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Differentiating Agency Independence: Perceptions from Inside the European Medicines Agency

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Abstract

The regulations granting the establishment of EU agencies were meant to ensure institutional independence in order to insulate everyday decision-making from political pressure, vested interests and political short-termism. However, recent events, including managerial resignations and the introduction of new rules concerning conflicts of interest, have brought renewed attention to the autonomy/independence debate. This article goes beyond the traditional de jure/de facto dichotomy of approaches to approaching the question of independence to consider *perceptions* of agency staff. It seeks to gauge the opinions of members of the European Medicine Agency's Management Board with regard to agency autonomy, distinguishing between four types of independence: legal, financial, administrative, decision-making. It draws on data collected using questionnaires, and interpreted using the expert evaluation method, to rank the importance given to types of independence among sub-sets of stakeholders overseeing the EMA.

Keywords

EU agencies, European Medicines Agency, autonomy, independence, management boards, perceptions

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Recent events have highlighted the sensitive issue of agency independence and questioned the checks and balances in place to ensure that agencies operate autonomously from business and political interests. In June 2010, the European Ombudsman ordered the European Medicines Agency (EMA) – the body meant to ensure that all medicines in Europe are safe and effective for citizens – to 'cough up the information', accusing it of maladministration; only in February 2011 did the EMA 'acquiesce' to the demand (EUobserver.com 2011). In December 2010, the agency's executive director resigned to go and work for a private consultancy advising the pharmaceutical industry. This incidence of a high-profile agency staff member drifting between public and private sector positions – a case of 'revolving doors' – was given the green light by the agency's Management Board (MB), which, it was reported, saw no conflict of interest (European Medicines Agency 2010a, 2010b). Then, in May 2011, the question of EU agency independence was brought under the spotlight controversially when the European Parliament refused – by a decision of 637-to-4 votes – to sign off the agency's accounts; the agency being 'further bludgeoned' when the Parliament subsequently ordered an investigation into the EMA's financing and the independence of its experts vis-à-vis the pharmaceutical industry (EUobserver.com 2011).

Over the last decade, scholars have addressed the notion of agency autonomy, analysing what position agencies hold in the hierarchy of the EU's organisational structure, i.e. whether they are independent or semi-independent from – or else completely dependent on – the EU institutions and other actors (Gardner 1996; Everson and Majone 2000; Kreher 2001; Shapiro 2001; Gilardi 2002; Geradin 2005; Vos 2000, 2005; Tarrant and Keleman 2007; Groenleer 2006, 2009; Sacchetti 2009; Busuioc 2009, 2010). More recently, scholars have focused on questions of agency autonomy: beginning by drawing on earlier studies examining the link between the institutional arrangement in which an agency's operation is embedded and the scope for quasi-independent action (Gehring and Krapohl, 2007); and later examining how accountability arrangements help to reinforce autonomy (Busuoic *et al.* 2011) and which actors are most able to act autonomously, recognising a difference between autonomy in practice versus in legal terms (Egeberg and Trondal 2011).

The regulations founding the EU agencies gave them a degree of independence in order for their everyday decision-making to be insulated from political pressure and the short-term preferences of interested parties, to ensure that objective and politically-unbiased

information could be made available to decision-makers. The Commission's own activity is frequently defined, or at least heavily influenced, by the information provided by the European agencies. As a result, the functioning of agencies attracts the attention of external actors and stakeholders, each with their own political or financial agenda. 'Objective' information becomes significant and desirable, causing the interest and involvement of other actors, eager to obtain this information and influence it. Regulatory agencies have 'some formal decision-making authority' and 'are more likely to be formally shielded against interference from the Commission, the member states and stakeholders' Christensen and Nielsen (2010: 182). However, actual independence is rarely explicit in the everyday policy-making of the agencies – does it exist, or is it a myth? As Borrás *et al.* (2007: 584) assert, the daily operation of agencies cannot be decoupled from their political and social environment; their operation depends upon socially-constructed perceptions and legitimacy-related beliefs.

Investigating how agencies themselves perceive independence means trying to glean the attitudes and opinions of those working inside. The division of roles is opaque: 'external actors' sit *inside* agencies on the Management Boards. What importance do 'external' actors such as supranational institutions attach to the independence of the agency? How do member state representatives on the Management Board perceive their role vis-à-vis the Commission? Which types of independence are at stake and which is deemed most important, by whom? In which areas of activity does agency staff believe it exerts most influence? How might we measure variation among individuals within the agency?

This article aims to investigate the importance attached to various dimensions of autonomy, by investigating the perceptions of those managing the European Medicines Agency. These dimensions of autonomy comprise four types of independence: administrative, legal, financial and decision-making. The research seeks to enhance our understanding of the work of EU agencies, and their relation with the EU institutions, in particular, the European Commission. The second part of this article explores the notion of independence versus autonomy, explores agency management boards and introduces the European Medicines Agency. The third part considers a methodology for gauging how Board members rank the importance of dimensions of independence. The fourth part analyses the data collected to draw out variations in the importance attached by sub-sets within the Management Board to types of agency independence, and considers what the findings contribute to the wider literature on EU agencies.

AUTONOMY, INDEPENDENCE AND THE EUROPEAN MEDICINES AGENCY

Definitions and perspectives

There are competing academic perspectives both on agency autonomy/independence, and the use of the terms. Are they synonymous or different? Agency independence has been said to exist when an agency can introduce its own policies, issues or solutions onto the agenda (Zito 2009: 1227). Yet, an agency's independence may be only a '[*relative* freedom] of control by any of the other organs of the [European] Community' (Shapiro 2001: 289), limited by the founding regulations creating the EU agencies. Independence can thus be considered a situation whereby institutional behaviour is not 'guided by personal or national interest or political pressure' (European Commission, 2000: 4). Recognising the policy world as one of goal conflicts and incomplete information, Yesilkagit (2004: 532) points out that 'in reality […] real autonomy may not correspond with the formal autonomy of agencies. Depending on the issue, agencies may enjoy more or less […] autonomy than formally is granted to them'. As Hanretty and Koop (2012: 199) recognised recently, agencies can be independent from a range of actors, including industry, civil society and the public, as well as from governments, parliaments, parties and politicians; 'political independence' is thus understood as day-to-day decisions being free from the interference and preferences of politicians. The

authors take this distinction further, identifying *formal independence* (de jure, legal), i.e. freedom from the 'politics inherent in those legal instruments which constitute and govern the agency', as opposed to *actual independence* (de facto, practical), i.e. acting daily without direct instructions, threats or inducements by politicians and vested interests. Moreover, the former is no guarantee of the latter (Hanretty 2010: 2). In short, one must consider not only the ability of EU agencies to act relatively independently from member state government institutions, but from all potential actors. This suggests, at least, a broad and a wide definition of independence. To be autonomous, therefore, an agency must be independent of political actors as well as stakeholders or clients (Geradin 2005: 230; Trondal & Jeppesen 2008: 421; Groenleer 2009: 36).

In short then, the literature can be divided into two camps. One purports that the level of independence is determined and fixed by the founding legislature: '[what] senior officials and staff members of EU agencies can do is often constrained, and sometimes wholly determined, by the formal rules and procedures put on paper' (Groenleer 2009: 23). This includes recent work by Wonka and Rittberger (2010), which identified functional and power-based factors accounting for variations in formal independence whereby levels of political credibility, complexity and uncertainty influence how political actors endow agencies with legal independence. Another camp assumes that, in reality, independence and power go beyond what is defined by the legal statutes but concerns the practicalities of the day-to-day, as agents engage with various stakeholders in 'providing data, information, and (mainly informal) proposals that may eventually influence the actual formulation of the content of the European public policy' (Barbiero and Ongaro 2008: 397). This includes work by Busuioc *et al.* (2011), which tries to move beyond *de jure* character to *de facto* manifestation, by investigating practice inside the European Police Office, observing how low levels of actual autonomy, even if only through an overload of formal accountability mechanisms, can stifle agency development. The authors assert that 'independent (i.e. fully autonomous) agents generally do not exist in systems of representative government since they are bound by the decisions of others (ibid. 850). For operational purposes, we perceive of autonomy as comprising *types of independence* that each set of stakeholders may rank differently in order of importance, as explored later in this section.

The role and status of management boards

As Keleman (2002: 102) recognised over a decade ago, any consideration of agency independence must recognise that the Commission itself is a 'generalist independent agency' created by the member states and by extension then, one must ask, 'of what exactly were these agencies intended to be independent'. Moreover, agency design – 'including the scope of their powers and their management structures' (Keleman 2002: 94) - was not solely determined by efficiency concerns; inter-institutional politics also played a role. Seeking to exert control over agency functions, member states designed agencies with management structures and operating procedures that would ensure oversight and control. Management Boards, comprised of nationally-appointed representatives alongside Commission, European Parliament and industry representatives, select the director and scientific committee. The EMA's own Board was originally made up of two representatives per member state, as well as two per EU institutions; with decision by two-thirds majority it was easy for the supranational bodies to be outvoted. Hence, it is questionable whether, with such strong intergovernmental management, there was any transfer in regulatory responsibility (Keleman 2002: 101). Acknowledging the limits of parliamentary oversight and representation, MEPs criticised the member state domination of MBs, on the grounds of transparency and democratic accountability (ibid. 2002: 104). In the creation of later agencies, the EP secured a greater role, such as with the European Food Safety Agency, created in the wake of the Mad Cow crisis (ibid. 2002: 108-110).

To what degree is the Management Board part of the agency? Is it the pivotal element linking external stakeholders with the agency staff (experts) as Busuioc (2009, 2010) and Groenleer (2006, 2009) assert, or is it a 'puppet', pulled by external strings? Certainly individual Board members have other institutional affiliations – i.e. identities and interests – and cannot thus be seen purely to represent the singular interests of the agency; as such there is potential for conflicts of interest. Yet, this raises the issue of loyalty and trust that is implicit in the collective membership of groups, the forging of common institutional (agency and board) identity and adherence to formalised codes of conduct (European Commission 2000, 2002, 2005, 2008). There has certainly been controversy over agency departures to industry, particularly for high-profile figures with experience, insight and networks, yet one should guard against presumptions of management boards as manipulated by third parties. That said, the EMA has recently revised its policy on the handling of conflicts of interest for scientific committee members, experts and agency staff, aimed at achieving 'a more robust system'. Its Management Board, at its meeting of 13 December 2012, agreed 'to develop initiatives for greater transparency and communication with stakeholders' and endorsed 'the continuing implementation of the conflicts of interest policies and their monitoring' (European Medicines Agency 2012).

The European Medicines Agency

The EMA is most similar to the regulatory model (Eberlein and Grande 2005: 95) and 'comes closest to being a fully-fledged regulatory body' (Majone 2001a: 263). As Gehring and Krapohl (2007: 209) assert, the EMA could be considered 'among the most important supranational regulatory authorities' and was 'a blueprint for future agencies'. The issue of authorising medicinal products is highly sensitive, heavily disputed, worth billions of Euros, and impacts upon individuals, often directly and immediately. Moreover, health and safety regulation is one of the 'arenas in which scientific and technological information battles are central to political outcomes' (Vos 2000: 1130). The issue area is a 'politically sensitive and emotionally-laden [issue] … which not only [involves] enormous economic interests but also [concerns] the public health of millions of EU citizens' (Groenleer 2009: 141). In addition, the pharmaceuticals industry is a highly developed, organised and 'intensely regulated' field (Feick 2002: 5), hence the frequent and intense interactions between the EMA and its stakeholders. Its information is essential and potentially influential for all stakeholders (Vos 2000: 1132).

The EMA (formerly European Agency for the Evaluation of Medicinal Products) was established by regulation in 1993 (Council 1993; EP and Council 1994). Based in London, its size has grown rapidly; in July 2011 the agency signed a 25-year lease to rent half of a new 20-storey tower in Canary Wharf. It now employs over 720 staff members of whom around 300 are scientific staff, alongside administrative staff and an increasing amount of IT support to manage European databases. Initially, the EMA was functionally and institutionally separate from the Unit for Pharmaceuticals and Cosmetics of the Directorate General (DG) III (Industry). It then came under the responsibility of DG Enterprise but since March 2010 answers to DG SANCO (Health and Consumers). The agency has responsibility to '[protect] and [promote] public and animal health, through the evaluation and supervision of medicines for human and veterinary use' (European Medicines Agency 2010) and 'was designed to accelerate the slow, fragmented and costly process of assessment and authorization of pharmaceutical products and thus to facilitate the completion of the internal market in pharmaceuticals' (Tarrant and Keleman 2007: 32). The agency serves the role of a 'hub of networks of national administrative agencies, research centres, testing laboratories and other expert bodies' (Keleman 2002: 103) and 'coordinates national activities with respect to post-marketing surveillance […] inspection and laboratory controls' (Majone 2001a: 271).

Importantly, for any discussion of independence, the EMA does not adopt binding decisions but instead prepares recommendations based on the scientific and technical expertise of its committees, which it then sends to the European Commission, which ultimately decides whether to license a certain pharmaceutical or not (Eberlein and Grande 2005: 95). Because of the co-decision procedure, the European Parliament, Council and European Commission are all effectively political principals of the EMA (Krapohl 2004: 520). As Thatcher (2011: 9) asserts, this implies a complex process involving the Commission, member state representatives and the Council, though 'in practice things may well differ'. The agency's Management Board functions as a 'steering body' in charge of overseeing the budget, appointing the executive director and monitoring performance (Vos 2000: 1126). It is composed of 35 members with a voting right – one representative from each EU member state, two each from the Commission, European Parliament and patients' organisations, and one from veterinarians' and doctors' organisations. Moreover, delegates from Iceland, Liechtenstein and Norway sit in as observers. The Commission, member states and observers usually have alternate representatives as well (European Medicines Agency 2009a, 2009b).

Busuioc (2010: 146) has identified a conflict of interest in the EMA's Management Board, particularly when it comes to payments made to national medicines agencies for work carried out on its behalf, asking whether the systems used are worthy of sound financial management. She reveals how the former executive director lamented the often 'tricky political balance' and delicate nature of securing agreements among Board members. Suffering from 'multiple accountabilities disorder' (MAD), a term put forward by Koppell (2005), the MB was seen to choose to protect the interests of national offices, rather than 'protecting the efficiency and financial health of the agency which it steers' (Busuioc 2010: 146.).

Types of independence

Legal

The EMA does not have a Treaty base because it was founded by secondary legislation (European Parliament and Council 2004; Krapohl 2004: 520). Hence, as Geradin (2005: 231) claims, 'the EU legislative institutions can … [potentially] limit the attributions of [the EMA] and could even decide to dismantle [it]'. The Council of Ministers established the EMA by regulation but today both the Council and EP have the right to amend the founding legislation. In functional terms, delegating power without guaranteeing a degree of independence is ineffective due to the high risk of an agent failing to provide long-term credible commitments, hence Majone's (2001b: 109-110) argument that it is in the best interests of the principals to provide at least minimal support for independence. On this basis, one might claim that, although the EMA's legal status can, in principle at least, be modified, it would be costly to do so. As Groenleer (2009: 32) asserts, once an organisation's founders have endowed it with legal personality, it is difficult to alter'.

The EP has many mechanisms to control the EMA, including monitoring its website, compulsory regular reporting by the executive director in the specialised parliamentary committee, through the feedback of its representative in the administrative board, as well as EP committee delegation visits to the agency every two years (Corbett *et al.* 2007). It can give 'negative advice' on the appointment of its executive director (Andoura and Timmerman 2008: 14-16). Moreover, the EP has previously 'supported inquiries by the European Ombudsman into administrative procedures and urged it adopt and publicize administrative codes of conduct' (Keleman 2002: 110). Recently, the EMA took up the European Ombudsman's recommendation, agreeing to further broaden access to documents held by the agency (European Medicines Agency 2010). In addition, the European Court of Justice (ECJ) monitors the actions and decisions of the EMA and,

at the request of EU institutions or citizens, can further scrutinise its functioning (Keleman 2002: 99). This procedure is especially important because the applicants (e.g. citizens) may be directly affected by any newly-authorised pharmaceutical product – hence, the possibility to take a case to the ECJ against the EMA's 'decisions'.

Financial

Due to the fact that the agency's EU financing is made up of non-compulsory expenditure, the EP has the power to grant (or not) the discharge of EU funds: it refused to do so in May 2011. Under the procedure, the executive director of the EMA is 'heard by the European Parliament (Budget Control Committee) on the budgetary exercise in question' (Sacchetti 2009: 17). The EP can also ask for reports and attendance at parliamentary committees, to overcome accountability concerns (Barbieri and Ongaro 2008: 411-412). Unlike many other agencies, the EMA's budget is not totally reliant on the Community funds; around 70 per cent is revenues generated from fees charged to pharmaceutical companies (Groenleer 2009: 157; Barbieri and Ongaro 2008: 416; Permanand and Vos 2008: 31). Such budgetary distribution is supposed to increase agency independence vis-à-vis the EU institutions, though this also raises questions about the dependence upon private firms, and the transactional nature of the relationship. When taking into account internal financial rules, the mechanisms regulating the fixing of fees and the influence of political actors over them, claims of agency budgetary independence are less convincing. The adoption and control of the EMA's internal financial rules are highly controlled by the Management Board and the Court of Auditors, as Kreher (2001: 236) observes; their control is the duty of a financial controller appointed by the MB or its budgetary committee.

