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## **The *communitarisation* of the Area of Freedom, Security and Justice: has institutional change triggered policy change?**

### **Abstract:**

This article investigates whether institutional change—the gradual *communitarisation* of the Area of Freedom, Security and Justice (AFSJ)—has triggered policy change. A comparative view on the different AFSJ sub-policies nuances the widespread expectation that stronger involvement of the EU's supranational institutions would lead to more liberal and harmonised EU policies. The rationale and core of most, although not all, AFSJ sub-policies have remained stable, regardless of altered decision-making rules. We argue that the existence or absence of a 'settled' policy core in a given AFSJ sub-policy and the level of conflict/unity inside each EU institution have been central scope conditions, enabling or constraining the choices of actors. If a policy core had been defined before institutional change took effect, certain EU institutions - notably, the Council as the dominant actor of the early intergovernmental cooperation - found it easier to co-opt or side-line competing actors with other preferences.

### **Keywords:**

European Union; Area of Freedom, Security and Justice; institutional change; policy change; new institutionalism; EU institutions; decision-making processes.

### **Résumé:**

Cet article examine dans quelle mesure les changements institutionnels - la *communitarisation* progressive de l'espace de liberté, de sécurité et de justice (ELSJ) -peuvent entraîner des changements politiques. Une analyse comparative des différentes sous-politiques de l'ELSJ nuance l'idée reçue selon laquelle une forte implication des institutions supranationales de l'UE conduirait à des sous-politiques plus libérales et harmonisées. L'une des raisons principales expliquant ce phénomène est que les sous-politiques de l'ELSJ sont restées stables, indépendamment du changement de règles dans la prise de décision. Nous montrons ici que l'existence ou l'absence d'une base commune (policy core) aux sous-politiques de l'ELSJ et le niveau de conflit ou d'unité au sein de chaque institution de l'UE sont les conditions centrales permettant ou entravant les choix des acteurs. Si une base commune politique (policy core) a été définie avant l'entrée en vigueur des changements

institutionnels, certaines institutions de l'UE - notamment le conseil de l'union européenne, acteur dominant de la coopération intergouvernementale - peuvent plus facilement coopter ou court-circuiter d'autres acteurs en compétition avec eux.

**Mots clés:**

Union européenne; Espace de liberté, de sécurité et de justice; changement institutionnel; changement politique, néo-institutionnalisme; institutions européennes; processus de décision.

## Introduction

The EU's cooperation in the Area of Freedom, Security and Justice (AFSJ) touches upon core functions of statehood including the safeguarding of internal security, the control of national frontiers, and access of citizens and non-citizens (in particular migrants and asylum seekers) to justice and rights. Decision-making in this field therefore affects the level of (actual or perceived) security of individuals in Europe as well as their rights and liberties (Mitsilegas/Monar/Rees 2003).

Given the sensitivity of these issues, it comes as no surprise that the process of European integration has been characterized by a high level of political contestation. When policy-making on justice and home affairs (JHA) was still dominated by member states, the Council of the EU shared more security-oriented positions and tended to contrast with the European Parliament (EP) – more prone to put human and civil rights forward. Often in conjunction with the European Commission, the EP positioned itself as a ‘pro-migrant’ actor and a defender of civil liberties on issues such as data protection (Kaunert 2010: 142-143; Hix/Noury 2007: 202; Argomaniz 2009: 123-124). The influence of the EU's supranational institutions, however, was limited. Virginie Guiraudon (2000) conceptualized the EU's early cooperation as a form of ‘venue shopping’, in which like-minded strategic actors, typically from ministries of the interior, sought venues of decision-making at the EU level in which they were protected from domestic actors with other preferences. In this view, the EU was primarily used by national executives to ease the constraints that were exerted by constitutions, jurisprudence and laws at the domestic level. This particular set-up raised questions around the eventual shift to the ‘Community method’ (Dehousse 2011), which became a moot point in the AFSJ. The process of *communitarisation* thus became an object of study in itself (see, e.g., Kaunert 2010; Wolff/Goudappel/de Zwaan 2011).

This article presents the findings of a collaborative research project examining in a systematic, comparative and theory-informed way the impact of this process of *communitarisation* on the different sub-policies of the AFSJ, ranging from the migration field through organised crime to data protection (Trauner/Ripoll Servent 2015). The comparative analysis nuances the widespread expectation that a stronger involvement of the EU's supranational institutions would lead to more liberal and harmonised EU policies. The rationale and core of most, although not all, AFSJ sub-policies have remained stable, regardless of altered decision-making rules. We present and categorize the different pathways that have led to policy stability and change in the AFSJ; out of the possible mechanisms, ‘co-optation’ and ‘side-lining’ appear to

be the most common and successful pathways, which leads to policy stability being more prevalent than change.

