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The Schengen Information System and Data Retention. On Surveillance, Security and Legitimacy in the European Union[1]

1. Introduction

In contemporary public debates, surveillance is commonly understood as an activity of doubtful legality, usually performed in secrecy. This perception has been strengthened by the revelations on the activities of the US National Security Agency (NSA). The revelations have unveiled a network of communication surveillance of global extension, which had been kept in large part secret until then. Surveillance, however, is not carried out exclusively by secret services. As a technique of social control based on the collection of information, it has been indeed a central instrument of any administrative power since the modern era. As such, it is usually practised openly and governed by public regulations (Weber 1978[2]; Dandeker 1990).

Surveillance is hence a common feature of any modern political system. It can, however, be carried out in different ways and these can provide important information on the basic features of a particular political system. Indeed, the introduction of surveillance measures has an impact on key features of a political system, such as the relationship between liberty and security, or between autonomy and authority. When a political system is, like the European Union (EU), in a dynamic and build-up phase, by analysing its surveillance practices one can even discern the trajectories of its developments.

In the following pages I shall analyse two surveillance measures in the EU: the Schengen Information System (SIS) and the Directive 2006/24/EC on data retention. The SIS is a database for the automatic search of objects and persons. It has been in use since 1995 and is

1 I would like to thank Charles Raab for an inspiring conversation on the topics of this chapter. I also gratefully acknowledge the comments made by Maria Laura Lanzillo and Carlo Galli on a previous version of this text.

2 Originally published in 1921/22.

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available to the EU member states, the members of the European Free Trade Association (EFTA) and, partially, the European agencies for law enforcement and judicial cooperation EUROPOL and EUROJUST. The Directive 2006/24/EC was introduced in 2006 and aimed to ensure that providers of communication services retain the data relating to their communication traffic for a period of time ranging from 6 to 24 months. After a period in which the Directive was applied only partially and was openly contested by some EU member states, in April 2014 it was invalidated by the Court of Justice of the EU (CJEU). Similar regulations, however, have already been reintroduced at the national level.[3] Moreover, the CJEU sentence itself does not prohibit all kinds of data retention, thus leaving the possibility open also for new EU-wide data retention regulations.

In section 2, I set out the methodology followed in the chapter, which is inspired by the works of Max Weber and Hannah Arendt. Their analyses of power structures offer in my view important methodological indications that can be used to identify key features of the EU power and the role played by security in its still fluid and dynamic constitution. In section 3 and 4, I carry out an analysis of the SIS and the Directive 2006/24/EC respectively, which is structured according to the following questions. Which values sustain their introduction? Which bodies decide about their introduction and through which mechanisms? Which bodies enforce the surveillance measures and which is their relationship with the decision-makers? In section 5, I build upon the analysis carried on in the previous sections and I put forth the argument that the reference to security as a value enables the EU to compensate its legitimacy deficiencies and to develop into a power system characterised by a more supranational structure than before. Section 6 concludes highlighting the specificity of this chapter's approach.

2. Methodology

Methodologically, the present chapter is inspired by the analysis of power conducted by Max Weber in *Economy and Society* (1978) and by Hannah Arendt in *The Origins of Totalitarianism* (1967).

3 This has been the case, for instance, in Germany. See 'Überwachungsgesetz: Bundestag beschließt umstrittene Vorratsdatenspeicherung', SPIEGEL ONLINE, 16.10.2015, http://www.spiegel.de/netzwelt/netzpolitik/bundestag-beschliesst-umstrittene-vorratsdatenspeicherung-a-1058086.html, accessed on 19/01/2016.

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Weber's methodology is based on the notion of "ideal types". In 1904, in the essay *The "Objectivity" of Knowledge in Social Science and Social Policy,* Weber introduces the ideal type as a concept

> formed by a one-sided *accentuation* of one or *several* perspectives, and through the synthesis of a variety of diffuse, discrete, *individual* phenomena, present sometimes more, sometimes less, sometimes not at all; subsumed by such one-sided, emphatic viewpoints so that they form a uniform construction *in thought* (Weber and Whimster 2004, 387–388, italics in original).

In *Economy and Society*, published posthumously more than fifteen years later, Weber defines the construction of ideal types as a methodological device, which consists in asking how a social phenomenon would have manifested if it had been determined by rational motives exclusively. An ideal type describes therefore a way of acting which is exclusively rational (6-7).

It is a controversial issue whether the two aforementioned definitions coincide with each other. Some scholars maintain indeed that they refer to two different kinds of ideal types: one historical and one sociological (Hekman 1983, 38; Janoska-Bendl 1965, 39f). The theoretical consistency of Weber's methodology and the logical foundations of ideal types have been controversially debated and criticised as well. For the purpose of this chapter, however, such issues can be set aside, since what is of interest here is the utility of ideal types for understanding phenomena resulting from human behaviour rather than the construction of new ideal types. Insofar as the ideal types can be considered a plausible model for understanding "social action"[4], I maintain, the matter of the theoretical consistency and validity of the way Weber *built* them can be laid aside. In other words, I suggest considering ideal types as tools for research instead of objects of research themselves.

