Setting Priorities: Functional and Substantive Dimensions of Irregular Immigration and Data Protection Under Co-decision

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Abstract

During the months leading to the end of the transitional period (January 2005), most academics and actors involved in the Area of Freedom, Security and Justice (ASFJ) expected the introduction of co-decision as the normal decision-making procedure in this area to change the balance between security and liberty. The involvement of the European Parliament as a co-legislator was thought to be a positive aspect, since this institution had persistently adopted a pro-civil liberties stance. Since then, this question has not been systematically tackled in the literature and consequently the impact of co-decision on the AFSJ remains unclear. However, in 2007, Maurer and Parkes looked at the securitised policy-image governing European asylum policy in order to understand why the European Parliament had been unable to redress the balance and establish civil liberties as a priority. Following their line of reasoning, this paper develops the functional and substantive dimensions introduced by these scholars, in order to explain why the European Parliament, and especially the LIBE committee, has been equally unable to change priorities in the fields of irregular immigration and data protection. I argue that the persistent weakness of the European Parliament in the functional dimension, i.e. the need to legitimise its presence in negotiations dealt with under co-decision, has made changes in the substantive dimension difficult to attain. In those areas were the substantive dimension is weak, as was the case in the *Returns* directive, the need to legitimise the presence of the EP creates more polarisation among the members of the LIBE committee. In those cases where there is a strong substantive alternative in the LIBE committee, as was the case in the *Data retention* directive, change is hindered by the Plenary, which establishes the strengthening of the functional dimension as a priority for the institution. In both cases the introduction of co-decision led to the persistence of a securitised policy-image and the impossibility of engaging in conflict expansion.

Keywords

Data protection; *Data retention* directive; Justice and Home Affairs; irregular immigration; policy-image; *Returns* directive; Area of Freedom, Security and Justice.

THE AREA OF FREEDOM, SECURITY AND JUSTICE (AFSJ) AND THE EUROPEAN PARLIAMENT (EP) have often been partners at odds. Until recently, this area was characterised by a predominance of intergovernmental methods that left the EP with little to say. The third

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pillar as created in the Treaty of Maastricht only gave the EP the power to give its opinion, which was more often than not ignored by the Council of the EU (hereafter 'the Council') (Kostakopoulou 2000: 498; Peers 2006: 26). Although the Treaty of Amsterdam transferred some of the issues to the first-pillar, in this period the EP grew used to being sidelined in negotiations and this opened up the opportunity to create dynamics of conflict with the Council. The EP enjoyed the inter-institutional battles, especially because they bore no consequences for the institution and its members. In consequence, in front of a Council often perceived as an instigator of restrictive policies (Geddes 2003: 5; Kostakopoulou 2000: 498; Uçarer 2001: 14), the EP constructed itself as a defender of civil liberties.

The Treaty of Amsterdam also provided for a transitional period of five years after which all issues except for police and judicial cooperation in criminal matters, family law and regular immigration would be transferred to the first pillar. This meant that a large set of issues would thereafter be dealt with under co-decision, thus giving Parliament the power to legislate jointly with the Council. Article 67 EC[1] stipulated the areas that fell under the transitional period. After 1 May 2004, these areas would have to be transferred to the first pillar following a unanimous decision taken by the Council, which eventually established the end of the transitional period on 1 January 2005 (Council of the European Union 2004c). As a consequence, all matters in Title IV EC would have to be legislated using co-decision and qualified majority voting in the Council. As mentioned above, presently the only exceptions are family law and regular immigration, both of which are considered too sensitive for member states and national judicial cultures to be dealt with under the community method. Logically, those issues that remain in Title VI EU, police and judicial cooperation in criminal matters, continue to be ruled mostly by unanimity in the Council in consultation with the EP. Given the dynamic existing between the two institutions, the end of the transitional period in January 2005 raised high expectations among those academics and practitioners wanting to see a more balanced approach to policies in the area of Freedom, Security and Justice (Grabbe 2002; Guild & Carrera 2005). Therefore, creating "more not less Europe" (Geddes 2003: 7), that is to say extending the powers of the European Parliament together with the Court of Justice, was believed to be the best way to overcome the existing rationale of fortress Europe (Geddes 2000).

Since then, few authors have tried to evaluate whether these prospects have been realised. Consequently, the impact of co-decision on the AFSJ dimension is still unclear, although the first attempts to plunge into the question seem to discredit the capacity of the European Parliament in balancing civil liberties and security. In this sense, Andreas Maurer and Roderick Parkes (2007) have attempted to explain why the Commission and the European Parliament have failed in their effort to redress the balance between security and liberty. They argue that although the institutional rules have changed and offered more possibilities to modify the content of policies, the lack of an alternative to the security-led proposals has made finding a balance more difficult. The Commission and the EP have been unable to convince other policy-makers and outsiders that another kind of policy is possible.

A set of interviews carried out during January 2009 with different actors involved in the AFSJ supports Maurer and Parkes' claim that the EP has been unable to introduce a more balanced outlook in terms of civil liberties and security. The interviews, with members of

[1] There were two exceptions foreseen in the Treaty to article 67 EC. Article 67.3 EC allowed for visa policies to be adopted by qualified majority voting and consultation with the EP. Article 64 EC also laid an exception for emergency measures, when the Council could also use QMV. The Treaty of Nice modified Article 67 EC, allowing for co-decision in civil law matters (except for family law) and in all those asylum issues that were not related to burden-sharing. A declaration annexed to the Treaty of Nice extended co-decision and QMV to short-term freedom to travel for third-country nationals and irregular immigration from 1 May 2004 (Peers 2006: 23-25).

the European Parliament (MEP, official and political advisor) and officials from both the Council and the Commission, have focused on two case studies: the *Data retention* directive, regulating the retrieval of telecommunications data for the purpose of investigating serious crimes, and the *Returns* directive, establishing common standards for the voluntary or compulsory return of irregularly staying third-country nationals. Although most of the informants were selected due to their involvement in both negotiations, the interviews tried to raise more general issues concerning the effects co-decision has had on the European Parliament and the involvement of the latter in the AFSJ. The information given by interviewees has been contrasted, whenever possible, with other sources such as debates in the EP or interviews given to the press.

The data from the interviews develops Maurer and Parkes' analysis by questioning two of their assumptions. First, the authors assume that the counterbalancing force against the Council is the European Parliament as a unified actor. In this article, I argue that this assumption is no longer accurate. Currently, we see instances of divergence between committee and plenary interests. Under consultation, the European Parliament had only the right to give its opinion. This meant that for the Plenary nothing was at stake and thus it did not hesitate to ratify the opinion given by the committee on civil liberties and justice and home affairs (LIBE). However, under co-decision, the priorities might diverge. Plenary and committee do not always agree on points either of substance or form and therefore we have to distinguish between the interests and priorities set by the LIBE committee and those set by the Plenary.

