of scrutiny. However, at the 1996 IGC Reflection Group, the EP pursued a 'minimalist' strategy[30], arguing that it should have the right of consultation (rather than co-decision). This, in turn, was accepted by the MS due to the limited nature of the demand and the perceived reduction in the democratic deficit that this would bring (Hix, 1999: 328) [31].

Like the Commission and the ECJ, the EP has also been critical of intergovernmental asylum and immigration policies for their restrictive, 'lowest common denominator' nature, and has

[30] Perhaps reminiscent of the Commission's approach during the Maastricht treaty negotiations
[31] This can perhaps be compared to the Commission's 'minimalist' strategy leading up to

therefore called for more supranationalisation in this policy area. The EP has been particularly critical of Commission initiatives being subject to long delays in the Council of Ministers, or being watered down or even completely abandoned by the Commission itself in the belief that they would not otherwise receive unanimous approval (Geddes, 2000: 142-143).

Moreover, it has been especially concerned with fighting racism and xenophobia, and has encouraged the Commission to produce proposals to this end (Geddes, 2000: 142-143). In fact, since the 1970s, the EP has itself produced reports promoting integration, social policies and rights for resident migrants, and highlighting the need to fight racism and racial discrimination. The EP has also, due to its budgetary powers, been able to fund initiatives such as the 'European Year against Racism' (Lahav, 2004a: 63-65).

Based on the concern about racism and xenophobia in evidence at the 1994 Corfu Council, and the report of the Kahn Comission which proposed binding legislation to combat racism and xenophobia, the EP argued that the Maastricht Treaty should be amended to deal with racial discrimination. The EP's lobbying, along with pressure from the Commission, finally ensured that a clause allowing action against discrimination on the basis of racial or ethnic group as well as gender was included in the Amsterdam Treaty (Geddes, 2000: 142-143).

The cultivation of spillover on the part of the supranational institutions, then, is the aspect of JHA development which is most incompatible with LI and, according to Moravcsik's own criteria, refutes it. As Rosamond points out, Moravcsik argues that the intergovernmental view can be challenged only if supranational institutions systematically bias outcomes away from the long-term interests of the MS (2000: 142-143).

Indeed, this is exactly what is increasingly happening in the area of JHA. Even the ECJ, for instance, while its official power in JHA is relatively limited, has been able to shrug off its constitutional straitjacket by granting free-movement rights to TCNs in some cases. It has done this through the extension of free-movement logic under the single-market legislation, an outcome that was clearly unintended and unwanted by the MS.

The Commission in particular has been active in promoting further integration in this area, and, far from merely being a promoter of positive-sum bargaining, has often shown itself to be an agenda-setter in JHA even before being granted the sole right of initiative. Moreover,

although it has generally been able to convince the MS that this has been in their own best interests, it has consistently sought more power for itself by continuously arguing for increased communitarisation of JHA.

It is therefore clear that spillover has played an important role in the development of JHA. However, it would be short-sighted to argue that it is the only explanation for integration in this area, as there are factors which are perhaps controversial from a neofunctionalist perspective:

- There is considerable diversity among the MS in this area. JHA is often cited as an example of 'Europe a la carte'[32]. In addition to the opt-out of the United Kingdom and Ireland from the Schengen agreement, Denmark, despite being party to Schengen, does not participate in asylum and immigration policy except for visa policy (Guiraudon, 204. 166-167). However, while such a situation is problematic from the point of view of traditional neofunctionalism, neo-neofunctionalism is more accepting of opt-outs and lengthy derogations (Schmitter, 2002: 41).

- Until the Constitutional Treaty comes into force, co-operation on police and criminal judicial matters continues to be under the third pillar, where the Commission has relatively little influence. Even in the Constitutional Treaty, the 'ghost of the third pillar' still remains, with the assent or consultation procedure and unanimous voting still applicable to many areas (Monar, 2005: 5). On the other hand, as has been pointed out, the Commission already seems to be pushing for greater supranationalisation in this area.

- Significant areas of JHA stil remain mostly under national control. Regarding immigration policy, for instance, while there is considerable integration in the area of control and regulation of immigration there is very little evidence of supranational, or even intergovernmental, integration in the area of immigrant integration, including such matters as citizenship policies, education, acculturation and language issues (Lahav, 2004a: 49). However, the Commission has also been pushing for integration in these areas and, particularly at the Tampere council, it can be seen to have had a certain amount of success.

[32] According to this concept, EU MS decide whether or not to participate in a particular activity on a case-by-case basis (Bainbridge, 2002: 180.

In conclusion, therefore, while it is undeniable that the MS have had a vital part in the development of the JHA *acquis*, it cannot be argued that they are the only major players in this policy area. Indeed, co-operation in JHA has increasingly escaped the control of the MS, first as a result of intergovernmental bargaining and later, and more significantly, as a consequence of increased supranationalisation.

Moreover, unlike the prediction of LI, it is difficult to argue that the supranational institutions have merely been the puppets of the MS in JHA. Indeed, they have tended to be proactive in this area. The Commission in particular has constantly been pushing for further supranationalisation and task expansion to new areas such as immigrant integration, but the role of the ECJ and EP has also been influential.

In addition, the evidence of political spillover in this area would appear to disprove the LI hypothesis in this case. Even actors such as interior and justice ministry officials, who tended to want JHA co-operation to remain at an intergovernmental level viewed EU level co-operation as a means of escaping the restrictions they were facing at MS level. Moreover, the increasing 'Europeanisation' of pro-migrant NGOs and their interest in lobbying the Commission in particular tends to undermine the idea that the supranational institutions have no power of their own.

2.8. The Application of Neofunctionalism to the Enlargement Process

> Although the neofunctionalist theory did not pay any attention to it, the most transcendental spillover of European integration has probably been the increased number of Member-States from the initial 6: 9, 12, 15, 25 and probably 27, 28 in the near future. As neo-functionalism foresaw and conceptualised, the dynamics of growth sector by sector have been vital, but the enlargement with the inclusion of new Member States has not been less so (Mariscal, 2004: 4).

There has, as yet, been relatively little attempt to theorise the enlargement process. The original proponents of the 'classical' integration theories, neofunctionalism and intergovernmentalism, made little mention of enlargement, understandably so when it is taken into account that these theories were largely developed in the 1960s, and that the first enlargement of the EC did not take place until 1973 (Miles, 2004: 253).

However, even early versions of neofunctionalism, in contrast to functionalism, recognised that regional integration did not take place in a void and was affected by the external environment (Caporaso and Keeler, 1995: 35). Lindberg, for instance, writing in 1963, asserted that nonmember states were likely to react to a customs union, which might, in turn, create problems necessitating further integration or expansion of the roles of the central institutions (Lindberg, 2004: 108).

In addition, there have been some later attempts to apply classical theories to the enlargement phenomenon although the theoretical examination of enlargement is still, perhaps surprisingly, relatively undeveloped, in spite of the amount of interest that Eastern enlargement in particular has provoked among academics (Andreev, 2004: 1).

Moreover, when discussing the application of theory to the enlargement process, several different aspects of enlargement may be theorised:

- The *raison d'etre* of the enlargement process itself: which factors can account for the EU's decision to accept new MS? (Miles, 2004: 253)
- The question of winners and losers of enlargement (Andreev, 2004: 1)
- The interaction between the candidate countries and the Union
- Evaluating the effects of past/present/future enlargements on the EU (Miles, 2004: 253-254)

Of these areas, the first two issues have been the most widely studied by theorists (Miles, 2004: 253-254). As this thesis deals with neofunctionalist theory, the questions may be rephrased in the following way:

- How far can neofunctionalism account for the enlargement process in general, and the adoption of the JHA *aquis* by the candidate countries in particular?
- What does neofunctionalism predict about the effect of the JHA *aquis* on the new MS, and the resulting consequences for the functioning of the EU as a whole?
- According to neofunctionalism, what implications does the existence of 'winners' and 'losers' from enlargement have for the integration process?

The thesis does not, of course, aim to give the definitive answer to these questions. However, it does aim to contribute to the recently opened debate on the application of neofunctionalism to the enlargement process. The basic argument is as follows. Firstly, when attempting to apply neofunctionalist principles to the enlargement policies of the EU and the candidate countries, it has been proposed that spillover can be external (taking place across the Union's frontiers) as well as internal (Miles, 2004: 256). This view has also been explored, for instance, in relation to the EU's relations with the Mediterranean countries participating in the Barcelona process (Moxon-Browne, 2003).

In Schmitter's view, once integration is well advanced, the regional organisation will begin to be placed under pressure from neighbouring countries. These will first begin to treat the region as an international bargaining unit, and perhaps insist that it takes on new resposibilities in areas such as defence and security. Eventually, such a region will enlarge, encouraged by efforts from regional bureaucrats on the one hand, and pressure from the neighbouring countries which, particularly given the negative consequences to them of regional discrimination, are likely to push for membership (2002: 35).

However, it can be argued that as the regional organisation enlarges its political weight in the region will increase. Consequently, there is an increased risk that neighbouring states will wish to join the organisation not because they share the political goals, or *finalite politique*, of the organisation but simply because they fear being left out (Miles, Redmond and Schwock, 1995: 182). Moreover, as Hooghe and Marks argue (2005), governance has a dual nature. The scope of a community rarely coincides exactly with the functional logic; instead conceptions of identity also play a role.

The 1973 accession of Britain and Denmark, which joined for mostly economic rather than political reasons, can be given as an example. In addition, although it is a less obvious case, the wish on the part of the CEECs to join the EU as part of a 'return to Europe' and the West after the collapse of Communism can also be cited as an example. In this case, the goal of peace in Europe which brought together the original Six takes second place to a general wish to 'belong' politically and economically to Europe. The same can be said of Turkey's desire to join the EU in the context of its drive to modernisation and Westernisation, which has its roots as far back as the latter years of the Ottoman Empire.

Although this is problematic according to more traditional versions of neofunctionalism, it is perhaps less so according to neo-neofunctionalism. While traditional neofunctionalism argues, or rather takes it for granted, that the *finalite politique* of the EU is a federal state, neo-neo-functionalism puts forward that it is more likely to be a system of polycentric and multi- level governance (Schmitter, 2002: 39). This, in turn, is capable of accepting a wider range of viewpoints.

As has been discussed earlier in the chapter, however, according to neofunctionalist theory [33], before integration can take place certain conditions need to be fulfilled. According to Haas, the three key features that were likely to encourage regional integration were the following: pluralistic social structures; substantial economic development, and 'common ideological patterns' (Moxon-Browne, 2003: 92) while Schmitter describes them as 'the size of the unit, the rate of transactions, pluralism, and elite complementarity'(Schmitter, 2001: 18).

From this, it follows that if these conditions are favourable and are not likely to be disturbed by the entry of new MS, enlargement is feasible as there is no reason why 'widening' should come at the cost of 'deepening'. Interestingly, these are the conditions specified in the Copenhagen Criteria (Miles, 2004: 256). From this argument, it also follows that the enlargement process may fail if these conditions are not adequately fulfilled.

As has already been pointed out, another factor proposed by Haas was mass and elite support for integration. He argued that spillover could occur if mass support was knowledgeable, and therefore supportive of, the benefits of integration, while national elites would support integration if they considered that it would serve their own best interests (Moxon-Browne, 2003: 92). This was later refined to suggest that the *perceptions* of the benefits, and of low costs, of integration were important, while the perception of an external threat could also be influential.

According to neofunctionalist theory, spillover may be functional, political and cultivated in nature. If neofunctionalist theory can explain enlargement, therefore, we would also expext to see these three kinds of spillover. However, as Schmitter points out, 'enlargement attenuates

[33] Despite other changes and developments in neofunctionalism, this concept of background conditions has remained fairly constant from the earliest neofunctionists to Schmitter's most recent 'neo-neo functionalism' thesis

and delays the probability of spillover – unless such a spillover in task or authority is built into the negotiations as a means to compensate existing members or accomodate new ones (Schmitter, 2002: 45). Therefore we would expect most of the spillover to be imposed on the candidate countries as a condition of accession, rather than being of a voluntary nature. The distinction between imposed and voluntary spillover will be discussed in greater detail below.

2.8.1. Functional Spillover

Functional spillover in the enlargement process may, for instance, be traced from early economic agreements between the candidate countries and the EC/EU. The fact that integration between the EC/EU and the enlargement countries began with the Europe agreements appears to fit the neofunctionalist hypotheses that integration begins with relatively uncontroversial, although significant sectors, and also that it tends to proceed from purely economic integration to intergation of a political nature (Moxon-Browne, 2003).

Niemann, in his analysis of the PHARE programme, argues that the development of such an aid programme can partly be explained by task expansion, a concept closely related to functional spillover[34], arising from the economic demands of the *acquis* (1998: 171). He points out that the prospect of eastern enlargement set in motion functional pressures for the candidate countries to be made fit for eventual accession. The PHARE programme was therefore adapted and expanded in order to support the pre-accession strategy (Niemann, 1998: 453).

Moreover, Miles, Redmond and Schwock point out that functional spillover may result from the interests of the new MS spilling over into new areas of integration. They argue, for instance, that the accession of Britain in 1973 resulted in functional spillover into two areas, perhaps ironic when it is considered that Britain is one of the most intergovernmentalist MS (1995: 183).

Firstly, its declining industrial regions and relatively low per-capita GNP prompted the establishment of the European Regional Development Fund (ERDF) and the development of regional policy in general. In addition, the existence of Britain's ex-colonies was also an

[34] The main difference between these two concepts is that, whereas functional spillover involves co-operation in a new field, task expansion is an increase in co-operation in the same field.

important factor in upgrading the EU's development policy, resulting in the replacement of the Yaounde convention with the more comprehensive Lome convention (Miles, Redmond and Schwok, 1995: 183).

This, therefore, suggests that the recent and forthcoming enlargements to the CEECs may also have a spillover effect on the *Acquis Communautaire*. This has particularly been the case in areas such as minority protection, which has been included in the criteria which the candidate countries have been required to fulfill as part of the accession process although, as it was not included in the *Acquis,* there was no obligation for the EU-15.

In addition, it can be argued that the prospect of enlargement to the CEECs was, along with the Single Market and the Schengen agreement, one of the main factors encouraging the EU's expansion of integration into JHA. Therefore functional spillover into JHA can be said to have resulted from the (prospective) Eastern enlargement.

Moreover, much emphasis was placed early in the accession period on the candidate countries' full participation in the Single Market upon accession (Baun, 2004: 57). As this, then, would eventually lead to the free movement of persons between the applicant countries and the EU-15, it was seen as necessary for the candidates to secure their external borders as much as possible, particularly given the EU's fear of mass immigration and organised crime from the region. This resulted, therefore, in the increasing emphasis on the strengthening of JHA co-operation as a condition for enlargement.

2.8.2. Political Spillover

In addition to functional spillover, neofunctionalists would expect to see some political spillover during the enlargement process. Political spillover can be described as adaptive behaviour by bureaucratic elites, political parties, interest groups and public opinion. However, it has been argued that, when applying the concept of political spillover to the enlargement process, it needs to be interpreted more flexibly.

In other words, political spillover must have an 'external' as well as an 'internal' perspective of elite interaction. Importantly this may be 'imported' to the EU from the candidate countries

during the accession process as well as flowing from the EU to the applicant states (Miles, Redmond and Schwok, 1995: 181).

Enlargement may lead to political spillover, then, particularly through *engrenage*, when civil servants, through their increasing involvement with each other, are encouraged to take integrative decisions. Niemann points out that good relations have developed during the accession process between civil servants from the EU and CEECs, due to regular meetings for the Association Council, Association Committee, the Central European Working Group and PHARE (1998: 436).

In addition, Miles, Redmond and Schwok point out that this may also occur when the political elites from the candidate countries are given observer status within the EU institutions, for instance the EP's working groups, during the enlargement process. In this way, then, they are exposed to EU political elites even before the accession process is completed (1995: 181).

Conversely, political elites from the candidate countries also bring with them their own 'baggage' which affects their views on further integration: it is possible that these elites may oppose further spillover and supranationalisation and limit, resist or reverse areas of integration (Miles, Redmond and Schwok, 1995: 181). In other words, political elites from the applicant states may be in favour of encapsulation or even spillback rather than spillover in certain areas. As will be discussed further, this may be the case in many areas of JHA

However, it is interesting that, at least in the earlier stages of the accession process, mainstream political parties in the candidate countries did not question the desirability of joining the EU or the conditions that their countries were required to fulfill in order to do so. Instead, political debate centred around the best ways to fulfill those conditions (Gryzmala Buse, 2004: 3). Despite this, attitudes towards the EU have perhaps become more sceptical in the later stages of the accession period and beyond, as will be discussed in the chapters relating to the CEECs and Turkey.

2.8.3. Cultivated Spillover

Finally, according to the concept of cultivated spillover, supranational institutions, particularly the Commission, are expected to use the integration process to enhance their own

power, while national governments become less and less proactive over time (O'Brennan, 2000: 171).

This is perhaps where neofunctionalism clashes most with a LI interpretation of enlargement. LI argues that national governments are the key players during negotiations related to enlargement, whether these are IGCs to negotiate treaty reform in preparation for enlargement, establishment of the conditions that the candidate countries are required to fulfill, or negotiations between the EU and the candidate countries (Miles, 2004. 258).

In this respect, LI could reflect Moravcik's idea of 'co-operative games', according to which the preferences of national governments (which are determined by domestic interest groups) affect the level of co-operation (Moravcsik, 1993: 499). According to this view, then, the Commission would simply act as a go-between for decision-making between the MS.

In contrast, neofunctionalists argue that the supranational institutions are likely to play an active part in any enlargement process. According to the neofunctionalist concept of cultivated spillover, we may expect to see Commission activity during the enlargement process in three areas:

- Promotion of the enlargement process itself
- Setting the agenda for the enlargement process
- Acting as a powerful broker in that process (O'Brennan, 2000: 171).

While very different from the LI hypothesis, this is not too divergent from the historical institutionalist hypothesis, which also argues that the Commission and other EU institutions can develop their own agendas over time. Historical institutionalism, however, explains this as a result of 'lock in' of both formal and informal institutional arrangements (Rosamond, 2000: 117). Therefore, historical institutionalism also predicts that supranational institutions will have an important impact on the enlargement process (Miles, 2004: 262).

Indeed, if we examine the current and most recent enlargement processes, those involving the CEECs and Turkey, examples of all three of the neofunctionalist predictions can be found. Despite the fact that enlargement was originally conceived as an intergovernmental process in which the Commission was a mere distributor of financial aid, it has, through its championing of enlargement and its willingness to produce proposals, become a significant player in the

enlargement process. The Commission has, therefore, used enlargement to enhance its power (O'Brennan, 2002: 171).

In particular, it has made great use of its informal agenda-setting powers, which include the highlighting of problems, advancing proposals, and identifying the possible material benefits of integration (Geddes, 2003: 6). Given that the enlargement process has frequently required the MS to work out a common position *vis a vis* the candidate countries (O'Brennan, 2002: 172), the Commission has been especially adept in selling itself as a mediator between the MS.

This has been the case particularly during the negotiation process, where it has produced proposals for the EU common position, and also mediated both between applicant countries and the EU in the case of serious disagreement, and between the MS in the forming of common positions (Geddes, 2003: 6).

Therefore, it can be argued that the Commission has largely been responsible for shaping both the content and timing of enlargement, in that it played an important role in developing the EU's pre-accession strategy. It has done so both by preparing the candidate countries for accession and, through its Agenda 2000 proposals, by readying the EU itself to accept new MS.

The Commission's influence on the enlargement process has, however, been especially clear through its Opinions which, in turn, have had considerable influence both on the Council's decision to open negotiations and on the content of the negotiations themselves (Baun, 2000: 17). The case of Turkey is illustrative here. Despite considerable scepticism from public opinion and national goverments in some MS, it was difficult for them to oppose the opening of negotiations with Turkey once the Commission had effectively given Turkey the 'green light' in its positive 2004 *avis.*

A fourth form of spillover, relevant to the enlargement process, is proposed by Arne Niemann. He calls this 'induced spillover' (1998), although elsewhere he refers to the same idea as 'exogenous functional spillover' (2006). This refers to external pressures, known as 'involuntary motives' by Schmitter, such as extra-Community demands or an unforeseen threat to Community interests (2002). As a result of this, MS will be compelled to adopt

common policies towards these countries and, in order to do this, will rely increasingly on the supranational institutions of the EU (Niemann, 1998: 432).

Niemann attributes the 1989 G7's decision to give the mandate for co-ordinating Western aid to CEE to the Commission to induced spillover. He points out that there was pressure on Western European states from both the CEECs and the USA to work in the EC framework rather than just unilaterally (1998: 432).

In addition, the Commission already had experience in co-ordinating aid to the African, Carribean and Pacific countries, through EC-CEEC trade agreements and European Political Co-operation (EPC), and probably therefore seemed the obvious candidate for co-ordinating aid to the CEECs after the collapse of Communism (Neimann, 1998: 431-432). In turn, the experience of co-ordinating PHARE also later gave the Commission a head-start in gaining influence over the enlargement process.

As well as the PHARE programme, it can also be argued that induced spillover from the collapse of communism and, especially, the prospect of enlargement played an important part in the development of JHA policies. At the time, there was a fear in Western European countries of mass migration and organised crime from the newly independent CEE states. This, then, was an additional pressure contributing to the perceived need to co-operate on JHA matters at EC/EU level, and the increasing tendency on the part of the MS to delegate power to supranational institutions in this area.

2.8.4. Institutional Spillover

Another form of spillover related to enlargement, proposed by Miles, Redmond and Schwok (1995), is institutional spillover. According to this idea, despite the fact that enlargement may sometimes decrease the political will to integration, it will frequently provoke a review of the EU's institutions and an extension of the EU institutions' powers.

This appears to occur due to the fact that an increase in the number of EU members complicates intergovernmental bargaining, making the process even slower and more cumbersome. Therefore, there is pressure for an increase in supranational policy making

(Miles, Redmond and Schwok, 1995: 189). Niemann (2006), on the other hand, refers to the same phenomenon as a functional pressure.

Miles, Redmond and Schwok point out that the extension of supranational decision-making in the 1986 Single European Act can be partly seen in this light (Miles, Redmond and Schwok, 1995: 189). While the institutional review leading to the Nice treaty was in direct preparation for the 2004 enlargement, enlargement can also be put forward as a contributing factor to the increase in QMV and co-decision seen in the Maastricht and Amsterdam treaties. Moreover, it can be argued that the increase in supranational decision-making in the (failed?) Constitutional Treaty was partly a result of preparation for future waves of enlargement.

2.8.5. Voluntary *versus* Enforced Spillover

Traditional neofunctionalist theory does not account for asymmetries in bargaining power between MS and applicants (Gryzmala Buse, 2004: 17). However, researchers on the subject have argued that spillover in the enlargement process differs from that between MS in one important way: external, unlike internal spillover, may be of a 'voluntary' or an 'enforced' nature.

Broadly speaking, voluntary spillover may be defined as originating from the candidate countries themselves, based on a perceived need for a closer relationship with the EU. Enforced spillover, on the other hand, occurs when the EU demands that applicants reform domestic processes in line with EU policy, usually as a prerequisite of accession (Miles, 2004: 256).

Miles, Redmond and Schwok divide voluntary external spillover into two types. Firstly, it may be *reactive*. In this case, although the third countries in question have no desire to join the EU and are sceptical about supranational integration policies, they feel the need to react to the increasing influence of the EU, which may be perceived as a threat. In the second type *active* external spillover, the nonmember states in question aim for eventual EU membership and, thus, are willing to adapt their own policies at almost any cost in order to fulfill this goal (Miles, Redmond and Schwok, 1995: 150).

Enforced external spillover, on the other hand, is imposed on non-member countries, usually as a condition of membership. However, this may not always be as a prerequisite of full membership of the EU; the EU/EFTA European Economic Area (EEA) agreement also required the EFTA countries to adopt the relevant parts in the EU's *acquis communautaire*, often provoking quite fundamental changes to national policies (Miles, Redmond and Schwok, 1995: 150).

Regarding JHA, it should first be pointed out that most of the spillover that has occurred to the candidate countries has been of an enforced nature. This is for the simple reason that the CEECs have been required to adopt the entire JHA *acquis*, including the Schengen *acquis*, from which the UK and Ireland were granted an opt-out. Moreover, previous to accession, the CEECs did not actively influence the developing JHA during the accession process in any way; rather, they were presented with a *fait accompli* which in many ways, went, and indeed continues to go, against their interests for several reasons which will be summarised below[35].

Therefore, while it can be argued that the adoption of JHA has been seen as a 'necessary evil' on the part of the candidate countries during the accession process, JHA has frequently been at odds with the economic, cultural and political goals of these states. As has already been discussed it has been hypothesised that two main reasons are likely for such a lack of accomodation of the candidate countries' needs and wishes.

Enforced spillover may either take into account or ignore the candidate countries' needs and priorities. It has been argued that there are two main reasons why candidate countries' preferences may not be taken into account in the accession process:

- Strong sectoral interest groups within the EU which oppose such an accommodation.
- The absence of policy advocates among the EU Member States (Sedelmeier, 2001: 2-3).

In fact, both of these factors can be borne out in the case of JHA. Firstly, as has already been noted, there is a strong anti-immigration lobby among the EU population, which feeds back into an anti-immigration stance of many MS governments, and among the law and order

[35] These issues will be discussed more fully in chapter 5

officials influential in the formation of JHA. Moreover, extreme right wing political parties are playing an increasing role in European governments. As has been discussed earlier in this chapter, prior to and during the accession process, there was widespread fear of mass migration from the CEECs in many sectors of EU society, and, it appears, Turkey is viewed even more negatively in this respect (Lahav, 2004a: 90).

Secondly, there is little support for the CEECs' preferences regarding JHA among the current MS. Indeed, the candidate countries' natural advocates, those EU-15 countries which were most supportive of enlargement, and had the closest economic and cultural ties with the CEECs, most notably Germany and Austria, were also those most concerned to prevent a flood of immigration from CEE. Indeed, it can be said that these countries were the only ones to receive significant amounts of immigration from the CEECs during the accession period.

In contrast, as has already been emphasised, the application of neofunctionalism to enlargement not only seeks to explain the enlargement process itself, but also attempts to explain and predict the behaviour of the newcomers after accession. As Schmitter points out, previous enlargements have run relatively smoothly, with the conditions of entry and distribution of burdens and benefits generally regarded as fair (2002: 43).

In the latest enlargement rounds, however, the conditions demanded of the CEECs and Turkey have been much more onerous, and the EU has been far less willing to grant compensations and exemptions than in previous enlargement rounds. This may have damaging consequences, as Öniş suggests:

> If the mix of conditions and incentives is inappropriate, however, and the emphasis is primarily on conditions or 'negative incentives' … it will also help to strengthen those groups both within and outside the state who are likely to oppose democratic opening as well as the loss of sovereignty in certain key areas of policy that eventual EU membership naturally entails (2003:9).

Moreover, it has been argued that JHA is one of the areas in which the needs and wishes of the CEECs and Turkey have been taken least into account, and in which they face most difficulties in adopting the *acquis.* This has resulted in the CEECs in a perception of being treated as second-class citizens, a sentiment which also seems to be on the increase in Turkey.

For this reason, then, this thesis argues that the CEECs may, if no effort is made to solve the problems that they are faced with as a result of the Schengen *acquis,* cause spillback in JHA by vetoing decisions. Despite the fact that most JHA decision-making is now covered by QMV, the CEECs, acting as a group, would be able to form a minority large enough to block proposals.

In addition, according to neo-neo functionalism, the fact that the CEECs are 'newcomers' to the group increases the possibility that they will choose spillback over other strategies. As Schmitter points out, '[Spillback] is the most likely strategy for an actor weakly affected by regional group formation, the development of regional identity and the international status effect, but highly sensitive to perceptions of inequity on comparative rate of return (2002: 32). Not only are the CEECs and Turkey less involved in the regional group than the EU-15, but they have consistently shown themselves to be sensitive about being treated as 'second-class citizens.'

2.9. Conclusions

Although the MS governments are clearly important players, the enlargement process is far from being entirely under their control. In fact, it can be argued that all three types of neofunctionalist spillover have contributed to enlargement, and that the supranational institutions, most notably the Commission, have played a particularly decisive role.

Moreover, it has been argued that further powers might accrue to the supranational institutions through enlargement via institutional spillover, in which institutional change is seen as necessary in order to accommodate the new MS. In addition, induced spillover, in which the EU reacts to an external threat or crisis and delegates power to supranational institutions, may also have played a role in the enlargement process.

However, enlargement will generally cause a setback to integration, unless the *acquis communautaire* is imposed on the accession states. Despite this, if the wishes and needs of the applicant countries are not taken sufficiently into consideration, the *acquis* can cause

difficulties for the candidates in certain areas, which may result later in a disaffection with the policy in question or even the EU as a whole.

From a neofunctionalist perspective, then, such a reaction may cause s*pillback*, or a halt or even regression in integration, usually due to the use of the veto or a blocking minority. This thesis puts forward, therefore, that the EU's current JHA policies cause certain difficulties for the CEEC members and applicants and for Turkey, and that if these problems are not tackled sufficiently there is a danger of *spillback* in this area. This, in turn, given the amount of support for JHA cooperation among the West European public and elite, could seriously damage the EU's already fragile legitimacy.

III. THE DEVELOPMENT OF CO-OPERATION IN JUSTICE AND HOME AFFAIRS

3.1. Introduction

Border policies have traditionally been the prerogative of the nation state. Indeed, the provision of security against both external and internal threats has been part of the basic justification and legitimacy of the state according to all major theories since the seventeenth century (Monar, 2005: 1). For this reason, there is a need to explain the MS' increasing willingness to co-operate significantly in this sensitive policy area, even, as has been discussed in the previous chapter, handing over some responsibility for it to supranational institutions. One of the aims of this chapter is therefore to explore the reasons for the development of co-operation in JHA from a neofunctionalist point of view.

As has been argued in the previous chapter, neofunctionalist theory can, at least in part, account for the development of JHA and its increasing supranationalisation. One of the goals of this chapter, then, is to explore the development of these neofunctionalist processes in chronological order, starting from the origins of co-operation in JHA issues in the 1970s to the present.

This chapter, and the thesis as a whole, also aims to explore the nature of the emerging AFSJ through posing the following questions. Are we witnessing the development of a 'fortress Europe', with clear 'ins' and 'outs'? In other words, does the creation of an 'area of freedom, security and justice' imply that, outside its borders, it is surrounded by a competing area of servitude, insecurity and injustice, which must be kept out by all means?

To rephrase the question, is the EU developing a liberal or a realist border policy frame? A liberal border policy frame here may be defined as a regime concentrated on individual and human rights and the situation of the individual, while a realist frame is one where illegal immigrants, refugees and asylum seekers are all viewed, as TCNs, as a potential threat to the security and stability of the state (or, in this case, regional organisation), and whose entry must therefore be strictly controlled (Lavenex, 2001:26). In addition, linking this issue with

neofunctionalist theory, this chapter seeks to explore the connection between more or less supranationalisation and a more or less realist/restrictive border policy.

In general, more supranational input hypothetically produces more liberal border policies, as a result both of international human rights legislation and of the need for increased freedom of movement in a globalised economy (Lahav, 2004: 7). Therefore, increased supranationalisation, according to this argument, while representing the erosion of states' capacity to control their borders, also empowers the migrant (Geddes, 2003:3).

In contrast, a border policy that is based on intergovernmental bargaining is likely to lead to a more restrictive policy through 'lowest common-denominator' outcomes (Lahav, 2004: 9-10) as states are eager to protect themselves from the illegal migration or international organised crime problems of their neighbours.

Therefore, given these hypotheses, and taking into account that JHA, as has been shown in the theoretical chapter, shows elements both of intergovernmental and supranational co-operation, with the supranational element gradually gaining in importance, the EU is becoming 'a testing ground for the relationship between the national state and supranational or transnational actors' (Geddes, 2003: 3). It is therefore important to ask whether JHA is likely to produce restrictive border policy outcomes, as may be expected from intergovernmental co-operation, or a more liberal outcome as is likely from more supranational involvement.

On the one hand, European integration, particularly when it has an important supranational element, has tended to be associated with an increased liberalisation of policies. An example is the Single Market legislation, which includes freedom of movement of goods, services, capital and persons. On occasion this liberalisation can even be extended outside the EU itself, in the form, for example, of the EEA or the EU's numerous trade and association agreements. On this basis, then, it can be argued that increased supranationalisation of JHA is also likely to lead to more liberal border policies, and that the supranational elements of the EU, most notably the Commission, are likely to promote such an outcome.

On the other hand, it can be said that there is considerable support within most MS, from elites as well as from the general public, both in favour of increased intervention on the part of the EU in border control and in favour of more restrictive border policies. However, they

have tended to prefer intergovernmental rather than supranational co-operation. More co-operation on the fight against illegal immigration in particular is called for, for reasons ranging from racist and xenopohobic attitudes to a fear that local communities will be altered out of all recognition (Hansen, 2003: 32). This is in spite of the demographic challenges facing Europe as a result of the ageing of its population, which may be alleviated by a certain amount of immigration.

While this shows some variation between MS and demographic groups, the tendency is there in all of the EU-15. As Uğur points out (2000: 166), governments are thus required to react, whether or not they realise that this may have some negative consequences. Therefore, given that, until recently JHA was largely intergovernmental in nature, with the powers of the supranational institutions constrained, policy outcome has tended to be largely restrictive. As Geddes suggests (2003: 7), then, the 'solution to fortress Europe … is not a return to state sovereignty, but rather consolidated powers for the Commission … i.e. *more* not *less* Europe in response to 'fortress' like tendencies'.

Moreover, while an excessively restrictive border policy appears to be damaging to the EU both because it limits TCNs' rights and from a demographic point of view, there is also evidence that it simply does not work. Experience from the Mexican/US border, for instance, suggests that the effect of restrictive border policies on reducing illegal immigration and international crime is unimpressive (Hansen, 2003: 32).

Despite the modernisation and the increase in checkpoints along the Mexican/US border since the 1980s there has been no decrease in illegal immigration (Hansen, 2003, 32), which may be explained by the fact that only around 20% of illegal immigration is due to illegal frontier crossing, the other 80% being accounted for by expired tourist visas (Zielonka, 2001: 522).

In addition, Zielonka argues (2001: 522) that the tightening of borders in one place merely leads to increased pressure at another; for instance, increased control at the German/Czech border may lead to more illegal migration and smuggling at another EU border point (Geddes, 2003: 15). Indeed, such restrictive border policies may even contribute to the development of the people-trafficking trade (Geddes, 2003: 15), a particularly worrying development as people trafficking has also been linked with the trafficking of women and children for sexual purposes as well as arms and drugs smuggling, and even terrorism (Geddes, 2000a).

Therefore, as Geddes points out (2000b: 26),

> Given that the European Commission, Parliament and Court of Justice have advocated the expansion of immigrant rights and freedoms, while national governments have preferred a restrictive line, the debate between supranationalism and intergovernmentalism is of direct importance to the future of Europe.

Given that a 'fortress Europe' appears to entail many costs and rather few benefits for the EU, then, it is worth considering why the MS continue to support restrictive border policies in spite of their negative consequences. One answer may be that, as immigration is generally viewed negatively by the West European public, politicians may gain votes if they are seen as pursuing 'zero immigration' policies (Geddes, 2000b: 26). As national executives are only in power for a relatively short time, they can sometimes ignore long term disadvantages in favour of a short-term electoral payoff.

A further reason, suggested by Virginie Giraudon (2001), may be the disproportionate influence of law and order officials in European intergovernmental co-operation in this area, particularly in the years before the Amsterdam Treaty. These officials generally supported a restrictive border policy, and tended to overstate the danger posed to the EU by illegal immigration and organised crime in order to justify their activity and budgets.

Supranational institutions in the EU, on the other hand, are more likely to pursue liberal border policies as they are under less pressure to please the electorate due to the EU's democratic deficit. Moreover, as has been pointed out in the theoretical chapter, they are increasingly the focus of lobbying by pro-migrant groups, which may also increase their tendency to support more liberal border policies, as well as improved rights and integration for migrants.

3.2. Early Co-operation

3.2.1. The Early Postwar Period

The first attempts at co-ordination of the policies now grouped under JHA (asylum and immigration, police and judicial co-operation) between European countries were made by the

Council of Europe in the post-war years. This was a consequence of the post-war wave of immigration into Western Europe, and the resulting worries about an increase in transnational crime. Although the discussion of these topics was a major breakthrough in itself, policy output was meagre and slow and often represented the 'lowest common denominator', a result of the difficulty of co-ordinating such politically sensitive policies (Uçarer, 2003: 295-296).

Immigration as such was, however, not regarded as a major problem in most Western European countries in those years. Indeed, many countries saw immigrants as a valuable resource in the reconstruction of their devastated economies, leading them to actively recruit foreign workers, particularly from ex-colonies, or, at least, to adopt a more or less 'laissez-faire' immigration policy (Lahav, 2004a: 29).

3.2.2. The Trevi group

The origin of co-operation between the EC Member States in JHA in an EC context, however, can be traced back to the 1970s and the "Trevi Group", which was formed on the basis of a British proposal to the European Council (Bainbridge, 2001: 519). The group, which first met in 1976 as a reaction to a spate of terrorist attacks and hostage taking, involved meetings of Ministers of Justice of the EU MS with the aim of co-operation in law and order. It was entirely intergovernmental, with no involvement of the European Commission or the other supranational institutions, and the results of its consultations were non-binding (Bainbridge, 2001: 519).

The main activities of the Trevi Group were information exchanges about terrorists, the security of vulnerable targets including air traffic systems and nuclear plants and co-operation in fighting terrorism (Hix, 1999: 317). Although it only met occasionally at ministerial level, most of the work was carried out at the level of working groups consisting of bureaucrats and officials (Uçarer, 2003: 296).

This enabled the building of relationships and trust between these officials, who tended to be from law and order ministries, and also allowed them considerable input into the agenda for transnational competition (Guiraudon, 2001: 7). Moreover, as shall be discussed further, this close co-operation between law and order officials also later placed them in a strong position,

as compared, for instance, with foreign affairs officials (Guiraudon, 2001: 8), to influence the Schengen agreement.

Over the following 20 years, the issues which had prompted the Trevi process developed further, and the mandate of the Trevi group was broadened to include co-operation against football hooliganism and international organised crime, such as drug and arms trafficking and bank robbery (Hix, 1999: 317).

In addition, the Trevi process led to the establishment of other groups, including the Judicial Co-operation Group, the Customs Mutual Assistance Group, and the Ad Hoc Groups on Immigration and Organised Crime, covering the four policy areas which would later comprise JHA (Uçarer, 2003: 296). Therefore, from a neofunctionalist point of view, co-operation at this stage appears to be heading towards 'spill-around', the proliferation of functionally specialised, independent but strictly intergovernmental bodies (Schmitter, 2002: 32), rather than spillover.

3.2.3. Immigration and Asylum: A Matter for Nation States

Throughout these years, moreover, attitudes towards immigration were changing, due to the economic and social crises of the 1970s, which resulted in unemployment and recession. It was now considered unfeasable by most governments to continue large-scale immigration, particularly as it was becoming clear that much of the 'temporary' migration of the post-war period had become permanent. These factors, in turn, led to public opinion becoming increasingly anti-immigration (Hansen, 2003: 31).

This period was, therefore, marked by increasing intervention in immigration policy on the part of national governments, involving the development of measures intended to deter immigrants including carrier sanctions, tighter border controls, expulsions and detention. As well as this, the EC MS also sought to negotiate readmission negotiations with non-member countries (Uçarer, 2003: 19).

Moreover, as economic stagnation and its consequences continued into the 1980s, immigration developed from being perceived as a merely economic and demographic

phenonemon into being viewed as a political and social problem, and began to appear as an issue in electoral campaigns.

In contrast, asylum policy was not an important issue at this time, as during this period asylum in Western Europe was merely a 'Cold War sideshow' (Lahav, 2004a: 29-30), limited to a few Eastern bloc dissidents. In fact, it was rather encouraged as, as Favell and Hansen point out, 'welcoming the odd Soviet ballet dancer or sportsman was both financially costless and politically rewarding, an ideal means of emphasising the West's moral superiority over Communism' (2002).

Interestingly, the Commission has been calling for the MS to co-ordinate their immigration policies from as early as 1973, although the Council responded in a 1974 decision that it was not a matter for the EU but should remain intergovernmental in nature. In fact, Uğur points out that there was little functional rationale for such a move at that time as the maintenance of national borders within the EC limited the need for integration (2000: 167-168).

In addition, as early as the 1970s, the EP and Commission were already indicating that their stance towards immigration was more liberal than that of the national governments. An example is the EP's call, in 1974, for a Migrant Workers' Declaration, which was supported by the Commission in 1976 on the grounds that it would help to promote free movement (Lahav, 2004a: 29-30).

In March 1979 the Commission proposed to be consulted, and for the MS to consult each other, on immigration policy. Rather surprisingly, given its previous antipathy to Commission interference in this area, the Council accepted. However, it decided that priority should be given to migrants from other EC MS, and also that migration from third countries should be included in the EC's embryonic foreign policy (Lahav, 2004a: 168), both rather restrictive measures. This suggests, then, that the EC MS were prepared to undertake a limited co-operation on immigration even at this early stage, and that this was already showing signs of being restrictive in nature, at least towards non-EU migration.

Despite this promising start, however, the Commission did not push further in this field until 1985. In that year, it prepared a document recommending which areas of migration policy should be subject to consultation. Secondly, it wanted any co-operation between the MS and

the Commission on this issue to be carried out within the EC institutional framework. However, five member states, in opposition to this, took the Commission to the ECJ, where it was overruled (Uğur, 2000: 170).

3.2.4. Neofunctionalist Commentary

The origins of European co-operation in areas that were later to come under JHA were entirely intergovernmental in nature. The Trevi Group in particular was dominated by law and order officials, who tend to support a restrictive policy. Although the mandate of the Trevi group increased over time, it was not at this point concerned with migration or asylum, the former being considered an issue for national governments and the latter being a limited phenomenon at the time. Finally, the Commission made some early, largely unsuccessful, attempts to make the MS co-ordinate their immigration policies, although it did succeed in being granted the right to consultation.

3.3. The Schengen Agreement

3.3.1. Basis of the Agreement

The original Schengen Agreement of 1985 was a decision between Belgium, the Netherlands, France, Germany and Italy to abolish border controls between themselves. Interestingly, the immediate trigger for the development of Schengen appears to have been a rather prosaic event: it was a reaction to roadblocks set up by disgruntled truckers who were annoyed at being kept waiting at intra-EC borders (Lahav: 2004a: 42).

The resulting agreement is based on three basic principles, as follows:

- Creation of a common European territory without internal borders and with a common external border
- Entry into one of the Schengen countries via its external border is equivalent to entry into the whole Schengen territory

- Once inside the territory, a person can move freely within the Schengen zone for three months out of six without further checks at internal borders (Apap, Carrerra and Kirişçi, 2004: 7-8).

3.3.2. Implications for External Borders

As can be seen, the agreement involves not only the dismantling of internal borders but also includes some co-operation on external border management. Thus, to compensate for the removal of internal borders (Guiraudon, 2001: 8), the Schengen group also intended to develop policies which would strengthen its external borders. In fact, it can be argued that issues relating to immigration control came to dominate the four Schengen working groups. Guiraudon explains this as a consequence of the dominance of officials from Interior and Justice Ministries, who tend to have a security-oriented approach to border policy, in Schengen decision-making (Uçarer, 2003: 297).

To this end, therefore, the Schengen Information System (SIS), a shared database accessible by national law enforcement authorities, which stored information such as criminal records and asylum applications, was set up (Uçarer, 2003: 297). However, the SIS, due to claims that it violated data protection safeguards and individual rights, was criticised on ideological grounds (Lahav, 2004a: 42-43).

More recent developments have, however, proved just as controversial. In particular, the second generation SIS, due to be completed by 2006, has been a cause of discussion. SIS II has as its main objectives the inclusion of the new MS in the system and the updating of the technology used for SIS 1. Moreover, a common Visa Information Service (VIS) has also been proposed as part of the 2002 Santiago Plan to combat illegal migration and trafficking in human beings (Apap, Carrera and Kirişçi, 2004: 7-8).

The Schengen regime has also been criticised on the grounds of lack of transparency. Firstly, freedom of movement within the Schengen zone is not complete, as the MS have included several ‘get-out’ clauses to maintain national control of their traditional external borders, such as spot-checks, if they consider this necessary for reasons of national security (Apap, Carrera and Kirişçi, 2004: 6). Moreover, there is little scope for a person denied a Schengen visa to

present a legal challenge against the decision, and it may be difficult even to learn the reason for the rejection (Apap, Carrera and Kirişçi, 2004: 8).

Finally, it can be argued that Schengen is an example of intergovernmental bargaining leading to an increasingly restrictive policy output as the result of the 'lowest common denominator' effect. The Schengen countries were wary of 'importing' immigration, and all the consequent political and social problems, from fellow participants (Lahav, 2004a: 42-43). For this reason, the Schengen 'blacklist' of countries whose citizens require visas for entry, for instance, is longer than that of any individual country prior to joining Schengen.

