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### Which European Public Order? Sources of Imbalance in the European Area of Freedom, Security and Justice

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# Which European Public Order? Sources of Imbalance in the European Area of Freedom, Security and Justice<sup>1</sup>

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**ABSTRACT** *The creation of the Single European Market has been accompanied by an intense discussion on whether market-creating measures have been privileged over market-correcting ones by the institutional system of the EU. The creation of an 'Area of Freedom, Security and Justice' (AFSJ) launched by the Treaty of Amsterdam poses a similar question which, however, has remained heavily under-researched: will the balance between policing competencies and individual rights shift towards the former at the expense of the latter? Recent work on the 'new raison d'état' and the strengthening of national executives in processes of Europeanisation points in this direction. This essay explores the parallels between the Common Market and the AFSJ with regard to the relationship between the structures and substance of governance. The balance between security and individual rights is scrutinised in the main pillars of the AFSJ: asylum cooperation, judicial cooperation in criminal matters and police cooperation.*

## Introduction

The creation of the Single European Market (SEM) has been accompanied by an intense discussion on whether market-creating measures are privileged over market-correcting measures by the institutional system of the EU.<sup>2</sup> The results of such an imbalance would be alarming to everybody concerned with the welfare state and a 'European social model'. The creation of an 'Area of Freedom, Security and Justice' (AFSJ) launched by the Treaty of Amsterdam (1997/1999) poses a similar question: will the balance between security considerations and individual rights shift towards the former at the expense of the latter? The tension between security and freedom is constitutive of any liberal democracy, and the balance found between these two paradigms has differed across time and across states. What is the balance between security and

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freedom in the emerging European multilevel polity and its endeavours to create a European public order? Which are the factors impacting on this balance?

Justice and Home Affairs (JHA) are amongst the most recent areas of cooperation in the EU and have rapidly developed from a peripheral aspect into a core priority of the European integration process. The rise of Justice and Home Affairs symbolises the shift from a predominantly economic to a political Union. In recent years, this symbolic shift has been taken up as a new source of legitimisation for further European integration. This is reflected in the Commission's Assessment of the Tampere Programme in June 2004, which described the creation of an Area of Freedom, Security and Justice as 'one of the most outstanding expressions of the transition from an economic Europe to a political Europe at the service of its citizens'<sup>3</sup>. The Convention drafting the Constitutional Agreement coined the phrase of an emerging 'European public order', which shall respond to the citizens' desire for security and reflect the values of freedom and justice to which the Union is committed.

Indeed, over the last 15 years, a considerable amount of common instruments, cooperation frameworks, networks and agencies have developed, which have led scholars to compare the dynamism implied in the creation of an AFSJ with that of the Single Market.<sup>4</sup> Originally developed at a purely intergovernmental level, this cooperation has gradually been brought closer to the structures of the European Community and its supranational procedures. External events, such as the Kosovo refugee crisis or the terrorist attacks of 11 September 2001, have been catalysts in this development. Yet, in contrast to many other areas of European integration, inter- or trans-governmental forms of governance between ministerial and operational actors below the level of state representatives have proved particularly resilient in this policy field, opening these actors to new contexts for cooperation beyond public and judicial scrutiny.<sup>5</sup>

This essay argues that the multilevel, incomplete EU polity has opened up an arena in which law-enforcement agencies of the member states have been able to prioritise securitarian objectives over the protection of individual rights and liberties in Justice and Home Affairs. The theoretical explanation for this development rests in a combination of intergovernmentalist accounts on the new *raison d'état* in the processes of Europeanisation with an institutionalist analysis of the structural determinants, which favour securitarian over liberal orientations. Here, as well as in the subsequent empirical analysis, we will draw a number of analogies with the development of the Single Market, which have favoured a neoliberal agenda over social-democratic goals. We start with a general discussion of the dynamics of internationalisation and securitisation in JHA. We then retrace the permeation of specific modes of governance known from the Single Market to the AFSJ and highlight their effects on the balance between freedom and security in policy-making. The final section documents these dynamics in the three main pillars of the AFSJ: asylum policy, judicial

cooperation in criminal law, and police cooperation. This analysis will point at the limits of what shall become the European public order in the incomplete European polity.

### **Europeanisation and Securitisation**

Influential strands of the International Relations and European Studies literature see cooperation and integration as a progressive achievement over the retrograde forces of nationalism. This is especially the case for liberal and functionalist scholars, who emphasise the higher collective rationality of cooperative arrangements. Particularly since the Danish voters' rejection of the Maastricht Treaty in 1992, and most forcefully since the French and Dutch 'no' to the Constitutional Treaty, however, scholars of European Union politics have become more concerned with a 'dark side of intergovernmental cooperation',<sup>6</sup> namely that 'international cooperation tends to redistribute domestic political resources toward executives'.<sup>7</sup> Whereas the 'Community method' of European integration tends to give the Commission, the European Parliament and the European Court of Justice a certain counter-balance to the predominance of national executives in the Council of Ministers, JHA is a field characterised by an inter- or transgovernmental mode of policy making.<sup>8</sup>

From this perspective, internationalisation may have the counter-intuitive effect to 'strengthen the executive by establishing an additional political arena which is dominated by government representatives'.<sup>9</sup> This interpretation contradicts conventional accounts of international cooperation, which associate it with a loss of state autonomy and transfers of sovereignty. Government representatives gain autonomy, because their action at the international level is shielded from the pluralistic domestic arena, where they compete with other actors on the 'right' interpretation of social problems and the balance between competing policy objectives, such as considerations of security versus individual rights. By acting jointly at the intergovernmental level, national executives gain an information advantage over their domestic counterparts and act in the capacity of gatekeeper. Usually gathering representatives from the same ministries, intergovernmental cooperation frameworks are often relatively homogeneous and thus favour particular policy options over others. According to this logic, the purpose of international cooperation hence is not necessarily the search for functionally superior collective policy solutions, as conventional cooperation theory would predict. Nor is it the search for effective and legitimate governance at a higher level, as the more recent governance literature scrutinises.<sup>10</sup> The 'escape to Europe' rather results from a 'new *raison d'état*',<sup>11</sup> which consists of the strengthening of particular governmental actors and their preferred policy agenda over other parts of the domestic constituency, including other sections of the public bureaucracies, but also parliament, political parties or courts. In the field of law and order, this shift is anything but trivial, since it amounts to a reorganisation of the core of statehood, the monopoly over the

legitimate use of violence (Weber), beyond the embedded liberalism of the nation state.<sup>12</sup>

