

From the Sidelines to Center Stage: Sidekick No More? The European Commission in Justice and Home Affairs

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Abstract

Cooperation in Justice and Home Affairs (JHA) – an issue area that includes matters of asylum, immigration, police and judicial cooperation – is a relatively new policy arena for the European Union. The level and quality of the collective thinking on these issues have improved since the mid-1980s. JHA cooperation was formally endorsed in Maastricht and revisited during the 1996 IGC, resulting in new institutional frameworks within which discussions now occur. Throughout this period, the European Commission has seen its involvement in the decision-making enhanced. Its efforts as an actor began with a humble Task Force with which the Commission attempted to steer EU's policies on asylum and immigration, as well as police and judicial cooperation. After Amsterdam, and particularly as a result of the Commission's restructuring following the resignation of the Santer Commission, the Commission's institutional capacities as well as its charge vis-à-vis the treaties has changed quite remarkably. This paper reviews the Commission's role in JHA as an institutional actor and will evaluate its agency and emerging autonomy in these fields. It argues that the Commission has a stronger constitutional and institutional basis from which to work, bolstered by the increased propensity by member states to delegate to the Commission and enhanced by the creation of the Directorate General for Justice and Home Affairs. While improvements in the Commission's position vis-à-vis the immediate aftermath of Maastricht are visible, challenges remain nonetheless which constrain the Commission's ability to act as a “competence-maximizing” institution with formal agenda-setting powers.

Kurzfassung

Zusammenarbeit in den Bereichen Justiz und Inneres (ZJI) – ein Bereich, der Fragen wie Asyl, Immigration, Polizei und justizielle Zusammenarbeit umfaßt – ist ein relativ neues Politikfeld für die Europäische Union. Der Grad und die Qualität kollektiven Denkens zu diesen Fragen haben sich seit Mitte der 80er Jahre verbessert. Die ZJI wurde in Maastricht formal beschlossen und während der Regierungskonferenz 1996 revidiert, woraus neue institutionelle Rahmenbedingungen resultierten, innerhalb derer sich nun die Diskussionen bewegen. Während dieser Periode sah die Kommission ihre Beteiligung an Entscheidungsfindungen als verstärkt an. Ihre Bemühungen als Akteur begannen mit einer bescheidenen Arbeitsgruppe, mit welcher die Kommission versuchte, die Asyl- und Immigrationspolitik, ebenso wie die polizeiliche und justizielle Zusammenarbeit der EU, zu steuern. Nach Amsterdam, und besonders in Folge der Restrukturierung der Kommission nach dem Rücktritt der Kommission Santer, haben sich die institutionellen Kapazitäten ebenso wie ihre Verantwortung gegenüber den Verträgen ganz entscheidend verändert. Dieses Paper bespricht die Rolle der Kommission in der ZJI als institutioneller Akteur und wird ihre Agentur und sich entwickelnde Autonomie in diesen Bereichen evaluieren. Es wird argumentiert, daß die Kommission eine stärkere konstitutionelle und institutionelle Arbeitsbasis gewonnen hat, welche aufgrund der gestiegenen Neigung der Mitgliedstaaten, an die Kommission zu delegieren ebenso verstärkt

worden ist, wie durch die Schaffung der Generaldirektion Justiz und Inneres. Während Verbesserungen in der Position der Kommission gegenüber den unmittelbaren Folgen von Maastricht zwar sichtbar sind, verbleiben dennoch Herausforderungen, welche die Fähigkeit der Kommission, als eine "kompetenz-maximierende" Institution mit formalen Rechtsetzungsbefugnissen zu handeln, erzwingen.

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1

1 Introduction [↑]

Since its creation by the Rome Treaties in 1957, the Commission has always been somewhat of a tightrope walker, much like the poet in Lawrence Ferlinghetti's poem, "Constantly Risking Absurdity and Death," who must constantly weigh both his words and actions (Ferlinghetti 1958). As the executive organ of the European Communities/Union,⁽¹⁾ the role of the Commission has traditionally been one of initiator of policy, depository of legislative information, manager and executor of Union policies, safekeeper of community *acquis*, mediator and broker, as well as mobilizer for new policy initiatives and spheres (Haaland Matlary 2000; Nugent 2001). In fulfilling this role, the Commission has continuously attempted to mobilize momentum towards greater economic and political integration, implementing standards in a manner that could at times come across as "heavy-handed, intrusive, and sometimes offensive," much to the dismay of the Council of Ministers and the member states (Dinan 1994: 200). Whatever problems the other three institutions of the EC might have had with the operating style of the Commission, however, its activities were legitimized and upheld to the extent that they were in conformity with the Rome Treaty. The Commission derives its formal mandate from treaty; I will refer to this as the Commission's constitutional domain. Articles 211-219 (ex. Articles 155-163) situate the Commission in the complex institutional terrain of the European Union and defines its rights and obligations vis-à-vis the European Parliament and the Council in particular (European Union 1997). The implementation of the Treaty on European Union (TEU or Maastricht Treaty) in 1992 – the negotiation of

which the Commission was unable to influence to its satisfaction – has made significant changes in the duties, the policy-making tools, and the competences of the Commission with respect to the policy domain that is the subject of this paper.

This paper focuses on the European Commission's agency in Justice and Home Affairs (JHA). The argument is informed by the hypotheses of the new institutional analysis of European integration while pointing out some of the challenges faced by the Commission in this new issue setting (See Peterson 1995). It argues that the institutional structure hastily agreed upon during the Maastricht debates made a potentially awkward actor of the European Commission in the third pillar⁽²⁾ thereby putting constraints on its agency capacity and its ability to act as a “competence-maximizing” institution (Cram 1993; Cram 1994; Cini 1996).⁽³⁾ The indicators analyzed to review the Commission's potential and effective agency and autonomy are its constitutional powers and constraints resulting from the Maastricht (and later, Amsterdam) Treaty and its institutional capacities as an organizational unit. The central question that guides this study is this: is the Commission a passive agent of the member states as asserted by the intergovernmentalists (Moravcsik 1993), or does it have a degree of autonomy that goes beyond carrying out duties framed and delegated by the principals (Cini 1996; Nugent 2001)? Pollack argues “the ‘agency’ or autonomy of a given supranational institution depends crucially on the efficacy and credibility of control mechanisms established by member state principals” and that agents can sometimes escape sanctions by principals by playing the field (Pollack 1997, 101). A review of the Commission’s emergent position in JHA suggests that while the autonomy of the Commission has strengthened over time, member states still possess sanctioning tools.

As will be seen in the following analysis, the terms actor, agent and autonomy are linked but are not necessarily mutually inclusive. In a policy field, it is conceivable that one could be an actor (a unit linked to the policy field) without being an agent (an actor to whom specific responsibilities are delegated by other actors). Likewise, one could be delegated as an agent without enjoying much autonomy in performing the duties of the agent. I argue that the agency and autonomy of the Commission (particularly in the field of JHA) hinges on two critical sets of variables (constitutional and institutional) and the degree to which the Commission is constrained or empowered by them.