However, despite the entirely intergovernmental nature of the Schengen agreement, even at this early stage there were attempts by the Commission and ECJ to influence immigration policy in particular. As may be expected, these supranational institutions aimed to temper the developing restrictive policy by focusing on improving the rights of TCNs.

In 1985, the Commission published its 'Guidelines for a Community Policy on Migration', which called for equality of treatment in living and working conditions, including free movement rights, for EU residents whatever their origins. However, this was taken to the ECJ by the MS, where a compromise decision was reached (Luedtke, 2005). From a neofunctionalist point of view, this can be considered as an early, perhaps premature, attempt at cultivated spillover on the part of the Commission. However, what is interesting is that this attempt by the Commission to influence the developing intergovernmental policy was partially successful.

3.3.3. Neofunctionalist Commentary

The Schengen agreement, while abolishing internal borders between the MS, also resulted in measures to strengthen the Schengen zone's external borders. Policy output was, therefore, largely intergovernmental and restrictive in nature as law and order officials continued to dominate the scene. Moreover, the 'lowest common denominator' effect of intergovernmental bargaining also contributed to this restrictiveness, as governments are eager to avoid importing what they view as the immigration problems of the other participants. This can account, for instance, for the length of the Schengen negative visa list, longer than the previous lists of any of the participating MS.

Although there were some attempts at cultivated spillover on the part of the Commission and ECJ advocating a more liberal policy, these were, for the most part, unsuccessful. As shall be seen in the next sub-chapter, although the scope of co-operation widened in the following years to include the non-Schengen MS, it remained both intergovernmental and restrictive.

3.4. Intergovernmental Agreements on Asylum and Immigration: The Dublin and Extradition Conventions and the London Resolutions

3.4.1. Immigration and Asylum Issues in the late 1980s

By the late 1980s, issues relating to immigration and asylum in the EC countries were gaining in importance for other reasons too. Perhaps the most important of these was the Single Market initiative, and the resulting free movement of persons within the EU that this implied. This, it was felt, needed to be compensated for by increased vigilance at the EU's external borders. From a neofunctionalist perspective, then, it can be argued that the Single Market Project, like the Schengen agreement, also provoked functional spillover to this area: just as within the Schengen agreement, the removal of internal borders was seen as necessitating increased control at external borders.

There is, interestingly, another early attempt at cultivated spillover on the part of the Commission during this period. In its original White Paper on the Single Market presented to the Milan summit in 1985, the Commission proposed supranational co-operation on asylum and immigration policy, including co-ordinated rules on visas, residence, entry and employment of TCNs and common rules on extradition. However, this was not included in the Single Act as, at this stage, the MS were not willing to cede sovereignty in these areas to supranational institutions (Geddes, 2000: 70-71).

Moreover, the collapse of Communism in CEE and the USSR between 1989 and 1991 also triggered widespread (and largely exaggerated) fears of mass migration and organised crime from these countries. The accession of Greece to the EC in 1981 and, especially, Spain and Portugal in 1996 also played a role as these countries had relatively open borders with countries south of the Mediterranean.

Due to the fact that public opinion, as has been discussed earlier, had become increasingly anti-immigration, governments were constrained to focusing on preventing immigration and limiting the number of asylum seekers[36]. This was in spite of the fact that immigration may provide a partial solution to the demographic and financial crisis that Europe was already heading for as a consequence of its ageing and declining population (Hansen, 2003: 36-37).

A Eurobarometer report carried out durıng this period suggests that EU citizens already defined 'the other' as non-EU migrants, as opposed to those from other EU countries. According to other surveys, 33% of European citizens wanted non-EU migrants' rights to be limited in 1991, a rise from 18% in 1988. Meanwhile, the proportion who wanted the non-EU migrants' rights increased dropped from 30% to 19% during the same period. In addition, those who thought there were too many non-EU citizens rose from 37% in 1988 to 50% in 1991 (Uğur, 2000: 165).

Moreover, despite the fact that the European public may be moved by extreme events such as Kosovan refugees fleeing soldiers burning their houses (Hansen, 2003: 32), attitudes towards asylum seekers are generally negative. This may be due, in part, to resentment of the cost of supporting them. However, there is also some evidence that people in some European countries may group together asylum seekers with established immigrant groups (such as Indians and Pakistanis in the UK), and may therefore extend any grievances they have with the established groups to the asylum seekers (Statham, 2003: 314).

Due to these pressures, therefore, intergovernmental co-operation on issues of immigration and asylum developed not only between the Schengen members but also between the MS as a whole. In 1986, the intergovernmental *ad hoc* Working Group on Immigration was established by the MS, which led to the signing of the Dublin Asylum Convention (1990) and the External Frontiers Convention, which remains unratified (Hix, 1999: 314).

It is important to note, however, that these moves towards co-operation on immigration and asylum policy were not actually preceded by a rise in immigration numbers. This suggests

[36] According to the UN definition, an asylum seeker is anyone who moves across borders looking for protection. A refugee is a person who has been granted permission to stay in the target country under the terms of the 1951 Refugee Convention because of a well-founded fear of persecution due to race, religion, nationality, political opinion or membership of a social group.

that, even at this relatively early stage, co-operation in these areas may be better explained by a crisis of elite and mass reactions to foreigners or by the dynamics of EU integration than by an actual mass immigration problem (Lahav, 2004a: 16 and 53). While immigration remained relatively stable, however, the number of asylum seekers did rise sharply between 1989 and 1992, more than doubling from 320,000 to 695,000, the vast majority of which were headed for Germany (Hansen, 2003: 35).

In fact, in a speech made in 1992, then Commission President Jacques Delors appears to have noticed that it was a mistake to link free-movement of persons within the EC to extra-EC migration trends, 'because the public reaction on the subject of immigration is more connected to emotions than to reality' (Uğur, 2000: 173). This indicates, then, the relative freedom from public opinion of the unelected Commission as compared to the MS governments which, of course, rely on the public for their re-election.

However, because of the Commission's lack of power as either a formal or informal agenda-setter at this stage, it had little influence, and the developing policy became increasingly restrictive. Notably, the Dublin Convention, the External Frontiers Convention and the London Resolutions all represent the development of a more restrictive policy than that previously practiced by the MS.

3.4.2. The Dublin and External Frontiers Conventions

The Dublin Convention, which did not come into force until 1997, is essentially an extension of the Schengen asylum rules to all the EU MS (Uçarer, 2003a: 25). The Convention decrees that applications for asylum to the EU must be dealt with by that MS which first receives the asylum seeker, unless there are good reasons for the case to be handled by another MS. In addition, it also rules that applications for asylum cannot be made to more than one MS (Bainbridge, 2001: 140). The main purpose of this is to avoid 'asylum shopping'. The Convention also sets out the obligations of the MS taking charge of an applicant, examining the application and the expulsion of applicants refused asylum (Hailbrunner, 2004: 74).

Moreover, the Dublin Convention sets out the relevant criteria for determining which MS should be responsible for examining the case of an asylum seeker, including place of application, family links, whether a residence permit has been issued and whether the

applicant has special ties with that country (Hailbrunner, 2004: 74). It also provides for information on asylum seekers to be exchanged between MS. However, the 1951 United Nations Convention on Refugees remains the source for the eligibility for asylum and the procedures for examining applications for asylum, which are not affected by the Dublin Convention (Bainbridge, 2001: 140).

Since coming into force in 1997, the Convention has had a mild success in reducing the burden on national asylum systems (Monar, 2000: 22). However, in support of the argument that excessively restrictive border policies simply do not work, this success has been limited. One important reason for this is that asylum seekers frequently hide their travel route or previous residence in or transit through another MS, and it can be difficult for a country to persuade other MS that this is the case (Hailbrunner, 2004: 74). As well as this, the Dublin Convention has been the subject of criticism by human rights groups, who point out that it restricts asylum seekers to only one chance of obtaining asylum in the EU (Monar, 2000: 22).

The External Frontiers Convention, meanwhile, remains unratified by Britain and Spain due to the Gibraltar issue (Hix, 1999: 315). It is also restrictive in nature in that it provided for a common list to be drawn up of countries whose nationals would need a visa to enter the EU, and for mutual recognition of 'short stay' visas of up to three months. Common procedures for the removal of illegal immigrants and overstayers were also included (Bainbridge, 2001: 275).

3.4.3. The London Resolutions

Another important set of agreements regarding asylum is the London Resolutions, signed in 1992. This is the origin of the EU's 'safe third country' approach, where countries are evaluated by risk of persecution according to the following criteria:

- Freedom
- Lack of risk of torture or inhuman and degrading treatment
- Full application of the principles of non-refoulement (Monar, 2000: 26).

If a country is considered 'safe' on this basis, asylum applications coming from that country's nationals, or from asylum seekers passing through that country are considered to be

'manifestly unfounded', and therefore will not even be examined (Guiraudon, 2004: 177). However there have been criticisms of the EU's 'hard' approach to asylum for two main reasons.

Firstly, human rights groups, as well as the UNHCR (Uçarer, 2003a: 21) (Van Der Klauuw, 2003: 36), have pointed out that this approach leads to merely superficial analysis of individual cases, and summary rejections (Monar, 2000: 21). The 'safe third country' approach has been particularly heavily criticised in this respect, as certain individuals or members of particular ethnic or social groups may face persecution even when the country otherwise appears to be a law-abiding democracy.

A notable example is that of the Roma of CEE, who may suffer from discrimination and racism in otherwise 'safe' countries, such as the Czech Republic, Slovakia or Romania during the accession process (Castle-Kanerova, 2001: 122-123). For instance, according to a survey of Czech Roma whose asylum applications for EU countries were rejected and who subsequently returned to the Czech Republic, fear for their personal safety was frequently cited as a reason for wishing to emigrate, along with high unemployment and other economic reasons (Castle-Kanerova, 2001: 122-123).

A second criticism of the EU's asylum policy is that, while it has set itself the aim of reducing the number of asylum seekers in the EU, it has not been particularly successful in achieving this. Indeed, more asylum applications were placed to the EU in 2002 than in 1997 (Guiraudon, 2004: 163) and certain countries, most notably the UK, have seen asylum applications grow considerably, again appearing to put the effectiveness of restrictive border policies into question. Moreover, only 10-20 percent of rejected asylum seekers are actually deported (Favell and Hansen, 2002).

Worse, and as has already been mentioned, restrictive asylum and migration policies may have the knock-on effect of leading to an actual increase in illegal migration. Potential immigrants and asylum seekers may attempt to circumvent restrictive rules by travelling with people-smugglers, bribing immigration officials and/or using false identity documents. The increase in people-smuggling gives particular cause for concern as it has also been linked to the trafficking of women and children against their will, and has been linked to drugs and firearms smuggling and even terrorism (Crisp, 2003: 83).

3.4.4. Neofunctionalist Commentary

In conclusion, therefore, the pre-Maastricht period effectively saw the beginnings of co-operation between MS on asylum and immigration, although this was still entirely of an intergovernmental nature and was outside the framework of the (then) EC. This co-operation, however, resulted in an increasingly restrictive asylum regime, the consequence of anti-immigration pressures from the public on the national governments involved. This developing regime, while it had little effect on the number of asylum seekers entering the EU, has dented the EU's reputation as a champion of human rights.

3.5. The Maastricht Treaty

3.5.1. Backgroud to JHA in the Maastricht Treaty

As has already been emphasised, during the period leading up to the Maastricht Treaty negotiations, pressure on the EU MS to co-operate further in asylum and immigration policies and between the police and judicial systems had increased for a combination of reasons. However, at this point it was generally felt among the MS that the intergovernmental agreements discussed above were insufficient to deal with these pressures.

Firstly, internal pressure, leading to functional spillover, arose both as a result of the Single Market programme (which included the free movement of persons) and of the Schengen agreement, which involved a lessening of control at the EU's internal borders. While the Schengen agreement arguably did necessitate a strengthening of the EU's external borders in order to compensate for the weakening of internal ones, however, it can also be argued that the single market itself is not a major cause of increased migration and crime, as only 1.5% of EU nationals live in another MS. Therefore, functional spillover in this case may have been a *perceived* necessity rather than an actual one.

The rise in migratory pressures and international organised crime is far more likely to be part of global trends (Hix, 1999: 321). These external pressures on the EU also increased, especially as a result of the collapse of Communism in CEE and the USSR, and, most notably,

as a consequence of conflicts, particularly in Yugoslavia, which led to a refugee crisis in several of the MS (Occhipinti, 2004: 184).

This increase in immigration and applications for asylum to the EU was not only a consequence of instability in the ex-Communist countries, but also resulted from difficulties in other parts of the world, notably Africa and the Mahgreb. Meanwhile, even those EU MS which were traditionally countries of emigration, such as Italy, Spain, Portugal, Greece and Ireland, became net-immigration states for the first time. As a result, by 1993 there were over 1 million legal immigrants in the EU, and racial, ethnic or religious minorities represented almost 6 per cent of the EU population by the mid 1990s (Hix, 1999: 319).

Moreover, the new permeability of borders in CEE had left some MS, especially in those neighbouring the region such as Germany, feeling particularly exposed to potential mass immigration and international crime, and therefore arguing for more European action in this area (Mitsilegas, Monar and Rees, 2003: 31).

For these reasons, too, pressure for an improvement in police and judicial co-operation also increased during this period, due to a rise in real and expected international crime. This ranged from serious crimes such as terrorism, drug trafficking, money laundering and Mafia activities, to less serious offences including football hooliganism, smuggling of tax-free goods and national cultural treasures, and distributing banned racist and pornographic publications (Hix, 1999: 321).

In 1991, Europol, an organisation intended to facilitate co-operation between the MS' police forces, was set up based on a proposal by the German government (Bainbridge, 2001: 271). The Europol convention was not, however, signed by all MS until 1995 and did not come into operation until 1998 (Hix, 1999: 317). The aim of Europol is to help MS fight cross-border crime, which it does through sharing information with national bodies, co-ordinating multinational operations and maintaining a database of information supplied by the MS (Occhipinti, 2004: 193-194).

3.5.2. Institutional Structure

However, while the need for increased co-operation was seen by probably all of the MS, there were differences, perhaps predictable ones, in their proposed solutions to the issue put forward during the 1990/1991 IGC, resulting in the formation of two opposing camps. While one group, including Germany, Italy, Belgium and Spain – mostly the traditionally 'good Europeans' - proposed that many JHA areas should be communitarised, the 'Eurosceptic' group, principally the UK and Denmark, argued both for an intergovernmental system and for the inclusion of a more limited range of policies (Mitsilegas, Monar and Rees, 2003: 32).

In consequence, the resulting arrangement was something of a 'lowest common denominator'. While JHA became the third pillar of the European Union, co-operation in this area remained largely intergovernmental in nature. This is despite the fact that the Commission did share the right of initiative with the MS, and is described in the Treaty as 'fully associated' with JHA. However, as Uçarer points out, the Commission's right of initiative in this area was actually weaker than it seems, as it was merely one of 16 potential points of origin for JHA policies (2003b: 299).

This relatively limited involvement of the Commission in JHA after Maastricht can, in part, be put down to the pragmatic stance of the Commission during the pre-Maastricht negotiations, where it showed sensitivity to the issues of national sovereignty inherent in this field by agreeing, in the short term, to take a 'backseat' in JHA, although it did aspire eventually to a greater role (Uçarer, 2001: 6).

Moreover, Commission action was also circumscribed by institutional constraints at this point, such as lack of experience in working in this field, a lack of assertive leadership (notably under Anita Gradin) and budgetary and human resource deficits, including the lack of a DG to deal directly with JHA (Uçarer, 2001: 6).

The ECJ, however, was not formally granted any jurisdiction over the third pillar and was therefore even less involved in the new JHA pillar than the Commission. Although Article K2 suggested compliance with the ECHR and Geneva Convention, this would be difficult to enforce due to the lack of legal oversight by the ECJ (Luedtke, 2004: 12-16).

Despite this, the fact that the ECJ had jurisdiction over the single market meant that, in practice, it did have an influence, albeit limited, over matters relating to the free movement of TCNs, at least when they were covered by free market legislation through being married to an EU citizen or working for an EU company doing business in another MS. It has been suggested that this constitutes a case of legal spillover as the ECJ, in these cases, was acting against the wishes of the MS, which wanted to retain full sovereignty over matters relating to TCNs (Luedtke, 2004: 12-16).

In general, though, the lack of binding legislation, such as regulations or directives, in the third pillar did weaken the ECJ's ability to act (Luedtke, 2004: 12). Instead, the actions provided for in JHA by the Treaty, such as common positions, framework decisions, decisions, implementing measures, and conventions for adoption by the MS (Bainbridge, 2001: 340), have at best an ambiguous legal status. This ambiguity also reflects the relative lack of involvement of the Commission in JHA at this time, as the Commission's preference was for more binding legislation (Uçarer, 2001: 5).

The role of the EP was also very limited in the Third Pillar, as it only had the right to be informed after the fact in JHA. The EP, however, protested against this, arguing that the intergovernmental decision-making prevalent in JHA lacked democracy and accountability and did not take human rights sufficiently into consideration. Although it did set up the Civil Liberties and Internal Affairs Committee to act as a watchdog, due to the committee's lack of power it was, according to Geddes ' rather like being barked at by a puppy' (2000: 99).

However, despite the lack of supranational involvement, it can be argued that the Maastricht provisions were a step towards further integration in that they did encourage the MS to co-operate more closely on JHA issues. Within the third pillar, nine spheres of common interest were identified in the Treaty as follows: asylum policy, rules and controls relating to the crossing of the external borders of the MS, immigration policy and residence rights of TCNs, combatting drug addiction and international fraud, judicial co-operation in both criminal and civil matters, customs co-operation and police co-operation in order to combat terrorism and drug-trafficking (Nugent, 1999: 75).

The Treaty required the MS to 'inform and consult' each other on the above issues (Bainbridge, 2001: 340). Moreover, it obliged them to set up co-ordinating mechanisms

between the relevant departments of their administrations, to be headed by the Council of Ministers at political level and the Article K4 Co-ordinating Committee at administrative level (Nugent, 1999: 76).

In addition, the JHA provisions did result in more regular meetings between interior ministers, and the adoption of more common policies. The legislation supporting these, however, tended to be of a non-binding type (such as recommendations and resolutions) which meant that their effectiveness was therefore limited (Hix, 1999: 315) and was difficult to monitor (Geddes, 2000: 104).

3.5.3. Immigration and Asylum Policies: A Step Towards 'Fortress Europe'

Despite the lack of binding legislation produced in the post-Maastricht years, intergovernmental co-operation was supported by two new bodies set up in 1994, the Centre for Information, Discussion and Exchange on the Crossing of Frontiers and Immigration (CIREFI) and the Centre for Information, Discussion and Exchange on Asylum (CIREA) (Uçarer, 2003b: 305). It can be argued, then, that during the Maastricht period asylum and immigration policy showed, in neofunctionalist terms, signs of 'spill-around', or the proliferation of intergovernmental bodies, more than of supranational spillover.

Many of the Council resolutions that were produced during this period dealt with immigration and asylum policy, with the Council adopting more than seventy measures in these areas. However, resolutions relating to both asylum and immigration tended to be of a restrictive nature. For instance, according to the 1994 Council Resolution on Admission for Employment, MS should refuse entry to workers from third countries unless a job vacancy cannot be filled by a national or EU citizen, or a TCN already legally resident (Geddes, 2000: 104).

Moreover, admission of TCNs was to be on a 'purely exceptional' basis while, according to a December 1997 Council resolution, a series of criteria for determining marriages of convenience was established. Any third country national found, as a result of these checks, to have contracted a 'marriage of convenience'[37] should be stripped of their residence permit,

[37] Separation was also to be taken as evidence of a marriage of convenience

whether their spouse was an EU national or not (Monar, 2001: 26). In contrast, there was very little legislation, either binding or non-binding, regarding the integration of migrants into the community.

In addition, during the years following the Maastricht Treaty, the development, under the guidance of the Council, of a system of readmission agreements with third countries, according to which they would be obliged to readmit rejected asylum seekers or illegal immigrants also showed that asylum policy was becoming increasingly restrictive. In 1994, a model-type readmission agreement protocol was agreed by the Council, which was followed by guidelines for negotiation in 1995 and the principles of readmission clauses to be inserted into future agreements (Monar, 2001: 26). According to the model readmission agreement, a contracting party would have to readmit the following categories of persons:

- Those holding the nationality of the state concerned
- TCNs who entered via the external frontier of that state
- TCNs who hold a valid visa or residence permit issued by the requested contracting party (Apap, Carrera and Kirişçi, 2004: 9).

The increasing restrictiveness of the post-Maastricht immigration regime, as well as its intergovernmental nature, can be exemplified by the following Council recommendations of the period:

- People suspected of illegal immigration by state organisations should be handed over to the relevant authorities. Organisations granting residence permits should also take the possibility of marriages of convenience into account.

- In an attempt to end a long-lasting misunderstanding between the UK and the other MS, the UK agreed to introduce legislation allowing inquiries into and, if necessary the relevant legal measures to be taken against companies suspected of employing illegal immigrants. The Council also recommended that MS governments could co-ordinate regarding this in areas or sectors with a high proportion of foreign workers (Uğur, 2000: 172).

In contrast, the relatively few joint actions undertaken regarding immigration and asylum in this period have tended to deal with comparatively uncontroversial issues such as easing travel restrictions on TCNs studying in the EU, a system of common transit visas in all MS and a uniform format for residence permits (Hix, 1999: 315). Others, however, have had more scope for controversy including a joint action dealing with burden-sharing regarding the admission and residence of refugees.

Regarding police and judicial co-operation, joint actions also tended to be both few and far between, as may be expected given the lack of involvement of the Commission. Moreover, they were relatively uncontroversial, mostly focusing on combatting drug trafficking and addiction, with only one joint action undertaken for tackling organised crime. Decisions, meanwhile, tended to be reserved for information exchange issues (Hix, 1999: 315).

The inclusion of JHA issues in the Maastricht Treaty, therefore, appears to be a fairly cosmetic change. Firstly, there was very little involvement of the European Commission, for both legal and institutional reasons, meaning that the policy area remained intergovernmental. Secondly, little binding legislation was produced in the post-Maastricht years. However, the legislation and non-binding agreements that were produced tended to be of an increasingly restrictive nature, most notably the development of the system of readmission agreements.

3.5.4. Neofunctionalist Commentary

From a neofunctionalist point of view, then, it can be argued that, rather than granting more competence to supranational institutions, the Maastricht period was characterised, more than by spillover, by 'spill-around', the proliferation of functionally specialised, independent, but strictly intergovernmental organisations (Schmitter, 2002: 32), such as Europol, CIREFI, and CIREA.

However, rather than institutional changes or the production of legislation, perhaps the Maastricht Treaty did have an important role to play in increasing the *expectation,* among many EU institutions and MS, that JHA matters would be increasingly dealt with at EU level (Mitsilegas, Monar and Rees, 2003: 32). It also made the public increasingly comfortable with immigration and asylum policies moving out of the national domain (Lahav, 2004a: 56).

Moreover, as shall become apparent, it can be argued that the Commission was preparing for an increased future role in JHA during this period, and that, rather than being merely a passive onlooker, it was biding its time, observing the shortcomings of the third pillar and preparing its arguments for a more active role in JHA. As Niemann points out (2006: 35-36),

> By adopting a less 'doctrinaire' and a more 'gradualist' strategy from the early to mid-1990s, the Commission had demonstrated that it could bring some added value into JHA policy-making. It generally presented well researched, creative and balanced proposals, which signalled to Member States that it could be entrusted with more powers in this politically sensitive field.

3.6. The Amsterdam Treaty

3.6.1. Introduction

As has been argued above, one of the main issues regarding JHA in the post-Maastricht years was the lack of policy progress, resulting, at least in part, from the cumbersome nature of intergovernmental decision-making procedures, which required unanimity, and often involved long-drawn out negotiations. Even when agreement was reached, the result was often a 'lowest common denominator' policy outcome, and, due to the generally non-binding nature of the policies agreed, their implementation was left to the discretion of the MS (Uçarer, 2003: 300-301). Moreover, there were concerns over the transparency and 'democratic deficit' of such methods (Uçarer, 2001: 8).

As Schmitter points out, under such circumstances, 'actors may be forced to revise their strategies and to consider alternative integrative obligations, i.e. they may reevaluate the level and scope of their commitment to regional institutions' (2002: 9). This appears to be exactly what happened in the lead-up to the Amsterdam Treaty.

The Commission, as may be expected, was particularly critical of the Third Pillar, and, in the Amsterdam IGC, saw an opportunity to increase its role. In two reports for the IGC, in 1995 and 1996, the Commission proposed the following reforms to the third pillar, which would give it more power in JHA.

- Replacement of the unanimity rule in all areas by QMV

- Extending to the Commission the right of initiative in all areas
- Developing more effective (i.e. binding) legal instruments
- Submitting decisions to review by the European Court of Justice (Schmitter, 2002: 9).

This, then, from a neofunctionalist viewpoint, is an example of cultivated spillover, according to which a supranational institution, identifying a 'gap' in policy making, seeks to further integration, thereby increasing its own power-base. The ECJ's official role in JHA was, however, not strengthened to the same extent, despite the fact that the EP, Commission and some of the MS had been calling for this throughout the 1990s.

While the Amsterdam Treaty did give the ECJ jurisdiction when national courts of 'final instance' requested rulings, it was not granted full direct effect in order to appease the UK and Denmark. Moreover, the ECJ was denied jurisdiction in all areas relating to 'internal security' and 'law and order'. However, as it is the ECJ itself that defines what constitutes 'internal security' and 'law and order' (Luedtke, 2004: 13-14), this does represent significant potential for legal spillover.

The EP also saw an increase in its involvement in JHA during this period, although it only gained the right to consultation, rather than co-decision. This can also be understood as a consequence of cultivated spillover on the part of the EP, which had consistently argued that intergovernmental border policies lack scope for policy makers and their decisions to be held to account.

It therefore called for increased supranationalisation in JHA, with a strengthened commitment to anti-discrimination and the fight against racism and xenopohobia (Geddes, 2000: 140-142), which would also, of course, increase the EP's own powers in this area. However the EP was careful to push only for consultation rather than full co-decision rights at the Amsterdam negotiations, which the MS accepted, viewing it as a minor price to pay for a more democratic and accountable image.

It can also be argued that, in addition to cultivated spillover, political spillover also made an important contribution to the increased supranationalisation of JHA in the Amsterdam Treaty. Guiraudon, for instance, argues that, as a consequence of inter-ministerial rivalry between foreign ministry officials and interior ministry officials in this policy area, the Foreign

Ministry officials, who are responsible for negotiating treaty reforms, saw the chance '… to rein in transgovernmental processes dominated by law and order civil servants that had multiplied and run amok' (2001: 11).

Such an outcome is, in fact, predicted by neo-neo functionalism. As Schmitter points out, the increase in status and resources of those ministries (and other organisations) that managed to get involved at an early stage in regional decison-making should encourage rival ministries to participate, even if they do not support integration (2002: 35).

Moreover, as Niemann argues, a certain amount of *engrenage* may have taken place among officials during the IGC itself. Several officials who took part in the pre-Amsterdam IGC noted during interviews that the atmosphere of frequent meetings, informal dinners and 'working trips' encouraged the formation of trust relationships and a sense of collective responsibility for the outcome of the conference. This, in turn, may have contributed to consensus formation and a more integrative outcome (2006: 31).

The resulting agreement, although it represented a certain degree of compromise between the position of the Commission and that of the more Eurosceptic MS, significantly increased the constitutional position of the Commission in JHA. The main change was the transferral of immigration and asylum co-ordination, including visas, asylum, immigration, refugees and displaced persons, as well as judicial co-operation in civil matters to the first, 'Community' pillar. Police co-operation and judicial co-operation in criminal matters, on the other hand, remained under the third pillar (Nugent, 1999: 84).

Although the MS agreement to these changes has been described by Uçarer as 'quite remarkable' (2001: 10) they were largely postponed for seven years, until 2004. In particular, unanimity and the consultation procedure applied to visa policy until 2004, when it was automatically replaced by QMV with co-decision (Nugent, 1999: 84).

Transferral of any or all the other 'pillar 1' JHA policies to co-decision and QMV, however, was made dependent on a unanimous Council of Ministers vote in 2004 (Eisl, 1999: 171). This was despite the fact that both the Irish and Dutch Draft Treaties foresaw an automatic transition from unanimity to QMV; this was, in fact scuppered by Chancellor Kohl, who was

facing domestic pressure against the transfer of JHA decision-making to Brussels (Uçarer, 2001: 10-11).

On the other hand, the Treaty provided that, after the five-year period, the Commission would automatically assume the sole right of initiative. Moreover, even on the third pillar, the Commission's decision-making position was improved, in comparison to the Maastricht situation, by giving it the right of initiative in police and criminal justice co-operation, an area where it had previously had no decision-making powers (Uçarer, 2001: 10-11). This 'communitarisation', despite its limits, has had several advantages concerning efficiency, including more openness, simpler decision-making, more effective legal instruments and judicial control (Eisl, 1999: 171).

3.6.2. The Incorporation of the Schengen *Acquis*

Another innovation of the Amsterdam Treaty which was to have important consequences for the development of JHA was the incorporation of the Schengen *aquis* into the EC/EU framework, as a protocol annexed to the TEU and TEC (Nugent, 1999: 84). The abolition of internal border controls in 'Schengenland' was largely completed by 1995, but necessitated measures to offset any actual or potential internal security risks arising as a result.

This system has now developed to such an extent that it can almost be compared with a state internal security system (Monar, 2000: 8). The incorporation of the Schengen *acquis* was therefore a daunting task, not least because it involved its publication and giving it a legal character (Guiraudon, 2001: 11).

The incorporation of the Schengen *acquis* can be considered largely the result of cultivated spillover on the part of the Commission, more precisely the Commission negotiatiating team headed by Michel Petite, whose 'Protocol Integrating the Schengen Acquis in the Framework of the European Union' was adopted. Guiraudon suggests that Interior and Justice officials were taken aback as they did not fully grasp the contents of the vague and complex Schengen agreement themselves (2001: 11).

Moreover, the Commission was supported in this by political spillover from Foreign Affairs ministers, who are responsible for negotiating treaty revisions. These ministers were keen to

'get their own back' on the Interior and Justice ministries who had dominated Schengen (Guiraudon, 2001: 11). Schmitter calls this the 'domestic status effect', in which ministries compete for the resources and status that comes from involvement in regional decision-making (2002: 35).

An important consequence of the incorporation of the Schengen *acquis* was that the British and Irish 'opt-out' from Schengen was the first formal example of the use of 'enhanced co-operation'. However, these were not the only MS not to be able to immediately participate in Schengen, as countries such as Greece and Italy were kept waiting for seven years before they were considered to have fulfilled the criteria for becoming full participants in the system (Monar, 2000: 7-9).

In addition, Spain has blocked the UK and Ireland's attempts to join substantial parts of the Schengen *acquis* in order to put pressure on Britain over the Gibraltar dispute (Monar, 2000: 8). It is able to do this through a clause in the Amsterdam negotiations stating that a decision to admit the UK and Ireland to Schengen can only be taken by a unanimous vote of the Schengen members.

Moreover, due to its 'special island status' the UK opted out from the Amsterdam Treaty's free movement of persons title, and was followed by Ireland, which wanted to maintain its Common Travel Area with the UK, and Denmark, which also argued that it had a 'special position' (Nugent, 1999: 84). While Denmark, however, has definitively chosen to opt out, Britain and Ireland's opt outs have an 'opt-in' clause included, enabling them, at least theoretically, to participate fully should they so wish (Uçarer, 2003: 302).

This tendency towards 'opt-outs' and 'enhanced co-operation' appears puzzling from the point of view of traditional neofunctionalism. After all, if the *finalite politique* of neofunctionalism is a federal state, it is difficult to explain the non-participation of some MS in certain policy areas. However, Schmitter's neo-neo-functionalism model is more accepting of opt-outs and lengthy derogations (2002: 41) as it is more flexible in its *finalite politique,* predicting a regional organisation based on MLG and PCG rather than a federal state as the result of neofunctionaist integration.

3.6.3. Asylum and Immigration Policy

Concerning asylum and immigration, the Amsterdam Treaty obliged the Council to develop common policies by May 2004 (five years after the entry into force of the Treaty) in the following areas relating to the development of a common asylum policy and the harmonisation of rules of entry and residence for non-EU citizens (Guiraudon, 2004: 165):

- Standards and procedures for checking people crossing the EU's borders
- A common list of countries whose citizens need visas for visiting the EU
- Conditions under which TCNs can visit the EU for up to three months
- Standards and procedures for dealing with asylum seekers and refugees,
- Minimum standards for the temporary protection of *de facto* refugees
- Common rules regarding immigration, including common conditions of entry and residence, and common rules on illegal immigration and repatriation
- Measures defining the rights and conditions under which TCNs can work and reside anywhere in the EU (Hix, 1999: 316).

In addition, the following were also required to be adopted, although not necessarily by May 2004:

- Minimum standards for receiving asylum seekers, the granting and withdrawal of refugee status.
- A system to ensure burden-sharing for EU countries receiving displaced persons
- Common policies for issuing long-term visas and residence permits
- Common policies to combat illegal immigration and residence
- Joint measures defining the rights of legally resident TCNs to relocate within the EU (Uçarer, 2003: 301).

Therefore, it can be seen that, while the overall emphasis was still rather restrictive, the fact that the rights of TCNs, immigrants and asylum seekers are mentioned suggests that some concessions were made to those who favoured a more liberal policy frame. This can be partly put down to political spillover on the part of NGOs, particularly pro-migrant groups. The Migration Policy Group, for instance, managed to link migrant integration to the EU's declared 'war on social exclusion', much discussed during the 1996 IGC. Similarly, the

Starting Line Group successfully proposed an anti-discrimination clause to the same IGC (Guiraudon, 2001: 17-18).

However, the focus remained on the control of potential immigrants and asylum seekers. It can be said that two separate lists of countries which require visas to visit EU countries developed during this period. The EU list, based on EC Regulation 574/99, consisted of 101 countries which require visas to visit the EU. The Schengen list, however, with a total of 135 countries, was notably more restrictive. The difference can largely be explained by Britain's willingness to allow citizens of several Commonwealth countries to enter without a visa (Monar, 2000: 23).

On the other hand, as Guiraudon points out, the Schengen negative visa list contains three quarters of non-EU countries including most developing countries apart from the wealthier ones (oil-rich states or Asian 'tigers'). Moreover, EU MS have been known to move states to the 'blacklist' following a significant increase in migration from those countries. For instance, this was Spain's reason for moving Ecuador to the list in 2003, provoking the Ecuadorian president to point out that 'when the Spanish came to America, nobody asked them for a visa' (2004: 176-177).

Moreover, the immigration and asylum policy provisions in the Amsterdam Treaty are a prime example of Europe *'a la carte'*. Britain and Ireland negotiated a 'selective opt-in', which means that they participate on a case-by case basis, while Denmark, in spite of being a member of Schengen, co-operates only on visa policy, meaning that each new decision necessitates the signing of a separate Denmark/EU treaty (Guiraudon, 2004: 169).

In general, then, there is increased supranationalisation of asylum and immigration policy in the Amsterdam Treaty. This is, however, incomplete, particularly with regard to the ECJ and EP, resulting in less judicial and democratic control of policy making than at national level. Consequently, although there are some nods to the goals of human rights for TCNs and integration of immigrants, the policy does, in practice, remain rather restrictive, partly because, as Geddes points out, the limited involvement of the ECJ and EP tends to reduce the scope for 'social and political spaces' for migrants (2000: 130).

3.6.4. Police and Judicial Co-operation

In contrast to asylum and immigration, co-operation in criminal matters was left in the third (intergovernmental) pillar, and would deal with combatting crime, terrorism, offences against children, trafficking in persons, drugs and arms, corruption and fraud. In order to further approximate the criminal justice systems of the MS, looser co-operation between police forces, customs and judicial authorities and Europol was envisaged (Uçarer, 2003: 302).

Moreover, despite the fact that police and criminal judicial co-operation remained in the third pillar, there was a certain degree of communitarisation in comparison to the Maastricht arrangements. As has been pointed out, although the intergovernmental framework was maintained for criminal matters, the Commission, for the first time, shared the right of initiative with the MS, while the EP gained the right to be consulted (Uçarer, 2003: 302).

In addition, the ECJ, for its part, was now allowed to make preliminary rulings, but only with the assent of the MS. Moreover, in order to overcome the slow progress demonstrated in this area in the post- Maastricht years, the Treaty envisaged greater use of binding instruments such as framework decisions and legally binding conventions (Uçarer, 2003: 302).

The Amsterdam Treaty also identifies the creation of the AFSJ as the key aim of JHA (Bainbridge, 2001: 11-12). However, the substance of the AFSJ is only vaguely laid out in the Amsterdam Treaty, which refers to the assurance of the free movement of persons and to 'appropriate measures' regarding external border controls, asylum, immigration, and the prevention and combating of crime. The 1998 'Action Plan on how best to implement the provisions of the Treaty of Amsterdam on an Area of Freedom, Security and Justice', adopted on the basis of a Commission communication, went some way towards clarifying the concept (Monar, 2000: 3)

The Action Plan defines 'freedom', in addition to the free movement of persons, as the 'freedom to live in a law abiding environment', achieved through effective action at both the national and European levels. This is in line with the objective stated in the Amsterdam Treaty, which is to 'provide citizens with a high level of safety' within the AFSJ, and clearly implies that the concepts of freedom and security in the context of JHA are interlinked (Monar, 2000: 4).

However, according to the Action Plan, the provisions laid down in the Amsterdam Treaty are not intended to replace national security measures. Therefore, although there may be an increased homogenisation of security practices at the EU's external borders, internally the EU will continue to be made up of separate, if interconnected, security zones. This is in response to the reluctance of some MS to give up control of national internal security instruments (Monar, 2000: 5).

3.6.5. Neofunctionalist Commentary

In conclusion, then, the Amsterdam Treaty saw increased, albeit postponed, communitarisation of many aspects of JHA. On the other hand, the Amsterdam JHA arrangements are also a good example of enhanced co-operation, so this is a rather 'lop-sided' communitarisation. While this may be viewed with suspicion by traditional neofunctionalists, it is more accepted by neo-neofunctionalists (Schmitter, 2002)

Moreover, although the Commission, until 2004, had little actual increase in its power, it became more active during the post-Amsterdam period by taking the initiative where it saw the chance, as in the preparation of the 'Action Plan on how best to implement the provisions of the Treaty of Amsterdam on an Area of Freedom, Security and Justice', in order to make itself increasingly indispensable in this area.

In addition, perhaps due to the increased involvement of the Commission during this period, the policy objectives, particularly regarding immigration and asylum, are less uniquely restrictive as some more liberal issues are also addressed, notably measures defining the rights and conditions under which TCNs can work and reside anywhere in the EU, standards and procedures for dealing with asylum seekers and refugees (Hix, 1999: 316) and Joint Measures defining the rights of legally resident TCNs to relocate within the EU (Uçarer, 2003: 301).

3.7. The Tampere and Seville European Councils and Beyond

3.7.1. Tampere and the AFSJ

The establishment of the AFSJ was further discussed at the special European Council meeting in Tampere in 1999 (Bainbridge, 2001: 11-12). 'Freedom' covers the free movement of persons, human rights, measures against discrimination and matters relating to asylum and immigration. 'Security' includes measures taken against organised crime, terrorism, fraud and drug trafficking. 'Justice', meanwhile, encompasses equal access to justice, judicial co-operation, the cross-border enforcement of justice in civil matters, the definition of categories of offence and the corresponding sentences, and mutual assistance in criminal matters (Bainbridge, 2001: 12).

The AFSJ was supposed to be based on the principles of democracy and transparency in response to criticisms from sectors of public opinion and from institutions of the EP about the increasing secrecy and unaccountability which was characterising JHA co-operation (Eder and Trenz, 2003: 112-113). In this case, therefore, it can be argued that both political spillover, in the form of public opinion, and cultivated spillover, paticularly on the part of the EP, appear to have contributed directly to the creation of the AFSJ.

Importantly, perhaps as a result of its previous efforts, the Commission was given a new role at Tampere, in that it was asked by the MS to keep track of, and report on, progress made in all of these areas (Uçarer, 2003: 305). It does this by publishing a detailed 'scoreboard' covering all the relevant areas, which was originally published as a Commission Communication in March 2000, and is brought up to date every six months (Bainbridge, 2001: 12).

The scoreboard now contains around fifty objectives, divided into eight separate areas, the specific actions needed to achieve them, the actor(s) responsible (EU instiution or MS), the timetable and the current situation regarding tansposition into national law (Occhipinti, 2004: 186). The scoreboard can be viewed as part of an effort to make JHA more transparent, one of the main aims of the AFSJ given public dissatisfaction with the secretive nature of decision-making in this area (Eder and Trenz, 2003: 112-113).

Moreover, the Commission also gained ground in the area of asylum, where it was asked by the MS to make exclusive use of its right of initiative, a move that was not foreseen, according to the Amsterdam Treaty, until 2004. This resulted in a number of initiatives, including two directives on temporary protection and minimum asylum standards (Uçarer, 2001). Interestingly, and in line with the hypothesis put forward in this chapter, the Commission's proposals appear to have been of a relatively liberal and human-rights oriented nature, which can be contrasted to the restrictive outcomes typical of intergovernmental bargaining.

In addition, during this period, the Commission's institutional ability to act was also improved by the creation of the DG for JHA, which brought with it almost a tripling of the number of Commission staff working directly on JHA, including experienced, high-ranking officials from other DGs. Moreover, an improvement in relations between the cabinet of the energetic new JHA commissioner Antonio Vitorino and the DG JHA officials also helped to increase morale and encourage a common sense of purpose (Uçarer, 2001).

3.7.2. Immigration and Asylum

Regarding immigration and asylum, Tampere was notable for being the first occasion at which the Council itself had called for a common EU asylum and immigration policy and, moreover, had set out the blueprint for such a policy, including common entry and post-entry standards for asylum seekers and the management of immigration policy (Moraes, 2003: 119-120).

This was also reflected, as has been pointed out above, in the granting of the sole right of initiative in asylum policy to the Commission (Uçarer, 2001: 13-14). Moreover, the Council also recognised the role of public opinion in influencing EU co-operation on immigration and asylum policy when it called for strong leadership to shape public opinion in favour of further communitarisation in these areas (Lahav, 2004a: 1153).

The approach towards immigration and asylum adopted at Tampere included a so-called 'root causes' approach aimed at tackling migratory pressures in migrants' and asylum seekers' countries of origin, including combatting poverty and political instability (Uçarer, 2003: 305). This approach had been strongly advocated by the Commission since 1994, and, in 1998, the

High Level Working Group on Asylum and Immigration (HLWG) came into existence. It prepared six Action Plans (on Albania/Kosovo, Afghanistan, Iraq, Morocco, Somalia and Sri Lanka), which advocated closer co-operation between the EU and countries of origin and transit, in time for the Tampere Council (Uçarer, 2003: 305).

In addition, however, as part of the Tampere programme, the EU also started to negotiate collective readmission agreements with some third countries of origin. So far, the EU has negotiated such agreements with Hong Kong, Macao and Pakistan, and has a mandate to start negotiations with Albania, Turkey, Algeria and China. However, there has been concern about the lack of differentiation between irregular migrants and would-be asylum seekers in these agreements (Uçarer, 2006b: 12)

Regarding asylum, the MS resolved to create a Common European Asylum System (CEAS), which was to be based upon the adoption of four key pieces of legislation by May 2004. These were the Council Regulation on determining the state responsible for reviewing claims (Dublin II), a Directive on Reception Conditions, a Directive on Qualifications for refugee or subsidiary protected status, and a Directive on Procedures for processing an asylum application. In addition, Tampere called for the adoption of a measure on temporary protection based on the principles of solidarity and burden sharing (Uçarer, 2006b: 11).

Of the four, the Directive on Procedures proved to be the most controversial. In particular, it rasied two sets of issues. Firstly, there was a perceived incompatibility with the EU's regional and international legal obligations[38]. Secondly, there were worries that the Directive could give rise to onward refoulement of rejected asylum seekers (Uçarer, 2006b: 13).

These debates were further fuelled by refugee crises in some southern EU states. First, 220 Eritrean asylum-seekers were removed from Malta in 2003 and returned to their country of origin where they were arrested on arrival. In January 2004, Italy deported 1,500 individuals from Lampedusa to Libya. Finally, in September 2005, a large group of sub-Saharan Africans who tried to enter the Spanish territories of Ceuta and Melilla were returned to Morocco. All of these incidents provoked criticism from NGOs related to breaking the principle of non-

[38] It was especially criticised for limiting access to the rights, granted by the ECHR and Geneva Convention, to lodge an application and enjoy due process, including the ability to appeal negative decisions.

refoulement and of dumping responsibility for border control and refugee protection onto neighbouring countries (Uçarer, 2006a: 14).

Despite this, however, declarations at Tampere regarding the need to treat TCNs fairly, fight racial and ethnic discrimination, respect international obligations and consider labour market needs for foreign workers indicate that the EU was considering a rather 'softer' approach to asylum and immigration. This new approach may have also been influenced, as has been pointed out above, by the Commission's new right of initiative in asylum policy.