The autonomy-generating effects of internationalisation are especially strong for democratic states, and may be particularly important in fields that are close to their liberal core, such as justice and home affairs. In the area of immigration policy, several authors have convincingly argued that two features of liberal democracies, the existence of heterogeneous (organised) interests and the legal rights conferred to different classes of migrants impose strict limits on the scope of domestic policy reforms—and for the attempt to reject ‘unwanted immigrants’.<sup>13</sup> Recent analyses of European cooperation in asylum and immigration matters confirm the autonomy-seeking behaviour of JHA officials acting at the European level. Highlighting the interplay between domestic politics and the developing European agenda, it was shown that the shift ‘upwards’ towards transgovernmental cooperation was motivated less by the goal of a truly supranational immigration policy. Instead, it followed the desire of particular sections of national bureaucracies to circumvent domestic obstacles to political reforms, which resulted from the constitutional foundations of humanitarian policy frames and their defence by political parties, the courts and fellow ministries.<sup>14</sup> Guiraudon aptly coins this strategy as an instance of ‘venue-shopping’ through vertical policy-making. Apart from opening new venues, the EU, as a normative project, also provides a powerful source of legitimacy for such shifts. In the area of immigration this became very clear, for example in a ruling of the German Constitutional Court of 1996, which justified limitations of the constitutional asylum right as a basis for a comprehensive European refugee policy aiming at the establishment of a system of burden-sharing among the participating states—a distant goal still ten years later.<sup>15</sup>

Similar dynamics are also at play with other aspects of JHA, such as the current Draft Framework Decision on communications data retention, which is not only hotly debated among human rights activists,<sup>16</sup> but has met with fierce rejection in the European Parliament.<sup>17</sup> The attempt by the British Home Secretary Clark (during Britain’s EU Presidency) to persuade the Parliament of this instrument is symptomatic of the securitisation discourse surrounding JHA: ‘In conclusion, I believe that “no” votes against the Constitution should be taken as a wake up call to those who believe and support the value of the European project to focus on what matters. The right to safety and security is a fundamental concern for our citizens. Here we can show that Europe can and does deliver real benefits.’<sup>18</sup>

Even when agreements require ratification by national governments, such as Europol’s protocol on privileges and immunities, rejection faces prohibitive costs once an agreement has been reached. Members of the Bundestag, the German Parliament, were extremely concerned about granting immunity to Europol officers. Nevertheless, the protocol was ratified because the Europol convention could not enter into force otherwise and a strengthening of Justice

and Home Affairs was considered to be an important part of Germany's EU policy. According to Wilhelm Knelangen, the government was 'in a superior position because by pointing to Germany's broader interests in EU politics, it could confer additional legitimacy on an issue that was heavily debated domestically'.<sup>19</sup>

There is no doubt that questions of immigration, organised crime or terrorism have become securitised.<sup>20</sup> The notion of securitisation does not a priori deny the presence of threats, but emphasises the social processes by which issues become perceived and handled as security matters.<sup>21</sup> By 'securitising' an issue, governments claim special prerogatives in dealing with it. Our argument is that by insulating actors interested in the maximisation of internal security from those concerned with the safeguarding of individual rights, and offering a 'compensatory' normative frame of legitimation, Europeanisation contributes to a securitisation of the issues falling under the heading of JHA.

Mitsilegas, Monar and Rees have shown that the discourse within the European Union is indeed biased towards security. At first glance, the Area of Freedom, Security and Justice envisioned in the Amsterdam Treaty comprises three aims on an equal footing. However, Mitsilegas, Monar and Rees demonstrate that the concept of security 'appears to underpin the concepts of both freedom and justice'. They are concerned that this discourse 'may lead to a proliferation of repressive, undemocratic measures which potentially threaten civil liberties and are justified through recourse to the elusive and easily manipulated premise of 'freedom from threat'.<sup>22</sup> The same criticism was voiced more recently by the UK's House of Lords in its recent Report on the Hague Programme laying down the objectives for JHA cooperation for the next five years: 'Criticism of the Hague Programme for placing undue emphasis on security considerations at the expense of respect for fundamental right is justified. ... it is important that measures to protect citizens' rights are not sidelined in the implementation of the Programme.'<sup>23</sup>

As we argue below, this bias is not only due to the autonomy-seeking behaviour of law and order officials in the multi-level constituency (as the new *raison d'état* argument would say), but also to the specific institutional framework of the EU, and the diffusion of market-based modes of governance to the domain of public order.

### **Negative and Positive Integration**

The idea that Europeanisation privileges particular policy frames resonates with the vast literature on the governance of the Common Market and its bias towards neoliberal orientations. Fritz Scharpf in particular has argued that the creation of the Common Market has been facilitated by a combination of treaty commitments based on a neoliberal ideology and the empowerment of supranational actors in implementing them. Particularly since the mid-1980s, the European Commission has become more proactive in pushing back

impediments to the free movement of goods, services, capital and people. In doing so, the Commission was supported by the adjudication of the European Court of Justice. Most importantly, in a 1979 landmark decision ('Cassis de Dijon') the European Court of Justice established the principle of mutual recognition which removed an important obstacle to intra-European trade, namely the pluralism of national standards. As a consequence, market-creating measures have become feasible without the explicit approval of the member states whenever a national regulation is brought to the European Court of Justice, which then declares the regulation to infringe upon the treaties.

In contrast to these measures of 'negative integration', however, measures of 'positive integration' were hampered by more demanding decision-making procedures. Most importantly, market-correcting measures required the explicit approval of the Council, deciding by either unanimity (for example on minimum indirect taxes) or by qualified majority (for example on environmental regulation).