Our analytical framework combines the insights of rational-choice and constructivist institutionalism. We focus on the behaviour of actors – in the present case EU institutions – when confronted with a change in their structural environment. We investigate how they make use of the new opportunity structure by decomposing inter-institutional negotiation processes. In addition, we examine whether or not they make an effort to legitimize their strategies and convince other actors that their solutions are the most appropriate ones. This focus seeks to overcome the structuralist bias present in many new institutionalist accounts and allows us to understand how and under what conditions actors' strategies lead to policy change or stability. Therefore, this research focus is not only of interest for the specialised literature on justice and home affairs (for an overview, see Boswell 2009), but also for more general debates on the role of EU institutions and dynamics of decision-making (Thomson/Stokman/Achen/König 2006; Farrell/Héritier 2007; Beach 2005; Loic/Dehousse 2012). With the changing involvement and decision-making powers of the EU's supranational institutions, the AFSJ provides a quite unique setting for contributing to this discussion.

## 1. Institutional change and policy change: a research framework

This section develops an analytical framework for investigating the impact of the *communitarisation* of the AFSJ on policy development.

### 1.1. Policy change

In a first step, it is necessary to specify what kind of policy change may occur in the AFSJ. Not all policy change is of equal importance. Kuhn's notion of a paradigmatic frame sets a cognitive hierarchy covering different levels of change depending on whether they affect 'metaphysical principles, specific principles, forms of action, and instruments' (Surel 2000). Hall (1993) adapts this notion of paradigm and defines three levels of change: a 'first order' policy change, which affects only the settings or levels of instruments used to reach a given policy goal; 'second order' changes that affect both the settings and the instruments themselves; while 'third order' change (the most unlikely to occur) affects the overall goals of a policy. In a similar fashion, Sabatier and Jenkins-Smith (1993) differentiate between a 'deep (normative) core', a 'near (policy) core' and 'secondary aspects' of a public policy. This differentiation is useful for distinguishing between far-reaching alterations in the development of a policy and minor legislative and administrative changes. Have the changes

concerned the 'core issues' of a policy or rather revolved around secondary aspects?

At times, smaller legislative changes or single events have been taken as indicators for the development of a given AFSJ sub-policy. A case in point has been the European Parliament's rejection of the EU-US Financial Messaging Data Agreement (the SWIFT Agreement) and its insistence on an overhaul of the Passenger Name Record Agreements (PNR) with third countries. These cases were among the first votes under the consent procedure in the post-Lisbon Treaty era and, thus, the first time the EP was involved in the negotiations of international agreements. Many observers believed these steps indicated the advent of new inter-institutional dynamics and a stronger focus on civil liberties within the EU's counter-terrorism and data protection policies. Jörg Monar (2010), for instance, considered the vote on the interim SWIFT agreement as 'historic'. However, the re-negotiated PNR and SWIFT agreements included only limited modifications compared to the rejected ones and, still, the European Parliament accepted them (de Hert/Papakonstantinou 2015; MacKenzie/Kaunert/Leonard 2015; Ripoll Servent/MacKenzie 2012). In other words, what seems to be a change to a 'core' of a policy at first glance might turn out to be only of secondary importance if viewed from a longer-term perspective.

## 1.2. Institutional change

Given that the term 'institution' is used differently in EU terminology and academia (Stacey/Rittberger 2003: 890), it requires a conceptual clarification. We label the European Parliament, the Council, the European Commission, and the Court of Justice as 'EU institutions'. If the term 'institution' stands alone, it refers to a set of rules and practices that guide the interactions of actors in a given structural context (see March/Olsen 1998: 948; North 1990).

Institutional change is understood as a change in the structural environment in which actors interact. Actors make policies, first, in the framework of a given set of procedures and, second, based on a specific definition of an issue. This structural environment may be subject to formal and informal change. Different instances of formal change—namely treaty reforms—have been the point of departure for this research project. We consider that the moves towards the *communitarisation* of the AFSJ are 'focusing events' (Sabatier/Weible 2007: 200-201), i.e. instances of change in the structural environment that are likely to affect policy outcomes. However, we do not exclude the possibility of policy change as a result of informal processes of institutional change occurring in-between treaty reforms. A given set of procedures may also undergo transformations due to informal changes occurring in-between treaty reforms. For instance, the growing importance of

trialogue meetings and early agreements may affect the opportunities for accessing and influencing EU policy-making (Farrell/Héritier 2007; Rasmussen 2011; Shackleton 2000).