Weber himself, indeed, does consider the construction of ideal types a means of research and not its end (Burger 1976, 135f). From this point of view, Weber's position did not substantially change over the years. In the work of 1904 Weber asserts:

> In its conceptual purity this construction can never be found in reality, it is a utopia. Historical research has the task of determining in each individual case how close to, or far from, reality such an ideal type is (388).

In *Economy and Society* we find similar considerations:

4 By "social action" Weber means the actions of individuals that take into account the behaviour of others and as far as individuals attach a meaning to these actions (1978, 4).

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> Sociological analysis both abstracts from reality and at the same time helps us to understand it, in that it shows with what degree of approximation a concrete historical phenomenon can be subsumed under one or more of these concepts (20).

As anticipated, Weber's methodology is of interest here not for constructing a new pure type of legitimate rule[5]. Rather, it will be useful for contrasting the characteristics of the form of power analysed with one of the pure types constructed by Weber in *Economy and Society*. The pure type, indeed, indicates "where to look, i.e. it lists the things which should be there if certain motives had been operating. If only some of these things are there, the scientist has to infer that other motives also had an influence" (Burger 1976, 139). My chapter is inspired by Weber's methodology in the following way: the characteristics of the empirical phenomenon will be compared with Weber's pure types. Where the empirical phenomenon differs from the ideal type, I will look for other motives for action. As we will see, in this context this will mean to look for other grounds of legitimacy.

In *Economy and Society* Weber distinguishes three pure types of authority: legal, traditional and charismatic. The principal element that distinguishes these types from each other is the kind of legitimacy foundation. Since for Weber the belief in the legitimacy of a certain form of authority is also the basis for the obedience rendered by the ruled to the rulers, the different kinds of legitimacy also determine the form of obedience, administration and exercise of authority (Weber 1978, 214). The analysis that I will carry out in the following pages is based on the assumption that the contemporary form of rule which exists in the EU approximately corresponds to Weber's ideal type of the legal authority and that therefore it can be understood through comparison with it. The main characteristics of this form of power will be recalled below.

As we have seen, Weber's methodology enables to compare a real existing ruling system with an ideal type, but it does not indicate how to

5 When referring to Weber's works, I use here the English words "rule" or "authority" to translate the German word "*Herrschaft*", which Weber distinguishes from "*Macht*" ("power"). *Herrschaft* is for Weber "the probability that a command with a given specific content will be obeyed by a given group of persons" (1978, 53), while he defines *Macht* as "the probability that one actor within a social relationship will be in a position to carry out his own will despite resistance, regardless of the basis on which this probability rests" (1978, 53). However, when referring more in general to the EU or other political organisations, I do not strictly follow Weber's distinction and I also use the word "power", which seems to me nearer to natural language, to denote phenomena that in Weberian terms fall under the meaning of "*Herrschaft*".

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identify the actual characteristics of the empirically existing form of authority.

How is it then possible to discern the main features of the current form of rule in the EU as it manifests itself in the surveillance practices mentioned above? The procedure followed by Hannah Arendt in order to identify the salient characteristics of totalitarianism offers useful indications in this respect.

The Origins of Totalitarianism appeared for the first time in 1951 in the US and four years later in a considerably expanded German edition.[6] In it, Arendt presents a historical reconstruction of the elements that "crystallised" into totalitarianism and an analysis of its main features. The book is composed of three parts: the first two deal with anti-Semitism and racism as historical elements that flowed into totalitarianism, while the third part analyses the peculiar characteristics of totalitarianism as a new form of power. This third part is one of the methodological points of reference for the analysis of this chapter. What, then, is the method followed by Arendt in order to detect the main features of totalitarianism as a new form of power?

Arendt does not explicitly address methodological questions in *The Origins of Totalitarianism*. In order to find indications of her approach, one has to look at an essay published in 1953, written as a response to Eric Voeglein's review of *The Origins of Totalitarianism* (Arendt 1953; Voegelin 1953). As mentioned above, Arendt explains here that the book offers a historical account of the elements that "crystallised" into totalitarianism (the first two parts) and, in the third part: "an analysis of the elemental structure of totalitarian movements and domination itself" (Arendt 1953, 78). In seeking to explain totalitarianism as an event that actually occurred in human society, Arendt pays particular attention to the "phenomenal differences" of totalitarianism that rendered it unique compared to any previous event:

> The 'phenomenal differences,' far from 'obscuring' some essential sameness, are those phenomena which make totalitarianism 'totalitarian,' which distinguish this one form of government and movement from all others and therefore can alone help us in finding its essence. What is unprecedented in totalitarianism is not primarily its ideological content, but the *event* of totalitarian domination itself (Arendt 1953, 80, italics in original).

6 Because the German version is more comprehensive, I will quote from the German edition. On the writing and structure of the books see Grunenberg 2003.