Administrative

The EP's power to appoint the EMA's director is limited. Although the EP can refuse a candidate for the post of executive director, the agency's Management Board can override their advice and appoint the candidate, usually selected on the basis of professionalism. Thus the EP is denied the opportunity to refuse the candidate for political reasons alone (Andoura and Timmerman 2008). By contrast, the EP has been influential in introducing 'formalized, open, transparent administrative procedures that create opportunity for its interest group allies to engage in indirect, 'fire-alarm' oversight and control' (Keleman 2002: 104-105). The director is selected by the MB from the nominees' list introduced by the European Commission (European Medicines Agency 2009a). Usually one representative, appointed by the MB, participates in the selection process of potential candidates, alongside the European Commission. Given that any final recommendation is based on scientific and technical evidence, the credibility and independence of experts producing this evidence needs to be ensured. In the case of the EMA, the agency itself nominates the experts but it is a mandatory procedure to consult the MB, without whose approval their choice is not legal.

Decision-making

The ultimate right of decision is another mechanism to control the agency's decision-making capacity in cases of conflict of interest. If the European Commission, with the consultation of the standing committees, cannot make a decision on a specific issue then it is referred to the Council, enabling this institution to further restrict the decision-making autonomy of the EMA. In addition to their ability to control the agency through the Council, the member states are strongly represented on its Management Board. The MB generally monopolises decision-making and ultimately controls many aspects of the

agency's functioning. As a result, the member states are arguably the actors most influential on the EMA itself in terms of determining its degree of independence.

The Commission's influence on agency decision-making and finances is apparent, given that it has the final say on the policies of the agency. If the Commission overturns an agency recommendation, it must 'justify the deviation, and provide a good argument for the decision' (Krapohl 2004: 532). Busuioc (2009: 612) highlights the informal power of the Commission in influencing decision-making, which originates in its role as financial provider. However, since the EMA is partially self-financed and partially-dependent on EU funds, the Commission's influence on the agency's financial and decision-making independence is expected to be neither high nor low. Groenleer (2009: 166) emphasises various methods that the competent national bodies employ to force their interests upon the agency. The first, and arguably most important, is a system of pharmaceutical self-assessment – national authorities can broker their preferences through a network of Heads of the Medicines Agencies (HMA), which currently presents 'a mechanism for communicating the views of [the] member states' competent authorities with the Commission and the EMEA' (ibid. 166).

All decisions are ultimately adopted by the European Commission, but the EMA 'nonetheless plays a highly autonomous role in industrial and social regulation' (Everson and Majone 2000: 65). The reasons for this are two-fold: firstly, although the decision-making of the agency is controlled, in Majone's (2001a) words, 'with information, knowledge and persuasion as the principal means of influence', the EMA uses the opportunity to assert influence and (to some degree) play an independent role in the process; secondly, it is in the interests of the EMA's committees to be as objective as possible, in order to maintain trust and credibility with decision-makers at higher levels. The importance placed on independence has grown significantly over time (Everson and Majone 2000: 59), but the accounts scandal of May 2011 has damaged political trust and external perceptions of objectivity.

THEORY AND RESEARCH METHODOLOGY

Theory

Theorists of sociological institutionalism (SI) believe that an institution is not purely a rational tool in the hands of its creators emphasising the role of argumentation and persuasion in a process of negotiation between and *inside* institutions. They argue that this process of 'interaction and the exchange of views can lead to the creation of new identities, attitudes, or roles' (Lewis 2003: 107-108). Borrás *et al.* (2007: 584) assert that 'socially-constructed perceptions and legitimacy beliefs, institutional path dependency and actor-related arguments (constellations, resources, knowledge)' are crucial to the setting up, but thereafter, also the running of agencies. We can discern from this that perceptions of effectiveness and legitimacy inside the agency are shaped by, and contingent upon, the social and political environment both within the various internal agency fora used for decision-making and control, and externally. Eventually, a '[thick] institutional environment' (Lewis 2003: 106) might (re)shape the belief systems of the actors involved in its functioning. Thus, investigating how actors inside the agency perceive themselves (to be and to behave) is necessary, in order to obtain a more comprehensive picture of independence. Groenleer (2009: 42) claims that 'the process of institutionalization differentiates the organization from its environment, makes it robust in the face of changing (and adverse) conditions, and gives it an autonomous status beyond the assigned legal mandates and formal tasks'. In short, agencies may develop a distinctive set of values and a strong organisational culture, evolving from 'rational tools into social institutions' (ibid.). Recognising this has obvious implications for research methods and design, hence the use of questionnaires and interviews in this article to investigate attitudes towards autonomy.

Research design and methodology

In order to rank the importance given to types of independence inside the EMA, and to see how this relates to the role played by different sets of political and non-political stakeholders on the Management Board, our research goes beyond the formal language and official rhetoric of the documents. It seeks to gauge the opinions and experiences of Board members to try to ascertain where they may be similarities and differences in attitudes towards agency (and Board) independence. Given their scope for oversight, Board members can provide valuable and comprehensive information about the agency's influence on decision-making processes and, to a limited degree, about the influence of external stakeholders present on the Board on agency activity, including priorities, work plans and regulatory recommendations. However, their views may be more general and less specialised than committee members. Admittedly, however, other agency staff may have very different and varying degrees of concern over issues of autonomy, one might assume technical experts to be less concerned or more distant from political dilemmas of independence (see Wonka and Rittberger's (2011) examination of agency staff attitudes towards EU integration, policy issues and their role in policy-making).

Questionnaires (see appendix) were circulated and then interviews conducted to gauge the opinions of agency stakeholders distinguishing between four different MB groups: 1) EU member states; 2) alternate members; 3) doctors', patients' and veterinarians' organisations; and 4) the EP and European Commission. In order to identify the most important aspects of the independence from the data obtained, the Expert Evaluation Method was used; thereafter, answers given by the members of the EMA's Management Board were calculated using the formula given below.

Questionnaire design

Participants were asked to respond to a series of statements (technically-speaking not questions but rather affirmative statements), some of which had to be ranked in order of importance. Results were aggregated to generate quantitative data. The questionnaire also gleaned qualitative data since participants could provide further comments in an open-ended section, which significantly increased the quality of information obtained (Goldstein, 2002). The questionnaire was divided into four blocks. Part A (question 1) investigated which type of independence was perceived to be most or least significant. The various members of the MB were asked to rank legal, financial, administrative and decision-making independence from 1 (most important) to 4 (least important). Part B (questions 2-13) studied administrative independence. Part C (questions 14-15) examined the role of national and common European interests in the decision-making process of the Board. Part D (questions 16-20) explored the financial independence of the EMA. Respondents were required to mark only one answer from five options. The scaling of answers was close to the standard 'five-level Likert item'.

The analysis of the questionnaire was divided into two parts. Firstly, the importance of different aspects of EMA independence (question Q1) was examined using the Expert Evaluation Method. Secondly, the degree of influence of various interested parties on various aspects of agency activity was calculated (questions 2-20). The questionnaire was sent to the members of the Management Board of the EMA (i.e. 'insiders'), including to alternate members and observers. Due to missing candidates or contacts, a total number of 30 questionnaires were sent out. The same indicator was 25 for the alternate members, observers and alternate observers together. The maximum number of respondents depended on the size of the MB; in this case, 35 permanent members. To maximise the response rate and glean as much information as possible, we added alternate members and observers.

The Expert Evaluation Method (EEM)

The main goal of the EEM is to assess the positions, opinions and attitudes of people. They may include academics, key decision-makers, heads of political as well as civic organisations, executives, parliamentarians, etc. (Matviyenko 2000). The method uses the so called 'coefficient of concordance (W)' (I-Kuei Lin 1989: 2000), which is calculated by a simple mathematical model known as Kendall's formula (Kendall and Gibbons 1990; Legendre 2005; Siegel and Castellan 1988: 266; Zhilyakova and Larin 2009), as illustrated in Figure 1. The final result of the EEM is reflected in the coefficient of concordance, with a mathematical number that ranges from 0 to 1. Complete agreement among experts is expressed as 1, while total disagreement equates to 0. The W has been applied to the first question of the survey to ascertain the opinion of the whole of the EMA's Management Board, as well as sub-sets within it.

Figure 1: The coefficient of concordance.

$$W = \frac{12 * S}{m^2(n^3 - n)}$$

where W = the coefficient of concordance

n = number of experts

m = number of factors

S = sum of squared deviations (differences)

$$S = \sum_{i=1}^{n}\left[\sum_{j=1}^{m} x_{ij} - \overline{x_{ij}}\right]^2$$

where S = sum of squared deviations

$\sum$ = simple sum of points, calculated by means of summation of all responses by EMA Board members, each aspect of independence treated separately

CASE ANALYSIS: RANKING DIMENSIONS OF AUTONOMY IN THE EUROPEAN MEDICINES AGENCY

Perceptions of independence types

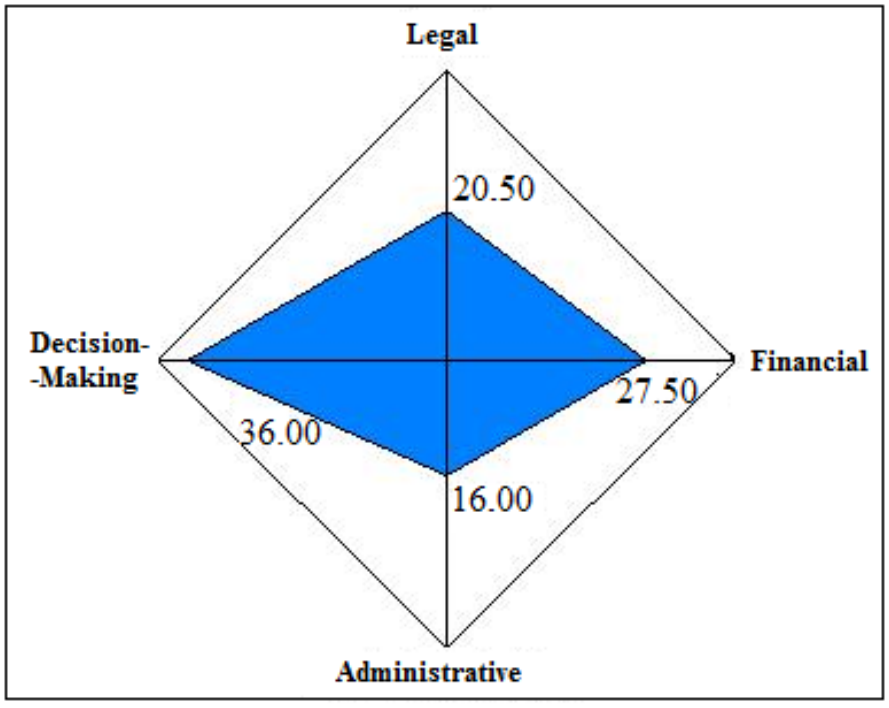
The response rate for the two groups was 53.3 per cent (16 replies) and 16 per cent (4 replies), respectively. For reasons of confidentiality they are identified as E1 through to E20. Analysis of the questionnaires clearly shows that decision-making independence is perceived to be the most important aspect, followed by the financial dimension. The rationale is simple – these aspects have immediate and direct effect on the EMA. A coefficient of concordance (W) of 0.46 indicates that, although there is no complete consensus among the members of the MB, there is enough consent on certain issues to consider the results reliable, as given in Table 1.

Table 1: Ranking the importance of different independence types.

Factors of independence (n = 4)	Total score across E20 respondents (n = 20)	Deviation from Mean	Square Deviation	Weight (W) = % responses ranking importance
Legal	41	-9.00	81.00	20.50
Financial	55	5.00	25.00	27.50
Administrative	32	-18.00	324.00	16.00
Decision-making	72	22.00	484.00	36.00
Total	200		914.00 (Total = S)	100
Total scores = 80; average score per factor = 2.5; coefficient of concordance = 0.46				

These results are represented in graphical form in Figure 2 below. They demonstrate that the members of the Management Board consider decision-making independence to be the most important aspect of the overall EMA independence, followed by financial, legal and administrative independence.

Figure 2: The overall perceived importance of the four independence types.



Distinguishing between group perceptions

It is possible to take this analysis further by distinguishing between the four groups of stakeholders to identify variations in the importance they place upon agency

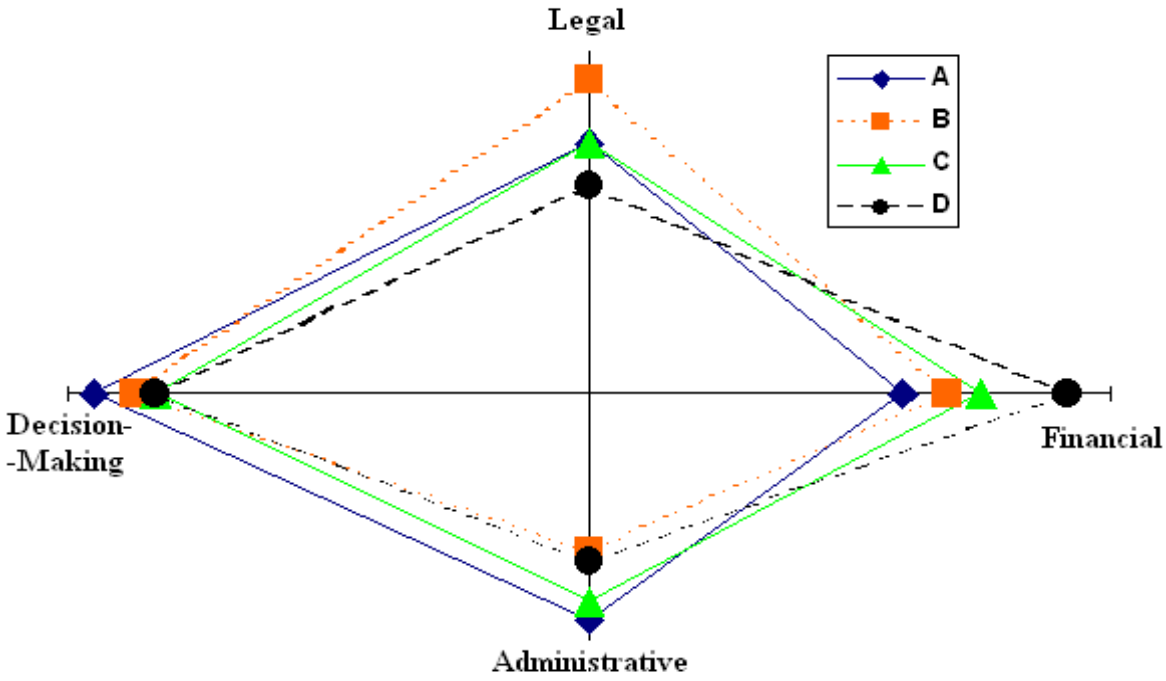
independence. Each group (i.e. group A – EU member states (W=0.49), group B – the alternate members (W=0.53), group C – doctors', patients' and veterinarians' organisations (W=0.38), group D – the EP and the European Commission (W=0.82)) has basically verified the results of the Management Board overall. In other words, financial and decision-making independence are perceived to be the most essential dimensions. At the same time, they highlight the perceived lesser importance of legal and administrative independence, as shown in Table 2.

Table 2: The importance of each independence type according to Board group.

	Weight of each type per group				
Type of independence	*Group A* EU member states	*Group B* Alternate members	*Group C* Doctors, patients, vets	*Group D* Commission and EP	Average Weight
Legal	20.00	25.00	20.00	16.67	20.50
Financial	24.00	27.50	30.00	36.67	27.50
Administrative	18.00	12.50	16.67	13.33	16.00
Decision-making	38.00	35.00	33.33	33.33	36.00

See Figure 3 below for a graphical demonstration of these results.

Figure 3: The importance of each independence type according to MB group: A) EU member states; B) alternate members; C) doctors, patients, vets; D) Commission and EP. Of the four groups, decision-making independence was perceived as the most important type by EU member states, while financial independence was most important for the Commission and EP.



A, B, C and D correspond to Group A, Group B, Group C and Group 4 respectively.

Discussion of the findings

The analysis highlights that the decision-making independence and financial independence of the EMA are perceived to be most important by the MB, while the legal and administrative dimensions are of lesser concern to its members. Groups C and D (Commission and EP) and Group C (doctors, patients, vets) place particular attention only on financial and decision-making independence, while Groups A and B (alternate members) also focus on legal independence at some point. All groups give less significance to the administrative aspect of the EMA's independence.

Legal independence

The results show the lesser perceived importance of legal independence. Hence, it is supposed that stakeholders are less interested in seeking to influence agency-related legislation. As previously explained, it is not in the interests of the EU institutions to curb agency independence too severely. The EP is interested mostly 'in the founding regulation of the agency and tries to influence it as much as it can in order to ensure that the tasks and the autonomy of the agency are described in the most acceptable way to the EP' (interviewee 2 23.05.2010). Indeed, during the 'founding phase', the EP had strong power over the legal independence of the agency 'by influencing its institutional arrangement in the founding act, yet there is relatively little interest in the day-to-day work of the agency' (ibid.). Moreover, enjoying a widely recognised legal personality, the EMA perceives itself to be a *de facto* independent legal actor vis-à-vis third parties. Like other EU institutions with a legal personality, it is accountable to the EU Courts. In this sense, actors on the EMA Management Board believe the agency's legal independence to be 'safe', despite considerable stakeholder influence.