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The constitutional factors are closely linked to the preferences of the collective principals – the member states of the European Union – as they play an important role in defining the parameters for cooperation in “constitutional moments” such as the Intergovernmental Conferences that produce changes in the founding treaties. The institutional factors (while also impacted by constitutional considerations) encompass the internal organizational workings of the Commission that are subject to change over time. If the Commission faces significant constitutional and/or institutional constraints, we can expect it to emerge as a weak agent (or no agent at all, making it a weak actor at best). By contrast, if the constitutional and/or institutional constraints on the Commission are diminished or addressed to empower the Commission, we can expect a gradual ascendancy in the Commission’s position in a given policy arena. We could likewise expect the Commission to actively strive towards improved constitutional and institutional capacities to achieve competence maximization.

The first set of the factors impacting the Commission’s ascendant agency includes *constitutional* mandates/constraints. These are the basis for the official sanctioning mechanisms available to the principals. Crucial to the Commission’s ability to work as a strong agent and strive towards autonomy in a policy field are the parameters of the mandate it is given through the founding treaties, which can be seen as collective delegation agreements between the member states and their supranational agents.⁽⁴⁾ These “constitutional” factors include considerations such as whether the Commission even has a mandate in the policy field, the decision-making rules that apply to that policy field, whether the Commission has a right of initiative, and

whether the initiatives undertaken are binding or not. Pollack (2000) argues that the Commission is likely to exhibit strong agency (and a degree of autonomy) if it has a clear treaty mandate, the decision-making rule is based on QMV, and the member states (individually and collectively) are unable or unwilling to sanction the Commission effectively should it embark on an agenda that diverges from the interests of the member states.

The initial limitations on the Commission's range of operations in JHA are intimately related to the setup of the European Union and Title VI of the Maastricht Treaty, largely because the Commission was unable to forge a more authoritative role for itself during the Maastricht negotiations and had to resign itself to its limited position to which the member states were willing to agree. This suggests unwillingness on the part of the principals to delegate (or deputize) significant powers to the Commission during the early phases of JHA cooperation. As we shall see below, the powers entrusted to the Commission were tentative and the policy instruments at the disposal of the Commission were new and vague. In addition, the policy initiation processes as well as the decision-making rules (the unanimity rule in particular) in JHA matters further constrained the leverage and leadership potential of the Commission in the policy-making cycle.

Yet, concentrating exclusively on the treaty constraints imposed on the Commission (and, indeed, on the JHA cooperation process) is not sufficient in explaining the extent of the Commission's agency and autonomy in this field. One must also consider a second set of factors impacting the Commission's capacity in JHA matters, which is *institutional* in nature (Nugent 1995; Nugent 2001). Arguably, even if the principals agree to deputize the Commission to carry out certain policy-making and oversight functions and the other exogenous variables outlined above were favorable for the Commission, its effectiveness would still be conditioned by its own institutional resources and capabilities. Applied to the JHA area, one observes that the Commission initially faced considerable internal institutional challenges as the college, cabinet, and civil servants sought to come to grips with their new mandate. These challenges included budgetary concerns, human resources deficits, and a lack of assertive leadership, which collectively limited the Commission's ability to assert and consolidate its role in JHA.

The Commission's activities in post-Maastricht JHA leading up to the Amsterdam Treaty suggest that the Commission's work was negatively impacted through both sets of constraints, making it an actor but not a very strong and effective (much less autonomous) agent. This initial experience prompted repeated calls from the Commission to address primarily the constitutional factors impeding its work and position within the Third Pillar. The conclusion of the Amsterdam Treaty, as will be discussed below, brought some changes to the Commission's present and potential standing, even though the impact in terms of policy output remains muddled.

In order to assess the Commission's evolving agency in JHA, the paper proceeds in four relatively chronological stages, each of which seeks to assess the extent to which the Commission was constitutionally and institutionally constrained or empowered. The paper begins with an analysis of the Maastricht Treaty and the very weak position of the Commission within it. In this period, the Commission appears to be severely constrained in *both* constitutional and institutional terms. It then reviews the period between Maastricht and Amsterdam, which witnessed an opening in constitutional terms with the institutional constraints still significantly in place. It then reviews the post-Amsterdam (but pre-2004) period during which an improvement in institutional capacities (as well as an increase in Commission-led initiatives) can be observed. Finally, the prospects of increased autonomy is reviewed in light of the planned move to an exclusive right of initiative in 2004 with the concomitant prospect of adopting QMV, which represents further constitutional advances as well as prospects for institutional assertiveness.

2 The Genesis of Cooperation on Justice and Home Affairs and the Creation of the Third Pillar [↑]

Preceding the Maastricht debates, during the latter half of the 1980s, there was a dramatic increase in multilateral fora that dealt with JHA matters (Collinson 1994; Uçarer 1999a; Geddes 2000). In addition, during the very period JHA cooperation was being urgently projected into multilateral fora in Europe, Europe itself was preparing for its biggest institutional shuffle since the founding of the EC. Gathering steam from 1991 onward, negotiations about the structure of the emergent European Union resulted at Maastricht in a "three pillared" edifice that some enthusiasts imagined to be a new European temple. JHA matters were incorporated into the Third Pillar within which the Union's common immigration and asylum policies, as well as its efforts to combat organized crime, terrorism and drug trafficking, would be hammered out. Title VI of the Maastricht Treaty set up an arrangement that allowed intergovernmental negotiations to take place within the newly engineered "European Temple," though the influence of the temple's custodians in the European Commission was considerably constrained.

During the pre-Maastricht preparatory negotiations, the Commission adopted a pragmatic stance sensitive to the fundamental issues of national sovereignty inherent in questions of JHA matters. Accordingly, the Commission agreed that measures associated with any program for a frontier-free European Union would have to be drawn up by intergovernmental bodies. In the short run, the Community institutions would be marginalized in policy making. Nonetheless, the Commission aspired to eventually get the Community institutions into the policy-making and review processes. The result was a substantial constitutional constraint for the Commission: policy issues like border controls and the standardizing of the review of asylum applications would be discussed mainly among national governments and would be subject to only limited Community oversight, limiting the role of the European Commission and the European Parliament.

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These developments were largely symptomatic of a broader debate in the pre-Maastricht era, one that focused on how to steer the EU into the new millennium. As has been the case during all of the instrumental turning points of European integration, there was a difference of opinion on how to do this as groups of member states continued to advance opposing views on future integration, resulting in the famous and well-documented "temple vs. tree" debate (Dinan 1999; Uçarer 1999a). The fact that the temple eventually outdid the tree represented a lost opportunity for the Commission which, was now put in a position where it had to operate in an intergovernmental setting to which it was unaccustomed. However, pragmatism on the part of the Commission demanded that the Commission play along, establish its roots in the third pillar and at least be able to struggle from within. The creation of the Third Pillar is a conditional willingness on the part of the principals (that is, member states and their representatives in the JHA ministries) to engage in regular consultations on matters that fell within the Third Pillar. However, as the following analysis of the position of the Commission in this new arena indicates, while the member states were willing to see the Commission as a (junior) actor in the JHA field, they were reluctant to deputize the Commission in policy-initiation through significant and constitutionally conferred powers.

2.1 Constitutional Constraints on the Commission [↑]

In addition to creating the Third Pillar, the Maastricht Treaty spelled out the nine areas of "common interest" which were to fall under the newly institutionalized JHA cooperation (Title VI, TEU) which included asylum, external borders, immigration policy and policy regarding third country nationals, combating drugs and fraud, judicial cooperation in civil and criminal matters, customs cooperation, and police cooperation (Article K of TEU). The Treaty also established a five-tier negotiation framework, and created a mechanism into which the

Commission civil servants could be integrated. These five levels of negotiations – working groups, steering groups, COREPER, K4 and JHA Council – diverged substantially from the traditional EC decision-making setup and added two intermediary levels to the already time consuming mechanism. Nonetheless, within this five-tiered setup, the Commission became officially involved in the discussions in the most instrumental four of the five levels (excluding the Council of JHA ministers).