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What Arendt is interested in, in other words, is not a theoretical investigation of totalitarianism's ideology, but an apprehension of the factual characteristics that distinguish totalitarianism as a real event from any previous form of domination. As Arendt specifies further, her account proceeds from "facts and events" and not from theoretical affinities and influences.

On the basis of a large amount of documents, Arendt provides, hence, an "analysis of the structural traits" (Forti 2003, 36) of the new form of power called totalitarianism. The characteristics that Arendt highlights concern the overall structure of the totalitarian system as well as its main institutions. Typical of totalitarianism is, for instance, its amorphous structure, in which authorities are systematically duplicated, the same orders are given simultaneously to several organisms and it is never clear which body is responsible for executing a particular task (Arendt 2011, 643–644, 766–813 and 833–839). In a totalitarian system, moreover, the real power is detained by the police, and in particular by the secret police, and not by the party. The principal function of the secret police is to make the fictions of totalitarian ideology materialise, to transform reality in order to adapt it to the "objective" laws of history and nature which the totalitarian power claims to know and enforce (Arendt 2011, 643–644, 821–822 and 867–907).

In this chapter, the reference to Arendt's work is not meant to build a parallelism between the totalitarian model and the EU. Rather, it has a purely methodological character and takes in Arendt's thesis that in order to individuate the structural features of power it is necessary to look at "facts and events" instead of establishing theoretical affinities. I understand this indication by Arendt as suggesting to examine existing documentation that keeps record of how events developed and of the institutional functioning behind them – rather than relying on other kinds of documents and literature such as the ones expressing declarations of intents, or focusing on theoretical matters. Accordingly, this chapter aims to highlight salient characteristics of the EU authority as they actually manifest themselves in the surveillance measures analysed.

3. The first and second generation SIS

The Schengen Agreement of 1985 is generally considered to have provided both the motivation and the legal basis for the introduction of a database for facilitating investigations across the EU (Schindehütte 2013).

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The Schengen Agreement established the abolishment of personal controls at the borders between the member states as a long-term end. The involved actors, although encouraging such development, also perceived it as a potential loss of control and security. Article 17 of the Schengen Agreement, consequently, determined the establishment of "complementary measures to safeguard internal security"[7], whose contents were then specified in a later treaty, the Convention implementing the Schengen Agreement,[8] signed in 1990. Title IV of the 1990 Convention prescribes the introduction of the SIS. Its aim is stated in article 93 of the Convention, which reads:

> The purpose of the Schengen Information System shall be in accordance with this Convention to maintain public policy and public security, including national security, in the territories of the Contracting Parties and to apply the provisions of this Convention relating to the movement of persons in those territories, using information communicated via this system.

The kinds of information stored in the database relate to both persons and objects. Concerning persons, the Convention limits the data that can be entered into the system to a few categories: personal details (name, particular physical characteristics, date and place of birth, nationality and gender), indications about the estimated dangerousness of the person, the reason for the alert and the actions to be taken. The Convention prohibits the gathering of further data in order to ensure compliance with the European norms on data protection (Art. 94). The categories of persons whose data can be entered in the database include: individuals wanted for arrest for extradition; foreign persons to whom access to the Schengen area shall be denied; missing persons or persons that shall be temporarily placed under police protection such as minors or persons that must be interned; persons involved in a criminal trial such as witnesses, indicted or condemned individuals and finally persons considered to be likely to commit a crime in the future or to constitute otherwise a threat to public security (Art. 95–99).

7 The Schengen acquis - Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders of 14/06/1985, Official Journal of the EU (EUOJ) L 239, 22/09/2000, 13–18.

8 The Schengen acquis - Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders of 19/06/1990, EUOJ L 239, 22/09/2000, 19–62.

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With the Schengen Protocol attached to the Amsterdam Treaty of 1997, the Schengen *acquis*, consisting of the norms of the previous Schengen treaties, was integrated in the EU legal framework. In particular, it became part of what at that time was the third EU pillar, which concerned the police and judicial cooperation in criminal matters and which was highly intergovernmental as to the decision and enforcement mechanisms. With the Lisbon Treaty of 2007, finally, the three pillars structure was abolished and the matters formerly included in the third pillar became subject to the ordinary legislative procedure of the EU, which implies the co-decision of the Parliament and Council of the EU.

While the EU structure was being so reshaped, with a series of decisions adopted starting from 2001, the Council and the Parliament determined the transformation of the SIS into the second-generation system SIS II.[9] The main rationale for the introduction of the SIS II was to enable the new EU member states to connect to and use the database. As time passed by, however, this function became less and less important, and eventually redundant. Indeed, already before the SIS II became operative in 2013, an upgraded version of SIS existed that was also available to the new member states: the SISone4all. In the end, the most relevant difference between the SIS II and the previous versions is another one: the SIS II allows to enter in the database also biometrical information such as fingerprints and biometric pictures and to link different searches with each other (Ambos 2009).