Financial independence

As the analysis of the questionnaire results shows, financial independence is felt to be one of the most essential types for the EMA, hence the high number of stakeholders interested in agency finances. In particular, the findings emphasise a strong role for the European Commission in the financial management of the Board due to its role as budgetary provider to the EMA (Q16). By contrast, although the EP has the power of budgetary discharge, more than half of the Board members disagree with its actual weight in the decision-making process (Q17) – though this is likely to have changed since the events of May 2011. Another significant actor is the Court of Auditors. To the statement: *'The European Court of Auditors auditing of budgetary spending strengthens its control of the agency'* (Q18), a majority (60 per cent) of the MB members were positive as opposed to 25 per cent negative. Indeed, although Court of Auditors' reports are usually delivered quite late, there have been cases where it has exerted considerable influence over the EMA (interviewee 1 22.05.2010). However, E6 felt rather sceptical about the Court's role in the EMA's finances, stating that, theoretically at least, the Court of Auditors is the most influential controller of the agency, 'but in practice the only strong action recognized is directed towards reducing the Member States' competent authorities' proportion of the fee income that pharmaceutical companies pay to the EMA for the scientific assessment of their applications'; nonetheless such assessment is the core business of the EMA, even if it is organised by EMA staff but carried out exclusively by member states' experts. Some 65 per cent of the Board members did not identify any other noteworthy influence on the agency's financial independence (Q20). Nevertheless, some members (e.g. E17, E19) pointed at national competent authorities acting as a network to influence the cost scheme, such as demanding expenditure on a *rapporteurship*. Others highlight conditions such as exchange rates having a 'limiting effect' on financial independence (E1, E11).

Special attention should be paid to the issue of fees paid to the agency by third parties. To the statement: *'A significant part of the agency's budget is generated through fees paid by third parties in the medicines sector, which, as a result, increases the EMA's independence and freedom of manoeuvre',* 65 per cent of the MB members responded positively. However, one of the Board members (E6) disagreed, suggesting that:

> if the [fee income] is increased, the surplus should be used to reduce the public (EU) contribution to the budget. 'Freedom of manoeuvre' will be used for hiring additional staff. Administrative staff will always find some activity to perform, but the question to be (externally) checked is to what extent additional staff is really necessary for the fulfillment of the institution's legal tasks. Financial pressure on public budgets in Europe is high, and in general this results in a cutback of public staff without reducing tasks. European Agencies such as EMA have largely been spared from that development, but should not expect this will be possible in the long term.

Administrative independence

The questionnaires show that the European Commission (65 per cent positive) and the MB (90 per cent positive) can significantly influence the appointment of the executive director (Q2 and Q4). By contrast, 55 per cent of the Board members consider that the EP does not exert the same amount of power (Q6) . Interestingly, more members feel positive (45 per cent) than negative (40 per cent) about the ability of the representatives from the doctors', patients' and veterinarians' organisations to influence the appointment (Q8). The results highlight the relative influence of the MB (55 per cent positive) on the everyday work of the agency (Q5). According to the same data, other actors were felt to be less influential: while 50 per cent believe the European Commission exerts an influence, only 35 per cent felt the EP did (Q3 and Q7). The results also indicate the perception that stakeholders such as the representatives from other countries (E8), industry, academia (E10), physicians (E11) and national consumer agencies (E13) can at some point influence the appointment and everyday work of the executive director (Q12 and Q13). For example, E10 commented that, 'through its [i.e. the EMA's] wide range of consultations, industry or academia, by participating in setting the agenda of the agency, they can thereby influence the everyday work of the executive director'.

Decision-making independence

The results emphasise the great importance and the powerful role of the Management Board and European Commission in the decision-making process. However, as the Board members underline, national and common European interests are usually balanced (Q14 and Q15), thus minimising the possibility of subjectivity among decision-makers. Contrary to the majority of questionnaire answers, interviewee 1 argued that in the case of the Commission, the agency is 'firmly consolidated by practice', well operated and powerful enough to do whatever it wants and not to agree with the Commission, implying that the Commission cannot actually influence it very much.

Other than the Board, another way in which the EU member states might influence the EMA is via the Committee for Medicinal Products for Human Use (CHMP), most members of which are not independent scientists, but representatives of the competent national authorities. Often members are risk managers in the national agencies deciding on the authorisation of new medicines. In this regard, the member states, and national competent authorities in particular, play a strong role in the decision-making process (interviewee 1).

The role of the EP in the decision-making is marginal due to its limited involvement in the Board. For example, interviewee 1 presented one example of the EP representative, an Italian professor, who had not given any feedback to the EP: 'he was sitting more or less on his own capacity and not really providing any personal feedback'. Recently, this has been changing. Closer links with the EP have been established, including an organised feedback system. Furthermore, certain people are assigned to monitor particular agencies (nowadays a Dutch MEP for the EMA); in short, these and other instruments provide the EP with the sources of information needed if it is to be able to understand properly and control the agency. Interviewee 1 observed that essentially it possesses information rather than influence, however, as interviewee 2 argued, 'if the EP wants to turn this information into influence, it can do so'.

Finally, the Court of Justice and the Court of First Instance also play a role in controlling the EMA's functioning. Despite no legal basis for judicial review, they have always performed such a task (e.g. Court of First Instance – Case T-133/03) (interviewee 1). Although Article 263 of the Lisbon Treaty gives a constitutional right to the Courts to review the agencies, in cases where the latters' decisions are binding for third parties, their role in shaping the agency remains limited.

CONCLUSION

Finding a practical method for measuring perceptions is no easy task. This article used questionnaires in order to capture systematically Board members' opinions. It has demonstrated how agency autonomy might be analysed by conceiving of *dimensions of autonomy*, and thereafter, *differentiating independence*. Four types of independence were identified, in order to examine the beliefs of various actors within the management board, which cannot be treated as a single unit, since it comprises various sub-sets of political and non-political stakeholders, each with its own agendas, loyalties and vested interests. The method enabled results to be isolated for individual sub-sets of MB actors. Using questionnaires was useful but it was essential to complement this with interviews where possible. Face-to-face interviews with MB members are becoming more difficult as agencies increasingly employ Communications Officers to provide a single voice on agency issues. In short, sociological institutionalism's focus on perceptions, attitudes and role behaviour is useful when seeking to understand how independence is actually articulated, or played out – not on the premise of the founding legislation, but through a process of internalising and institutionalising norms and rules, as well as social learning, both *inside* the EMA in the almost 20 years since the agency was created in its original guise, and *between* the agency and its stakeholders.

This article found that the EMA possesses a higher perceived degree of independence in some areas than others. Differentiated dimensions of autonomy are acknowledged by members of the Management Board. On the basis of the results, members do not consider the agency to be either fully independent or fully dependent. Consequently, the EMA can be considered a semi-autonomous and/or semi-controlled agency. What are the implications of distinguishing different forms of agency independence, to find that decision-making independence is regarded as the most important? This finding is in some senses paradoxical since the MB is not directly concerned with regulatory questions, and does not regulate. Instead, it is the agency secretariat and various issue-specific committees which make recommendations, with the Commission taking final and binding decisions. Yet, the MB does make decisions in regarding the direction and internal functioning of the agency, an area where the Commission and other external actors would arguably not seek to exert as much direct control. The analysis showed up the contrasting perceptions of those in the MB of its strength vis-à-vis the Commission, even if managerial power was (unsurprisingly) an important factor for all respondents exerting it, collectively.

The findings presented in this paper are supported by recent research, particularly on the power of the Commission vis-à-vis EU agencies and the 'intimate' relationships that seem to develop between EU agencies and relevant DGs in the Commission – here, DG Enterprise, then DG Sanco. Thus, EU agencies seem to strengthen and legitimise (though member state engagement) the executive capacity of the Commission. Since the Lisbon Treaty introduced new changes to the roles of other agency stakeholders not identified in this research, it would be fruitful to examine whether they impose challenges to EU agencies by introducing more control mechanisms, thus potentially limiting their independence, or if the modifications provide opportunities for agencies to play a greater – and more independent – role in EU policy-making. Concerning financial and decision-making independence at least, the European Parliament looks set to play a stronger role in scrutinising how the EMA generates its revenues and recruits its 'independent' experts.

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APPENDIX

No.	Question / Statement
1	In your opinion, which aspect of independence is most important?
2	The European Commission can influence the appointment of the executive director of the EMA by suggesting a candidate.
3	The European Commission can influence the everyday work of the executive director of the EMA.
4	Members of the management board of the EMA can influence the appointment of the executive director of the agency.
5	Members of the management board of the EMA can influence the everyday work of the executive director.
6	The European Parliament can influence the appointment of the executive director of the EMA.
7	The European Parliament can influence the everyday work of the executive director of the EMA.
8	Representatives of patients', doctors' and veterinarians' organisations can influence the appointment of the executive director of the EMA.
9	Representatives of patients', doctors' and veterinarians' organisations can influence the everyday work of the executive director of the EMA.
10	Other stakeholders can influence the appointment of the executive director of the EMA.
11	If you answer 'a' [strongly agree] or 'b' [agree] in question 10, please specify those stakeholders.
12	Other stakeholders can influence the everyday work of the executive director of the EMA.
13	If you answer 'a' [strongly agree] or 'b' [agree] to question 12, please specify those stakeholders.
14	National interests can influence your position during negotiations in the management board of the EMA.
15	Common European interests can influence your position during negotiations in the management board of the EMA.
16	The European Commission's role as a budgetary provider to the EMA in turn strengthens its position during the decision-making in the management board.
17	The European Parliament's power of budgetary discharge in turn strengthens its position during the decision-making in the management board.
18	The European Court of Auditors auditing of budgetary spending strengthens its control of the agency.
19	A significant part of the agency's budget is generated through fees paid by third parties in the medicines sector, which, as a result, increases the EMA's independence and freedom of manoeuvre.
20	As far as you know, is there any other actor that has an influence on the finances of the EMA?

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Domestic Non-Compliance of the EU Norm: Case Study of the Capital Punishment System in Japan

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Abstract

There is a worldwide declining trend in the number of countries that have retained capital punishment since the end of World War II, and the international society has created a series of benchmarks for modern democracies represented by the *acquis communautaire* by the European Union (EU), and relevant covenants by the United Nations (UN). Despite their efforts to urge Japan to abolish capital punishment, the Japanese government does not try to match it up and is rather running backwards in the international trend retaining inhuman and degrading practices. This paper examines the Japanese institutional and cultural context, and clarifies where the governmental resistance to the anti-death penalty norm stems from. It will critically investigate which institutional frameworks have been constraining anti-death penalty activists from getting involved in Japanese policymaking; and the extent to which cultural factors have been hindering their activities from gaining roots in Japan. Critical assessment of which specific approaches can help EU institutions and other European activist groups influence Japan more effectively concludes this paper.

Keywords

Japan, EU, capital punishment, death penalty, anti-death penalty norm

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There is a worldwide declining trend in the number of countries that continue to retain capital punishment today, and more than two thirds of the countries in the world have abolished this system in law or practice (Amnesty International, 2010: 1). However, Japan does not try to match it up and is rather running backward the international trend retaining inhuman and degrading practices. Whilst studies have shown that democracies are less likely to violate human rights compared to autocracies (Kirkpatrick, 1979; Howard and Donnelly, 1986; Henderson, 1991), capital punishment has been declared constitutional by the Supreme Court of Japan since 1948. Article 31 of the Constitution of Japan stipulates that 'No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, *except according to procedure established by law*', which refers to capital punishment. The execution method is also specified as hanging in Article 11 (1) of the Criminal Code of Japan. However, human rights NGOs have been criticising the Japanese government that the exact hanging method infringes Article 36 of the Constitution of Japan which forbids cruel punishments.[1] Once a noose is placed around the inmate's neck, a button is pressed. A 90 centimetre square plate where the inmate stands opens; and he falls for approximately four metres until the rope is fully extended at approximately 15 centimetres from the ground (Sakamoto, 2010: 36). Highlighting this inhuman and degrading execution method, Matsushita Kesatoshi, the then death row inmate in the Tokyo Detention Centre, took a legal step claiming that capital punishment is unconstitutional in 1958. Nevertheless, the case was rejected in 1960, and the execution method has not changed from hanging up to the present day.

On the other hand, there is a significant anti-death penalty movement in Europe. EU Member States have all abolished capital punishment since the abandonment of which is one of the key criteria in the *acquis communautaire* that States must conform to before they can be admitted into the EU. The European Commission has also been promoting the abolition of capital punishment; and the European Council raises the issue in the bi-lateral summit with Japan. Moreover, the Council of Europe, an independent organization from the EU, is committed to this movement as well. Japan obtained an observer status in the Council of Europe in 1996, and is entitled to participate in the Committee of Ministers and all intergovernmental committees. However, Japan has not met the requirement declared in the Statutory Resolution (93) that those who acquire observer status should be 'willing to accept principles of democracy, the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental

freedoms' (Council of Europe ,1993: 1). In 2001, the Parliamentary Assembly of the Council of Europe warned both Japan and the US that the possession of the observer status would be threatened if any significant progress in the implementation of the resolution cannot be made by 1st January 2003 (Council of Europe, 2001: 3). Nevertheless, the Japanese government did not respond to this. Instead, at a seminar 'Judiciary and Human Rights in Countries that Hold Observer Status with the Council of Europe', which was held on 28th to 29th May 2002, the then Minister of Justice, Mayumi Moriyama, even made a bold statement: wide public support for capital punishment stems from a specific Japanese view on guilt represented by a phrase '*shinde wabiru*', or to atone for one's crime by killing oneself (Japan Times, 2002: 4).

Besides Europe, the UN has also been taking an initiative in the anti-death penalty campaign. Japan ratified the International Covenant on Civil and Political Rights (ICCPR) on 30th May in 1978, and Article 40 of which specifies that every Member State is obliged to submit periodic reports to the UN Human Rights Committee (UN Human Rights Committee, 1966: 12). For example, in response to a fifth periodic report that the Japanese government submitted in December 2006, the UN Human Rights Committee presented Concluding Observations on 18th December in 2008, though it is legally non-binding. Raising several positive aspects on the improvement of the human rights record in Japan, the Committee voiced the concern that many of the recommendations made towards the fourth periodic report have not been implemented (UN Human Rights Committee, 2008: 2). In particular, the Committee advised the government to ease the rules on the treatment of death row inmates, but the Japanese government made a further comment and tried to justify the extant policy. Thus, whilst communication between the UN and the Japanese government takes place formally and frequently at times, Japan has not committed to improving the situation.

This paper will examine: (1) why Japan resists the anti-death penalty norm; and (2) in what way the EU institutions and other anti-death penalty bodies can approach the Japanese government more effectively. Firstly, it will briefly review a normative theory which tries to offer a way to observe the international norm diffusion mechanism. The role of culture in norm transplantation process may appear to account for the Japanese government's rejection of the anti-death penalty norm at first sight. However, this part will argue that it is more important to examine institutional constraints in Japan. Secondly, it will investigate the institutional framework within which policy elites operate, and highlight the elite-driven nature of the capital punishment policy. It will first introduce a Japanese decision-making system, which restricts leading actors to bureaucrats, business community, and the ruling party; and explain why it is challenging for actors in Europe to influence the Japanese policies in Japan. It will then demonstrate that the Japanese government has not been dealing with the capital punishment policy as the issue of criminal justice, which has been hindering the EU institutions and other activist groups from approaching the government from human rights perspectives.

Thirdly, it will shift my focus to a civil society level and examine the extent to which capital punishment is embedded in Japanese culture. Although human rights violations should not be permitted over domestic cultural manifestation, the Japanese government tends to proclaim that the issue of capital punishment is domestically and culturally determined. It will first present Moriyama's claim that a social norm of *shinde wabiru* has still been appreciated by the contemporary Japanese public. Secondly, it will investigate whether or not other aspects of Japanese culture have been keeping the Japanese public 'indifferent' to the issue of capital punishment; or hindering anti-death penalty activists from raising sympathy amongst the public. Finally, after examining the institutional and cultural background to explain the Japanese government's resistance, the article will critically assess which approaches can be more successful across the EU institutions and other European anti-death penalty activist groups in influencing Japan more effectively.

NORMATIVE THEORY AND CAPITAL PUNISHMENT

First of all, it is a normative theory that tries to offer a way to examine the State's reluctance to adhere to international norms. Regarding the way in which international norms are transmitted to the domestic arena, Thomas Risse and Kathryn Sikkink (1999: 11) present step-by-step procedures of norm socialisation: (1) processes of adaptation and strategic bargaining; (2) processes of moral consciousness-raising, shaming[2], argumentation, dialogue, and persuasion; and (3) processes of institutionalisation and habitualisation. Similarly, Finnemore and Sikkink (1998: 895) present a 'life cycle' of norm transplantation as follows: norm emergence; norm cascades; and norm internalisation. In the first stage, norm entrepreneurs/leaders – international organizations, transnational advocacy networks or NGOs, and domestic elites – attempt to socialise other States to become norm followers/takers. This is based on the assumption that the State's compliance to a norm depends on the domestic mobilization of actors that socialise States to adhere to new norms and values (Moravcsik, 1997; Hafner-Burton and Tsutsui, 2005: 1380). Norms then cascade in the second stage with 'a combination of pressure for conformity, a desire to enhance international legitimation, and the desire of State leaders to enhance their self-esteem' (Finnemore and Sikkink, 1998: 895). Despite the fact that 'international society is a smaller group than the total number of States in the international system' (Risse and Sikkink, 1999: 11), the embarrassment of not belonging to it; and their desire to obtain a 'social proof' as a legitimate member of it are supposed to make States consider the acceptance of norms (Axelrod, 1986). Finally, norm internalisation occurs when norms acquire taken-for-granted quality that does not require a broad domestic debate such as women's voting rights and the slavery system (Finnemore and Sikkink, 1998: 895; Hafner-Burton and Tsutsui, 2005: 1385).