Scholars of rational-choice and constructivist institutionalism propose different assumptions regarding how actors will adapt to institutional change. From a rational-choice institutionalist perspective, an altered structural environment will have an impact on their calculations of costs and benefits (North 1990; Thomson/Stokman/Achen/König 2006). In this sense, the change from consultation to co-decision introduces new veto players in the law-making process. The introduction of co-decision also sets additional constraints such as the necessity to reach an absolute majority in the EP at the second-reading stage, which may lead to a closer relationship between the EP and the Council and to sidelining the Commission (Costello 2011; Hagemann/Høyland 2010).

From a constructivist perspective, institutional change may have an impact on actors' belief and norm systems. This process may put into question existing beliefs (Sabatier/Weible 2007: 204) or introduce alternative normative frames that need to be accommodated to established practices (Clemens/Cook 1999). Therefore, institutional change may affect the plausibility of certain actors' cognitive schemas, opening a window for reinterpretation and reformulation of existing policy solutions (Carstensen 2011; Suchman 1995). Preferences are seen as endogenous to a particular system – the wider norms of behaviour guide actors' actions or policy alternatives. In this sense, institutional change is significant as it might contribute to rendering the roles and patterns of behaviour of specific actors dysfunctional under new structural conditions (Clemens/Cook 1999: 449). Any alteration in how actors perceive a given set of procedures and their appropriate behaviour might have direct consequences on policy outcomes. For example, in a new structural environment, actors may develop more consensual social practices (Shackleton 2000). These practices may offset other formal changes, such as a major shift in the EP's internal composition in the wake of elections. The necessity to be consensual may limit the ability of a new political majority to push for its preferred alternatives if its activities are seen as too confrontational (Adam/Kriesi 2007: 145; Ripoll Servent 2012; Sabatier/Weible 2007: 200).

### **1.3. Linking institutional change and policy change**

The insights of institutional scholars and experts on policy change outlined thus far are too often disconnected from one another. Paul Sabatier (2007), for instance, highlights the absence of institutional change as an explanation for policy change.

We address this research desideratum by suggesting that certain scope conditions relating to the nature of a given policy constrain or enable the choices of actors in a situation of institutional change. A highly relevant scope condition is whether or not the key principles of a given policy – its ‘core’ – have been settled before institutional change takes place. The existence or absence of a policy core substantially impacts the distribution of strategic choices and opportunities. The assumption is that if a policy core has been settled before institutional change, actors whose positions are close to the existing core will find it easier to prevail in an altered structural environment and to maintain a policy outcome close to the status quo. In a sense, it is easier to function and formulate solutions that resonate with widely shared and accepted cognitive and normative frames. This does not mean that policy change is not impossible under these circumstances, yet changing a policy core is substantially more difficult to achieve when it needs to put into question well-established belief systems – i.e. produce changes higher up in the cognitive hierarchy (Campbell 2002; Surel 2000). A second scope condition refers to the level of internal conflict inside each institutional actor – e.g. the presence of policy cleavages in the Council or the EP.

In view of these two conditions, we expect those actors that were responsible for the definition of a policy core to use strategies that attempt to lock in and legitimize the status quo. The more united they are in their efforts to lock in and legitimize a sub-policy area, the more chances they will have to maintain stability in a policy core. In contrast, when the policy core is not yet settled, we expect formal treaty changes to offer a better opportunity for actors pursuing policy change, especially if they are cohesive in their efforts to legitimize an alternative understanding of the policy issues at stake. Therefore, focusing on actors’ strategies under particular scope conditions allows us to understand why formal institutional change such as a treaty reform may not always have the expected effects and lead to only limited policy change.

## **2. Change and stability in the ‘cores’ of AFSJ sub-policies**

Unexpected external events have often been named as factors driving the European integration process in the field of internal security (Monar 2007). Indeed, our comparative analysis confirms that the 9/11 terrorist attacks on the United States have strongly affected the EU policies on counter-terrorism, police cooperation, criminal law and data protection. Only in reaction to this unprecedented event did EU member states become more willing to accept a stronger ‘European dimension’ in issues such as counter-terrorism. Most ‘policy cores’ of these AFSJ sub-fields developed in the years following the 9/11 attacks (and/or the Treaty of Amsterdam). The European Commission

was particularly keen to seize the terrorist attacks as a ‘window of opportunity’ to push for a stronger EU involvement in counter-terrorism (MacKenzie/Kaunert/Leonard 2015). Prior to 9/11, member states had refrained from doing so due to different historical experiences and threat perceptions. After 9/11, the threat of terrorism and the EU’s role in countering it has been re-evaluated. The whole field of EU data protection – or, more precisely, data processing for security purposes – developed after the 2001 attacks. The policy development caused a deep division between those ‘willing to sacrifice a level of data protection (or, for the same purposes, other individual rights) for increased security within the EU and those with pro-data protection stances’ (de Hert/Papakonstantinou 2015: 185). In general, the terrorist attacks of 9/11 were an exceptional event in the sense that they contributed to developing a new threat perception and understanding of the EU’s role in ‘high politics’. The event altered the way in which some internal security issues were perceived, which, in turn, actors used to develop some AFSJ sub-policies with a security-driven focus and/or with a stronger EU component.