National authorities play the main role in enforcing the SIS measures. The search is launched by national bureaus, which enter the data in their national system N.SIS. A centralised system, the C.SIS, transmits then the data to the other national systems. In each member state the offices called SIRENE (*Supplementary Information Request at National Entry*) are responsible for the maintenance and the exchange of information with other states. In 2012, the technical support unit of the SIS, which was

9 See the Council Regulation (EC) No 2424/2001 on the development of the second generation Schengen Information System (SIS II) of 06/12/2001, EUOJ L 328, 13/12/2001; the Council Decision 2001/886/JHA on the development of the second generation Schengen Information System (SIS II) of 06/12/2001, EUOJ L 328, 13/12/2001; Regulation (EC) No 1987/2006 of the European Parliament and of the Council on the establishment, operation and use of the second generation Schengen Information System (SIS II) of the 20/12/2006, EUOJ L 381/4 of 28.12.2006 and the Council Decision No 2007/533/JHA on the establishment, operation and use of the second generation Schengen Information System (SIS II) of 12/06/2007 EUOJ L 205/63 of 7.8.2007.

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previously located in Strasburg, was relocated to Tallinn and placed under the competence of the EU-LISA, the EU agency for large IT systems.

As far as investigations are concerned, since the beginning the SIS has been used principally for the search of the second category of persons, namely aliens to whom access to the Schengen area shall be denied.[10] In 2005, for instance, the number of data relating to this category was 47 times the number of the data relating to the first category (persons wanted for arrest) and almost seven times as big as the sum of the data pertaining to all other categories.[11] Although proportions have changed over time, aliens remain the first category of persons for which the SIS is used.

What inferences regarding the model of power emerging in this area can be drawn from the events described above on the development and the functioning of the SIS?

Concerning its justification, the SIS has been introduced, as we have seen, as a measure aiming to compensate a perceived loss of security due to the abolition of the EU internal frontiers. However, it has been questioned whether such loss really occurred. The existence of such problem, indeed, was rather proclaimed than demonstrated with reference to studies and statistics. The main arguments used for supporting the existence of a loss of security were rather abstract and based on the idea of the border as a protective barrier against criminality (Schindehütte 2013, 12–13). Although such kind of arguments may be *prima facie* convincing, the studies that have dealt with this issue came to different conclusions. Hans-Heiner Kühne, for instance, analysed the central statistics of the German border police (*Deutsche Grenzpolizei*) from 1980 to 1989 and came to the conclusion that borders have a minor relevance for granting

10 This indicates an interesting parallelism between surveillance practices at the local (municipal) and at the supranational (European) level. This use of surveillance indeed interestingly resembles what Gargiulo depicts in this volume as the local governments' uses of surveillance as "a *defence* of the symbolic and material boundaries of the municipal polity". See Gargiulo in this volume.

11 EU Council, SIS Database Statistics 2005, doc. 8621/05, http://data.consilium.europa.eu/doc/document/ST-8621-2005-INIT/en/pdf, accessed on 19/01/2016, and EU-LISA, SIS II 2013 Statistics, June 2014, http://www.eulisa.europa.eu/Publications/Reports/eu-LISA_SIS%20II%20-%20Statistics%202013.pdf, accessed on 19/01/2016.

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internal security (Kühne 1991). Kühne's conclusion is that "the implementation of the Schengen agreement does not give rise to concerns regarding a substantial diminution of internal security" (50). That the relevance of the SIS does not principally reside in the reduction of criminality seems to be confirmed also by its actual use, which, as we have seen, has been directed principally against aliens and not against criminals. It is important to stress that the existence of a criminal conviction or a suspicion of dangerousness is not a necessary condition for a search on a foreign person through the SIS.[12]

According to some authors, then, the abolition of border controls decided in Schengen has provided favourable conditions for strengthening the cooperation between EU states in criminal matters, of which the SIS is an important element. However, the aim of reinforcing police and judicial cooperation among EU states has been, according to these authors, pursued independently of the presumed loss of security caused by the abolition of border controls (Schindehütte 2013, 14–16; Taschner 1997, 42). It seems not to be correct, hence, to consider the SIS a compensation for a loss of control or security (Kühne 1991, 50).

Regarding the decision process, the introduction of the SIS has been characterised by a gradual shift from intergovernmental to more supranational mechanisms. There has been a transition from an international agreement, the Schengen treaty, to a procedure that requires the co-decision of the Council and Parliament of the EU. This progressive shift towards supranationality clearly mirrors the broader process of European integration. In recent years, this process has influenced with particular intensity the so-called "area of freedom, security and justice" (AFSJ), which covers the EU competences in the domains of judicial and police cooperation and the EU migration policies. It is interesting, however, that in the case of SIS the process of European integration has been characterised by a restriction of individual safeguards and an expansion of public powers. This has happened not only with the introduction of the SIS, which boosted the existing national surveillance capabilities through interstate coordination, but also with its transformation into the second-generation system. With the transition to SIS II, indeed, the kinds of data that can be entered in the database have been broadened to include biometric data, and a new functionality has been introduced that enables to connect different searches and therefore to establish links between individuals and groups. These functionalities, which were not the original rationale for the

12 See Art. 96 of the Convention implementing the Schengen Agreement, cit.

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upgrade of the SIS, ended up being the most important innovation introduced through the SIS II.