Secondly, with regard to the denial of international norms in domestic arena, a national attachment to a competing norm and cultural factors are raised as principal reasons. For example, Risse and Sikkink point out 'that denial of the norm almost never takes place in the form of open rejection of human rights, but is mostly expressed in terms of reference to an allegedly more valid international norm, in this case national sovereignty' (Risse and Sikkink, 1999: 23-24). Moreover, Jeffery Checkel argues that diffusion is more rapid and smooth when a 'cultural match' exists to a great extent, which varies from positive (+), null (0) to negative (-) indicating a degree of a congruence between international and domestic norms (Checkel, 1999: 6). Under this assumption, '[i]nternational norms are more likely to have an impact if they resonate with established cultural understandings, historical experience, and the dominant views of domestic groups' (Hawkins, 2001: 11).

Checkel's cultural approach can be useful to examine Japan's approach on some international norms. The anti-nuclear proliferation norm is an example of a positive cultural match. Japan has been 'nuclear-allergic' after the end of the World War II and preserving three main non-nuclear principles: not to make such weapons, not to possess them, and not to bring them into Japan[3]. Also, the anti-whaling norm is a typical example of a negative cultural match between meat-eating and fish-eating countries (Hirata, 2004: 188). Similarly, Japan's non-compliance of the anti-death penalty norm may appear to stem from a negative cultural match. Instead of accounting for why Japan retains capital punishment leaving human rights concerns, the government tends to claim that this issue should be left to the national criminal justice system, public climate, and a Japanese culture on death and guilt.

Therefore, the theoretical framework on international norm transplantation may appear to be accountable for Japan's rejection of certain norms at first glance. Having said that, the 'life cycle' of norm transplantation does not appear to fit in the actual domestic dynamics in Japan. For example, regarding the argument that international norms are contested by national attachment to domestic norms, it is worth noting that public support for capital punishment tends to result from strategically structured public

surveys conducted by the Prime Minister's Office (Sato, 2008). Furthermore, the Japanese distinct view on death or guilt does not necessarily account for public support for capital punishment since it is not a sentiment that is appreciated by the contemporary Japanese public. It is more accurate to State that the Japanese government has been trying to make the issue look domestically and culturally determined so that it can point to external pressures as an illegitimate intervention in the internal affair. In order to investigate these issues in detail, this paper will examine what institutional and cultural factors have been hindering EU institutions and other European anti-death penalty activists from transplanting the anti-death penalty norm to Japan.

NON-COMPLIANCE OF THE ANTI-DEATH PENALTY NORM AT GOVERNMENTAL LEVEL

EU institutions and other anti-death penalty advocates tend to pressure Prime Ministers or governmental officials in the Ministry of Foreign Affairs (MOFA) in order to urge Japan to abolish the capital punishment system. This is because Prime Ministers possess the executive power in the Japanese government; and the MOFA is responsible for the diplomatic policy and functions as Japan's window upon the world. However, in reality, the Prime Minister has practically 'no explicit legal authority enabling him to insist on policy innovation outside his Office, force a Cabinet colleague to take a particular course of action or even divulge a particular piece of information' (Neary, 2004: 675). Moreover, the MOFA is not in a position to express any independent opinion on capital punishment, and it only reproduces the policy of the Ministry of Justice as a dominant voice of the Japanese government[4]. In order to explore more effective campaigns in Japan for the anti-death penalty lobby, the first part of this paper will explore: (1) who gets involved in the actual decision making process in the capital punishment policy; and (2) why the Japanese government has been resisting pressures from the EU and other anti-death penalty advocates.

Pro-Death Penalty Norm Entrepreneurs in the Japanese Government

Capital punishment has been dealt within the Ministry of Justice, and it may appear effective for the anti-death penalty lobby to approach Ministers of Justice at first sight. Indeed, Ministers of Justice are theoretically the top authority on this policy, and Article 475 of the Code of Criminal Procedure stipulates that capital punishment shall be executed under their order within six months of the final verdict; and Article 476 also provides that execution shall be carried out within five days upon authorisation. However, it is not appropriate to over-represent their roles in the running of this policy. Ministers of Justice rarely stay in office for more than one year on average, and they cannot get involved in the capital punishment policy thoroughly. Rather, it is employed-for-life bureaucrats in the Ministry of Justice who wield tremendous power in this policy. This can be explained by how decisions are made in the Japanese government in general. What has been widely used to account for the power dynamics in Japan is the Iron Triangle model, which consists of bureaucrats, party politicians, and the business community. Of the three, it is the bureaucrats who play a significant role in both policymaking and policy implementation in Japan. Approximately 80 per cent of all legislation passed is drafted by bureaucrats, and Diet members merely rubber-stamp the documents (Van Wolferen, 1989: 33, 145). As Karel van Wolfren (1989: 145) argues, 'The law-making process is usually over by the time a bill is submitted to the Diet'. This holds true to the capital punishment policy, and it is bureaucrats in the Ministry of Justice who play a prominent role in this policy, not Ministers of Justice who tend to be short-lived because of the frequent cabinet shuffle.

Moreover, it is important to acknowledge the role that the bureaucrats in the Public Prosecutor's Office play in the capital punishment policy. Despite that the Public Prosecutor's Office is a subordinate institution of the Ministry of Justice, they tend to influence the policy of the Ministry of Justice since important positions in the Ministry of Justice have been monopolised by prosecutors and a few judges (Van Wolferen, 1989: 222). Indeed, public prosecutors practically get involved in the crucial part of this policy from generating confessions from suspects to preparing execution documents for Ministers of Justice (Johnson, 2008: 54). Consequently, it is not Prime Ministers, MOFA officials, or Ministers of Justice who exert tremendous power in the decision making process of the capital punishment policy. Prime Ministers or MOFA officials are not in a position to present an independent opinion in response to external pressures; and the role that short-lived Ministers of Justice can play is also small. Important decisions are made by selected elites in the Ministry of Justice and the Public Prosecutor's Office; and this strict governmental control to restrict leading actors from a decision making process does not allow external anti-death penalty bodies to influence its policy.

Capital Punishment as a Criminal Justice Issue in the Japanese Government

Secondly, the prime reason that the Japanese government resists the EU's and other anti-death penalty lobby's campaigns appears that capital punishment has been dealt with as a criminal justice issue in Japan, not as a human rights issue. There are two governmental agencies concerned with human rights protection in Japan: the Human Rights Bureau in the Ministry of Justice and the Human Rights and Humanitarian Affairs Division in MOFA. I approached both of these bodies to see if they would agree to an interview. In January 2011, the Human Rights Bureau declined my request, stating that they are not in charge of capital punishment. I was urged to contact the Criminal Affairs Bureau. In the meantime, two senior ministers in the MOFA division, one of which was previously in the Ministry of Justice, agreed to be interviewed in June 2011. However, they also denied any responsibility for dealing with the issue of capital punishment, now or in the future. According to them, 'there is no such issue on earth that is not related to human rights. However, it is impossible to deal with every single issue in the human rights divisions in governmental agencies, and we had better prioritise major issues and tackle them efficiently'[5]. Both groups thus maintained that capital punishment is not a human rights concern but an issue of legal punishment under the aegis of the Criminal Affairs Bureau in the Ministry of Justice. Therefore, the governmental retention of capital punishment does not appear to stem from a resistance to an international human rights norm itself. Rather, it is a governmental resistance to foreign pressures from human rights perspectives since the capital punishment policy has been dealt within the closed institutional framework as a criminal justice issue in Japan.

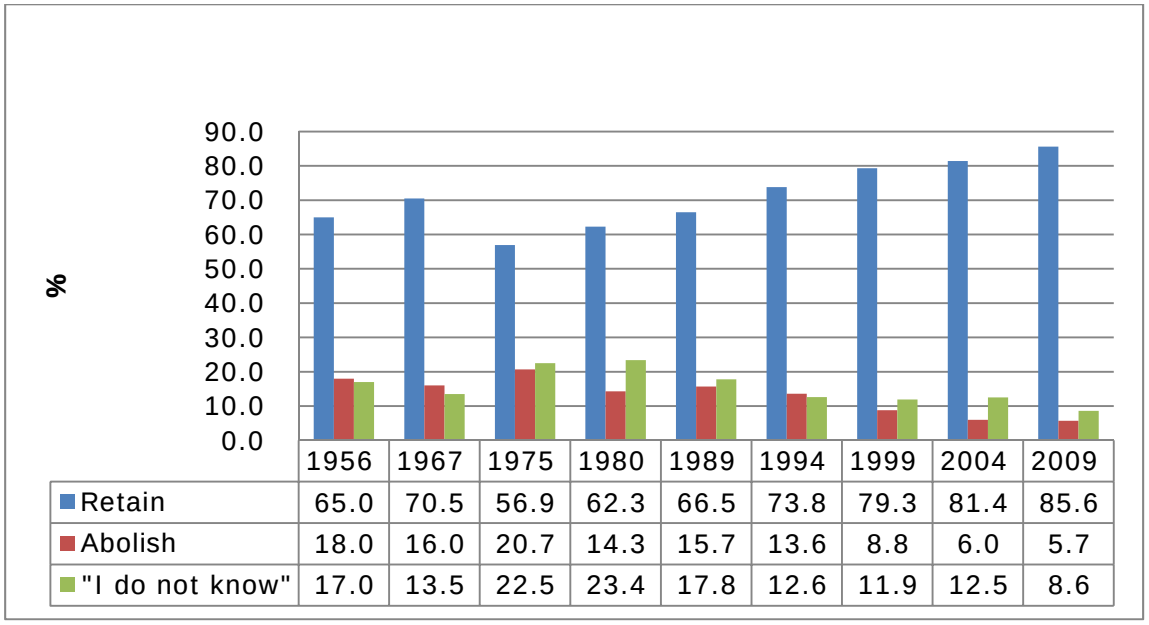
NON-COMPLIANCE OF THE ANTI-DEATH PENALTY NORM AT CIVIL SOCIETY LEVEL

Despite that the capital punishment policy is thus primarily elite-driven, the Japanese government tends to justify the system using public opinion and Japanese culture. Firstly, the Japanese government frequently cites the results of the governmental opinion poll on capital punishment, and proclaims that the majority of the Japanese public supports the system. Secondly, the government tends to argue that the issue of capital punishment is culturally determined. As already mentioned, a former Minister of Justice, Moriyama Mayumi, has claimed that capital punishment is deeply embedded in the Japanese view on guilt, and other Ministers of Justice such as Okuno Seisuke (1980: 8) and Goto Masao (1989: 3) also have shared the similar views. In order to critically examine the limits of domestic and cultural factors in the elite-driven nature of the capital punishment policy, this part will explore: (1) a methodological problem of the

governmental opinion polls, and (2) a validity of using a cultural value to a justification of the governmental policy.

Since 1956, the Prime Minister's Office has been conducting Opinion Poll on Basic Legal System irregularly; and every five years since 1994, surveying 3,000 men and women aged 20 or older nationwide. The result in 2009 revealed that public support for capital punishment reached 85.6 per cent, the highest percentage ever compared to 81.4 per cent in 2004; 79.3 per cent in 1999; and 73.8 per cent in 1994 (The Prime Minister's Office, 1994; 1999; 2004; 2009). Whilst these results appear to demonstrate strong public support for capital punishment, an examination of the questions posed leaves room for doubt. In seeking public opinion regarding capital punishment, the poll required participants to choose between three choices: (1) 'it is unavoidable *in certain circumstances*,' (2) 'it should be abolished *in all circumstances*,' and (3) 'I do not know.' The results in 2009 were 85.6 per cent, 5.7 per cent and 8.6 per cent, respectively (see Table 1). As Sato Mai (2008) analyses, the first two answers appear to have been framed strategically in order to produce results that would justify the governmental policy.

Figure 1: Opinion Poll on Basic Legal System by the Prime Minister's Office



	1956	1967	1975	1980	1989	1994	1999	2004	2009
Retain	65.0	70.5	56.9	62.3	66.5	73.8	79.3	81.4	85.6
Abolish	18.0	16.0	20.7	14.3	15.7	13.6	8.8	6.0	5.7
"I do not know"	17.0	13.5	22.5	23.4	17.8	12.6	11.9	12.5	8.6

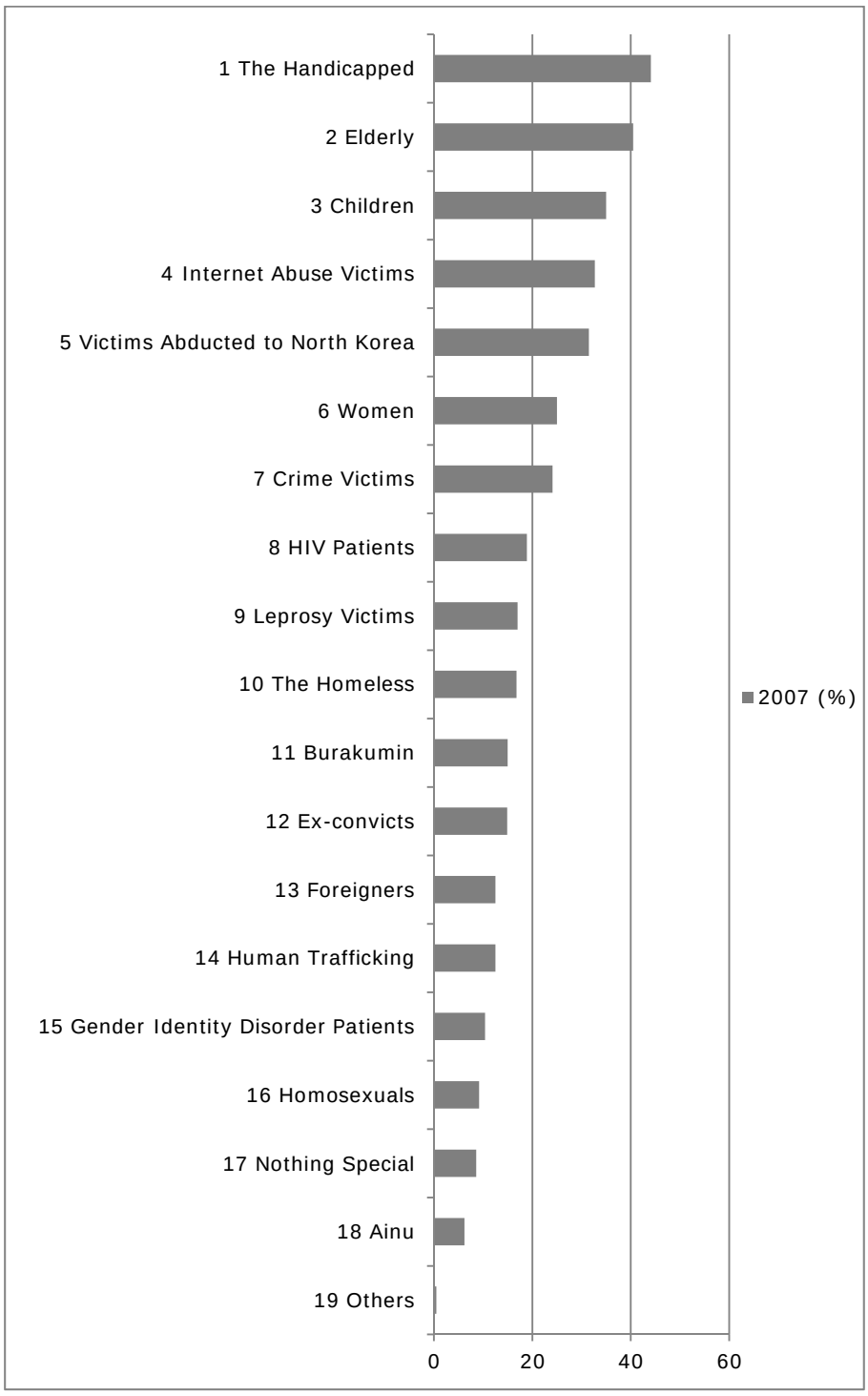
Source: The Prime Minister's Office, 1956; 1967; 1975; 1980; 1989; 1994; 1999; 2004; 2009.
Question: Out of these opinions on the issue of capital punishment, which one do you agree with?