Our comparative analysis demonstrates that most ‘policy cores’ of the AFSJ sub-policies, once established, have kept a high level of stability regardless of the introduction of the Community method. Also, no other unexpected external event after the 9/11 terrorist attacks has had a comparable impact on the EU institution’s behaviour and policy development in the AFSJ. The impact of such events depended on how EU institutions absorbed and incorporated them in a given opportunity structure. In particular, the Council often used a crisis situation ‘to bounce Parliament into first-reading agreements and browbeat it into “behaving responsibly”’ (Parkes 2015: 65). Yet many external events – even those causing intense media coverage – had, in fact, little impact on the policy cores of AFSJ sub-policies. The 2013 tragedy of Lampedusa, for instance, when more than 360 migrants drowned in their attempt to reach European shores, caused a public outcry and calls for a reversion of the existing EU asylum and border control policies. The tragedy triggered a range of immediate political responses (such as senior EU politicians travelling to Lampedusa and a quicker realization of the Eurosur border surveillance project) but it did not contribute to altering any of the constitutional pillars of EU asylum and border control policy.

Table 1 classifies the different AFSJ sub-policies. It presents the main issues around which the policy core revolves and the policy controversies that have characterised decision-making processes in the different fields before and after *communitarisation*. Starting from pure intergovernmentalism, the Treaty of Amsterdam introduced a first major shift towards *communitarisation* by transferring the policy fields of asylum, immigration, external border controls

and civil law matters to the Community first pillar under Title IV. Still, for a transitional period of five years, the competences for the supranational EU institutions were constrained and unanimity voting was kept in the Council. The Treaty of Lisbon ended this institutional development by introducing the Community method in the remaining third pillar areas (police and judicial cooperation in criminal matters). The field of EU citizenship is exceptional, since it has always been decided under the Community method.

*Table 1: Policy core in the AFSJ sub-policy areas before and after communitarisation*

	<b>Policy core</b>	<b>Policy controversies</b>	<b>Degree of change</b>
<i>Stability in the policy core</i>			
<b>Asylum</b>	Dublin system; 1 <sup>st</sup> generation asylum laws	Access to and scope of rights given to asylum seekers (restrictive vs. liberal)	Limited - 2 <sup>nd</sup> generation asylum laws adjusted and tweaked existing policy core
<b>Border control</b>	Schengen regime and Frontex operations	Migration control vs. post-national, European state building vs. efficiency of border management	Limited - different rationales continue to compete and co-exist
<b>Counter-terrorism</b>	Wide range of counter-terrorism measures; deepening the external dimension (in particular the with US)	Proportionality of security measures;	Limited - building on and adjusting pre-Lisbon measures
<b>Police cooperation</b>	Work of Europol; Different forms of law enforcement cooperation	Efficiency and parliamentary control of (new EU) policing activities	Limited - evolutionary logic continues; more parliamentary control
<b>Civil justice</b>	Constituting laws in all sub-areas (e.g.	Improve functioning of	Limited - mainly recast of existing

	procedural cooperation; choice of law)	internal market; Expansive vs. restrictive interpretation of 'cross-border limitation'	instruments; persistent narrow interpretation
<b>Citizenship</b>	The material scope of rights given to EU citizens (what kind of rights)	Scope of rights linked to EU-citizenship vs. member states' autonomy in migration law	Limited - rights-enhancing dynamic prevails (in particular since 2006);
<i>Change in the policy core</i>			
<b>Criminal law</b>	Mutual recognition encompassing the pre- and post-trial stages; Harmonisation of crime definitions and sanctions	Proportionality of security measures;	Substantial - increasing focus on rights of victims and defendants
<i>Policy core not yet settled</i>			
<b>Immigration</b>	Fragmented (policies on irregular migration more defined than on admission)	'Managed' migration (stem 'unwanted' and attract 'attractive' migrants)	Limited - slightly stronger focus on regular immigration
<b>Data protection</b>	Fragmented (experimenting with instruments)	Role of individual rights vs. data processing for security purposes	Substantial - efforts to settle policy core and develop coherent framework

Source: own elaboration based on Trauner and Lavenex (2015)