Moreover, perhaps due to improved economic conditions in the EU, both the European Commission and individual MS such as Germany and the UK were proposing that a zero immigration policy was both impractical and not in the best interests of the EU (Guiraudon, 2004: 170) giving the demographic ageing of the EU's population.

However, despite the Commission's increased powers and activity, this new approach to immigration and asylum was to prove short-lived. The Seville Summit of 2002, for example, focused entirely on combatting illegal immigration, reflecting the change of mood following the events of September 11 2001, and the consequent electoral breakthroughs made by extremist parties in several EU countries (Guiraudon, 2004: 171). In addition, due to the rise of these extremist parties, otherwise moderate governments and opposition parties have come under pressure to 'talk tough' on migration (Crisp, 2003: 83-84).

In general, at this time national migration and asylum policies were becoming more hard-line, as exemplified by Italy's fingerprinting of all new entrants, Austria's imposition of compulsory learning of German for immigrants and the passing of a Danish law preventing any Dane aged under 24 from living in Denmark with a non-EU spouse (Moraes, 2003: 123-124).

In short, migration was further securitised, and connected with terrorism in European minds, in the follow-up to September 11. This hostile attitude could also be seen to extend to asylum seekers, particularly those from countries associated with radical Islam, terrorism and/or political violence (Crisp, 2003: 82).

Moreover, due to this 'hardening' of public opinion, it can be argued that, even in countries where extremist parties had relatively little influence, such as the UK and Spain, governments were beginning to take a more 'far-right' type stance towards immigration and asylum. In these countries in particular, public opinion was also influenced by intensive media coverage of incidents such as the Sangatte refugee crisis between Britain and France and the supposed link between illegal immigrants and crime in southern Spain (Moraes, 2003: 123).

In consequence, then, there was pressure from the MS for further EU action to prevent illegal migration and limit the number of asylum seekers. As an example of this new change in attitude, the 2003 UK proposal that demands for asylum should only be processed in special refugee camps, or 'safe havens', was criticised only by Germany and Sweden, in spite of the fact that it would be breaching the principle of *non-refoulement* in the Geneva Convention and would also be incompatible with the Dublin Convention (Guiraudon, 2004: 177-178). Other examples include France's proposal to set up charter flights to deport illegal entrants to the EU, and Greece's offer to set up a training course for a future EU border police force (Moraes, 2003: 125-126).

The Greek presidency of 2003, however, showed that the more comprehensive Tampere approach to immigration and asylum was not altogether defunct, by pushing for the managed migration agenda, family reunion legislation and further progress on migrant integration policies (Moraes, 2003: 128).

In addition, a Commission communication on immigration, social policies and integration published in the same year, advocating co-ordination of labour migration rules and integration policies, which have so far been left up to the MS, also indicates that the Commission has continued to support the Tampere approach. In this communication, the Commission once again argued that zero immigration was not an option because of the EU's rapidly ageing population structure, and that migration would in any case continue as long as levels of welfare varied widely between countries (Moraes, 2003: 125).

The Hague programme, in force between 2005-2010, also hints at a less uniquely restrictive approach to immigration, although there is still a lot of emphasis on border controls. Firstly, it acknowledges that legal migration will play a more important role in economic development in Europe and will contribute to the Lisbon strategy. In addition, it views the development of

legal migration opportunities as a way of combatting illegal migration (Van Selm, 2005). On this basis, the Commission was asked to come up with an action plan by the end of 2005. However, this will not be legally binding, and the MS will retain the right to determine the volume of immigration.

As well as this, the Hague programme indicates that there is some interest at EU level in the integration of TCNs. In particular, it includes a new action plan regarding equality of chances, including for immigrants. As well as this, a 2003 directive allows immigrants to acquire long-term resident status after staying in the EU for five years, thus granting them a more secure status than previously. However, this is subject to conditions such as the financial situation of the applicant, and their level of integration. As well as this, the Hague programme develops the idea of partnership with third countries of origin in migration issues, also extending it to refugee protection (Van Selm, 2005).

While this seems like significant liberalisation, however, the changes put forward in the Hague Programme do not go far enough according to the CEPS policy think tank. It argues that the AFSJ is at a crossroads, as it is facing opposition in some MS circles both from groups concerned about the loss of sovereignty and from public concern about transparency and rights (Carrera, 2006).

CEPS, therefore, maintains that the only way for the AFSJ to escape this impasse is by increasing both the communitarisation in this area and the emphasis on the 'freedom' aspect of the AFSJ (Carrera, 2006). Thus, from a neofunctionalist perspective it can be argued that JHA is facing a crisis in integration, which will lead the actors involved to consider new strategies. Interestingly, the EU public is also calling for an increase of EU decision making in border policy, with an average of 72% support for further EU involvement in border policy across the EU-25 (Eurobarometer, 2007).

3.7.3. Police and Judicial Co-operation

Police and judicial co-operation was also a priority at Tampere, notably the plan to create a European Judicial Area, including mutual recognition of judicial decisions which would replace the standard of 'double-criminality', which demands that MS define and sanction crimes in the same way (Occhipinti, 2004: 186), cross-border information exchange for

prosecutions and minimum standards for civil procedural law, which was supported by French Minister of Justice Elizabeth Guigou (Uçarer, 2003: 306). Generally speaking, therefore, the area of freedom, security and justice was to be built on mutual recognition of criminal codes, and co-operation in fighting crime (Occhipinti, 2004: 186).

In addition, it was decided that Europol was to lead efforts to fight organised transnational crime, trafficking in human beings, and terrorism. In addition, a European Police Chiefs Operational Task Force was set up at the Lisbon Council of 2000. This organisation, which brings together high-level officials from the MS' police forces in six-monthly meetings, shares best practices and information on current trends in international crime, as well as defining priority areas (Occhipinti, 2004: 194) (Uçarer, 2003: 306).

Moreover, another new institution, the European Judicial Co-operation Unit, or Eurojust, composed of judges, prosecutors and police officers taken from the MS, was also set up at Tampere. Its aim was to improve the co-ordination of national prosecution authorities, and to support criminal investigations in cases of organised crime (Bainbridge, 2001: 178-179). It is also supposed to co-operate closely with the European Judicial Network, which was set up in 1998 on the basis of Article K3 of the Maastricht Treaty in order to facilitate judicial co-operation (Bainbridge, 2001: 232).

The September 11, 2001 terrorist attacks can be said to represent the culmination of a fundamental change in the perception of terrorism in Europe. Although, as has been pointed out, co-operation against terrorism was one of the main *raisons d'etre* of the original Trevi group, as a result of the 2001 events the focus shifted from 'home grown' terrorist groups, such as the IRA or ETA, to imported international terrorism requiring, in the view of EU publics and elites, a response which could be best provided at EU level (Den Boer, 2003: 1).

The EU's most immediate reaction following September 11 was to convene an Extraordinary EU Council on JHA on 21 September 2001, which gave the EU new impetus to adopt anti-terrorist policies. Firstly, it enhanced Europol's role by creating an anti-terrorism task-force within it, and called for the co-operation of national intelligence agencies and police forces to share relevant information with it. By December 2001, there was already more co-operation between the MS and Europol regarding this issue (Occhipinti, 2004: 189).

In addition, the Council decided to speed up the adoption of the Framework Decisions on Terrorism (which provided a common definition of terrorism and minimum sentences for terrorist offences), deemed necessary as only six MS had legislation specifically directed against terrorism (Occhipinti, 2004: 189), and the European Arrest Warrant, which would replace the previous, rather lengthy extradition process. Both were adopted in June 2002 (Uçarer, 2003: 309).

However, neither of these measures was without controversy. The MS were keen to show that the definition of terrorist acts would not preclude legitimate public protests, peaceful demonstrations or the right to strike and join trades unions, in response to fears that this legislation could be used to break up anti-globalisation demonstrations (Occhipinti, 2004: 189-190).

The European Arrest Warrant proved even more controversial, although it was eventually agreed upon by all MS, after appeal procedures and other safeguards were included, most notably concerning the possibility of extradition to a country where the death penalty was carried out, removal of the double criminality principle[39], and the broad extension of the warrant to 32 crimes (Den Boer, 2003: 7).

There were concerns in particular that Ireland would use the warrant to extradite someone suspected of having an abortion, resulting in abortion being left off the positive list of crimes (Occhipinti, 2004: 189-190). In addition, there were fears on the part of countries such as the Netherlands, which had special legislation on euthanasia and abortion, that these would be included in the warrant (Den Boer, 2003: 6).

In spite of the fact that most of these difficulties were eventually 'ironed-out', however, the warrant was originally opposed by Ireland, which argued that it included crimes such as 'extortion' and 'swindling' for which there was no common definition, and by Italy, over concerrns about its own constitutional situation and civil liberties or, according to rumour, because of Berlusconi's personal fear of being extradited over tax fraud (Occhipinti, 2004: 190-191).

[39] According to the concept of double criminality liability, an offence must be recognised by both states. Its removal, therefore, means that the offence in question needs only be subject to criminal law in the requesting state

Although agreement was eventually reached with these countries, the effectiveness of the warrant may be undermined by the absence of legal machinery to punish a MS that does not fulfill its obligations, as only another MS, rather than the Commission, can initiate proceedings in the ECJ in this case (Den Boer, 2003: 6).

Other measures included the Framework Decision on the Freezing of Assets of Suspects, which was originally proposed in November 2000 to cover drug trafficking, EU budget fraud, money-laundering, counterfeiting of the euro, corruption and trafficking in human beings, and involved the immediate freezing of assets or evidence from another MS (Den Boer, 2003: 7).

After September 11, this was expanded to include terrorism, resulting in over 100 million euros of assets of terrorist suspects being frozen (Den Boer, 2003: 7). In addition, the Council pushed for an increased effort in combatting falsified and forged travel documents and visas (Uçarer, 2003: 309). As is the case for asylum and immigration policy, however, there has been criticism of the 'democratic deficit' in this area. More recently, in 2006 the Supreme Council on Counter Terrorism was established, which proposes recommendations to be issued by the Council of Ministers (European Union, 2007).

3.7.4. Neofunctionalist Commentary

In conclusion therefore, the terrorist attacks of September 11 2001, as well as the succeding attacks on European soil on March 11 2003 and July 7 2005, can be identified as an exogenous functional pressure for co-operation in JHA, in particular in the areas of police and criminal co-operation. While the resulting co-operation has been still largely intergovernmental in nature, the fact that agreement was reached on some very sensitive and controversial issues points to significant integration in this area.

3.8. The European Convention and Constitutional Treaty

3.8.1. The European Convention

In 2002, Schmitter asks if the 2002-2003 Convention is likely to lead to a transforming cycle, or a situation in which the role of the actors and institutions are finalised and the EU is given its definitive shape. Although he is doubtful that the Convention will lead to a transforming cycle, the fact that he poses the question indicates that he considers the EU is at a suitable stage in its development to undergo this, i.e. that the initiating and priming cycles have been completed (Mariscal, 2004: 4-5). As Schmitter himself debates:

> It is possible that the so-called 'Convention' might generate such an outcome, i.e. delimit definitively the territorial scope of the Euro-polity, define the nature and scope of common institutions, and assign these functions (competences) to specific levels of governance. If the EU were at this point in its development (which I doubt), it would presently be in what I will call below a 'transforming cycle' (2002: 26)

In fact, the resulting Constitutional Treaty does not completely respond to Schmitter's criteria. While it calls itself a Constitution, and grants the EU a legal personality there are still limits on integration and on supranational decision-making. In Mariscal's view, however, the Constitutional Treaty will trigger a transforming cycle in the future if and when it creates a sense of common identity and a European 'demos' (2004: 5)

However, the Constitutional Treaty is, at present, frozen after the negative votes in the French and Dutch referenda of 2005. Although the motives of the French and Dutch electorates for rejecting the Treaty are not entirely clear, several hypotheses have been put forward, including protest at their *national* governments performance or at the prospect of further EU enlargement, particulary to Turkey. Another hypothesis is that these publics perceived the changes included in the Constitutional Treaty as too far reaching, although it does not by any means intend to turn the EU into a federal state. Despite the relatively limited outcome of the Treaty, then, it may go too far for many.

If the Constitutional Treaty is accepted as a potential transformation cycle, or an attempt to define the EU's *finalite politique,* neo-neo functionalism indeed predicts that, due to its

complexity and far-reaching potential for change, such a step is likely to be extremely controversial and has a high risk of being scuppered by one or more countries. As Schmitter argues,

> The bypassing of prior changes at the national level (especially at the level of loyalty and legitimacy), the resistance to activism on the part of regional bureaucrats unaccountable to the citizenry, the reaction of governmental decision-makers to the erosion of their monopolistic control over certain policy areas … have an enornous potential for generating conflict (and encouraging defection by particular countries) (2002: 36). .

JHA was one of the policy areas which was paid most attention in the Laeken Council. This was a result of the mid-term review of the Tampere provisions, but was also a consequence of the increased urgency in this area particularly due to the September 11 attacks. The Laeken Council was invested with three main goals regarding JHA;

- To carry out a critical review of developments in JHA since Tampere
- To stress the importance of strengthening judicial co-operation (Eurojust) in the context of the fight against terrorism
- A redefinition of the guidelines for asylum and migration policies, with the intention of giving them a new impetus (Faria, 2002: 1)

In general, however, the Laeken Council was faced with the same concerns as the Tampere Council. Principally, these were the impression that too little progress had been made, on the one hand, and concerns, particularly from NGOs, that rapid development and securitisation in this area could be at the cost of human rights, democracy and transparency (Faria, 2002: 1).

3.8.2. Institutional and Legal Changes to JHA

The Constitutional Treaty recasts the entire legal structure of JHA and the AFSJ by replacing the existing ‘pillar’ framework with a single framework covering all aspects of JHA (Monar, 2005: 4). In other words, the current system in which asylum, immigration, border controls and judicial co-operation in civil matters are included in the first ‘communitarian’ pillar while judicial co-operation in criminal matters and police co-operation fall under the third ‘intergovernmental’ pillar is abolished under the Constitutional Treaty. This is part of the

general focus towards unity in the Constitutional Treaty as a whole (Walker, 2004: 31).

The Constitutional Treaty aims to improve the democratic legitimacy of the policy by further involvement of the EP, which will adopt measures together with the Council, and the ECJ, which will have judicial control over the area, although this remains limited in the area of policing. However, significant parts of the ex-third pillar will continue to be covered by the assent or consultation procedures, rather than co-decision, including those areas of criminal law explicitly set out in the Constitutional Treaty as eligible for approximation (Walker, 2004: 32-33).

The Commission, meanwhile, will have the sole right of initiative, which it previously shared with the Council, although a quarter of MS can still propose legislation in the area of co-operation on criminal matters. In addition, QMV largely takes over from unanimity in the Council, making decision-making more efficient (although arguably less democratic).

In spite of this, to a large extent, co-operation in criminal judicial matters and police co-operation will still be covered by unanimity (Monar, 2005: 5) especially in particularly sensitive areas. These include the European Public Prosecutor, operational co-operation between national law enforcement authorities, the cross-border competence of national law-enforcement and judicial authorities, and extension beyond the provisions laid down in the Constitutional Treaty of procedural and substansive criminal law (Walker, 2004: 32).

Therefore, in spite of the abolishment of the pillar structure in JHA by the Constitutional Treaty, and the extension of QMV and unanimity, what Monar calls the 'ghost of the third pillar' (2005) continues to haunt police and criminal judicial co-operation. It does so in the form of the continuation of unanimous voting, the shared right of initiative and the use of the assent or consultation procedures rather than co-decision. This is despite the fact that the EU public is clearly calling for an increase in EU action especially in those areas of JHA which currently belong to the third pillar, most notably in the fight against organised crime and trafficking, and the fights against terrorism and drug abuse (Eurobarometer, 2007a: 3)

Another important institutional change made to JHA in the Constitutional Treaty is a significant increase in the role of the ECJ. Importantly, it now gets full jurisdiction, in the form of direct effect, over immigration policy, with the exception of quantities of legal

immigration which, on the insistance of Germany, will continue to be determined by the MS. This is a remarkable development when it is recalled that, in the Maastricht Treaty, the ECJ had no jurisdiction whatsoever over JHA (Luedtke, 2005).

An analysis of the period leading up to the Convention, and the dynamics of the Convention itself, indicate the presence of all three types of spillover. Functional pressures for the further Communitatisation of JHA at this time were primarily exogenous in nature, namely the impending enlargement to 10 CEE and Mediterranean countries (Niemann, 2006: 26).

In particular, there was concern that issue areas such as Title IV that were still subject to unanimity would be subject to deadlock once the number of MS rose to 25. In addition, there was dissatisfaction with the EU's performance in achieving the goals that had been set out in the Treaty of Amsterdam and Tampere. The Commission's AFSJ 'Scoreboard' served to highlight these delays (Niemann, 2006: 26).

Regarding political spillover, it can be argued that there was considerable *engrenage* among officials during the Convention, particularly as a result of its opening listening and reflection phase. This early phase of the Convention encouraged a deeper understanding of other members' positions, while the focus on working groups later on may have also encouraged the development of an 'esprit de corps' and the sense of joint responsibility for the Convention's outcome (Niemann, 2006: 34-35).

Concerning cultivated spillover, the Prodi Commission, having recovered its self-confidence after the Santer Commission's resignation in 1999, was far more active during this IGC than it had been during the 2000 Nice Treaty IGC. In this it was also helped by the structure of the Convention, which was far more 'open' than that of previous IGCs (Niemann, 2006: 34-35).

For instance, the Commission could make its point, that the current decision-making rules were inadequate for the fulfillment of the Amsterdam and Tampere objectives, through personal contacts with national officials, interviews and the presentation of papers. In addition, the open style of the Convention and the atmosphere of discussion there meant that all arguments and positions, including that of the Commission, were considered more seriously by the participants than may have otherwise been the case (Niemann, 2006: 40).

3.8.3. Policy Innovations

Regarding policy, the main innovation of the Constitutional Treaty is its provision for the establishment of a common European asylum system, including a uniform status for refugees and common procedures, and the setting out of guiding principles of the common immigration policy. These involve striking a balance between the effective management of migration flows, while ensuring fair treatment for legal immigrants. Thus, there are clear attempts to consider a more balanced, less uniquely restrictive policy here.

The Constitutional Treaty uses the term 'common policy' in the area of asylum policy, building on the already close integration in this area resulting from the Tampere Council. The further integration in asylum proposed in the Constitutional Treaty includes the following:

- A 'uniform status of asylum'
- A 'uniform status of subsidiary protection'
- Common procedures for the granting of and withdrawal of asylum and subsidiary protection status
- 'Partnership and co-operation' with third countries for the purpose of managing inflows of people applying for either status (Monar, 2005: 9-10).

The Constitutional Treaty also expects the MS to establish a common policy in the area of immigration, which seems ambitious considering that the previous level of integration was rather less than in the area of asylum (Monar, 2005: 10). The following points are included:

- Efficient management of migration flows (although MS will keep their right to determine 'volumes of admission')
- Fair treatment of legally resident TCNs
- Enhanced combatting of illegal immigration and trafficking in human beings
- Provisions on measures against illegal immigration and unauthorised residence
- Readmission agreements with third countries (European Union, 2004: 26).

As a result of the MS maintaining the right to determine volumes of admission, however, it can be argued that immigration policy will still be focused more on combatting illegal

immigration than on opening up more channels for legal immigration (Monar, 2005: 10). This, in addition to being a potential loss to an EU with a rapidly ageing population, will also reinforce the EU's reputation as a 'fortress Europe'. The fair treatment of TCNs is the only clause here that indicates a liberalisation of policy.

In contrast to asylum and immigration policy, the changes proposed to judicial co-operation in civil matters are relatively minor. The additional aims mentioned regarding judicial co-operation in civil matters are the following:

- A 'high level of access to justice'
- The development of alternative methods of dispute settlement
- Support for the training of the judiciary and judicial staff

The EU has already been active in these areas; therefore the Constitutional Teaty mostly provides for codification of existing practice. However, it also creates a clear base for future action by giving the Council and the EP the ability to adopt laws and framework laws in this area (Monar, 2005: 11). This does, then, represent some supranationalisation of this policy area.

On the other hand, the changes proposed to the area of co-operation on criminal matters are relatively far-reaching. In this area, the Constitutional Treaty increases the number of objectives from four to twelve (Monar, 2005: 11). The EP and Council can now establish common definitions and penalties for a number of cross-border offences including terrorism, drug and people trafficking, racism and xenophobia, environmental crime and the sexual exploitation of children (European Union, 2004: 27). Moreover, the EU will be able to adopt framework laws concerning the rights of victims and personal rights in the criminal procedure, a sign of increased liberalisation.

The Council also has the ability to set up a European Public Prosecutor's department, which would track down those involved in serious cross border crime, if it decides to do so by unanimity. This would, however, be limited to crimes affecting the financial interests of the Union, and are likely to include the following: fraud affecting the financial interests of the European Communities, market rigging, money laundering, conspiracy, corruption, abuse of office and disclosure of secrets pertaining to one's Office (Van den Wyngaert, 2004: 219).

However, a potential hurdle in this area could be the difficulty of harmonising the significantly different legal systems of the civil and common law countries of the EU in an area which is typically sensitive. The introduction of the possibility to set up a European Prosecutor's department was particularly controversial during the negotiations, although it can only be set up by unanimity, and British opposition resulted in a significant 'watering down' of the originally proposed European Prosecutor's mandate (Monar, 2005: 12).

3.8.4. The Lisbon (Reform) Treaty

The Lisbon Treaty, signed on 19 October 2007, is an attempt to ressucitate, with amendments, the Constitutional Treaty. It originates from the June 2007 European Summit when a draft of a new treaty, known as the Reform Treaty, was agreed along lines proposed by German chancellor Angela Merkel. The Lisbon Treaty engenders two separate bodies of law; an amended version of the Treaty on European Union (TEU) and the Treaty on the Functioning of the Union (TFU). The latter contains 5 chapters under the AFSJ heading (Carrera and Geyer, 2007: 2).

Regarding JHA, one of the most striking changes, when compared with the Constitutional Treaty, is the inclusion of new opt-outs for the UK and Ireland in the areas of policing and criminal law. This also applies to Denmark, although the Danish opt-out was already agreed as part of the Constitutional Treaty. However, while the UK and Ireland are able to opt into measures on a case by case basis Denmark, at present, cannot (Peers, 2007: 2) (Carrera and Geyer, 2007: 4).

Another innovation is a new addition to Article 234 TEC/TFEU requiring the ECJ to act with minimum delay in cases regarding a person being held in custody (Peers, 2007: 2). In addition, as in the Constitutional Treaty, the ECJ will gain jurisdiction to interpret and review AFSJ acts in the Draft Reform Treaty, implying a higher level of judicial control and protection in the AFSJ (Carrera and Geyer, 2007: 3).

In the field of judicial co-operation in civil matters, the Reform Treaty grants national parliaments control over the extension of QMV and co-decision regarding laws concerning family reunification with cross-border implications. In judicial co-operation in criminal matters, the main change is that, in cases where a MS has applied the veto or the 'emergency

brake'[40], 9 or more MS can, if they wish, continue with enhanced co-operation (Peers, 2007: 14-20).

Britain and Poland have also been pressing for opt-outs from the inclusion of the Charter of Fundamental Rights. While the inclusion of the Charter, planned in the Constitutional Treaty, should put more onus on the MS to respect the fundamental rights of TCNs, this issue has become more complicated with the opt-out of some of the MS.

In general, then, the Lisbon Treaty provides for a more 'multi-speed' Europe as compared to the Constitutional Treaty. This will undoubtedly cause some practical difficulties in implementation. As Schmitter points out, however, this emphasis on opt-outs and enhanced co-operation, although greeted by traditional neofunctionalists with scepticism and concern, is more easily digested by neo-neo functionalists due to its more flexible finalite politique (2002: 42-43). In other words, these changes do not particularly indicate a setback to integration in JHA from a neo-neo functionalist point of view.

3.8.5. Neofunctionalist Commentary

The Constitutional/Lisbon Treaty represents a considerable, although not total, supranationalisation of JHA. Due to the extension of opt-outs in the Lisbon treaty, however, the vision of the AFSJ that appears is rather 'multi-speed'. While it is perhaps difficult to envision a fragmented Area of Freedom, Security and Justice where, to echo Orwell, some MS are freer and more secure and just than others, the use of opt-outs or derogations in itself is not as problematic to neo-neofunctionalists as it is to traditional neofunctionalists. This is due to the fact that the neo-neofunctionalist *finalite politique* is an entity characterised by MLG and PCG than a federal state.

Even so, the supranationalisation of JHA proposed in the Constitutional Treaty and largely maintained in the Reform Treaty is, in fact, remarkable. This is particularly so when it is taken into account that, even after the Maastricht Treaty and the creation of the Third Pillar, this was an almost entirely intergovernmental policy area. The changes made to JHA in the Constitutional and Reform Treaties do, then, support a neofunctionalist analysis. Moreover, if

[40] The 'emergency brake' in this case refers to a MS's right to suspend a draft European Framework Law if it considers that it would affect fundamental parts of its criminal justice system.

the Reform Treaty should come into force, the increased involvement of supranational institutions should encourage the development of a more liberal, less restrictive border policy.

3.9. Conclusions

In recent years, co-operation among EU MS in the area of JHA has undergone both significant widening and deepening. Not only is co-operation now undertaken in more policy areas, but it has developed from being entirely of an intergovernmental nature to being increasingly supranational. As has been argued in the theory section of this dissertation, neofunctionalist spillover may account for this at least in part, although some co-operation remains intergovernmental even after the reforms introduced in the Constitutional Treaty, especially in areas in the Third Pillar.

Functional spillover appears to have played an important role, particularly following the implementation of the Single Market reforms and the Schengen agreement, after which it was felt necessary to compensate for the weakening of internal frontiers with increased vigilance at external borders. However, it can be argued that political and cultivated spillover also contributed to the development of JHA.

Political spillover can be seen in many areas. Firstly, while accepting that it is probably not the main determinant, there is evidence that public opinion may have a greater influence on European integration than was originally thought to be the case. In general, the EU public considers that responsibility for immigration and asylum issues should be shared between the EU and MS, and the further EU integration progresses in these areas, the more likely the public is, in turn, to support further integration. Moreover, the EU public has also indicated that combatting organised crime and terrorism should be among the EU's highest priorities.

Political spillover is not, of course, limited to public opinion. Indeed, according to traditional neofunctionalism, it is more likely to originate from groups including elites, officials and NGOs. As predicted, it has been seen that these groups have played a significant part in pushing EU integration in JHA forward. Competition between national justice and foreign affairs ministries, for instance, has contributed, however unwittingly, both to the focus on guarding external borders in the Schengen group and to the incorporation of the Schengen

acquis into the Amsterdam treaty. NGOs, on the other hand, have contributed, for example, to several Commission proposals in this area.

It has also become clear that integration in JHA has been cultivated by the EU's supranational institutions, principally, although not uniquely, the Commission. Although the Commission has been pushing for more power in this area since the days of the Trevi Group, it was particularly evident in the run-up to the Amsterdam Treaty, when it argued that further supranationalisation of JHA was necessary if it was to escape its impasse. The Commission's success in using its new powers meant that the MS were only too eager to grant it new responsibilities at Tampere. The EP and ECJ have also attempted to cultivate spillover in JHA, albeit with rather less success.

However, in contrast to EU integration in other areas, such as the Single Market, which has encouraged liberalisation, developments in JHA have, with some reservations, tended to be restrictive in nature. This can be partly explained by the 'lowest common denominator' effect that tends to result from intergovernmental co-operation in this area, because, as EU internal borders have become increasingly open, MS are reluctant to 'import' the illegal immigration or international organised crime problems of their neighbours. This has been supported by the generally anti-immigration stance of the EU public and of some elite groups.

Moreover, there is some evidence of a clash between the Commission and the EP on the one hand and the MS on the other over the nature of EU border policies. While, has already been examined, both the general public and elites of most EU member states tend to support further EU action in JHA, this support tends to be, particularly since Septemer 11, for restrictive, 'fortress Europe' type policies.

The supranational institutions, on the other hand, together with NGOs and some elite groups, have tended to be in favour of a more liberal policy. Therefore, they are more likely to support controlled legal immigration and policies favouring the integration and rights of migrants and asylum seekers. This may be due to the relative insulation of these groups from the pressures of public opinion, which tends to view immigration primarily as a social problem to be prevented. In addition, it may be a case of supranational institutions, with the support of NGOs, identifying 'policy gaps' in JHA and seeking to fill them in order to propel integration and increase their own power.

However, research suggests that excessively restrictive border policies are, in general, disadvantageous as they are expensive and fairly unsuccessful in effectively preventing illegal migration. In addition, overly restrictive policies may have the effect of inadvertently encouraging criminal activities such as people-trafficking as legal possibilities of entering the territory decrease. Moreover, it is difficult to argue that a zero-immigration policy is in the demographic interests of an EU whose population is ageing and workforce declining. As Geddes suggests, then, continued supranationalisation as well as attempts to modify public opinion appear to be the best ways to avoid the spectre of a 'Fortress Europe' (2003).

As the next two chapters seek to demonstrate, negative externalities of JHA due to its restrictive nature are already evident for the CEE MS and candidate countries, and for Turkey. Moreover, these negative externalities are likely to extend to the non-EU neighbouring countries of the new MS and candidate countries, putting extra strain on countries which are, in many cases, unstable or poverty stricken. The nature of the difficulties that the extension of a restrictive JHA poses to these countries, then, will be analysed in the rest of this thesis, and potential solutions discussed.

IV. THE EXTENSION OF JHA TO THE CEE MS AND CANDIDATE COUNTRIES

4.1. Introduction

It is almost impossible to completely separate the enlargement process from the development of JHA. Indeed, it can be argued that the latter has been heavily influenced by the former. Without going as far as to claim that enlargement is the only external *raison d'etre* for JHA[41], it has certainly provided an important impetus for co-operation in this area. The main influence of the collapse of Communism and the subsequent enlargement process on JHA has been twofold:

- With the collapse of Communism, CEE became the EU's 'backyard'. It was now the main cushion between the EU and the ex-Soviet republics, which, at least in popular Western European perception, were a hothouse of instability waiting to unleash hordes of migrants and international criminals onto an unsuspecting EU.

- The CEECs themselves were much poorer than the EU. It is also important to recall that, at least in the early post-Communist days, there was not yet any guarantee that these countries would develop into stable, peaceful democracies. The outbreak of conflict in the ex-Yugoslavia, in particular, served as a warning. For these reasons, it was generally assumed, both among the EU's public and its elite, that there was also the risk of mass migration from the CEECs.

Very interestingly, the assessment of the threat of mass migration and crime arriving in the EU either originating from or passing through the CEECs has been proved to be, to a large extent, exaggerated. Although estimates of the number of people emigrating annually from Eastern to Western Europe varies from 200,000 to 1,000,000, this is considerably less than early predictions. Migration levels are, however, relatively high for Germany and Austria, which receive three-quarters of East European migrants, mainly of Polish origin (Guiraudon, 2004: 175-176).

[41] For example, particularly since the events of September 11 2001 and March 11 2003, the threat of international terrorism has also been an important impetus for increasing JHA co-operation.

Moreover, a 2004 Eurobarometer questionnaire suggests that, at the time of accession, only around 1% of Central and East Europeans' intended to migrate to the EU-15. As well as this, potential migrants are likely to be young, well-educated people with no dependents, who are hardly likely to put much strain on the social security systems of the EU-15 (Work Permit, 2004) (European Foundation for the Improvement of Living and Working Conditions, 2007: 118).

Perhaps a more real problem resulting from such a migration pattern is that of brain drain from CEE to Western Europe. Moreover, as would-be migrants from the EU-15 tend to share similar characteristics with their CEE counterparts this could potentially result in a mobility stepping-stone effect, or 'chain brain drain' with its final destination in the USA (European Foundation for the Improvement of Living and Working Conditions, 2007: 118).

However, due to these fears, the collapse of Communism and the subsequent enlargement have not only been a catalyst for JHA integration, but there has also been considerable pressure on these countries to adapt to the JHA *acquis*, in particular regarding the strengthening of external borders.

In general, though, this process has been depoliticised (Jileva, 2003: 75), and, at least until accession, the CEECs had little or no say in the decision-making process. JHA policies, therefore, have caused considerable difficulties for the new MS and candidate countries, particularly as the EU's new external border is also the dividing line between many of the CEECs and their non-EU neighbours.

After the accession of Romania and Bulgaria this border is of considerable length, stretching from the border town of Narva-Ivangorod between Estonia and Russia in the north, through areas of Belarus bordering Latvia, Lithuania and Poland, to the Ukrainian borders with Poland, Slovakia and Hungary and south to the Moldovan and Ukrainian borders with Romania (Jileva, 2003: 75).

As a consequence of these considerations, then, in addition to the internal factors discussed in previous chapters, the enlargement process itself can be considered to be an exogenous functional pressure for the development of JHA. In short, it seemed necessary for the EU to tighten its border regime, and, simultaneously, for this regime to be extended to the CEECs

(which represented the EU's new *de facto* external border), while, at least in the medium term, to maintain strict border controls between the EU and the CEECs themselves.

Another way that the prospect of enlargement has exerted functional pressures for the development of JHA has been to encourage further communitarisation of JHA. While the unanimity rule was already slowing down decision-making in a comparatively homogenous EU-15, it was looking increasingly untenable in a very diverse EU of 25 or more members. This argument was used consistently by the Commission, particularly during the Nice 2000 IGC, and the European Convention and the ensuing IGC (Niemann, 2006: 24-25), at a time when enlargement to 10 CEE and Mediterranean countries was on the horizon.

4.2. JHA and the Enlargement Process: A Neofunctionalist Analysis

4.2.1. Relations between the CEECs and the EU immediately following the collapse of Communism

It can be argued that the EC, which had had only limited relations with the CEECs during the Communist period, was caught by surprise by the collapse of Communism in CEE in 1989-1990. Despite the fact that economic relations had developed somewhat during the period of *glasnost* and *perestroika*, there was, at that time, no reason to believe that the CEECs would one day be willing or able to accede to the EC (Gower, 1999: 3).

While initially following the collapse of Communism the CEECs were more interested in the military security of NATO membership, they also began to focus their attention on EU membership, which they considered to be a way of 'return to Europe' as well as a potential source of both economic and political stability (Vachudova, 2005: 83). In contrast, the EU was, at first, reluctant to open its doors to the potentially unstable new democracies to its East. Therefore, the EU's initial reaction was a cautious one, limited to providing financial aid and technical assistance (Gower, 1999: 3).

A. The Europe Agreements

However, there was increasing pressure both from the CEECs themselves and from the USA for further integration. The result was the Europe Agreements, bilateral association agreements, the first of which was signed in December 1991. Although these did turn out overall to be benefical to trade relations between the CEECs and EU, goods which were considered 'sensitive' by the EU, such as agricultural goods and products of 'declining' industries were not covered.

This was a significant disadvantage for the CEECs, as it was just these sectors in which they were relatively competitive. Moreover, given the Agreements' small effect on EU trade, the EU could have afforded to be less protective (Grabbe and Hughes, 1997: 33).

Moreover, the Europe Agreements did not go far enough to please the CEECs as they contained no commitment to future membership. The only concession to an eventual Eastern enlargement was the inclusion of a clause recognising that the eventual objective of the CEE signatory was accession to the EU, and that the EU recognised that the agreement may be useful in fulfilling that objective (Baun, 2004: 140).

B. The Decision to Enlarge

At the same time as the CEECs were putting pressure on the EU to enlarge, the issue was, naturally, being discussed within the EU. The question of enlargement took the form of a 'widening versus deepening' debate, as the MS generally took the position that enlargement would take place at the cost of deeper integration. Individual MS positions on enlargement were therefore partly determined by their attitude towards EU integration.

As a result, traditional 'good Europeans' such as the Benelux countries and France tended to have reservations about Eastwards enlargement as they feared it would hold up the EU integration process, although it is likely that fear of competiton with CEE agricultural goods in the case of France and the spectre of larger contributions to the EU budget in the case of Benelux also played a role. Meanwhile the quintessentially Eurosceptic British supported enlargement in the hope it would dilute European integration, although they were also

influenced by the rather nobler motives of wanting to spread free trade and liberal democracy in Europe (Vachudova, 2005: 93).

Another factor that influenced whether an EU MS was likely to support or oppose enlargement was its geographical proximity and/or cultural links to the CEECs. Thus, Germany, Austria and the Nordic MS tended to favour enlargement principally for reasons of national security and economic opportunity (Vachudova, 2005: 93).

Finally, a third group of countries opposed enlargement on the grounds that the accession of a large group of relatively poor, agricultural countries from the East threatened to reduce their income from the EU's Structural Funds and/or from the CAP. Unsurprisingly, this group was made up of the poorer EU MS, namely Greece, Ireland, Portugal and Spain, sometimes joined by Italy, which also received large Structural Funds payments for its relatively poor South. These countries, moreover, also tended to have relatively large agricultural sectors and, with the exception of Greece, to be geographically distant from Eastern Europe.

Despite the fact that the MS were divided on the enlargement question, however, Vaduchova argues (2005: 119) that the Commission was in favour of enlargement from the beginning, and consistently supported the CEECs in their quest for trade concessions and a timetable for enlargement despite the fact that the Commission is often considered the motor of deeper EU integration.

She also suggests that the Commission may have viewed enlargement as encouraging, rather than hindering, deeper integration as it would force significant reform of EU institutions, particularly an increase in QMV. Moreover, the Commission may have seen enlargement as a way of increasing its power, as much of the work of preparing for enlargement would be delegated to it (Vaduchova, 2005: 119).

Moreover, during this period, the Visegrad leaders continued to lobby for full membership. Arguing that they had been able to co-operate with each other successfully as the Visegrad Triangle/Quadrangle[42] and were the most politically and economically developed of the ex-

[42] The Visegrad Triangle (Poland, Hungary and Czechoslovakia) became the Visegrad Quadrangle after Czechoslovakia's 'velvet divorce' in 1993

Communist states, they refused to accept any alternative to full EU membership and continued to press for a timetable and conditions for membership (Vachudova, 2005: 94-95).

The decision to enlarge to the East was made at the Copenhagen European Council in June 2003, on the basis of the Commission's 1992 report 'The Challenge of Enlargement'. No date was suggested for accession, however, and accession would be conditional on fulfilling the so-called 'Copenhagen Criteria', which basically involves the adoption of the entire *acquis* (Gower, 1999: 5).

It is clear, however, from a neofunctionalist analysis, that the decision to enlarge was not made on an entirely intergovernmental basis as some of the MS were against enlargement. It appears that there was some political and cultivated spillover involved. First, CEE leaders had consistently lobbied for full membership, and were supported in this by the MS with which they had the closest relations.

Secondly, the Commission had generally supported the CEECs in their quest for enlargement, viewing it as a way both to stimulate further integration and to increase its own power. As Dinan points out, 'As much as any other factor, the imminence and importance of future enlargements strengthens the Commission's claim to remaining at the centre of the EU's institutional system, in full possession of its existing powers and prerogatives'(1998: 119).

However, the decision to enlarge may perhaps be best explained by Niemann's concept of induced spillover. According to this idea, the regional organisation is faced with external demands or an external threat and is then forced to come up with common policies *vis a vis* those countries, usually delegating the task, at least in part, to the supranational institutions (1998: 432).

As an example, according to Niemann both the perceived threat of mass migration from the CEECs due to economic and political instability and their geographical proximity necessitated co-ordination on the part of the MS regarding aid, leading to the PHARE programme. Moreover, as predicted by induced spillover, the mandate for co-operation was handed over to the Commission (1998: 433-434).

The same can be argued for the enlargement process as a whole. Enlargement can be viewed both as a consequence of the CEECs' desire to join the EU, and of the EU's reaction to the potential threat of mass migration and organised crime posed by instability in CEE. As Mattli points out, an organisation will choose to expand when the net cost of excluding prospective members is larger than the cost of enlargement; that is, when negative externalities originating in the potential candidates threaten to disrupt the organisation's stability, security and prosperity (1999: 95).

In the case of the EU, then, there appears to have been a change of attitude towards the potential costs and benefits of enlargement to CEE. While, in the immediate post-Communist period, the EC was concerned about importing instability from CEE, it eventually realised that it would have more control over the CEECs' development as a result of conditionality if they were included in the accession process than if they were excluded. Perhaps it had come to this conclusion through the experience of the Europe Agreements, which also contained some political conditionality.

C. CEE Borders and Co-operation with the EU Prior to Membership Application

During the Cold War, the infrastructure and apparatus for border control already existed in the communist states of CEE. This was, however, directed towards preventing people leaving rather than for the purposes of entry control. Following the collapse of the Berlin Wall, this infrastructure was dismantled through the early 1990s, leading to CEE becoming an area of considerable freedom of movement, in which border controls were virtually absent, and visa policies were drawn up on the basis of each country's foreign and trade policy (Pastore, 2004: 129).

This led to the revival of traditional cultural and trade connections, which had been suppressed during the Communist period (Pastore, 2004: 129), and was part of the policy, common to most of the ex-Communist CEECs at the time, of constructing and maintaining friendly relations with neighbouring countries (Apap *et al*, 2002: 2) something which was later to be encouraged by the EU as part of the candidate countries' accession criteria.

Indeed, these open border policies have generally been credited as contributing to the prevention of destabilisation in the region following the collapse of Communism, and, as a result of their facilitating contacts between ordinary people from different CEE countries, have helped to overcome some of the negative stereotypes and mutual distrust previously prevalent in the region (Apap *et al*, 2002: 2-3).

However, such an open border policy was also, particularly in Western Europe, seen as conducive to the risk of a significant rise in organised transnational crime, including people trafficking, the smuggling of radioactive substances, drugs, arms and cars, currency counterfeiting, money laundering and robberies. Moreover, it was considered to leave them open to illegal immigration, both as transit countries destined for the West, and, increasingly, as destinations for illegal immigrants, attracted by the increasing prosperity in the region as economic recovery progressed (Eisl, 1999: 172-173).

This, in addition to the fact that it was, as yet, by no means clear that the newly independent countries were on the road to developing into peaceful, prosperous democracies, led to a widespread fear in Western Europe of a massive influx of immigrants, asylum seekers and organised crime both originating from CEE and from further afield, using the CEECs as countries of transit.

From as early as 1989, therefore, a number of East-West forums, multilateral intergovernmental processes with varied memberships, were set up to ensure that the CEECs' developing border policies would be compatible with Western European ones. (Guiraudon, 2004: 175).

One of the key ideas which developed from these forums was that the CEECs could act as a 'buffer zone' for migration and asylum flows destined for the West, which resulted in a number of bilateral readmission agreements being signed between CEECs and Western European countries. An example was the 1993 agreement signed between Germany and Poland, according to which Poland would re-admit migrants who had illegally crossed the border to Germany (Guiraudon, 2004: 175-176).

4.2.2. The Early Years of JHA and the Accession Process

A. A Neofunctionalist view of Enlargement and the Copenhagen Criteria

The EU's intention to enlarge to the CEECs was first officially stated at the 1993 Copenhagen European Council, where the conditions that the countries would have to fulfil in order to become EU members were laid down. In addition to political[43] and economic[44] criteria, applicant countries would also have to adopt the *acquis communautaire,* including the rapidly developing JHA *aquis*, as a condition of membership (Nugent, 2004: 35-36).

The Copenhagen Criteria are divided into three broad criteria. The first are the political criteria, which include stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities. In a sense, the political conditions are the most important, in that accession negotiations cannot begin until the candidate country is deemed to have fulfilled them. Second are the economic criteria, the existence of a functioning market economy which is able to cope with competitive pressure within the Union. Finally, the applicant states must adopt the entire *Acquis Communautaire* (Brennan, 2000: 162).

The criteria, however, are stricter than any applied in previous enlargement rounds, perhaps because of the size of the enlargement and because of the political and economic difficulties that the CEECs faced as a result of half a century of autocratic rule. In fact, it can be argued that the Copenhagen Criteria are even harsher than the conditions imposed on the MS themselves, in that the candidate countries (in contrast to the MS) are not allowed to opt out of any area of the *acquis.* Moreover, some areas of the Copenhagen Criteria, such as minority protection, are not part of the *acquis*: while the EU monitors minority protection in the candidate countries, it has little say in how the EU-15 treats its own minorities (Vaduchova, 2005: 121-122).

In neofunctionalist terms, spillover to third countries may be *voluntary* or *enforced.* Broadly speaking, voluntary spillover may be defined as originating from the third countries

[43] Stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities

[44] The existence of a functioning market economy and the ability to cope with competitive pressures and market forces within the Union.

themselves, based on a perceived need for a closer relationship with the EU, either as a reaction to increased EU influence[45], or due to a desire for closer integration with the EU[46]. Enforced spillover, on the other hand, occurs when the EU demands that applicants reform domestic processes in line with EU policy, usually as a prerequisite of accession or of other forms of integration with the EU, such as membership of the EEA (Miles, 2004: 256).

Clearly, then, the Copenhagen Criteria represent enforced spillover, in that they are imposed unilaterally by the EU. The willingness of the CEECs to agree to such strict criteria implies both the importance of EU membership to the CEECs and the asymmetry of power between them and the EU. The benefits to the CEECs of enlargement were, or at least appeared to be, much greater than those to the EU, allowing the EU more leverage in the conditions it imposed.