Secondly, this article will also argue that the experience of these last four years has shown that in spite of an institutional change giving more opportunities to the EP to change the substance of policies in the area of Freedom, Security and Justice, the European Parliament is still regarded as a newcomer and thus suffers from a lack of legitimacy. We can therefore say that the functional dimension is still weak and that this weakness makes it more difficult to operate changes in the way the AFSJ is perceived by those involved in the policy process. Essentially, I argue that the EP's search for legitimacy is undermining its capacity to create a new ground for legislative texts giving priority to civil liberties over security concerns.

In order to illustrate this, I will first discuss the framework offered by Maurer and Parkes and link it to existing literature on securitisation and co-decision. Secondly, I will expose how functional weaknesses have made change in those areas where there is no alternative to existing policy, such as irregular immigration, even more difficult. Finally, I examine how these difficulties persist even in those areas, such as data protection and discrimination, where there is a strong substantive alternative. The examples used in both sections will also illustrate the mismatch of interests between the Plenary and the LIBE committee.

Policy-images: functional and substantive dimensions in the AFSJ

The concept of policy-image has been developed as a way to understand change in policy-making. Policy-images are defined as perceptions or understandings of factual information. In consequence, in policy-images the empirical information is mixed with emotive appeals offering a frame of reference to actors involved in policy-making (True *et al.* 2007: 161-162). As a result, depending on how much the policy-image is shared by these actors, stability or change will predominate in a specific policy area. In those areas where the understanding of a problem and the way to handle it is widely supported by policy-makers and public opinion, stability will predominate. Conversely, if important sectors involved in the definition of the problem have alternative views on how to define and how to manage the issue in question, change will be more probable. Those actors advocating a different policy-image will try to find alternative points of access or venues to

introduce and expand their ideas, entering into a process of conflict expansion. The success of a strategy of conflict expansion depends both on how the alternative is framed – whether the solutions offered are convincing or not – and on the specific institutional framework and decision-making rules offered to the actors engaging in such a strategy (Princen 2007: 30). Here, Maurer and Parkes' modification of the concept to discern between a substantive and a functional dimension of policy-images is particularly heuristic. The substantive dimension reflects the willingness to legitimate a particular understanding of a problem, while the functional dimension reflects the search for legitimacy of those actors involved in the policy process. Only when both dimensions are present and strong, will actors be successful in their strategy of conflict expansion (Maurer & Parkes 2007: 177-178).

The use of policy-images is especially relevant in the area of Freedom, Security and Justice. Actors involved in the policy process have successfully redefined this area to create a very specific policy-image. In this strategy technical and emotional elements have been successfully mixed in order to legitimise both the substantive and the functional dimensions of the policy-image. Firstly, the substantive dimension has been recreated in terms of a process of securitisation, where the constitutive elements of the policy area have been approached from the perspective of security. In this process, elements such as migration and borders have been initially inserted in the realm of politics and later they have been addressed in the public debate as elements of security (Buzan *et al.* 1998: 23). The result of the process is a strategy of securitisation, where elements previously disconnected from security, such as immigration or asylum, become involved in the same policy-image as hard security issues, for instance terrorism or organised crime. The substantive dimension of the policy-image governing the AFSJ works around the idea of a security-continuum, where security has to be managed inside and outside borders in order to control any threat related to trans-border activities, be them terrorism, organised crime or migration (Bigo 1994). The appeal to security has been thus a powerful legitimising tool, especially after the terrorist attacks of 11 September 2001, and it has successfully mobilised both its technical and emotional aspects. On the one hand, technical issues such as the removal of internal borders have been used as reasons to create a common area of Freedom, Security and Justice. Achieving safety inside the Schengen area requires common standards on external borders to make sure that every member state protects the others at an appropriate level (Monar 2001). This rationale has been used to increase the security elements of this new common area in order to achieve a 'safe' inside.

On the other hand, emotional appeals have reconstructed the objects of the policy area especially since the 1990s. After an era of clear threats provided by the Cold War, the 1990s opened a time of uncertainty where security actors had to find new objects of security. In this sense, the increase in asylum-seekers in some European countries served as a reason to recreate migrants as the new objects of security. Discourses appealing to the economic burden and the rise of crime created support from the public towards this new policy-image, which resulted in the securitisation of the AFSJ (Geddes 2000; Huysmans 2006). The terrorist attacks of 2001 onwards have only reinforced these emotional appeals and provided a higher support from the public. Therefore, the policy-image is well established in this area and it is shared by most actors involved in the policy process. The legitimacy of the policy-image is reinforced by its origins, dating back to the actual introduction and development of an Area of Freedom, Security and Justice. That is why those appealing to an alternative substantive dimension of the policy image have had so many difficulties in convincing actors involved in policy-making that an alternative policy-image is possible. The alternative proposed tries to balance the output of policies by giving a priority to civil liberties and human rights. In this sense, there is a willingness to treat home affairs issues as independent from security, with the intention of avoiding security concerns being used

as a legitimising tool for action. Among EU institutions, this substantive alternative has been mainly promoted by the European Parliament, and more specifically by the LIBE committee, which has tried to engage in conflict expansion via the use of opinions and reports, without much success. Here, the functional dimension comes into play, since, as previously stated, to be effective in conflict expansion actors need to legitimise not only the substantive dimension but also the functional dimension.

As Maurer and Parkes' have convincingly explained, the functional dimension in the AFSJ has been legitimised around the notions of expertise and cooperation. Experts and officials have successfully created a need for efficiency and technicality and have received the necessary support from politicians. The result is an area with a preference for minimum standards and extra-communitarian forms of decision-making, as the recent Treaty of Prüm, negotiated by only seven member states in order to make exchange of information, particularly in combating terrorism, cross-border crime and irregular immigration more effective, clearly shows (Maurer & Parkes 2007). This functional dimension is still present even in the aftermath of institutional changes modifying the decision-making rules. Although formally the European Parliament is now a co-legislator together with the Council, its legitimacy is still weak. As I will show below with the examples of the *Returns* directive and the *Data retention* directive, the EP has now engaged in a strategy of gaining respect and authority from the Council, thus complying with the current policy-image that privileges expertise and efficiency. In order to prove its capacity to adapt to the functional image shared by officials and experts, the EP has taken advantage of some tools provided by co-decision. It has understood that in order to have some influence and be effective, it has to engage itself in the early stages of the policy-making process (Farrell & Héritier 2004; Rasmussen 2007) and in parallel it has to prioritise those informal channels, such as trialogues, that are increasingly present in inter-institutional negotiations (Garman & Hilditch 1998; Häge & Kaeding 2007; Shackleton 2000; Shackleton & Raunio 2003). Co-decision has also changed the internal dynamics of the European Parliament (Maurer 2003). The procedure gives more influence to some actors such as rapporteurs, shadow rapporteurs and committee chairs (Benedetto 2005; Burns 2006; Neuhold 2001; Settembri & Neuhold 2009) and this creates more occasions for divergence of interests and strategies. Therefore, the example of the AFSJ shows that if under consultation we could talk about the European Parliament as a unitary actor engaging in conflict expansion, now we have to differentiate between different levels of decision-making in the EP. Under co-decision, the willingness to enter into conflict expansion and the purpose of the conflict can diverge between the committee in charge, in this case the LIBE committee, and the Plenary. While the LIBE committee may have an interest in mobilising and producing change in the substantive dimension, the Parliament may have broader long-term institutional interests, namely the extension of its decision-making powers (Priestley 2008).