As can be seen in Table 1, the first and largest cluster of AFSJ sub-policies regroups those cases where changes to the policy core have been limited. This is a surprising finding for some AFSJ sub-policies. In asylum policy, for instance, the EU adopted a series of laws between 1999 and 2005 defining minimum standards in areas such as the reception and qualification of asylum seekers in order to reduce differences between member states' asylum systems. At that time, the Council and the EP developed a very different

approach on asylum. The EP constantly put forward liberal, refugee-friendly proposals and acted as an advocate for more harmonisation, yet the Council insisted on restricting rights and benefits for asylum seekers as well as maintaining flexibility for member states. Under consultation, the Council translated most of its positions into EU law. As of 2005, these legislative texts became subject to a recast exercise aimed at going beyond the common minimum standards of the first generation and developing fully harmonized Common European Asylum System (CEAS). The second generation of asylum laws were negotiated under co-decision, implying an empowerment of the European Parliament compared to the previous negotiations. And yet, the new procedural rules only marginally affected the core of the asylum regime and primarily fine-tuned and tweaked the existing asylum instruments and laws (Ripoll Servent/Trauner 2014, 2015)

Also, the EU's early cooperation on EU border control put the field on a certain pathway. According to Roderick Parkes (2015: 57-58), the 'aggressively exclusive trans- and intergovernmental cooperation founded between interior ministers [in the framework of the Schengen cooperation] laid the bases for later EU border policies'. In many instances, the measures adopted after incorporating the Schengen *acquis* into the EU's legal framework have built upon and refined already existing laws and practices. In counter-terrorism, periods of relative inertia were followed by intense activism after terrorist attacks. Particularly after the terrorist attacks of 9/11, member states decided to consider counter-terrorism as a European priority and no longer only a national concern (MacKenzie/Kaunert/Leonard 2015). The core of the policy has remained unaffected by the Lisbon Treaty, even though it set the ordinary legislative procedure as a standard.

EU citizenship has emerged as a fundamental status of EU nationals since the Maastricht Treaty formally introduced the concept. It has resulted in 'both the removal of impediments for mobile EU citizens and in the entrenchment and spread of shared norms [such as respect for family reunification]' (Kostakopoulou 2015: 153). The controversies in the field concerned primarily how many 'rights' should be linked to 'being' an EU citizen and who decides on these rights - member states have been keen to keep their regulatory autonomy in migration law. A rights-enhancing dynamic prevailed, notably in the years following 2006 when the constitutional pillars of EU citizenship policy were gradually defined.

The second cluster contains EU criminal law as a sub-policy in which policy change has been more substantial in the post-Lisbon era. In criminal law, the core has been defined in the post-Amsterdam period, when the EU adopted a wide range of framework decisions ranging from trafficking in human beings to corruption in the private sector and racism and xenophobia. Still, post-

Lisbon, new EU competence for the field of criminal proceedings (Article 82(2) TFEU) and a stronger focus on the rights of defendants and victims have altered the core of the policy away from an overly security-driven orientation (Mitsilegas/Vavoula 2015).

Finally, the last cluster presents those sub-policies where their core has not been clearly settled. The field of data protection in particular has been regulated by a set of very diverse and disparate rules. The result is a patchwork of rules and regulations without an established 'policy core' (de Hert/Papakonstantinou 2015). The EU has become increasingly aware of the problems resulting from this piecemeal approach and has sought to provide a more coherent framework. The 'package approach' taken to negotiate the Data Protection Regulation and the Police and Criminal Justice Data Protection Directive is a reflection of this objective. The core of EU immigration policy – according to Andrew Geddes (2015: 78) 'who enters, on what basis, for how long and in what number' – has essentially remained in the hands of member states. The EU primarily constitutes a new governance layer 'intervening' in how member states frame and define their national policies. The EU's policy in itself has remained fragmented with policies on curbing irregular migration being more developed than those on admission (ibid).

### 3. Maintaining policy stability in the AFSJ

This section shifts attention to the question as to why certain actors – notably the Council as the dominant actor of the early intergovernmental cooperation – have been successful in maintaining policy stability regardless of new procedural rules.

#### 3.1. Co-opting competing actors into the dominant rationale

In a first 'co-opting' pathway towards policy stability, the Council benefited from the existence of a policy core by negotiating in a more uncompromising (and effective) way and fostering the advent of new, more consensus-oriented procedural norms, in particular with regard to the European Parliament. While the EP and the Council have been *de jure* on an equal footing after the introduction of co-decision, the Council has been *de facto* in a better position in those AFSJ sub-policies where the policy core had already been settled. In these situations, the Council could more easily risk a failure of inter-institutional negotiations. Non-agreement automatically implied maintenance of the *status quo*, which had been largely defined by the Council under the former procedural rules. In other words, the Council's leading role at the advent of the AFSJ provided member states with a first-mover advantage with which the other EU institutions struggled to catch up.