EU membership not only offered economic advantages to the CEECs, it would also provide them with a voice in the EU, a powerful neighbour that in any case would dominate them unilaterally if they did not accede. However, it is also important to stress that at no time did the EU coerce the candidate countries into meeting the membership criteria – in fact, some of the MS may have breathed a sigh of relief if it appeared that the CEECs were *not* able to meet the criteria (Miles, 2004: 108-109).

Interestingly, the Copenhagen Criteria tie in rather closely with the 'background conditions' specified by neofunctionalists as necessary if spillover (and therefore integration) is to occur. These may be summarised as shared basic values, a certain degree of homogenity in levels of political, social and economic development, a network of transactions, comparable decision-making processes and compatibility of expectations (Moxon-Browne, 2003: 92).

The countries involved, therefore, need to be as homogenous as possible for integration to occur, which, at least in theory, appears to be the result of the fulfilment of the Copenhagen Criteria – they are designed to make the candidate countries as similar to the MS as possible. As Schmitter points out, enlargement is likely to hinder integration if the background conditions are not in place (2002: 42-43).

[45] This type of spillover is known as *reactive*
[46] This is known as *active* spillover

In addition, neofunctionalism argues that both the general public and elite should be convinced that integration will lead to an increased satisfaction of needs and that problems can be solved in a mutually acceptable way (Groom, 1994: 114). In other words, integration should be generally perceived as being beneficial, and of incurring low costs for spillover to take place (Moxon-Browne, 2003: 92).

On examination of Eurobarometer survey results, while both the EU-15 public and the public in the CEECs appear to have been broadly in favour of enlargement in 2002, this support seems to be rather lukewarm in both cases. In the EU-15, support ranged from 76% in Greece to 41% in France, while 17% of Greeks surveyed declared themselves against enlargement, rising to 49% in the case of France (Eurobarometer, 2002: 58.1)

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Perhaps more surprisingly, in the years immediately preceding the 2004 accession, public support for enlargement in the CEECs themselves was also rather lukewarm. In a sample of 6 CEECs[47] surveyed in 2003, the percentage of respondents who thought that EU membership was 'a good thing' ranged from 44-58 in the four CEECs which were due to accede in 2004. In contrast, the proportion in Bulgaria and Romania, which were further behind in the accession process, was much higher, at 73% and 81% respectively (Eurobarometer, 2003: 2003.4).

The results of the referenda that were carried out on joining the EU in the CEECs appear to contradict this by showing a much higher level of support, ranging from 92% and 91% in favour in Slovakia and Lithuania respectively to 67% in both Latvia and Estonia. However, the low turnout rate, from 46% in Hungary to 73% in Latvia, suggests that the CEE public was not as enthusiastic about accession as it might appear at first sight (Vaduchova, 2005: 227-232).

This decline in support for EU accession may be due to the realisation in the candidate countries that, while the Copenhagen Criteria benefit them in some respects, they have negative consequences in others (Vaduchova, 2005: 227-232). In short, the Copenhagen Criteria were unilaterally imposed on the CEECs by the EU without taking into consideration their own special needs. In addition to posing significant difficulties for the CEECs in some

[47] Bulgaria, the Czech Republic, Hungary, Poland, Romania and Slovakia

cases, which may be financial, political or technical in nature, this has fostered an opinion in some sectors of CEEC society that they are being treated as second-class citizens by the EU.

As Vaduchova points out, this may become increasingly problematic after accession: 'In the new member states the perception of a second-class status may have a regrettable impact on public and elite opinion, foreclosing debate on how to take advantage of EU membership in myriad areas while strengthening the hand of xenophobic politicians' (2005: 241).

In other words, the Eurosceptics in CEE may be strengthened by inflexibility on the part of the EU during the enlargement process. Schmitter also agrees that, while the Copenhagen Criteria or something resembling them are vital for enlargement to go ahead without disrupting integration, the EU could have been more generous with opt-outs and derogations without serious harm.

Instead, he also supports the view that the EU's rigid approach will increase Euroscepticism in CEE, with the consequence that the CEE member states will choose to block many EU initiatives through the use of the veto or blocking minority, causing a deadlock in integration (*spillback* in neofunctionalist terms):

> The conditions demanded [of the CEECs] have been more onerous – and more ostensibly political as well as economic and social; the willingness to pay compensations and allow for exemptions for 'sensitive' products and issues much less forthcoming; the sheer numbers so large that delicate inter-institutional balances are bound to be upset. Under these conditions, the extension to cover a wider and more diverse territory may not ensure subsequent conformity to existing rules (and, remember that unanimity is still necessary for many decisions) (2002: 42-43).

B. Adoption of the JHA *Acquis* as a Condition of Enlargement

Due to concerns with the ratification of the Maastricht Treaty and the July/August 1993 exchange rate crises, little progress on policy towards CEE was made until the end of 1993, when pressure on the EU to deal with the prospect of Eastern enlargement was increasing (Baun, 2000: 53-54).

As a result, starting in January 1994, the Commission prepared a wide-ranging review of EU policy towards CEE, following which 10 CEECs formally applied for EU membership,

beginning with Hungary's application in March 1994 until the Czech Republic's application in January 1996. These were added to the applications of Cyprus and Malta, which had applied in 1990 (Nugent, 2004: 34-36).

In response, the Commission prepared a pre-accession strategy, something that it had been asked to do by the Corfu Council. The two main instruments of the proposed pre-accession strategy were to be the Europe Agreements and the already existing multilateral structured relationship. The Commission also suggested at this point that the accession process should be carried out on a 'case by case' basis (Baun, 2000: 56-57).

However, the Commission suggested that, while the structured relationship had previously only involved joint meetings with the Council, it should be expanded to include the other EU institutions, therefore, of course, promoting its own influence in the accession process. Moreover, it stressed that the new CFSP and JHA pillars should also be covered, although its main focus was on integrating the CEECs into the Single Market (Baun, 2000: 57-58).

This strategy was finally endorsed by the 1994 Essen European Council, which, consequently, marked a major step forward in the accession process (Baun, 2000: 58). From a neofunctionalist point of view, therefore, this can be understood as an example of cultivated spillover, with the Commission, arguing on the grounds of greater efficiency in decision making, simultaneously seeking to strengthen its own position as an agenda-setter in the enlargement process.

In addition, it can be argued that functional spillover from the decision to focus on preparing the CEECs for entry to the Single Market also played a part in the decision to include JHA as part of the accession process. In other words, if freedom of movement of persons was, as argued in the theoretical chapter of this thesis, one of the factors provoking the EU-15 to strengthen its external borders, it follows that, given the prospect of extending freedom of movement of persons to the CEECs, these countries would also have to participate fully in the EU's developing border policy.

Following this decision, therefore, the Commission undertook to design a number of 'horizontal' programmes in the key areas of JHA, which would be applicable in all the candidate countries. Meanwhile, individual programmes tailored to the specific needs of each

country were also being designed (Van Der Klauuw, 2003: 38). Initially, co-operation between the applicants and EU in JHA took the form of meetings between the justice ministers from the EU MS and the CEECs (Eisl, 1999: 76).

Moreover, early co-operation seems to have concentrated more on judicial and police co-operation than asylum and visa policies, perhaps indicating, at this stage, that, in the short term the EU was more concerned about keeping out organised crime from the CEECs and the ex-Soviet Union than it was about the potential extent of illegal migration. Interestingly, this is in contrast to the general development of JHA, in which integration tended to be both deeper and faster in asylum and immigration issues than in judicial and police co-operation.

For instance, the first example of JHA co-ordination between the EU and CEECs was the September 1994 Berlin conference on drugs and organised crime. This resulted in the Berlin Declaration, which identified common priorities in combating international crime, and identified the exchange of information on JHA matters as a priority (Eisl, 1999: 76). In contrast, a 'horizontal' programme on asylum was not implemented until 1999 and 2000, and national asylum programmes only appeared in 1998-2001 (Van Der Klauuw, 2003: 38).

The December 1995 Madrid summit asked the Commission to examine the implications of enlargement for the EU, and to produce Opinions on each country's state of preparation for accession. This resulted in the Commission's 1997 *Agenda 2000* document, which included a report on the likely effects of enlargement on the EU, and Opinions on the candidate countries, in which it recommended opening negotiations with Poland, the Czech Republic, Hungary, Slovenia and Estonia (Nugent, 2004: 36).

As the accession process developed, the EU became increasingly assertive regarding the candidate countries' adoption and implementation of the *acquis*, and in particular JHA legislation (Guiraudon, 2004: 174). In fact, as has already been emphasised, it can be argued that the prospect of enlargement had itself been an important catalyst in the development of JHA. In consequence of fears that the CEECs would act as a 'leaky sponge' to the EU for migration and crime from the ex-USSR and beyond, there was a largely unfounded but widespread fear of mass migration to the EU from the CEECs themselves.

Following this, as had already been agreed at Essen, JHA was also included as part of the Structured Dialogue, according to which MS and the CEECs could discuss matters of common interest, in order to build mutual trust. Regarding JHA, each presidency discussed a main topic (for instance, asylum, border controls, judicial co-operation or police co-operation) agreed upon by a work programme in 1996 (Guiraudon, 2004: 177).

The Structured Dialogues did result, for example, in a 1998 pre-accession pact on organised crime, which helped to identify common objectives and priorities for the candidate states in this area, such as developing formal ties with Interpol prior to accession (Occhipinti, 2004: 205). However, in general, mostly due to limited time and resources, the results of the Structured Dialogue were limited, leading the process to sometimes be dubbed the 'Unstructured Monologue' (Eisl, 1999: 177).

A further development was that financial support for JHA co-operation, from a decision taken in the 1995 Cannes European Council, was provided through the PHARE programme, which concentrated especially on multi-country activities and intra-regional co-operation (Eisl, 1999: 177). Particularly after 1997, when PHARE became accession-driven rather than project-based, JHA became a major priority for funding (Grabbe, 2002: 2). In all, ten per cent of the PHARE funds were allocated to JHA, of which most were destined for border security (Guiraudon, 2004: 174).

Moreover, EU funding was available for projects of European interest and involving more than one MS, which could also include applicant countries. In this way, such projects could also contribute to the candidate countries' preparation for accession. Most of these projects focused on training, exchange and work experience, or on research. The areas covered included training and co-operation among justice officials (GROTIUS), those working with identity documents (SHERLOCK), officials responsible for fighting trafficking in human beings (STOP) and law enforcement authorities (OISIN) (Eisl, 1999: 179).

In addition, bilateral assistance was provided, particularly in the area of police co-operation. This generally took the form of training, although equipment was also offered. The large EU countries have generally been the most active, especially Germany, while smaller MS have tended to focus on neighbouring CEECs. The Central European Police Academy, which offers courses on specific cross-border issues such as illegal immigration and drug-smuggling,

originated from such a bilateral agreement between Austria and Hungary, although it later expanded to include Germany, Switzerland, Poland, Slovakia, Slovenia and the Czech Republic (Eisl, 1999: 180)

In conclusion, then, during this period, it is evident that enlargement was not merely guided by intergovernmental bargaining but, in fact, was also influenced by cultivated spillover[48] in a neofunctionalist sense. Firstly, towards the end of 1993 it was the Commission which took the initiative in preparing a review of enlargement policy, the successful completion of which, in turn, possibly led to it being delegated more responsibilities in this area, most notably its annual *Opinions*, by the MS.

It can also be argued that the Council was eager to hand these tasks over to the Commission as they were complex, technical and labour intensive, ranging from reforming the public administration to bolstering civil society to harmonising transport and environmental policy. As well as this, by accepting the Commission's views, the Council also managed to avoid potentially time-consuming and politically damaging disagreement and bargaining over enlargement (Vaduchova, 2005: 117-118).

Moreover, in its promotion of enlargement, the Commission succeded in acquiring new powers for itself in a more direct sense; its proposal that the Commission, in addition to the Council, was to participate in the Structured Dialogues was accepted by the Essen Council (Baun, 2000: 58), with the consequence, of course, of the Commission gaining more power in shaping the enlargement process.

In addition, according to neofunctionalist theory, if a supranational institution is involved, an 'upgrading of integration' may occur rather than the 'lowest common denominatior' outcome expected of intergovernmental bargaining (Groom, 1994: 4-6). This can, in fact, be seen during this period of the enlargement process when the Commission's suggestion that the CFSP and JHA pillars should also be included in the pre-accession process was also accepted by the Essen Council.

[48] This concept, in addition to functional spillover and political spillover, is discussed in detail in the theoretical chapter of this thesis

4.2.3. The Amsterdam Treaty and the Accession Partnerships

Taking into account the impending opening of negotiations with five of the candidate countries, the introduction of the Accession Partnerships in 1998 was intended to co-ordinate efforts towards the candidate countries' preparation for accession. The idea for the Accession Partnerships was originally put forward by the Commission as part of its 'Agenda 2000' report. Although the proposal was not formally endorsed by the Council until the Luxembourg summit, the Commission began work on the Accession Partnerships in the second half of 1997, finishing in early 1998 (Baun, 2000: 101).

The Accession Partnerships provided a single framework for membership preparations by building on and extending the previously existing accession structures and aid (PHARE funding, the Europe agreements and the Commission's Regular Reports on the applicant countries' progress towards accession) (Nugent, 2004: 44-46). Each Accession Partnership set out short and medium term 'priorities' which the candidate countries were expected to complete respectively within less than and over a year, and 'intermediate objectives' (Baun, 2000: 101).

Despite these similarities, the texts of the Accession Partnerships were individualised according to the specific situation of each applicant state. While Poland, for instance, was expected to focus on restructuring the steel industry, Latvia and Estonia's concentrated on the need to improve the rights of the Russian minority, while Slovakia's biggest priority was judged to be the holding of free and fair elections. The Accession Partnerships were not, however, well received by the candidate countries, who considered that they had essentially been dictated to them by the Commission, with little input from the CEECs themselves (Baun, 2000: 101-102).

Regarding JHA, the Accession Partnerships in 1998, detailed the main themes in which the candidate countries had to make progress in the adoption of the *acquis*, which, after the Amsterdam Treaty, now included the Schengen *acquis*. Unlike the MS, the candidate countries were not offered the possibility of an opt-out, and an unsuccessful or incomplete adoption of the Schengen *acquis,* while not necessarily delaying enlargement, carried the risk of borders between Schengenland and the CEECs being maintained after enlargement (Monar, 2000: 21-22).

It is important to emphasise that the applicant countries were not consulted on this decision, which was taken unilaterally by the EU Council, on the insistence of Holland (Jileva, 2003: 78). The decision to oblige the candidate countries to adopt the Schengen *aquis* can therefore be viewed as another example of enforced spillover.

In the original Accession Partnerships, however, the language used was rather vague due to the fact that the JHA policy area was itself still developing, although it was clarified in later programmes (Grabbe, 2002: 2). In particular, the 1999 Accession Partnerships were more clearly defined, especially regarding the adoption of the Schengen *acquis*, although they still focused on rather vague terms such as 'co-operation' and 'co-ordination', indicating that, at this point, the EU's main aim was for the candidate countries to become more like the EU-15 in their outlook towards JHA rather than the implementation of specific policies (Grabbe, 2003: 94).

In short, regarding the Schengen *acquis* the systemic overhaul which the candidate countries were asked to carry out can be divided into three broad areas:

- The replacement of the old exit-control system with an entry-control system, including the professionalisation and demilitarization of border guards, technological improvement and development of co-operation in this area

- The 'Europeanisation' of national visa policies, including the imposition of visas, even for short stays, on nationals of 'migration-risk' countries, the abolition of the practice of granting visas at borders, and improvement in technological communication between consulates

- The passing of rigorous immigration legislation, including the adoption of EU practices on refusal of entry and expulsion, the conclusion of readmission agreements with the main third countries of provenance and transit, and adoption of EU rules for controlling illegal migration including the need to obtain residence permits and limits to the upgrading of short-stay permits to long-stay ones (Pastore, 2004: 130)

In addition to the incorporation of the Schengen agreement, the fact that JHA policy aims had been significantly expanded increased the pressure on the candidate countries to secure their borders still further, due to the perceived link in the EU between immigration and organised crime (Guiraudon, 2004: 174).

Therefore, the JHA *aquis* that the applicant countries had to take on was by no means limited to the Schengen *aquis*, especially as a consequence of the large body of intergovernmental agreements and agreements (unilateral, bilateral and multilateral) with third countries in the area of asylum and immigration policy. As has been discussed in the previous chapter, these agreements are mostly based on the readmission of migrants and the 'safe third country' concept (Guiraudon, 2004: 5).

Moreover, co-operation between the candidate countries and the EU-15 on fighting organised crime also began in 1998, in order to integrate the candidate countries to the 1997 Action Plan on Organised Crime and prepare them for accession to the Europol Convention (Monar, 2000: 19).

In May 1998, therefore, the Pre-Accession Pact on Organised Crime was signed by the EU-15 and the candidate countries. This was aimed at developing a common annual strategy with the assistance of Europol, in order to develop increased exchange of law-enforcement intelligence, co-operation on training, equipment and investigation, and to identify the most significant common threats in organised crime (Monar, 2000: 19).

Also in line with the EU's increased emphasis on the CEECs' adoption and implementation of the JHA *acquis*, a twinning programme was set up in 1999 between the CEECs and the EU-15, involving the seconding of civil servants from the MS to work in CEE administrations. Its aim was to help the candidate countries in their implementation of the *acquis* in four key areas: JHA, finance, agriculture and the environment. The JHA twinning projects focused on customs controls, asylum and immigration, judicial institutions, police training and the fight against organised crime, reflect the Accession Partnership priorities (Grabbe, 2002: 3-4).

Twinning projects with CEE on border issues during this period encouraged intense competition due to the political importance of the issues, particularly from France and Germany, and to a certain extent from Britain on fighting organised crime. The reaction from

the candidate countries themselves, on the other hand, was rather mixed: while they valued the prestige of co-operation with powerful EU countries such as Germany and France, they were concerned about German domination in this area, particularly as Germany had provided a significant amount of bilateral aid to the CEECs targeted at improving border control (Grabbe, 2003: 96).

However, as Gregory's examples of PHARE-funded European-level, regional and bilateral programmes[49] in the Estonian police show, such co-operation emphasises a 'dialogue and partnership' approach which diverges from the EU 'monologue' which had previously been in evidence in JHA (Gregory, 2001: 11).

Meanwhile, as a result of increasing fears that inadequate implementation of the JHA *acquis* could negatively affect the internal security of the EU-15, the Council adopted a joint action in June 1998 establishing a mechanism for collective evaluation of the enactment, application and implementation of JHA *acquis* on the part of the candidate countries. This has been carried out by the so-called Collective Evaluation Group, a group of experts supervised by COREPER, and in close co-operation with the Article 36 Committee, which is responsible for providing regular reports on the progress made in this area by the candidate countries. (Grabbe, 2002: 18).

Much of their information was gathered from the MS themselves, including information on working with candidate countries, Schengen material and reports from embassies, while other sources included the Council of Europe (regarding the adoption of Council of Europe Conventions), PHARE reports and Commission delegations. The Evaluation Group's results were then passed on to the Council and Commission, which had to take them into account in its preparation of the Accession Partnerships (Grabbe, 2002: 18).

As a result of this evaluation, and in spite of the general framework of the *aquis* to be adopted, a certain degree of differentiation was also made between the tasks set for the applicant countries. Poland, in particular, due to its long border with ex-Soviet countries not affiliated to the enlargement programme, had pressure put on it to protect its external borders (Grabbe, 2002: 2).

[49] He focuses on three separate programmes, the AEPC programme at European level, a regional project (the Nordic-Baltic Police Academy) and a bilateral Netherlands/Estonian programme.

4.2.4. The Accession Negotiations

A. A General Overview from a Neofunctionalist Perspective

Since the beginning of the enlargement process, there had been considerable discussion among the MS over whether enlargement should be based on the 'regatta approach', according to which all the candidate countries would join simultaneously, or 'differentiation', which would mean their accession in different groups according to their progress in fulfilling the Copenhagen Criteria.

While those MS who supported the regatta approach argued that it would ensure that the less advanced candidate countries did not lose interest in the accession process, the proponents of differentiation considered that the regatta approach could slow down the whole accession process as those countries best prepared for membership would have to wait for the 'laggards'.

However, in practice, a MS's geopolitical concerns were often the decisive factor in determining which approach it favoured: if the CEEC(s) with which it had closest relations were advanced in the accession process it tended to support differentiation. This was the case of Germany, which had the closest links with the relatively advanced Visegrad countries. On the other hand, if a MS's 'protégé' was not likely to be included among the frontrunners it would more probably support the regatta approach, as did Greece, which was anxious that its neighbours Bulgaria and Romania not be left behind (Baun, 2000: 85-89).

The decision that was eventually reached, based on a Commission proposal, can be described as a compromise between these two positions, referred to by Baun as the 'stadium approach' (2000). It was decided that accession negotiations would begin with six countries in 1998[50], and the others[51] in 2000, giving all applicant countries the chance of acceding to the Union at the same time provided they could complete the negotiations. It thus eventually permitted Latvia, Lithuania and Slovakia, originally in the second group, to accede to the EU at the same time as the frontrunners, although this was not the case for Bulgaria and Romania.

[50] Cyprus, Czech Republic, Estonia, Hungary, Poland and Slovenia
[51] Bulgaria, Latvia, Lithuania, Slovakia and Romania

Here, in effect, it can be argued that the decision to adopt the 'stadium approach' meant that the enlargement process was once more largely in the hands of the Commission. Given that a candidate's membership date would be decided according to its progress in the negotiations, this decision would be heavily influenced by the Commission's Regular Reports (Baun, 2000: 105).

Moreover, the opening of negotiations was preceded by a 'screening' process, in which the Commission, working together with each applicant state,[52] attempted to establish the country's level of preparation and the tasks that it needed to complete prior to accession, after which the Commission submitted individual reports on each country to the Council (Baun, 2000: 105).

The accession negotiations are divided into 29 chapters each representing an area of the *aquis,* as well as two, relating to institutional matters, to be completed when all other chapters are closed (Nugent, 2004: 50). The negotiation process begins with the screening of the candidate countries by the Commission, which attempts to evaluate the extent to which they already comply with the *acquis*. Following this, the negotiations discuss how much of the *acquis* has been implemented, and possible transition periods (Vachudova, 2005: 124-125).

The screening process eventually began with the first group countries on 31 March 1998, and, in spite of doubts from France and Spain, substantive negotiations with the first group began on 31 October 1999 (Baun, 2000: 109). It was stressed that membership depended on full adoption of the *acquis*, and that any derogations would only be limited and temporary (Nugent, 2004: 104), again emphasising the enforced nature of spillover in this enlargement process.

In fact, the CEECs did obtain transition periods on several chapters in which immediate compliance was impossible for reasons of money or state capacity. However, the MS also imposed their own transition periods in some areas, in order to pacify domestic producers and publics. Most controversial of these was the decision to delay free movement of workers for CEE MS citizens for up to seven years after accession (Vachudova, 2005: 233).

[52] The screening process was, however, carried out multilaterally with the second group countries

Due to the need to adopt the *acquis* in its totality, the focus in the negotiations was on highly technical matters, and was based heavily on the Commission's *avis* on the countries' progress towards accession, which have been published annually since 1998 (Nugent, 2004: 50-51).

According to this, the candidate countries produced position papers, in which they estimated the progress that had already been made and stated any wish for a transition period, and the Council agreed a common position, prepared by the Commission, on each chapter (Nugent, 2004: 50-51). Any chapters where there was no disagreement or where EU legislation had already been substantially implemented were declared 'provisionally closed' (Baun, 2000: 110).

Following this, most of the work was done through informal negotiations which took place between officials on both sides, with later formal negotiating rounds between EU foreign ministers or their representatives and the chief negotiators of the candidate countries having a largely symbolic importance (Nugent, 2004: 50-51).

However, the pace of negotiations tended to become slower as more complex and difficult chapters, which were often interdependent with other chapters, were discussed. This led, on the one hand, to the Commission taking a more differentiated approach to the candidate countries as negotiations progressed and, on the other, to a tendency towards more 'horizontal' negotiating rounds encompassing several chapters (Baun, 2000: 200-201).

In general, then, it can be seen that the negotiation process has been heavily influenced by the Commission, which took advantage of disagreement between the MS on the issue of the regatta/differentiation approach to take matters into its own hands. Moreover, the decision to open negotiations with an individual candidate country would be heavily influenced, or even controlled by, the Commission through its annual *avis*. Here, then, the Commission can be said to have used its superior knowledge[53] to achieve a more active role as co-ordinator of the integration process.

However, the negotiation process also serves to highlight the lack of flexibility on the part of the EU regarding enlargement. The unwillingness on the part of the EU to grant significant

[53] In this case, knowledge about the state of preparedness of the candidate countries

derogations to the candidate countries indicates, from a neofunctionalist point of view, that the spillover in question has been not only enforced in nature, but it has generally been imposed without taking into consideration the needs of the candidate countries. It can, however, be argued that the *acquis* imposed on the applicant states may not be entirely suitable for them, given the wide economic, social and political differences between them and the EU-15 (Schmitter, 2002).

The EU, on the other hand, argues that, if an enlarged EU is to be a success, it is important that the candidate countries become as much like the existing MS as possible. Moreover, neofunctionalists basically argue the same point, as they consider that it is necessary for the members of a regional organisation to share similar economic and political conditions and culture for integration to break out of its capsule. However, as shall be discussed further below, Schmitter argues that a certain amount of opt-outs and derogations does not necessarily disrupt integration and may prevent difficulties after accession (2002: 42-43).

B. The Accession Negotiations and JHA

Although JHA was one of the most difficult and contentious issues between the EU and the candidate countries, the negotiations on this topic went surprisingly smoothly (Pastore, 2004: 131), with Hungary being the first candidate country to close the chapter in November 2001, followed by Cyprus, Slovenia and the Czech Republic a month later. By July 2002, when Poland closed negotiations on JHA, they had been completed by all candidate countries with the exception of Romania, Bulgaria and Turkey, which had not yet begun negotiations (Occhipinti, 2004b: 197).

This rather swift completion of JHA negotiations was even more remarkable when it is considered that the EU took until the Portuguese presidency of 2000 to come up with a common position on JHA, delaying the beginning of negotiations on that chapter (24) until May of that year (Occhipinti, 2004a: 205). Moreover, the CEECs were now effectively moving against a ‘moving target’ due to the rapid development of JHA since the events of September 11 2001 (Occhipinti, 2004b: 197).

However, this success was probably eased, certainly on the EU side, by the European institutions’ decision, as a result of demands from Germany, that the candidate countries

should join Schengen in a two-stage process: while the candidate countries were expected to implement a high level of external border control before accession, internal borders between the Schengen countries and the applicant states would not be dismantled for several years after accession. While this certainly brings problems, which are discussed in more detail below, it did allow the candidate countries to spread the cost of convergence while satisfying the EU-15 (Pastore, 2004: 131-132).

Following the terrorist attacks of September 11 2001, there was both a general 'speeding up' of JHA, as has been discussed in the previous chapter, and further pressure on the candidate countries to successfully adopt and implement the *acquis* in this area including strengthening of external borders, monitoring the movement of TCNs through their territory, and increased co-operation with EU-15 police authorities, both at national level and with the EU through Europol and Eurojust (Occhipinti, 2004a: 205-206).

Therefore, despite significant pressure from the EU, the adoption of the JHA *acquis* on the part of the CEECs was surprisingly quick and unproblematic. However, as shall be discussed in the next part of this chapter, several problems remain which, if not addressed, may disrupt integration in JHA, and even affect the legitimacy of the EU as a whole in the long term.

4.2.5. Neofunctionalist Commentary

In conclusion, therefore, it is clear that the accession negotiations were not merely an intergovernmental process. Instead, the Commission in particular played an important role, especially as the decision to adopt the 'stadium approach' to enlargement meant that, in practice, the date of a candidate country's accession would be largely determined by the Commission's Regular Reports. Moreover, the *content* of the negotiations was also largely based on the Commission's Opinions. Therefore, it can be argued that the accession negotiations represent an example of cultivated spillover.

As Schmitter points out, a neofunctionalist analysis of enlargement should not stop at accession – it should also aim to predict the behaviour of the new members *after* enlargement. He argues that, while previous enlargement rounds have proceeded relatively smoothly, the CEECs are likely to prove more 'difficult' after accession as the conditions demanded of them as part of the accession process have been much more onerous. Moreover, the EU has been

far less willing to grant compensations and exemptions than in previous enlargement rounds (2002: 42).

As a result, there may be disillusionment with the EU on the part of the CEECs, notably a perception of being treated as second-class citizens. Therefore, after accession, when they have a chance to influence the decision-making process, the CEECs may display a tendency to block decisions through use of the veto or blocking minority – in neofunctionalist terms, by causing *spillback,* the stagnation or even reversal of integration.

Moreover, it has been argued that JHA is one of the areas in which the needs and wishes of the CEECs have been taken least into account, and in which they face most difficulties in implementing the *acquis,* due to the negative externalities discussed in the following sub-chapter (Grabbe, 2003) (Geddes, 2003: 14).

For this reason, then, the CEECs may, if no effort is made to solve the problems that they are faced with as a result of the Schengen *acquis,* cause spillback in JHA by vetoing or blocking decisions. The following section, then, discusses the nature of the difficulties posed to the CEECs as a consequence of the restrictive nature of the EU border regime.

4.3. Analysis of Problems facing the Candidate Countries

As has already been pointed out, spillover in the JHA area has largely been enforced on the CEECs, and generally has not taken their needs and wishes in this area into consideration. Therefore, due to geopolitical and economic differences between the CEECs and the more established MS, this is likely to create some problems for the CEECs. While the effects of JHA on the new MS and candidate countries have varied from country to country to some extent in their nature and severity, certain difficulties have been identified which are common to at least some of the new MS and/or candidate countries.

Geddes divides the problems that the CEE MS and candidate countries face into six categories of 'Schengen-related strain' as follows:

- Unpredictable migration pressures

- The possibility of 'leakage' of illegal immigrants, leading to negative perceptions in (Western European) press and public opinion
- The adverse economic (and political) effects of constructing borders between neighbouring countries which previously had intense economic, cultural and social ties (such as Poland and Ukraine)
- The position of national minorities, such as ethnic Hungarians living outside Hungary in non-EU countries
- High costs of border control
- The dependence of border control on co-operation between neighbouring countries, when relations between these countries may be strained due to the imposition of a visa regime as has been the case, for example, regarding Belarus and Poland (Geddes, 2003: 14).

This section aims to analyse the nature of some of these problems, discuss their possible consequences for the future of decision-making in JHA and, where possible, propose some ways in which these may be solved or, at least, ameliorated. Moreover, as these difficulties will be taken into account when discussing the case of Turkey in the next chapter, the chapter also discusses some problems encountered during the accession process which have now been completely resolved for the CEECs. Most notably, the inclusion of Bulgaria and Romania on the Schengen 'blacklist' until a relatively late date in the accession process will be discussed, as this is relevant for Turkey's current situation.

4.3.1. Schengen Visa Requirements and Relations with Third Countries

One of the requirements that the CEECs were faced with as part of the adoption of the JHA *acquis* was the implementation of the Schengen negative visa list, more colloquially known as the Schengen 'blacklist'. As has been pointed out in the previous chapter, this list denotes those countries, numbering over 130 at present, whose citizens require a visa in order to enter EU territory. However, due to the enforced nature of the Copenhagen Criteria, it can be argued that the EU has required the CEECs to adopt the negative visa list without taking their own sensitivities into account (Jileva, 2003: 78).

Therefore, the adoption of the Schengen negative visa list has meant that, in some cases, CEECs have had to impose visa requirements on neighbouring countries where previously none was necessary, thus interrupting historical ties between countries in the region (Buonanno and Deakin, 2004: 99). The imposition of visas may even strain relations between these countries because, as Apap points out, they 'are expressions of mistrust of third countries - until the mid-1980s they reflected a mistrust of governments and now often a mistrust of people' (2002).

Moreover, the imposition of visa regimes on the non-EU neighbours of the CEE MS has particularly serious ramifications for minorities in the region, who frequently have family and ethnic connections in neighbouring countries (Grabbe, 2003: 102). Many in the Balkan region, for example, have relied until recently on regular trips to neighbouring countries not only for trade purposes but also to maintain ties with relatives across the border (Kovacs, 2002: 5).

This is, in fact, an unprecedented situation for these countries as, although visiting the West was proscribed during the Communist period, trips to other Socialist countries were fairly routine (Grabbe, 2003: 102), as travelling between Warsaw Pact countries (comprising all of the ex-Communist MS except Slovenia during the Cold War period) was visa-free (Jileva, 2003: 79).

In addition, the CEECs face a contradiction because on the one hand the EU expects them to impose a restrictive visa regime on non-EU neighbouring countries, with the implication that the citizens of the CEE MS' neighbours are 'undesirable legal migrants, a threat to public security, and not important for their international relations' (Jileva, 2003: 71). At least in SEE, this has resulted in considerable resentment of the Schengen regime in neighbouring countries, particularly given the high cost and complicated nature of visa applications (Baldwin-Edwards, 2006: 3).

On the other hand the CEECs have been expected, as part of the accession process, to establish and maintain good neighbourly relations with those same neighbouring countries (Jileva, 2002), including interregional co-operation and co-operation over minority rights, which, during the accession process has been evaluated on a yearly basis by the Commission (Jileva, 2003: 79-80).

The most important initiative in this respect has been the 1995 European Stability Pact, which encouraged the CEECs to undertake good-neighbourliness agreements and develop regional co-operation arrangements, with the intention, among other things of reducing the social and economic divide between the 'ins' and 'outs' (Jileva, 2003: 80)

However, the imposition of the current border regime in CEE potentially goes directly against this as it creates new barriers to trade and cultural links in the area. Moreover, such a regime is likely to exacerbate the gulf in economic and social conditions that is already becoming apparent between CEE EU states and their non-EU neighbours. Migration, on the other hand can help to close the wealth gap between countries, as migrants can contribute to the development of their country of origin both by remittances (which can account for up to 6% of GDP) and through skills learned while abroad (Anderson, Apap and Mulkins, 2001).

In particular, the recent enlargement to Romania and Bulgaria and the forthcoming one to Croatia and Macedonia will affect citizens of the ex-Yugoslavia. While in the case of Romania, Moldova is the only country to be affected by its accession to the EU as Romania has long implemented the Schengen "black list" in other cases, Bulgarian accession means the end of visa-free travel for the former Yugoslav Republics of Macedonia, Serbia and Montenegro (Baldwin-Edwards, 2006: 12).

Moreover, a failure to complete this even after accession may result in the invocation of a safeguard clause. Three types of safeguard exist, relating to economic issues, the single market and JHA, and they can be implemented for up to three years after accession (EurActiv, 2006). Indeed, the German parliament has already threatened to invoke a JHA safeguard in the case of Romania and Bulgaria (Florian, 2006).

In addition, when the candidate countries of Croatia and the former Yugoslav Republic of Macedonia adopt the Schengen *acquis* citizens of Bosnia and Herzegovina and Serbia will be affected in the case of Croatia and citizens of Serbia, Bosnia and Herzegovina, Albania, and Montenegro in that of the former Yugoslav Republic of Macedonia (Baldwin-Edwards, 2006: 12).

As well as issues of regional stability along these borders, which are perhaps overwhelming in a region which has only recently recovered from civil war, the question of labour mobility could also become more problematic. This is especially true for Croatia and Montenegro, which have labour shortages and for Albania and Kosovo, which have an excess of workers (Baldwin-Edwards, 2006: 12).

Finally, visa restrictions on neighbouring countries in CEE may prove to be counterproductive. As has been pointed out in the previous chapter, an increase in border restrictions appears to have at best a minor impact on reducing illegal immigration, and is likely only to increase pressure at other crossing points (Zielonka, 2001: 502) or force would-be immigrants into the hands of people-traffickers (Geddes, 2003: 15). In the case of the CEE borders, too, the imposition of visa restrictions is likely, if anything, to contribute to rather than to address the problem of illegal immigration.

Firstly, permanent migration to the CEE MS, or to Western European states, may increase as visa restrictions make regular crossings (so called 'pendular migration'), which had been common in the region prior to the imposition of visas, more difficult (Guiraudon, 2002).

Secondly, it has been argued that, due to the need to overcome bureaucratic restrictions during the Communist period, 'homo sovieticus' has become especially adept at bending the law when necessary. Before Romania's inclusion on the 'white-list' many Romanians otherwise barred from entering the Schengen zone, for instance, managed to clear themselves from the SIS database by remarrying, and hence changing their name, or lying about their age (Guiraudon, 2002).

This, in fact appears to be the case, as the trend has been for declining registered border crossings to be accompanied by a large increase in illegal entries. As Baldwin-Edwards points out, in Hungary, between 2002 and 2004, the forgery of official documents increased by 68 percent, and illegal entry and residence increased by 44 percent. In Slovakia, meanwhile, the number of detained nationals from Moldova rose 600 percent annually between 2000–2002, and has continued to increase gradually. In the Czech Republic, after the impositions of visas on Ukrainians, they constituted some 80 percent of persons violating immigration conditions by working or overstaying in 2003 (2006: 16).

In order to illustrate, then, the difficulties that visa restrictions pose both to the new MS/candidate countries and their non-EU neighbours in CEE, as well as possible ways of minimising these, two case studies, the cases of Poland and Hungary, will be examined. In the first case, the difficulties that Poland, with its long frontiers with ex-Soviet states such as Russia, Ukraine and Belarus, has faced will be discussed. Secondly, the focus will be on the case of Hungary, and how the imposition of visas on neighbouring countries has affected the Hungarian diaspora in the region.

A. The Case of Poland

The adoption of the Schengen visa system has been shown to have disrupted ties between Poland and its neighbours Ukraine, Belarus and Russia, whose citizens could traditionally travel to Poland visa-free. However, as Ukrainians, Belarussians and Russians need visas to travel to the EU, Poland has also had to impose visas on these countries, with negative consequences for trade between Poland and its neighbours, for Polish businesses (particularly small businesses) and for migrant workers and their families from Poland's neighbours.

Moreover, it can be argued that political relations between Poland and these countries have been damaged as a consequence of Poland's implementation of the Schengen *acquis*, and protest from Russia, Belarus and Ukraine has resulted in the imposition of visas for nationals of neighbouring countries wishing to enter Poland, originally planned for early 2003, being postponed twice (Rigo, 2005)

In addition, using PHARE aid, a number of border crossings along the Eastern frontier were built, and electronic reading of passports introduced. This, however, caused a political outcry from both Russia and Belarus, with the Belarusian ambassador to Poland withdrawing from Warsaw in 1999 (Grabbe, 2002: 11)

Due in part to the prohibitive cost of the visas, which was 60 dollars per visa, at a time when an average Belarusian's monthly salary was only 30 dollars (Buonanno and Deakin, 2004: 99), and, in part, to the difficulty of reaching a Consulate particularly in a country as large as Russia (Derviş, Gros, Emerson and Ülgen, 2004: 51), the number of Belarusians crossing the border dropped by 35.8% and the number of Russians by 48.5% after the implementation of the 1998 Act (Buonanno and Deakin, 2004: 99).

As a consequence of the close relations between Poland and Ukraine Poland was more hesitant in imposing visas on Ukrainian citizens. Indeed, it promised Ukraine that visas would be imposed only 'at the very last minute' (Guiraudon, 2004: 175), i.e. there would be no imposition of visas until immediately prior to enlargement.

The importance of these relations is both economic and strategic. Trade relations are of considerable importance for both countries. Before the imposition of visas, Ukraine was Poland's third largest trading partner, providing a living for 30-40% of Polish small businesses, and a net surplus for Poland of $15 billion (Guiraudon, 2002). As a result, the Korczow/Krakowiec border between Poland and Ukraine has been one of the busiest in Europe (Buonanno and Deakin, 2004: 99). In addition, Poland has strategic reasons for maintaining good relations with Ukraine, as it considers a stable Ukraine to be a potential balance to Russian hegemony in the region.

Prior to the imposition of visa requirements, two and a half million seasonal migrant workers and small traders crossed the border from the Ukraine into Poland each year. As well as providing Poland with an annual net surplus of 1.5 billion US $, and being the main source of income for around 35% of Polish small businesses (Buonanno and Deakin, 2004: 174-175), this also provided the main source of income for many Ukrainian families (Grabbe, 2002: 7). Moreover, it is estimated that trade between the two countries has dropped by 30% since the tightening of border controls between the two countries in 1997 (Grabbe, 2002: 7).

In addition, it appears that much of this decline was due to a lack of Polish consular facilities as a consequence of financial constraints. Poland planned for only an extra three consulate offices in Ukraine after the introduction of visas for Ukrainians, bringing the total to six, not nearly enough to deal with the expected visa applications (Anderson, Apap and Mulkins, 2001.

Therefore, the November 2004 Polish decision to issue multi-entry, long-term visas for Ukrainians who can demonstrate ties with Poland, as well as the decision to issue cost-free visas for Russian and Ukrainian citizens, has been successful in limiting the loss of trade expected following visa imposition (Baldwin-Edwards, 2006: 16).

Despite this, some problems inevitably remained which were alleviated to an extent by improving the efficiency of Poland's visa issuing and border control system. However, this inevitably came at a considerable cost. Firstly, Poland effectively covered the whole of Ukraine by expanding consular offices in Kyiv, Lviv and Kharkiv, and opening two new ones in Lutsk and Odessa. Moreover, more consuls were provided, and 250 local staff were employed. In addition, computer and office equipment had to be supplied, as well as training by the Foreign Ministry (Baldwin-Edwards, 2006: 16).

B. Minority Issues: The Case of Hungary

The case of the Hungarian Diaspora shares many similarities with that of Poland/Ukraine. However the case of Hungary also has another dimension: the involvement of a national minority. While Hungary itself has a population of 10 million, there is also a 3-million strong diaspora of ethnic Hungarians living in (as yet) non-EU neighbouring countries, especially Romania (prior to 2007), Ukraine and the former Yugoslavia (Guiraudon, 2004: 175),.

Protecting the rights of minorities has been an important aspect of political conditionality imposed by the EU on the candidates, and, as one of the Copenhagen criteria, has been evaluated by the Commission as part of the accession process. Moreover, co-operation on minority issues among the CEECs was seen as part of the general principle of 'good-neighbourliness' encouraged by the Stability Pact (Jileva, 2003: 79-80). It can, therefore, be seen as part of the EU's general drive to improve interregional co-operation and, consequently, stability in CEE.

Ensuring the welfare of this Hungarian diaspora, who could previously enter Hungary visa-free, has always been the main goal of Hungarian foreign policy. In contrast, then, to Poland's comprehensive "Eastern foreign policy" covering Russia, Belarus, Moldova, and Ukraine, Hungary was more concerned with its neighbours in the Carpathian basin with significant ethnic Hungarian populations, particularly Slovakia, Ukraine, Romania, Serbia-Montenegro, and Croatia (Baldwin-Edwards, 2006: 16).

As in the Poland/Ukraine situation, however, relations between Hungary and the Hungarian diaspora prior to the imposition of visas, had resulted in considerable cross-border trade and

investment, while seasonal migration to Hungary provided support for ethnic Hungarians from poorer countries (Grabbe, 2002: 7).

Although Hungary introduced a Schengen-type visa control system in Autumn 1999, and introduced visas for Russians and Belarusians in June 2001, it promised that visas for Ukrainians and Serbians would not be introduced until accession. While the problem of the Hungarian diaspora in Romania was largely solved by the lifting of EU visa requirements for Romanian citizens, such a move was practically out of the question for Ukraine and Serbia, being non-candidates (Grabbe, 2002: 9).

In an attempt to alleviate the effect of the Schengen border regime, however, the Hungarian Parliament passed the 'Status Law', a law offering members of the Hungarian minorities in neighbouring states privileged access to education, cultural facilities, public transport, health and employment in Hungary (Batt, 2002: 20). In particular, this law reflects concerns amongst Hungarians about new divisions being created between their ethnic communities by EU membership due to the cutting of economic and cultural ties caused by Schengen (Barnes and Anderson, 2004).

However, while this law may help preserve ties among ethnic Hungarians in the region, it has caused some difficulties in Hungary's relations with Romania and Slovakia, which viewed the law as impeding upon their sovereignty (Barnes and Anderson, 2004). In Romania, for instance, while this was well-accepted by inhabitants of the border region of Banat, even among those who did not belong to the Hungarian minority[54], it was deeply controversial in other parts of Romania, and seriously damaged Romanian-Hungarian relations (Batt, 2002: 20).

The Greek use of special identity cards for TCNs of Greek origin, entitling the holder to access into Greece, provided one potential model. Similarly, France, which has a significant Algerian minority, issues a special residence permit only to Algerian nationals (Kovacs, 2002: 5). This does, however, have the same potential difficulty as the Commission's proposed multiple use, short term visas discussed below: due to the lack of checks at Schengen internal

[54] According to Batt, one of the reasons for the more positive attitude towards the law in Banat may be the experience of the German government's help for the local German minority in the form of grants and investment, a develpment that has been to the advantage of the region as a whole

borders it would be difficult to prevent the holder of such an identity card from illegally migrating to another Schengen country should he/she so wish.