In consequence, although there has been a functional change under the shape of an institutional modification of the decision-making rules, this change is rather formal and leaves the EP in a weak position in relation to the functional dimension, affecting its capacity to alter the substantive content of the policy-image. The following sections will show how a weak functional dimension hampers change when the substantive dimension is weak but also when it is strong and how co-decision has redefined the strategies and interests of actors inside the EP.

Irregular immigration: a weak alternative substantive dimension

The substantive dimension of irregular immigration

Since the early 1990s but especially since 2001, the EU has developed common migration policies with two specific focuses: asylum and irregular immigration. Although the legal bases are different (Articles 63.1 and 63.2 EC Treaty in the case of asylum and refugee

policies and Article 63.3 EC Treaty for irregular immigration), in both cases the emphasis has been on restriction, thus recreating third country nationals as the unwanted others. Maurer and Parkes have explained elsewhere the policy-image of European asylum policy, showing how since the waves of asylum-seekers coming to Europe during the early 1990s the concept of asylum has been progressively redefined from an issue of human rights to a threat to internal security (Maurer & Parkes 2006). In this process, policy-makers have highlighted the "politicised conception of asylum, citing the dangers it posed to internal security, society and the economy" (Maurer & Parkes 2007: 181). In parallel, immigration has been communitarised mainly in connection to irregular immigration; regular immigration (Article 63.3.a EC Treaty) is still dealt with under consultation and unanimity (Council of the European Union 2004c: recital 7). The result is that the most positive aspects of immigration policies, such as integration, are left to the initiative of member states and in consequence hardly ever dealt with at EU level.

On the other hand, irregular immigration has been dealt with mainly in two ways. First, a set of very diverse measures have been created to deter third country nationals willing to come to the EU. Crossing the borders of the European Union (and especially those of the Schengen area) is the first challenge that most third country nationals face when travelling to Europe. The EU has not only externalised border controls, bringing them closer to the country of origin (Melis 2001), but it has also privatised them, making transport companies responsible for carrying irregular immigrants (Council of the European Union 2001, para. 1). The emphasis put on Frontex, the European agency for the management of borders, is not accidental. Frontex's operations in the Mediterranean and African maritime coasts - such as INDALO, MINERVA, HERMES or HERA (Frontex n.d.) - respond to this willingness to stop third country nationals before they even cross an - increasingly non-physical - border (Carrera 2007).

Secondly, once inside, irregular immigrants have to be kept under control and sent back to their countries of origin, sometimes even of transit, if possible. Indeed, here the policy-image dominating the AFSJ is clear: since immigrants are perceived as a security threat, they have to be separated from society, by being retained in special detention centres (although sometimes also in camps or prisons), and removed from the territory whenever possible. Since there is no point in sending back persons that will not be granted entrance in the countries of destination, the EU has tried to convince countries of origin or transit to sign readmission agreements. This means that once it has been proved that an irregular immigrant comes or has been present in a third country, readmission agreements ensure that member states can send the person back and that they will not be refused entrance (Bouteillet-Paquet 2003; European Commission 2006: 8).[2]

The Returns directive: the failure of the LIBE committee to present an alternative

The result is that irregular immigration policies have achieved a circle of exclusion where entrance is pre-empted and expulsion promoted. This has constituted the rationale, or policy-image, of those policies. Since most of the measures have been taken under consultation and unanimity, it is a good starting point to test whether the instruments agreed since 2005 with co-decision have been able to change the substantive element of immigration policies.

[2] Following the latest Commission's report, between 2005 and 2007 over 1.5 million migrants received a removal decision but only half of them have been carried out (data does not include Denmark and Luxembourg). The 'effectiveness rate' between 2004 and 2007 is estimated to be between a half and one third of all the removal decisions (European Commission 2009: 34-35).

In order to do so, I will examine the case of the *Returns* directive, agreed in June 2008 between the European Parliament and the Council (European Parliament & Council of the European Union 2008). The directive is based on Article 63.3.b of the EC Treaty and thus falls under one of the communitarised areas of the AFSJ. Its main objective is the harmonisation of national conditions dealing with the voluntary or compulsory return of irregular immigrants, that is, the periods of time during which irregular immigrants may voluntarily decide to go back to their country of origin as well as the stipulations to issue removal decisions, forcing third country nationals to leave the country. The directive also regulates the conditions for detention while awaiting removal in cases where it is suspected that the person will abscond. The directive deals thus with one of the core subjects of EU irregular immigration policies: removal from the territory. It is thus the last step of the long circle of exclusion.

However, despite being a central topic, the LIBE committee has never had a strong position on these issues. Under co-decision, LIBE members have become increasingly polarised and acted following more consistent partisan lines than they used to do under consultation. In reference to immigration control policies, Lahav and Messina (2005: 870) have argued that, "as the EP has gained greater policy-making authority, the abatement of external struggles may have liberated European parliamentarians to think more ideologically and act on their natural partisan impulses". This argument does explain the voting behaviour of the political groups in LIBE during the negotiations of the *Returns* directive, yet, as I will show in the next section, it does not explain negotiations dealing with data protection and discrimination.

What was seen in the *Returns* directive was a classic left/right divide. In the final votes, the right-wing and the liberals voted in favour of the agreement reached between the rapporteur, shadow rapporteurs and Council at first reading (367 votes), while the left voted largely against (206 votes) although some of its members decided to abstain (109 votes). Two points have to be underlined in relation to the votes. First, the ALDE group broke the tradition of voting in the AFSJ dimension together with the left-wing parties. However, as I will show later, this was not a question of substance, but rather of form. Some members of the ALDE group accept that although the directive helps to solve some problematic issues, the outcome is not completely to their liking (A. Alvaro, interview, January 2009). Therefore, they did not vote in favour because they were convinced by the contents of the agreement but, as I will show, because they wanted an agreement. Secondly, the socialist group was divided between those, like some members of the French delegation, who wanted to oppose the directive because they did not agree with its point of departure, namely the necessity to return irregular immigrants, and those who believed that the agreement reached was better than not having any legislative text at all (M. Speiser, interview, January 2009; European Parliament 2008b). In fact, some argue that those socialist delegations that were more positive towards the text were at the brink of voting yes but, in order to keep some consistency inside the group, they decided to abstain (EP official, interview, January 2009; European Parliament 2008c).