The 'co-optation' pathway explains, for instance, the limited degree of policy change in EU asylum. In this field, the Council acted with a high level of internal cohesion. During negotiations for a recast 'asylum package', centre-left interior ministers often put forward solutions similar to their centre-right colleagues. Also, member states felt no urgency to revise the first generation asylum laws which they had just finished implementing. They were more inclined to let the negotiations fail than accept a change in the asylum 'policy core' that had been defined under consultation up until 2005. The EP's position, by contrast, tended to fluctuate depending on the ability of political groups to form coalitions. Centre-left groups in the EP supported the Commission's attempt to draft new proposals that aimed to underline the added-value of more harmonised and liberal asylum rules. However, a coalition between the EP's left-wing and liberal groups was made more difficult after the 2009 parliamentary elections, which resulted in a conservative-led majority, less prone to oppose the Council on security-related issues. As a result, while the Socialists and Democrats (S&D) and Greens continued to view the Council's position from a critical eye, the conservative European People's Party (EPP) – now the largest group in the Chamber – was willing to support the Council's key positions. In such a divided EP, the Alliance of Liberals and Democrats for Europe (ALDE) became a pivotal actor. In 2011, Commissioner Malmström issued new proposals on key asylum laws resulting in a *de facto* rapprochement of the Commission's position to the Council's. Influenced by their fellow liberal Commissioner, the ALDE group decided to abandon the liberal-left coalition. This was the breakthrough for the acceptance of an 'asylum package' in June 2013, where most of the Council's central demands were accepted. The behaviour of liberal parliamentarians was driven not only by the negotiation dynamics but also by new consensual practices that gained importance under the altered procedural rules (see detailed Ripoll Servent/Trauner 2014, 2015).

This case stands for a broader pattern. In the last legislative term, ALDE frequently played a pivotal role in deciding the success or failure of coalitions within the EP. The Parliament's conservative EPP group tended to propose solutions on AFSJ-related matters close to the Council, which gave rise to an inter-institutional coalition that focused on co-opting the liberal political group to achieve their preferred policy outcomes. In several key decisions, liberal members of the EP shifted gear and eventually accepted the positions and discourse of the EPP-Council coalition, which led them to adopt more security-led positions than on past occasions. One of the clearest episodes was negotiations on a SWIFT Agreement with the US, which was sensitive from the perspective of an individual's data protection. The liberal group shifted from a negative vote in the interim agreement in February 2010 to

arguing in favour of a re-negotiated agreement regardless of the fact that the later agreement's content was not substantially different from the one they had originally opposed (MacKenzie/Kaunert/Leonard 2015: 107-109). The influence of member states on the Parliament's centre-right party groups was also central to understanding why the EP accepted an early agreement of the first (and highly controversial) EU immigration law negotiated under co-decision – the EU's Returns Directive (2008/115/EC). Under pressure from member states, the EP accepted the law as a 'least worse option' fearing that a rejection of an early compromise solution achieved in the trilogue negotiations would lead to a reopening of the package deal and result in even more restrictive solutions (Geddes 2015; Acosta 2009; Ripoll Servent 2011). As Diego Acosta (2009: 39) notes 'if the European Parliament does not have the possibility to go to the "second reading" because of its own incapacity or fear of consequences in the Council, then the co-decision process cannot be considered as a fair procedure among equal institutions'.

### **3.2. Sidelining institutional competitors**

A second pathway towards policy stability was to sideline institutional competitors by pre-empting their empowerment. In EU police cooperation, for instance, the issue of who 'guards the guardians' (Wagner 2006) has been a particularly salient one. The European Parliament was eager to get a stronger grip on the work of the European Police Office Europol, yet it faced strong opposition from member states (Trauner 2012). The transformation of Europol from an intergovernmental body into an EU agency appeared to be a good occasion for the European Parliament to improve its standing. Yet the Council speedily adopted the Europol decision only months before the Lisbon Treaty entered into force in order to avoid the enhanced decision-making powers of the European Parliament (Den Boer 2015). In the 2009 Council decision, member states only marginally enhanced the EP's control and consultation rights vis-à-vis the agency. They argued the EP would be involved anyway through its capacity to decide on the agency's funding when negotiating the Community's budget. The EP criticised this procedure and rejected four draft Council Decisions on measures implementing the Europol Council Decision based on the argument that these should be adopted after the entry into force of the Lisbon Treaty (Trauner 2012: 792).