The position of the Commission was strengthened by Article K.3, which gave the Commission a *shared* right of initiative in a substantial portion of JHA matters. This also allowed the Commission to be represented during the deliberations and engage in policy discussion. Until then, the Commission had at best an observer status in the cooperation undertaken by the Ad Hoc Group of Immigration Experts and various other groups that met periodically during the late 1980s to discuss matters relating to immigration, asylum, organized crime and external borders. Before Maastricht, the Commission could make suggestions to the policies when input was solicited, but it could not submit policy proposals nor could it offer unsolicited opinions or feedback. Nonetheless, while the stipulations in the Treaty elevated the Commission's level of involvement beyond this limited access and secured it a meaningful seat at the discussion table, they were not comparable to the privileged position the Commission held in the first pillar (Meyers 1995).

Surprisingly, it was exactly at this promising juncture that the Commission "experienced pronounced bureaucratic inertia" (Papademetriou 1996: 60). Contributing to this inertia were several factors. The first was that the JHA cooperation got off to a deceptively good start, which waned soon afterwards. The initial workload was heavy, not because all of the initiatives being discussed had suddenly been mounted after the Maastricht Treaty, but because the workload carried over from the progress made in pre-Maastricht intergovernmental cooperation (Fortescue 1995). What this meant for the Commission was diminished opportunities to provide input – much less exercise leadership – over texts that were already negotiated for the most part.

Furthermore, progress was further hampered by the ambiguity of the treaty on the kinds of instruments that could be brought to bear in the third pillar. TEU foresaw joint decisions and actions (as opposed to the conventional ones in the First Pillar) as policy instruments. These were not only new kinds of policy instruments but also ambiguous in terms of whether they were binding or not. Predictably, the Commission was in favor of adopting unambiguously binding documents, and as this proved all but impossible in the intergovernmental setting, steered away from using its (shared) right to draft and propose Title VI instruments. The Commission was clearly uncomfortable with this and voiced its concerns on several occasions. For instance, in 1995, it argued that:

(t)he question of whether the legal instruments and the practice of the cooperation – both inspired by Title V which deals with Common Foreign and Security Policy matters – are indeed appropriate for the field of Justice and Home Affairs is worth reflecting upon. Title V and Title VI cover completely different areas: whereas the former deals with the appropriate responses to changing international conjuncture, the latter deals mostly with normative questions which deal with basic rights and therefore demand a uniform legal basis (Commission of the European Communities 1995: 52, author's translation).

Another difficulty that was the lack of a clear delineation between the first and third pillars on some issues, as some of the areas of common interest – most notably the Community's external borders, and policies regarding third country nationals – were already dealt with in the first pillar. These issues where the line between first and third pillar competence became blurred represented coordination problems between the newly emerging third pillar bureaucracy and the existing cadres in DG V and DG XV.

It was also apparent that member states continued to regard the Commission with suspicion and were unwilling to confer more powers. This reluctance was effectively written into the Maastricht Treaty by the member states, which withheld agency from the Commission while linking it to the policy-making process nonetheless. Perhaps the most important setback to the Commission's work has been that of the absence of an *exclusive* right of initiative, which the Commission continued to enjoy in the first pillar. Though an improvement from its previous standing in the intergovernmental discussions relating to third pillar affairs, a *shared* right of initiative was clearly an indication that the Commission was envisioned as one of *sixteen* actors in the third pillar to take initiative in JHA matters. Not only was the Commission not designated as an agent of the member states, it was clearly made into a "junior" actor in the JHA field at best.

The shared right of initiative (itself noncommittal in terms of the willingness to delegate by the member states) further robbed the Commission of its strategic advantage in the decision-making process and the tactical moves available to it. In the first pillar, the Commission enjoyed the opportunity to respond to the changes to its proposals and seek to get a draft adopted which would be mostly in line with the original proposal. In adverse situations, the Commission could defend itself against undesirable and unacceptable amendments by withdrawing the proposal if a stalemate were seen as preferable to the amendments. The shared right of initiative robbed the Commission of this tactical move for the impact of the withdrawal of a Commission proposal would be in essence neutralized by the tabling of an alternative proposal by any of the member states, forcing the Commission to think twice before it tabled any initiative.

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With these constitutional constraints stacked against it, the Commission adopted a strategy of "not pushing its luck in competence terms" between 1989 and 1992, even as this applied to legislation necessary to complete the project of accomplishing free movement of persons (Fortescue 1995: 21). Instead, rather than tabling proposals, and running the risk of failure to get them adopted, the Commission opted for a confidence building strategy with the Council and the individual member states. Accordingly, instead of introducing a barrage of new initiatives in the third pillar, it opted in favor of preparing and tabling nonbinding communications that sought to describe the existing challenges in JHA cooperation as well as attempting to set the agenda by creating a dialogue around its framework.

In 1994, after a long period of preparation, the Commission tabled two such communications, one on immigration and asylum policies, and another on drugs (Commission of the European Communities 1994). Its emphasis on the root causes of immigration aside, the Commission's communication appeared to be a compendium of the existing policies in the member states, carefully worded to avoid antagonizing member states which could stall further progress and isolate the Commission. In terms of legislation, the Commission tabled a revised version of the External Borders Convention. Finally, the Commission invoked Article K.1 (5) to initiate a process, which would culminate in a convention on fraud against the community budget. The Commission did not table additional initiatives for fear of irreparably antagonizing the member states. Other than inching along on business that was already long underway, and attempting to smooth out the differences of opinion between the member states on the various issues that were being discussed, few concrete results were reached in the post-Maastricht period. It is apparent that the Commission struggled very hard – but not particularly successfully – during this period to improve its position at the table before and immediately after Maastricht. Due to the sensitivity of the issue area and an initial reluctance on the part of the member states to cooperate substantively on JHA matters, the immediate aftermath of Maastricht does not register much success in terms of policy output.

2.2 Institutional Constraints: Can the Actor Act? ↑

The Creation of DG JHA. With the extension of the Commission's mandate, it became necessary to create a new bureaucracy to administer the newly created workload. At the top of this bureaucracy were a Commissioner and the Cabinet.⁽⁵⁾ Normally, a directorate-general (DGs) would be below the College, Commissioner, and Cabinet, headed by a director-general and reporting to a Commissioner who has the political and operational responsibility for the work of the DG. The difficulty with administering third pillar affairs began in that while a Commissioner and Cabinet was charged with shaping third pillar policies and initiatives, no commensurate DG was created to provide the technical and administrative background for the work. Instead, a small Task Force for Justice and Home Affairs (TFJHA) was created, headed by a *Conseiller hors Classe*.⁽⁶⁾ The TFJHA was created within the Secretariat of the Commission, reported directly to the Commissioner and her Cabinet and was organized along the lines of the three main areas of cooperation: 1. immigration, asylum, and external borders, 2. drugs and 3. judicial cooperation respectively.