The result was that the LIBE committee was unable to present a common front and a substantive alternative to the Council. The EPP-ED group approached the matter as a question of being realistic. This idea of being realistic refers to the ability to put the directive into practice and implement it effectively. In consequence, the result has a closer resemblance to the policy-image developed by the Council and the Commission than to the alternative views that some committee members may have had. For instance, the left-wing groups in the LIBE committee wanted to include those individuals retained in transit zones or rejected at borders into the scope of the directive. This means that those persons awaiting return after having been denied entrance or stay in a member state could still benefit from some standards of protection. However, the rapporteur, Manfred Weber

(EPP-ED), shared the opinion of the Council that it is the right of member states to decide who crosses the border and who does not, and in consequence who can and cannot receive benefits and safeguards (European Parliament 2007: 28). As Michael Speiser (interview, January 2009), political advisor to the EPP-ED group, has clearly explained it, "[they] have to make sure that [the directive] does not just apply to anyone who is five kilometres away and waves his [sic] hands and says 'I want to fall under this directive'. Either you are in or you are out".

In short, the political groups in the LIBE committee were far too polarised to share a substantive policy-image that could convince the Council to change the substantive track abruptly. Rather, some of the members, and most importantly the rapporteur, shared the substantive policy-image of the Council, making it even more difficult for the left-wing groups to engage in conflict expansion. Having more power to co-decide did not provide more opportunities for those at the margins to introduce an alternative policy-image.

Legitimising the LIBE committee: why the functional dimension stopped policy change

As noted when explaining the motivation for the final votes, the lack of a shared alternative to the existing substantive dimension of the policy-image does not explain single-handedly why some groups preferred to vote for the first-reading agreement. In theory, rejecting the first-reading agreement was not equivalent to losing the chance to have a *Returns* directive. The groups that hesitated, such as ALDE and parts of the socialist group, could have forced a second reading by dismissing the first-reading agreement, and thus forced continuation of negotiations with the Council. It would certainly have been more difficult to reach agreement between the EP groups, since the EP needs a majority of its members to pass amendments and not just a simple majority of the members present. In spite of this caveat, how do we explain the final commitment to the first reading agreement and their refusal to continue the proceedings?

The answer is two-fold and linked to the functional dimension of the policy-image. First, there was an agreement at first reading because MEPs knew that the Council had almost no interest in having a *Returns* directive (Council official, interview, January 2009). In fact, the Council had always called the proposal a 'right to stay' directive, instead of a *Returns* directive, consistent with a more negative approach to irregular immigration (M. Speiser, interview, January 2009). In consequence, political groups such as ALDE decided to go along with the first-reading agreement, since for them the most important thing was to have a legislative text dealing with this issue, even if they felt blackmailed when the Council gave very clear signs that "if there [was] no first-reading agreement, [the EP should] forget the whole thing" (A. Alvaro, interview, January 2009).

Secondly, the EP was severely pressured to reinforce the functional dimension, in the sense that it had to prove a valuable partner when negotiating with the Council under co-decision. Taking both elements into account, it meant that the LIBE committee had to be flexible enough to convince the Council first that it was worth having a directive on *Returns* and second that the committee was a serious, committed partner that would work towards finding an agreement that would satisfy both the majority in the EP and member states (Dragutin Mate in European Parliament 2008b). Therefore, as M. Speiser (interview, January 2009) openly expressed it, the rapporteur of the LIBE committee realised that they could not start negotiations with the same radical posture that they used to have under consultation because in that situation the Council would say: "'listen if you are coming with such unrealistic proposals and unrealistic demands, we just give up on it because the current situation is not problematic for us, we do not need at all price this European harmonisation. We keep people in prison as long as we like, we send home who we like

and in which way we like and as long as this is in accordance with our own constitutions, don't bother us'".

Therefore the result is "bittersweet", as one Council official has put it (interview, January 2009), even though the flavour seems to be more bitter for some of the political groups. There is a general consensus on the need to sacrifice the substantive elements of the negotiation in order to strengthen the functional dimension of the committee, a consensus that fits the long-standing battle of the EP to widen its decision-making powers (Priestley 2008). However, putting the functional element of the policy-image as a priority makes conflict expansion more difficult. This conflict of interests is still more poignant in those cases where there is a well formulated substantive alternative, as we will see with the case of data protection.

Data protection: a strong alternative substantive dimension

The substantive dimension of data protection

Contrary to irregular immigration policies, data protection and discrimination have been central issues in the development of the LIBE committee. One could say that they are the issues around which the committee has constructed its policy-image. Since the late 1990s, the LIBE committee has been very active and effective in convincing other decision-making actors that it had a role to play in issues such as access to documents, protection of personal data, transparency and gender discrimination, for instance by organising public hearings dealing with these issues, especially on data protection. These issues have also been open to judicial control and the EP has not hesitated to involve the Court of Justice. In consequence, members of the LIBE committee share an understanding of the functional, but also the substantive role that the committee has to play in this area. They share a common culture that has allowed them to be regarded as a powerful committee both inside and outside the EP, since their protection of personal data and their fight against discrimination has gained the respect and support both of other EU institutions and also societal actors.

A long standing fight of the committee exemplifies the existence of an alternative substantive dimension in data protection. The *Passenger Name Records* (PNR) refers to the information provided by individuals to airline companies when buying an airplane ticket. The content and extent of the information varies, but usually PNR contain not only objective data obtained from passports – advanced passenger information – but also data provided by the passenger, such as home and work addresses or special meal requirements. Since the events of 2001, this background information is not just used to provide information to book a flight, but also to check if the person is allowed to cross the borders (Hailbronner *et al.* 2008: 189) and, even more importantly, it can also be used for the purpose of profiling, that is finding correlations among data that show suspicious patterns or links among persons considered a threat (Brouwer 2009: 2).