Another kind of sidelining consisted of preventing an institutional competitor from developing a different policy rationale. By insisting on a specific solution as the most legitimate one, actors managed to institutionalise a particular rationale and relegated alternative understandings into the background. This happened in EU civil justice, where the inter-institutional controversies revolved around the issue of the cross-border limitation of the EU's

competence (Storskrubb 2015). The main debate there hinged on whether this cross-border limitation in civil justice matters should be interpreted in a narrow or an expansive way. The Commission was clearly in favour of an expansive interpretation of the cross-border limitation yet a coalition of the Council and the EP favoured a narrower interpretation of EU's treaty competences and constantly countered the Commission's efforts. A factor explaining this relatively stable pattern of inter-institutional cooperation relates to the fact that the European Parliament's legal affairs committee (JURI) – and not the committee on justice and home affairs and civil liberties (LIBE), traditionally dealing with AFSJ-related matters – negotiated with the Council. This committee had had more experience in negotiating under co-decision and had already internalized a consensus-oriented norm of behaviour. 'This institutional norm has often appeared in the EP's justification why it agrees with the Council in the field of civil justice and has legitimated the more limited advances in terms of policy change and further EU integration' (Storskrubb 2015: 213).

In some cases, the process of sidelining was only partially successful and led rather to a juxtaposition of policy rationales – each aiming to maintain the preferred policy 'core' of an institutional actor. In the case of EU border policy, no inter-institutional coalition effectively managed to sideline an institutional competitor. The three EU institutions involved in the decision-making process failed to reconcile their different approaches and visions of what 'borders' are supposed to fulfill after *communitarisation* (Parkes 2015). As a result, their different agendas have continued to compete with one another and/or co-exist rather than merge in an integrated way. Roderick Parkes refers to the reform of the Schengen Borders Code as an example of unfulfilled 'sidelining'. Agreed upon in May 2013, the reform was initiated in the wake of the increased migration flows triggered by the Arab Spring. As a result, 'whilst the Council acceded to the moves to supranationalise the system, it ensured that the decision to reintroduce borders remains in the hands of member States. Two very different visions of Schengen governance, one heavily supranationalised, one nationalised, now sit side-by-side in the reformed system' (Parkes 2015: 66). This policy outcome is clearly sub-optimal and is described as negatively impacting the effectiveness and democratic quality of EU border control policies.

### 3.3. Judicial 'lock ins'

A third pathway towards maintaining stability has been a judicially-driven 'lock in' of a particular policy rationale and core. According to Fritz Scharpf (2006:

852-3), the Court's 'strategic value as an instrument of European legislation' can only be understood if seen in conjunction with the Commission's powers to ensure compliance with European legislation. The interactions between the Court and the Commission can contribute to limiting the margin of manoeuvre for other actors to steer a policy in a different direction. Actors may use the jurisprudence of courts to prevent any deviation from the established judicial precedent. Beyond their immediate legal implications, actors may also discursively rely on court rulings to enhance the legitimacy of their policy choices.

The most evident process of judicial 'lock in' took place in EU citizenship. Building upon the 'skeleton of provisions' (Kostakopoulou 2015: 159) defining EU citizenship in the Maastricht Treaty, the case law of the CJEU steadily enhanced the rights linked to the status of EU citizen. The process raised substantive yet ineffective criticism of the member states about the 'quasi-legislative role played by the Court and its relation to Member State autonomy' (Kostakopoulou 2015: 160). The Commission eagerly followed up this case law by proposing rights-enhancing legalisation and framing the debate on EU citizenship. In other words, the Commission used the case law of the Court of Justice to stabilize and deepen a rights-enhancing rationale in EU citizenship policy.

## 4. Triggering policy change

Despite the preponderance of policy stability in most AFSJ sub-policies, more substantive changes have not been impossible to achieve. As seen before, this has concerned primarily EU criminal law. In EU immigration and data protection, the policy core has not been fully defined. Compared to policies with a more established policy core, this situation allows actors to benefit more easily from institutional change when they attempt to trigger policy change.

### 4.1. Cohesiveness and legitimacy during negotiations

In EU criminal law, the process of change has been influenced by a combination of factors. A first factor has been a growing functional need to approximate substantive criminal law standards in order to mitigate the negative-side effect of the mutual recognition measures that have dominated the field since the Treaty of Amsterdam. These measures - with the European Arrest Warrant being a flagship law - were seen to lower human rights standards, notably as defendants' rights and standards (e.g. access to a lawyer upon arrest) differ in the EU (Wagner 2011; Lavenex 2007; Mégie 2010). Also, the legality of applying such measures has been increasingly contested before

national courts. In the Lisbon Treaty, therefore, member states provided the EU with express legal competences for legislating in the field of criminal procedure, including the rights of defendants, for the first time (Article 82(2) TFEU).