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The TFJHA was staffed by newly recruited civil servants and national experts on secondment from their governments for a period up to three years. These civil servants and national experts were responsible for attending the meetings of the decision-making bodies. Though the TFJHA was run by able career bureaucrats who have had considerable practical and political experience over the years, besieged by chronic manpower shortages and increasing workload, TFJHA faced the challenge of representing an institution already constrained by the factors outlined above. The outfit was clearly overworked and understaffed (Uçarer 1999a). Adding to this was the problem of turnover and continuity resulting from a mandatory return of the seconded personnel to their capitals after three years.

One final challenge for the TFJHA was its rising rivalry for power with the Council bureaucracy. Just as the Cabinet and TFJHA were in charge of representing the Commission and initiating Commission policies, its counterpart in the Council was charged with similar duties. While there were no signs that TFJHA was eventually going to be expanded into a DG, member states agreed to strengthen the Council Secretariat. In terms of access, the Council secretariat enjoyed superior leverage compared to the Commission's ranks. The Council Secretariat was also closer in institutional culture to the member states and they seemed more comfortable with this particular outfit.

The Commission's was further hampered by leadership problems. From 1995 onwards, JHA related matters fell under the mandate of Commissioner Anita Gradin. When the Santer College was installed for the period between 1995 and 2000, Anita Gradin – the oldest member of the College – was inaugurated as the new Swedish Commissioner in charge of JHA, financial control and fraud prevention. Gradin, trained in social work and public administration was a long time member of the Swedish Parliament and was actively involved with labor and trade relations in Sweden. She had served as the Council of Europe's Committee on Migration, Refugees and Demography between 1978 and 1982 and worked as the minister with responsibility for immigrant and equality affairs at the Swedish Ministry of Labor between 1982 and 1986 (European Commission 1995: 28-29). Despite her credentials, however, she came into the job with some handicaps. She not only was the Commissioner of a new member state in the Union, but also the Commissioner in charge of issue areas completely new to the Commission. In a move the logic of which was highly questionable, she put together her Cabinet and Cabinet staff, which consisted almost exclusively of fellow Swedes who were not yet well versed in the workings of the Commission and Union apparatus.

Her leadership style was noticeably different from her predecessor Pádraig Flynn, who was in charge of social affairs and employment, immigration, home affairs and justice between 1993 and 1994 in the Delors College (itself known as one of the high points of Commission's assertiveness). The Irish Commissioner brought to the job his experience as the previous Irish Minister of Justice, a position he occupied immediately prior to his appointment as the Commissioner in charge of JHA (European Commission 1995: 24-25). In

sharp contrast to the bold and at times impassioned style of Flynn, Gradin was generally more cautious. This caution or indecisiveness caused harm both to her image as an effective Commissioner who was able to carry the Commission to an authoritative policymaking position in JHA and to the morale of her civil servants who routinely had to shelve efforts in which considerable time, human resources, and hope was invested. Often, her follow-through on initiatives that she publicly announced to the European Parliament was frustratingly lagging behind her own timetable. The Commission's initiative on temporary protection is a good illustrative example (see Uçarer 1999b).

At the confluence of these factors, discontent mounted within her own cadres. While her Cabinet argued in favor of exercising restraint in the name of confidence building, she began to be viewed as not bold enough, lacking a certain political vision to seize the small window of opportunity that was accorded to the Commission and turn it into an enhanced role for the Commission. While some of these criticisms levied against her were admittedly harsh – after all, the Commission had an unflattering reputation among the member states even before she stepped in and this reputation extended well beyond JHA – they were symptomatic of low organizational morale which resigned most bureaucrats to concentrate on staying afloat amidst a staggering workload instead of aggressively pushing for Commission visibility.

Finally, the Commission's work was hampered by the lack of resources. It was not until 1996 that the third pillar received a separate budget line from the Union. This budget was used to finance not only the Commission's programs underway in the third pillar, but also the administrative costs of creating a bureaucracy that would run the activities. The lack of resources was especially chronic with respect to personnel matters, making it all but impossible to expand the Commission's workforce to allow it to work more effectively.

3 From Maastricht to Amsterdam: The Commission Gains Ground [↑]

From the early days of intergovernmental cooperation institutionalized by the Maastricht Treaty, it became apparent that the apparatus created was unable to deal efficiently with the existing workload. The EU institutions – most notably the Parliament⁽⁷⁾ and the Commission – as well as most of the member states – with the exception of the UK and Denmark – acknowledged the shortcomings of the institutional structure (den Boer and Wallace 2000). Their arguments, all well known by now to the critics of the third pillar, centered around the premise that this new model of intergovernmental negotiations was not only not particularly fruitful, but also posed significant problems with respect to transparency (Collinson 1993b; Collinson 1993a; Collinson 1994; O'Keefe 1995; O'Keefe 1996) and the democratic deficit (Curtin and Meijers 1995), two issues that are of paramount importance to the image of the European Union as an organization that serves the peoples of western Europe (Lipsius 1995). The frustrations with the actual work that was being done was obvious: due to the unanimity rule, and problems associated with the ratification of the conventions that were concluded in the third pillar, tangible progress in terms of legislation was hard to demonstrate. It was also increasingly difficult to justify the secrecy with which many of the instruments were negotiated and concluded.

The disagreements challenging the reform process were twofold: there was the question of how far the harmonization process was to go and what it was ultimately to cover, and the question of decision-making. This latter issue was a particularly divisive one, pitting those who favored supranational decision making against those who had more intergovernmental aspirations. Of particular concern was whether the Third Pillar would be *communitarized*, which implied exclusive competence for the Commission, increased input from

the Parliament, a new competence for the ECJ, and a move toward qualified majority voting (QMV). Alternatively, a decision against the complete *communitarization* of Third Pillar issues would imply a multi-speed Europe in which the member states would participate with varying degrees of involvement.

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Not surprisingly, the Commission was critical of the functioning of the third pillar, not least because of the constraints that were imposed upon it by the Treaty. It was particularly unsympathetic to the unanimity rule, which made timely decision-making all but impossible. It also wished to see a move towards an exclusive right of initiative for the Commission noting the limitations on its shared right of initiative which had, up to this point, forced it to be overly cautious with exercising it. Like the other EU institutions that sought to create a platform for reform, the Commission enumerated its reasons for discontent with the Title VI arrangements in two reports on the reform of the Maastricht Treaty in light of the approaching start of the IGC in March 1996. The first was a report on the functioning of the treaty, submitted to the IGC Reflection Group in May 1995 (Commission of the European Communities 1995). The second represented the Commission's stance on political union and enlargement, delivered to the IGC in February 1996 (European Commission 1996). This opinion by and large reiterated the argument made in the 1995 report and proposed reforming the third pillar along the following lines (Hix and Niessen 1996: 32):

- *Replacement of the unanimity rule in all areas by qualified majority voting;*
- *Extending to the Commission the right of initiative in all areas;*
- Developing more effective legal instruments, such as directives instead of joint actions or common positions; and
- Submitting decisions to review by the European Court of Justice (Hix and Niessen 1996: 11-12, emphasis added).