As we have seen, indeed, the reason why the EU Council in 2001 charged the Commission with supervising the development of the SIS II was to make the system accessible to a larger number of states. This aim, however, had already been achieved in 2007 with the introduction of the system SISone4all. The Commission remained nevertheless persuaded that the SIS II project should not be abandoned, although its costs were at that time four times as high as initially estimated[13]. As the European Court of Auditors highlights, moreover, the whole decisional process that led to the transformation of the SIS into the SIS II was characterised by an underlying lack of transparency and rationality. The special report on the SIS II it issued in 2014 points the following out:

> It was not clear to all SIS II stakeholders who made key decisions in practice. Although the minutes of SISVIS (sic) Committee meetings were recorded, there was no decision log to enable the basis for all important decisions to be easily traced and understood (22).

The Court, moreover, asserted that the Commission, after having been entrusted with the development of the SIS, "did not set out the benefits of SIS II in terms of its contribution to fighting crime or strengthening external borders. It did not state the problems SIS II was designed to address and how its success would be measured" (32).

Finally, the execution of the decisions taken at the European level remains, as we have seen, the responsibility of national authorities. These indeed are in charge of both launching searches and entering the data in the SIS II.

4. The Directive 2006/24/EC on data retention

The Directive 2006/24/CE on data retention was issued by the Parliament and the Council in March 2006.[14] As a EU Directive, it requested the

13 European Court of Auditors, Lessons from the European Commission's development of the second generation Schengen Information System (SIS II), Special Report 3/2014.

14 Directive 2006/24/EC of the European Parliament and of the Council on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, of 15/03/2006, EUOJ L 105/54, 13.4.2006.

Final version published in:
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member states to achieve particular ends, but it left the question of the means for the states to decide. The Directive prescribed that states should oblige providers of communication services to retain for a minimum of six months and a maximum of two years the data concerning the communication traffic administered by them (Art. 6). According to the Directive, the service providers had to store the data necessary to identify the source, destination, date, time duration and kind of communication, as well as the kind of devices used and their location. Data regarding the communication content were explicitly excluded from the information to be collected and stored (Art. 5).

The aim of the Directive was to ensure the availability of communication data "for the purpose of the investigation, detection and prosecution of serious crime" (Art. 1). Notwithstanding this explicit connection to security issues, the Directive was introduced as a measure concerning the harmonization of the internal market and thus pertaining to the former first pillar of the EU.

Previously, attempts had been made to introduce the Directive in the most obvious context for security measures, i.e. the former third pillar of the EU, concerning the police and judicial cooperation. But they failed. For instance, in 2004 a proposal for a Council framework decision was advanced as a third pillar initiative.[15] For adopting such decision it would have been necessary to achieve the unanimity of the Council members. Since it was clear, however, that some state representatives would have voted against the proposal, this was withdrawn before being voted (Moser-Knierim 2014, 149). The problem was later bypassed by presenting the proposal as a first pillar directive, for whose adoption a majority decision by the Council and the Parliament suffices.

The inclusion of the data retention norms into the first pillar has been criticised and motivated an annulment request by Ireland to the CJEU. The Court, however, in its judgement of 2009 maintained that the classification of the Directive as a first pillar measure was correct, since the Directive served the primary purpose of ensuring the proper functioning of internal market.[16] But the resistance by some member states went further than that. Austria and Sweden, for instance, intentionally delayed the release of the

15 Council Document 8958/04 of 28.04.2004, available at http://www.statewatch.org/news/2004/apr/8958-04-dataret.pdf, accessed on 19/01/2016.

16 Judgment of the Court (Grand Chamber) of 10 February 2009 — Ireland vs European Parliament, Council of the European Union, (Case C-301/06), EUOJ C 82/2 of 04/04/2009.

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national norms necessary to implement the Directive (Schweda 2011). In Germany, in 2010 the Constitutional Court declared the national regulations released in accordance with the Directive invalid because violating fundamental rights.[17] Also the Romanian and Czech constitutional courts declared the data retention norms unconstitutional (Schweda 2011). Finally, a second request of annulment to the CJEU, based on concerns of incompatibility of the Directive with, among others, the Charter of fundamental rights of the EU, was presented by Ireland and Austria. This attempt was successful and in 2014 the CJEU declared the Data Retention Directive invalid.[18] The decision of the Court, like the previous judgement of the German Constitutional Court, does not declare data retention *as such* incompatible with fundamental rights, but just in the form established by the Directive. These judgements, consequently, do not prevent other data retention norms to be reintroduced in a modified version. Indeed, as anticipated, a new national data retention law has already been passed for instance in Germany.[19]

Also the events concerning the data retention Directive give interesting information on the functioning of power in the EU.