In the aftermath of 11 September 2001, the United States extended the requirement to provide passengers' information to international airlines. These requirements left European companies in an impasse: if they failed to provide this information, they would not be allowed to fly to the USA, but if they did give the information, they would be breaking European data protection law. In order to find a solution for European airlines, the Commission decided to negotiate a bilateral agreement with the USA (Council of the European Union 2004a), even though it was clear that the data protection standards in the United States did not reach the requirements of EU law (Hailbronner *et al.* 2008: 189). The result was an obvious opposition from the European Parliament, which filed a case to the Court of Justice contesting both the legal basis of the agreement and its capacity to

protect fundamental rights (Joined Cases C-317/04 and C-318/04 Parliament v Council and Commission [2006] ECR I-4721). The allegations made by the EP reflect well the willingness to change the policy-image in data protection both in its functional and substantive elements. The disagreement about the legal basis turned around the interest of the LIBE committee to lead the discussion. The agreement had been decided upon the basis of article 95 EC (i.e. in relation to transports policy), but the LIBE committee wanted to change the legal basis because it considered that the measure dealt primarily with data protection. In 2004, the EP was waiting for the end of the transitional period and trying to convince member states to expand the powers of the EP in the area of Freedom, Security and Justice. Therefore, it was in its interest to reaffirm its functional dimension in this area. On the other hand, the willingness to enter into conflict expansion in relation to the substantive dimension is clear. The LIBE committee argued that EU law did not permit the transfer of personal data to a third country if it could not ensure an adequate level of protection. Although the Commission had issued an adequacy decision, the EP and the European Data Protection Supervisor continued to believe that the level of protection was not sufficient and that the amount of data required was excessive (Saxby 2007: 295).

The decision of the Court failed to deal with the substantive claims of the EP because it annulled the agreement on the basis of an invalid legal basis. However, the result was not as the LIBE committee expected: the Court agreed with the EP that the object of the agreement was not transport policy but it also considered that it should have been dealt under criminal law (i.e. under the third pillar), giving an exclusive right to negotiate the agreement to member states. This decision forced the Council, instead of the Commission, to reach an agreement with the US in the name of all EU member states (European Union 2007). Although the number of items required diminished, this was the result of simply merging different categories (Brouwer 2009: 13). The result is that the LIBE committee is still very sensitive when dealing with PNR and it has not failed to demonstrate how central this issue is to its committee culture. For instance, in November 2007, the Commission issued a proposal aiming to introduce a Council framework decision on the use of Passenger Name Records for law enforcement purposes (European Commission 2007). Since the proposal falls under the third pillar, the LIBE committee only has the right to issue an opinion. The Resolution adopted by the LIBE committee concerning the proposal is very critical (European Parliament 2008), but it gives the Council a chance to address its concerns before issuing the EP formal opinion (European Parliament 2008: 3). The LIBE committee has again highlighted the problems concerning individual rights and committee members have also agreed that such a framework directive might be uncalled for, since there might be no need for a European-wide passenger name records system (A. Alvaro, interview, January 2009).

The PNR case shows the consistency and long-term engagement of the LIBE committee towards data protection. It can therefore be said that the LIBE committee has an interest in maintaining such a shared common culture around data protection and discrimination issues, since it is the source of its good reputation (EP official, interview, January 2009). In consequence, one should expect that for LIBE members it would be easier to continue their conflict expansion when dealing with data protection and discrimination, especially under new decision-making rules that give them more potential to shape the substantive element of policies.

The Data retention directive: the attempt of the LIBE committee to present an alternative

The *Data retention* directive (European Parliament & Council of the European Union 2006) was one of the first instruments to be dealt with under co-decision. The directive stipulates that national authorities, such as police forces, can keep information on calls or internet communications for a certain time with the intention of using this information in cases of

criminal investigations, though only for those offences considered as serious.[3] The proposal was first proposed as a third-pillar instrument by France, Ireland, Sweden and the UK (Council of the European Union 2004b), but the Commission argued that the categories of data covered by the proposal affected first pillar competences. Therefore, it was decided that the Commission would issue a proposal under Article 95 EC, as a single market measure and thus falling in the first-pillar where co-decision applies, taking advantage of the end of the transitional period. Therefore, the LIBE committee found itself with a perfect window of opportunity to enter into conflict expansion in order to change the policy-image dominating the AFSJ via its most cherished topic: data protection.

Indeed, the rapporteur, Alexander Alvaro (ALDE), engaged the committee in a thorough revision of the proposal and, by the end of the negotiations at committee level, he was convinced to have achieved a good cross-party agreement reflecting a balanced outcome (A. Alvaro, interview, January 2009; European Parliament 2005a: 35). The report introduced a much higher standard of data protection, making reference to case law from the European Court of Human Rights and European data protection legislation (European Parliament 2005a). There were some details, such as the period of retention or the definition of serious crime, that were made stricter in his report. In reference to the length of data retention, the Commission had proposed one year for all types of data, while the LIBE committee preferred six to twelve months. Regarding the definition of serious crime, although the Commission already specified that it could not be used for any crime, the LIBE committee proposed to link the definition of serious crime to the European Arrest Warrant, where member states had agreed on a list of serious offences (Council of the European Union 2002). However, more importantly, the rapporteur did introduce an important difference in his report. The Commission was relatively vague in relation to the purpose of the directive. Article 1 stated that the "data is available for the purpose of the prevention, investigation, detection and prosecution of serious criminal offences" (European Commission, 2005, art. 1). This meant that data stored in national databases could be used not only when there was a suspicion but also for other purposes, such as profiling (see above in relation to PNR). Alvaro was opposed to this use and wanted to make sure that the data would only be used in cases of suspicion (Commission official, interview, January 2009). Therefore, the LIBE committee proposed to delete the word prevention, considering it too vague, and introduced an extensive and detailed new article on access to retained data. Article 3a.1.e clearly specifies that access "does not include large-scale data-mining in respect to travel and communications patterns of people unsuspected by the competent national authorities" (European Parliament 2005: 15-16).

By the end of the negotiations UK Home Secretary, Charles Clarke, met the LIBE committee on 13 July 2005 and most of its members criticised the insistent pressures of the Presidency to force them into an agreement. This resistance to Clarke shows that they had initiated a strategy of conflict expansion and that it was being relatively successful, since the UK Home Secretary acknowledged that the EP was now in a legitimate position to co-decide and to block negotiations if it wished to do so. This realisation culminated with retaliation from Clarke, who threatened the EP with abandoning the negotiations on the directive and opting for the conclusion of the third pillar framework decision previously proposed. The EP responded to the threat with another threat, warning Clarke that it would not hesitate to bring the matter in front of the Court of Justice (EDRI 2005a). Why then, with such a clear willingness to bring the matter further and not yield to the pressure exerted by the presidency, did the EP agree to follow most of the Council preferences and reach a first-reading agreement?

[3] The definition of serious crime is left to the discretion of member states.

Legitimising the European Parliament: the functional dimension as an obstacle for policy change

The situation during the last stages of the negotiation on the *Data retention* directive was therefore very different from the *Returns* directive. There was a clear conflict of interests between the LIBE committee and Council, both parties embracing very different substantive positions. The LIBE committee was not interested in reaching an agreement at all costs. Following the above-mentioned meeting with Clarke, Alvaro affirmed that "the LIBE Committee was not to be pushed into blind obedience by the UK" (EDRI 2005a). The conflict was still standing on 12 October 2005, when the JHA Council meeting took place, but on 20 October the leaders of the political groups had decided to comply and reach a first-reading agreement with the Council (EDRI 2005b). What were the reasons behind the UK presidency insistence on reaching an agreement and why did EP group leaders from the EPP-ED and PES follow the lead?