Furthermore, the Japanese government tends to claim that a cultural value, *shinde wabiru*, has been widely accepted as a social norm in Japan, and it supports the retention of capital punishment. In order to test this claim, it is important to investigate the actual event that an act of *shinde wabiru* was conducted in Japan. It was General Nogi Maresuke and his wife who committed *seppuku*, or ritual disembowelment, following the State funeral of Emperor Meiji in 1912. His suicide note revealed that it was *junshi* – to commit *seppuku* upon the death of the lord – in order to expiate his disgrace in two main events: the Satsuma Rebellion in 1877 where he lost the imperial banner to the enemy; and the devastating result in Russo-Japanese War from 1904 to 1905 where 56,000 lives were lost, including his two sons. In the latter event in particular, although General Nogi was first stationed at Port Arthur with approximately 90,000 soldiers, Commander in Chief, Oyama Iwao, sensed that defeat was imminent under Nogi's

leadership. Therefore, Oyama appointed Kodama Gentaro as the Chief of General Staff of the Manchuria Army at the end of November 1904 instead (Lifton, 1977: 65). Since this decision was not announced to the public, Nogi was celebrated as a national hero following Japan's victory, though he took this as an undeserved honour (Lifton, 1977: 66). A sense of shame made Nogi plead capital punishment on each occasion that he was granted an audience with the emperor and in his meetings with the major. However, it was not permitted since they both knew that Nogi genuinely meant to atone for his disgrace, and Emperor Meiji told him to live at least until Emperor's death (Lifton, 1977: 53). For this reason, Nogi committed *seppuku* with his wife in order to atone for his disgrace on the day of the State funeral of Emperor Meiji in 1912. Nogi's case received a great deal of worldwide scholarly attention into the study of seppuku ritual. This cultural value, *shinde wabiru*, may appear to have been contributing to the current public support for capital punishment. However, it merits some attention that *seppuku* ritual is a particular historical and political event with a particular set of sociological phenomena, and Nogi's case was also a symbolic suicide, which aimed at appealing to the public in a traditional *samurai* spirit. This is a sentiment not common amongst the contemporary Japanese public, and cannot be a prime reason to justify capital punishment with.

In the meantime, other Japanese cultures may appear to be associated to the capital punishment system at first sight: legal and human rights consciousness. Firstly, retention of capital punishment in Japan may imply that the Japanese public has 'lower' human rights consciousness than those in Western countries. However, in reality, since the Japanese government has been treating the issue of capital punishment from the perspective of a criminal justice, Japanese public do not appear to have been given opportunities to discuss it from a human rights perspective in the first place. The Public Survey on Defence of Human Rights (*Jinken Yogo ni Kansuru Yoron Chosa*) is conducted by the Prime Minister's Office every five years; and 1,776 out of 3,000 people aged 20 or older responded in 2007. With regard to the question: 'Which of the following human rights issues are you concerned with?', 19 issues are listed as possible choices (see Table 2). However, what merits some attention is that domestic human rights issues raised by the Prime Minister's Office are mostly different from what the international society has been mainly concerned with in Japan such as: (1) treatment of prisoners; (2) lack of independent national human rights institution; (3) historical responsibility concerning *ianfu* (comfort women) system during the wartime; and (4) the rights of minorities and foreigners (Amnesty International, 2008; UN Human Rights Committee, 2008). Of course, it is natural that domestic concerns raised by the government tend to be daily or local issues whilst those by the international society tend to be more internationally critical issues for a global comparison. Having said that, since treatment of prisoners are not listed in the survey, there is a little chance that the public would treat related issues such as the detention condition and execution methods for death row inmates as human rights issues in Japan. Opting out these issues from the governmental opinion polls appears to be preventing the public from engaging in a domestic debate on capital punishment indeed. Therefore, it is challenging to statistically observe the Japanese public's attitude towards human rights of prisoners or death row inmates in particular, or to claim that retention of capital punishment stems from the low human rights consciousness of the Japanese public.

Figure 2: Public Survey on Defence of Human Rights by the Prime Minister's Office: 'Which of the following human rights issues are you concerned with?'



Source: Prime Minister's Office 2007

Secondly, Japanese legal consciousness may appear to explain the mechanism that the general public does not show much sympathy towards domestic anti-death penalty activities. For example, a low litigation rate in Japan compared to other industrialised countries (Kawashima, 1967; Cole, 2007) may make it look that the Japanese public has

'low' legal consciousness, and it does not support the anti-death penalty lobby who tries to challenge the extant legal provisions. Generally speaking, the Japanese public tends to 'regard law like an heirloom samurai sword, something to be treasured but not used' (Dean, 2002: 4), and prefer to settle disputes informally through mediation. According to a legal sociologist, Kawashima Takeyoshi, this relates to the fact that the Japanese do not appear to assert their legal rights. Whilst duty or norms are emphasised in Japanese society, terms such as 'rights' (*kenri*) did not exist when Japan imported a Western legal system, making the translation work challenging (Kawashima, 1967: 15). Kawashima also claims that once a contract is made in any profession, a master-servant relationship arises: when troubles occur in this power dynamic, mediation is preferred and any hard feeling is expected to be 'washed away' (*mizu ni nagasu*) through apology or small compensation. If someone still tries to bring a law suit, this behaviour is seen as morally wrong, subversive, and rebellious, which appears to have been contributing to the low litigation rates in Japan (Kawashima, 1963: 45). This also relates to Wagatsuma Hiroshi and Arthur Rosett's work on apologetic culture in Japan. According to them, the Japanese public tends to apologise even when it is not entirely their fault, and this derives from their wish to maintain community harmony and stability (Wagatsuma and Rosett, 1986). Such cultural preference might not motivate the Japanese public to support the anti-death penalty lobby's vocal campaigns, which try to urge the government to repeal or amend the legal provisions.

However, as is the case of Japanese human rights consciousness, it is not easy to evaluate Japanese legal consciousness from low to high in the first place. Regarding the reason that the informal way is preferred for solving problems, it is worth noting the conciliation methods employed in Japan. For example, companies usually provide employees with a mediating service in the case of traffic accidents, and there is no need for the individual to bring a law suit. Legal procedures come in only after exhausting all the available conciliation methods, and by the time people do so, the problem is normally being solved peacefully by mediators' efforts. Therefore, low litigation rate in Japan does not necessarily stem from 'low' legal consciousness of the Japanese public, but from what is prepared as an alternative conciliation method. More precisely, the legal consciousness of the Japanese public cannot be examined through the lens of culture or institutions, but rather encompasses both study areas (Feldman, 2007: 63). Secondly, although the Japanese public may appear loyal to the judicial authority and do not show much interests in the anti-death penalty campaigns, it is not appropriate to link this to their 'low' legal consciousness directly. It is not unnatural that the Japanese public considers that the issue of capital punishment should be left to the judiciary, since it has been dealt with by the government as the issue of criminal justice or law and order, not as the issue of human rights.

THE FUTURE OF ANTI-DEATH PENALTY CAMPAIGNS IN JAPAN

Finally, this article will investigate if there is some room for improvement in the anti-death penalty activities by EU institutions and other activist groups. Firstly, it is required for them to acknowledge Japan's institutional framework since the government tends to conceive their campaigns as a single-sided imposition of the European or international ideology. As the Iron Triangle model indicates, Japanese policies are made and implemented by a cluster of elites, party politicians, and the business community. Such closed institutional framework does not allow any external actors to get involved in its decision making process. Moreover, the capital punishment policy has been run by the bureaucrats in the Ministry of Justice and the Public Prosecutor's Office as the issue of criminal justice, and the government tends to resist external pressures, which try to transplant human rights norms.

Relating to this, it is also important for the European and international anti-death penalty lobby to recognise that the capital punishment policy is not necessarily embedded in the

Japanese view on death and guilt, or legal and human rights consciousness. The Japanese government often justifies capital punishment on cultural grounds so that third parties should have no say. However, it is essential for these bodies to acknowledge the elite-driven nature of the capital punishment policy in Japan and proclaim that human rights violations should not be permitted over domestic cultural manifestation. Without understanding the actual interplay or divergence between domestic culture and international consensus, it is most likely that the anti-death penalty lobby keeps pressuring the Japanese government from human rights perspectives; or misjudges that the governmental retention stems from cultural differences. In order to conduct a more effective way to approach Japan to help alter its policy, it is required for the EU institutions and other anti-death penalty groups to develop specific strategies towards Japan.

CONCLUSION

This paper has examined Japanese institutional and cultural contexts in order to investigate where the governmental resistance to the anti-death penalty norm stems from, and in what way the EU institutions and other anti-death penalty lobby can approach the Japanese government more effectively. Although a normative approach may suggest that a national attachment to the pro-death penalty norm is a great obstacle to abolish capital punishment in Japan, the first part of this analysis clarified that the pro-death penalty norm entrepreneurs in Japan are selected elites in the Ministry of Justice and the Public Prosecutor's Office. In other words, decisions are made within the closed institutional framework irrespective of the public sentiment or Japanese culture. This part also discussed that the governmental retention of capital punishment does not necessarily stem from its strong disagreement to the international human rights norm. Rather, the capital punishment policy has been dealt with as a criminal justice issue in the Ministry of Justice, and the Japanese government does not simply invite opinions or suggestions from external actors from human rights perspectives.

The second part of this article critically investigated the governmental justification of capital punishment on cultural grounds. Although Ministers of Justice tend to cite public opinion and Japanese culture in order to legitimise capital punishment, this part contended that the capital punishment policy is not domestically and culturally determined. Firstly, although the governmental opinion polls indicate a wide public support, there lies a methodological and conceptual problem. Questions regarding the public support on capital punishment appear to have been strategically phrased in order to draw answers, which is in favour of the governmental view. Secondly, an act of *shinde wabiru* is a particular historical and political event with a particular set of sociological phenomena, and not a sentiment appreciated amongst the contemporary Japanese public. Thirdly, it argued that lack of public interest in human rights concerns of the capital punishment system does not necessarily stem from a weak human rights consciousness. Rather, it heavily links to the governmental approach on capital punishment as the issue of criminal justice. Fourthly, whilst Japanese legal consciousness may partially account for the public resistance to the anti-death penalty lobby, it illuminated the fact that capital punishment issue is primarily elite-driven, and domestic or cultural factors do not influence its decision making directly.

Finally, this study discussed that it is required for the EU institutions and other activists to alter their anti-death penalty campaigns to have their voices heard by the Japanese government. If the anti-death penalty body continues to try to urge the government to abolish capital punishment from human rights perspectives, the Japanese government will consider it as an intervention in the internal affair, and resist it using domestic and cultural factors as a shield. As a better approach for European and international anti-death penalty lobby to deal with the capital punishment policy in Japan, this paper discussed that it is significant for them to try to understand what kind of institutional

framework has been affecting the government's resistance to their pressure; and how strategically the Japanese government uses domestic and cultural factors for the justification of capital punishment.

* * *

[1] Article 36 of the Constitution of Japan provides that '[t]he infliction of torture by any public officer and cruel punishments are absolutely forbidden'.
[2] Shaming here means creating a tension between norm-abiding and norm-violating countries to make the latter realise that international norm compliance has now become one of the crucial constitutive elements of modern statehood or a member of international society (Risse and Sikkink, 1999: 8, 15; Risse and Ropp, 1999: 234).
[3] However, it merits some attention that this can also be construed as a socialised norm as a product of American security guarantee, given that the renunciation of war was included in the US occupation policy (Johnson and Zimring, 2009: 60–61).
[4] Interview with a MOFA minister, Tokyo, 9 May 2011.
[5] Interview with two MOFA ministers, Tokyo, 17 June 2011.

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Overcoming Gridlock: The Council Presidency, Legislative Activity and Issue De-Coupling in the Area of Occupational Health and Safety Regulation

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Abstract

A member state of the European Union can use its term as the Council president to make progress on pending but stalled proposals which it would like to see adopted. This case study of the directive on the risk arising from physical agents shows how a Council presidency can use issue subtraction, additional meetings and compromise proposals to overcome gridlock in the Council. There is a notable difference in terms of legislative activity between the presidencies of high regulation and low regulation countries. High regulation countries put forward compromise proposals and scheduled additional meetings to resolve outstanding issues. The case study also demonstrates the importance of issue subtraction. The original proposal was gridlocked in the Council for five years. Only after the original proposal was split up into several dossiers (issue de-coupling) was it possible to reach agreement.

Keywords

Council of the European Union, Council Presidency, issue subtraction, negotiation, health and safety regulation

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As European legislation impinges to an increasing degree on European citizens and companies, member state governments strive to influence EU legislation to minimise adoption costs in respect of different regulatory styles, to benefit their domestic industries or to address the concerns of their constituencies which can only be resolved transnationally. Countries with a high level of regulation in particular will try to extend their regulatory regime to the European level to shield their domestic industry from competition due to lower regulatory costs and/or to increase the market size for their products in line with their own regulatory standards (Scharpf 1999; Heritier, Knill, & Mingers 1996). A member state can use the opportunity of its term as the Council president to make progress on pending but stalled proposals. Member states with high levels of national regulation in an area benefit from leveling the playing field by establishing European-wide regulation. In contrast, member states that benefit from unequal levels of regulation because of their lower domestic standards do not have an incentive to push for legislation by the EU. The Council presidency acts as the 'agenda manager' in the Council (Tallberg 2006: 82-112) and can use its procedural prerogatives to push for legislation according to its own national priorities (Warntjen 2007). Thus, we would expect to see more legislative activity on a dossier during a presidency that has higher regulatory standards. By scheduling more meetings the presidency can provide the necessary time to find a solution acceptable to all member states or increase the pressure on recalcitrant member states to give up their opposition. If a presidency has an interest in overcoming gridlock on a certain dossier it will also make an extra effort to resolve this issue by formulating compromise proposals and/or by arranging issue linkages or de-coupling issues.

The office of the Council presidency offers a member state a number of tools to advance a gridlocked piece of legislation. For example, it can arrange bilateral meetings to identify the concerns of individual member states and use indicative votes to put pressure on some member states. Package deals, which compensate losses on one issue by providing gains on another, are frequently mentioned as a tool to overcome gridlock (Heisenberg 2005; Mattila & Lane 2001). Issue subtraction provides another possibility for unlocking stalled proposals (Hug & König 2002; Sebenius 1983). It reduces the complexity of a proposal, which might make it easier to reach agreement. Furthermore, issue subtraction in the form of sequential bargaining can help to build momentum. Thus, issue subtraction might help to unlock a previously gridlocked dossier.

This case study of the directive on the risk arising from physical agents shows how a Council presidency uses issue subtraction, additional meetings and compromise proposals to facilitate progress. In 1994, the Commission put forward a proposal that covered four physical agents (electromagnetic radiation, noise, optical radiation, vibrations). This proposal, however, languished in the Council for five years without being actively considered. In 1999, the German presidency proposed to split up the directive into four, each of which covered one physical agent. After this de-coupling of issues, a common position was agreed upon in the Council for all four directives in the space of five years. In this time period, a presidency which had an interest in seeing European legislation adopted in the area of occupational health and safety was more active in trying to ensure agreement than a country at the helm that had no particular interest in that area. With only one exception, all new proposals were put forward by high regulation countries (Denmark, Germany and Sweden). In addition, the presidencies of high regulation countries generally scheduled more meetings to resolve outstanding issues. For example, the working group discussing the noise directive met four times during both the German and Finnish presidencies, but only once during the Portuguese presidency.

This study adds to the existing literature on legislative decision-making in the Council and the Council presidency in several respects. First, in a detailed case study it empirically elucidates the causal mechanisms (issue subtraction, compromise proposals, and additional meetings) that link the interest a Council presidency has in reaching agreement on a given dossier and legislative activity in the Council. An earlier statistical analysis provided evidence for the existence of a link between salience and the number of adopted acts (or adopted common positions) for environmental policy in the time period 1984-2001 (Warntjen 2007); it could not, however, show how the presidency pushes for legislation. This case study shows that a presidency which has a higher interest in a dossier schedules more meetings of the working group and prepares compromise proposals to find agreement. Second, it highlights the so far largely neglected role of issue subtraction (or issue de-coupling) in overcoming legislative gridlock in the Council. The next section describes the theoretical effect of issue subtraction (removing political obstacles, reducing complexity, building momentum) in detail, which is also a prominent feature of the case study. Issue subtraction is a well-established concept in the literature on international negotiations; bringing it into the study of EU legislative decision-making facilitates cross-fertilisation of these two fields of study. The case study shows that issue subtraction can be an important factor in overcoming gridlock in the European Union. Third, the study uses a comprehensive measure of the main independent variable for all member states based on the qualitative literature which is cross-validated using several quantitative indicators (ratification of international conventions, transposition of social policy directives, and exposure of workers to physical agents). Fourth, this study raises the question of whether the sequence of presidencies matters. A number of member states with a high level of interest in European-wide regulation succeeded each other in a relatively short time period, with only a few intermediate presidencies with little or no interest in the topic. Does such a sequence of presidencies help to maintain the necessary momentum which makes it more likely that gridlock is overcome?

This study uses a number of indicators to deliver a detailed assessment of the interest of the various presidencies in pushing for legislation in a certain area and shows how the presidency uses its prerogatives to achieve agreement on regulation in line with its national priorities. Tallberg (2006: 82-112) provides one example where the presidency successfully pushed for an initiative in external relations (the Finnish presidency and the Northern Dimension) and one where the presidency stalled legislation (the German presidency and the end-of-life vehicles directive), but not an example of overcoming gridlock in the legislative domain. Sherrington (2000: 125, 150-1 and 108-9) reports three examples of legislative dossiers in which presidencies tried to fast-track items which may have been due to national priorities, but does not offer a detailed

examination of the mechanisms used by the presidency to reach agreement. In contrast to Warntjen's (2007) positive finding, Wurzel's (2004) comparative case study of four British and German presidencies concludes that there is little evidence for a relationship between salience and legislative activity in the field of environmental policy. Extending the analysis to a different policy field (occupational health and safety) can help us to resolve this controversy.