Concerning legitimacy, one can distinguish two levels of justification for the introduction of the Directive. A first level, which can be defined as "technical", refers to the harmonisation of internal market. The obligations imposed by the Directive are directed, in the end, to the providers of communication services, whose data retention practices should have been harmonised through the application of the Directive. As we have seen, this justification made possible the inclusion of the Directive among the first-pillar actions and smoothed the way for its adoption. Such classification, however, has been contested, and also the CJEU decision which confirmed its validity has been harshly criticised for being based on thin argumentations (Ambos 2009; Ohler 2010). A second level of justification, which can be called ideological, presents data retention as a measure aiming to safeguard the EU internal security. From the original proposal to introduce data retention as a measure of judicial and police cooperation till the final introduction as an economic measure, the connection to security did not lose importance. It remained, indeed, the principal purpose of the

17 Judgement of the German Constitutional Court of 02.03.2010, Az. 1 BvR 256/08, 1 BvR 263/08, 1 BvR 586/08.

18 Judgment of the Court (Grand Chamber) of 8 April 2014 — Digital Rights Ireland Ltd (Joined Cases C-293/12 and C-594/12), EUOJ C 175/6 of 10/06/2014.

19 See 'Überwachungsgesetz: Bundestag beschließt umstrittene Vorratsdatenspeicherung', cit.

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Directive, as the above quoted passage from Article 1 of the Directive's text testifies. As also the advocate general Bot in his opinion presented to the CJEU affirmed,

> it has not been disputed by any party during these proceedings, and it appears […] to be unarguable, that the rationale of the obligation to retain data which is imposed on providers of electronic communications services lies in the fact that it facilitates the investigation, detection and prosecution of serious crimes.[20]

Also regarding the decisional procedure, multiple levels of analysis can be distinguished. First of all, one can observe a *de facto* increase of the supranational character of the matter. Regarding data retention and differently to what happened in the case of the SIS, this development was not the consequence of the application of the EU ordinary legislative procedure to the by then abolished third pillar. On the contrary, it was the effect of the transferral of the concerned topics from the area of judicial and police cooperation to economy policies. This shift made possible the introduction of the data retention norms notwithstanding the opposition of some states that in an intergovernmental decision procedure would have blocked the adoption of the norms. However, on a second level, it is interesting to note that this attempt has been only partially successful. While on the one hand it allowed releasing the Directive, on the other hand the adopted Directive faced resistance by some states who refused to implement it, was object of declarations of unconstitutionality and, eventually, of the request of annulment to the CJEU. The opposition of some EU member states, hence, partially impeded the application of the Directive. One can maintain, therefore, that the states' competence for the application of the data retention norms represented a significant obstacle to the implementation of the Directive. However, the definitive annulment of the Directive was only possible on the basis of a decision by a EU body, the CJEU.

5. Security, legitimacy, power

According to Weber's model, the legitimacy of the type pure of authority called legal is of rational character and is based on the belief by the ruled in the legality of established normative orders and in the right to rule of

20 Opinion of Advocate General Bot delivered on 14 October 2008 1, Case C-301/06 Ireland v European Parliament, Council of the European Union, § 92. See also Ambos 2009 and Gausling 2010, 25–43.

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Elisa Orrù, Maria Grazia Porcedda, Sebastian Weydner-Volkmann (eds.), Rethinking Surveillance and Control. Beyond the 'Security vs. Privacy' Debate. Nomos: Baden-Baden 2017

those who exercise authority.[21] The legitimacy of a rule system of this kind derives therefore, according to Weber, from a purely formal element: legality. As far as the legal type pure is concerned, legitimate authority is for him an authority exercised in conformity with established norms (Bobbio 1981). The basic characteristic of such authority is for Weber a system of functions, regulated in detail and distributed according to fixed competences. In such system, a domain of actions is clearly circumscribed for each matter. In accordance with this separation of domains, the necessary means for ruling and enforcing are defined and assigned (Weber 1978, 218).

In the case of the analysed EU measures, however, it is difficult to detect a clearly regulated structure like the one described by Weber. The EU ruling system appears rather as a dynamic complex, constantly restructuring itself. Rather than by a rigid and stable distribution of competences, it is characterised by a permanent redistribution of functions, both vertically, namely from the national to the supranational level, and horizontally, i.e. between the different EU bodies. Concerning the SIS, this shift is apparent in the transition from negotiations among states (the 1985 Schengen Treaty is an international agreement) to the incorporation of the Schengen *acquis* into the EU legal framework through the Amsterdam treaty and, finally, with the Lisbon treaty, to the ordinary legislation mechanisms, characterised by a high level of supranationality. The lack of a clear distribution of competences and of clearly defined decision mechanisms was evident also in the transition from the SIS to the SIS II, which was marked, as we have seen, by scarce clarity and transparency as to how and by whom decisions were taken. In the case of the Directive there has been an analogous shift of competences from the intergovernmental to the supranational level. This has occurred in advance of the general restructuration of competences, due to the stratagem consisting in considering the topic part of the EU economic policies.