The reasons behind Clarke's behaviour are easy to understand. The UK was among those member states that had proposed the third-pillar framework decision. Therefore, they were already fairly unsatisfied with having to include the Parliament in the negotiations, especially when the LIBE committee turned out to have very different ideas about data retention. Clarke faced two more pressures. First, the UK wanted to reach agreement before the end of its presidency. As with most presidencies, they had an interest to claim success for an important and highly controversial piece of legislation. Yet, on this occasion, there was a second reason that made an agreement all the more important. On 7 July 2005, just some days after the start of the British presidency, London was affected by a set of simultaneous bombings. The terrorist attack came just over one year after a set of similar attacks in Madrid. The general ambiance in the Council, especially amongst those member states that had suffered or that thought themselves more at risk, was of a growing electoral pressure to act against terrorism. The expectations put on Clarke were extremely high. He wanted to make sure that he could go back to UK citizens with as many results as possible, showing his clear commitment to the fight against terrorism. The result was that most of the pressure and the rush to find a first-reading agreement came from the UK, and especially from Clarke himself (A. Alvaro & Commission official, interviews, January 2009).

The reasons behind the group leaders' behaviour are clearly located in the functional dimension of the policy-image instead of the substantive dimension. Although a majority in the Parliament might have followed the alternative substantive dimension that the LIBE committee offered, they prioritised the functional dimension (i.e. the search for institutional legitimacy), for two different reasons. The first reason relates to the necessity of the European Parliament to show its engagement in negotiating effectively under co-decision. In a sense, it reflects the same pressure the EP felt while negotiating the *Returns* directive. Since, the *Data retention* directive was among the first pieces of legislation to be agreed under co-decision in the AFSJ, the group leaders from the largest political parties felt the necessity to show their ability to compromise and to be responsible. They were afraid that failing to find an agreement that would make the Council, and especially the Presidency, happy would translate into a long-term conflict with member states, which could block the capacity of the European Parliament to participate effectively in the development of the AFSJ. Clarke very bluntly affirmed that "if parliament failed, he would make sure the European Parliament would no longer have a say anymore on any JHA matters" (ECRI 2005b). After so many years of waiting to expand their powers in the AFSJ, group leaders probably did not want to jeopardise future negotiations. Making sure that the Council perceived Parliament as a serious partner was a way to strengthen the functional dimension, reassuring them that their claims of being a legitimate actor in the area of Freedom, Security and Justice were correct and that member states could trust Parliament to behave responsibly.

Secondly, this necessity to act responsibly was also a result from a parallel strategy from the Council. During the last stage of the negotiations, the Council assured political groups' leaders that, if they were consensual and showed a mature behaviour in this case, they would make use of the passerelle clause in order to extend co-decision to some of the issues still in the third-pillar (A. Alvaro, interview, January 2009). Ultimately the discussions in the Council lingered until the end of 2006, but it was quite clear that the shift to co-decision would be almost impossible to achieve, especially given that some large member states such as Germany opposed the use of the passerelle clause, for which unanimity was required (Monar 2007: 120-122). Alvaro, who in spite of being the rapporteur was marginalised during the negotiations between Clarke and the group leaders, still fails to understand what happened exactly and "why group leaders were so naive to believe this argument" (A. Alvaro, interview, January 2009).

The result was an agreement very much to the liking of the Council. For instance, they kept, as desired, the period of retention between six months and two years and the definition of serious crime was left to member states. Also, in reference to the purpose of the directive, although the mention of prevention of crime was deleted, article four concerning access to data is reduced to the strict minimum and contains only vague references to the necessity and proportionality of access (European Parliament & Council of the European Union 2006). Since the agreement had been negotiated by the two largest groups of the chamber, the rapporteur, from ALDE, could not gather a majority to support his report and withdrew his name from it (European Parliament 2005b: 31). Plenary voted the amendments proposed by the political groups and the result was a large majority in favour (378 votes, mostly from the EPP-ED and PES, 197 against and 30 abstentions).

Apart from opening important questions in terms of democracy and transparency issues, the agreement on *Data retention* illustrates the long-term engagement of the European Parliament towards the expansion of its institutional powers. Clearly, in front of a dilemma opposing the interests of the LIBE committee – that wished to engage in a strategy of conflict expansion to change the policy-image in data protection – and the largest interests of the European Parliament, group leaders did not hesitate in opting for the latter, making sure that the EP was regarded as a reliable and, following the words of the Council, *mature* institution that could offer an added value to decision-making in the AFSJ. Therefore, with or without a strong alternative in the substantive dimension, the functional dimension continued to be a priority for the EP, rendering conflict expansion an unviable option.

Conclusion

The aim of this article was to assess the capacity of the European Parliament to influence policy change in the area of Freedom, Security and Justice. After the institutional changes introduced in 2005, the EP was given the right to co-legislate with the Council in those issues transferred to the first pillar (i.e. all the issues included in the AFSJ except for police and judicial cooperation in criminal matters, family law and irregular immigration). It was expected that in this upgraded position the EP would be able to engage in substantive policy changes, transforming the policy-image in order to balance security and liberty and to give priority to the latter. The empirical evidence shows that these expectations have not been realised and that the Parliament has been unable to change substantively the policy-image governing the AFSJ. Securitisation is still the priority and continues to mobilise public support.

The article has also sought to develop Maurer and Parkes' functional and substantive dimensions. The concepts have proven to be relevant and heuristic in the AFSJ. The

substantive dimension combines strong elements of technicality and emotional appeal and has been constructed in very confrontational terms. As explained by the authors, the functional dimension has been almost solely responsible for the institutional change, offering new decision-making rules to the area. Yet, the empirical evidence shows that this change cannot be taken for granted. Although the formal shift in decision-making has been successful in giving powers of co-decision to the European Parliament, the functional dimension is still weak, since the EP is not yet regarded as a fully legitimate and efficient actor in the decision-making process. Besides, the shift to co-decision in the area of Freedom, Security and Justice weakens the assumption of a unified European Parliament. The gain in responsibility and the feeling that what the EP decides with the Council will have a direct impact on citizens (i.e. voters) has created a breach separating the interests of the LIBE committee from the wider interests of the European Parliament.

In consequence, the desire of the European Parliament to strengthen its functional dimension has become a priority that works against the potential to change the substantive dimension of the policy-image. In those cases were the LIBE committee is polarised and does not have a clear alternative to the substantive image presented by the Council, the willingness to portray itself as a reasonable and *mature* institution capable of reaching inter-institutional compromises blocks any capacity of minority actors to convince the other members of the committee to engage in conflict expansion. As explained earlier, during the negotiations on the *Returns* directive, the left-wing was unable to convince the committee that fighting for a particular conception of returns was more important than obtaining a directive at any price. Even more interesting is the effect of a weak functional dimension on those areas where an alternative substantive dimension exists. Here, strengthening the functional dimension has not only made strategies of conflict expansion more difficult, but it has also created a dilemma between the LIBE committee's substantive interests and the EP's functional interests. As a result we see that broadening the powers of the European Parliament is perceived to be a long-term strategy and thus a more important objective than ensuring a substantive change in a specific policy area.