The AFSJ project shows remarkable similarities to the Common Market project. The most obvious one is the adoption of the principle of mutual recognition. Although already endorsed with regard to asylum policy since the 1990 Dublin Convention, at the 1999 Tampere European Council the member states declared that 'mutual recognition' should 'become the cornerstone of judicial co-operation in both civil and criminal matters within the Union'.<sup>24</sup> With the implementation of this principle, a major obstacle to cross-border law enforcement is removed because different national criminal codes (such as gathering evidence, pre-trial detention, standards of proofs and punishment, judicial records) no longer obstruct judicial cooperation between member states. Thus, mutual recognition in judicial cooperation can be expected to have the same effect as in the Common Market: differing standards, for example regarding defendants' rights, no longer inhibit the transnational prosecution of suspects. However, one important caveat has to be mentioned: for the creation of the Common Market, the principle of mutual recognition has been made particularly effective by endowing the European Commission with the exclusive right to make legislative proposals and by empowering the European Court of Justice to review member states' compliance with their commitments. In contrast, the supranational institutions have been deliberately marginalised in EU internal security politics. As a result, the principle of mutual recognition cannot be enforced against member states' opposition and accompanying 'positive integration' measures, such as the approximation of laws, are much more difficult to obtain.

As documented in the empirical analysis below, the application of the principle of mutual recognition in core areas of national sovereignty is indeed delicate as it presupposes recognition of the 'equivalence', 'compatibility' or (at least) 'acceptability' of a counterpart's public order.<sup>25</sup> The fact that its introduction in the area of criminal law was proposed by the UK in order to facilitate cooperation without harmonisation suggests that this instrument does

not challenge the states' sovereignty. Yet, as Kalypso Nicolaidis suggests, mutual recognition 'is meant to respect sovereignty on the one hand' (by foregoing the option of total harmonisation and centralisation), 'while radically reconfiguring such sovereignty on the other'—by delinking the exercise of authoritative power 'from the territorial anchor of sovereignty'.<sup>26</sup> From this perspective, the exercise of mutual recognition constitutes 'a reciprocal allocation of jurisdictional authority to prescribe and to enforce'<sup>27</sup> or a 'horizontal transfer of sovereignty'.<sup>28</sup>

As with the Single Market, negative integration and mutual recognition presupposes a number of 'market-correcting' or positive integration measures. These usually take the form of minimum standards, which are binding on all Member States. As Majone argues, harmonisation (or approximation through minimum standards) and mutual recognition are complementary mechanisms of integration.<sup>29</sup>

In the AFSJ, the principle of mutual recognition is based on the assumption that the member states meet the standards of human rights protection set out in the European Convention on Human Rights (ECHR).<sup>30</sup> Yet, this of course does not preclude important differences in substantive and procedural asylum or criminal law in the member states, which renders the comparability of jurisdictions questionable (see the examples below). As shown below, there is also no EU mechanism so far for monitoring and ensuring that these principles are observed in practice in the member states. Other problems with this line of reasoning arise from the inconsistent ratification by the member states of Protocol 7 ECHR, which contains some fundamental due process rights.<sup>31</sup>

The need for minimum standards in the AFSJ has been recognised, but faces much higher institutional (and probably also ideational) hurdles towards adoption than in the Single Market. This is due to the specific modes of governance that have emerged in this area, which reflect member states' concern to safeguard sovereignty over these core aspects of statehood and which have been referred to as intensive transgovernmentalism.<sup>32</sup> Supranational procedures that ease the adoption of common binding measures have been introduced only for those issues falling under the 'first pillar' and have become effective only from 2005 onwards. Until then, and still for all other issues remaining in the third pillar, the Commission has to share its right of initiative with the member states, the Council decides by unanimity, and the European Parliament has no right of co-decision. Whereas after the Amsterdam Treaty there has been a shift from non-binding forms of cooperation to legally binding instruments, a second specificity of this field is the considerable importance of operational cooperation and coordination below or beyond legislative action. This operational cooperation, which is not further defined in the treaties, occurs through little accountable networks of justice and home affairs officials in form of common operations such as border controls or joint investigations, or through the creation of special agencies and coordination bodies such as the European police service, Europol, the European body for



judicial cooperation, Eurojust, the European Agency for the Management of Operational Cooperation at External Borders, the Task Force of Police Chiefs. Finally, JHA cooperation continues to be promoted outside the institutional framework of the EU. The most recent transgovernmental initiative is the conclusion of the so-called ‘Schengen III’ Treaty among Belgium, Germany, Spain, France, Luxembourg, The Netherlands and Austria in May 2005. Although the EU Treaty provides for the possibility of enhanced cooperation, this initiative will contribute to the deepening of cross-border cooperation, in particular in the fields of the fight against terrorism, cross-border criminal activities and illegal migration, outside the EU framework, at a purely transgovernmental level.

Due to this hybrid pattern of transgovernmentalism, supranational policy-making and operational cooperation between law enforcement agencies, JHA opens a considerably greater leeway for the ‘escape route’ of internationalisation identified by authors such as Klaus-Dieter Wolf and Andrew Moravcsik as discussed above. Firstly, the rule of unanimity renders any legally binding agreement which is higher than the lowest common denominator unlikely, even if the initial proposal by the Commission is more balanced. The weakness of judicial and parliamentary control adds to this. This is clearly visible in all ‘minimum standards’ which have been adopted so far in the now ‘communitarised’ areas of asylum and immigration.<sup>33</sup> In the area of criminal justice, too, the introduction of mutual recognition has preceded the adoption of common legal and procedural standards—and many member states indeed see it as an alternative to common measures. Apart from the weakness of harmonisation measures, the second feature of intensive transgovernmentalism, the importance of operational cooperation, excludes a priori the occurrence of positive integration, and with it that of legal scrutiny through the European Court of Justice. Instead, the philosophy backing this cooperation is that trust and compatible standards of rights and punishments will occur ‘by default’ through the socialising impact of every-day interaction. The analysis below shows the limits of ‘negative integration’ in these core functions of statehood, not only in terms of practical implementation, but also democratic accountability and legitimacy.