THE COUNCIL PRESIDENCY, LEGISLATIVE ACTIVITY AND ISSUE SUBTRACTION IN THE COUNCIL

A member state can use its presidency to focus attention on a gridlocked proposal that is of particular interest to it. Besides devoting more time to an issue, the presidency can push for agreement on a legislative dossier by tabling compromise proposals and using issue subtraction or addition. The interest a member state government takes in an area of European regulation is affected in two ways (Warntjen 2007: 1138). Firstly, electoral and ideological considerations (Tallberg 2003: 9) are significant: the higher the issue rates among the core constituency of a government, the dearer the topic will be to it; secondly, the economic ramifications of having a European-wide regulation imply that a member state whose industry will be significantly affected by changes in the regulatory environment will attach more importance to the topic. Regulations affecting the production process – like environmental regulations or regulation on occupational health and safety - potentially add to the production costs. As the principle of mutual recognition guarantees access to the markets of the other member states, high level regulation states cannot force their higher standards upon member states with lower levels through unilateral action (i.e. non-tariff trade barriers). Thus, states find themselves in a competition of regulatory standards (Sun & Pelkmans 1995). In this situation, member states with high levels of regulation have an incentive to strive for European-wide regulations (Heritier et al. 1996: 11-15; Scharpf 1996: 23-25; Rehbinder & Stewart 1985: 10-13;). Any form of European-wide regulation would benefit them as it implies (progress towards) a level playing field. For example, the Maastricht Treaty refers to establishing 'minimum requirements' regarding the health and safety of workers (Article 118a Paragraph 2 TEC); member states can still adopt (or maintain) higher national standards (Fairhurst 2009: 266). In addition, member states with a large economic sector producing machinery, which effectively has to comply with process regulations, benefit from European-wide regulations (Scharpf 1999: 110; Heritier et al. 1996: 24). Such countries could use their time at the helm in the Council to push for European regulations in areas like occupational health and safety policy.

The Council presidency gives a member state a unique opportunity to push for legislation to which it attaches high salience (Warntjen 2007; Hayes-Renshaw & Wallace 2006: 148; Tallberg 2003). It is the presidency that decides on the legislative work programme in the Council. It drafts the agendas and chairs meetings at all levels of the Council (Tallberg 2006: 86-7; Westlake & Galloway 2004: 35; Kirchner 1992: 76, 90-1, 104). Using its prerogatives as the chair in individual meetings, the presidency can put pressure on member states to make concessions (de Bassompierre 1988: 25-6) and use 'confessionals' with individual member states to push for an agreement (Hayes-Renshaw & Wallace 1997: 147). Furthermore, the presidency can hold indicative votes to isolate individual delegations (Westlake & Galloway 2004: 41). The powers of the presidency are not unlimited and its influence on the legislative agenda is constrained by the existing agenda, events that require attention, as well as the need to get sufficient support for a proposal and to stay within acceptable boundaries of (self-interested) behaviour (Niemann & Mak 2010; Warntjen 2008; Tallberg 2006: 87- 90). Nevertheless, the procedural prerogatives of the presidency do allow a member state to promote certain initiatives and thus to prioritise some proposals in line with its interests (Warntjen 2007; Hayes-Renshaw & Wallace 2006: 148-9; Tallberg 2006: 11). In

particular, it can schedule extra meetings, put forward compromise proposals and set up issue linkages or de-couple issues to facilitate decision-making.

The Council presidency is in charge of agenda management in the Council (Tallberg 2006: 82-112). Thus, it can focus the attention of the Council on certain topics by scheduling extra meetings. At any given moment, there are a number of pending proposals but only a limited amount of resources (in terms of staff and time) to address them. Finding agreement on an issue, however, takes time. When discussing a legislative proposal, legislators have to deal with the uncertainty regarding the link between a proposed policy and its effects. Legislative actors are primarily interested in the outcome of a given policy, but cannot be sure which policy will produce the outcome closest to their most preferred outcome (Krehbiel 1991: 61-68). Besides these technical aspects, bargaining partners have to understand the positions and possible reservations of the other actors in order to reach agreement. In other words, the necessary transaction costs of decision-making have to be met before a negotiation can be concluded successfully. This includes the allocation of sufficient time, allowing a group to exchange viewpoints and conduct negotiations (Furubotn and Richter 2000: 45). Having a meeting on an issue can also signal the intention of an actor to make progress. This can help to build momentum (see below), particularly if the actor, like the presidency, can influence the course of decision-making.

Negotiators often have an incentive to misrepresent their preferences, which can lead to protracted exchanges of proposals and counter-proposals. Negotiations, however, imply opportunity costs. The presidency can help to overcome the negotiators' dilemma by putting forward a compromise proposal based on private information about the positions of the bargaining partners that it receives in its role as an 'honest broker' (Warntjen 2008: 205; Tallberg 2006: 112-141).

Besides allocating more time to an issue and providing compromise proposals, the presidency can arrange issue linkage or issue subtraction to facilitate decision-making in the Council. Despite high voting thresholds and high preference heterogeneity in the Council, member states manage to agree on a substantial amount of legislation every year. In fact, there is a tendency to reach agreement by consensus even if the necessary majority exists to adopt a legislative proposal. A prominent explanation for this pattern is issue linkage (or vote trading): an actor votes for a proposal that s/he is opposed to but which is of little consequence for him/her in exchange for a vote by another actor on an issue that is more important to him/her (König and Junge 2009; Heisenberg 2005; Mattila and Lane 2001). Another tool for overcoming gridlock that has received less attention so far is issue subtraction. Due to its central role in the negotiations as the agenda manager and its prerogative of making compromise proposals, the presidency can use issue linkage or issue subtraction to overcome gridlock in the Council. Under certain circumstances, issue subtraction (also referred to as issue decomposition, issue disaggregation, issue separation or fractionation) can allow bargaining parties to conclude successful negotiations on complex and gridlocked issues (Fisher 1969: 90-95; Hampson 1999: 45-7; Hopmann 1998: 80-1; Sebenius 1983). Issue subtraction implies that an issue is now considered on its own merit, independent of other issues. A clear example of issue subtraction is a situation where issues are considered by different groups or organisations. However, even within a single negotiation issue subtraction can take place if issues are considered at different moments in time or if issues are considered simultaneously but without the possibility of linkage (Sebenius 1983: 288). Sequential bargaining, for example, decouples issues by dealing with issues one after another (Sebenius 1991: 134-5). The presidency chairs all meetings in the Council and can de-couple issues, for example by restricting the debate to certain issues or holding an (indicative) vote on one issue before moving on to the next. Similarly, it can propose to split a proposal and to discuss the separate proposals sequentially. Decoupling issues increases the chances for successful negotiations for three reasons. First, issue subtraction can remove political obstacles to the conclusion of negotiations. Second,

issue decomposition reduces the complexity of negotiations. Third, issue decoupling can create momentum towards an agreement. The first aspect focuses on a primarily static analysis of the preference configuration whereas the latter two stress the character of negotiations as a dynamic process.

The higher the number of issues that are touched upon in a proposal, the higher are the chances that one of them raises political conflict. This is particularly relevant for a decision-making body which, like the Council of the European Union, has a high voting threshold and values consensus (Hayes-Renshaw & Wallace 2006: 259-295). The governments have to consider in turn the interests of their domestic constituency, including the producers in the economic sectors affected by the proposed legislation, and parliamentary majorities. Comprehensive pieces of legislation are more likely to fail because they potentially mobilise a larger number of opposing groups. When structuring the negotiation agenda, one can increase the likelihood of success via the 'preemption of potential blocking coalitions' (Sebenius 1991: 134). Even if all issues under discussion are contended, it might be easier for the recalcitrant side to give in on one issue rather than making concessions across the board (Fisher 1969: 93-95). The presidency holds bilateral meetings with member states to get a more detailed understanding of the various concerns of member states. When putting forward a compromise proposal in the Council it can accommodate those concerns by adding exemptions for specific sectors (e.g. suggesting that regulation on noise at the workplace would not apply to engine rooms on ships, which is a major concern for member states with a large maritime sector such as Greece). Reducing the scope of a directive effectively reduces the number of potentially contentious issues. Similarly, longer transitional periods can remove political obstacles to agreement. Furthermore, reaching a partial agreement quickly rather than holding out for a comprehensive settlement reduces the risk of the positions of bargaining partners shifting (e.g. due to elections) which might complicate matters even more.

Negotiations are complex affairs: the concerns that hold back governments from giving their approval to a given proposal need to be understood, potential solutions have to be discovered, other member states have to be sounded out on a new proposal, etc. Issue decoupling, that is focusing on fewer issues simultaneously can increase the chances of finding common ground. In the regulatory realm particularly, legislative proposals can involve a number of technical issues: how can default values be measured? What are the effects of certain threshold values? What are the effects of exemptions or transitional periods vis-à-vis the stated goal of the proposal? The more issues a proposal addresses, the higher the complexity of the negotiations due to the multi-faceted technical aspects of the discussions. At a certain stage, the complexity of these discussions can become overwhelming, leading to negotiation failure. A high number of issues, and hence a high degree of complexity, might simply overtax the cognitive abilities of the negotiators (Watkins 2003: 153-4). Thus, the technical complexity of a proposal might obscure the fact that sufficient support for a compromise proposal exists. Finally, issue decoupling (or incremental or sequential bargaining) can increase the chances of reaching agreement because it helps to build momentum (Watkins 1998: 252). Investigating possible compromises (e.g. in the form of exemptions or transitional periods) requires resources. Bargaining parties might not be willing to expend those resources if an agreement seems to be out of reach anyhow (Kingdon 1984: 175-6). However, reaching agreement on one aspect of a legislative dossier can rekindle discussions on other aspects as an overall solution now seems more feasible than before (Fisher 1969: 94). Reaching (partial) agreements (on sub-issues) early in negotiations can lead to an 'escalating commitment to agreement' (Pendergast 1990: 139) as the time spent on negotiations becomes a sunk cost. The presidency can structure the agenda of Council meetings to focus on some issues initially and subsequently lock in the benefits of partial agreement while using the momentum generated to reach agreement on so far unresolved issues. Furthermore, there can be a technical spill-over effect. Agreeing on European legislation on one issue can increase the substantive need for (or the benefits

of) regulation on a related issue. A partial agreement can thus mobilise (domestic) interests and result in more pressure to find agreement on other issues as well (Nugent 2006: 562-3). Finally, as a decision becomes more likely, participants might abandon maximalist bargaining positions and engage in a more compromising manner in the negotiations to shape the eventual outcome (Kingdon 1984: 169-70, 176), which in turn increases the chances of reaching agreement.

Thus, issue subtraction can potentially be used to overcome gridlock because it might remove obstacles to reaching agreement, reduce complexity and – in the form of sequential bargaining – build up momentum. The Council presidency can use this tool to advance issues that are of particular importance to it. In addition, it can use its procedural prerogatives regarding agenda management and make compromise proposals to facilitate agreement on legislative dossiers.

OCCUPATIONAL HEALTH AND SAFETY: IDENTIFYING LEADERS AND LAGGARDS

The governments of the member states of the European Union have a long tradition of regulation of health and safety in the work place and different systems and levels of regulations have emerged in the EU member states (Vogel 1994). By estimating which member states adopted stringent regulations at a high level we can identify lead nations who are likely to be willing to use their time in the presidential seat to push for European-wide legislation. After discussing qualitative assessments of the comparative level of regulations in the (EU-15) member states, I will cross-validate this ranking using a number of quantitative indicators. Besides countries with high levels of regulations (e.g. the Nordic countries), countries that have a large economic sector which exports machinery (e.g. Germany) which has to comply with occupational health and safety regulations, would be particularly interested in legislation in this area. Having to comply with European-wide regulations only rather than with different national regulations makes it easier for them to cater to a larger market. At the end of the section, I present the relevant figures from EUROSTAT on the relevance of domestic industry exporting machinery in the member states.

Based on a comprehensive review of several indicators and the existing descriptive literature, a comparative qualitative assessment of the regulatory level of occupational health and safety in EC member states differentiated between three groups of countries with low, medium, and high standards (Eichener 2000: 59-64). The first group is characterised by rudimentary protection in the working place and high risk. This group includes Greece, Portugal, and Spain. In Italy, occupational health and safety is decided upon on a regional basis. Southern Italy also belongs to the group of low standards, whereas the standards are generally higher in the North. Ireland has adopted higher standards, notably in the Safety, Health, and Welfare at Work Act of 1989, but lags behind in implementation; hence, Eichener (2000) locates it between the low and medium group. A second group of countries exhibits notable levels of regulation with respect to risks to health in the work place due to the physical environment. This group includes Belgium, France, Great Britain, (northern) Italy, and Luxembourg. West Germany is located at the higher end of this group due to its traditionally high technical levels of regulation, whereas Eastern Germany would be part of the lower group. It should be noted in this respect that after re-unification West German standards and legislation commonly applied in East Germany. High levels of workplace health action in Germany are also attested by another comparative study, which contrasts this to low values for the United Kingdom and Ireland (Wynne & Clarkin 1992: 154). The top group not only has high levels of regulations concerning traditional perceptions of risks, but in addition – unlike Germany - employs a holistic approach towards health risk due to work. This includes health risks due to the organisation of work. Denmark, the Netherlands and Sweden form this group of member states with high levels of regulation of occupational health and safety and an innovative and comprehensive approach to

combating risk in this area. Another comparative study of thirteen EU member states (Piotet 1996: 81) concludes that besides the Scandinavian countries, Germany and the Netherlands feature occupational health and safety systems that go beyond mere prevention of accidents and disease, but stimulate actions taken against ill-health in its wider meaning.

To cross-validate this categorisation of leaders and laggards in occupational health and safety policy, we can turn to a range of quantitative indicators. Unfortunately, national regulations on the risk of physical agents in the work place are subject to different legal cultures. In the absence of a comprehensive study that would allow direct comparison of national standards, only rough estimates based on indirect measurements can be provided (Rantanen et al. 2001).

The first set of quantitative indicators concerns the general level of occupational health and safety standards as measured by ratification of international conventions on this issue and the transposition of European directives on social policy. Table 1 gives an overview of the average delay in (correct) transposition for six European directives on social policy (e.g. on parental leave, working time, young workers) (Falkner et al. 2005). Three caveats have to be noted. First, a delay in transposing a directive might be due to factors other than a low level of regulation (e.g. a federal decision-making structure, political conflict, etc.). Second, the regulatory standards on social policy in general might not reflect those in occupational health and safety. Third, the data that was used is truncated; some of the directives were not fully implemented in the time period covered by the study.

Table 1: Transposition of European Directives in the Area of Social Policy

	AT	BE	DE	DK	ES	FI	FR	GR	IE	IT	LU	NL	PT	SE	UK
Delay	34.7	41.4	40.8	10.1	32.6	33.7	53.1	44.5	17.9	48.8	41.1	14.9	50.3	28.3	20.8
Rank	8	11	9	3	6	7	15	12	2	13	10	1	14	5	4

Source: Falkner et al. (2005: Table 13.6), delay is given as an average for six directives in months; own calculations.

The data broadly supports the distinction made in the qualitative literature. The Netherlands occupies the first place. The Scandinavian countries are all in the top half of member states. Germany is part of the middle group. In contrast, countries like Greece, Italy and Portugal show a low performance in transposing European directives. The position of Ireland (second place) is surprisingly high.

Member states that voluntarily sign up to international conventions to protect workers in the work place are more likely to have strict regulations on occupational health and safety in place, either as a consequence of committing to international standards or because they support the convention on the basis that they have already adopted strict national measures.

Table 2: Ratification of International Conventions

	AT	DE	DK	ES	FI	FR	IE	IT	LU	PT	SE	UK
Ratifications (%)	14	68	41	64	82	50	23	45	18	41	82	18
Rank	9	2	6	3	1	4	7	5	8	6	1	8

Source: Rantanen et al. (2002: Table 6); own calculations

Table 2 lists the percentage of conventions of the International Labour Organization (ILO) ratified by 12 EU member states. Countries which adopted a high number of ILO conventions tend to have the highest legal coverage in the area of occupational health and safety (Rantanen et al. 2001: 32). Unfortunately, the ranking only includes 12 of the (then) 15 member states. The top three countries are Finland, Sweden (joint first rank), and Germany. Finland and Sweden both ratified 82 per cent of the ILO conventions, for Germany the value is 68 per cent. Spain occupies the third place with 64 per cent. Eichener (2000: 60), however, notes Spain's notoriously weak national laws on occupational health and safety, characterised by a lack of clear definitions of key terms and a binding nature. Thus, the overall pattern – with the exception of a relatively low value for Denmark – confirms the categorisation of the qualitative studies.

The second set of quantitative indicators concerns the conditions in the work place. Countries with high levels of regulation (and enforcement) should exhibit lower exposure of workers to risks from physical agents. The European Foundation for the Improvement of Living and Working Conditions carried out a number of surveys on working conditions which allow us indirectly to gauge the relative level of regulation in EC/EU member states (Paoli 1992, 1997). An important caveat is that the surveys report on the subjective impression of working conditions, not the level of regulations directly. Thus, what constitutes 'appropriate' machinery or what 'loud' means might be understood in different ways in the countries included in the study. The surveys were carried out as a part of the Eurobarometer with an oversampling of persons in active employment.