Seen from a Weberian perspective, such fluidity poses patent problems as to the legitimacy foundation of the EU authority. How can the EU, as a form of legal authority, claim legitimacy for its orders and provisions if

21 There is an ambiguity as to the meaning assigned to legitimacy by Weber. Sometimes he understands legitimacy as the *claim* by the rulers on which obedience should be based, sometimes as the *belief* by the ruled on which their obedience is based. See Bader 1989. I do not share, however, Bader's thesis according to which the two meanings are incompatible. Consequently, in this chapter I refer to legitimacy primarily as a rulers' claim, which, however, can be accepted by the ruled, thus becoming part of their beliefs.

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Elisa Orrù, Maria Grazia Porcedda, Sebastian Weydner-Volkmann (eds.), Rethinking Surveillance and Control. Beyond the 'Security vs. Privacy' Debate. Nomos: Baden-Baden 2017

these are not issued in conformity with an established set of norms and with a clearly defined distribution of competences?

The hypothesis I put forth is that the EU compensates these flaws regarding the basis of its legitimacy claim through the recourse to a material element: the value of security. By underpinning its legitimacy claim through the value of security it is possible for the EU to adopt measures that go beyond the established competences. This is not primarily or solely true of "exceptional" policies, adopted in an emergency situation (Williams 2015). Rather, it allows building stable structures of power.

Surely, this strategy is not always successful, as the events regarding the data retention Directive demonstrate. Rather, it is an attempt to speed up the process towards more supranationality by claiming "material" legitimacy.

A set of specifications is needed at this point. The first regards Weber's thesis that legitimacy can be derived from a purely formal legality. This thesis has been challenged by several authors, including Jürgen Habermas and Norberto Bobbio (Habermas 1987; Bobbio 1981). According to Habermas, it is possible to ground the legitimacy of a normative order in its legality only if the formal characteristics of the system have a moral content. This moral content refers for Habermas to the rationality of the procedures through which norms are created and applied. These, in a legal system, institutionalise the procedures of justification and reasoning and apply to the (democratic) production and application of legal norms. The rational procedures guarantee the impartiality of law, which according to Habermas is "the rational core in practical-moral meaning of legal procedures" (12), and the validity of the achieved results.

Bobbio as well contested the thesis that the legitimacy of a legal order can be derived exclusively from the compliance with established norms. He highlights how legitimacy and legality, traditionally, have pertained to two different domains: while the former refers to the possession of power, the latter refers to its exercise. Weber's thesis that legitimacy can be derived from legality neutralises such difference. According to Bobbio, however, the purely formal rationality of a set of rules cannot be a self-sufficient criterion for legitimacy. Bobbio notices that such difficulty was evident to Weber as well, although he did not further investigate the possible additional criteria for legitimacy. Such criteria can for Bobbio only reside in the material rationality of the legal order, i.e. in the values it realises.

The thesis I suggested above can be reformulated in the light of these criticisms. According to Habermas, as we have seen, the legitimacy of a

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Elisa Orrù, Maria Grazia Porcedda, Sebastian Weydner-Volkmann (eds.), Rethinking Surveillance and Control. Beyond the 'Security vs. Privacy' Debate. Nomos: Baden-Baden 2017

set of norms is based ultimately on the impartiality of the procedures of formation and application of the norms, which is itself guaranteed by the rationality of the same procedures. Security hence – one can argue – is a material element that compensates for the deficit of rationality of the EU decision mechanisms. Referring to Bobbio's criticisms, which directly mention material principles, one can maintain that security plays a central role among the values on which the EU bases its legitimacy claim, even when it acts *ultra vires* or otherwise expands its competences.

The second specification regards the meaning of security *as a value*. Peter Burgess stressed the tight link connecting any form of power with normativity:

> All power has an ethical underside. All power promotes implicitly a set of values, if only clandestinely. There is no act of foreign policy that does not simultaneously put forth in the world a value or set of values as an alternative – a forced alternative – to what is the case. […] All power is normative (Burgess 2011, 12).

As a key political concept, security as well is invested with normative qualities. To acknowledge the normative nature of security has been a key achievement of the Copenhagen School of security analysis (Buzan, Waewer and de Wilde 1998). Its researches broadened the focus of security studies beyond the traditional military domain and stressed how virtually any issue can be framed as a security matter, as far as there are actors and an audience respectively declaring and accepting it as such. Understanding security policies in this way, i.e. as the result of a "speech act" (Waewer 1989) or as a securitization strategy, stresses the inter-subjective nature of security and makes the link between security and values explicit. Security, indeed, has to do with "what matters to us": "a threat to security […] is linked to the possibility that what we hold as valuable could disappear, be removed or destroyed" (Burgess 2011, 13).

The claim made in this chapter, however, goes a step further than that. It not only recognises that power, security and values are strictly connected to each other and that therefore our understanding of security is determined by our normative conceptions, it also understands security *as a value* itself.