### **Gaps and Imbalances in the Area of Freedom, Security and Justice**

This section highlights the problems implied in establishing an AFSJ on the basis of negative integration and mutual recognition and identifies some of the gaps emerging from the attempt to shift refugee protection, criminal prosecution or police cooperation out of the constitutional framework of the nation state. Whereas in all three areas, Europeanisation has entailed a vast array of measures, we focus on three core instruments: the system of responsibility allocation for asylum procedures (Dublin Convention and Regulation); the EU’s extradition regime based on the European arrest warrant; and Europol’s

personal data regime. The conclusion of this essay recapitulates the limits of these instruments and addresses the prospects for a redress of this bias towards internal security to the benefit of individual rights and civil liberties.

### *The European Asylum System*

Asylum is an intriguing institution from the point of view of human rights and state sovereignty. Unlike the broader phenomenon of migration, which occurs on a voluntary basis, the notion of asylum derives from international human rights and republican understandings between the state and the people. Together with the right to family unity, the right to seek asylum constitutes the only exception to the sovereign right of states to select the admission of non-nationals on their territory. This exception is codified in the customary norm of non-*refoulement*, which prohibits the return of individuals to a place where they fear inhuman or degrading treatment or punishment or persecution on defined grounds.

The core of the so-called European asylum system is a system of responsibility allocation for the examination of asylum claims between the member states, codified first in the 1990 Dublin Convention and since 2003 the so-called Dublin II Regulation.<sup>34</sup>

This system establishes objective criteria, which determine the single responsibility of only one member state for the examination of an asylum claim. The other member states are then dispensed from their obligations towards the applicant and may hand over the person to the responsible state. Although officially the term of mutual recognition has not been applied to this system, the member states implicitly acknowledge recognition of the others' asylum determination procedures when applying this rule. The 'Dublin' system thus breaks with the basic principle of international refugee law, which centralised the responsibility not to *refoule* as well as the right to grant asylum within the sovereign state. This principle is replaced by an unspecified notion of transnational responsibility based on the mutual recognition of asylum systems.

As with the other areas of JHA, where mutual recognition was later formally introduced, this exchangeability of legal responsibilities and liberal commitments is not self-evident. In a number of countries, the ratification of the Dublin Convention entailed the introduction of a formal exception to the constitutional asylum right. Furthermore, its implementation presupposes the equivalence or at least compatibility or acceptability of asylum determination standards among the member states. In reality, however, there is great variation between the level of procedural safeguards granted during the asylum procedure and in the interpretation of what constitutes a refugee. Such difficulties have been pronounced prominently by British courts. The Court of Appeal stated in 1998 that the discrepancies of approach between the various Member States to the criteria of protection should not to be taken into consideration unless deemed 'outside the range of tolerance' and unless

affecting proper application of the Geneva Convention (R v. SSHD, ex parte Iyadurai, 1998 INLR 472). In 1999, the Court of Appeal quashed the Home Office's decision to transfer several applicants to France and Germany on the basis that these two countries do not acknowledge persecution by non-state agents as grounds for granting refugee status. In its decision (R v. SSHD, ex parte Adan, Subaskaran and Aitseguer, 1999 INLR 472), the Court noted that the applicants concerned could, in principle, have been entitled to refugee status in the United Kingdom, whereas this was not possible in Germany and France because of their restrictive policies.<sup>35</sup> Of course, the cases of rejected asylum seekers who would have had better chances to be admitted in another Member State than that determined as responsible under the Dublin system are not known.

Although the need to harmonise procedural and substantive law had been stressed early on by the Commission and the European Parliament, it took eight years after entry into force of the Dublin Convention to draft a directive on asylum procedures,<sup>36</sup> which is however still not formally adopted. The draft report of the European Parliament's Committee for Civil Liberties is indicative of the limits of this 'positive integration' measure. Although conceding that the need for such a directive was undisputed, it argued that various provisions in the proposal are a threat to human rights standards and principles of refugee law, because they contained too many exceptions. The Rapporteur also complained that the Council had not consulted the EP before reaching political agreement and asked the Committee to consider whether legal advice should be sought on challenging the Directive before the European Court of Justice.<sup>37</sup> These concerns have been echoed by the United Nations High Commissioner for Refugees, the international agency in charge of the international refugee regime, who has found the draft asylum procedures directive to be in breach with international law.<sup>38</sup>

### *The Governance of Extradition*

Extradition is the most important means of international legal assistance in criminal matters. Its reform was therefore assigned high priority by the EU member states. After having reached a general agreement on the principle of mutual recognition at the Tampere European Council in 1999, the European arrest warrant that the member states endorsed in late 2001 was the first application of this principle.

Before the arrest warrant was introduced, manifold obstacles to extradition were in place: the principle of sovereignty has emphasised that states do not share a common legal order, but that each of them has a distinct legal order of its own which is not necessarily respected by other states. Because another state's legal order is generally perceived as 'alien', there is no reason why a state should contribute to its effectiveness by extraditing persons who have fled its jurisdiction. As a consequence, the decision whether to grant extradition to

another state has traditionally been an exclusive right of sovereign states. Even in constitutional states in which governments may not extradite a person if the presiding court has denied its admissibility, governments remain free to refuse extradition where it is admissible. Instead of extraditing, states may grant asylum to the requested person. In practice, however, states have passed a large number of bilateral treaties that are usually guided by the following principles: first, extradition is only granted on the condition that the requesting state will do the same in comparable cases (principle of reciprocity or *do ut des*). Second, a person is extradited only if the offence under consideration is punishable in both the requesting and the requested state (principle of double or dual criminality). This principle highlights the perceived 'alienness' of other states' legal orders, which necessitates a new examination of whether the requested person can be considered a fugitive from justice in the first place.

Spain took a leadership role in establishing the mutual recognition of court judgements as a new principle in European extradition law. According to that principle, states consider each other's legal and judicial system trustworthy enough as to recognise any request for extradition without the many reservations that have remained part of European extradition law. The principle of mutual recognition implies the abolition of the principle of double criminality: a person must be extradited even if the offence under consideration is not punishable in the requested state. The principle of mutual recognition thus serves to enhance the security in areas that pose a particular problem in some though not all members states, for example membership in terrorist organisations for which some member states do not have respective legislation.