Second, the European Parliament, often in conjunction with the Commission, acted cohesively and pushed for a more rights-based approach in EU criminal law. A case in point has been the EU's policy against human trafficking. Initially conceived as a means 'to enhance the crime-fighting tool box of law enforcement officials' (Mitsilegas/Vavoula 2015: 148), the EU eventually started to focus more on the protection of victims. The 2011 Directive on human trafficking - the first law in this field negotiated under the ordinary legislative procedure - contained detailed provisions for the assistance of victims, particularly children, and established an EU anti-trafficking coordinator. The Parliament's proposals to insert these provisions has been given additional legitimacy by achieving an oversized internal majority including both centre-right and centre-left groups. It could also refer back to certain rulings of European Court of Human Rights which exerted judicial and normative pressure on member states to better protect women against trafficking and exploitation in the sex industry (e.g. case *Rantsev v Cyprus and Russia*, see Mitsilegas/Vavoula 2015).

#### **4.2. Litigation as a source of policy change**

As seen in the previous section, litigation might contribute to locking-in a particular policy rationale (such as a rights-enhancing dynamic in EU citizenship). However, litigation can also be used to achieve the opposite outcome, namely policy change. Such a dynamic was of importance in the early days of EU criminal law. The Council initially opposed any European Community/European Union involvement in the field of criminal justice. By referring several cases to the Court of Justice, the Commission contested this view and fought for the EU's right to adopt criminal law measures even in the absence of express treaty competence (Mitsilegas/Vavoula 2015: 140). In cases such as the environmental crime case (C-176-03) and the ship-source pollution case (case-440/05), the Court of Justice sustained the Commission's point of view and allowed for the adoption of EU criminal law measures if such measures are necessary to achieve other Community objectives. Member states eventually accepted a need for a stronger EU involvement in substantive criminal law. The new competences have been formalised in the Lisbon Treaty (Art 83(2) TFEU-Lisbon).

In EU immigration policy, individuals and migrant entrepreneurs have taken the lead in resorting to the Court of Justice's enhanced powers of the post-Lisbon era. The Court's decisions were of particular relevance in the fields of

expulsion, family reunification and integration and have challenged some (restrictive) practices of member states. According to Andrew Geddes (2015; see also Acosta/Geddes 2013), this kind of dynamic has been discernible at the national level for several years already, with the EU now catching up. 'In post-Lisbon Europe there have also emerged social and political spaces linked to the role of courts that has been an important component of the politics of immigration in Europe since the 1970s and now has an EU dimension' (Geddes 2015: 89).

## Conclusions

This article aimed to establish whether and, if so, how institutional change has contributed to triggering policy change in the AFSJ.

We argue the AFSJ sub-policies have displayed a high level of stability even after the formal decision-making powers of the EU's supranational institutions were enhanced. EU institutions adapted to the new procedural rules introduced by treaty reforms and changed their institutional practices. This concerned first and foremost the European Parliament, which developed a more consensual behaviour vis-à-vis the Council and a feeling of shared responsibility for policy outcomes. However, to fully understand the limited impact of institutional change, it is crucial to take into account two scope conditions that served to facilitate or constrain the strategies of actors: the existence or absence of a 'settled' policy core in a given sub-field and the level of conflict/unity inside each EU institution. If a policy core had been settled before the advent of institutional change, the Council found it easier to co-opt or side-line actors with competing preferences. Another pathway towards stability was the institutionalisation of a certain policy rationale through a series of court rulings – in other words, a judicial 'lock-in' achieved through precedent-based patterns. While most sub-policy areas remained stable, the AFSJ sub-policy that underwent the farthest-reaching change in the post-Lisbon era was EU criminal law. This was the result of a combination of factors including a high level of unity within the European Parliament in its ambition to develop a more rights-based approach and a certain learning process on the parts of member states regarding the implications and negative side effects of the mutual recognition instruments adopted thus far.

What are the implications of these findings? First, at a conceptual level, this research project has demonstrated the usefulness of better linking the insights of new institutionalist scholars and experts on the policy process for understanding the impact of institutional change on policy change. In those cases where the policy 'core' had already been settled (i.e. where the specific cognitive principles conformed a shared belief system), institutional change

has generally had fewer implications. Although it might have changed the opportunity structure for actors involved in policy-making, its effects were felt mostly in the lowest cognitive level, affecting in general only the secondary (instrumental) aspects of a sub-policy area. Second, policy outcomes could rarely be explained as a result of only one explanatory factor. Formal bargaining processes were often influenced and reinforced by discursive entrepreneurship and notions of appropriate behaviour suggesting that a combination of rational choice and constructivist institutionalism provides high explanatory value. Finally, the research findings also suggest that the era of intergovernmental policy-making has left deep marks on today's Area of Freedom, Security and Justice. Although the dynamics of supranationalism have started to become discernible – notably due to the activities of the Court of Justice of the EU – member states in the Council still appear to remain privileged policy entrepreneurs. Their dominant role at the time when most 'cores' of the AFSJ sub-policies were defined has allowed them to shape the policy debates and set standards of legitimacy and appropriateness that have proven difficult to modify for the newly empowered supranational EU institutions.

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