In addition, since January 2006, Hungary has made available to ethnic Hungarians special residence visas valid for five years, for multiple entries and practically unlimited stay, although, due to Schengen rules, these visas do not permit the holder to work or study in Hungary. However, it should be reiterated that this policy is focused on ethnic Hungarians to the exclusion of ethnic Serbs, for example (Baldwin-Edwards, 2006: 16).

As in the Polish/Ukrainian case, this has been successful in curbing the decline in cross-border trade. However, again resembling the Polish case, it has also come at some cost. Hungary opened two new offices in the Hungarian-populated areas within Ukraine (Berehovo and Uzhhorod), along with the existing one. Meanwhile, new staff were taken on and trained in Ukraine and Serbia-Montenegro, and an online consular information system covering 98 offices was developed (Baldwin-Edwards, 2006: 16) .

The imposition of the Schengen visa regime in CEE has indeed proved to be disruptive in terms of interregional co-operation, both regarding trade and political relations. As has been emphasised above, this is contrary to the EU's own goal of encouraging good-neighbourliness and co-operation in the region.

Removal of the EU's new Eastern neighbours from the Schengen 'blacklist' would be a solution although this is unlikely to be acceptable to the EU, at least before the long term due to (probably unjustified) fears of mass migration (Apap *et al*, 2001: 10). The negotiation of visa facilitation agreements, currently undertaken by the Commission with several neighbouring countries, will, however, alleviate matters significantly.

However, given that alterations to the Schengen negative visa list are not, at present, feasible, it is possible that these difficulties may be eased, if not entirely solved, in other ways. On the one hand, this could be done by improving the visa application system and, on the other, by introducing special arrangements for border regions. Firstly, it has been suggested that the main difficulty for visa applicants to the Schengen zone may lie, in most cases, in the

inconvenience of the application system, rather than in actually being granted the visa (Kovacs, 2002: 4) (Jileva, 2002: 4).

Many of these factors are avoidable, for instance by introducing mail/internet applications, reducing the cost of visas and increasing efficiency at consulates and border crossings. In addition, respectful behaviour towards applicants, particularly by scrapping unnecessary interviews in consulates[55] and an improvement in the attitude of border guards on the external frontier (Apap *et al,* 2001: 8), would help to 'soften the blow' for third countries of the imposition of the Schengen visa regime (Jileva, 2002).

Cost is also a significant obstacle. In addition to paying the visa fee itself, applicants may be required to provide translations of documents, sometimes stamped by a notary, and travel insurance. As Baldwin-Edwards points out, the combined cost of a Schengen visa application amounts to a month's salary for an average citizen of a SEE country before they have even begun to pay for the trip itself. Moreover, applicants are sometimes required to show a return ticket even though they may not be granted the visa (2006: 3).

This, in fact, implies a significant transfer of funds from poorer non-EU countries to their wealthier Schengen neighbours – Bosnians, for instance, are estimated to have spent some €50 million in 2005, which is equivalent to the entire CARDS funding to Bosnia and Herzegovina during the same period (Baldwin-Edwards, 2006: 4)

While lack of efficiency is often the case even for EU-15 consulates, CEE consulates in the region, as suggested by the example of Poland in the earlier pre-accession days, face even greater barriers to efficiency in granting visas, due in particular to a lack of funding and of experience in the field. Therefore, particularly in the CEECs, in order to achieve this greater efficiency, extra funding as well as training may be necessary, particularly when it is taken into consideration that, at only around 0.12% of the total EU budget, the JHA budget, even accounting for intergovernmental contributions, is disproportionately small (Jileva, 2002).

In addition to the improvements discussed above, special arrangements for border regions may be helpful in easing cross-border crossings between the CEE MS and the neighbouring

[55] These interviews are not required according to the Schengen agreement but are frequently carried out

countries. In fact, there are three types of derogations possible under the Schengen agreement:

- Derogations linked to treaty declarations. One example is the issuing of one-year residence permits for inhabitants of the Moroccan towns of Teutan and Nador, which border on the Spanish enclaves of Ceuta and Melilla. Another case is the Portuguese visa waiver with Brazil, according to which illegal Brazilian nationals found to have entered the Schengen area via Portugal would be readmitted (Baldwin-Edwards, 2006: 20).

- Temporary Derogations. These include the right to issue visas of limited territorial validity, such as those issued by Greece for SEE citizens during its transition period to Schengen in 1992-1998. Such visas are not valid for transit or entry in other Schengen states (Baldwin-Edwards, 2006: 20). However, experience suggests that under such schemes it is relatively easy to disappear into the EU as an illegal immigrant should the temporary visa-bearer so wish (Anderson, Apap and Mulkins: 14).

- Long Term National Visas. While Schengen visas are normally issued for a period of up to three months, states may sometimes be allowed to issue visas for longer periods. An example is that of Estonia, which issues up to 4, 000 multiple-entry, free of charge visas for Russians annually (Baldwin-Edwards, 2006: 20).

The European Commission has been active in suggesting possible solutions for the situation in CEE. In 2003, for instance, it proposed two measures[56]. According to the first proposal, residents of the border areas of third countries[57] would be eligible for special visas allowing them to cross the EU border many times for stays of up to seven days, totalling not more than three months out of every six. This visa would only be valid in the border area of the issuing EU Member State (Apap, Carrera and Kirişçi, 2004: 37-38).

However, it was argued that the overload that such a system would cause to consulates without proper levels of adequately trained staff and technology would leave the situation

[56] COM (2003) 502
[57] Those resident for at least one year within 50 km of the EU border

more open to cases of fraud and misinformation. One example is that of 2,500 residents of Kaliningrad who claimed they were planning to stay at the Olivia hotel in the Polish town of Olsztyn on their applications for Polish tourist visas. The point here is that the Olivia hotel, used as an example in the instructions for applications for a visa, does not actually exist (Barnes and Anderson, 2004).

The second of the Commission's 2003 proposals was that the new MS should be able to conclude or maintain bilateral agreements with third countries at least until the lifting of the internal borders with the Schengen area, on the basis that, until then, anyone entering the Schengen zone from the CEECs would, in any case, be subject to border checks (Apap, Carrera and Kirişçi, 2004: 38). This is, for instance, what happened in the case of Poland/Ukraine and that of Hungary with neighbouring countries, and, as has been suggested above, has played an important part in minimising the negative impact of visa imposition.

Most recently, the Commission has proposed a visa-facilitation scheme, developed by the JHA Council meeting in April 2006, for neighbouring countries. The priority is given to countries with a close link to the EU, particularly candidate countries and those covered by the EU's Neighbourhood Policy, and those which have concluded a readmission agreement with the EU. The Commission has already completed such an agreement with Russia, is negotiating one with Ukraine and plans to have negotiated all visa-facilitation agreements in SEE by the end of 2007 (Baldwin-Edwards, 2006:4).

Eventual visa-free travel in the Schengen zone is envisaged as a possibility for neighbouring countries with visa facilitation agreements. JHA Commissioner Franco Frattini has pointed out that this will be based on the effective functioning of visa facilitation and readmission agreements, along with evidence of efforts to improve cross-border police cooperation and to combat corruption. In addition, the introduction of biometric data and personal data protection measures are seen as vital (Baldwin-Edwards, 2006: 4)

In this way then, from a neofunctionalist viewpoint, the Commission has clearly attempted to cultivate spillover in this context, and has often been successful in doing so. Moreover, although neighbouring countries will have to adjust to the relatively restrictive Schengen system if they are eventually to be granted visa-free travel, the Commission's proposals have

tended to be in favour of liberalising entry to the Schengen zone for citizens of neighbouring countries.

4.3.2. Implementation Problems

Although implementation problems in JHA are certainly not limited to the candidate countries, due to the non-binding nature of many of the recommendations and the high cost of policing border controls (Geddes, 2003: 14) the difficulties in the CEECs have been particularly marked. This can be explained by the fact that, before the accession process, they completely lacked a border-control system, and also by these countries' relative poverty, making them even less able to bear the costs of implementation than the EU-15, despite considerable PHARE funding.

As a result, CEE border guards have tended to be underpaid and consequently subject to corruption (Grabbe, 2002: 2). This not only directly affects the efficiency of border control in these countries, but can discourage their counterparts in other EU states from co-operating and sharing information. Moreover, as Monar points out, this problem got worse rather than better in the years immediately preceding accession in some of the new MS, most notably the Czech Republic (Grabbe, 2002: 7).

Moreover, during the accession process, infrastructure, equipment and training in all areas of JHA as well as co-operation and exchange programmes were urgently needed if the CEECs were to reach EU standards of border security (Eisl, 1999: 75). Even as late as 2001, just three years before accession, the numbers of border guards in Hungary and Poland fell short of the target by around 30%, while Slovenia had only appointed approximately half the police staff predicted in its Schengen Action Plan for 2002-2003 (Monar, 2003: 5).

In addition to corruption and relatively low standards of border security, Monar (2003:4-5) points out that, in the run up to accession, there was slow progress in the organisation of data-protection agencies, which are of central importance for participation in Europol and other computerised EU co-operation networks. Therefore, in order to improve implementation of JHA in the CEECs, an increase in funding on the part of the EU is necessary. In addition to this, training programmes and incentive programmes for border guards are important if corruption among them is to be reduced.

4.3.3. The Transition Period for Free Movement of People from CEE

As has been discussed above, in spite of the fact that the new MS were required to fully implement the Schengen external border requirements before accession, internal borders between the new MS[58] and the EU-15 are not due to be dismantled until around 7 years after accession (i.e. until around 2011), as the consequence of a German-Austrian demand (Guiraudon, 2004: 175).

This contrasts with the candidate countries' optimism, prior to this decision, about joining Schengen soon after enlargement: as a representative of the Polish government stated in 2001, 'The possibility of Germany's imposition of a 7 to 10 year delay in implementing Schengen is weak; it is more likely to be 2 years at most before Poland is a full member of Schengen' (Anderson, Apap and Mulkins, 2001: 10).

This transitional period is divided into three different stages. Firstly, for the first two years after accession, national migration policies[59], including previously concluded bilateral agreements, continue to apply in all countries, except for the UK, Ireland and Sweden, which have opened their labour markets to nationals of those CEE member states which joined in 2004. In 2006, the MS are to decide whether to prolong the transitional measures for another three years, after which they may be extended for another two years in the case of 'exceptional or unexpected circumstances' (Carrera, 2004: 7-8).

While this has allowed the CEECs to spread the costs of implementation (Pastore, 2004: 132), it has also caused hard feelings in some of the new MS who feel that they are being treated as 'second-class citizens'[60]. There is resentment of the fact that, despite the efforts that the CEECs have made, often at considerable financial and political cost, to implement the JHA aquis, their citizens still lack the right of free movement within the EU, which has been one of the essential political symbols of the AFSJ, the Single Market and, indeed, the EU itself (Carrera, 2004: 8).

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[58] Except for Malta and Cyprus

[59] More stringent measures may not be introduced after the accession of the CEECs, and CEE workers already intgrated into the labour market of the EU-15 are to continue to have access

[60] It is, however, true that the right to free movement is not applicable even to EU-15 citizens who do not have a job or the financial means to support themselves in another EU Member State

However, as Buonanno and Deakin point out (2004: 96), modernist explanations of identity formation argue that labour mobility is the determining factor both in geographical identity formation and in successful political integration, and may in fact be more important than either money or goods. This issue has been of concern in the governments of the new MS: Victor Orban, for instance, ex-Hungarian Prime Minister has said that an enlarged EU without labour mobility would resemble a class-system (2004: 96).

It can be argued that Western European reluctance to open their doors to the CEECs is based on a fear of mass migration from those countries. In fact, Lahav's research suggests that there is a fairly negative attitude towards (potential) migrants from CEE in the EU-15 both among members of the public and the elite (here MEPs). While migrants from CEE would be welcomed more than many other groups, they are viewed in most cases[61] as less desirable than migrants from the EU-15 or non-EU Western Europe (2004: 92), although this appears to be based more on economic issues than on xenophobia.

As Lahav has pointed out, the fear of mass migration from CEE does not appear to be based on racism or ethnic issues. Among people who linked immigration to race relations, for instance, only 12% wanted to see a reduction of immigration from CEE. On the other hand, migration from CEE is a concern mostly to those who associate immigration with unemployment, as CEE migrants are viewed (in contrast to North Africans, for instance) as competing with EU citizens for the same jobs, and on more attractive terms (2004a: 91-111).

However, it appears that this move is out of all proportion to the 'threat' of migration from CEEC. As has already been pointed out, migration from the CEECs in the short to medium term is not only likely to be limited in number, but many potential migrants are just the kind of people that are likely to be an asset to, rather than a drain on, Western Europe – young, well educated and with no dependents (Work Permit, 2004).

Moreover, when the citizens of Greece, Spain and Portugal were granted free movement rights in 1992, there was no substantial rise in the number of workers from those countries

[61] According to Lahav's survey of MEPS, the exception are MEPs from Denmark and Ireland, who give migrants from Eastern Europe and non-EU Western Europe an equal ranking, while Spanish and Italian MEPS rank East Europeans as more desirable than Western Europeans (non-EU in the case of Italy, both EU and non-EU in the case of Spain)

settling in the EU, despite the fact that those countries were also significantly poorer than the EU average (Uğur, 2000: 164).

Indeed, the tables may be turned in the not-too-distant future: the significantly faster rates of economic growth in the East than the West[62] may encourage Western Europeans to seek opportunities in the CEECs that are not available in the sluggish economies of their own countries. Such a scenario would be problematic due to the unfairness of 'Westerners being able to cross the EU's borders freely while Easterners cannot' (Buonanno and Deakin, 2004: 98).

The experience of the UK, Ireland and Sweden, whose labour markets have been open to CEE migrants since 2004, also supports the idea that immigration from the CEECs will be limited. In the first few months after the May 2004 enlargement, for instance, the majority of CEE nationals registering to work in the UK were already resident in the country before May 2004, while the situation in Sweden is similar. Ireland[63], in contrast, has seen a significant increase in CEE nationals seeking employment since 2004 (Carrera, 2005: 9-10).

In fact, research has indicated that, while many citizens of the CEECs are interested in the experience of working in other EU-MS, only a small minority would consider *settling* in another country. Moreover, of those who would consider settling abroad, the vast majority would choose the USA over Germany, the most popular EU destination. Therefore, any migration from the CEECs to Western Europe will tend to be short-term and circulatory in nature[64]. Rather perversely, the EU's closing its doors to this kind of migration may encourage would-be *pendeln* migrants to aim to settle permanently in the EU-15 (Buonanno and Deakin, 2004: 97-98).

A further difficulty regarding the transition period is that previous experience of the enlargement of Schengen to border states, in this case Italy and Greece, has shown that inclusion can be postponed almost *ad-libitum* for political and electoral, as well as technical reasons (Pastore, 2004: 132).

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[62] In recent years growth rates in the CEECs have averaged around 5%, decisively outstripping the EU-15 rate of about 1%

[63] Ireland itself is an excellent example of how the migration tables can be turned: massive economic growth in the last decade or two has transformed it from a poor, emigrant producing country to a major pole of attraction for immigrants relative to its size.

[64] This type of migration is also known as *pendeln* migration.

This is due to the fact that the decision to accept an EU MS into the Schengen *acquis* must be taken unanimously by all Schengen members. In the case of Italy and Greece, the waiting period lasted for almost seven years, and eventually caused considerable political friction between these two countries and the Schengen members (Monar, 2000: 9), and perhaps negatively affected the functioning of the entire border control system during this period (Pastore, 2002: 1).

A further example of political motives causing a delay in a country's inclusion to Schengen is that of Spain currently vetoing the UK and Ireland's request to join considerable parts of the Schengen *acquis* as a means of pressurising the British government over the Gibraltar dispute (Pastore, 2002: 12). These examples suggest, therefore, that political factors (in particular pressure from public opinion) may also result in the extension of the CEE MS' transition period.

The transition period is also problematic in that it can be seen to violate the legal principle of free movement, upon which so many other EU rights are based. In particular, it has been criticised for being incompatible with the Europe Agreements, which contained provisions relating to the free movement of workers, which, notably, confer equal rights on CEE and EU-15 nationals regarding working conditions, remuneration or dismissal (Carrera, 2005: 9).

4.3.4. Readmission Agreements and other Asylum *Acquis*

The conclusion of readmission agreements with the CEECs was intended to limit the amount of illegal migrants and asylum seekers entering the EU. The first readmission agreement signed between an EU MS and a CEE country was signed between Germany and Poland in 1991, before Poland even became an applicant country. According to this agreement, Poland is responsible for any migrants caught crossing the Polish border to Germany illegally (Jileva, 2003: 84), whether the migrants were of Polish origin or in transit through Poland.

As a consequence of this agreement it is also now impossible for an asylum-seeker to gain asylum in Germany after arrival in Poland, therefore ensuring that many of these illegal migrants and asylum seekers now settle in Poland, rather than merely viewing the country as a point of transit *en route* to Germany. Therefore, much of Germany's burden of illegal

migration and asylum seekers has been shifted eastwards to Poland (Grabbe, 2003: 99-100), a country which, despite considerable economic support, has arguably less socio-economic resources to deal with such an influx.

Other features of EU asylum policy which favour CEE becoming a 'buffer zone' for migration and asylum seekers otherwise destined for Western Europe include the Dublin Convention and London Resolutions concluded in the early 1990s. Firstly, as was discussed in the previous chapter, the London Resolution allows for the return of asylum seekers to countries, either of origin or transit, designated as 'safe'. As all of the CEE MS and candidate countries were considered 'safe' throughout the accession process, this has resulted in many asylum seekers destined for the EU being returned to CEECs (Jileva, 2003: 84-85).

In addition, the requirement to introduce readmission agreements with third countries may also have a damaging effect on the relationship between these third countries, which are often neighbouring countries and the CEECs. Moreover, if concluded with countries that themselves have few or no readmission agreements, it may result in the creation of a second 'buffer-zone' outside the EU-25 or 27, this time in countries that are even less able to deal with a large influx of asylum seekers or illegal migrants than the CEE MS.

These neighbouring countries may therefore resent the attempt to impose such an agreement, particularly if they consider that, despite the fact that they have no prospect or intention of EU membership, it would contribute to them becoming a buffer zone for asylum and immigration destined for the EU. An example is Russia's rejection, in 1999, of Bulgaria's attempt to conclude a readmission agreement on the grounds that Russia itself had no readmission agreements with any country (Jileva, 2003: 82). While Russia is unlikely ever to apply for EU membership, other third countries in the region, with a view to an eventual EU membership application, may feel pressurised into accepting such an agreement.

Moreover, the potential creation of a buffer zone for asylum and illegal migration in CEE countries bordering the EU is particularly worrying as these countries are not equipped to cope with such an influx, as they lack the policy and administrative infrastructure to do so, and, in particular, have not yet had the chance to develop policies which deal with refugees in a way compatible with the protection of human rights (Geddes, 2003: 15). As well as this,

there is, as yet, no significant arrangement for burden-sharing with these countries (Uçarer, 2006b: 10).

In addition, the designation of all EU MS as 'safe' countries also raises a different problem regarding some of the CEE MS. Following the collapse of Communism, some residents of the emerging CEE states were not granted citizenship, most notably ethnic Russians in the Baltic states and Roma in Central Europe, and this issue was not fully resolved during the accession process, leaving many Roma in Slovakia and Slovenia and Russians in Latvia effectively stateless, and consequently without EU citizenship (Van Selm and Tsolakis, 2004: 10).

This may, therefore, potentially result in a stateless person requesting asylum in another EU country, on the grounds of persecution, perhaps discrimination resulting in their exclusion from national (and therefore EU) citizenship. Both the acceptance and rejection of such an asylum claim by another MS would cause difficulties; if accepted, it could spark an intra-EU crisis, while, in the case of rejection, the applicant may be refused admission to their country of origin on the grounds that he/she is not a citizen (Van Selm and Tsolakis, 2004: 10).

4.3.5. Neofunctionalist Commentary

As Schmitter has pointed out, the Copenhagen Criteria are probably necessary from a neofunctionalist perspective as they help the candidate countries conform with the background conditions considered as necessary by neofunctionalists for spillover, and therefore integration, to take place. However, he also argues that the conditions for Eastern enlargement, which have been the most stringent so far, are perhaps too one-sided and harsh and, according to neo-neo functionalism, could be tempered by an increased use of opt-outs and derogations without having a detrimental effect on neofunctionalist processes (2002: 42-43).

According to neofunctionalists, integration should be generally perceived as being beneficial, and of incurring low costs for spillover to take place (Moxon-Browne, 2003: 92). In consequence, Schmitter suggests that such harsh conditions may alienate the new MS on accession. This sense that they are being unfairly treated may, in turn, lead to spillback on their part, in the form of increased use of the veto or, in the case of QMV, the blocking

minority. Indeed, there are already some signs of a certain amount of disillusionment with EU membership on the part of the CEECs (2002: 43).

Despite the speedy resolution of the JHA accession negotiations, JHA remains, after enlargement, one of the most controversial areas between the CEECs and the EU. One of the thorniest issues has been the question of free movement of workers. The delay of the implementation of free movement of workers for citizens of the CEE MS had already caused an outcry even in the early days of the accession process. One of the most frequent complaints was that of being treated as 'second-class citizens'.

Moreover, it has been argued that the ability of workers to move freely is an important, perhaps the most important, part of geographical identity formation. This, in turn, is considered to contribute to successful political integration (Buonanno and Deakin, 2004: 96).

This is important from a neofunctionalist point of view, as, although early neofunctionalists tended to downplay the importance of public opinion, more recent research has suggested that EU identity formation among the public can increase public support for EU integration. As Hooghe and Marks have pointed out (2005), public support has become increasingly salient in EU decision-making today due to the increased use of referenda on EU issues[65]. Moreover, as the EU has branched into more controversial areas, such as JHA, public opinion has necessarily become more divisive.

Spillback may also occur due to a perception of unfairness resulting from the imposition of strict visa requirements on neighbouring countries, thus disrupting trade, cultural, political and even, in some cases, family relations between the new CEE MS or candidate countries and their non-EU neighbours. The use of temporary visa arrangements, the postponement of visa imposition on the most sensitive countries until accession and the conclusion of visa facilitation agreements by neighbouring countries with the EU may help to overcome this, at least in part (Baldwin- Edwards, 2006).

Moreover, a perception of being excluded from the benefits of EU membership may eventually result in a wish on the part of these non-EU CEECs to apply for EU enlargement.

[65] The rejection of the Consititutional treaty in referenda in France and Holland, for instance, demonstrates the increasing power of the public in relation to EU integration.

As Schmitter points out, enlargement can occur as a result of pressure from neighbouring countries which, particularly given the negative consequences to them of regional discrimination, are likely to push for membership (2002: 35).

Therefore, the more the non-EU CEECs feel discriminated against, the more likely they are to push for full membership, which could prove problematic from the point of view of EU public opinion, particularly in the case of large countries such as Ukraine. Moreover, even the European Commission appears to be suffering from a certain degree of 'enlargement fatigue'.

Commission President Jose Manuel Barroso, for instance, stated in late 2006: 'I do not think it would be wise to proceed with any enlargement before we have resolved the constitutional issue in Europe' (cited in Euractiv, 26 September 2006). As the Economist points out, the latter task is 'immense' and enlargement has thus 'become hostage to the constitution' (March 17-23 2007: 5-12).

However, the use of twinning and bilateral or multilateral co-operation, as has been frequently used in the accession process, may be beneficial from the point of view of neofunctionalist theory. For instance, as Gregory's research regarding the Estonian police indicates (2001), this may lead to a certain amount of *engrenage* between the officials involved, thus implying an increase in the similarity of outlook.

In turn, as Gregory's research has again suggested, this may result in an increase in voluntary spillover, or the candidate countries wishing to align themselves more towards EU policies from their own volition rather than merely as a result of reform being imposed from above by the EU (2001).

The following argument that Monar puts forward regarding the common management of external borders (2003:16) could also be extended to other areas of JHA co-operation, from co-operation regarding asylum and immigration to that between police forces and judicial co-operation:

> Elements such as common operational co-ordination, exchange of personnel, the formation of joint operational teams and the introduction of burden-sharing mechanisms as part of a gradual move towards a European Corps would give the 'old' member states a feeling of having an insight into

> and influence over the way the external borders are managed, provide ample opportunity for sharing experiences between officials from old and new member states and facilitate the transfer of expertise. All this would make a substantial contribution to trust and confidence-building.

4.4. Conclusions

While the candidate countries are expected to adopt the *acquis communautaire* in its entirety, it can be argued that growing attention was placed on the implementation of the JHA *acquis* in particular during the accession process. This can be explained by the perceived threat of mass migration and international organised crime passing from or via the CEE candidate countries to the EU. In addition to the insistence that the candidate countries strengthen their external borders, it also led to the maintenance of borders between the EU and the CEE MS until at least seven years after accession.

Moreover, first the collapse of Communism and then the prospect of enlargement themselves constituted considerable functional pressures for the development of JHA, in addition to the dismantling of internal borders. Thus, the fear of mass migration and organised crime from the candidate countries, particularly in the context of weakened internal borders within the EU, contributed to the swift development of JHA. This provided an additional difficulty for the CEECs in their adoption of the JHA *acquis,* as they were effectively trying to keep up with a moving target.

As has been mentioned, the particular geographical, economic and social situation of the CEECs was not taken into consideration during the accession process, and the CEECs, in contrast to established MS such as the UK, Ireland or Denmark were not granted the choice of opting out from any part of the JHA *acquis.* As a result, the adoption of the JHA *acquis* has posed considerable problems for the CEEC MS and candidate countries, and for their neighbours.

Perhaps most notable among these is the issue of the CEECs relations with their neighbouring countries. These are strained in various ways by the JHA *aquis*, particularly through the imposition of visas, which can disrupt trade, political, diaspora and even family relations. The problem is also exacerbated by a lack of resources at consular level. This, then, is clearly

contradictory to the EU's own condition that candidate countries should develop good relations with their neighbours.

The cases of Poland and Hungary can be instructive here. Both countries left imposition of visas for their closest neighbours (respectively Ukraine, and those countries with a significant Hungarian diaspora) until the last moment before accession. Moreover, even after accession both states issued long-term, multiple entry visas for certain groups from those countries[66].

This has certainly helped to alleviate the loss of trade and other ties that would otherwise have occurred with visa imposition, although it was accompanied by a significant expansion of consular facilities and staff, implying considerable cost for the countries involved (Baldwin-Edwards, 2006: 16).

In addition, the JHA *acquis,* through strengthened borders and readmission agreements, has a tendency to turn the CEE MS' neighbouring countries into a buffer-zone for unwanted immigration and asylum seekers otherwise destined for the EU. This is certainly problematic when it is recalled that most of these states are less able to deal financially and socially with such an influx than the EU itself.

Therefore, it is likely that, unless these problems are resolved, or at least alleviated, there will be considerable resentment towards JHA in the CEE MS. This could, consequently, result in spillover being replaced by spillback in this area, particularly if the CEECs were able to form a consistent blocking minority. If it is taken into consideration that free movement of labour constitutes an important part of identity formation, the extended transition period for freedom of movement for workers from the CEECs to the EU could also contribute to worsening this situation.

In turn, a gridlock in the development of JHA could have a disastrous effect on the legitimacy of the EU, both from the point of view of the CEECs and in the EU-15, where co-operation is demanded by the public and promoted, particularly by the European Commission, as the new *raison d'etre* of the EU itself. However, both neofunctionalist theory and institutional factors

[66] In the case of Poland, for Ukrainians who could demonstrate close ties with Poland, and in the Hungarian case for members of the Hungarian diaspora.

suggest that spillback in JHA is possible, or even likely, given severe dissatisfaction in this area on the part of the CEECs.

Firstly, neofunctionalist theorists predict that enlargement itself is likely to obstruct spillover. As enlargement increases the diversity of interests of the MS, it will probably tend to be an obstacle to the integration process as a larger, more diverse group of states will be likely to find it more difficult to identify a common need, agree on action, and for their citizens to demand that the relevant action be carried out by the EU rather than the MS in question (Schmitter, 2005: 268).

In addition, in order to examine the danger of spillback, it is necessary to evaluate whether the CEECs could, and would, form a blocking minority in case of dissatisfaction with the EU's border policy. In general terms, the effect of enlargement is likely to be a slowing-down of decision-making: as Dinan points out, it is far more difficult to accommodate the preferences of 25 or more MS than of 15, therefore making the EU at once 'more European, and less united', and, consequently, bringing legitimacy, along with identity and governance, to the top of the EU agenda (2004: 24).

However, it is not, in general, necessarily expected that the CEECs will act as a cohesive voting bloc; instead, the wealth and size of the CEECs is diverse enough that, despite similarities in their historical experience and the fact that they are new members, they are more likely to associate themselves with existing rich/poor, small/large, federalist/intergovernmentalist or liberal/statist voting blocs (Baun, 2004: 140) depending on the issue in question.

Despite this, Baun does identify the conflict between internal and external security goals as a potential new divisive point between the 'old' and 'new' MS arguing that, while the EU-15 are more security-conscious about their internal security, the CEECs are concerned about the development of new divisions between a peaceful and prosperous EU and its poor, unstable Eastern neighbours (Baun, 2004: 140).

Moreover, a recent study suggests that Eastwards enlargement has already had a negative effect on legislative output, diminishing to levels lower than in the previous ten years,

although some of this effect may be put down to the result of the French and Dutch rejection of the Constitutional Treaty (Leuffen, 2006: 12-18).

In conclusion then, although a drastic reworking of the Schengen agreement, or the possibility of opt-outs do not seem realistic options, there are several steps that the EU could take to ease the adoption of the JHA *acquis* on the part of the CEECs. Some suggestions include the following:

- Special visas for inhabitants of border areas allowing them to come and go to the EU neighbouring border areas. This would not only contribute to the maintenance of trade and cultural relations between the regions, but, through promoting the continuation of *pendeln* migration, may actually discourage the residents of such regions from immigrating permanently (and perhaps illegally) to the EU.

- Negotiation of visa-facilitation agreements with all neighbouring countries. This would not only help to lessen the loss of trade and other ties in the region, but would decrease the negative image of Schengen and the sensation of being 'left out' which have become widespread in the non-EU CEECs (Baldwin-Edwards, 2006). A reduction in the price of visas for citizens of neighbouring countries, many of which have a relatively low GDP per capita, would also be useful in this respect

- The development of a burden-sharing system which extends to neighbouring third countries, whether or not they are, or intend to become, candidates for EU membership. Such a system could be used to aid such countries if they are effectively becoming buffer-zones for unwanted migrants and asylum-seekers destined for the EU.

- Financial, technical and training assistance for CEE MS to continue past accession. Although a fund for 'transitional Schengen measures' was established to last from 2004-2006, with an annual facility of 286 million Euros, it is unlikely that this is sufficient to cover the new MS' needs, particularly when the implementation of the SIS II is taken into account.

This would be directed towards both consulates and border control. In the case of consulates, this would allow CEE consulates to deal with larger quantities of visa applications more quickly, thereby promoting relations with neighbouring countries. Regarding border-control, increased technical and financial assistance would speed up checks at border posts. In addition, larger salaries and increased training would gradually help to reduce corruption among border guards, which is still a major problem in many CEE MS.

In conclusion, then, these changes, without representing serious reform to the Schengen system as a whole, would contribute to minimising dissatisfaction with JHA in the CEE MS and candidate countries, thus limiting the potential for spillback in this area. Moreover, inclusion of the non-EU CEECs, through visa facilitation schemes, burden sharing, and increased co-operation and financial aid may help to postpone further enlargement pressures from the region at a time when the EU appears to be neither able nor willing to cope with further enlargement in the medium term.

V. THE EXTENSION OF JHA TO TURKEY

5.1. Introduction

As has been discussed in previous chapters, EU border policies have become increasingly restrictive in recent years, due to 'lowest common denominator' intergovernmental bargaining, and growing concern on the part of the European public about international terrorism and illegal migration, which they often consider to be connected. This has, as has already been examined, had important consequences for the CEECs, which are now expected to be the 'guardians' of the EU's Eastern border.

However, as Pastore points out, the Mediterranean region has also long been a source of immigration for many EU countries. Migration has often played an important role in the bilateral relations between the countries on both sides of the Mediterranean and in multilateral relations between the EU as a whole and the Mediterranean countries which have developed, particularly through the Euro-Mediterranean partnership, or 'Barcelona process' (2003: 105). This is particularly important in the light of the EU's developing neighbourhood policy.

As a Mediterranean country set in a tumultuous region, and with traditionally high emigration of its own, Turkey's application for EU Membership therefore poses particular difficulties for the EU MS, where pressure for restrictive border policies is high. It can be argued that the EU has two basic worries about the effect of Turkey's membership on the AFSJ, which can be summed up as follows:

- Due to its geographical situation at the hub of troubled regions such as the Balkans and the Middle East, Turkey itself has increasingly become a country of immigration and asylum. The EU, afraid of large numbers of transit migrants arriving via Turkey, wants Turkey to strengthen its external borders. It also expects Turkey to adopt the *acquis* on asylum, including the Dublin Convention, and to sign readmission agreements with neighbouring countries and the EU itself. This would allow asylum seekers entering the EU via Turkey to be returned there, effectively making Turkey a potential buffer zone for unwanted migration destined for the EU.

- As is comparatively well-known, Turkey has also long been a country of emigration, and, indeed, Turkey is the Mediterranean country which has the highest number of citizens living abroad. Moreover, given Turkey's comparative poverty, there is a fear of mass migration from Turkey to the EU itself.

While academic studies have shown that this is unlikely, and that emigration pressures from Turkey are actually decreasing (Pastore, 2003: 105), there is a negative attitude to immigration in general among many political groups and large sectors of the EU public. It is especially feared that mass migration from Turkey will contribute to unemployment, depression of wages and social and political problems (Togan, 2002).

Moreover, as will be discussed in more detail below, studies among the EU public and elite (represented by MEPs), have shown that the prospect of mass migration from Turkey, for instance when compared to that from the CEECs, is viewed as particularly undesirable. In consequence, this provides a political impetus for the EU both to prolong Turkey's accession process and, judging from the CEECs' experience, for the EU to maintain internal borders with Turkey for many years after accession.

As a result, despite the fact that, at the time of writing, Turkey is still far from accession[67] and even further from sharing internal borders with the Schengen members[68], there has already been considerable pressure on Turkey to begin implementing the JHA *acquis* as part of the accession process. Moreover, in addition to Turkey's desire to become an EU member, the EU has also been able to put pressure on the country in this area because of the important part it plays in the Turkish economy, both as Turkey's largest trade partner and as its largest source of foreign direct investment (Kruse, 2003: 16-17).

However, as will be discussed further in this chapter, the adoption of the EU JHA *acquis* has already been a subject of significant controversy in Turkey. This results from the 'lack of fit' between Turkish and EU border policies as well as Turkey's geographical situation, which mean that Turkey will face certain difficulties as a result. While these are often similar to those faced by the CEECs discussed in the previous chapter, they are if anything more serious

[67] This is expected some time between 2013 and 2015 at the earliest
[68] Given an accession date of 2015, it is unlikely that internal borders will be dismantled until 2022 at the earliest, given the delay of at least seven years after accession that the CEE Member States are currently facing.

in the case of Turkey due to the above factors. Moreover, this is compounded by the fact that Turkey is expected to carry out these reforms when its projected accession date is still relatively distant, and when accession itself is still not a certainty.

5.2. JHA and Turkey's Accession Process: A Neofunctionalist Perspective

'Westernisation' attempts in Turkey date back as far as the latter part of the Ottoman Empire, to the *Tanzimat* reforms of the nineteenth century (Mango, 2005: 15-16). Atatürk's reforms carried out in the new Turkish Republic in the 1920s and 1930s, which included secularisation, the emancipation of women and the adoption of the Latin language and Western calendar, show further Western and European influence.

Although Atatürk generally emphasised that he wanted his people to be part of a universal civilization, he recognised that what he was undertaking was in fact Westernisation (Mango, 2005: 18), and he would have to carry it out despite the West rather than with its help. In his own words, 'The West has always been prejudiced against the Turks. But we Turks have consistently moved towards the West … in order to be a civilized nation, there is no alternative' (cited in Morris, 2005: 30).

Turkey's aim to become part of the Western world has also extended to foreign policy. Turkey has become a long-standing member of several important European and other Western organisations, including the OECD (Organisation for European Co-operation and Defence) since 1948, the Council of Europe since 1949, and NATO (the North Atlantic Treaty Organisation) since 1952 (Dorronsoro, 2004: 2).

Turkey's desire for relations with the then EEC can also be viewed in this context. As Oğuz Satici, president of the Turkish Exporters' Assembly, points out, 'For Turkey, EU Membership is the most important step towards the goal of integration with 'modern civilization' shown by the founder of our Republic and modern Turkey, Mustafa Kemal Atatürk' (Friends of Europe *et al,* 2004: 9-10).

Despite making its first application for associate membership in 1959 (Asbeek Brusse and Griffiths, 2004: 19), though, it is still in the waiting room for accession, although in the

meantime 21 other countries have 'jumped the queue' for membership. As a result, Turkey is today the EU's longest standing associate partner.

5.2.1. The Customs Union

Turkey's application resulted in the 1963 Ankara Agreement, whereby a customs union would be set up in three stages. This is, in fact, consistent with a neo-neo-functionalist hypothesis, which foresees that, as integration develops, 'integrating units will find themselves increasingly compelled – regardless of original intentions – to adopt common policies vis-a-vis non-participant third countries' (Schmitter, 2002: 20).

Moreover, this was seen as a step towards eventual full membership. Turkey's intention to accede to the EEC at an unspecified later date was officially recognised, with Walter Hallstein, then Commission President, declaring that 'Turkey is part of Europe' (Dorronsoro, 2004: 49). The process was, however, delayed in the 1970s due to political and economic circumstances in Turkey (Uğur, 2000: 175).

The Association Agreement, as is also the case with Association Agreements between the EU and some North African countries[69], also included the right of free movement of persons and the transferability of social entitlements (Luedtke, 2004: 17-18), which would be implemented in stages. According to the Additional Protocol:

- Turkish workers in the EC should have equal rights to local workers regarding wages and working conditions
- Turkish workers and their families should be covered by the social security system of their country of residence
- If Turkish workers move from one EC country to another, their social security primes should be cumulative to those earned in the previous countries (Uğur, 2000: 175).

However, Turkish immigration to the EC-6, which had reached a high of around 123,000 by 1973, dropped dramatically to a tenth of the previous figure following the oil crisis of that

[69] The North African countries are chosen as a point of comparison here as neither the North African countries nor Turkey are, as yet, Member States. However, the free movement of workers clause also applied to some association agreements with countries that later went on to become full members, such as Greece.

year, causing economic difficulties for Turkey which included a rise in unemployment and a sharp drop in Turkey's foreign currency revenue. Moreover, the crisis resulted in a reluctance on the part of the EC governments to implement the free movement of wrkers clause of the Ankara Agreement. They argued that difficulties in the EC labour market should be taken into consideration and the focus should, instead be on improving the rights of Turkish workers already resident in the EC (Uğur, 2000: 179).

The question of the rights of Turkish workers resident in the EC was reiterated in 1980 by a decision of the EC-Turkey Association Council. According to this decision, Turkish workers would benefit from the gradual removal of employment limitations, a prohibition on future restrictions to Turks' access to the labour market, and equal social security[70] and educational and vocational opportunities as EU citizens (Geddes, 2000b: 52-53). Moreover, workers' families were also to be allowed full residential and professional freedom after five years of residence, and workers' children should have the right to work if they received appropriate education in the country in question (Uğur, 2000: 183-184).

In reality, no free movement of persons resulted directly from the Association Agreements, either for Turkish citizens or for those of North African countries[71]. In the case of Turkey, this was partly due to a change of tactics. The Turkish government, seeing that the EC members, particularly Germany, were increasingy opposed to granting free movement rights to Turkish citizens decided, instead, to attempt to improve the rights of those Turkish workers already resident in the EC. Moreover, another reason for Turkey's change of focus regarding free movement was that the new government was increasingly determined to apply for full membership in the shortest possible time (Uğur, 2000: 184-185).

However, in some individual cases Turkish workers were conceded free movement rights on the basis of the rights granted to workers already resident in the EC. The *Sevince* case set a precedent, as the ECJ decided that the provisions made by the EC-Turkey Association Council were sufficiently precise to have direct effect. Moreover, in the *Kus* case, the ECJ decided that a Turkish worker resident in Germany was entitled to renew both his residence

[70] As social security rights were to be based on payment rather than residence, however, this effectively excluded illegal immigrants and encuraged return to Turkey in the case of accident or injury.
[71] In fact, this is hardly surprising as even free movement for EU citizens did not exist in practice until the Single Market Programme, established by the 1986 Single European Act. Even today free movement is limited to those EU citizens who will not be a financial drain on their adopted country.

and work permits following his divorce from his German wife. The ECJ argued that, as he had entered the country and applied for permits legally, he had the right to continue employment (Geddes, 2000b: 53).

Therefore, as in these cases the Turkish workers in question were granted free movement rights, these are examples of *legal* spillover resulting from the Association Agreement according to Luedke's definition: 'If we can find evidence of the Court making use of this role[72] to eventually grant TCNs free movement rights against the wishes of national politicians, then we can say that [legal] spillover ... has occurred' (2004: 10-11)

The military coup of 12 September 1980 naturally postponed Turkey's dreams of full membership, and of free movement of persons within the EC still further. In effect, EC-Turkish relations were frozen. Germany, followed by France and the other EC MS quickly imposed visa requirements on Turkish citizens, although they were urged not to do so by the Council of Europe, which argued that they were effectively discriminating against a Council of Europe member (Uğur, 2000: 185).

Following the restoration of democracy after the *coup d'etat,* Turgut Özal's government decided to continue the fight both for free movement rights and for full membership of the EC. With the former objective in mind, Özal visited Bonn in 1984 to lobby for free movement rights[73], although Germany responded that this was impossible due to the rise in Turkish worker migration. When Chancellor Kohl visited Turkey in 1985, this was seen as a positive gesture on the part of Germany as it was the first official German visit since the *coup.* However, it had not changed its opinion *vis-a-vis* Turkish free movement, and now claimed that it was supported by the Commission in this (Uğur, 2000: 186).

Meanwhile, in January 1986, the Commission began to prepare its recommendations regarding the Turkish situation. In many ways, it was similar to the German position[74] as it supported the improvement of the rights of Turkish workers already within the EU rather than implementing free movement. It argued that free movement should be postponed both

[72] Its role in jurisdiction over the Single Market
[73] Free movement of Turkish citizens was originally supposed to have been implemented by 1986.
[74] The main difference was that the Commission proposed that new workers from Turkey, in addition to those already in the EC, be given second priority as long as they did not upset the labour market or pose integration problems.

because of high unemployment in the EU and because Turkish citizens should not be granted free movement before the citizens of the EC's new Mediterranean MS, Greece, Spain and Portugal (Uğur, 2000: 187-188)[75]. Moreover, although the Commission implied that Turkish workers resident in the EC would be able to travel freely within the new Schengen zone, this turned out not to be the case.

Given this continuing lack of success in achieving free movement, the government decided to focus once more on full membership. In 1987, then, Turkey submitted another application for EC membership which was rejected in 1990 on the grounds of continuing political and economic instability, and because of already considerable pressure on the EC's finances following the Mediterranean enlargement of the 1980s (Asbeek Busse and Griffiths, 2004: 22-23). However, it was at least established that Turkey was considered a European country from the point of view of EC accession, and was therefore potentially eligible for membership.

Moreover, although there was no promise of accession, it was decided to revive the plan for a customs union between Turkey and the EU, and a customs union for industrial goods was phased in between 1996 and 2001 (Togan, 2002: 2), despite the opposition of the EP, which voted 3-1 against the Customs Union in early 1995. Socialist MEPS in particular voted against as a protest to what they viewed as an unsatisfactory human rights situation in Turkey although Felipe Gonzales and Tony Blair, the leaders of the two largest socialist parties in Europe instructed their MEPs to vote in favour (Lake, 2005: 10).

However, despite the doubts of the EP and other institutions, it was eventually decided to go ahead with the Customs Union, although the financial aid that Turkey was due to receive as part of its participation was vetoed by Greece (Öniş, 2005: 23). In general, it can be argued that the EU saw the revival of the Customs Union as a strategic necessity in order to maintain relations with Turkey. This seemed particularly vital in view of the prospect of enlargement to the CEECs, positive newcomers to the EU waiting room in comparison with Turkey.

This appears to fit the scheme of Niemann's 'induced spillover', a type of exogenous functional spillover according to which participants find themselves compelled to adopt common policies towards third countries, who find themselves more and more drawn to the

[75] Free movement for Greeks was implemented in 1987, and in 1992 for the Spanish and Portuguese.

successful integration project (1998: 431). In addition, it is also consistent with the neofunctionalist hypothesis that integration begins with relatively uncontroversial, although significant sectors, and also that it tends to proceed from purely economic integration to intergation of a political nature (Moxon-Browne: 2003).