At the 1999 special European Council in Tampere, the member states endorsed the principle of mutual recognition as a basis for future judicial cooperation.<sup>39</sup> The European Commission's 'proposal for a European arrest warrant',<sup>40</sup> which the Tampere European Council had asked for and which has been based on the principle of mutual recognition, was tabled in September 2001. Under the impression of the terrorist attacks on New York and Washington, agreement was reached within an extraordinarily short period of merely three months. The most important feature of the European arrest warrant is that the requirement of dual criminality, which had been the most prominent impediment to extradition, is replaced with the principle of mutual recognition of court judgements among EU member states. Moreover, extradition is facilitated by abolishing the political phase inherent in any extradition procedure and by allowing for direct communication between the issuing and the executing judicial authorities. Without doubt, the European arrest warrant improves the prosecution of suspects by eliminating the most common obstacles for extradition among the EU member states. The arrest warrant has been designed to bring criminals to court, who would otherwise escape justice because of obstacles in the extradition procedure. In this regard, the arrest warrant is a welcome innovation to make extradition among the EU member states more effective.

However, there is a thin line between making existing criminal law more effective on the one hand and making it less liberal on the other hand. Two cases, both concerned with the persecution of terrorists, may serve as examples. In the first case, the arrest warrant has served to close down a loophole in the combat of terrorism; in Belgium, membership in a terrorist organisation had been no crime. As a consequence, members of terrorist organisations tended to use Belgium as a 'safe heaven' from persecution. The European arrest warrant now obliges the Belgian authorities to arrest and surrender persons, who are regarded as members of terrorist organisations in other EU countries.

The second case concerns Mamoun Darkanzali, who was born in Syria, later became a German citizen and who was suspected of having provided logistical and financial support to Al Qaeda. However, although German intelligence collected evidence against Darkanzali, this evidence did not suffice to bring Darkanzali to court. What is more, a Spanish request to extradite Darkanzali was turned down, because German law did not allow for the extradition of nationals. After the European Arrest Warrant had come into force, however, the Spanish request was successfully renewed and, in October 2004, German police arrested Darkanzali. In Spain, the burden of proof to arrest terrorist suspects is reported to be lower. The European Arrest Warrant has made it possible to have Darkanzali arrested on the basis of this lower burden of proof. Darkanzali was not surrendered, however, because the Federal Constitutional Court declared Germany's European Arrest Warrant Act invalid. According to the Court, 'the legislature has not exhausted the margins afforded to it by the Framework Decision on the European arrest warrant in such a way that the implementation of the Framework Decision for incorporation into national law shows the highest possible consideration in respect of the fundamental right concerned' and 'infringes the guarantee of recourse to a Court' because the decision to grant extradition could not be challenged.<sup>41</sup>

The fact that the European Arrest Warrant obliges member states to arrest persons for offences that are not necessarily punishable in the arresting state has raised concerns in many member states. Line Barfod of the Danish Enhedslisten worried that mentally disabled or ill criminals who receive special treatment in Denmark would have to be surrendered to common criminal treatment in other member states.<sup>42</sup> The German weekly magazine *Der Spiegel* claimed that a Dutch doctor who actively assisted a terminally ill German in medicide in the Netherlands would not commit a crime according to Dutch law, but could nevertheless be surrendered to Germany for manslaughter. According to a German criminal lawyer, the European Arrest Warrant makes the most punitive law prevail across Europe.<sup>43</sup> The problem may be compounded, if prosecutors across the EU member states use Eurojust to issue arrest warrants in those countries in which the burden of proof is the lowest.<sup>44</sup>

Extradition politics also illustrates the obstacles in adopting measures of positive integration that are designed to re-balance law enforcement and individual rights. The Commission has recognised that the introduction of a

European Arrest Warrant (and the progressive implementation of the principle of mutual recognition) should be accompanied by common standards of defendants' rights because

mutual recognition can only operate effectively in a spirit of confidence, whereby not only the judicial authorities, but all actors in the criminal process see decisions of the judicial authorities of other Member States as equivalent to their own and do not call in question their judicial capacity and respect for fair trial rights.<sup>45</sup>

Thus, the Commission has proposed a Framework Decision on procedural rights applying to proceedings in criminal matters throughout the EU.<sup>46</sup> The proposal calls for minimum standards of access to legal advice, to interpretation and consular assistance as well as for notifying suspected persons of their rights ('letter of rights'). However, the prospects of having the proposal adopted are rather low, given that a unanimous decision is required.

#### *The Personal Data Regime in Police Cooperation*

The European Police Office (Europol) has no executive powers. Thus, Europol officers may not arrest suspects or conduct house searches. Instead, Europol's main task has been the exchange and analysis of data that are related to severe forms of transnational crime.<sup>47</sup> For that purpose, several data systems have been established in The Hague. Europol's information system assembles data on suspected and sentenced persons. Member states' police officers can access the information system via national liaison bureaus. More important, however, are Europol's work files that are more comprehensive than files in the information system. In addition to data on culprits, data on possible witnesses, contact persons and victims may also be collected. Moreover, sensitive data, such as ethnic origin, political or religious convictions, health and sexual preferences, may be stored. Access to these work files is strictly limited to Europol officers working in specific task forces, for example on 'money laundering' or 'Iraqi Kurds'. Work files are designed to investigate the structures of organised crime, the results of which are then presented to the member states which in turn can initiate investigations. Europol obtains data from the member state police, third states and international organisations.

Although Europol officers may not arrest anybody or conduct house searches, Europol's data processing activities directly touch upon individual rights. Data protection therefore plays a prominent role in the Europol convention: first, the communication of data between the member states and Europol is based on the respective member state's data protection regime. Thus, data that may not be processed or stored according to national law, may not be shared with Europol either. Second, member states are obliged to ensure a standard of data protection that at least corresponds to the standards of the

Council of Europe's 'Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data' of 1981. As a consequence, the Council of Europe convention becomes a common minimum standard across the member states. Third, Europol itself is also obliged to 'take account of the principles of the Council of Europe convention' in 'the collection, processing and utilization of personal data' (art. 14 (3) Europol-convention). Fourth, operational agreements between Europol and third countries that include an exchange of personal data can only be concluded if the third country's level of data protection meets the standards of the Council of Europe convention. Finally, a 'Joint Supervisory Body' has been established to supervise the compliance with these provisions.