However, the long-term perspectives for both issue areas, irregular immigration and data protection, are very different. In the event that the European Parliament could effectively strengthen the functional dimension in the AFSJ, the capacity to engage in conflict expansion is much higher in those issues were a substantive alternative exists. Therefore, the LIBE committee might have more opportunities for conflict expansion once the group leaders are convinced that the Council has accepted their presence in negotiations in the area of Freedom, Security and Justice. If in the future the Council comes to trust the Parliament and perceives it as a cooperative and helpful partner, then the LIBE committee might be able to convince the enlarged Parliament (i.e. the Plenary), to defend substantive issues that are of core importance to the committee. Once its position is secured, the committee might also be able to engage the EP in inter-institutional battles by challenging the substantive dimension in the European Court of Justice. If the Treaty of Lisbon comes into practice, these possibilities for conflict expansion may potentially include those areas that are now still part of the third pillar, since the pillar structure will formally disappear and the community method will apply to most issues related to police and judicial cooperation in criminal matters. Indeed, with the introduction of the Lisbon Treaty, issues such as data protection, PNR, discrimination or access to documents, which are now dispersed between the first and the third pillar, will have a higher potential to be substantively changed[4] and judicially challenged in the mid-term compared to asylum, irregular immigration or border policies. The latter will probably turn out to be an area of

[4] See for instance the allusion made to future changes in the EP resolution on data protection (European Parliament 2005c)

conflict inside the committee, very much dependent on political majorities and personal behaviour of core actors, especially rapporteurs.

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References

Benedetto, G. (2005). Rapporteurs as legislative entrepreneurs: the dynamics of the codecision procedure in Europe's parliament. *Journal of European Public Policy*, 12(1), pp. 67 - 88.

Bigo, D. (1994). The European Internal Security Field: Stakes and Rivalries in the Newly Developing Area of Police Intervention. In M. Anderson & M. den Boer (Eds.), *Policing across National Boundaries*. London: Pinter.

Bouteillet-Paquet, D. (2003). Passing the Buck: A Critical Analysis of the Readmission Policy Implemented by the European Union and Its Member States. *European Journal of Migration and Law*, 5, pp. 359-377.

Brouwer, E. (2009). Towards a European PNR system ? Questions on the Added Value and the Protection of Fundamental Rights. Study requested by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE). Available at: http://www.europarl.europa.eu/activities/committees/studiesCom/download.do?file=24151#search= pnr, last accessed 13 August 2009 .

Burns, C. (2006). Co-decision and Inter-Committee Conflict in the European Parliament Post-Amsterdam. *Government and Opposition*, 41(2), pp. 230-248.

Buzan, B., Wæver, O., & Wilde, J. D. (1998). *Security: A new framework for analysis*. Boulder: Lynne Rienner Publishers.

Carrera, S. (2007). The EU Border Management Strategy: FRONTEX and the Challenges of Irregular Immigration in the Canary Islands. *CEPS Working Documents*, *261*.

Council of the European Union (2001). *Council Directive of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985. 2001/51/EC, Official Journal, L 187/45*.

Council of the European Union (2002). *Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States. 2002/584/JHA, Official Journal, L 190/1*.

Council of the European Union (2004a). *Council Decision of 17 May 2004 on the conclusion of an Agreement between the European Community and the United States of America on the processing and transfer of PNR data by Air Carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection. 2004/496/EC, Official Journal, L 183/83*.

Council of the European Union (2004b). *Draft Framework Decision on the retention of data processed and stored in connection with the provision of publicly available electronic communications services or data on public communications networks for the purpose of prevention, investigation, detection and prosecution of crime and criminal offences including terrorism. CNS/2004/0813* .

Council of the European Union (2004c). *Council Decision of 22 December 2004 providing for certain areas covered by Title IV of Part Three of the Treaty establishing the European Community to be governed by the procedure laid down in Article 251 of that Treaty. 2004/927/EC, Official Journal L 396/45*.

EDRI (2005a, July 14). Europarl protests against UK push for EU data retention . *EDRI-gram*, *3*(14). Available at: http://www.edri.org/edrigram/number3.14/retention, last accessed 22 February 2009.

EDRI (2005b, October 20). Data retention: Council barks but cannot bite. *EDRI-gram*, 3(21). Available at: http://www.edri.org/edrigram/number3.21/retention, last accessed 22 February 2009.

European Commission (2005). *Proposal for a Directive of the European Parliament and of the Council on the retention of data processed in connection with the provision of public electronic communication services and amending Directive 2002/58/EC. COM/2005/0438 final*.

European Commission (2006). *Communication from the Commission to the Council and the European Parliament on the Global Approach to Migration one year on: Towards a comprehensive European migration policy, COM(2006) 735 final*.

European Commission (2007). *Proposal for a Council framework decision on the use of Passenger Name Record (PNR) for law enforcement purposes. COM/2007/654 final*.

European Commission (2009), *Third annual report on the development of a common policy on illegal immigration, smuggling and trafficking of human beings, external borders, and the return of illegal residents, SEC(2009) 320 final*.

European Court of Justice (2006). *European Parliament v Council of the European Union and Commission of the European Communities, Joined Cases C-317/04 and C-318/04.*.

European Parliament (2005a). *Report of 28 November 2005 on the proposal for a directive of the European Parliament and of the Council on the retention of data processed in connection with the provision of public electronic communication services and amending Directive 2002/58/EC . A6-0365/2005*.

European Parliament (2005b). *Wednesday, 14 December 2005, Report of proceedings, final version - Plenary documents, P6_CRE(2005)12-14*. Available at: http://www2.europarl.eu.int%2Fregistre%2Fseance_pleniere%2Fcompte_rendu%2Ftraduit%2F2005%2F12-14%2FP6_CRE%282005%2912-14_DEF_EN.pdf&TYPE=PCRE, last accessed 13 August 2009.

European Parliament (2005c). *Legislative resolution of 14 December 2005 on the proposal for a directive of the European Parliament and of the Council on the retention of data processed in connection with the provision of public electronic communication services and amending Directive 2002/58/EC, P6_TA(2005)0512*.

European Parliament (2007). *Report of 20 September 2007 on the proposal for a directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals. A6-0339/2007*.

European Parliament (2008a). *Resolution of 20 November 2008 on the proposal for a Council framework decision on the use of PNR for law enforcement purposes. B6-0615/2008*.