Moreover, pro-EU Turkish business NGOs, notably IKV[76] and TÜSIAD[77], also played a role in the revival of the customs union. IKV, for instance, has principally forged links between Tukish and EU businesses, while acting as advisor on small and medium enterprise EU programmes such as Europartenariat, Medpartenariat and Interprise (Altinay, 2005: 108). This, then, indicates that political spillover from the business world may also have been a driving force in resuccitating the Turkey-EU customs union project.

5.2.2. Turkey as a Candidate Country

A. The Helsinki Council

In spite of these developments, the prospect of enlargement to the CEECs made it difficult to keep the Turkish application for membership on hold any longer (Togan, 2002: 2). Turkey was first formally accepted as a candidate country for EU membership by the December 1999 Helsinki European Council. This followed its rejection by the 1997 Luxembourg Council, at which Greece and Germany in particular were against Turkey's being granted candidate status.

Human rights and democracy issues were officially cited as reasons for Turkey's rejection, particularly due to the rather oppresive nature of the 1982 Constitution adopted in the wake of the 1980 *coup d'etat.* However, it is also likely that socio-economic issues, especially Turkey's relative poverty and large, mostly Muslim, population also played a part. Regarding the latter issue, a survey of MEPs carried out during this period suggests that many MEPS considered Turkey's population being overwhelmingly Islamic to be a potential stumbling block to its acceptance even by the EU elite (Lahav, 2004a: 160-161).

[76] The Economic Development Foundation
[77] Turkish Industrialists and Bsinessmen's Association

In particular, Chancellor Kohl pointed out that a large increase in the number of Turkish migrants in Germany would probably be unacceptable to German public opinion (Baun, 2000: 93). Despite the fact that this was probably true, such fears were probably unfounded. Studies have shown that migration from Turkey is likely to remain moderate, with only an estimated 0.3% of Turkish citizens expected to migrate to another EU country under conditions of complete freedom of movement (Krieger, 2004).

As a result, as Turkey was perceived both as a source of migration and as a country of transit for migrants aiming to reach the EU, the EU gradually began to see Turkey's inclusion in its developing border policy as important. This was particularly true as the prospects for eventual Turkish accession increased. What is perhaps the first example of co-operation on JHA matters between Turkey and the EU was a joint action plan agreed in 1998 and adopted on the basis of Article K3 in the Maastricht Treaty. While the intention of the action plan was to deal with the influx of migrants from Iraq and neighbouring areas, it was concerned especially with migrants in transit through Turkey (Geddes, 2000a: 104-105).

In consequence, EU officials visited Ankara and Istanbul in March 1998 seeking Turkish co-operation in dealing with migrants passing through Turkey from the Middle East and South Asia. This resulted in the Turkish government agreeing to set up 'reception houses' for asylum seekers with EU funding and expertise. The EU also tried to push Turkey into seeking re-admission agreements with neighbouring states; although the Turkish government was not interested in this, it did agree to the EU attempting to set up readmission agreements with Bangladesh and Pakistan on Turkey's behalf.

From a neofunctionalist point of view, therefore, the decision to co-operate with Turkey on JHA matters can again perhaps be understood through Niemann's concept of induced spillover. As has been discussed in the theoretical chapter, according to this concept external pressures, known as 'involuntary motives' by Schmitter, such as extra-Community demands or an unforeseen threat to Community interests, result in the MS adopting common policies towards the country in question. In turn, responsibility for these policies is often handed over to the supranational institutions (1998: 432).

In this case, it can be argued that the threat in question was Turkey's development into a country of asylum in the 1990s as well as its being a country of immigration and irregular

transit migration. Given that the fledgling EU immigration and asylum policy was becoming increasingly restrictive, therefore, it was seen as necessary to include Turkey in the EU's sphere of influence in these policy areas if flows of irregular migrants and asylum seekers from Turkey to the EU were to be curbed.

Fairly shortly afterwards, the decision to accept Turkey as a candidate country was finally made at the Helsinki European Council in 1999. This was partly a result of changes in national politics. The replacement of Kohl by Schröder as German chancellor probably had an especially important impact, as Schröder had a far more positive attitude towards Turkish membership than his predecessor (Baun, 2000: 130).

However, it can also be argued that the European Commission's policy of supporting the granting of formal candidate status to Turkey on the grounds that it would encourage democratic reform there, and including Turkey in its annual *avis* also had an impact. In part, this was because the Turkish government welcomed this as a positive sign of inclusion, and thus helped to ease the negative attitude that Turkey had been developing towards the EU since Luxembourg (Baun, 2000: 130-131).

Moreover, it is likely that the Helsinki Council was influenced by the Commission's recommendation, in its 1999 annual report, that Turkey be considered as a candidate country (Rumford). There is, therefore, a case for arguing that cultivated spillover had a role in Turkey's acceptance as a candidate country, and, going on the experience of the CEE countries discussed in the previous chapter, it undoubtedly will continue to do so during the negotiation process.

In addition, it is probable that functional spillover had a part to play in the acceptance of Turkey's candidature. As has been discussed above, given both international and domestic EU developments in the field of migration and border control in the 1990s, the EU saw it as increasingly necessary to tie Turkey into EU policy in this area. Given that this was also the case in other policy areas, most notably the CFSP (Common Foreign and Security Policy) and the developing co-operation in defence, granting Turkey candidate status was likely to be an effective means for the EU to exert further control over Turkish policy.

B. The Accession Conditions and Turkey: A Neofunctionalist Analysis

Like the other candidate countries, Turkey is expected to conform to the Copenhagen Criteria. As Schmitter points out, the Copenhagen Criteria appear to tie in very closely with the background conditions considered necessary by neofunctionalists for spillover to occur. On the other hand, however, he argues that their very imposed nature and the fact that they ignore the needs and wishes of the candidate countries implies that they may require those countries to make some difficult and ultimately unpopular reforms (2002: 42-43).

As part of the accession process, therefore, Turkey, like the other candidate countries, has to comply with the EU's JHA *aquis*, including the Schengen *aquis*. This means that, while living up to international human rights standards, it must act as gatekeeper of the EU's external border (Frantz, 2003: 13), a particularly difficult task for Turkey given the extent and difficult terrain of some of its frontiers, as shall be discussed below.

On 11 April 2000, following Turkey's acceptance as a candidate country in the December 1999 Helsinki Council, eight sub-committees including one which was to deal with JHA matters were set up in the EU/Turkey Joint Council. These sub-committees were intended to oversee the harmonisation process (Derviş, Gros, Emerson and Ülgen, 2004: 46). However, it is only relatively recently, especially since 2002, that attention in Turkey has been concentrated on JHA, due to the previous focus on fulfilling the political Copenhagen criteria (Apap, Carrera and Kirişçi, 2004: 13).

Turkey's candidate status was further cemented by the European Council's agreement, in 2001, to a membership-partnership, stipulating the main short and medium term measures that Turkey would have to take in order to fulfill the membership criteria (Griffiths and Özdemir, 2004). Regarding JHA, according to Turkey's Accession Partnership Document[78], prepared by JHA experts from the EU with the co-operation of the Turkish authorities (Içduygu, 2003), Turkey needed to make the following broad changes regarding border policy:

- Align its visa policy and practice with that of the EU

[78] The document was originally adopted on 8 March 2001 but was revised on 26 March 2003

- Adopt and implement EU practices on migration, including admission, readmission and expulsion with the aim of preventing illegal migration
- Strengthen its border management and continue to align with the *acquis* in order to prepare for the implementation of the Schengen system
- Start to align with the *acquis* in the field of asylum, including lifting the geographical reservation in the 1951 Geneva Convention; strengthening the system for hearing and determining asylum applications and developing facilities for accomodation and access to social services for asylum seekers and refugees (Frantz, 2003: 14), (Tokuzlu, 2005: 339).

As will be discussed in this chapter, Turkey's geographical situation and the difference between Turkish and EU policy in these areas have made this a difficult and controversial task for Turkey, perhaps even more so than for the CEECs. However, in many areas of Turkish society it is also seen as a 'necessary evil' if Turkey is to accede to the EU.

In response to the Membership Partnership, therefore, the Turkish Government prepared a National Programme for the Adoption of the *Acquis*, agreed upon and signed by both sides. However, the National Programme did not go all the way towards fulfilling the Copenhagen Criteria. In fact, as Öniş argues, 'The National Programme represented an attempt on the part of the political authorities in Turkey to strike a balance between the need to meet the Copenhagen Criteria and the unwillingness to implement reforms on the most sensitive issues in the short term' (2003: 13).

In June 2002, a task force was set up by the Turkish government, made up of officials from the Ministry of the Interior, the Foreign Ministry and the General Secretariat for the EU, in addition to representatives from the Coast Guard, Gendamerie, Military and Undersecretary of Customs. This task force was charged with preparing an action plan for the adoption and implementation of the JHA *acquis* (Derviş, Gros, Emerson and Ülgen, 2004: 41-42).

Since then, the task force has produced Strategy Reports in respect to JHA which were consequently negotiated by the Turkish government and the European Commission representation in Ankara. In addition, the government has put forward a number of twinning proposals in this area, mainly dealing with Action Plans for the implementation of the

Strategy Reports, officer training programmes and resources for improving administrative capacity (Apap, Carrera and Kirişçi, 2004: 14).

Finally, an important stage in Turkey's accession process was reached when it was at last able to begin accession negotiations in 2005. A Commission report was published on 6 October 2004 indicating that, while some gaps still remained, particularly in the areas of judicial reform, religious, cultural and women's rights and the fight against torture, Turkey essentially fulfilled the Copenhagen political criteria[79](Kaleağası, 2006: 288). On the basis of this positive report it was difficult for the European Council to argue that Turkey was unprepared for the opening of accession negotiations, and it duly accepted on 17 December 2004.

However, although negotiations were opened in 2005, since then it has been argued that there has been a significant slowing down of the reform process in Turkey. A deadlock has been reached over the issue of Cyprus: Turkey refuses to open its ports and airports to Greek Cyprus, as required by the EU, unless the EU lifts its effecive trade embargo on the North. In consequence, the Commission has recommended that negotiations of eight chapters will be suspended.

This slowing down of progress also goes for the area of JHA. Although the Turkish government published an Action Plan for Asylum and Migration, which came into force on 25 March 2005, the codification of the Law on Asylum and the Law on Aliens, which would both simplify the current Turkish legislation and bring it in line with the EU *acquis*, is not expected to be concluded until 2012 (Tokuzlu, 2005: 340).

5.2.3. Prospects for Membership: Political and Public Attitudes towards Turkish Accession in Turkey and the EU

This subchapter aims to examine the level of support for Turkey's accession at both mass and elite level, in both Turkey and the EU. In other words, then, it aims to explore both the neofunctionalist pressures in favour of Turkey's accession, and those against as, as has been discussed in the theory chapter, neofunctionalism argues that both elite and mass support are

[79] It should be recalled, however, that no candidate country completely fulfilled the Copenhagen political criteria at the beginning of the accession process. Indeed, it has been argued that no EU country is a perfect model of democracy.

necessary for integration to proceed. The hypothesis is, then, that the greater the amount of support for Turkish membership in both areas, and at both levels, the greater Turkey's chance of eventually completing the accession process.

A. Public Opinion in Turkey

The aim of EU accession has been, in general, supported both by the Turkish public and the Turkish elite, at least until recently. This is despite the fact that the rate of perception of a European identity to go along with a Turkish identity is relatively low. According to a Eurobarometer-type question in a 2002 survey directed by Hakan Yılmaz, 54% of (Turkish) respondents claimed to have only a national identity. This is significantly higher than the EU average of 38%, although lower than or comparable to some individual EU states such as the UK (62%), Finland (55%) and Sweden (54%) (Yılmaz, 2005: 184).

In spite of the relatively low perception of a European identity, the Turkish public in 2002 seemed to be largely in favour of Turkey's joining the EU. 74% of the population was in favour of accession, and large sections of the population were in favour of carrying out the dramatic political reforms demanded by the EU (Apap, Carrera and Kirişçi, 2004: 13). Public support for EU membership had grown even more by 2004, increasing by 10% to reach 84%, an indication, obviously, of overwhelming support (The Economist, September 30 2006: 35).

However, since then Turkish public support for EU membership has fallen dramatically, and is now, in late 2006, at only around 50% (The Economist, September 30 2006: 35). This is comparable to developments in the CEE candidate countries in the run-up to accession, where 'accession fatigue' appears to develop as the realities of the often arduous reforms required by the EU kick in (Vaduchova, 2005: 227-232).

In the 10 CEE and Mediterranean states which were due to join in 2004, for instance, only 44-58% of respondents thought that EU accession was 'a good thing' one year before accession, in contrast to 73 and 81% in Bulgaria and Romania, which were further away from accession (Candidate Countries Eurobarometer, 2003: 2003.4). The case of Turkey is, however, more worrying in that it is still almost a decade from accession, with many difficult reforms, not least in the area of JHA, still to come. There is, then, a danger that Turkey itself will give up on the accession process.

Moreover, research by Görgün (2004) has revealed that the Turkish public has a poor conception of what the EU is and its functions. This is important from the point of view of neofunctionalist theory, as the loyalty transference which is considered a prerequisite for neofunctionalist spillover to occur is linked to perceptions of welfare provision. If the public is not conscious of the role of the EU in welfare provision, its loyalty is likely to remain linked only to the nation state (Rosamond, 2000: 66)

In addition, there is evidence of a certain amount of anti-EU prejudice in some sectors of the Turkish public, a counterpart to the anti-Turkish prejudice to be found in some sectors of the EU public. Görgün cites the following examples, which indicate a certain amount of suspicion of the EU at mass level, which is incompatible with the neofunctionalist background conditions:

> 'We are Muslims, they are Christian'
> 'The whole point of the EU is to move immigrants to their home towns'
> 'Is the Sevres agreement on the agenda again?'
> 'If we enter the EU will kokoreç[80] be prohibited?' (36)

Yılmaz (2005: 185), in turn, classifies Turkish anxiety related to the EU into five categories:

- Exclusion anxiety: the fear of being excluded or put off by the EU
- Historical anxiety: the 'Tanzimat' and 'Sevres' syndromes[81]
- Religious anxiety: the perception of the EU as a 'Christian club'
- Separatism anxiety: the fear that Turkey's unity will break down as a result of EU membership
- Moral anxiety: concern over the disintegration of moral values.

If the trend towards a decline in public support for accession in Turkey continues, then, it may lead to a scenario where Turkish membership is blocked not by the EU but by the Turkish public itself. It may do this either through an outright rejection of EU membership in a referendum, or more indirectly by putting pressure on the Turkish government to relax the reform process.

[80] Roasted tripe, a popular snack in Turkey
[81] The fear that EU accession conditions are a repetition of history, notably the unilateral concessions of the Tanzimat era and the conditions of the Sevres treaty (Yılmaz, 2005: 185)

Indeed, the latter may already be occurring to a significant extent. Enlargement Commissioner Olli Rehn, for instance, has recently taken a pessimistic view of Turkey's accession process, famously arguing that it is heading for a 'train wreck' due to Turkey's reluctance to recognise Cyprus (Tassinari, 2006: 21). He also points out, with concern, the growing wave of nationalism in Turkey which could be exacerbated if Turkish membership negotiations are postponed too long or do not result in full membership of the EU (Rehn, 2007: 148-149).

So far, issues related to JHA do not appear to be of prevalant concern among the Turkish public. However, a 2003 Eurobarometer survey has shown that support for JHA is lower in Turkey than in the vast majority of the CEE members and candidate countries, despite the fact that this survey was carried out at a time when overall support for EU membership was high. According to the survey, only 36% and 37% of Turkish respondents were in favour of EU involvement in immigration and asylum policies respectively (Eurobarometer, 2003).

The only JHA areas where a majority of Turkish respondents supported EU involvement were fighting drug smuggling, trade in people and terrorism, with 50%, 51% and 53% in favour respectively. However, even in these cases figures were much lower than in most of the CEECs, with 95% of Slovak and 91% of Polish respondents in favour of EU involvement in fighting terrorism (Eurobarometer, 2003).

In general, then, Turkish public support for accession, and particularly for JHA, is low. There is also little evidence that the majority of the Turkish population has a good understanding of the EU's functions and purpose, and trust of the EU appears to be low. This could prove problematic from a neofunctionalist point of view, as public perception of the benefits of integration was considered to be one of the background conditions for successful integration, and that negative feedback from the public could delay, or even halt integration according to Niemann's criteria.

In the event of a referendum on membership in Turkey the connection is obvious; even if no such referendum is held, however, public dissatisfaction with EU accession could feed back into pressure on Turkish politicians to slow down or even stop the reform process required for EU accession. Indeed, there is some evidence that this is already occurring.

B. The Role of the Turkish Elite

At the elite level, Turkish NGOs have been active in promoting the benefits of EU membership in Turkey, particularly the IKV, TÜSIAD, TESEV[82] (Turkish Economic and Social Studies Foundation) and Avrupa Hareketleri 2002[83]. The IKV and Avrupa Hareketleri, for instance, have been particularly active in mobilising Turkish civil society in favour of EU membership, principally by making public statements, placing advertisements and coining slogans. The other civil societies discussed have mainly contributed to Turkey's EU vocation by encouraging and carrying out projects relating to the accession process (Altinay, 2005: 107).

Moreover, Turkish NGOs have not only attempted to win the Turkish public over to EU membership, but have also, through lobbying, attempted to win the EU over to Turkish accession. Avrupa Hareketleri 2000, for instance, has organised a series of meetings between pro-Turkish membership European intellectuals and EU officials (Altinay, 2005: 107). Many of these NGOs are connected to business interests, and Turkish membership of the EU has been broadly supported by the business community, which perceives the economic benefits of EU membership and, by extension, the advantages for Turkish business.

In addition, there appears to be a broad pro-EU consensus among the mainstream Turkish political parties. Erdoğan's government, for instance, has, at least until relatively recently, been especially active in carrying out reforms stipulated by the EU despite the fact that it has Islamist roots. This is in contrast to earlier Islamist parties such as Erbakan's Welfare Party which did not have a European vocation (Shankland, 2005: 55). However, extremist parties, both right-wing and Islamist, have usually been against Turkey's accession (Güngör, 2004: 40).

As well as this, a study of Turkish parliamentarians carried out in 2000 appears to show that, at least at that time, there was practically no opposition to Turkey's eventual full membership of the EU. In fact, although a certain amount of scepticism had been expected, all but one deputy interviewed declared that they were either 'in favour' or 'strongly in favour' of

[82] Turkish Economic and Social Studies Foundation
[83] The 2002 European Movement

Turkey's accession to the EU, and 64% stated that they were 'strongly in favour' (McClaren and Müftüler-Baç, 2003: 207-208).

When asked if EU membership would entail any disadvantages for Turkey, 26% of MPs questioned considered that there would be none, while slightly smaller groups cited cultural deterioration (24%) and economic deterioration (23%). However, only 17% of MPs were concerned about the loss of sovereignty that EU accession would bring, and only 44% of deputies thought that a loss of sovereignty would result from EU membership. McClaren and Müftüler-Baç draw attention to this as a sign that even elite groups such as MPs do not fully understand what EU membership would entail for Turkey, and responses to other questions in the survey also indicate a lack of knowledge about the EU (2003: 209-211).

In general, then, the elite in Turkey is largely supportive of EU membership, especially the business community, which has been particularly active in promoting integration. The results of a survey of Turkish Parliamentarians, however, indicates that overwhelming support among them may be at least partly the result of a lack of information about the effect that membership would have on Turkish sovereignty. Moreover, as Turkish public support for EU accession drops, leading political parties may be forced to take a more sceptical stance towards EU-motivated reform, or a government which takes a tougher stance towards EU-accession could be voted in.

C. Official and Public Views towards Turkish Accession in the EU

Most national governments in the EU-25 have shown themselves to be broadly in favour of Turkish accession on condition that it fulfills the Copenhagen criteria The UK and Spain, in particular, have been staunch supporters of Turkish membership, both for strategic reasons and due to the potential of Turkey's large market (Kaleağası, 2006: 204-209).

The situation in France and Germany, however, is more complex, with some of the major political parties having a record of scepticism towards Turkish accession (Kaleağası, 2006: 212-220). In Germany, while Merkel's Christian Democratic Union (CDU) is in favour of a 'privileged partnership' for Turkey, the Social Democrats come out in support of a 'modern Turkey in the EU'. In France, while former PM Dominique de Villepin backed Turkey on

condition that it recognises Cyprus (Repa, 2005), incumbent Nicolas Sarkozy opposes Turkish EU membership (Euractiv, 2007).

Sceptics, such as Sorbonne professor Nicolas-Jean Brehon, fear that Turkey's relative poverty and large population will drain the EU of resources, and that, again because of its size, it will disrupt the institutional functioning of the EU (Friends of Europe *et al*, 2004: 17). Social Conservatives have reservations about letting a country with a Muslim majority into the 'Christian club'; ironically, as Morris points out, their basic argument is that Turkey is too socially conservative (2005: 197). Liberals, on the other hand, worry about Turkey's human rights record (Tassinari, 2006: 21-22). At the end of the day, Turkey's accession may well be scuppered by a veto in the European Council.

Indeed, alternatives to full membership for Turkey have already been discussed at EU level, including Privileged Partnership and Extended Associate Membership options. However, either of these options, which would include only an emasculated participation of Turkey in the EU institutions, would mean the prospect of Turkish full membership being taken off the table. Another option that has been proposed by analyst Cemal Karakaş is a 'gradual integration' model, a kind of staged accession process (Tassinari, 2006: 23-24). However, as Morris argues, the Privileged Partnership and its cousins are perceived in Ankara as 'a 'no' dressed up to look like a 'yes' (2005: 197).

On the other hand, those who support Turkish accession argue that the inclusion in the EU of Turkey, a democratic, secular Muslim state with a free-market economy, is, in the words of Joshka Fisher, 'almost a D-Day for Europe in the war against terror' (cited in Morris, 2005: 197). Moreover, traditional Eurosceptics such as the UK realise that there would be 'no need to worry about a 'United States of Europe' if Turkey were part of the equation' (Morris, 2005: 197-198).

Some of the most energetic support for Turkey's EU membership within the EU-15, however, has come from the business community, which senses the opportunities provided by Turkey's large market. In some cases they have joined together with the Turkish business community to promote Turkey's accession process, as when TÜSIAD and its British counterpart CBI[84]

[84] The Confederation of British Industry

issued a joint open letter urging political problems in Turkey's accession process to be overcome in order to promote economic reform (Kaleağası, 2006: 205). From a neofunctionalist viewpoint, this indicates the presence of a certain amount of political spillover pressures in favour of enlargement to Turkey.

On the other hand, public opinion in the EU has been less enthusiastic than the elite about Turkish accession, indicating negative feedback in this area. Despite this, support for Turkish accession tends to be relatively higher in those countries whose governments are supportive of Turkey's membership, notably Hungary and Poland, the UK, Portugal and Spain.[85]

In contrast, public support is especially low in France, Germany and Austria, where a quarter or less of the public supports Turkey's EU membership bid (BBC, 2005). These results are backed up by the latest Eurobarometer report on enlargement, which indicates that only 39% of respondents from the EU-25 would be in favour of Turkish membership even if Turkey complied with all the membership criteria (Eurobarometer, 2006).

5.2.4. Neofunctionalist Commentary

In conclusion, therefore, Turkey has had a long, difficult and still incomplete path to EU membership. Despite the fact that, at the time of writing, the EU has recently opened membership negotiations with Turkey, accession appears to be unlikely before around 2015, and Turkey's accession itself is stil far from a foregone conclusion.

As has been discussed in the theoretical chapter of this thesis, according to Haas, the three key features that were likely to encourage regional integration were the following: pluralistic social structures; substantial economic development, and 'common ideological patterns' (Moxon-Browne, 2003: 92). Schmitter argues that for enlargement to proceed successfully, without interrupting the integration process, the candidate countries must fulfill these conditions (2002: 42-43).

It is no accident, therefore, that the Copenhagen Criteria roughly overlap with Haas' background conditions (Miles, 2004: 256). From this point of view, then, the recent

[85] Hungary and Poland both have approval rates of over 50%, the UK, Portugal and Spain of over 40%

democratic reforms in Turkey are a source of optimism regarding Turkey's eventual accession, as is the high rate of transactions between Turkey and the EU as a result of the customs union.

However, Haas also considered that mass and elite support were necessary for integration. He argued that mass support would exist if the public was knowledgeable about, and supportive of, the benefits of integration, while national elites would support integration if they considered that it would serve their own best interest (1961: 306-312).

If this is applied to Turkey's prospects of accession to the EU, the picture looks less rosy due to widespread anti-Turkish prejudice among both the EU elite and public. The Turkish view appeared much more positive until recently with a general political and elite consensus in favour of accession, as well as widespread support from the Turkish public. However, this has also changed dramatically since as recently as 2004, with a steep drop in public support for EU membership, and a notable increase in 'reform lethargy' on the part of the government.

In general, the fact that Turkey has made it so far in its accession process can be partly explained, as neofunctionalism predicts, by functional, political, cultivated and induced spillover. Firstly, it can be viewed as a result of functional spillover from the EU/Turkey Customs Union. Secondly, it can be argued that political spillover has played a part. This is not only due to *engrenage* between Turkish and EU officials as a consequence of the Customs Union, but also as a result of public support in Turkey and lobbying (both of the Turkish public and elite and of Brussels) on the part of Turkish NGOS.

Cultivated spillover can also be said to have played a role, particularly on the part of the Commission. As has been discussed in previous chapters, the Commission has been an important actor in determining the enlargement process, particularly through its annual *avis* and its participation in the membership negotiations (Baun, 2000: 17). The EP, in contrast, has typically had a rather negative view of Turkish enlargement, although this may change as Turkey proves itself to have really implemented the Copenhagen political criteria.

Finally, the Customs Union and Turkish candidacy, as well as the opening of negotiations with Turkey, may also be partly a consequence of induced spillover, or exogenous functional pressures. In all these cases, it can be seen as an EU response to Turkish demands for

membership, or to the threat of losing Turkey as an ally or even of pushing it into the hands of Islamic fundamentalists. The original Ankara agreement, for instance, can be seen as a kind of 'consolation prize' for Turkey.

Similarly, the later decision to complete the Customs Union can also be seen as a gesture on the EU's part to compensate for the rejection of Turkey's 1987 application. Moreover, the 1999 acceptance of Turkey as a candidate can also be understood as an EU reaction to the threat of Turkey becoming disillusioned with trying to join the EU after the 1997 rejection of its candidacy, and is also the result of cultivated spillover on the part of the Commission.

Despite this, there is still considerable opposition to Turkish accession in many sectors of EU society, at both mass and elite levels, roughly corresponding to Niemann's counterveiling forces. There is evidence that the EU public, in particular, tends to have a rather negative attitude towards the prospect of Turkey becoming an EU member, with significantly less than half supporting its accession bid, while many political parties in some of the core EU countries have a distinctly anti-Turkish stance.

While both the Turkish elite and general public have appeared to accept the rather draconian political reforms necessitated by the accession process, it has already been noted that, in contrast to the CEECs or the EU-15, Turkish society is not only considerably sceptical about EU involvement in the area of JHA, it is increasingly suspicious of EU accession itself. Thus, according to Niemann's criteria for counterveiling forces, even if a pro-EU-accession government is maintained in Turkey, its integrative actions (i.e. accession-motivated reform) could be constrained by an increasingly restless public.

The third counterveiling force to integration that Niemann mentions is diversity: common positions or policies may require one or more MS to depart from deeply-rooted structures, customs or policies. This, in turn may have a negative effect on integration (Niemann, 2006: 13-14). Turkey, like the CEECs at the beginning of their accession process, is significantly diverse from the EU-15 in many areas including JHA, and, from a neofunctionalist angle, the Copenhagen Criteria are probably necessary in order to make Turkey more 'EU-like' and able to fulfill the background conditions for acession.

However, as is the case with the CEECs, the spillover that Turkey is required to adopt, both as part of the accession process in general and in the area of JHA in particular, has been largely of an enforced nature. Moreover, as Schmitter points out, the Copenhagen Criteria have only taken into account the needs, culture and wishes of the EU-15 (2002: 42-43)..

Any difficulties they may pose to the candidate countries tend to have been ignored. According to Schmitter, then, this may lead to repercussions later if the new MS are unhappy with the conditions that have been imposed upon them (2002: 42-43). In other words, through the veto, or a blocking minority, they may disrupt the integration process via spillback. In the case of Turkey, a form of spillback resulting from diversity may even occur during the accession process, through an increasingly negative public, elite or governmental reaction to the reform programme enforced by the EU.

As has already been pointed out, EU involvement in JHA is particularly unpopular among the Turkish public. As the restrictive nature of JHA, and the problems that Turkey is likely to face on implementing them, become further publicised, there is a danger that the Turkish elite and population's scepticism about EU involvement in JHA issues, and about EU accession in general will increase. This may then contribute to a slowdown in reform, or even halt the reform process altogether.

The next section of this chapter, then, aims to examine the main disadvantages, as well as the advantages, that the adoption of the JHA *acquis* will pose for Turkey in various areas, including visa policy, border control, immigration and asylum, and police and judicial co-operation. This will then be analysed from the point of view of neofunctionalism. First, however, the nature of Turkey's borders will be examined.

5.3. The EU's JHA policies and Turkey: Issues and Dilemmas

5.3.1. The Nature of Turkey's Borders

As has been mentioned, a point of concern regarding Turkey's accession to the EU is its geographical position between such potentially tumultuous regions as the Middle East, the Caucasus and the Balkans, provoking fears of mass migration from these areas heading towards Western Europe via Turkey. This is compounded by the length of Turkey's land and sea borders, of 2,949 km and 8,330 km respectively, and the fact that the border areas sometimes consist of terrain that is difficult to control (Apap, Kirişçi and Carrera, 2004: 1).

Consequently, there are fears within the EU that, without stricter border controls, Turkey may, particularly after accession, become an easy target for illegal transit migrants and international organised crime aiming to get to Western Europe. Moreover, due to the Turkish government's difficulty in controlling these borders and the relative ease of entering the country illegally, Turkey does, to a certain extent, welcome co-operation with the EU on this issue (Özcan, 2005: 126).

Of Turkey's sea borders, which are controlled by the coastal guard, the Aegean coast is particularly difficult to control, due to the shape of the coastline and its numerous islands. As it is relatively easy to cross to Greek islands from Turkey's Aegean coast, this is a route often preferred by illegal migrants wishing to get to the EU (Apap, Kirişçi and Carrera, 2004: 1).

The Mediterranean coast, due to its geographical position between Europe, Africa and Asia is also often used by illegal migrants (Apap, Kirişçi and Carrera, 2004: 1). However, unlike the Aegean, it is comparatively easy to control, while the Black Sea coast seems not to be used for migration and human smuggling purposes (Derviş, Gros, Emerson and Ülgen, 2004: 42-43).

In general, though, there has been a growing trend towards the use of sea routes by people smugglers for travel between Turkey and Europe, as a response to the reinforcement of entry controls in airports. Moreover, the use of sea routes is also viewed as advantageous from the point of view of the smugglers as it allows for the transport of a greater number of migrants,

guaranteeing greater profits for the smugglers (İçduygu, 2003: 51). In addition, too, smugglers face less danger of getting caught if they use sea, rather than land, routes (Doğan, 2005: 166-167).

Despite the risks that smugglers run when crossing land borders, they are used for entering Turkey from countries which share land borders with it such as Iraq, Iran or Georgia (Doğan, 2005: 166). Moreover, many of Turkey's land borders are of a mountainous nature, which facilitates illegal migration and smuggling (Derviş, Gros, Emerson and Ülgen, 2004: 42-43). A method favoured by smugglers is to transport people in lorries using secret panels. Failing this, it is sometimes possible to enter on foot, particularly through mountainous areas where checks may be insufficient (Doğan, 2005: 167).

Although Turkey's borders with Iran, Iraq and Syria were quite open until the mid-1970s, control of the borders was increased following their use by the PKK in the 1980s and 1990s. This included the placing of mines along the Turkish/Syrian border, which began to be removed according to a 2004 decision (Derviş, Gros, Emerson and Ülgen, 2004: 42-43).

Today, the patrolling and protection of the area within 50 kilometres of the sensitive South-Eastern land border is carried out by the Turkish army, except for the area surrounding the city of Van which is controlled by the Gendarmerie (Apap, Carrera and Kirişçi, 2004: 14-15). Despite these measures, the Iranian border has proved particularly sensitive to migration pressures, (both of asylum seekers and transit migrants), resulting in most asylum applications in Turkey being evaluated in Van, near the Iranian border (Derviş, Gros, Emerson and Ülgen, 2004: 42).

Similarly, the Iraqi border has also been a focus of migration, with 60,000 Iraqi Kurds fleeing to Turkey in 1988 following attacks by Saddam Hussein's regime, and 450,000 Iraqis (most of whom later returned to Iraq) entering Turkey in the aftermath of the first Gulf War (Derviş, Gros, Emerson and Ülgen, 2004: 42).

In addition, Turkey's Eastern borders are a major transit route for drugs, which often pass into Turkey after being cultivated in countries like Afghanistan. Much of this is then destined for Europe; indeed it is estimated that around eighty per cent of the heroin sold in Europe arrives through Turkey (Morris, 2005: 209).

During the Cold War, Turkey's borders with the Soviet Union (now with Azerbaijan's Nahcivan province and Georgia) were almost completely closed. Since the end of the Cold War, however, these have become open and active borders. In spite of this, Turkey's border with Armenia, as a result of both political and geographic factors resulting from difficulties in relations between Turkey and Armenia and the separation of the Turkish and Armenian borders by a river (Apap, Carrera and Kirişçi, 2004: 13), remains practically closed (Derviş, Gros, Emerson and Ülgen, 2004: 42-43).

The Bulgarian border, previously tightly controlled, has also become very active since the improvement in Turkish/Bulgarian relations after the end of the Cold War, and the clearing of the mines placed along the border in the mid-1990s (Derviş, Gros, Emerson and Ülgen, 2004: 42-43). It is now an important transit path both for commerce and for seasonal Turkish labour migration to Europe (Apap, Carrera and Kirişçi, 2004: 15). In addition, in March 2004 a border management cooperation protocol was signed between Turkey and Bulgaria, according to which the Bulgarian border police and the Turkish coastguards will work together to prevent violations of the two countries' territorial waters and exclusive economic zones (European Union, 2005).

Meanwhile, the Turkish/Greek border, which had been heavily controlled since the early 1960s, has also become more active, and has been progressively demilitarised, since the improvement in Turkish/Greek relations which resulted in part from the 1999 earthquakes (Derviş, Gros, Emerson and Ülgen, 2004: 42-43).

In conclusion, therefore, for geographical reasons, Turkey's borders are particularly difficult to control. According to a 2000 report published by the Turkish Security Department Directorate on Smuggling and Organized Crime, for instance, there are thirteen major points of entry between Turkey's borders with Georgia, Armenia, Iran, Iraq, and Syria and ten on the Aegean and Mediterranean Sea coasts (Gresh, 2005: 8).

Moreover, Turkey's borders with neighbouring countries have become increasingly open since the late 1980s. While this is particularly true of borders with its ex-Communist neighbours following the end of the Cold War, and with Greece after the improvement in relations following the 1999 earthquakes, it is also the case that borders with Middle Eastern

neighbours have gradually become more open. This is consistent with Turkey's policy, dating from the same period, of relaxing visa requirements for citizens of neighbouring countries, which shall be examined in more detail in the next sub-chapter.

In recent years, though, there has been pressure on Turkey, through the demands of EU accession, to strengthen its borders in order to limit transit migration through Turkey to the rest of the EU, and the EU has encouraged and supported co-operation in this field. In other words, then, Turkey is being required to apply the EU's more restrictive border regime to its own borders which, in the event of Turkish accession to the EU, will become the EU's new South Eastern frontiers.

On the other hand, one of the main requirements of the JHA *acquis* which Turkey is expected to implement is the replacement of the current border-control system by an integrated civilian, professional border control unit which would be situated within the Ministry of the Interior(Apap, Carrera and Kirişçi, 2004: 16-17).

After initial scepticism on the part of Turkish officials[86], this proposal is largely welcomed by Turkey, which sees it as contributing to national security, although Turkey prefers to implement this gradually due to the huge effort and financial cost that such an undertaking would incur (Apap, Carrera and Kirişçi, 2004: 16-17).

Information exchange and the delimination of responsibilities between the various bodies concerned with the control of Turkey's borders still needs to be improved. However, legislative progress has been made with the adoption in March 2006 of the National Action Plan for the implementation of the Integrated Border Management Strategy (European Union, 2007).

[86] The nature of this new organisation was misunderstood in Turkish official and military circles, who thought that it would lie outside the State apparatus

5.3.2. Visa Policy

A. Adoption of the Schengen Visa Regime

In the same way that Turkey is required to adopt the EU's more restrictive levels of control at external borders, it is also expected to apply the EU's more restrictive visa regime to (non-EU) TCNs. The changes that Turkey is required to make were laid out in the 2003 National Programme for the adoption of the *Acquis* (Tokuzlu, 2005: 344). Like the other candidate countries, Turkey is having to adopt the Schengen negative visa list as part of the accession process. In addition, however, the Turkish visa *system* is having to undergo intensive change in order to conform to the Schengen *acquis*. At present, the Turkish visa policy divides countries into three categories for the purpose of granting visas:

- Those whose nationals can enter without a visa, usually for up to three months
- Those whose nationals can buy a visa at the airport (the 'sticker visa' system)
- Those whose nationals must apply for visas through the Turkish Consulate

This relatively liberal visa system was devised by ex-President Turgut Özal, who believed in functionalism and interdependence in international relations), as a way of improving Turkey's relations, particularly with neighbouring countries (both in the Black Sea area and the Middle East) and/ or those which share a linguistic and cultural heritage with Turkey, notably Central Asian and Caucasian countries (Derviş, Gros, Emerson and Ülgen, 2004: 51) (Kirişçi, 2003: 136). In this way, the lifting of visa requirements for these groups helped him to fulfill several of his aims in foreign policy.

Firstly, it encouraged exchanges with other Black Sea countries, thereby supporting the Black Sea Economic Co-operation Area, a project of Özal's intended to encourage greater contact, of a cultural as well as an economic nature, between Black Sea countries in the post-Cold War period (Apap, Carrera and Kirişçi, 2004: 27-28).

Secondly, it was intended to encourage an increase in contacts with the Turkic republics of Central Asia, and consequently help to increase Turkey's presence in the region. Finally, the relaxing of visa requirements for Middle Eastern countries was consistent with Özal's Middle

East policy, particularly his aim of encouraging tourism and investment from that region, especially the wealthy Gulf States and Saudi Arabia (Apap, Carrera and Kirişçi, 2004: 27-28).

While the sticker visa system has had advantages, particularly regarding Turkey's foreign policy, it has been argued that the resulting ease of entering Turkey for the nationals of many countries has contributed to a rise in illegal immigration, particularly by nationals of ex-Soviet republics or other ex-Communist neighbouring countries (Apap, Carrera and Kirişçi, 2004: 27-28).

Throughout the 1990s, particularly as a consequence of the arrival of a considerable number of prostitutes in Turkey principally from the ex-Soviet Union and other parts of Eastern Europe, both the Turkish authorities and the general public began to press for a tightening of the visa regime. This led, in some cases, to an increase in the price of a visa to 20 dollars and the requirement to show a certain amount of hard currency on entering the country (Kirişçi, 2003: 137).

Therefore, pressure for change to the Turkish visa system has come from inside Turkey itself as well as from the EU. However, the Schengen *acquis* requires much more far-reaching changes; Turkey must replace the 'sticker' visa system with a two-tier visa system. According to this system, the nationals of some countries are free to enter without a visa, while nationals of countries on the Schengen 'blacklist' (numbering 135 countries in 2004) must apply for visas through the relevant consulate (Derviş, Gros, Emerson and Ülgen, 2004: 51). Moreover, Turkey is required to adopt both the Schengen 'black' and 'white' lists: in addition to imposing visas on some countries, it must waive them for others.

According to the original National Programme, 75% alignment with the Schengen negative visa list was to be achieved by May 2003. Turkey therefore first introduced visa requirements for six Gulf states (Bahrain, Qatar, Kuwait, Oman, Saudi Arabia and the United Arab Emirates) as of 1 September 2002. Following this, visa requirements coming into effect between May and July 2003 were imposed on thirteen geographically distant countries[87] (Tokuzlu, 2005: 345).

[87] Indonesia, South Africa, Kenya, Bahamas, Maldives, Barbados, Seychelles, Jamaica, Belize, Fiji, Mauritius, Grenada and Santa Lucia

Despite this, progress in implementing the negative visa list has since then been slow. In addition, while the Schengen visa system was supposed to be implemented by 2005 according to the National Programme this has not yet been carried out (Kirişçi, 2007). Turkey has, however, been more active in implementing the positive visa list, having concluded visa exemption agreements with several Latin American countries[88] the Czexh Republic and Andorra in 2006 (European Commission, 2006).

However, in the view of Baldwin-Edwards, for instance, a more staged implementation of the negative visa list, with visa imposition on those countries with the closest ties to be left until last, is to be recommended as it would help to ease the disruption in trade, political and other ties which would otherwise result. Moreover, several kinds of visa facilitation, following the examples of Poland and Hungary, could be allowed at least until Turkey's full participation in the Schengen system (2006: 16-24).

Otherwise, the Schengen visa requirements, particularly for neighbouring countries, could pose significant implementation and financial difficulties for Turkey. Given the number of Iranians and Russians alone who entered Turkey in 2003 (a combined total of 1.8 million), issuing visas for all those wishing to enter Turkey after the imposition of visas for Russian and Iranian citizens is likely to result in significant administrative costs and difficulties for Turkish consulates even if the amount of planned visits is reduced (Apap, Carrera and Kirişçi, 2004: 31).

Moreover, while this may help Turkey to combat illegal immigration, it may reduce the amount of *bona fide* entries from some countries. Russia is likely to be the country most affected by this change, as, given the size of the country, the difficulties of reaching a Turkish consulate may be off-putting for many would-be visitors (Derviş, Gros, Emerson and Ülgen, 2004: 51). Even so, it is unlikely that Turkish consulates will be able to deal with the amount of visa applications, at least in the short term.

In addition, as well as the considerable administrative costs that switching to this system will impose, it may have a negative effect on the Turkish economy. This is not only because of the loss of trade and investment, but also because Russians are the second largest tourist group in

Turkey and, unlike many Western visitors, are renowned in the Turkish tourist sector for spending large amounts of money while on holiday (Derviş, Gros, Emerson and Ülgen, 2004: 52). The new visa system will also reduce the opportunities for 'suitcase trade'[89], which has helped many people from neighbouring countries, as well as Turks, to get through difficult economic times (Kirişçi, 2003b).

Similarly, the imposition of a Schengen-type visa system on neighbouring countries may have the inadvertent effect of increasing the amount of asylum seekers to the EU. This is because many people from countries and regions such as Chechenya or Iran, in order to escape from conflict and persecution as well as economic hardship in their own countries, are presently working illegally or carrying out 'suitcase-trade' in Turkey. If these migrants are prevented from entering Turkey under the new visa system they may decide to apply for asylum in the EU (Kirişçi, 2003b).

If it is not carried out in stages, then, Turkey's adoption of the Schengen negative visa list may cause a deterioration in trade, cultural and even political relations between Turkey and neighbouring countries. As has been seen in the previous chapter, the adoption of the Schengen negative visa list by the CEE MS and candidates has led, in several cases, to a deterioration in relations with their neighbours.

B. Turkey on the Schengen 'Blacklist'

A further difficulty is, as Turkey itself is still on the Schengen 'blacklist', Turkish citizens still require visas in order to travel to the EU. This has caused widespread complaints, particularly among Turkish businessmen, who argue that it gives the EU, whose businessmen can enter Turkey freely, an unfair competitive advantage (Derviş, Gros, Emerson and Ülgen, 2004: 56).

However, the prospect of eventual visa-free travel for Turks to the EU has been a major incentive for Turkey to adopt the Schengen *acquis*. In this regard, the case of Bulgaria may be instructive in trying to establish how Turkey may get off the Schengen 'blacklist'. According to Council Resolution 539/2001, the decision whether to impose visa requirements on a

[89] This has usually involved people from neighbouring countries, who arrive in Turkey to sell a 'suitcase' of goods then buy consumer goods to take back to their country.

country is based on a wide range of criteria, including illegal immigration, public policy, security, the EU's external relations and the implications for regional coherence and reciprocity (European Council, 2001: 40).

In the case of Bulgaria, the factors that seemed to be decisive in the lifting of the visa requirement for Bulgarian citizens were various. They included the introduction of passports that meet the EU requirements, criminal sanctions for illegal border crossing and forged documents, the facilitation of legal migration, the conclusion of bilateral readmission agreements with 16 states (including 10 Member States), and the improvement of technology at border posts (Apap, Carrera and Kirişçi, 2004: 40).

In the case of Romania, moreover, ending the special passport-free travel arrangements with neighbouring Moldova, and the privileged access of Moldovans to Romanian citizenship appear to have been important factors in the decision to remove Romania from the Schengen common visa list from January 1 2002 (Batt, 2002: 21). This suggests, therefore, that Turkey's application of the Schengen common visa list, a process which is already underway, may also have a positive influence on Turkey's removal from the list.