To be sure, the establishment of a common minimum standard for data protection has improved data protection in some countries of the EU. Although the Council of Europe convention had been signed by most of the then EU member states shortly after its negotiation, the ratification procedures in several member states may have been accelerated by the parallel ratification of the Europol convention. In the ten countries which became member states in 2004 the ratification of the Council of Europe convention may also have benefited from the obligation arising from Europol.

However, for EU member states with a data protection standard above the level of the Council of Europe convention, the Europeanisation of policing tends to undermine this standard. Most importantly, the police in such high-standard member states may, via Europol, receive personal data from colleagues from low-standard member states which they would otherwise, that is, according to their national standard of data protection, be prohibited from storing or processing. Moreover, obligations to delete data within certain periods can easily be circumvented. As a general rule, the institution responsible for an entry into TECS ('The Europol Computer System') is also in charge of its maintenance. This responsibility includes an obligation to delete data if they are no longer true or if the maximum storage time has expired. However, if another member institution adds further information to an entry, it also assumes the responsibility for maintaining this entry. As a consequence, data which would have been deleted according to the laws of the member state making this entry in the first place may stay in TECS, if a member state with longer maximum storage periods has updated this entry and thus assumed responsibility for its maintenance.<sup>48</sup> Finally, data processing at Europol is less constrained than data processing in high-standard countries. In Germany, for example, the Federal Constitutional Court has prohibited the use for repressive purposes of data that were collected for preventive purposes.<sup>49</sup> However, there is no such provision in the Europol convention. As a consequence, the German police may collect personal data for preventive purposes and may forward them to Europol. These data may then be processed by Europol's intelligence unit and may, in combination with further data from other member states, be reported back to the member states. In the final analysis and notwithstanding

the Constitutional Court's prohibition, data collected for preventive purposes could trigger investigations in Germany. Thus, a cornerstone of Germany's personal data regime has been undermined in the process of Europeanisation.

### Conclusion

Since the early 1990s, the economic orientation of European integration has increasingly been superseded by a security rationale. The EU's commitment to establish 'a high level of safety within an area of freedom, security and justice' in particular has triggered a multitude of activities to make policing and law-enforcement more effective in a European Union characterised by waning internal border controls and a concomitant perception of increased vulnerability vis-à-vis organised crime and other securitised phenomena, such as irregular migration. With this security rationale, the legitimisation discourse of the European Union has also changed. The need to both respond to the concerns of the citizens and guarantee a sentiment of 'European public order' has gained prominence. This discourse resonates with modern theories of the state, which, since the seventeenth century, have drawn on its capacity to provide security to its inhabitants.<sup>50</sup>

But what kind of 'European public order' is emerging? Reminiscent of the 'new *raison d'état*' thesis,<sup>51</sup> we argued that European integration opens up a transgovernmental venue which allows national justice and home affairs officials to pool their respective 'monopolies over the use of violence' while shielding them from the established liberal norms and procedures that limit this monopoly in national constitutions. As Elspeth Guild has put it, this system is incomplete, because 'it is only criminal judgements that have this power to cross the border without risk of further control. The individual's rights in respect of a criminal charge, trial, and sentence remain bound within the territory of each member state.'<sup>52</sup> There are strong parallels with the Single Market, in which goods, services, capital and EU citizens move freely, but where production standards, social policies or pension systems remain nationally bound. As we have argued, these parallels result from the diffusion of market-based mechanisms of integration from the economic to the political field, that is, an emphasis on negative integration and mutual recognition.

The mutual recognition of asylum procedures, criminal laws or warrants, however, presupposes a high level of mutual trust in the member states' judicial systems. As our cases show, even among near neighbours who have a long history of cooperation, this trust cannot be taken for granted.<sup>53</sup> As long as doubts remain about the proper respect for individual rights in other member states, courts are unlikely to accept other states' decisions without further scrutiny and citizens are unlikely to welcome such a Europeanisation of internal security cooperation as an advancement.<sup>54</sup> Thus, there is a strong case for the neofunctionalist notion that European cooperation in criminal law necessitates a common approach to defendants' rights, that European police-cooperation



'spills over' into European level controls of data protection and asylum cooperation needs an integrated asylum system. Legal approximation, as an alternative or complement to mutual recognition, would have the advantage of replicating the fundamental rights and guarantees found in national legal system at the European level, enforceable through supranational judicial control. The Treaty Establishing a Constitution for Europe would have been a first step in that direction, particularly by incorporating the Charter on Fundamental Rights into the Treaty and by giving the supranational institutions a greater role in justice and home affairs. Recent plans to set up a European Fundamental Rights Agency address the lack of monitoring mechanisms limiting the newly acquired powers of transgovernmental actors. Yet, it is not clear how far a mandate limited to the gathering and dissemination of information, as currently planned, will make a real value added to already existing human rights institutions.<sup>55</sup> Finally, there are also limits to legal approximation in these sensitive areas of national sovereignty, as the now communitarised cases of asylum and immigration policy show. Minimum standards are adopted on the lowest common denominator, and leave the member states enough leeway to maintain nationally diverging practices.

To conclude, our analysis has shown that internationalisation and the new *raison d'état* in European integration poses a challenge not only for the balance between state and market (Scharpf) or legislatives and executives (Wolf), but also a third fundamental asset of European liberal democracies, the balance between freedom and security. This raises the need to continue to study the transformation of statehood under the influence of internationalisation and Europeanisation, and to understand better the factors that contribute to a more balanced transformation process. The politicisation of European integration and the debates brought about by the Constitutional Treaty may be a first step in this direction, and contribute to closer scrutiny of the relationship between the modes and the substance of governance in the European Union.

## Notes

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<sup>2</sup> The works by Fritz Scharpf have been milestones in this discussion, for example F. Scharpf, *Governing in Europe. Effective and Democratic?* (Oxford and New York: Oxford University Press, 1999).

<sup>3</sup> Commission of the European Communities, Communication on the Area of Freedom, Security and Justice: Assessment of the Tampere Programme and Future Orientations. Brussels, 2.6.2004 COM (2004) 401 final.