Table 3 provides the ranking of the surveys for 1991 and 1996 with regard to exposure to physical agents (noise, vibrations, radiation). In 1991, interviewees were also asked whether they had 'appropriate machines and tools' to carry out their work (Paoli 1992). Regarding noise, the Netherlands, Belgium and Germany feature the lowest exposure to noise (in the category 'at least 25% of the time'). With regard to appropriate machines, the leading countries with the highest percentage of workers reporting having appropriate machinery are Ireland, Spain and Germany (joint second place), and Denmark and Great Britain (joint third place). The good standards in Ireland can be explained by the high level of investment in new machinery at that time (Eichener 2000: 57). In the 1996 survey, the member states that joined the Union in 1995 were included. Furthermore, questions on the exposure to vibrations from hand tools and machinery and radiation by sources such as x-rays, radioactivity, laser beams, or welding lights were added (Paoli 1997). Italy, Belgium, and the Netherlands exhibit the lowest exposure to noise (i.e. they have the highest values in the category 'almost never or never'). The survey reports the responses for West and East Germany separately, in the table the values for West Germany are used which only ranks fifth (East Germany would rank second). The Scandinavian countries report relatively high levels of exposure, contrary to our expectations based on the qualitative literature. Regarding the exposure to vibrations, the Netherlands, Sweden and Denmark (joint second place), and

Belgium and United Kingdom (joint third place) exhibited the lowest levels of exposure. Finally, respondents from Italy and Portugal (joint first place), France and Belgium (joint second) and Ireland and The Netherlands (joint third) reported the lowest exposure to electromagnetic radiation. The differences here are less pronounced than for the other physical agents, presumably because electromagnetic radiation is less common than, say, noise or vibrations. In line with the qualitative literature, the Netherlands as well as countries like Belgium, France and – to a lesser degree – (West) Germany performs well in the rankings. In contrast, Sweden and Finland have lower and Ireland and Italy unexpectedly high rankings in light of the qualitative literature. This could be due to different expectations in these countries as to what constitutes a safe work place.

Table 3: Exposure to Physical Agents in the Workplace

	AT	BE	DE	DK	ES	FI	FR	GR	IE	IT	LU	NL	PT	SE	UK
1991															
Machines	--	77	87	84	87	--	72	81	88	75	81	81	76	--	84
Noise	--	23	24	26	32	--	31	32	31	25	28	20	28	--	28
1996															
Noise	73	77	72	71	71	61	70	62	70	79	72	76	72	69	69
Vibratis	73	82	71	85	70	74	77	63	76	80	75	87	70	85	82
Radiation	91	96	94	93	94	92	96	93	95	97	94	95	97	92	94

Source: Paoli (1992: pp. 17 and 45), Paoli (1997: Tables 4.2, 4.7, 4.12), rounded values for 1991. Note: For machines, the values are the percentages of respondents reporting appropriate machinery. Otherwise the percentages are for the answer category indicating the least amount of exposure (e.g. 'almost never or never'). The surveys reports responses for East and West Germany separately, the West German values were used in the table.

The descriptive literature distinguishes between leaders in occupational health and safety (the Scandinavian countries plus the Netherlands), a group of high technical (but not necessarily innovative) regulatory standards comprised of countries such as Germany, France or Belgium, and mainly Southern laggards. This picture is largely confirmed by the ratification of international agreements as well as the transposition record and, albeit

to a lower extent, by surveys of the working conditions. Italy and Ireland have unexpectedly high rankings.

Another reason to place an item high on the legislative agenda would be the importance of a domestic industry which is affected by a given dossier. Regulation of the exposure of workers to noise and vibrations affects the building of machinery. The machinery building industry would prefer a uniform European-wide regulation as this allows it to reap the benefits from economies of scale as it can build for a larger market, rather than having to accommodate different national regulations. Denmark and Germany have the highest percentage of employees (14 per cent) in machinery building of the national industrial labour force in the EU. Germany also has the densest concentration of industrial workers in the machine building industry. The top seven regions most specialised in the manufacture of machinery are all in Germany. Machinery also plays an important part in German exports and thus in the German economy. Indeed, in 2003 German production comprised 37.7 per cent of value added by the manufacture of machinery and equipment of the EU-27 (Eurostat 2006). Thus, we would expect a German government in particular to rate dossiers which affect the manufacture of machinery very highly.

In sum, we should expect a push for legislation on occupational health and safety when the Council presidency is occupied by a North European country. Besides the Scandinavian countries, the Netherlands and Germany and to some degree France and Belgium stand out in the different indicators as member states with innovative and/or comprehensive national regulations of occupational health and safety. Germany and Denmark have a further interest in directives concerning machinery due to their large industry producing machinery.

OVERCOMING GRIDLOCK: THE IMPACT OF THE COUNCIL PRESIDENCY ON THE GRIDLOCKED REGULATION OF OCCUPATIONAL HEALTH AND SAFETY

Member states with high levels of regulations and/or a large industry exporting machinery have the greatest interest in establishing European-wide regulations in the area of occupational health and safety. The Scandinavian countries, the Netherlands and Germany have high standards and, in the case of Germany and Denmark, an additional economic incentive to push for European levels. The case study shows how these countries used the presidency to push for legislation in this area. The focus of the case study will be on reaching political agreement in the Council in first reading. Later readings are subject to strict deadlines which largely determine the timing of events. Thus, the presidency largely has to react to external events in that phase. In contrast, a bill can potentially stay in first reading indefinitely, which allows the presidency to prioritise some items in line with its national preferences. The formal adoption of a common position in the Council is sometimes delayed to allow for linguistic and legal work on the final proposal.

Large differences in the legislation on workplace safety still existed in the member states of the EC at the beginning of the 1990s (Vogel 1994; Wynne & Clarkin 1992: 56-69). The completion of the Single Market as well as the new provisions of the Maastricht Treaty and the Social Charter gave an impetus to development of a comprehensive European regulation in the area of occupational health and safety (Wynne & Clarkin 1992: 51-55). The Commission made a proposal for a new directive on the minimum health and safety requirements regarding the exposure of workers to the risks arising from physical agents (electromagnetic fields, noise, optical radiation, vibrations) in July 1994 (COM 94/284). Within the group of the (then twelve) member states, only Germany and the Netherlands already had specific national regulations with strict thresholds in place regarding all of the physical agents covered by the proposal. Subsequently, the proposal was stalled in the Council for five years until successive

presidencies of member states with high levels of regulation in occupational health and safety pushed for new European-wide regulations (interviews Commission official, 13 June 2005; Council official, 6 June 2005; Council official, 27 June 2005).[1] After the German presidency suggested dividing the comprehensive proposal on all four physical agents into several dossiers (issue de-doupling), political agreement in the Council was reached on all of them within five years. Nearly all of the new proposals were put forward by the presidency of high regulation countries, which also scheduled additional meetings and put together compromises to reach agreement during their term in office (Table 4).

Two weeks into its term of office, the German presidency gave new impetus to the physical agents directive in January 1999. It suggested splitting up the original proposal and having separate directives on the different physical agents, noting the difficulty of the member states to reach agreement addressing all of the different sources of rísk simultaneously (Agence Europe, No. 7470, 22 May 1999). Furthermore, it submitted a proposal covering vibrations (Council Document 1320/98). The argument for starting with vibrations was that there currently was no European regulation on vibrations, that there was a clear link between vibrations and occupational diseases and that scientific knowledge was most advanced in this area (PRES/00/454). In addition, in the view of the German presidency this was the area where agreement could be reached relatively quickly (Council Document 5825/99). However, it stressed that the other physical agents should be addressed in due course as well. Thus, the German presidency tried to create momentum by focusing on an area where agreement was likely, which would revitalise discussion on the other issues as well. The Council's Social Questions Working Party met twice in February 1999 and again in March and June of the same year to discuss the German proposal for a directive on vibrations. The general approach of the presidency was explicitly supported by eleven member states (Council Document 6939/99). During the Finnish presidency in the second half of 1999, the working party met another four times. Under the German and Finnish presidencies, the working party resolved fundamental issues of how to define and assess risks, how to limit exposure, on aspects of worker information and training, and health surveillance (Council Document 12689/99). At the end of the Finnish presidency, the working group put forward an amended proposal (Council Document 5322/00). Reviewing the progress made during the Finnish presidency at their meeting on the 29 November, the ministers were hopeful that a Common Position could be adopted during the upcoming Portugese presidency (European Report 1999). However, there was only one meeting of the working group during the Portugese presidency. Issues that were still debated included the scope and possible derogations from the directive, whether or not there should be limit values of exposure in addition to values at which action was required and how detailed the provisions on measurement should be. Some of these issues were resolved in two meetings at the working group level during the French presidency in the second half of 2000 (Council Documents 13071/00). The remaining issues were the inclusion of limit values, transitional periods and derogations. The French presidency presented a new compromise proposal addressing these issues in the Coreper meeting on 24 November 2000. It suggested higher values and a longer transitional period (Council Document 13697/00). Subsequently, political agreement was reached at the meeting of the Employment and Social Policy Council on 27 and 28 November 2000 (Council Document 13875/00).

Table 4: Legislative Activity in the Council on the Physical Agent Directives

Year	Presidency	Activity Vibrations	Noise	Electromagnetic	Optical
1994	Germany	Commission Proposal			
1995-1999	FR, ES, IT, IE, NL, LU, UK, AT	No activity in the Council			
1999	Germany	Proposal to split directive New proposal 4 meetings WG			
	Finland	4 meetings WG.			
2000	Portugal	1 meeting WG			
	France	2 meetings WG Presidency proposal COREPER (pol. agreement) Council (pol. agreement)			
2001	Sweden	Council (common position)	New proposal 9 meetings WG COREPER (pol. agreement Council (pol. agreement)		
	Belgium		Council (common position)		
2002	Spain	No activity in the Council			
	Denmark			Conference Council discussion Presidency proposal 1 meeting WG	
2003	Greece			5 meetings WG Council discussion	
	Italy			3 meetings WG COREPER (pol. agreement) Council (pol. agreement) Council (common position)	
2004	Ireland				Conference Presidency proposal
	Netherlands				5 meetings WG COREPER (pol. agreement) Council (pol. agreement) Council (common position)

Source: Council of the European Union, protocols of meetings. WG = Council Working Group.

The Swedish presidency presented a proposal for a directive on noise a few weeks into its term in office in January 2001 (Council Document 5474/01). The Social Questions Working Party met a total of nine times during the Swedish presidency to discuss the proposal. Similarly to the directive on vibrations, discussions focused on the scope of the directive, inclusion of limits and the possibility of derogations (Council document 9101/01). The Swedish proposal was discussed in Coreper on 1 June 2001 which noted that a number of issues had to be resolved at the ministerial level (Council document 9484/01). For example, Greece was concerned about the scope of the directive extending to workers on ships and airplanes. A compromise suggested by the presidency was to set an additional transitional period of five years for seagoing vessels, thus removing a political obstacle to reaching agreement on this issue. Another contentious issue concerned the maximum values. Denmark was pushing for lower values and references to international guidelines, whereas Italy, Greece and Spain argued that the values were already too low, putting too much of a burden on companies (European Report 2001). On the basis of a compromise proposal of the Swedish presidency, political agreement on a common position for the noise directive was reached in the Council in June 2001 (Council document 9855/01). The preamble contained a reference to international standards which could provide guidance, but whose implementation was left to the member states. Several member states (Austria, Germany, the Netherlands) had national legislation in place that was stricter than the proposed European legislation regarding the overall exposure levels (Agence Europe, No. 8329, 29 October 2002).

There was no activity in the Council on the remaining physical agents during the Spanish presidency in the first half of 2002. The Danish presidency, however, organised a conference on electromagnetic radiation in September 2002 in Copenhagen and the topic was discussed again in the Council in October 2002. Subsequently, the Danish presidency presented a proposal of a directive on electromagnic fields and waves in December 2002 (Council Document 15400/02). After being discussed once at the Social Questions Working Party during the remaining weeks of the Danish presidency, the proposal was discussed several times during the Greek and Italian presidencies in 2003. As with the previous directives, discussions at the working group level focused on the scope of the directive and limit values. For example, the working group debated at one of their four meetings in this period whether static electric fields should be subject to the directive. Furthermore, there was a discussion on the length of a transitional period (Council Document 9541/03). An informal gathering of the Employment and Social Policy Council meeting in Varese on 11 July - at the beginning of the Italian presidency - made further progress regarding the directive on electromagnetic fields. The remaining questions were resolved in discussions at three meetings of the Social Questions Working Party and Coreper during the Italian presidency. Political agreement was reached in the Employment, Social Policy, Health and Consumer Affairs Council meeting on 20 October 2003 (Council document 13838/03).

The Irish presidency in 2004 took up the final physical agent (optical radiation). It organised a conference on the topic in Feburary 2004 and presented a proposal in the final month of its term in office (Council document 10678/04). Subsequently, the proposal was discussed five times at the working group level during the Dutch presidency in the second half of 2004. Part of the discussions were devoted to the necessity of having a directive. Several delegations requested an impact assessment with recent cost estimates. Other issues involved questions regarding specific standards, provisions on health surveillance, natural sources of optical radiation and national guidelines on good practice (Council document 14287/04). Political agreement on the Council common position was reached in the Employment, Social Policy, Health and Consumer Affairs Council meeting on 6 and 7 December 2004 during the Dutch presidency (Council document 15686/04).

The timing of legislative activity in the Council largely conforms to our expectations. The directive was stalled in the Council during the reign of presidencies with little interest in

the regulation of occupational health and safety (an exception being the Dutch presidency in 1997). No steps were taken on the directive during the presidencies of Austria, France, Great Britain, Ireland, Italy, Luxembourg, the Netherlands and Spain between 1994 and 1999. The key steps on the directive are all taken in the period after the 1999 German presidency split up the proposal (Table 4), with governments in the chair who have high levels of regulation in this area (Denmark, Germany, Finland, the Netherlands, Sweden), while there was little or no progress during the term of office of low regulation countries (Portugal, Spain).

Germany, with its large number of workers in the manufacturing of machinery and equipment, unlocked the gridlocked directive encompassing all four physical agents and made a proposal on vibrations, which was subsequently discussed several times at the working group level. Sweden, a leading country in terms of its national regulation on occupational health and safety, took up the second physical agent (noise) and led the negotiations to political agreement in the Council, which was based on a Swedish compromise proposal, following nine meetings at the working group level. Denmark made a proposal on the technically more difficult subject of radiation after having organised a conference on the topic early on in its presidency. During the Finnish presidency, several meetings were held to make progress on the vibrations directive, resulting in an amended proposal. Political agreement was eventually reached during the French presidency, which put forward a new compromise proposal. Strikingly, little progress was made on this proposal – contrary to the expectations of the participants – during the intermediate Portuguese presidency. The Dutch presidency initiated five meetings on optical radiation at the working group level and reached political agreement on this directive.

No activity at all took place during the Spanish presidency, even though it could have organised, for example, an informal session on one of the remaining physical agents (like the following Danish presidency). Thus, most of the initiatives were taken during the presidencies of member states with a high interest in this area (Denmark, Germany, and Sweden). Similarly, we observe high levels of legislative activity at the working group, COREPER and ministerial levels during the presidencies of member states that are leading (the Netherlands, Sweden, Finland) or have high standards (Germany, France) in occupational health and safety. In contrast, little or no activity took place during presidencies with low levels of regulation (Spain, Portugal).

Only the activities during the Greek presidency are surprising in light of the previously discussed results on leaders and laggards in occupational health and safety regulation. Whether they simply followed up on the Danish initiative or put an extra effort into pushing for legislation in this field, contrary to expectations, is unclear. As discussed in the previous section, Ireland and Italy cannot be unambiguously identified as leaders or laggards in the field. The qualitative literature characterises them as laggards overall, despite there being regional differences in Italy and movement towards higher levels of regulation as well as state-of-the-art machinery in Ireland. In contrast, the rankings of the quantitative indicators put them in or near the top group. Thus, the Irish initiative for a directive on optical radiation as well as the efforts the Italian presidency put into reaching agreement on the directive on electromagnetic fields are inconclusive.

We can also rule out some alternative explanations. Neither a change of the voting threshold (e.g. from unanimity to qualified majority) nor an overall shift in the party political composition on the left-right dimension can explain the pattern of legislative activity we observed. No activity took place after the proposal was put forward under the Maastricht Treaty. The push towards political agreement in the Council took place after the treaty changes adopted in Amsterdam came into effect. However, the necessary voting threshold did not change with the Amsterdam Treaty. The proposal of the Commission (COM 94/284), which was put forward under the Maastricht Treaty in 1994, was based on Article 118A of the Treaty establishing the European Economic Community, which means that from the very beginning (only) a qualified majority was

necessary to adopt the Council's Common Position (Maastricht: Art. 189c TEC; Amsterdam: Article 251 TEC).

Due to elections and overall changes in the party political landscape, the composition of the Council changed several times in terms of the overall left-right position in the period under discussion. The Council moved to the right in the mid-1990s, when the physical agents directive was gridlocked, and back to the left in 1999 and the early 2000s, when political agreement was reached in the Council (Warntjen, Hix, & Crombez 2008: 1249). Thus, the overall party political orientation of the Council might have facilitated or even inspired the progress made after the German presidency proposed a split in the directive in 1999. This would not, however, explain the differences in the pattern of legislative activity in the Council in the period after 1999.

Although alternative explanations (a change of preferences, an increased sense of urgency, international developments, etc.) cannot be definitely ruled out, the empirical pattern fairly strongly suggests a relationship between the salience the presidency attaches to a dossier and legislative activity in the Council.