However, the decision by the EU to remove a country from the Schengen negative visa list tends ultimately to be a political one despite the availability of objective criteria to judge the country's suitability for visa-free travel (Apap, Carrera and Kirişçi, 2004: 40) (Baldwin-Edwards, 2006:). Therefore, even if provided with a positive report from the Commission, there is no guarantee that the Council will agree to remove that country's visa requirement.

This may prove especially difficult in the case of Turkey, as research suggests that the attitude of the European public towards Turkish migrants is particularly negative. According to a 1998 Eurobarometer report, when asked to place their feelings about 10 ethnic groups[90] on a scale of 1 (unfavourable) to 10 (favourable), Turks were judged to be the most unfavourable of all groups, with a score of 5.79 (Lahav, 2004a: 90). Therefore, unless public opinion towards Turkish migrants changes considerably during Turkey's pre-accession period, this may place political pressure on governments to vote against Turkey's removal from the list.

[90] Turks, North Africans, Asians, black Africans, S.E.Asians, W.Indians, Surinamers, Jews, S.Europeans, N.Europeans

Moreover, this negative view is not limited to the 'man in the street'; taking MEPs as an example, European elites do not appear to have a much more favourable opinion towards Turkish immigrants than the general public. According to a 1992 study, MEPs from Greece, Belgium and Luxembourg chose Turkish immigrants as the most undesirable, ranking them more unpopular than migrants from often far poorer and more unstable regions such as Africa, Asia and North Africa (Lahav, 2004: 130).

As well as this, MEPs from all countries except Germany ranked Turkish immigrants as equally, or, in most cases (7 out of 10 countries), more undesirable than CEE migrants. In addition, it was shown that only 15% of MEPs from all countries supported an increase in migration from Turkey, less than for all other groups of migrants, including those from Asia (30%), Africa (40%) and North Africa (50%) (Lahav, 2004a: 130).

There is consequently likely to be considerable pressure from elite groups and the general public on the MS and the Commission to delay the removal of Turkey from the negative visa list. Moreover, free movement between the EU and Turkey will probably to be postponed for even longer than in the case of the CEECs. Borders are not likely to be opened between the CEECs which acceded in 2004 and the EU until 2011, or 7 years after accession. It is therefore improbable that Turkish citizens, given a (rather optimistic) estimated accession date of 2015[91] (Rehn, 2007: 146) will be able to move and work freely in the EU until 2022 at the earliest.

This will not only lead to considerable inconvenience for Turkish industry and individuals wishing to travel to other EU countries, but, in the long term, may also foster resentment towards the EU and a 'Eurosceptic' attitude in Turkey. As has been argued in the previous chapter, according to modernist explanations of identity formation labour mobility is the determining factor both in geographical identity formation and in successful political integration, and may in fact be more important than either money or goods (Buonanno and Deakin, 2004: 96).

[91] According to Rehn, the EU-Turkey accession negotiations are likely to take 10 to 15 years, giving an estimated accession date somewhere between 2015 and 2020. In any case, he points out, even if negotiations were completed before 2015 Turkey could not accede before the EU's financial perspective starting in 2014.

From a neofunctionalist standpoint, as has been explored in the theory chapter, public opinion is now considered to be an important factor in promoting or restricting further integration particularly since the Maastricht Treaty (Hooghe and Marks, 2004). Moreover, there is evidence that public support for integration is connected with the development of ties of mutual identity, loyalty and affection (Lahav, 2004a: 72). If this is hindered in the case of the Turkish public, then, by long delays in implementing the free movement of workers, it may contribute to negative public opinion towards EU integration, thus potentially resulting in a lack of support for reform before accession or in increased spillback afterwards.

5.3.3. Migration Trends in Turkey

As has already been mentioned, there appears, among both the EU public and elite, to be a fear of mass migration to the EU originating from Turkey, and from third countries in transit through Turkey. In reality, however, the prospect of mass migration to the EU on Turkish accession, or when Turkish citizens are granted freedom of movement in the Schengen zone is probably exaggerated. Despite this, the fear of mass migration has been an important factor in the considerable pressure that the EU has put on Turkey to implement its generally more restrictive border regime even at such an early stage in the accession process.

Therefore, as part of the accession process, Turkey has faced considerable pressure to combat illegal transit migration destined for the EU. However, as Kirişçi points out, it is simultaneously under pressure, both from the EU and from migrant and human rights groups, to adapt its asylum system in order to bring it up to EU and international standards (2005: 349-350). This section, therefore, aims to explore the basis of Turkey's immigration and asylum policies, and the nature of the changes that have been imposed by the EU accession process. Moreover, it intends to examine the nature of immigration to Turkey today, both that centred on Turkey itself and transit migration destined for the EU.

A. Immigration to Turkey: A Historical Perspective

Although Turkey is better known as a country of emigration, it also has a history as a country of immigration dating back to the Ottoman Empire, a tradition which continued after the founding of the Turkish Republic. During 1923-1997, for example, 1.5 million people migrated to Turkey.

This migration often received government support, particularly in the case of culturally close peoples: Turkish speakers or Muslims from the Caucasus or Balkans, such as Bosnians, Albanians or Circassians. Migrants from these groups were preferred as they were viewed as being able to assimilate to the homogenous national identity that the founders of the modern Turkish state were seeking to create (Kirişçi, 2005: 352).

In contrast, migration was not encouraged among peoples of different religion or ethnicity, due to the fact that they would contribute to Turkey's already considerable ethnic and cultural diversity, thereby hindering the government's aim of creating a more homogenous Turkish national identity. Even groups which were ethnically close to the Turks but had a different religious background, such as the Christian Gagauz Turks, were not encouraged to immigrate to Turkey (Kirişçi, 2005: 352). In effect, the period of government-supported immigration, as in many Western European countries, came to an end in the early 1970s (Apap, Carrera and Kirişçi, 2004: 18).

In consequence, then, many immigrants to Turkey, particularly during the earlier years of the Republic, were those of Turkish or related origin from neighbouring countries. 384,000 Turks arrived in Turkey from Greece as part of the population exchange, while significant numbers of Turkish immigrants also arrived from other neighbouring countries in the 1920s and 1930s. Of these, roughly 200,000 were Bulgarian Turks, 117,000 Romanian Turks and Tatars, and 115,000 Turks and Bosnians from Yugoslavia (Doğan, 2005: 331).

B. Legal Migration To Turkey

Today, however, Turkey is *de facto* both a transit country and a final destination for migrants, both legal and illegal, from many countries and origins. The amount of legal immigration to Turkey can be indirectly estimated by the quantity of residence permits issued by the Directorate of General Securiy. These are issued in the case of residence for over one month (Içduygu, 2005: 334).

Legal immigrants to Turkey include students from many countries, and workers granted permits, including many professionals from EU countries, who tend to establish themselves in Istanbul and Ankara (Apap, Carrera and Kirişçi, 2004: 18). Around 14% of permits issued in

2001-2002, for instance, were for students, while residence permits on the basis of employment accounted for another 14% (Içduygu, 2005: 334).

Moreover, there has been an influx of retired people, mostly from EU countries, who settle along the Turkish coast (Derviş, Gros, Emerson and Ülgen, 2004: 45). These immigrants, who represent a relatively new kind of immigration to Turkey, now number around 100,000 - 120,000 (Apap, Carrera and Kirişçi, 2004: 18).

Despite this, the majority of legal immigration to Turkey continues to originate from the Turkish-speaking populations of neighbouring countries, with a notable influx of over 320,000 Bulgarian Turks by August 1989 (Doğan, 2005: 46). Immigration by ethnic Turks from neighbouring countries accounted for the vast majority (72%) of residence permits issued in 2001-2002 (Içduygu, 2005: 332-334). Today Turkish-speaking immigrants arrive primarily from Bulgaria and Azerbaijan, and tend to come to Turkey principally for family reasons rather than employment purposes (Içduygu, 2005: 334).

In addition, Turkey has been required to change its laws regarding legal residents from third countries in order to align it with the Schengen *acquis.* A new law introduced in 2003 allows foreign nationals to work on the same basis as Turkish nationals, while work permits are now to be issued by the Ministry of Employment and Social Security rather than, as was the case previously, by a number of different bodies (European Union, 2006).

Moreover, the government is preparing a draft law in order to replace the 1934 Settlement Law governing immigration to Turkey. The new law, however, also makes reference to restricting immigration to people of 'Turkish language and culture', which, as well as being out of line with EU policy is also clearly irrelevant to the realities of the nature of immigration facing Turkey today (Kirişçi, 2005: 352).

C. Irregular Migration to Turkey

a. Permanent Settlement in Turkey

In addition to the legal migration described above, there is a considerable amount of irregular immigration to Turkey. In 2000, the estimated proportion of countries of origin of irregular

migrants to Turkey was as follows: Iraq (19%), Moldova (9%), Iran (5%), Pakistan (5%), Romania (5%), Russia (5%), Ukraine (5%), Georgia (3%) and Bangladesh (3%) (Doğan, 2005: 175). This, then, indicates that the vast majority of illegal migrants originate from neighbouring countries, particularly in the Middle East, Balkans and ex-USSR.

Together with transit migrants, irregular migrants to Turkey account for over a third of all immigration (Içduygu, 2005: 332). Between 1995-2004, for instance, 477,849 irregular immigrants were caught, over 120,000 of whom were nationals of the ex-USSR or Balkan countries, and it is estimated that there are over a million residing in Turkey today (Derviş, Gros, Emerson and Ülgen, 2004: 45).

It can be argued that the Turkish visa system, in which many nationals, particularly of neighbouring countries, can still or could until recently enter without a visa or with a visa that can be easily bought at the airport, encourages irregular immigration. Thus, many migrants who enter the country legally with a tourist visa, particularly women from the ex-USSR and Balkans, stay on in Turkey after the visa's expiry, to work as domestic servants, employees in the construction or tourism sectors, or prostitutes.

While, according to a 1932 law, foreigners were until recently prevented from exercising a wide variety of jobs and professions, some of these have typically been carried out illegally by Eastern European women in Turkey such as waitressing and entertainment. Moreover, the fact that the right to work as tourist guides and translators were limited by this law to Turkish citizens has been a further limitation to foreign women's legal job opportunities in Turkey (Içduygu, 2004: 73-74).

Often unable to obtain work permits, these migrants have had to try illegal means, sometimes falling into the hands of traffickers (Doğan, 2005: 46-47) and finding themselves working as prostitutes and living in conditions that resemble slavery. Even trafficking victims who work in 'legitimate' areas such as domestic service often find their working and living conditions deplorable and, if female, may face sexual exploitation (Erder and Kaska, 2003: 10).

However, as Kaiser points out (2007: 480), particular groups of foreigners may be allowed to carry out certain jobs according to a new law. This draft law, adopted by the Turkish parliament on 27 February 2003 may contribute to easing the situation, particularly as it

allows foreign migrants to be legally employed as domestic workers for the first time (Gresh, 2005: 16).

Rejected asylum seekers who do not wish to return to their countries of origin constitute another source of irregular migration to Turkey. Turkey does not, as yet, recognise asylum seekers from outside Europe due to the Geneva Convention's 'geographical reservation'. Therefore, many asylum seekers from the Middle East will stay and work illegally in Turkey if they are not granted official refugee status, and consequently the right to be resettled in a third country (Içduygu, 2005: 33).

b. Turkey as a Country of Transit

Since the mid-1990s, there has also been a rise in transit migration through Turkey, mostly originating from the neighbouring countries of Iran, Iraq and Syria as well as Afghanistan and Pakistan (Derviş, Gros, Emerson and Ülgen, 2004: 46). The aim of these migrants is generally to reach the EU. Turkey, along with Bulgaria and Romania, is a key transit country for illegal migrants who use Albania, Hungary and the Czech Republic to reach Western Europe (Özcan, 2005: 104).

When transit migrants were asked why they chose to pass through Turkey, the fact that it was a neighbouring country was the most frequent reason given. However, for many respondents, Turkey's lack of a visa requirement was also an advantage, while the low cost of travel to and the comparatively low cost of living in Turkey were also stated (Frantz, 2005: 23).

These migrants have shown a complex list of reasons for wishing to leave their homeland, often including a mixture of political and socio-cultural factors in addition to economic ones (Mannaert, 2003: 1). Indeed, it has been shown that the average income transit migrants earned in their home countries was a respecatble 700 dollars per month, making them financially better off than average (Frantz, 2005: 24). Therefore, in some cases it is difficult to differentiate these migrants from asylum seekers, as both groups are frequently fleeing from an unfavourable political situation in their home countries (Mannaert, 2003: 1).

Since the late 1970s, as a consequence of the Iranian Revolution and the Iran/Iraq war, nearly one and a half million Iranians have entered Turkey with the intention of moving onward to a

third country (Mannaert, 2003: 2), although 100,000 -200,000 have remained in Turkey (Frantz, 2005: 25). This migration was encouraged by Turkey's policy of providing visa-free entry and temporary shelter for refugees fleeing Khomeini's regime, although permanent settlement was, in most cases, not encouraged (Mannaert, 2003: 2).

In addition, between 1988 and 1991, approximately 600,000 Iraqis have entered Turkey, usually with the intention of moving on to the West. The Iraqis involved have mostly been Kurds escaping both adverse political and economic conditions (Kirişçi, 2003). Most notably, these include the Iraqi military reprisals on Kurdish villages in 1988, including the use of chemical weapons on the town of Halabja, for the Kurds' support of Iran in the Iran/Iraq war (Mannaert, 2003: 3). Although some of these have resettled in a third country, a large proportion have returned home, while a small number are still in Turkey (Frantz, 2005: 25).

Moreover, around 25,000 Bosnians sought refuge in Turkey between 1992 and 1994, most of whom intended to proceed to the West. While many have been successful in obtaining refugee status in the West, however, some are still living with friends and relatives in Turkey (Frantz, 2005: 25). Other waves of migration originating from European countries have included Bulgarian Turks fleeing the repressive regime in Bulgaria after 1989, and Kosovo Albanians in 1999 (Mannaert, 2003: 2).

Finally, since the late 1980s, thousands of transit migrants[92] have arrived from African and Asian countries as diverse as Ghana, Nigeria, Tanzania, Ethiopia, Sudan, Tunisia, Afghanistan, the Philippines and Sri Lanka (Frantz, 2005: 25). In addition, it appears that the number of transit migrants from these regions passing through Turkey at any one time increased from around 2,700 (2,000 African migrants and 750 Asians) in the mid 1990s to around 6000 (5,000 and 1,000 respectively) in the early 2000s (Mannaert, 2003: 4).

A study of transit migrants in Turkey suggest that around 40% of transit migrants entered Turkey without valid documents such as a passport or refugee document, and, according to the Ankara Chief of Security, Turkish security forces detained 346,940 illegal migrants between 1995 and 2002. These migrants, mostly Iraqi citizens from ethnic minorities (Kurds,

[92] The figure is estimated at over 30,000

Chaldeans or Turks) generally entered Turkey with the help of traffickers, including, in some cases, bus services for illegal migrants (Frantz, 2005: 19-20).

The rise of people-trafficking in transporting illegal migrants from Turkey to the EU is a particularly worrying trend, as the smugglers are not above commiting human rights violations, which may include rape, physical and mental abuse, food deprivation, abandonment and even death (Içduygu, 2003: 43).

In addition, although Turkey has defined the crimes of smuggling and people-trafficking in its 2002 Criminal Code and set punishments equivalent to those in the EU (Özcan, 2005: 124-125), the benefits to the criminals involved greatly outweigh the risks. The average annual income for a European smuggling organisation is as high as 100 or 120 billion dollars, suggesting that they charge illegal migrants exorbitant fees (Özcan, 2005: 97-103).

Moreover, Turkey itself is also a source country for migration to the EU, both legal and illegal, as well as for asylum seekers. In 2002, for instance it was estimated that nearly 3.2 million Turkish citizens were residing in Europe[93]. Statistics suggest that there are several reasons why Turkish citizens choose to emigrate, including to be reunited with family or for labour reasons which may vary from low-skilled to professional work. In fact, it appears that, in recent decades, there has been a considerable 'brain-drain' of high-skilled university graduates. Some of this migration is of an irregular nature, although the trend appears to be in decline (Içduygu, 2004: 335-336).

In conclusion, then, Turkey has become a target country for irregular migrants, both for those intending to stay in Turkey and for transit migrants *en route* to the EU. This is partly due to Turkey's geographical position, particularly its Middle Eastern dimension. Between 75% and 85% of Iraqi and Iranian illegal migrants, for instance, chose Turkey because of its geographical proximity (Içduygu, 2003: 33). This, then, serves to highlight the migration pressures that Turkey is subject to due to its geographical situation.

[93] Out of a total estimate of 3.6 million Turkish citizen living abroad

c. EU Requirements

As has been discussed in previous chapters, the EU has been concerned, particularly in recent years, with preventing irregular migration. This has been especially evident since a rise in illegal migration and asylum applications in the late 1990s followed by the September 11 and March 11 terrorist attacks. As a result there has been considerable pressure on Turkey to clamp down on transit migration destined for the EU.

This was particuarly evident in the run up to the Seville European Council summit of 2002, which was mainly devoted to the prevention of illegal migration. In fact, this reached such an extent that British and Spanish leaders Tony Blair and Jose Maria Aznar even threatened Turkey and countries like it with sanctions if they did not co-operate with the EU in this area (Apap, Carrera and Kirişçi, 2004: 17).

According to the Accession Partnership, Turkey is expected to implement a number of measures intended to curb transit migration to the EU, including reinforcement of border management with a view to eventually fully implementing the Schengen Convention. This includes increasing Turkey's capacity to fight organised crime, including people trafficking (Mannaert, 2003: 11), and the signing of readmission agreements with both neighbouring countries and the EU itself (Apap, Carrera and Kirişçi, 2004: 19) the consequences of which will be discussed in more detail below. Moreover, as has been mentioned above, the alignment of Turkey's visa system with that of Schengen is also intended to reduce transit migration through Turkey (Mannaert, 2003: 11).

In consequence, therefore, to changes made to border policy as a result of Turkey's 2001 National Programme for Accession the Turkish government has been increasingly successful in recent years in controlling illegal transit migration and people smuggling (Mannaert, 2003: 12).

This results from a combination of factors including an increase in the number of border control staff and sea patrols, tougher laws for people smugglers[94], as well as the signing of

[94] This has resulted in the increasing 'popularity' of alternative routes for people-smugglers, such as the Caucasus, Iran and the Ukraine

readmission agreements with several countries, and the progressive application of the Schengen visa list (Mannaert, 2003: 12).

Moreover, in 2004, a border management protocol was signed between Turkey and Bulgaria, leading to co-operation between the Turkish coastguards and Bulgarian border police (SCADplus, 2006). In addition, since 2000 Turkey has significantly increased its involvement in both regional and international initiatives dealing with migration and border control issues directed towards creating an infrastructure for the sharing of information and for co-operating regionally and internationally on migration issues (Gresh, 2005: 20)

EU programmes and co-operation have also had an impact. For the period 2002-2006, for instance, Turkey has been an indirect recipient of the *Argo* Programme, designated by the EU to fund administrative co-operation between MS on border controls, asylum, visas, and immigration. Turkey has also started to take part in the EU's 'twinning' projects in the area of border control and migration management. In addition, Turkey, along with the other candidate countries, will be included in the Hague Programme, the main aims of which include establishing a common immigration and asylum policy (Gresh, 2005: 17-20).

As a consequence of these efforts, the number of illegal migrants apprehended by the Turkish authorities has risen from 11,362 in 1995 to 94,514 in 2000 (Mannaert, 2003: 12). This is backed up by the Italian government, which claims that the number of illegal immigrants apprehended on their arrival at the Italian coast via Turkey has fallen sharply, from 6,093 in 2001 to 177 in 2003 (Apap, Carrera and Kirişçi, 2004: 20). Moreover, since April 2003 negotiations have been going on between the EU and Turkey for a joint action programme against illegal immigration (European Union, 2005).

One of the main changes that Turkey is required to make in this area is the conclusion of readmission agreements with neighbouring countries and third countries of origin. Although Turkey was very reluctant to sign such agreements, it agreed to do so in 2001, first with its eastern neighbours, then with countries further east and, finally, western countries (Özcan, 2005: 126). As a result, Turkey signed readmission agreements with Greece and Syria in 2001, Kirgizistan in 2003 and Romania in 2004, and is also negotiating and offering agreements to other neighbouring countries (Derviş, Gros, Emerson and Ülger, 2004: 48-49).

These agreements, however, are proving problematic for several reasons. First, it is not always easy for Turkey to negotiate them, particularly when the neighbouring country in question is unenthusiastic. At the time of writing, Turkey has concluded readmission agreements with Greece, Syria, Kirgizistan and Romania (Tokuzlu, 2005: 342). It is in the process of negotiating readmission agreements with Iran, Belarus, Bulgaria, Egypt, Libya, Lebanon, Hungary, Macedonia, Sri Lanka, Russia, Ukraine and Uzbekistan, although it has recieved no response from another 15 countries (Apap, Carrera and Kirişçi: 2004: 22).

In addition, there is evidence that these agreements may be open to abuse, leading to the sending of migrants and asylum seekers back and forth over borders like ping-pong balls. This has particularly been the case at the Greek/Turkish border, where this often takes place in dangerous conditions at night, leading to some asylum seekers being lost or drowned along the border. It has also been reported that some migrants deported to Turkey from Greece did not proceed from Turkey in the first place (Frantz, 2003: 15).

In fact, since the agreement came into force, the Greek authorities have provided Turkey with a list of over 14,101 illegal migrants they want sent back to Turkey, of whom Turkey agreed to admit 2,416. Greece, however, was only able to hand over 1,006[95] of these. On the other hand, of the 753 migrants, of varying nationalities, that Turkey wanted to return to Greece, Greece accepted only 19 Somalis (Kirişçi, 2005: 354).

Moreover, there is evidence[96] that Greece has sometimes declined to use the readmission procedure in the Protocol, but has rather sent illegal migrants informally to Turkey, either by pushing their boats towards Turkish waters or by releasing them in order to let them escape into Turkey (Tokuzlu, 2005: 343). Turkey estimates that 2,816 illegal migrants were 'returned' to Turkey in this way (Kirişçi, 2005: 354). This dispute has, moreover, caught the attention of the European Commission, which has urged the two parties to implement the readmission agreement more effectively (Tokuzlu, 2005: 343).

Finally, there has been pressure on Turkey, following its endorsement by the 2002 Seville Council, to sign a readmission agreement with the EU. Negotiations began after the the draft agreement was transmitted to the Turkish government in March 2003, but, at the time of

[95] 270 Iranians and 736 Iraqis
[96] Including reports of the migrants involved and video recordings

writing, have not yet been concluded (Tokuzlu, 2005: 342) (European Union, 2007). One reason for this is Turkish fears that the country may subsequently be used as a buffer-zone for unwanted migration destined for the EU. As Kruse points out (33) such an agreement would be particularly problematic for Turkey if its bid for full membership were to fail.

Not only would this place an undue strain on Turkish resources, considering the scale of the problem (250,000 migrants from Africa, the Middle East and Asia are said to cross into Greece via Turkey each year), but it would also prevent many genuine asylum seekers from making asylum applications in the EU (Frantz, 2003: 14-15). It is therefore vital that such an agreement contains instruments for burden-sharing and safeguards for people in need of international protection (Tokuzlu, 2005: 342).

Moreover, there is also a perception among Turkish officials that Turkey has been treated unfairly in this regard in comparison with previous candidate countries. The military in particular has been against the signature of a readmission agreement with the EU (Kruse: 34). In contrast to Turkey, those countries were not expected to sign bilateral readmission agreements until after the beginning of the accession negotiations, and were not expected to sign a readmission agreement with the EU at all (Apap, Carrera and Kirişçi, 2004: 23).

Given the difficulties that Turkey has encountered in concluding readmission agreements with third countries, therefore, there are fears that the conclusion of an agreement with the EU could result in Turkey's becoming a buffer zone for unwanted migration destined for the EU. Although the EU would be able to return migants who arrived there from third countries via Turkey back to Turkey, Turkey would not, in many cases be able to return them to their countries of origin (Apap, Carrera and Kirişçi, 2004: 23).

5.3.4. Asylum Policy

A. Turkey's Asylum Policy

Turkey also has a long history as a country of asylum, dating back to the Ottoman Empire's acceptance of Spanish Jews fleeing from the Inquisition. During the Second World War, as Kirişçi points out, Turkey accepted up to 100,000 Jews from Nazi Germany, and also accepted refugees from Nazi-occupied Balkan countries. Moreover, refugees from the Greek Civil War were also known to have taken refuge in Turkey. More recently, 20,000 asylum

seekers fleeing from the 1992-1997 Bosnian crisis, most of whom returned home after the conclusion of the Dayton agreement, were accepted into Turkey as well as 8,700 Kosovo Albanians after 1999 (2003b).

Turkey's current asylum policy is based on three pieces of legislation: the 1934 Law on Settlement, the 1951 Convention on the Status of Refugees and the 1994 Asylum Regulation. The 1934 Law sets limits on who can settle, migrate and acquire refugee status in Turkey: people of 'Turkish language and culture', including ethnic Turks and related groups from the Balkans and the Caucasus, and also central Asian Turkic peoples, such as Kazakhs, Kyrgyzs, Turkmens and Uygurs (Mannaert, 2003: 7).

Since 1951, Turkey's asylum policy has been based on the UN Agreement on Refugees, which obliges it to give full refugee status to refugees fleeing from events in Europe. Despite this, while Muslim refugees from post-Communist conflicts in the Balkans and ex-Soviet territories such as Azeris, Uzbeks or Chechens were technically covered by the 1951 Agreement, Turkey generally preferred to allow them to stay unofficially or to settle according to the 1934 law rather than to grant them refugee status (Kirişçi, 2003a: 127-128).

Moreover, Turkey has shown flexibility, at least until the early 1990s, in accepting refugees from other regions, particularly the Middle East. Following the Iranian revolution, for example, 1.5 million refugees (regime opponents, Shah supporters and other endangered groups such as Kurds, Jews and Bahai) were allowed to settle temporarily in Turkey (Kirişçi, 2003b). After the Iranians, Iraqi asylum seekers have been the largest group accepted in this way, although Afghan, Sudanese, Palestinian, Sri Lankan, Somalian and Tunisian asylum seekers have also benefitted from this practice (Kirişçi, 2003a: 128).

This flexibility has prompted the UNCHR to state that Turkey has a 'well-functioning system of temporary asylum'. However, since the 1994 regulation it has been estimated that around 13% of refugees registered with UNCHR may have faced difficulties in meeting the deadline for registering with the Turkish authorities described below (Mannaert, 2003: 8) until its relaxation.

Following a refugee crisis from the late 1980s to the early 1990s, involving Bulgarian Turks, Bosnian Muslims and half a million Iraqi Kurds, Turkey's asylum policy has become stricter.

With the creation of the 'safe haven' in Northern Iraq, for example, the Iraqi Kurdish refugees were deported, putting Turkey under pressure from human rights groups and Western governments to accept the principle of *non-refoulement* for non-Convention refugees (Kirişçi, 2003b).

The result of this relatively sudden increase of asylum seekers to Turkey, therefore, was the Asylum Regulation of 1994, which effectively removes the right of status determination out of the hands of the UNCHR to the Turkish Ministry of the Interior. However, once recognised by the Ministry of the Interior refugees may then apply to the UNCHR for resettlement (Mannaert, 2003: 7).

According to the 1994 Regulation, once accepted by the Ministry of the Interior, these refugees are allowed to reside in Turkey 'for a reasonable period of time' until admitted as refugees by a third country (Tokuzlu, 2005: 341). This regulation, therefore, effectively reduces the role of the UNCHR in Turkey to that of resettling abroad asylum seekers whose status has been accepted in Turkey (Kirişçi, 2003a: 129).

The regulation also required asylum seekers to register with the police within five days and provide valid documentation within another 15, while asylum seekers entering the country illegaly have to apply at their point of entry, often necessitating a long journey which may cause them to miss the deadline (Mannaert, 2003: 7-8). In addition, it includes a stricter imposition of the geographical criteria of the 1951 Convention, although it does continue to grant temporary protection to asylum seekers coming from elsewhere, particularly Iran and Iraq (Apap, Carrera and Kirişçi, 2004: 24).

During the first few years of implementation of the 1994 Regulation, Turkey was heavily criticised by both Western governments and human rights groups, who argued that Turkey was violating the rights of asylum seekers and refugees. However, it has also been argued that, during this period, Turkey was effectively at risk of becoming a buffer zone for refugees intending to head to the West but stranded in Turkey due to increasingly restrictive European immigration policies (Mannaert, 2003: 7).

In this view, then, the Regulation was a reaction to this real or perceived danger (Kirişçi, 2003b: 7). Moreover, according to Içduygu (2000), the Regulation meant that Turkey was

recognising its changing status as a transit country, and that it needed to take more responsibility for dealing with non-European asylum seekers. However, it also reflects the increasing perception within Turkey of asylum seekers as polarised security threats.

As a response to these criticisms, therefore, Turkey extended the time limit for application from five to ten days (Kirişçi, 2003b: 7) until eventually, in January 2006, the time limit was replaced with the words 'shall apply without delay' (Tokuzlu, 2006: 359). As well as this, the last paragraph of Article 4, which used to expose asylum seekers to deportation and punishment before a risk assessment was carried out, has been removed (Tokuzlu, 2006: 359).

In addition, Turkey began co-operating more closely with the UNCHR, which provided training sessions for Turkish officials dealing with asylum applications, and influenced Turkey to open up the possibility of the right to appeal against negative decisions regarding asylum applications. Moreover, in practice, Turkey has begun co-operating closely with the UNCHR on status determination (Kirişçi, 2003a: 130).

However, due to provisions of the above-mentioned 1934 Settlement Law, which states that only individuals 'of Turkish descent and culture' have the right to immigration and refuge in Turkey, many refugees continue to be settled out of Turkey (Apap, Carrera and Kirişçi, 2004: 24). In recent years, this policy has been criticised by the EU, which argues that the restriction on asylum opportunities in Turkey is forcing migrants to attempt to enter the EU illegally. Italy in particular has accused Turkey of violating its international obligations by not controlling its borders and coasts regularly (Özcan, 2005: 123).

Moreover, Turkey has begun to come under pressure even from governments who have traditionally accepted refugees and asylum seekers from Turkey, such as Canada, Australia, the USA, Holland, Sweden and Norway. These countries argue that, in their view, Turkey is in a position to settle some of these asylum seekers on its own soil (Mannaert, 2003: 9).

Pressure on Turkey to accept more refugees and asylum seekers was also expressed in the Council of Europe's 1998 'Action Plan on the Influx of Migrants from Iraq and the Surrounding Area'. This was intended to keep the majority of refugees in the region rather than granting them entry to the EU. The original idea was to keep them in safe havens in Northern Iraq, or, if this should fail, in neighbouring countries such as Turkey or Jordan.

However, in the end, the plan has focused upon Turkey, particularly Istanbul, viewed in the EU as being a hub for the transit of illegal migrants from Iraq and other Middle Eastern or South Asian countries (Özcan, 2005: 112-113).

In fact, Turkey has also been criticised due to serious problems in the provision of social support services for asylum seekers, including housing, healthcare, legal advice and training. Moreover, although asylum seekers are theoretically eligible to work and receive social security in Turkey, social support systems are practically non-existent and asylum seekers have serious difficulty in obtaining a work permit. This, in turn, often forces them to work illegally, thus making them vulnerable to deportation (Mannaert, 2003: 8). Despite this, EU reports suggest that the situation has been improved in recent years (SCADplus, 2006).

Provisions for the schooling of refugees' and asylum-seekers' children have been improved, which is important since almost one third of refugees and asylum-seekers currently registered in Turkey are under 18[97]. Moreover, although it is true that they are generally placed in poor accommodation in poor neighbourhoods (Mannaert, 2003: 8), asylum seekers and refugees in Turkey, while awaiting resettlement, are assigned to 'free' residences in designated cities. This is in contrast to the case in many EU countries, where they are settled in camps or reception centres (Apap, Carrera and Kirişçi, 2004: 24).

In addition, Turkish NGOs are increasingly beginning to deal with asylum issues, particularly by offering practical support to asylum seekers. The Association of Solidarity with Migrants and Asylum Seekers, for instance, helps asylum seekers by organising training and public awareness seminars, and offers social assistance and counselling to asylum seekers. Another important NGO, the Anatolian Development Foundation, has also been active in assisting in the settlement of refugees in Turkey (Kirişçi, 200b). However, ironically, just as Turkey's human rights record in dealing with asylum seekers has improved, its candidacy for EU membership is requiring it to take a more security-oriented approach (Kirişçi, 2004: 17).

[97] In 2003, for instance, 3225 of a total of 11,635 asylum seekers registered were minors of less than 18 years of age.

B. EU Requirements

The National Programme for the Adoption of the Acquis foresaw that the new Law on Asylum to be adopted by the end of 2005 should include provisions corresponding to the implementation of the Dublin Treaty, the Dublin II Regulation, EURODAC and the Council Decision on the European Refugee Fund. However, this was largely meaningless because, as Tokuzlu points out, it is impossible for a state to fully participate in any of these until it becomes a full member of the EU (2006: 360).

Therefore, these objectives have since been replaced by more attainable ones, such as, among others, the establishment of an asylum and migration specialization unit, a training academy, a COI system, reception and accomodation centres, setting non-refoulement standards, introducing family reunification procedures and initiating accelerated procedures for asylum seekers (Tokuzlu, 2006: 363).

As well as the readmission agreements discussed above, perhaps the main change that Turkey is required to make to its asylum policy is to lift the geographical limitation included in the UN Agreement on Refugees. While, according to the Agreement, Turkey is only responsible for granting full refugee status to those fleeing from events in Europe, the EU expects Turkey to extend this to refugees originating from other parts of the world (Derviş, Gros, Emerson and Ülgen, 2004: 50). This is, however, not unique to Turkey: other candidate countries, particularly Hungary, have been required to do the same during the accession process (Apap, Carrera and Kirişçi, 2004: 25).

In fact, a July 2000 ruling of the European Court of Human Rights (the Jabari case), has already established that Turkey cannot *de facto* use the geographical limitation to justify the deportation of an asylum seeker if it can be demonstrated that that person is at risk of torture, inhuman or degrading treatment or punishment at home (Tokuzlu, 2006: 359). However, a formal relinquishing of the geographical limitation together with a readmission agreement with the EU would automatically give Turkey ‘safe third country’ status.

In addition to lifting the geographical limitation, Turkey is required to update and develop its arrangements for refugee status determination, on the grounds that it would become a country of first asylum, and would therefore be responsible for status determination. At present, this is

carried out by UNCHR in Turkey as non-Europeans are technically not allowed access to asylum procedures there. In consequence of this pressure from the EU, however, Turkey is now working together with UNCHR, through joint projects and training sessions, in order to improve its status-determination system (Mannaert, 2003: 11).

This has, however, also raised fears in Turkey about becoming a buffer-zone for asylum-seekers, as, as has been discussed in Chapter 3, according to EU asylum rules, asylum seekers are generally returned to the 'country of first asylum' (Derviş, Gros, Emerson and Ülgen, 2004: 50). Turkish officials are particularly afraid of Turkey being left in a situation in which it has lifted the geographical restriction without its membership of the EU being approved: in such a situation Turkey would be left alone to deal with potentially large flows of refugees from the Middle East (Apap, Carrera and Kirişçi, 2004: 25).

As Tokuzlu argues, Turkey's becoming a safe third country would, ironically, be detrimental to its bid for full membership of the EU as full membership would entitle Turkey to participate in burden-sharing resources (2006: 368-369). In addition, it would be required to take complete responsibility for assessing asylum applications to Turkey without the benefit of support mechanisms such as the Dublin Convention or EURODAC (Tokuzlu, 2004: 341).

This has therefore prompted Turkey, in its National Programme for the Adoption of EU Acquis, to state that lifting of the geographical limitation should depend on its not encouraging large flows of refugees to Turkey, and on burden-sharing on the part of the EU (Frantz, 2005: 14), given the potential social and economic difficulties of dealing with large numbers of refugees. Turkey has therefore put off the adoption of the Asylum Bill until 2012 (Tokuzlu, 2004: 341).

Public opinion, as far as the public is aware of the issue, is mixed. While some oppose lifting the geographical restriction on the grounds that such a move would effectively turn Turkey into a buffer-zone for unwanted migration and asylum-seekers, others argue that it is a necessary move in order for Turkey to show that it lives up to the legal and political standards for EU membership (Kirişçi, 2003b: 9).

5.3.5 The Third Pillar: Turkey and the EU's Police and Criminal Judicial Co-operation *Acquis*

A. The Development of the Third Pillar *acquis*

The EU MS have tried to co-operate in the fight against transnational crime since as early as the 1970s, through the Trevi group, which focused principally on combatting terrorism and drug trafficking (Occhipinti, 2004a: 199-200). Later on, in the late 1980s and early 1990s, there was concern about a possible increase in illegal migration and cross-border crime as a consequence of the dismantling of internal borders resulting from the Schengen agreement and the Single Market. This, partly as a result of functional and political spillover on the part of law and order officials, led to the creation of the JHA pillar in the Maastricht Treaty.

Regarding police and judicial co-operation, the Treaty provisions included the creation of Europol, a European Police Office which was intended to act as a liaison centre for national police forces. Europol, however, did not become fully functional until July 1999 (Occhipinti, 2004b: 185) and even then there were still severe limitations on law enforcement authorities' ability to act across borders. For instance, police forces are allowed to detain, but not arrest, suspects on foreign soil, and they are only allowed to carry out pursuit or maintain surveillance over land, not by sea, air or rail (Occhipinti, 2004a: 200).

According to Article 30 TEU, the purpose of police co-operation is to guarantee EU citizens a 'high level of safety' in the Area of Freedom, Security and Justice'. Although the concept of a 'high level of safety' has not been clearly defined, it can perhaps be understood as the fight against terrorism, people-trafficking, drugs and arms smuggling and cross-border financial crime such as fraud (Fijnaut, 2004: 245). In addition to the JHA pillar, prevention of organised international crime has begun to take an important place in some policies under the CFSP pillar, such as that regarding Russia (Fijnaut, 2004: 260).

Moreover, at the 1999 Tampere European Council, the Police Chief's Task Force, a forum for high-level police chiefs to discuss strategies and tactics, was also set up. In addition, the European Police College was also established in order to train high-level police officers, and link police academies in MS and candidate countries (Occhipinti, 2004b: 185)

As well as this, in the years following Tampere, functional spillover from various areas increased the importance of Europol in crime-fighting. For instance, the introduction of the Euro resulted in Europol being granted a prominent role in combatting counterfeiting, while there was more focus on fighting money-laundering and financial crime at EU level due to the Single Market provisions on the free-movement of capital (Occhipinti, 2004b: 187)

Regarding criminal judicial co-operation, a European judicial unit, or 'Eurojust', was proposed at the 1999 Tampere Council, which was intended to facilitate judicial co-operation by acting as a liaison network of national criminal prosecutors. The Tampere meeting also introduced the principle of 'mutual recognition' of criminal codes and judgements instead of aiming for 'double-criminality', according to which all MS would define and punish crimes in the same way. However, it was deemed that some approximation of criminal codes was still necessary, which would be largely carried out by means of the framework decision (Occhipinti, 2004b: 186).

5.3.5.2. The Adoption of the Third Pillar *Acquis* by Turkey

As in other aspects of JHA, particular importance has been given to adoption of the police and criminal judicial cooperation *acquis* by Turkey and the other candidate countries, which will, of course, form the new external borders of the EU upon accession. Moreover, Turkey, like many of the CEE MS and candidate countries, borders on relatively unstable regions which can be problematic from the point of view of controlling organised crime.

A. People Smuggling and Trafficking

The difficulty of controlling Turkey's extensive land and sea borders, as discussed earlier in this chapter, leaves Turkey relatively open not only to illegal migration but also to international organised crime. Both drug smuggling and people trafficking have long been points of concern in bilateral relations between Turkey and EU countries (Morris, 2005: 209)

In 2002, an important step was taken with the recognition of smuggling and trafficking in human beings as crimes in the Civil Code (SCADplus, 2006). As a result, Turkey has also implemented training programmes for officials who deal with cases of trafficking. In 2004, more than 400 police, 120 Jandarma, and 160 judges received training on people-trafficking

issues (US Department of State, 2005). As a result, the Turkish authorities have become increasingly efficient in referring victims of trafficking to the IOM for assistance (Demirelli, 2005).

In addition, the project has focused on rescuing trafficking victims. This has included the setting up of a 24-hour hotline in which victims of trafficking can ask for assistance. In 2004, for instance, a Ukrainian woman's call to the hotline resulted not only in her own rescue but in that of eight Georgian and Azeri women who were being kept in the same hotel (Azcan, 2005: 75). Moreover, two shelters in Ankara and Istanbul to aid trafficking victims were set up under the project (Demirelli and Özerkan, 2006).

B. Europol

The EU is therefore particularly concerned for Turkey to take part in police co-operation in order to prevent organised crime reaching the EU via Turkey. According to the Accession Partnership Agreement and Turkey's National Programme, then, Turkey's main challenge regarding police co-operation is to join Europol and become part of the SIS (İçduygu, 2003: 63). As in the case of the CEE countries, such reform involves not only co-operation, but also reorganisation of Turkey's police force so that it fulfills membership conditions (Fijnaut, 2004: 260).

The adoption of the *acquis* on criminal judicial matters is one of the goals of Turkey's action plan, which aims to address the measures needed to improve the legislation and practice relating to mutual judicial assistance, extradition and the freezing or confiscation of assets. As a consequence, the Foreign and Turkish Criminal Judgments Enforcement Act was amended in January 2003. In addition, in August 2004 Turkey ratified the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (European Union, 2005).

The Action Plan has also emphasised the importance of training in Turkey's drive to fulfill the *acquis* in police and judicial co-operation. In 2004, for instance, the Ministry of Justice published a training manual on judicial cooperation and signed a memorandum of agreement with the University of Yeditepe to give judges and prosecutors the opportunity of learning English. Moreover, in the same year, the School for the Judiciary was opened and accepted its first intake of students (European Union, 2005). In addition, a new law has come into force

allowing graduates to be recruited to the police force, thus increasing the level of education among the police (European Union, 2006)

Concluding bilateral agreements is also a means towards achieving this goal. In July 2001, for example, a cooperation agreement between Greece and Turkey to fight cross-border crime came into force, while in 2004 bilateral cooperation agreements were ratified with Finland, Germany, Poland and South Africa and an agreement was signed with Belarus to intensify the fight against trafficking in human beings (European Union, 2005).

A co-operation agreement was signed with Europol in 2004 to enhance co-operation in fighting serious crimes, although it does not provide for the exchange of personal information (European Commission, 2004: 141). Since the agreement was signed, Turkish police officials have attended the European Police College (CEPOL) sponsored by Europol where they have attended short courses on external border security, knowledge of police systems and Europol, and illegal immigration (Gresh, 2005: 19).

Turkey also has observer status in the EU's crime prevention network (SCADplus, 2006). All such co-operation initiatives are welcome from a neofunctionalist point of view, as they build trust, and therefore provide favourable conditions for the development of *engrenage* among officials.

In addition, a working group on harmonisation with the Europol *acquis*, co-ordinated by the office of the Legal Adviser at the Ministry of the Interior, has been set up. Again, training has been an important part of Turkey's efforts to fulfill the *acquis* in this area. An example is the training sessions organised in 2000 by the Ministry of the Interior for 533 officials on the recognition and prevention of forged documents to control illegal border crossings (Içduygu, 2003: 64).

Moreover, in 2003-2004, forensic police officers were trained to raise the police' general detection and analysis capacity, and five new police academies and two new forensic medicine laboratories were opened. However, training has, in some cases also focused on human rights. For instance, the 2003-04 training scheme for police and gendarmerie operated in conjunction with the Council of Europe resulted in the gendarmerie adopting a 'model human rights training programme' (European Union, 2005).

C. Terrorism

The fight against terrorism has also been an important issue in police co-operation between the EU and Turkey, particularly as both Turkey and some EU countries have faced attacks from international terrorist organisations in recent years. As Günter Verheugen points out, Turkey is in a position to demonstrate to the Islamic world that there is no implicit contradiction between human rights and democracy on the one hand and a Muslim background on the other (Friends of Europe *et al,*2004: 27).

It can be argued that the outlook for co-operation is fairly positive in this area, as Turkey and many EU countries have developed similar attitudes towards fighting terrorism over the years, partly due to their common experience in tackling domestic terrorism problems (Özcan, 2005).

This has resulted, for example, in an approach which is careful to avoid mistakes on the parts of governments such as victimising the innocent which may then be used in anti-government terrorist propaganda. This is in contrast to the US model of anti terrorism which, perhaps due to less experience in this field, has been less discriminating in this respect (Özcan, 2005).

This similarity in outlook, then, has allowed Turkey, with relatively little difficulty, to strengthen its anti-terrorism co-operation with the EU through bilateral protocols and action plans with some of the EU MS. As an example, in compliance with the UN Security Council Resolutions on the Suppression of Financing of Terrorism, the assets of 187 persons and institutions were frozen in Turkey by late 2004 (European Commission, 2004: 142).