<sup>4</sup> J. Monar, 'Justice and Home Affairs after Amsterdam: The Treaty Reforms and the Challenge of Their Implementation', in J. Monar and W. Wessels (eds), *The European Union after the Treaty of Amsterdam* (London and New York: Continuum, 2001), p. 294.

- <sup>5</sup> S. Lavenex and W. Wallace, 'Justice and Home Affairs. Towards a "European Public Order"?' in W. Wallace, H. Wallace and M. Pollack (eds), *Policy-Making in the European Union* (Oxford: Oxford University Press, 2005).
- <sup>6</sup> K. Wolf, 'The New Raison d'État as a Problem for Democracy in World Society', *European Journal for International Relations* 5/3 (1999), p. 333.
- <sup>7</sup> A. Moravcsik, 'Why the European Community Strengthens the State: Domestic Politics and International Institutions', *Center for European Studies Working Paper Series 52 1994* (Cambridge: Center for European Studies, 1994), p. 7.
- <sup>8</sup> H. Wallace, 'The Institutional Setting: Five Variations on a Theme', in H. Wallace and W. Wallace (eds), *Policy-Making in the European Union* (Oxford: Oxford University Press, 2000); Lavenex and Wallace, 'Justice and Home Affairs. Towards a "European Public Order"?'.
- <sup>9</sup> Wolf, 'The New Raison d'État as a Problem for Democracy in World Society', p. 336.
- <sup>10</sup> M. Jachtenfuchs, 'The Governance Approach to European Integration', *Journal of Common Market Studies* 39/2 (2001), pp. 221–240.
- <sup>11</sup> Wolf, 'The New Raison d'État as a Problem for Democracy in World Society'; K. Wolf, *Die Neue Staatsräson – Zwischenstaatliche Kooperation als Demokratietheorie in der Weltgesellschaft* (Baden-Baden: Nomos, 2000).
- <sup>12</sup> E. Guild, 'Crime and the EU's Constitutional Future in an Area of Freedom, Security and Justice', *European Law Journal* 10/2 (2004), pp. 218–234.
- <sup>13</sup> C. Joppke, 'Why Liberal States Accept Unwanted Immigration', *World Politics*, 50/2 (1998), pp. 266–293. See also G. Freeman, 'Modes of Immigration Politics in Liberal Democratic States', *International Migration Review* 29/4 (1995), pp. 881–902; V. Guiraudon and G. Lahav, 'The State Sovereignty Debate Revisited: The Case of Migration Control', *Comparative Political Studies* 33/2 (2000), pp. 163–195; S. Castles, 'Why Migration Policies Fail', *Ethnic and Racial Studies* 27/2 (2004), pp. 205–227.
- <sup>14</sup> V. Guiraudon, 'European Integration and Migration Policy: Vertical Policy-Making as Venue Shopping', *Journal of Common Market Studies* 38/2 (2000), pp. 251–271.
- <sup>15</sup> Rulings of the German Federal Constitutional Court, BVerGE 2 BvR 1938/93 and 2 BvR 2315/93 of 14.5.1996, §1.
- <sup>16</sup> European Digital Rights, Privacy International and Statewatch, NGO letter to the European Parliament on mandatory retention of communications data, 6 June 2005.
- <sup>17</sup> Questioning the proportionality of the measures, it writes that 'if all the traffic data covered by the proposal did indeed have to be stored, the network of a large internet provider would, even at today's traffic levels, accumulate a data volume of 20–40 000 terabytes. This is the equivalent of roughly four million kilometres' worth of full files, which, in turn, is equivalent to 10 stacks of files each reaching from Earth to the moon' ...! European Parliament, Committee on Civil Liberties, Justice and Home Affairs, *Draft Report*, Provisional 2004/0813(CNS), 18 April 2005, 8/9 available at <http://www.statewatch.org/news/2005/may/ep-data-ret-alvaro-report.pdf> last accessed 14 Oct. 2007.
- <sup>18</sup> C. Clark, *Speech to the European Parliament*, Brussels, 7 September 2005, available at <http://www.statewatch.org/news/2005/sep/03clarke.htm> last accessed 14 Oct. 2007.
- <sup>19</sup> W. Knelangen, *Das Politikfeld innere Sicherheit im Integrationsprozess* (Opladen: Leske + Budrich, 2001) (author's translation) p. 248.
- <sup>20</sup> J. Huysmans, 'The European Union and the Securitization of Migration', *Journal of Common Market Studies*, 38/5 (2000), pp. 751–777; B. Buzan, O. Wæver and J. de Wilde, *Security. A New Framework of Analysis* (Boulder, CO: Lynne Rienner, 1998).
- <sup>21</sup> For example the so-called 'Copenhagen School', in particular O. Wæver, 'Securitization and Desecuritization', in R. Lipschutz (ed.), *On Security* (New York: Columbia University Press, 1995), Buzan, Wæver and Wilde, *Security*; O. Wæver, 'Securitisation: Taking Stock of a Research Programme in Security Studies' (mimeo, 2003).
- <sup>22</sup> V. Mitsilegas, J. Monar and W. Rees, *The European Union and Internal Security. Guardian of the People?* (Basingstoke: Palgrave Macmillan, 2003), pp. 85, 86.