European Parliament (2008b, June 17). Debates - Common standards and procedures in Member States for returning illegally staying third-country nationals, CRE 17/06/2008 - 4. Available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20080617+ITEM-004+DOC+XML+V0//EN, last accessed 13 August 2009.

European Parliament (2008c, June 18). Debates - Explanations of vote. Available at: http://www.europarl.europa.eu/sides/getDoc.do?type=CRE&reference=20080618&secondRef=ITEM-007&language=EN&ring=A6-2007-0339#3-171, last accessed 13 August 2009.

European Parliament, & Council of the European Union (2006). *Directive of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, 2006/24/EC, Official Journal, L 105/54*.

European Parliament, & Council of the European Union (2008). *Directive of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals*. EC, 2008/115/EC, *Official Journal, L 348/98*.

European Union (2007). *Agreement of 18 October 2006 between the European Union and the United States of America on the processing and transfer of Passenger Name Record (PNR) data by air carriers to the United States Department of Homeland Security (DHS)*. *Official Journal, L 204/18*.

Farrell, H. & Héritier, A. (2004). Interorganizational Negotiation and Intraorganizational Power in Shared Decision Making: Early Agreements Under Codecision and Their Impact on the European Parliament and Council. *Comparative Political Studies*, 37(10), pp. 1184-1212.

Frontex. (n.d.). Examples of accomplished operations. Available at: http://www.frontex.europa.eu/examples_of_accomplished_operati/, last accessed 21 February 2009.

Garman, J., & Hilditch, L. (1998). Behind the scenes: an examination of the importance of the informal processes at work in conciliation. *Journal of European Public Policy*, *5*(2), pp. 271-284.

Geddes, A. (2000). *Immigration and European integration: towards fortress Europe*. Manchester: Manchester University Press.

Geddes, A. (2003). Still Beyond Fortress Europe? Patterns and Pathways in EU Migration Policy. *Queen's Papers on Europeanisation*, (0037). Available at: http://ideas.repec.org/p/erp/queens/p0037.html#download, last accessed 19 February 2009.

Grabbe, H. (2002). Justice and Home Affairs: Faster decisions, secure rights. *CER Policy Brief*. Available at: http://www.cer.org.uk/pdf/policybrief_jha.pdf, last accessed 19 February 2009.

Guild, E., & Carrera, S. (2005). No Constitutional Treaty? Implications for the Area of Freedom, Security and Justice. *CEPS Working Document*, (231).

Häge, F. M., & Kaeding, M. (2007). Reconsidering the European Parliament's Legislative Influence: Formal vs. Informal Procedures. *Journal of European Integration*, 29(3), pp. 341 - 361.

Hailbronner, K., Papakonstantinou, V., & Kau, M. (2008). The Agreement on Passenger-Data Transfer (PNR) and the EU-US Cooperation in Data Communication. *International Migration*, 46(2), pp. 187-197.

Huysmans, J. (2006). *The politics of insecurity: Fear, migration and asylum in the EU*. London: Routledge.

Kostakopoulou, T. (2000). The 'Protective Union': Change and Continuity in Migration Law and Policy in Post-Amsterdam Europe. *Journal of Common Market Studies*, 38(3), pp. 497-518.

Lahav, G., & Messina, A. M. (2005). The Limits of a European Immigration Policy: Elite Opinion and Agendas within the European Parliament. *Journal of Common Market Studies*, 43(4), pp. 851-875.

Maurer, A. (2003). The Legislative Powers and Impact of the European Parliament. *Journal of Common Market Studies*, 41(2), pp. 227-247.

Maurer, A., & Parkes, R. (2006). Asylum Policy and Democracy in the European Union from Amsterdam towards the Hague Programme. *SWP Working Paper*, *16*. Available at: http://www.swp-berlin.org/en/common/get_document.php?asset_id=2730, last accessed 13 August 2009.

Maurer, A., & Parkes, R. (2007). The Prospects for Policy-Change in EU Asylum Policy: Venue and Image at the European Level. *European Journal of Migration and Law*, 9, pp. 173-205.

Melis, B. (2001). *Negotiating Europe's immigration frontiers*. The Hague: Kluwer Law International.

Monar, J. (2007). Justice and Home Affairs. *Journal of Common Market Studies*, 45(s1), pp. 107-124.
Monar, J. (2001). The Dynamics of Justice and Home Affairs: Laboratories, Driving Factors and Costs. *Journal of Common Market Studies*, 39(4), pp. 747-764.
Neuhold, C. (2001). The 'Legislative Backbone' Keeping the Institution Upright? The Role of European Parliament Committees in the EU Policy-Making Process. *European Integration online Papers (EIoP)*, *5*(10). Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=302785, last accessed 19 February 2009.
Peers, S. (2006). *EU Justice and Home Affairs Law* (2nd ed.). Oxford: Oxford University Press.
Priestley, J. (2008). *Six Battles that Shaped Europe's Parliament*. London: John Harper.
Princen, S. (2007). Agenda-setting in the European Union: a theoretical exploration and agenda for research. *Journal of European Public Policy*, 14(1), pp. 21-38.
Rasmussen, A. (2007). Early conclusion in the co-decision legislative procedure. *EUI Working Paper MWP*, (2007/31). Available at: http://cadmus.eui.eu/dspace/bitstream/1814/7635/1/MWP_2007_31.pdf, last accessed 19 February 2009.
Saxby, S. (2007). Parliamentary Committee strongly criticises EU/US Passenger Name Record Agreement. *Computer Law & Security Report*, 23(4), pp. 295-296.
Settembri, P., & Neuhold, C. (2009). Achieving Consensus Through Committees: Does the European Parliament Manage? *Journal of Common Market Studies*, 47(1), pp. 127-151.
Shackleton, M. (2000). The Politics of Codecision. *Journal of Common Market Studies*, 38(2), pp. 325-342.
Shackleton, M., & Raunio, T. (2003). Codecision since Amsterdam: a laboratory for institutional innovation and change. *Journal of European Public Policy*, 10(2), pp. 171 - 188.
True, J., Jones, B., & Baumgartner, F. (2007). Punctuated-equilibrium theory, explaining stability and change in American policy-making. In Paul Sabatier (Ed.), *Theories of the Policy Process*. Boulder: Westview.
Uçarer, E. M. (2001). From the Sidelines to Center Stage: Sidekick No More? The European Commission in Justice and Home Affairs. *European Integration online Papers (EIoP)*, *5*(5). Available at: http://eiop.or.at/eiop/pdf/2001-005.pdf, last accessed 13 August 2009.

Interviews

- Alvaro, A. (MEP), Interview, January 2009.
- Council of the European Union (official), Interview, January 2009.
- European Commission (official), Interview, January 2009
- European Parliament (official), Interview, January 2009.
- Speiser, M. (EPP-ED Political Advisor), Interview, 2009

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