The italicized items list issues of primary concern to the Commission and its attempt to address the constitutional constraints placed upon it. Especially with respect to the move from a unanimity rule to one that represented some sort of QMV, the Commission hoped that having to secure the support of only a qualified majority of the member states would enhance the likelihood of support for its initiatives – particularly those of a binding nature – which would enable it to use its right of initiative more actively. As the IGC proceeded, the Commission's services were asked to produce a draft for possible amendments to the Treaty. The draft revision that was produced by the Irish presidency in December 1996 appeared to have taken the Commission suggestions into account, and showed some signs of moving in a favorable direction for the Commission. The presidency's draft addressed the five major aims of the IGC set by the Florence European Council. The first of these aims geared towards making "the Union more relevant to its citizens and more responsive to their concerns" was of direct relevance to the third pillar as the Union, it was argued, must be able to "extend as necessary across those borders the protection of its citizens" (Council of the European Union 1996).

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Appropriately, the first section of the draft concerned the creation of "an area of freedom, security and justice" (AFSJ). In the areas of free movement of persons, asylum, and immigration, the presidency proposed setting target dates for adopting clear procedures governing the crossing of external borders, establish provisions for common visa regulations, tackling the issue of asylum and illegal drugs collectively. In order to achieve these goals, the presidency "considered" the drafting of a new title and the incorporation of this title in the Treaty Establishing the European Community (TEC), which would mean a transfer of these issues to the

first pillar. Noting that not all of the member states were in favor of such a move, the presidency suggested the adaptation of the (decision-making) rules of the TEC to be applied to these new areas. The draft revision remained silent on the issue of the Commission's enhanced position in the decision-making. It favored a process during which the shared right of initiative for the Commission would move along a previously-decided-upon schedule towards an exclusive right of initiative.

These arguments were surprising, given that many including those in the Commission, had resigned themselves to the prospect of no meaningful reform of the third pillar. Before the beginning of the IGC, it was generally expected that third pillar issues would not figure prominently on the IGC's agenda. However, when the Netherlands took the helm of the EU presidency in January 1997, it demonstrated its resolve to preside over the conclusion of the IGC by speeding up the tempo. During the six months it held the presidency, the Irish Draft Treaty was polished and elaborated, especially with respect to JHA issues. On June 16, 1997, agreement was finally reached on a new draft treaty, the Treaty of Amsterdam, to mark the end of the IGC. The Treaty of Amsterdam inserted a new section into the First Pillar and moved (or communitarized) asylum, immigration, safeguarding the rights of nationals of third countries, and judicial cooperation in civil matters from Title VI of the TEU to Article 73 of the newly drafted Title IIIa. The treaty, agreed to at the Amsterdam European Council of 16-18 June 1997, was formally signed on 2 October 1997 and took effect on 1 May 1999.

4 The Amsterdam Treaty – Windows of Opportunity? [↑]

4.1 Constitutional Empowerment [↑]

To guarantee that the AFSJ is established gradually in the Community, the treaty prescribed that there will be a five year period from the entry into force of the Treaty during which the Council will continue to take decisions by unanimous vote. When these five years expire, the Commission assumes an exclusive right of initiative, which signals the final communitarization of the transferred issue areas. The Amsterdam Treaty embodied several provisions that were designed to make this possible. The comparison in Table 1 reveals a fundamental institutional change in JHA/AFSJ cooperation from its pre-Maastricht origins to the post-Amsterdam period, especially for those issues that were now housed in the first pillar.

Table 1

The institutional changes to which most of the participating states agreed are quite remarkable. For the communitarized issues, there was now potentially a greater role for the Commission, Parliament, and Court. The intergovernmental Third Pillar was streamlined, and reduced to the areas of police cooperation and judicial cooperation on criminal matters. Its objectives were spelled out more explicitly and the Commission was given a right of initiative in police and criminal justice cooperation, which was clearly an improvement from the Maastricht setup where the Commission was explicitly excluded from the decision making.

Yet, despite the communitarization of immigration and asylum issues, perhaps the biggest shortcoming of the 1996 IGCs was the failure to agree on an automatic transition from unanimity to QMV. The Irish and Dutch draft treaties both foresaw such an automatic transition after a five-year period following the entry into force of the new treaty. Yet, during the final days of negotiation, Germany's Chancellor Kohl struck down this idea. Feeling pressured by Germany's *Länder* governments which adopted an increasingly unfriendly stance against the transfer of decision-making capacity to Brussels on immigration and particularly asylum matters, Chancellor Kohl eventually insisted on unanimity in decision-making, at least for the first five years following

the implementation of the treaty.

The final text of the treaty reflects this compromise and implies limited agency for the Commission: while member states agreed to transfer some of the Maastricht third pillar issues to the first, they did so by retaining the unanimity rule for five years. After this time, the Council will decide “unanimously, but without the need for national ratification” whether QMV should become the rule for some or all of the new First Pillar issues (Petite 1998). Predictably, the Union institution that was least satisfied with the compromise was the Commission. In his October 1997 open letter, Commissioner Oreja (whose portfolio included the IGC) complained that it was unfortunate that when these powers were transferred from intergovernmental cooperation to the Community there was not a parallel shift from unanimity to qualified majority voting in the Council. We must also regret that Parliament's opportunity to carry out its true mission (legislative function) has been deferred for five years, and is subject to a Council decision (by unanimity) on an amendment (Oreja 1997).

Thus, while the member states conferred some additional powers to the Commission, they did so with a lag involved. Still, this was interpreted as increased willingness on the part of the member states to delegate to the Commission meaningful authority in JHA matters. The Commission was not entirely satisfied, however. Another cause for concern for the supranationally driven Commission was the prospect of a multi-speed Europe through various opt-outs that were granted to the UK, Ireland, and Denmark. Instead of opt-outs which were secured for the Euroskeptics on other occasions during the European integration process, the new treaty provided for opt-ins: while the new Title III of the amended Rome Treaty does not apply to the UK or Ireland, both countries are allowed to participate in issues of their own choosing. Denmark, on the other hand, secured a general opt-out from the new Community framework. In short, the Commission's institutional autonomy (or at least the policy initiatives that would result from its efforts) was not universally accepted in the EU. In the interest of pragmatism to move forward with the integration process, opt-outs and opt-ins were granted and intergovernmentalism was allowed to creep into the First Pillar, at least for the first five years.⁽⁸⁾ As was the case with the Maastricht treaty, the Commission had little leverage to produce an alternative communitarian outcome.

4.2 Institutional Empowerment [↑]

Perhaps the most significant institutional difficulty during this period was the resignation of the Santer College, which exacerbated the Commission's institutional problems. Yet, this proved to be a blessing in disguise for the TFJHA. After the entry into force of the Amsterdam Treaty, which endowed the Commission with new responsibilities in the JHA field, the Commission was soon to point out its lingering institutional problems by pointing out that “Task Force for Justice and Home Affairs in the Secretariat-General is insufficient to meet the requirements of the Treaty.” In order for the Commission to carry out its constitutional mandate effectively, it was implied, a new institutional setup was necessary which would afford the Commission autonomy “to give it a higher profile” and to deal with the recurring institutional problem of overlapping competences within the Commission (European Commission 1999c, 49) .

The decision to create a separate functional Directorate General to deal with Justice and Home Affairs matters were precipitated by the events leading up to the resignation of the Santer Commission. On 20 October 1999, the out-going Secretary-General Williamson submitted a report on the general inspection of the services, referred to as the Williamsport Report (European Commission 1999a) . Combined with the Report of the Committee of Independent Experts (CIE), a reform process was initiated in the Commission “efficiency, accountability, service and transparency.” Approximately two weeks after the Parliament's vote on the new Prodi Commission, one of the president's first moves was the creation of the new

Directorate-General Justice and Home Affairs (DG JHA), with Adrian Fortescue (the sitting *Conseiller hors Classe* of the TFJHA) as the Director-General.