- <sup>23</sup> House of Lords, 'The Hague Programme: a five year agenda for EU justice and home affairs', §74. Tenth Report of the House of Lord's Select Committee on the European Union, London, 23 March 2005, available at <http://www.parliament.the-stationery-office.co.uk/pa/ld200405/ldselect/ldcom/84/8402.htm> last accessed 14 Oct. 2007.
- <sup>24</sup> Commission of the European Communities, Annex to the Communication from the Commission 'Area of Freedom, Security and Justice: Assessment of the Tampere programme and future orientations {COM(2004)401 final}' (SEC[2004] 693), Brussels.
- <sup>25</sup> K. Nicolaïdis, 'A World of Difference. Exploring the Dilemma of Mutual Recognition' (mimeo, 2005), footnote 4.
- <sup>26</sup> Nicolaïdis, 'A World of Difference', p. 3.
- <sup>27</sup> Nicolaïdis, 'A World of Difference', p. 4.
- <sup>28</sup> See also S. Schmidt, 'Notwendigerweise unvollkommen: Strukturprobleme des Europäischen Binnenmarktes', *Zeitschrift für Staats- und Europawissenschaften (ZSE)/Journal of Comparative Government and European Policy* 3/2 (2005), p. 190.
- <sup>29</sup> G. Majone, 'Mutual Recognition in Federal Type Systems', in A. Mullins and C. Saunders (eds), *Economic Union in Federal Systems* (Sydney: Federation Press, 1994), p. 83. See also Schmidt, 'Notwendigerweise unvollkommen: Strukturprobleme des Europäischen Binnenmarktes', p. 192.
- <sup>30</sup> S. Alegre and M. Leaf, 'Mutual Recognition in European Judicial Cooperation: A Step Too Far Too Soon? Case Study – the European Arrest Warrant', *European Law Journal* 10/2 (2004), p. 201.
- <sup>31</sup> Guild, 'Crime and the EU's Constitutional Future in an Area of Freedom, Security and Justice', pp. 218–234.
- <sup>32</sup> Wallace, 'The Institutional Setting: Five Variations on a Theme'; Lavenex and Wallace, 'Justice and Home Affairs. Towards a "European Public Order"?'.
- <sup>33</sup> See G. Brinkmann, 'The Immigration and Asylum Agenda', *European Law Journal* 10/2 (2004), pp. 182–199; E. Guild, 'Changing the Ground Rules. Reframing Immigration, Asylum and Security in the European Union', in A. Verdun and O. Croci (eds), *Institutional and Policy-making Challenges to the European Union in the Wake of Eastern Enlargement* (Manchester: Manchester University Press, 2005).
- <sup>34</sup> A. Geddes, *Immigration and European Integration: Towards Fortress Europe?* (Manchester: Manchester University Press, 2000); Guild, 'Changing the Ground Rules. Reframing Immigration, Asylum and Security in the European Union'.
- <sup>35</sup> Danish Refugee Council and European Commission, *The Dublin Convention. Study on its implementation in the 15 Member States of the European Union* (Copenhagen, 2001). Available at <http://www.flygting.dk/fileadmin/uploads/pdf/Materialer/dublin.pdf> last accessed 14 Oct. 2007.
- <sup>36</sup> Council of the European Communities, 'Amended proposal for a Council Directive on minimum standards on procedures in the Member States for granting and withdrawing refugee status', Doc. 14203/04 Limite of 9 November 2004.
- <sup>37</sup> European Council on Refugees and Exiles (ECRE), ECRAN Weekly Update of 17 March 2005, at <http://www.ecre.org/Update/Index.shtml>. Similar criticism has also been raised with regard to the minimum standards directives adopted in the area of legal migration (on family reunification and long-term residents, see Brinkmann, 'The Immigration and Asylum Agenda').
- <sup>38</sup> UNHCR, *UNHCR regrets missed opportunity to adopt high EU asylum standards*. Press release of 30 April 2004. Available at <http://www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.htm?tbl=NEWS&id=40921f4e4&page=news> last accessed 14 Oct. 2007.
- <sup>39</sup> Tampere European Council, 15 and 16 October 1999, Presidency Conclusions, especially No. 33 (Bulletin EU 10-1999).
- <sup>40</sup> European Commission, Proposal for a Council framework decision on the European arrest warrant and the surrender procedures between the Member States. COM (2001) 522 final/2, 25/9/2001 (OJ C 332 E, 27.11.2001, 305–319).
- <sup>41</sup> Federal Constitutional Court, Press release no. 64/2005 of 18 July 2005 on the judgment of 18 July 2005 (2 BvR 2236/04).
- <sup>42</sup> EUOberserver, 3 March 2004.

- <sup>43</sup> B. Schünemann, 'Europäischer Haftbefehl und EU-Verfassungsentwurf auf schiefer Ebene – Die Schranken des Grundgesetzes', *Zeitschrift für Rechtspolitik* 36/6 (2003), pp. 185–189.
- <sup>44</sup> P. Albrecht, 'Europäischer Strafrechtsraum: Ein Albtraum?', *Zeitschrift für Rechtspolitik* 37/1 (2004), pp. 1–32.
- <sup>45</sup> C. Morgan, 'The European Arrest Warrant and Defendants' Rights: An Overview', in R. Blekxtoon (ed.), *Handbook on the European Arrest Warrant* (Cambridge: Cambridge University Press, 2004).
- <sup>46</sup> Proposal for a Framework Decision on certain procedural rights applying in proceedings in criminal matters throughout the European Union, COM (2004)328 F of 28 April 2004.
- <sup>47</sup> For an overview of Europol's mandate and activity see J. Occhipinti, *The Politics of EU Police Cooperation* (Boulder, CO: Lynne Rienner, 2003).
- <sup>48</sup> B. Kremer, *Immunität für Europol-Bedienstete? Eine Untersuchung der Aufgaben und Befugnisse von Europol unter besonderer Berücksichtigung der Immunitätsproblematik* (Frankfurt/Main: Lang, 2001), p. 186.
- <sup>49</sup> BVerGE 100 [decisions of the Federal Constitutional Court, volume 100], p. 313.
- <sup>50</sup> Mitsilegas, Monar and Rees, *The European Union and Internal Security: Guardian of the People?*, p. 7.
- <sup>51</sup> Wolf, 'The New Raison d'État as a Problem for Democracy in World Society'; Wolf, *Die Neue Staatsräson*.
- <sup>52</sup> Guild, 'Crime and the EU's Constitutional Future in an Area of Freedom, Security and Justice', p. 220.
- <sup>53</sup> For other examples see also Guild, 'Crime and the EU's Constitutional Future in an Area of Freedom, Security and Justice'.
- <sup>54</sup> Eurobarometer data also reveal that large majorities of citizens in the EU member states favour EU-level decision-making in fighting organised crime but at the same time prefer to keep competences for police and justice at the national level.
- <sup>55</sup> On this see the critical Resolution of the Council of Europe Parliamentary Assembly no. 1427 of 18 March 2005, 'Plans to set up a fundamental rights agency of the European Union'.