D. Drugs

Turkey is a major source country for drugs. For this reason, the European Commission has pressed Turkey to develop co-operation with other countries in the area of drug trafficking. In general, bilateral co-operation in this area between Turkey and the UK, for instance, appears to be viewed positively by the Turkish police (Morris, 2005: 209).

Moreover, some multilateral co-operation has also been undertaken. For instance, Turkey has ratified an agreement signed with the EU on precursors and chemical substances used in

manufacturing narcotic and psychotropic drugs. As well as this, in August 2004, an agreement was signed for Turkey to participate in the ECMDDA (European Union, 2006)

In conclusion, police and judicial co-operation is one of the less problematic areas of the JHA *acquis* from the point of view of Turkey. This is perhaps because integration in this area has not proceeded as quickly in this as in the JHA 'first pillar' due to the relatively cumbersome nature of intergovernmental bargaining.

Moreover, as in the case of the CEECs discussed in the previous chapter, the focus on training, 'twinning', bilateral and multilateral agreements helps to increase mutual confidence and may, particularly in the case of co-operation with the EU, promote 'engrenage' in this area. This, in turn, will fuel further political pressure for spillover. Such initiatives should therefore, if possible, be increased even further.

5.4. Turkey's adoption of the JHA *acquis*: Neofunctionalist Commentary

As has been discussed earlier in this chapter, migration issues have been on the EU/Turkey agenda since the signature of the Ankara Agreement in 1963. However, it was not until the 1990s, with the rise in asylum seekers headed to the EU, many of whom entered through Turkey, the increasingly anti-immigration atmosphere in the EU, and the institutionalisation of JHA in the Maastricht and Amsterdam treaties that the EU made serious attempts to draw Turkey into this area.

One of the first examples of the EU aiming to influence Turkey's migration and asylum policies was the European Council's action plan, which was adopted in 1998. According to this plan, Turkey was expected to play an important role in preventing Iraqi migration to the EU. It also included objectives which included, as well as continuing the dialogue with Turkey on this matter, providing technical, financial and training assistance, and exchanging experience on these issues(Özcan, 2005: 121-122).

Although the EU had had some impact on Turkey's migration and asylum policies in previous years, it was with Turkey's acceptance as a candidate country in 1999 that it really came into the EU's 'sphere of influence' in this respect (Kirişçi, 2003a: 130). It must be reiterated here

that EU attitudes towards migration and asylum seekers have hardened considerably in recent years for a number of partly interlocking reasons. These include 'lowest common denominator' intergovernmental bargaining, the prospect of enlargement to CEE countries, the rise of the far-right in many EU countries and the terrorist attacks of September 11 2001 and March 11 2003.

In contrast, during these years, Turkey's own border policy had been developing in the opposite direction. Borders which had been closed in some cases for decades were gradually being re-opened, while the visa policy introduced by Özal ensured that citizens of neighbouring countries could enter Turkey either visa-free or with a simple, reasonably-priced visa that could be bought on the spot at the airport.

While there was little encouragement for foreigners of non-Turkish origin and culture to settle in Turkey, the ease of entering the country and the flourishing underground economy ensured that many stayed illegally, whether Turkey was their original destination or if they were transit migrants or asylum seekers who had originally intended to settle elsewhere. This, coupled with the entry of large numbers of ethnic Turks from neighbouring countries ensured that Turkey became a country of significant immigration.

Due to the lack of fit between the EU and Turkish border policies, the accession process has required no less than an upheaval in Turkey's border, visa, asylum and immigration policies. Essentially, then, the adoption of the JHA *acquis* involves Turkey's tightening its borders in every way. It must strengthen its visa system, improve control at borders and clamp down on irregular migration, particularly that destined for the EU.

Moreover, from a neofunctionalist perspective, the spillover that Turkey is required to adopt in the area of JHA is largely enforced in nature, and, as in the case of the CEECs, there is no room for opt-outs such as those granted to the British, Irish or Danish. While opt-outs are frowned upon by traditional neofunctionalists, they are not problematic according to Schmitter's neo-neo- functionalism, which foresees a more flexible *finalite politique* than a federal state. Indeed, in Schmitter's view, opt-outs may be advantageous if they cater for a candidate country's specific needs and may therefore help to avoid spillback at a later date (2002: 42-43).

From Turkey's point of view, one of the most controversial aspects of the JHA *acquis* is that it will have to conclude readmission agreements not only with countries of origin but with the EU itself. Given that Turkey has had difficulty in concluding readmission agreements with countries of origin, this has the potential to turn it into a buffer-zone for illegal migrants headed for the EU in the absence of more significant burden-sharing resources. Similarly, the lifting of the geographical requirement and the adoption of the rest of the EU asylum *acquis* could have this effect, as Turkey would become a safe third country and, in many cases, a first country of entry.

This has caused a backlash among Turkish officials, who have refused to adopt this area of the *acquis* without the promise of burden-sharing from the EU. This scepticism has already resulted in a delay to 2012 in their predicted adoption according to Turkey's action plan, and may result in a crisis if no satisfactory (from the Turkish point of view) burden sharing is put in place by then. There is, thus, the threat of spillback in Turkey's accession process in this area in the form of a potential deadlock in negotiations.

Regarding visa policy, the tightening of Turkish visa policy to fit the Schengen visa system in some ways fits with demands from certain sectors of Turkish society for a stricter line on illegal immigration, and especially on the phenomenon of people-trafficking. However, as in the case of the CEECs, the imposition of visas on neighbouring countries is problematic in some respects. In addition to potentially straining political relations, the necessity to travel to a Turkish consulate in order to obtain a visa could deter many potential tourists and tradespeople from these countries from visiting Turkey.

A further problem related to this is the issue of Turkey's remaining on the Schengen blacklist itself even when it is required to impose that list, and the longer-term issue of the delay in the free-movement of Turkish workers. The latter is unlikely to occur before 2022 at the earliest, given a (relatively optimistic) accession date of 2015.

From a neofunctionalist point of view, this could eventually have a negative effect on Turkish integration into the EU, as free movement is considered to be an important aspect of identity formation (Buonanno and Deakin, 2004: 96). Since the acquisition of some level of 'European identity' promotes a 'pro-integration' attitude in the general public (Hooghe and Marks:

2004), the delay in free movement could promote 'Eurosceptic' attitudes among the Turkish public both during the accession process and afterwards.

As Hooghe and Marks point out (2004), although it was given less importance by earlier neofunctionalist scholars, public opinion has become increasingly salient in EU affairs in recent years, particularly due to the widening policy competence of the EU and the increasing use of referenda regarding EU issues.

However, perhaps especially in the area of police and judicial criminal co-operation, the neofunctionalist outlook is not such a gloomy one. There is evidence that co-operation and training, whether bilateral or multilateral, in these areas has generally been a positive learning experience for those involved. Moreover, the experience of the CEE candidate countries suggests that such co-operation may encourage both *engrenage* and voluntary external spillover in this area (Gregory, 2001). Practical co-operation, both bilateral and multilateral, whether among police forces, border officials or staff at consulates, should be continued and expanded.

5.5. Conclusions

Turkey has made great progress towards its aim of EU accession, having commenced membership negotiations in 2005. The accession process has shown the influence of a number of neofunctionalist processes, including Commission activism, political spillover at mass and elite level, and exogenous functional pressures.

However, Turkey is still far from accession, with the earliest expected date around 2015. As the accession negotiations are open-ended, this may be postponed even further. Even so, Turkey's accession is not a certainty. It may be overturned by several factors, including a veto at EU level or a negative referendum in one of the EU MS. A more recent spectre, reflecting the recent dramatic fall in Turkish public support for accession, is a negative Turkish referendum or, perhaps more likely, a slowing down or stalling of the reform process due to public pressure.

Indeed, the reforms required can often be arduous, not least in the area of JHA. As Schmitter points out, the Copenhagen Criteria are notably similar to the background conditions accepted by neofunctionalists as necessary for spillover to occur (2002: 42-43). Such background conditions include shared basic values, a certain degree of homogenity in levels of political, social and economic development, a network of transactions, comparable decision-making processes and compatibility of expectations (Groom, 1994: 114), which are clearly promoted by the Copenhagen Criteria.

Therefore, from a neofunctionalist perspective, fulfillment of the Copenhagen Criteria is probably necessary in order to reduce the diversity between the candidate countries and the EU enough for spillover, and therefore integration, to continue. This is particularly true in the case of Turkey, which is otherwise difficult for the EU to absorb due to its size and political, economic and cultural differences to the EU.

However, neofunctionalism argues that there must also be a shared belief that integration will lead to an increased satisfaction of needs and a belief at both mass and elite level that problems can be solved in a mutually acceptable way (Groom, 1994: 114). As Schmitter points out, the Copenhagen Criteria were generally unilaterally imposed, and did not take into account the specific needs and conditions of the candidate countries (2002: 42-43).

Moreover, the candidate countries, including Turkey, were not ceded opt-outs from 'difficult' areas. This may cause dissatisfaction with EU membership, which can be problematic particularly after accession when it may lead to spillback through the use of the veto or blocking minority. Indeed, signs of dissatisfaction with the EU are already in evidence in Turkey, where public support for EU membership has declined dramatically in the last two years.

While there has, until recently, been more focus on the political reforms that Turkey is required to carry out, the adoption of the JHA *aquis* will also pose significant problems for Turkey as it necessitates the transformation of its border policies from being relatively liberal to a more restrictive, 'Schengen'-type system.

In some areas the EU's JHA *acquis* co-incides with the goals of sectors of the Turkish public and elite. For instance, there is some support in Turkey itself for the strengthening of visa

requirements as a way of keeping out irregular migrants. Generally speaking, Turkey also welcomes EU assistance in the control of its extensive borders. However, there are several instances in which JHA will be the cause of more difficulties than it alleviates for Turkey.

Firstly, as is the case in CEE, the imposition of stricter visa requirements on Turkey's neighbours may strain relations with these countries, particularly in the area of trade and tourism. Tourism from Russia and Iran, whose nationals could previously enter Turkey without a visa, is likely to be particularly hard-hit.

In addition, trade between Turkey and its neighbours is likely to suffer, particularly the informal 'suitcase trade'. Especially problematic is the fact that Turkey itself is still on the EU's negative visa list, and may remain there for quite some time. This has been a cause of complaint in particular by Turkish businessmen, who argue that they are being treated unfairly and are being put at a disadvantage compared to their EU counterparts who can enter Turkey freely.

A related issue, and one that Turkey shares with the CEE MS, is that of free movement of workers within the EU. This is expected in the case of most of the CEECs in around 2011, or seven years after accession. However, if the same criteria are applied to Turkey, free movement within the EU will not take place until 2022 at the earliest given an accession date of 2015. If it is recalled that free movement of Turkish workers was first included in the 1963 Ankara Agreement, this implies a delay of almost 60 years! This may also hinder the formation of a 'European' identity among the Turkish public, which may contribute to putting a brake on neofunctionalist spillover.

In addition, perhaps one of the biggest dilemmas that Turkey faces as a result of adopting the JHA *acquis* is in its asylum policy. Firstly, it is required to lift the geographical restriction included in the UN Agreement on Refugees. As this would also imply Turkey being classified as a 'safe third country', some Turkish officials argue that this would result in Turkey becoming a 'buffer-zone' for asylum seekers otherwise destined for the EU. Moreover, Turkey, as it is not yet a full EU member, would not be able to partake in burden-sharing resources.

Another important issue is the question of readmission agreements. Turkey is expected to conclude a readmission agreement with the EU as part of its accession process, which would require Turkey to accept back any illegal migrants and failed asylum seekers from the EU which had either originated from Turkey or passed through its territory. This is exacerbated by the fact that Turkey itself has had difficulty in persuading source countries to sign readmission agreements, and also by the problems it has faced even in those cases where it has been able to conclude them.

Given the significant amount of transit migration and asylum seekers that Turkey receives, due to its geographical position and the difficulty of controlling its borders, these measures have the potential to turn Turkey into a buffer zone. This has already resulted in a delay in the foreseen date for lifting the geographical limitation according to Turkey's action plan until 2012.

As in the case of the CEECs, if these difficulties are not alleviated, this may delay the accession process, or contribute to spillback in this area once Turkey becomes a MS. Given the amount of votes a country as large as Turkey is likely to obtain in the Council of Ministers it will not find it difficult to form a blocking minority on these issues, particularly if the CEECs still face similar problems.

Therefore, from a neofunctionalist viewpoint, it is advisable to attempt to find a solution, or at least a compromise, to these problems. Despite the gradually increasing involvement of the supranational institutions, which tend to be more liberal in outlook than the MS, in JHA there is no reason to expect that the EU's border policies will change dramatically in the near future. However, there are some adaptations that could be made in order to adjust to Turkey's situation.

Firstly, Turkey could be allowed to maintain its visa system at least until it is removed from the Schengen blacklist itself. This would help to build trust on the Turkish side, and would perhaps help reduce the sense of unfair treatment mentioned by Turkish businessmen in particular. Given Turkey's improving record in controlling irregular migration from Turkey to the EU, it may even be feasible if such a trend continues to allow Turkey to maintain its current system even until accession as the Schengen border between Turkey and the EU will not be effectively lifted for several years after that.

Secondly, burden-sharing resources, in the form of a certain amount of resettlement or, more likely, financial aid, should be made available for Turkey to cope with the large influx of asylum seekers and/or illegal immigrants that it is likely to receive on implementing the re-admission agreement with the EU and on lifting the geographic condition for asylum seekers. Turkey would also benefit from co-operation with officials working with asylum-seekers in EU-countries. This would not only help to improve the expertise of the Turkish staff, but would also encourage political spillover in the form of *engrenage* between these officials.

Border and customs officials, as well as the police, could also benefit from the extension of bilateral and multilateral projects and exchanges for the same reasons. Indeed, there is evidence, particularly from the police, that such co-operation is already showing some positive results from the point of view of *engrenage*. However it is, of course, important that such efforts are backed up with sufficient financial and technical resources.

VI. CONCLUSIONS AND OUTLOOK

JHA has been one of the fastest growing EU policies in recent years. Although, especially in the early days, it was dominated by intergovernmental bargaining, it has become increasingly supranationalised, particularly since the Amsterdam Treaty. Neofunctionalist theory, especially Schmitter's neo-neofunctionalism, may provide a suitable explanation for these developments as the impetus for the growth of JHA has come from a variety of sectors, roughly equivalent to the neofunctionalist concepts of functional, political and cultivated spillover.

The first source of functional spillover is the Schengen agreement and the free movement of persons clause of the Single Market programme. By demolishing the internal frontiers of the EU, they provided pressure for strengthening the external frontiers in order to keep out cross border crime and illegal migrants.

A further source of functional spillover, exogenous this time, was the prospect of enlargement. Fuller co-operation at EU level was considered necessary in order to protect the EU from the large numbers of illegal migrants and international organised crime that, it was feared, would arrive from or via the candidate countries. This was joined by the increasing number of asylum applications to EU countries and, perhaps more notably, by the September 11 terrorist attacks and the ensuing attacks on Madrid and London. Seemingly non-JHA related developments such as the introduction of the Euro and the participation of civilian police in some of the Petersberg tasks have also spilled over into JHA.

There has also been evidence of political spillover in the development of JHA. Some of this originated in the early days of JHA co-operation, in the Trevi group and the Schengen agreement, from officials of the interior and justice ministries. Firstly, there was significant *engrenage* between these officials as a result of the 'wining and dining' culture which developed during the Trevi period. Following this, these officials found themselves increasingly constrained at national level during the 1980s due to the increased liberalisation of national migration policies.

With the signing of the Schengen agreement, then, they increasingly focused their attention on gaining power and resources at European level, which they were in a good position to do due

to their involvement in the Trevi group. Thus, these interior and justice ministry officials sought greater power and funding by publishing 'scaremongering' reports on the potential for illegal migration and organised crime seeping into the EU as a result of Schengen and the Single Market (Guiraudon, 2001). At this point, though, the increased European co-operation which resulted was largely intergovernmental in nature, encouraging outcomes which were both restrictive and ' lowest common denominator' in outcome.

However, at this stage, foreign ministry officials, who also play a part in migration and asylum policy, were seeking to get 'in on the act' at European level. This kind of competition between ministries for influence and resources at the level of the regional integration project is, in fact, predicted by Schmitter as a feature of the transformation cycle (2002: 35). In the case of JHA, as interior ministry officials had dominated decision-making in the early days, foreign ministry officials were keen to get their 'revenge' in the Amsterdam Treaty, which they did by including the entire Schengen *acquis* (Guiraudon, 2001: 11).

Political spillover can also be seen in the increasing development of EU level pro-migrant NGOs, who, in turn, lobby the supranational EU institutions, in particular the Commission. In addition, there has been some pressure from big business to speed up and simplify the process of obtaining visas and work permits for employees. From a neofunctionalist viewpoint, then, the development of EU-level lobby groups indicates the growing importance of the EU, particularly supranational institutions such as the Commission, in the relevant policy area.

Finally, cultivated spillover can be seen in the efforts of the Commission to win a greater role for itself in JHA. It has done this through policy entrepreneurship as well as open lobbying for more powers. In the early days of JHA, when the Maastricht Treaty was being negotiated, the Commission avoided the temptation of arguing for a too significant increase in its powers. Instead it attempted, although it shared the right of initiative at that stage with the MS, to prove its value to the MS by producing a significant number of relevant proposals.

As a result, the Commission was in a much stronger position to bargain for more powers in the pre-Amsterdam IGC, particularly as a new DG for JHA had also opened. In consequence, the Commission was able to negotiate significant new powers in JHA, including the sole right of initiative and the possibility of QMV. This, then, represents an important development towards the supranationalisation of JHA. Moreover, at Tampere, the Council, perhaps

surprisingly, elected to delegate the sole right of initiative for asylum policy to the Commission five years ahead of schedule.

The Commission has also been adept in using its informal agenda-setting powers, especially making policy proposals and identifying areas for further integration. In fact, it became a proponent of migration-policy co-operation as early as the 1970s and early 1980s. Today its proposals tend to focus on integration in more liberal areas, such as legal labour migration and immigrant integration. To a certain extent, this has fed through into more recent EU JHA legislation and declarations such as the Tampere and, especially, the Hague programmes.

However, the Commission is not the only supranational institution of the EU to have cultivated spillover in JHA. The ECJ can also be said to have cultivated spillover in this area, particularly through the extension of free movement rights to TCNs, either as a result of their marriage to EU citizens, working for an EU company or due to association agreements. Moreover, the EP, despite its weak role in JHA, has also shown some signs of cultivating spillover in this area, paticularly in the relationship between JHA and the fight against racism and xenophobia.

A further effect of the increased supranationalisation of JHA is that it should tend to make JHA less restrictive, and therefore increasingly liberal, in nature. Restrictive regimes may win out, as in the case of the EU, due to public and elite fears of a massive influx of unwanted immigration and transnational crime. However, as supranational institutions become more dominant, they should have a liberalising effect on policy output, due, in part, to their being relatively sheltered from public opinion as a consequence of the ‘democratic deficit’.

Generally speaking, scholars favour a relatively liberal border regime, focusing on immigrant rights and integration, over a restrictive one, which tends to concentrate on keeping immigrants and asylum seekers out (Lavenex, 2001:26). The reason for this, in addition to questions of human rights and the argument that migration may provide economic and demographic benefits to an ageing region like Europe, is that restrictive regimes are notoriously inefficient in preventing illegal migration (Hansen, 2003, 32) (Zielonka, 2001: 522).

In other words, the majority of potential migrants are not put off by border or visa restrictions. They will merely seek other ways of entering the target country, possibly resorting to human traffickers. In addition to charging would-be migrants extortionate sums, many of them are actually dangerous, on occasion even raping or murdering their 'customers' (Geddes, 2000a) (Geddes, 2003: 15).

The EU's developing border policy, however, has been largely restrictive in nature, leading to the epithet of 'fortress Europe'. As well as domestic constraints, this can be explained by the predominance of intergovernmental decision making, which tends to be 'lowest common denominator' in nature. In the case of border policy, this may occur, for instance, when a MS insists on more restrictive measures in order to avoid importing what it perceives as another MS' immigration problems.

One example of this is the Schengen negative visa list, a list of those countries whose nationals require a visa in order to enter the Schengen zone. This list is notably longer than that of any of the individual MS as the signatory countries insisted on their own entire negative visa lists being included. Thus, while, hypothetically both France and Spain may have exempted some third countries, possibly ex-colonies, from their own negative visa lists, they would not have accepted the other country's exemptions, resulting in a longer common visa list.

There is every reason to consider that JHA continues to be predominantly restrictive in nature. However, as the gradual supranationalisation of JHA has proceeded, there are some signs that it is becoming less *exclusively* restrictive than it was previous to the Maastricht Treaty, in theory if not yet in practice. Examples include, among others, the two directives on minimum standards and temporary protection for asylum seekers following Tampere, the Tampere 'root causes' approach to immigration and asylum, and the points of the Hague programme relating to the integration of immigrants.

Neofunctionalist theory can also be of assistance in understanding the enlargement process and, specifically, the extension of JHA to the candidate countries and new MS. Firstly, it can be argued that (exogenous) functional pressures, otherwise known as induced spillover, contributed to the decision to enlarge. According to Niemann, induced spillover occurs when the EU is forced to react to an external event, which it may perceive as a threat. As a result,

the EU is required to develop common policies towards the third countries in question, and normally delegates the responsibility for these to supranational institutions such as the Commission (1998: 432).

In fact, although Niemann demonstrates the concept of induced spillover using the example of PHARE, it can also be applied to the enlargement process as a whole. The EU was forced to develop policies towards the newly independent states from CEE soon after the collapse of Communism in the region. This was due both to pressure from the CEECs themselves and from the USA, which expected the EU to take responsibility for 'its own backyard'. Schmitter also predicts that a regional integration project will be increasingly forced to develop common policies towards neighbouring third countries as it becomes more successful (2002: 35).

However, it is also clear that the EU perceived the CEECs as a potential threat in terms of economic or political instability in the early post-Communist years, not least as the region was viewed as a source of illegal migration and cross-border crime. One way to minimise this threat was by developing policies towards the CEECs with a high level of conditionality, such as PHARE aid or the Europe agreements. As induced spillover predicts, responsibility for such common policies tends to get delegated to the supranational institutions, particularly the Commission, due to its (perceived or real) superior experience or knowledge in the area.

In addition to pressure from the neighbouring countries themselves, one rationale for enlargement, due to the conditions required of the candidate countries, is that it is also provides the EU with the ultimate conditionality weapon. It is, then, at least theoretically, an excellent way of ensuring that the candidate countries become increasingly democratic and economically stable – that is, as similar to the EU MS as possible. It is, then, no accident that the Copenhagen Criteria are strikingly similar to the background conditions deemed necessary by neofunctionalists for spillover, and therefore further integration, to occur.

As the CEECs, and Turkey, were viewed, particularly in the public eye, as a potential source of illegal migration and cross-border crime, it can be argued that the prospect of enlargement itself was one of the triggers for the speedy development of JHA and the AFSJ – in other words, a source of exogenous functional spillover. Moreover, and perhaps rather ironically, it is possible that this perceived threat was in turn a further source of exogenous functional

pressure for enlargement itself. Indeed, as has been discussed, there is no more effective way for the EU to exert conditionality than through the enlargement process.

In addition, it can also be argued that cultivated spillover has played an important part in the enlargement process. For instance, while Eurosceptic MS such as the UK may have been supporters of enlargement because (among other reasons) they thought it would slow down integration (the concept that *widening* could only come at the cost of *deepening*), Vaduchova points out that the Commission may have supported enlargement because it saw it as *contributing* to, rather than detracting from, further deepening. In turn, further deepening is generally supported by the Commission on principle and, rather more pragmatically, as it implies an increase in its own powers (2005: 119).

Another way that enlargement could contribute to further powers for the Commission is because it would necessitate a certain amount of institutional spillover, or reorganisation of the institutions in order to cope with a larger EU. Such spillover generally involves an increase in QMV as, the larger the EU grows, the less viable unanimity becomes as a form of decision making – if it is difficult to reach a unanimous decision between six MS it is much more so in an EU of 27 or more members. This, then results in increased supranationalisation, which inevitably means more powers for the Commission. The effect of enlargement may thus be an important factor in the progressive supranationalisation of JHA.

Thus, it is clear that the Commission has played a vital part in the enlargement process. The MS have tended to delegate to the Commission in this respect for several reasons. Firstly, they may view the Commission (incorrectly according to neofunctionalism) as a relatively impartial institution, and therefore tend to delegate to it in order to avoid potentially time-consuming and costly arguments.

Secondly, it may delegate to the Commission as the Commission tends to have (or at least is able to *present* itself as having) greater expertise in addition to greater impartiality. One result of this is the influence that the Commission has managed to wield over the enlargement process through its position as a negotiator, and, above all through its annual *avis*.

In general, the Council has based its decisions on the Commission's *avis* throughout the enlargement process. As an example, in the case of Turkey, when the Commission pointed out

that it considered that Turkey was ready to begin accession negotiations, the Council agreed to do just that. Conversely, when the Commission advised in its 2006 *avis* that negotiations should be frozen in eight chapters, the Council duly followed suit.

As has been pointed out earlier, the Copenhagen Criteria seem to tie in to the neofunctionalist background conditions to a remarkable degree. This is, perhaps, just as well as, otherwise, neofunctionalists predict that enlargement is likely to slow down integration. However, as Schmitter points out, the conditions for this round of enlargement have been harsher than ever before, and increased support and use of opt-outs may have helped to avoid spillback after accession (2002: 42-43).

In other words, neofunctionalist scholars have divided the adoption of the EU *acquis* on the part of candidate countries (and other third countries who have relations with the EU) into two. Spillover may be *enforced,* imposed unilaterally by the EU as a condition of membership/relations or *voluntary*, adopted by the candidate or third country of its own will (Miles, Redmond and Schwok, 1995: 150).

In general, then, the current and recent enlargement processes have involved mainly enforced spillover. This is particularly true of JHA, where the candidate countries were not granted opt-outs in the same way as the UK, Ireland and Denmark. Moreover, this has caused serious difficulties not only for the candidate countries and new MS themselves, but, due to externalities of JHA, to their neighbouring countries as well.

The adoption of the JHA *acquis*, like the other accession criteria, has been largely enforced in nature. Moreover, they have tended to take into account only the wishes of the EU MS while ignoring the needs and opinions of the candidate countries. This could result both from strong sectoral interest groups within the EU which oppose such an accommodation and to the absence of policy advocates among the EU MS as most MS have a strong interest in strengthening the EU's external borders, particularly the Eastern ones.

In the case of JHA this has been particularly problematic as a result of the lack of goodness of fit between the border policies of the EU on the one hand and the CEECs and Turkey on the other. Prior to becoming candidate countries, both the CEECs and Turkey had relatively liberal border policies, which they have had to transform into EU-like restrictive policies as a

condition of accession. This has caused several important difficulties for the candidate countries and new MS, and also for their neighbouring countries.

Firstly, in the case of the CEECs, travel between the ex-Communist countries was easy and visa-free in the early post-Communist days. This is a legacy of Communist times, when the main focus of border policy was on stopping people from leaving the country rather than preventing their entry. Similarly, as a result of Ozal's policies, prior to Turkey's candidacy the Turkish visa system was liberal in nature, particularly for neighbouring countries. Nationals of neighbouring countries could generally enter Turkey visa free, while those of other states usually simply needed to acquire a moderately priced 'sticker' visa at the airport.

As has been seen in the case-studies of Poland and Hungary in Chapter 3, this has had negative effects on the CEEC MS relations with their neighbours. First, trade between neighbouring countries has been affected. Moreover, particularly in the case of the existence of diasporas in neighbouring countries, cultural links, or even family ties, may be disrupted, as in the case of Hungary. Finally, political relations with neighbouring countries may be negatively affected. This is particularly disconcerting, as it goes directly against the EU's own emphasis on the development of 'good neighbourliness' in the region.

Turkey and its neighbours can also expect to suffer some negative externalities. Firstly, trade with neighbouring countries is likely to be disrupted as a result, with negative consequences for both sides' economies. Tourism in particular could suffer, particularly, for instance, if visas issued by a consulate are imposed on Russian citizens as Turkey has been a prime destination for wealthy Russians. They may be put off coming to Turkey if a lengthy process, possibly including a long trip, was necessary in order to obtain a visa.

In addition, the imposition of Schengen-type visas on citizens of neighbouring countries may also be detrimental to bilateral political relations. While Turgut Özal first allowed visa-free entry for visitors from neighbouring countries in order to improve Turkey's bilateral relations with its neighbours, then, the imposition of the Schengen visa regime is likely to achieve the opposite effect.

On the other hand, there is one potentially positive consequence of adopting the Schengen 'blacklist' from Turkey's point of view. The imposition of the Schengen visa regime should

allow Turkey to increase its control of irregular migration, as many migrants enter Turkey legally and then become 'overstayers'. For the same reasons, it should also help Turkey to clamp down more successfully on human trafficking.

Another issue posed by the Schengen *acquis* for Turkey is that it is expected to carry out these changes to its visa regime while itself remaining on the Schengen blacklist. This has also contributed to a feeling in Turkey that it is being unfairly treated by the EU, particularly among Turkish businessmen, who feel that their EU counterparts, who can enter Turkey freely, have an unfair advantage (Derviş, Gros, Emerson and Ülgen, 2004: 56).

Moreover, even those CEECs that acceded to the EU in 2004 are unlikely to be granted complete labour mobility in the Schengen zone until 2011. On the same reckoning, if Turkey joins the EU in 2015 it will probably not entirely achieve free movement in the EU until 2022 at the earliest – almost an astounding sixty years after the Ankara Agreement, which promised free movement for Turkish workers, was signed.

However, according to modernist explanations of identity formation labour mobility is the determining factor both in geographical identity formation and in successful political integration, and may in fact be more important than either money or goods (Buonanno and Deakin, 2004: 96).

As there is evidence that public support for integration is connected with the development of ties of mutual identity, loyalty and affection if public support is not forthcoming there could eventually be public dissatisfaction with EU membership and consequently, from a neofunctionalist perspective, pressure for spillback. In the CEECs which are already members this could take the form of increased use of the veto or blocking minority; in the case of a candidate country such as Turkey it may disrupt the accession process, either through a negative referendum result or through pressure on the government to slow down reform.

In addition, in the case both of the CEECs and of Turkey, delays in free movement rights are largely due to public and elite fears of mass migration from these countries in the EU-15. However, academic studies suggest that this is, in any case, an unlikely scenario (Guiraudon, 2004: 175-176) (Pastore, 2003: 105).

Moreover, from a neofunctionalist viewpoint, the fact that the non-EU CEECs are on the Schengen 'blacklist' may eventually result in a desire on their part to apply for EU membership. As Schmitter points out, enlargement can occur as a result of pressure from neighbouring countries which, particularly given the negative consequences to them of regional discrimination, are likely to push for membership in order to benefit from it and to avoid the 'negative externalities' of non-membership (Schmitter, 2002: 35).

This pressure is likely to increase the longer the non-EU CEECs feel discriminated against. This could prove problematic from the point of view of EU public opinion, which is reluctant to accept further enlargement at present. In addition, even those EU institutions such as the Commission which are relatively shielded from public opinion are showing signs of enlargement fatigue.

There is also the threat that the CEECs, and especially non-EU CEECs and other neighbouring countries such as Turkey will tend to become buffer-zones for irregular migrants and unwanted asylum-seekers who would otherwise be destined for the EU. In particular, there has been pressure on Turkey to sign re-admission agreements both with the EU and with third countries, and also to lift the geographical restriction on the UN Agreement for Refugees.

If these are implemented, Turkey will automatically become a safe third country, and, as it will also frequently be a first country of asylum, will have to deal with potentially large influxes of asylum seekers without being able to participate in burden sharing resources (Tokuzlu, 2006).

Moreover, the signing of readmission agreements, both with third countries and with the EU, can be problematic in itself for Turkey. Firstly, third countries may have little incentive to sign readmission agreements with a country like Turkey – they have potentially little to gain and much to lose from such a situation. Moreover, taking the example of the Greek/Turkish readmission agreement, these may be open to abuse. In this case, Greece has sometimes been tempted, for instance, to push boats of migrants back into Turkish waters or release them, allowing them to escape into Turkey.

The requirement for Turkey to sign a readmission agreement with the EU poses problems of its own, particularly as it is the only country that has been asked to do so during its candidacy for EU membership. Due to Turkey's geographical position, it is a destination for many asylum-seekers and irregular migrants, many of whom intend to get to the EU.

The implementation of such an agreement, then, in the absence of adequate arrangements for burden-sharing, may also result in Turkey effectively being turned into a buffer-zone. This would not only put undue strain on Turkey's financial resources but would also prevent some genuine asylum seekers from making claims in the EU.

While great improvements have been made in recent years regarding the conditions for refugees and asylum-seekers in Turkey, it can be considered unfair to impose the role of buffer-zone on a still-developing country without sufficient aid and compensation. This argument is perhaps even more valid for some of the EU's 'non-EU' neighbours, which, in some cases, are still struggling with poverty and economic and political instability.

These problems are serious, then, in that they may cause a sense of dissatisfaction in the countries in question. In the case of the new MS, it may result in increased spillback, through the use of the veto or blocking minority where appropriate. As Schmitter warns, 'Under these conditions, the extension to cover a wider and more diverse territory may not ensure subsequent conformity to existing rules … it will almost certainly weaken rather than strengthen EU institutions' (2002: 43).

In the case of the candidate countries, especially Turkey, it may contribute to an already growing mistrust of the EU among the population. This may be reflected (as is perhaps already the case in Turkey) in a lack of political will to carry out EU-motivated reforms, or even in a negative referendum on accession. Neofunctionalism argues that both mass and elite support are necessary for integration to proceed. At both levels, there must be a shared belief that problems can be solved in a mutually acceptable way.

According to neofunctionsalism, it is, then, vital to make some adjustments to JHA so that it is more acceptable to the new MS, the candidate countries and neighbouring countries. At this stage in its development, however, it is extremely unlikely that the fundamental structure of the Schengen regime will be reformed dramatically.

In other words, the Schengen regime already exists, and the possibility of it being scrapped and replaced by a more liberal, migrant-friendly regime in the short term is minimal. Nor is it likely that the new MS and candidate countries will suddenly, like the UK, Denmark and Ireland, be offered opt-outs from problematic areas of the *acquis*. Any solutions, then, will have to be suggested within the existing regime.

One problem that needs to be tackled, both in the case of the CEECs and Turkey, is the difficulty of imposing visa requirements on neighbouring countries as a consequence of the Schengen *acquis*. This is particularly problematic from the point of view of residents of border areas who may cross the border regularly.

One possibility is for these residents to be granted multiple-entry visas. Such agreements have been included in accession treaties in the past. An example is the case of the Spanish enclaves of Ceuta and Melilla in Morocco. These were granted local visa exemptions for cross-border trade with the neighbouring Moroccan provinces of Teutan and Nador. The Portuguese visa-waiver for Brazilian nationals is another example. However, the EU has been much more reluctant to grant such waivers in the accession treaties of the CEECs.

It should be reiterated that *not* issuing such multiple-entry visas is far more likely to have the effect of increased irregular migration to the EU as would-be *pendeln* migrants are forced to migrate permanently to the EU. In any case, however, visa-fee waivers or the issuing of long-term, multi-entry visas can be undertaken at least until the candidate country/new MS is participating fully in Schengen.

One positive step, however, is the visa facilitation agreement scheme proposed by the Commission, an example of cultivated spillover. According to the scheme, visas would be issued at no cost for certain neighbouring countries which have implemented readmission agreements with the EU. Such an agreement already exists with Russia and others are under negotiation with the Ukraine and some SEE countries. There is also scope for countries with a visa facilitation agreement to eventually be included on the Schengen 'white list' which would help to rebuild relations and trust between these countries and the EU.

Furthermore, in the case of a country like Turkey which is still itself on the Schengen negative visa list, it appears to be gratuitous to force it to implement the Schengen negative visa list fully before it is withdrawn from the list itself. Giving Turkey a longer 'period of grace' to implement the negative visa list or removing it from the list itself will help to inject a degree of trust into a relationship that is desperately in need of it.

Applying the list gradually would also ease the matter of the disruption of trade and other ties which would otherwise result. In this way, then, it would be following the example of Poland and Hungary, which implemented the Schengen list in stages, beginning with more distant countries and ending, a few months before accession, with those with the closest ties.

Another way to increase mutual trust between the MS, both old and new, and the candidate countries, is to encourage the extension of co-operation between officials who work in JHA-related areas, including police forces, border-guards, judges, customs officials and consular officials. From a neofunctionalist point of view, this could contribute to increased *engrenage* which, in addition to promoting mutual trust, would encourage a convergence of ideals and values. Gregory (2001) has shown how this has worked in the case of the Estonian police force.

Moreover, such co-operation, coupled with an increase in financial resources, would contribute to ameliorating the new MS's implementation problems, and would help to ensure that the candidate countries would not face such severe difficulties on accession. Co-operation between border guards from the EU-15 and CEE MS, together with more funding, would assisit in reducing corruption and improving training among CEE border guards.

In addition, burden-sharing resources need to be improved in order to support countries that are destined to become 'buffer-zones' for the EU due to the imposition of readmission agreements or, in the case of Turkey, EU asylum legislation. This has already become a bone of contention between Turkey and the EU, and is a potential hurdle in Turkey's accession process. However, adequate burden-sharing provisions during the accession process, probably taking the form of financial assistance, could help to ease the situation.

Such provisions are also necessary for CEECs which border the CEE MS but are unlikely to become EU members, at least in the medium term. These will also have the tendency to

become buffer-zones for the EU due to the EU's strict border control and its use of readmission agreements. As has been mentioned, this could contribute to enlargement pressure from these countries. Moreover, it is problematic from an ethical point of view as many of the non-EU CEECs do not, at least at present, have the financial or social resources, or the experience, to adequately deal with large amounts of asylum seekers or immigrants.

In summary, then, while any liberalisation in the JHA *acquis* will tend to be gradual, as supranational institutions have increasing input into policy outcomes, some of these issues need more urgent solutions if disillusionment with JHA development in the new MS and candidate countries is not to be translated into spillback in the form of increased use of the veto or the blocking minority.

This could be problematic from the point of view of the legitimacy of the EU itself. As has been demonstrated, JHA is one of the fastest developing policy areas in the EU, and it is also one where there is considerable demand from the EU-15 public for further action. Moreover, in recent years, it has effectively been promoted as the new *'rasion d'etre'* of the EU, both by the Commission and by MS leaders such as Chancellor Kohl. A severe deadlock in JHA decision-making, then, could threaten the perhaps rather fragile legitimacy of the EU.

In addition, an AFSJ which intends to export its immigration and asylum issues to its poorer neighbours by effectively turning them into buffer zones is storing up problems for the future. Not only will this bolster the EU's image as a 'fortress', but it is in direct conflict with the aims of the EU's neighbourhood policy, which attempts to improve prosperity and relations in the countries bordering the EU.

The research then backs up the main hypothesis of this thesis[98]. However, no research project can give definitive and complete responses to all of the questions which it seeks to answer. Indeed, one of the purposes of any kind of research is to open up and identify new avenues for future research. This thesis, therefore, suggests several directions in which related research could be carried out.

[98] The hypothesis is that neofunctionalist spillover has played a role in the development of JHA and in its expanison to the EU-27 and candidate countries, including Turkey. However, as the current JHA is largely restrictive in nature there are likely to be some problems in the willingness and ability of the new MS and candidate countries, which had more liberal border regimes prior to their candidacy. These difficulties, if they are not tackled, may result in neofunctionalist spillback.

Firstly, more empirical research is still needed to back up the hypothesis put forward here regarding a neofunctionalist analysis of JHA. In particular, further research on the neofunctionalist implications of bilateral or multilateral co-operation between officials working in JHA-related sectors would be useful both from a theoretical and a practical point of view. While some research has been carried out among officials at EU institutions, notably by Niemann (2005) (2006) and Lahav (2004a) the effect on, for instance, the police, border guards or consular officials has been relatively neglected.

In addition, another comparatively little-researched area has been the relationship between identity, public opinion and neofunctionalism, and its consequences for the further development of JHA in an enlarged (and enlarging) EU. While these issues have been touched upon in this thesis, they still provide fertile ground for further research. Questions to be examined in these areas could include the following:

- How far does the existence (or not) of a 'European identity' among the EU public affect the prospect of neofunctionalist spillover?. In other words, to which extent does public support for integration affect the integration process, and how far does the public need to 'identify' with the EU in order to support further integration?

- What is the relationship between public opinion, both in the new MS and candidate countries and in the 'old' EU, on the enlargement process and on the behaviour of the new MS after accession?

Further research will also still be necessary, particularly as the supranationalisation of JHA proceeds, on the relationship between the level of supranationalisation and the liberal/restrictive nature of the AFSJ. So far, it appears that, as hypothesised, the increased involvement of supranational institutions in JHA has had a mildly liberalising effect on policy outcome. However, as JHA decision-making structures evolve, this needs to be re-examined. A research question in this area, then, could perhaps be phrased as follows:

- To what extent is it possible to see a progressive liberalisation of JHA? How far can this be connected to increasing supranationalisation in this field?

Moreover, some research has been carried out on the externalities of JHA for the new MS and candidate countries, although there is still scope for further study in this area. However, a more neglected field is that of the externalities of JHA on those neighbouring countries[99] that are neither candidate countries nor likely to become so in the medium term, although Baldwin Edward's paper on SEE countries is a notable exception (2006).

These countries, as has been discussed throughout the thesis, have already been affected in many ways by their neighbours' adoption of the JHA *acquis,* from the imposition of visa restrictions to readmission agreements. Some research questions in this area, then, could include the following:

- What are the negative externalities of JHA on the neighbouring countries of an enlarged and enlarging EU?

- In which way do externalities from JHA support or contradict the goals of the EU's neighbourhood policy?

[99] This could include non-EU CEECs, or, as Turkey's accession process proceeds, other countries which border on Turkey, including Middle Eastern countries such as Iraq and Iran.

Annex 1

QD2 From the following list of actions or policies, what in your view should be the three priorities for the European Union? (MAX. 3 ANSWERS)

EU25

Fight against organised crime and trafficking	56%
Fight against terrorism	55%
Fight against drugs abuse	37%
Asylum and migration policy	29%
Exchange of police and judicial information between Member States	24%
Promoting and protecting fundamental rights	21%
Quality of Justice Control of external borders	16%
None of these	1%
(SPONTANEOUS)	3%

Annex 2

4 QD1 For each of the following areas, please tell me if you believe that more or less decision-making should take place at a European level.

1. Fight against drugs abuse

More decision-making / Less decision-making / No change is needed/ (SPONTANEOUS)				
EU25	86%	8%	3%	3%
BE	92%	5%	2%	1%
CZ	94%	4%	2%	1%
DK	93%	3%	2%	2%
D-W	91%	4%	3%	2%
DE	92%	3%	2%	2%
D-E	96%	2%	1%	1%
EE	81%	11%	2%	7%
EL	86%	11%	3%	1%
ES	83%	5%	5%	8%
FR	92%	4%	2%	2%
IE	77%	6%	7%	10%
IT	76%	15%	5%	4%
CY	91%	5%	2%	2%
LV	84%	8%	3%	5%
LT	80%	9%	2%	10%
LU	91%	3%	2%	3%
HU	79%	6%	9%	6%
MT	75%	12%	4%	9%
NL	95%	3%	1%	1%
AT	72%	14%	11%	4%
PL	91%	5%	1%	3%
PT	86%	5%	2%	7%
SI	84%	4%	7%	5%
SK	90%	6%	2%	2%
FI	88%	9%	2%	0%
SE	90%	6%	2%	3%
UK	77%	17%	2%	4%

Source: Special EUROBAROMETER 266 Security in general

Annex 3

4 QD1 For each of the following areas, please tell me if you believe that more or less decision-making should take place at a European level.

2. Control of External Borders

More decision-making / Less decision-making / No change is needed/ (SPONTANEOUS)

EU25	72%	15%	8%	5%
BE	73%	13%	13%	1%
CZ	73%	14%	10%	3%
DK	82%	10%	3%	5%
D-W	73%	13%	11%	4%
DE	73%	13%	11%	4%
D-E	72%	13%	12%	3%
EE	68%	19%	5%	8%
EL	74%	18%	7%	1%
ES	77%	7%	6%	10%
FR	77%	11%	8%	3%
IE	66%	10%	9%	16%
IT	76%	15%	6%	3%
CY	86%	8%	1%	2%
LV	69%	19%	5%	6%
LT	70%	16%	3%	12%
LU	66%	18%	13%	3%
HU	60%	9%	22%	9%
MT	68%	11%	4%	16%
NL	75%	17%	5%	3%
AT	64%	19%	13%	4%
PL	79%	13%	3%	6%
PT	75%	8%	9%	8%
SI	73%	9%	12%	6%
SK	64%	23%	10%	3%
FI	60%	29%	10%	2%
SE	58%	21%	12%	10%
UK	59%	30%	4%	7%

Source: Special EUROBAROMETER 266 Security in general

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