The creation of the DG was a long-coveted development empowered to address some of the institutional constraints on the Commission. The core Task Force personnel soon found themselves in a new building, with their ranks increasing by four to five new personnel in the subsequent months. In fact, one year after the creation of the Directorate General, about 180 were employed. By comparison, the Task Force employed 46.5 FTE (full time equivalents in man/years) in 1998 (European Commission 1999c, 122). At the peak of its staffing just before the creation of the DG, the Task Force employed 55-60 FTE. By comparison, the two other DGs (DG V and DG XV) that tangentially dealt with border-crossing issues employed 467.25 FTE and 275.15 FTE respectively (European Commission 1999c, 115, 119) . With their ranks almost tripled, the services appeared to be better poised to take on the opening in its constitutional mandate. DG personnel observed that Commission civil servants (particularly those who had a point of reference with the Task Force) were rejuvenated by their improving fortunes. The creation of the new DG sought to address issues of overlap with other DGs. It was also successful in recruiting high-ranking civil servants from the former DG XV (Internal Market and Financial Services) who joined the ranks of DG JHA. This was a good tactical move to empower the new DG not only with new personnel but also with experienced Commission employees who were able to bring along an “institutional memory” of pre-Amsterdam (and, indeed, pre-Maastricht) days. The DG’s organizational structure was somewhat similar to that of the Task Force but also encompassed new divisions that reflected the new priorities of the Commission and the Union (for example, the drafting of a Charter of Fundamental Rights and a greater emphasis on communication and coordination).

Figure 1

Leadership Matters: New Blood at the Helm. Adding to the overall improvement of human resources and morale in the services was an improvement of the relationship between the services and the Cabinet of the new Commissioner, António Vitorino. Romano Prodi, who succeeded the Presidency of the European Commission after the demise of the Santer College, began to initiate an overall reform of the Commission with an eye towards service and transparency. One of his first moves was to bring the Commissioners (and their Cabinets) closer to their services. Accordingly, Vitorino, his cabinet, and DG JHA were moved to a common location. Though this move appeared at first to be more symbolic than substantive, it was quite an important improvement over the previous setup where Commissioner Gradin and her Cabinet were physically removed from the Task Force. This move seems to have improved communication between the Cabinet and the services, adding a sense of cohesion and commitment to their common purpose.

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In addition to the changes in the setup of the services, another important change was the new Commissioner in the field. Vitorino seemed to be uniquely suited for the job and was a strong candidate from the beginning. The second youngest member of the Prodi Commission, the Portuguese Commissioner had a degree in political science, law (he was previously a judge on the Portuguese Constitutional Court) and, more importantly, already had considerable experience in elected and appointed offices held in Portugal and beyond. He became a member of the Portuguese parliament in 1980, at the age of 23, and was immediately involved with the Joint European Parliament/Portuguese Parliament Committee on European Integration. He was subsequently elected to the European Parliament in 1994, where he soon became the Chairman of the Civil Liberties and Internal Affairs Committee within whose mandate Justice and Home Affairs matters fell. He later returned to Portugal to serve as the Deputy Prime Minister and Minister of Defense from 1995 to 1999 before he was nominated for the Commission position which he finally assumed in 1999 (European Commission 1999b). In addition to his relevant experience in politics and the politically important posts he

held in Lisbon and Strasbourg/Brussels, Vitorino was further judged as diplomatic but outspoken, possessing excellent communication skills, being at the beginning of his career and therefore possessing the ambition and dynamism that was visibly lacking in the previous Commissioner. Above all, his staff noted that he was a “full time Commissioner” at the helm of a promising policy field for the Commission.

On all fronts, constitutional and institutional, post-Amsterdam developments suggest an overall empowerment of the Commission, which the Commission welcomed. It promised “genuine Community added value” with the new Prodi Commission (European Commission 2000a). Nonetheless, it still faced important constraints even as its position improved, raising questions about whether it could develop a degree of autonomy in this new issue area. It seems that Amsterdam deferred such autonomy until 2004 which, it turns out, works to the Commission’s advantage.

5 Post-Amsterdam Commission in Justice and Home Affairs[↑]

5.1 Intermediate period: 1999-2004

Amsterdam foreshadowed two important changes in the decision-making apparatus applying to JHA/AFSJ, each of which could significantly improve the Commission’s agenda-setting power, which is a significant indicator of its autonomy. The first change is a matter of time: on May 1, 2004, the Commission becomes the sole initiator of policy proposals as the shared right of initiative rule is abandoned in favor of an exclusive right of initiative for the Commission. This “warming up” period can be seen as a cautionary move on the part of the member states as they test the conduct of the Commission. It also indicates the remnants of their willingness and ability to sanction the Commission and limit its agenda-setting abilities. Seen from the perspective of the Commission, the intermediate period represents an opportunity to consolidate its agency by demonstrating its usefulness as a locus of technical expertise, institutional memory, and brokering between member states. While the analysis is necessarily tentative, a review of the Commission’s performance in the post-1999 period indicates that it has been able to seize on the lingering shortcomings of Maastricht which are still evident in the interim Amsterdam setup. In particular, it has been able to exploit the incoherent manner in which policy-making has proceeded with potentially 16 proposals on any given issue.

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Its position has been further enhanced as a result of the special Tampere European Council on Justice and Home Affairs matters which met on 15-16 October 1999 in Tampere, Finland. This European Council (convened as a special European Council only five months after the entry into force of the Amsterdam Treaty) was, among other things, an effort to coordinate policy-making in JHA to achieve the AFSJ. At this Council, it was decided to foster such coordination through the implementation of a “scoreboard” which was to keep track of progress updated in six-month intervals (European Commission 2000b). The Commission was put in charge of producing the scoreboard. Pursuant to this, it has produced to such updates which lists not only the specific policy proposals but also who is to be working on them.

At the Tampere Council, the Commission gained important ground on the asylum issue, which is part of the overall portfolio. Despite the fact that the official move to an exclusive right of initiative was not foreseen until 2004, member states asked the Commission to make exclusive use of its initiative right to the Commission on asylum issues, five years ahead of schedule. In turn, member states – particularly those holding the presidency – reserved the right to submit initiatives on migration management. The fact that the Commission was clearly delegated the asylum portfolio is not surprising: asylum was at the forefront of cooperation all along which seems to have allowed the member states to be comfortable with the Commission’s facilitative role in developing common procedural roles for the reception of asylum seekers into the Union territory.

Subsequently, the Commission started working feverishly on a variety of initiatives, including two directives on temporary protection and minimum asylum standards. This was the first time that a “normal” and unquestionably binding Union policy instrument was being drafted by the Commission. The Commission seems also to have developed closer ties to the European Parliament and found in the Parliament a partner in pushing the reform process forward. As the other marginalized institution in JHA, the Parliament has been very critical of the policy-making process and, while pushing for an expanded mandate for itself, has argued for better Commission action and agency to counterbalance the (restrictive) prerogatives of the member states.