The question becomes, then, what kind of value security is. "Security" can be employed with reference to the most different domains: from the international to the economic, to the health and to the social fields, it has found application in virtually every sphere of life (Conze 1984). The meaning of security as depicted in the texts that introduce the surveillance measures analysed in this chapter, however, all converge on a quite focussed meaning of security. They refer to what traditionally has been

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Elisa Orrù, Maria Grazia Porcedda, Sebastian Weydner-Volkmann (eds.), Rethinking Surveillance and Control. Beyond the 'Security vs. Privacy' Debate. Nomos: Baden-Baden 2017

covered by the concept of states' "internal security". In the EU, such concept of security is currently characterised by the blurring of the distinction internal/external (Burgess 2009), since competences that were traditionally states' responsibilities are shifted to the realm of interstate cooperation, and duties that were traditionally carried out by the military are increasingly demanded of other institutions. As far as the analysed measures are concerned, hence, "security" covers the tasks traditionally understood as internal security – consisting in fighting criminality, addressing in particular serious crimes and terrorism – although this is now not carried out exclusively by states' security agencies.

Normatively, security in this context refers therefore to a state of safety, of not having one's life or physical integrity or property being threatened by criminals. However, as we have seen, the factual connection to such circumstances (i.e. that the analysed measures have been introduced primarily in order to and are effective in achieving this kind of security) can be questioned. This ambiguity opens the way to interesting questions such as the status of security as a value and in particular its being a "thin" or rather a "thick" concept (Williams 1985). It might be argued, indeed, that the semantic ambiguity of "security" is a signal for its "thinness". According to this hypothesis, "security" would be a concept with a high normative content but a low descriptive value. This is not the place, however, to further discuss and verify such hypothesis. What can be argued is that the semantic indeterminacy of "security", coupled with its strong normative character, acts as a powerful instrument to promote specific agendas. In the context of this chapter, as we have seen, this has meant to foster surveillance practices related to data retention such as the SIS and its transformation into the SIS II. With the words of Charles Raab:

> the pursuit of this value [security] permeates a wide range of social relationships and organisational practices, and gives advantages to certain elites and aspirant interests whose claim to resources and power is that they have the expertise, vision and means to make us safe and secure. It acts as a powerful motivator for decision-making in a vast array of domains in which, increasingly, those decisions involve the application of privacy-invasive surveillance, and in which objections are difficult to voice (2014, 13).

6. Conclusion

Security with all its indeterminacy, therefore, appears to be a central element of the legitimacy claim advanced by the EU in a phase that, like the current one, is characterised by a continuous reorganisation and

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Elisa Orrù, Maria Grazia Porcedda, Sebastian Weydner-Volkmann (eds.), Rethinking Surveillance and Control. Beyond the 'Security vs. Privacy' Debate. Nomos: Baden-Baden 2017

redistribution of competences. It is a key element for the EU for redefining its competences towards the formation of power structures that are meant to be durable and are characterised by a higher supranationality compared to the past.

As we have seen, moreover, the security measures implemented in the EU often consist in surveillance activities, such as the ones in the focus of this chapter. These activities can obviously affect individuals' privacy and other fundamental rights and liberties. However, rather than focussing on the potentially conflicting relationship between surveillance and individual rights, this chapter focussed on what one could call a macro-structural level. The purpose of this chapter was indeed to explore what current surveillance practices can tell us on the institutional developments in Europe and on the form of power that is delineating itself in the EU. It emerged that security, as a rationale for introducing surveillance activities, is a key element for legitimising such developments.

The centrality that security gained in the EU in recent decades is also well attested in the texts that define the central strategies of the EU, such as the Amsterdam treaty of 1997, which introduced the AFSJ, and the Hague Programme of 2005, which put the fight against terrorism and organised crime among the ten EU priorities for the following five years.[22] These documents confirm at the theoretical level the trend according to which the EU considers itself an increasingly central actor in guarantying citizens' security. However, an analysis that would have considered only these official documents would have not been able to recognise the role that security plays in the contemporary process of EU restructuring. Only by following Arendt's indication to look to praxes, to "facts and events", was it possible to appreciate the pragmatic function of security in enabling the expansion of the EU competences, even beyond the limits posed by its core treaties.

Remarks

Unless otherwise specified, quotations from foreign languages have been translated by the author. For a shorter version of this chapter see: E. Orrù (2015), Sorveglianza e potere nella Unione Europea, Filosofia Politica 29: 459-474.

22 Communication from the Commission to the Council and the European Parliament - The Hague Programme: Ten priorities for the next five years. The Partnership for European renewal in the field of Freedom, Security and Justice /COM/2005/0184 final of 10/05/2005.

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Elisa Orrù, Maria Grazia Porcedda, Sebastian Weydner-Volkmann (eds.), Rethinking Surveillance and Control. Beyond the 'Security vs. Privacy' Debate. Nomos: Baden-Baden 2017

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