From the vantage point of member states and their relations to the Commission as an agent, the interim post-Amsterdam period suggest a greater willingness to delegate and a diminished desire (and perhaps ability) to sanction the Commission effectively compared to the earlier times. This might be attributable to the fact that JHA matters are no longer on the fringes of Union cooperation but are rather now cast as inextricably linked to broader issues of security. By developing and committing to this rhetoric, member states may have (unintentionally) strengthened the hand of the Commission as an increasingly autonomous agent.

5.2 Post-2004 Commission

The fact that the Commission will start treading on familiar ground with the implementation of the exclusive right of initiative is significant and allows the Commission to not only have a greater impact on setting the agenda but also reclaims its tactical move to pull unfavorable proposals. Post-2004 Commission will be in a significantly improved position concerning policy-initiation. The undesirable (and perhaps unintended) consequences of a shared right of initiative are already visible. The Commission, member states, and even the European Parliament are complaining about the fact that a shared right of initiative (which locates the policy initiation in sixteen as opposed to one source) has resulted in a ballooning of initiatives that are often inconsistent with each other and lack the very essence of good cooperation – a shared vision. This duplication and efficiency issue is illustrated nicely in the comments of MEP Baroness Sarah Ludford (ELDR, UK) who likened this plethora of initiatives – some of which are coming out of the Commission – to “being showered with confetti” (2001) . There is a growing consensus (even on the part of the member states who are already expressing a degree of willingness to “let the Commission do it”) that an exclusive right of initiative for the Commission is a desirable move. This change in rhetoric is quite interesting, especially if one considers the suspicion with which the Commission was regarded in this policy field only a short time back.

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Another decision-making innovation that will be considered in 2004 is the issue of QMV. While the move to QMV is not automatic – as is the case with moving to an exclusive right of initiative for the Commission – it would be a change that the Commission would push for and would very much like to see occur. QMV, as opposed to unanimity, affords the Commission to play its brokering role more successfully as the threat of stalling on proposals over the objection of one member state would disappear. Commission civil servants are quick to point to many initiatives that have floundered because of the unanimity hurdle. QMV, coupled with an exclusive right of initiative, significantly improves the Commission’s agency and affords it a degree of autonomy, which has been absent so far in this policy field. But a move to QMV promises to be a difficult issue, as the member states will ironically need to arrive at a unanimous decision to move from unanimity to QMV. The Commission is hopeful that this unanimity might be achieved, particularly because the Amsterdam Treaty does not require the ratification of such a decision in the national capitals, something that might make the representatives of the member states more likely to cooperate. While over-optimism might prove hazardous, even without the move towards QMV, the Commission will be on relatively better grounds when compared to its former position.⁽⁹⁾

6 From Inconsequential Actor to (Autonomous) Agent: The Implications of the Commission's Evolving Role in JHA[↑]

Approximately eight years after its creation, the third pillar of the European Union is no longer in the shadows it used to be at its inception. Nor is the Commission in the awkward position it occupied for a while in this emergent policy field. JHA is an interesting policy field in that it is a recent addition to the Union's policy repertoire. It is further intriguing in that it provides us with an opportunity to observe how Union institutions are injected into policy making in a new and controversial field; or put differently how agency is created for supranational institutions. Unlike other issue areas where the Commission enjoyed a mandate from the start and was hence an unquestionable agent of the member states, JHA was created an amorphous appendage with Maastricht and represented a policy sphere that was neither in nor entirely out of the Union.

This paper highlighted the evolution of the Commission's role in JHA/AFSJ from an awkward, yet potentially significant actor, to an aspiring autonomous actor endowed with constitutional and institutional constraints and capabilities. [Table 2](#) summarizes the phases on the Commission's ascent from the early periods of cooperation in JHA matters to the most recent developments in post-Amsterdam European integration process. In the pre-Maastricht origins of what was to become JHA cooperation, the Commission had no meaningful role. The Maastricht setup, negotiated almost exclusively by member states, conferred a tentative and constrained agency to the Commission.

In the face of Maastricht's shortcomings, and at the urging of the Commission and European Parliament, member states reconsidered the Third Pillar and transformed most of it by moving a significant portion of its portfolio to the First Pillar with the concomitant implications for an increased role for the Commission. But member states also included a lag for the full implementation of the communautarization decision, ostensibly creating an interim period during which the Commission's role would still be somewhat constrained. At the same time, it became apparent in Tampere that the member states were willing to entrust the Commission with more responsibilities than was actually foreseen in the Amsterdam Treaty, at least in some of the dossiers. The findings of this study cautiously point to a strengthening of the Commission's position, improving its position from that of a weak actor (pre-Maastricht intergovernmental JHA) to possibly a stronger and relatively autonomous position with significantly improved agenda-setting powers in 2004 and beyond.

Table 2

Between the mid-1980s and the late 1990s, the Commission has registered a significant reversal of fortune that included successive improvements in its constitutional standing and an empowerment in institutional terms. While the record shows that the Commission has fought actively for the opening that it now enjoys, it must be observed that it was the member states that chose to incrementally confer a larger role to the Commission at the various constitutional junctures and subsequently tinker with their constitutional setup. Having said this, one must not reduce the delegation of agency to the Commission as simply something that was done at Maastricht and Amsterdam. It quickly became apparent that both treaties (Maastricht in particular) resulted in operational weaknesses in effective cooperation in JHA. The Commission (with the help of the Parliament) successfully pointed to these weaknesses and exploited them to secure an improved position for itself. At the confluence of these factors, the member states' propensity to delegate to the Commission was strengthened. The Commission (with the help of the European Parliament which remains disempowered) continues to highlight the inefficiencies of the existing methods and seeks to cast itself as the *sine qua non* of the collective policy-making process through its (accumulating) expertise and improved institutional capabilities.

While important, its constitutional fortunes (and the member states' apparent shift in willingness to delegate to the Commission) should not be seen as the only factor that contributed to the Commission's ascendance. As was highlighted in the paper, internal institutional factors (such as leadership and resources) have also played a concomitant role in determining the extent and quality of the Commission's space in a policy field. We also see significant improvements with regard to this variable, contributing to the consolidation of the Commission's role in collective decision-making. In sum, the paper suggests that both constitutional factors (which might delegate agency as agreed to by the principals) and institutional factors (which capture the operational capacity of the agent) should be taken into consideration when evaluating the potential role of an institution like the Commission in a new policy field. It has most definitely been a "long and winding road" for JHA cooperation in general and for the Commission in particular (de Jong 2000). Yet, unlike the morale-deprived and constrained environment of as little as five years ago, these are exciting and promising times to be in the Commission's shoes and stride with confidence. It remains to be seen if the Commission can exhibit a similar trajectory in other new fields (such as CFSP) or in existing ones (such as the left-over current Third Pillar).

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Endnotes [↑]

(*) This data for this paper partly relies on anonymous interviews conducted at the Task Force for Justice and Home Affairs and the Directorate-General Justice and Home Affairs between 1996 and the summer of 2000. The author wishes to thank those who took the time to discuss these matters. The analysis rendered in this paper is the author's interpretation and does not bind the interviewees.

(1) The Treaty on European Union renamed the European Communities – European Economic Community, European Coal and Steel Community and Euratom – as the European Union (EU). The term EU thus denotes the post-Maastricht architecture consisting of three pillars: The first pillar is the Rome Treaty as amended by Maastricht, the second pillar is the common security and foreign policy (CSFP) and the third pillar is the competence area of justice and home affairs. In current EU parlance, especially when used by individuals active in the third pillar, the term EC is used when referring only to the first pillar and EU when referring specifically to third pillar structures and developments. Accordingly, this study employs the term EU when referring to post-Maastricht third pillar affairs and will use EC when appropriate.

(2) In this paper, the term third pillar will refer to the policy spheres added to the EU's competence with the Maastricht Treaty. The Amsterdam Treaty, as will be discussed below, removed some of these issue areas from the third into the first pillar. However, for convenience, traditional third pillar issues will be analyzed under this rubric.

(3) Many EU scholars have argued that supranational organizations, particularly the Commission, are advocates for the deepening of European integration. In the case of the Commission, deepening would also suggest an institutional opportunity.

(4) These are the Commission's formal powers. In addition to its formal powers, the Commission has developed substantial informal powers in the areas in which it has been a strong agent. Such informal powers in the field of JHA are as yet difficult to demonstrate.

(5) During the first two post-Maastricht years, third pillar issues were added to the competence of Pádraig Flynn in the Delors College. Anita Gradin subsequently became the Commissioner in charge of JHA.

(6) This is a bureaucratic title accorded to someone who cannot officially be given a directorship general.

(7) The Parliament, as the only democratically elected body of the European Union, has been very dissatisfied with the cursory role it has been given in the third pillar. Often circumvented in ingenious ways in the policy debate, the Parliament is one of the most vocal critics of the pillar structure and has made its discontent be known in a series of reports prepared by Jean-Jouis Bourlanges and David Martin in 1995.

(8) A Brussels official interviewed during the summer of 2000 bitterly complained that Amsterdam was “a triumph of *realpolitik*, not pragmatism.”

(9) The Treaty of Nice does not make any substantial changes to these issues. See (European Union 2001)

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Table I

Comparison of JHA issues: Pre-Maastricht, post-Maastricht and post-Amsterdam

	Pre-Maastricht	Post-Maastricht Third Pillar	Post-Amsterdam First Pillar (Communitarized areas of former Third Pillar)	
			1999-2004	Post-2004
Asylum, Immigration, External Borders	Domestic policy-making giving way to intergovernmental cooperation <i>outside</i> the Community framework	Third Pillar, Title VI, Article K of TEU	Article 73 of Amsterdam Treaty	
European Parliament	No role	Limited role	Consultation for the first five years after Amsterdam Treaty takes effect, co-decision afterwards	
European Court of Justice	No jurisdiction	No jurisdiction	Referral for an obligatory first ruling for national last-instance courts	
Decision-making	Intergovernmental negotiations Nonbinding decisions in the form of resolutions Binding decisions in the form of treaties	<i>Unanimity</i> rule on all issues	Council acts <i>unanimously</i> on proposals from Commission and member states <u>for the first five years</u>	Council will act <i>unanimously</i> on a move towards <i>qualified majority voting</i> (with no need for national ratification of this decision)
Commission's Right of Initiative	None Occasional observer status at intergovernmental meetings	<i>Shared</i> right of initiative for the Commission and Member States	Commission has shared right of initiative (member states have encouraged the Commission to assume an exclusive right for asylum issues)	Commission has <i>exclusive</i> right of initiative in Title IIIa

Source: Maastricht and Amsterdam Treaties

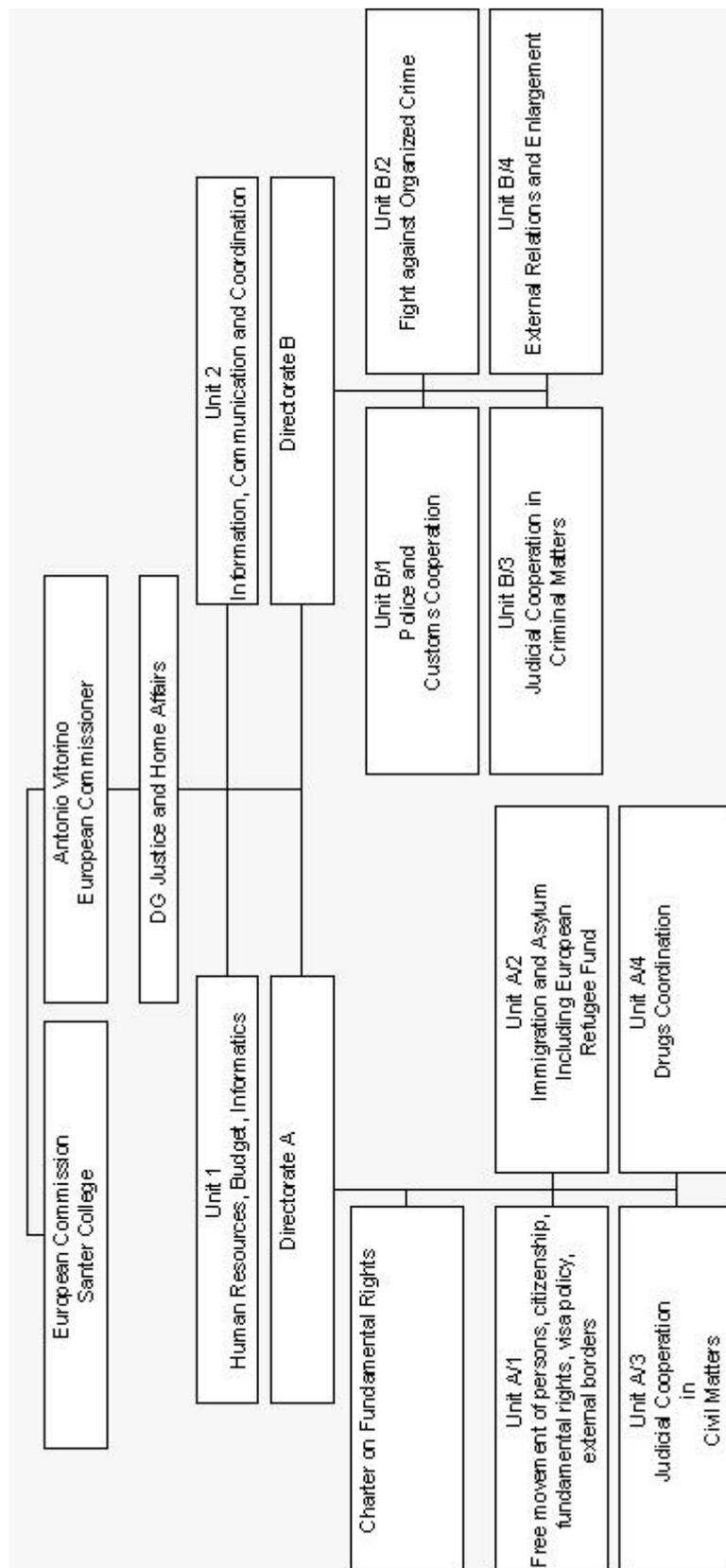
Table II

The Evolving Role of the Commission in JHA/AFSJ

	Constitutional	
	Constrained	Empowered
Institutional	Pre-Maastricht JHA Actor	Post-Maastricht, Pre-Amsterdam Weak Agent
	Amsterdam – 2004 Strong Agent	Post-2004 Improved autonomy (in immigration, asylum, and external borders)

Figure 1

The Organizational Structure of the Post-Amsterdam Prodi Commission in Justice and Home Affairs



Source: Adopted from (European Commission 1999d)

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