CONCLUSION

European regulation needs to pass through the needle's eye of the Council where countries can prevent initiatives from straying too far from the lowest common denominator due to a high voting threshold and diverse preferences on European legislation among the member states. The Council presidency is uniquely positioned to push legislation through the Council despite these obstacles. The revival of the stalled directive on the risk arising from physical agents in 1999 and the subsequent adoption of four separate pieces of legislation reflect the ability of the Council presidency to influence legislative activity. After languishing in the Council for years, the discussion on the directive on occupational health and safety was revived by presidencies which attached high salience to it because of their domestic high standards in this area. The German presidency divided the proposal into four separate directives which unblocked the stalled negotiations. This issue de-coupling resulted in the relatively quick adoption of EU legislation in this field, following proposals by Germany, Sweden, Denmark and Ireland. The key steps in resolving outstanding issues were taken under presidencies that are leaders in the field of occupational health and safety regulation and/or have a special economic interest in this field. They presented compromise proposals and scheduled additional meetings to resolve outstanding issues. Thus, the case study presents evidence for an effect of the presidency on legislative activity in the Council.

The findings relate to the period prior to enlargement in 2004. Enlargement is likely to have had two different effects on the steering capacity of the presidency. On the one hand, it raises the pressure to increase the powers of the presidency so that it can act as an effective coordinator. On the other hand, it makes it more difficult for the member state holding the presidency to push for an agreement. This might be a particular issue for countries with small staff numbers, a fragmented internal decision-making system and/or high stakes in a large number of areas. The rotating presidency has been discussed repeatedly in the context of institutional reform in the Council in the last decades. It was a prominent topic during discussions on the constitutional and subsequently reform treaty. On the one hand, it has been argued that the leadership function of the presidency ensures (more) efficient negotiations. Extending its term in office would thus lead to more efficient decision-making. On the other hand it has been noted that the delegation of special powers raises the spectre of agency drift. Member states have different priorities and their time in the chair allows them to search for European solutions to problems that are highly salient to them. By rotating the presidency, all member states have an equal opportunity to put the spotlight on issues which are particularly important to them. The Lisbon Treaty added a permanent

presidency of the European Council to the rotating presidencies of the sectoral Council formations. In addition, team presidencies were supposed to add more coherence to the legislative agenda. Whether or not these institutional innovations will have the desired effect remains to be seen. Another question for future research is the cumulative effect of several presidencies. Are initiatives from one presidency routinely picked up by subsequent ones or can progress made during one presidency be neutralised or even reversed due to lack of support from the following Council presidencies?

* * *

[1] Interviews were held in June 2005 in Luxembourg and Brussels with the three Commission and Council officials who were most directly involved in the discussions on the physical agents directives.

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Refugee Quota Trading within the Context of EU-ENP Cooperation: Rational, Bounded Rational and Ethical Critiques

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Abstract

In 1997 Peter Schuck proposed a 'refugee quota trading' mechanism, whereby countries voluntarily form a union, each country accepting a quota of refugees and able to buy and sell the quota to other states within and even outside of the union. Today, the EU arguably has a de facto cash transfer mechanism both within the EU and between the EU and European Neighbourhood Policy countries. This article explores the question of refugee quota trading, explaining why current EU policy fails to increase refugee protection. Throughout the critique, states are treated either as rational actors or actors with present-preference bias, the latter largely ignored in current discussions on international refugee 'burden sharing'. In addition, the ethics of refugee quota trading is presented using arguments distinct from that of Anker et al. (1998) who argue that refugee quota trading creates a 'commodification' of refugees. One could argue that refugees' protection is being commodified, not refugees themselves. However, when states are provided funds not to deport refugees, this can be a type of reward for not taking an action that states ought to follow regardless of the reward. Just as there are non-utilitarian reasons not to rely on rewards alone for lowering the crime rates for heinous crimes within states, there may be non-utilitarian arguments against refugee quota trading.

Keywords

Refugees, asylum-seekers, burden sharing, European Neighborhood Policy

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The 1951 Geneva Convention for the Protection of Refugees and its 1967 Protocol give refugees the right to gain asylum in the first country in which they arrive. Yet, within the European Union (EU), some states receive significantly more 'spontaneous refugees' compared to others. Most EU countries accept significantly fewer refugees per capita, and certainly fewer per GDP, compared to European Neighborhood Policy (ENP) countries (UNHCR 2009). Solutions proposed in the current academic literature include mechanisms for 'burden sharing', to ensure a more equal distribution of obligations towards refugee protection. In relation to this, the provision of quotas for each country is proposed, each country also given the ability to trade these quotas amongst themselves (Schuck 1997). A similar policy involves money transfers in return for asylum without any set quotas (Hathaway and Neve 1997). These mechanisms have already been the subject of analysis by Anker et al. (1998) and Smith (2004) and others (Czaika 2009: 103 and Facchini et al. 2006) have shown the practical weaknesses of a money transfer scheme between rational states. This paper returns to this debate within the context of the EU itself and its relationships with ENP countries. It also (see Anker et al. 1998) tackles the questions of the practical results of quota trading and the ethical limits of the quota trading proposal but uses fresh theoretical critiques and applies the issue specifically to EU-ENP relations. It answers the question: *Do refugee quotas and quota sharing within the EU and between the EU and ENP countries constitute a viable and ethical policy?*

The article also engages with key wider debates concerning the relationship between the normative and cost-benefit logic of states attempting to take part in burden sharing for refugee protection. It first provides insight into why rational states may not be incentivised to absorb refugees as part of a voluntary quota trading scheme. Unlike previous critiques (Czaika 2009; Facchini et al. 2006; Smith 2004; and Anker et al. 1998), the article compares and contrasts refugee quota trading to catastrophic health insurance in the private and public sector, the analogy used by Schuck (1997). The comparison helps clarify why refugee quota sharing may fail in an international arena. This comparison with insurance is necessary, considering the term 'insurance' has increasingly been used to explain why states agree to burden sharing mechanisms. This

article then goes beyond the logic of both rational choice and norms to show how a 'bias towards the present' (Parfit 2011) or 'status quo bias' (Kahneman et al. 1991) may diminish the effectiveness of quota trading on a theoretical level. The bias towards the present may also serve as an additional logic for the actions of states, rather than only a combination of normative and rational cost-benefit logic as addressed by Thielemann in the context of the EU (2003a). Finally, building on literature that questions the ethics of refugee quota trading (Smith 2004; and Anker et al. 1998), the article questions an approach that only addresses the 'provision of asylum capacities' (Czaika 2009: 91) or the 'utilitarian social welfare' (Facchini et al. 2006: 418) of burden sharing mechanisms. Unlike previous literature, I show why refugee quota trading might be considered unethical even if it succeeds in protecting refugees.

Before this contribution, the following second section will provide broader context, including an overview of policies within the EU and ENP countries with regards to asylum coordination, and a brief overview of the current literature on burden-sharing. The solution of refugee quota trading is then critiqued in the third section of the article, using four major categories of argumentation, each using a slightly different qualitative methodology. The first and second categories, which build on the assumptions of Schuck (1997), assess the potential impact of refugee quota trading for EU and ENP states, with states assumed to be rational actors. The methodology also partially draws on the analytical framework developed by Noll (2003) who demonstrates the value of using a game-theoretic approach to understanding why cooperation may fail. The third category of argumentation uses a bounded rational choice assumption, attempting to explore the potential limits of refugee quota trading if states have a status quo bias. This methodology differs from Noll (2003), Thielemann (2003a) and others who limit their analysis to the tangible and intangible costs and benefits and coordination challenges in refugee burden sharing, rather than biases even under a completely coordinated system with tangible costs. However, the bias towards the present could be interpreted as an intangible cost, and therefore be a new factor to consider within the theoretical framework developed by Noll (2003) and Thielemann (2003a). In this section the theoretical examples use a two-country model, extending the Facchini et al. (2006) quantitative model by making qualitative suggestions that can be applied to a quantitative analysis.

The fourth argument in this section relates more closely to the study of ethics, and questions whether the morality of refugee quota trading conflicts with our intuitions about moral responsibility. This fourth critique will include an imaginary thought experiment of a policy that would be considered morally wrong, yet which is similar enough to refugee quota trading to raise moral concerns about that policy. This is a similar method to Smith (2004), who compares quota trading to another policy considered immoral. Like Smith, the methodology does not include a full philosophical analysis, though it presents a starting point for such analysis by showing the intuitive limits of an approach that only attempts to maximise welfare utility.

THE ASYLUM DEBATE

Attempts at a coordinated asylum policy in the EU and with ENP countries

A brief overview of the evolution of cooperation within the EU and between EU and ENP countries is necessary first in order to understand better why money transfers have become relevant in refugee absorption and in the academic literature on refugee burden sharing. International law, though not always followed, sets the general standards for asylum processing within the EU. The 1951 Convention and the 1967 protocol are the main pieces of international law, along with the UNHCR's (United Nations Refugee Agency) non-legally binding ExCom Conclusions. In the 1951 Convention and subsequent UNHCR guidelines, which have been incorporated into domestic law in EU

countries, an individual has the right to asylum if he or she can prove his or her life is under threat in the country they fled from, because of persecution due to their ethnicity, national origin, membership in a particular social group, or political opinion. However, different countries offer different levels of assistance to refugees, and have different criteria for proof of refugee status. This in itself can make cooperation on refugee absorption a challenge, even if states agree to accept more refugees, which they often do not.

In the 1980s, the Council of Europe agreed that it was necessary to harmonise asylum law to prevent 'country shopping,' whereby asylum-seekers do not request asylum at the first country they reach, leading to the Dublin Convention in 1990 (European Union 1997), which determined the state responsible for examining an application for asylum. Similarly, with the signing of the Maastricht Treaty, immigration law, including asylum law, was considered a common interest of EU countries. As a result, there were limited attempts to coordinate and create more equal burden sharing, and this included responsibilities towards refugees who had fled first countries of asylum outside of the EU. A press release from Brussels in September 2009 emphasises that the number of refugees voluntarily resettled in any member country is lower than those resettled in the US, Canada, and Australia, but that far more spontaneous asylum cases reach the EU compared to these countries (European Commission 2009). Many of these refugees arrive from third countries that may not follow the principle of non-refoulement.

Coordination between EU countries therefore involves engaging with third countries. The original readmission responsibilities of the EU were described in Article 63(3)(b) of the Amsterdam Treaty as including 'repatriation of illegal immigrants' (Official Journal C 340 1997). However, if third countries are not processing asylum-seekers, and perhaps deporting them, these particular people have the right under the Convention to seek asylum. Protected Entry Procedures were suggested in the November 2000 Communication. This entails asylum-seekers getting refugee status recognition outside of the EU and then applying for resettlement in EU member states (Noll et al. 2002). The Commission recommended that this particular procedure be complementary and not at the expense of asylum-seekers who reach EU member states without prior refugee status recognition. However, such protection may come at the expense of spontaneous asylum-seekers. For example, in the case of Denmark's mechanism of requiring visas for Bosnians, and for allowing a limited quota of 'particularly distressed' Bosnians, such protection came after access to Danish territory had already been blocked to most Bosnians (ibid). This mechanism within the EU therefore relies on improvement of asylum mechanisms within third countries, though these are not always available. Bosnians, for example, needed to cross the border into Croatia to reach a Danish representative or a UNHCR representative (ibid). Therefore, in 2005 a communication on Regional Protection Programmes (RPP) set out the need to improve asylum processes and conditions in non-EU countries, perhaps in order to prevent refugees from reaching the EU. RPP was to consist of practical actions that aimed to 'deliver real benefits both in terms of protection offered to refugees and in their support of existing arrangements with the relevant third country.' (COM [2005] 388). 'Real benefits' included cash transfers as a mechanism for refugee protection in third countries.

Funds for asylum processing and refugee absorption

The 'European Union Policy towards a Common European Asylum System' created a EUR 250 million budget in the AENEAS Programme between 2004 and 2008 to be given to those third countries which needed assistance in asylum processing (COM [2006] 26). Within the EU, member states can voluntarily agree to accept refugees who have already received refugee status from the UNHCR, and these member states will receive EUR 4,000 for every refugee they accept from the European Refugee Fund, the budget of which was EUR 614 for the period between 2008 and 2013 (European Parliament and

Council 2007). Funds provided through the International Organization for Migration (IOM) are given in the case of some readmission agreements, with the purposes of improving asylum processes. According to the Ukrainian Deputy Minister of Internal Affairs, Vasyl Marmazov, one temporary centre for illegal migration located in Volyn, Ukraine cost UAH 36 million (USD 4,497,335) with funds received directly from the EU and through the IOM (in Klymonchuk 2009). The total budget for the IOM is close to CHF 40 million (USD 75 million), though the total budget for all country field missions for the 2010 year was CHF 3,673,000 (IOM 2009).

Funds for EU countries are often not enough to encourage voluntary acceptance of asylum-seekers, suggesting funds in exchange for re-admittance of stateless persons may not be the most effective incentive for a fair asylum process, both in terms of the incentive of countries to pay other countries and the incentive the payment creates to accept refugees. For instance, Guild points out that only Romania, a non-EU country at the time, agreed to accept Uzbek refugees fleeing from Kyrgyzstan in 2005, even though EU states would have received funding from the European Refugee Fund (ERP) and Romania could not (Guild 2006: 631).

There are mixed results in the extent to which funding from the EU to third countries leads to readmission agreements. The 2007 EU-Ukraine Cooperation Council established EU financial support for asylum processes and infrastructure needs in addition to easier visa access for Ukrainian citizens, in return for Ukraine re-admitting stateless persons who had left Ukraine for EU counties. Wichmann uses this as an example of a mechanism used in the ENP to improve judicial procedures in non-EU countries. However, she also points to the failed negotiations with Morocco, an ENP country which requested and was denied funding for processing immigrants from Sub-Saharan Africa (Wichmann 2007: 14). Because Spain solicited Morocco for a readmission agreement, but could not pay the costs of assuring that immigrants from Sub-Saharan African would be repatriated to their country of origin after readmission to Morocco, the agreement was never fully implemented (Cassarino 2009).

Furthermore, even if funds are provided to absorb those who are readmitted to non-EU countries, these refugees may also be forcibly repatriated to areas of conflict. The ENP progress report on Israel, for example, states that 'Israel, in coordination with Egypt, continues to instantly and forcibly send back asylum-seekers/migrants from countries such as Sudan, Eritrea and Somalia' (European Commission 2009a). Even when states accept refugees and therefore receive funding to assist them, the funds are not necessarily utilised for this purpose. The UNHCR funds to UNHCR offices in Egypt for processing asylum seekers were arguably/apparently misused when refugees had difficulty accessing UNHCR offices, and could therefore not receive funds meant to be allocated for the welfare of refugees (Moorhead 2005). Furthermore, legal aid assists in gaining refugee status in Cairo, but those without such aid have extreme difficulties (Kagan 2006).

Financial transfers therefore play a role, positive or otherwise, in the relations between EU and ENP countries. States view accepting refugees as a burden, and this can inhibit states from absorbing them, making refugees vulnerable to deportations. Money transfers can be used for a variety of purposes, including as incentive to absorb refugees, as a means to cover costs of absorption, and as a means to deport refugees from an ENP country to the country of origin or another country of asylum. A type of explicit trading is therefore increasingly playing a role in the refugee regime, both in terms of bilateral agreements and as a result of attempts at burden sharing.

Burden sharing and refugee quota trading in the current literature

While it is clear that cash transfers play some role in refugee policy, current scholarly work has attempted to understand better the patterns of burden sharing within the EU and proposals for coordination that improve welfare and better protect refugees. One debate within this literature is why states agree to take part in burden sharing, such as contributing to the European Refugee Fund, when they would appear to be worse off in such a scheme. Thielemann argues that one reason may be because they are committed to certain norms, such as human rights protection. Another reason is that the scheme can be in their interests if they are receiving side-payments for agreeing to the scheme. The scheme can also serve as insurance for the future (Thielemann 2003b: 228) because states know that, should a large number of refugees enter their country in the future, other states will assist in absorption. Empirical evidence shows that states act according to both a cost-benefit logic and a norm logic, taking actions that are deemed 'appropriate', without necessarily calculating the costs and benefits (Thielemann (2003a).

Another related debate is whether refugee protection is a 'public good'. Suhrke (1999) argues that refugees staying in their home countries can fuel conflict, destabilising security for all. Refugee protection, like a public good, creates non-excludable benefits for states – meaning no state can be excluded from the benefits, in general, of the refugee protection regime - and non-rival benefits – meaning one state benefiting from refugee protection does not diminish the benefits to others. This is because all states benefit as a result of increased security from refugee protection, tempting states to free-ride off the generosity of other states providing this protection (Suhrke 1999). If refugee protection is a public good, a voluntary insurance scheme may not work because of free-riding. Yet there are benefits that only accrue to a state that contributes to the burden-sharing regime, suggesting that there are instances in which states can be incentivised to contribute (Betts 2003). Refugee protection, Betts argues, may not be a public good model but a 'joint-product model' where there is a positive relationship between a state's contributions to the regime and the excludable benefits it gains from the regime. In other words, the benefits that it gains means that others, as a result of not contributing, will not gain. This would suggest that states have an interest in not always free-riding. For example, resettlement agreements with other countries, should a state be faced with far more refugees than it feels it can absorb, are perhaps dependent on having absorbed at least a given minimum number of refugees.

If states, for whatever reason, do contribute to the regime – either despite the fact that it is a public good or because they have an interest in contributing because it is a joint product model – this could allow for what Thielemann (2008: 13) calls 'trading in refugee protection contributions'. A 'multi-dimensional burden sharing regime' (Thielemann (2008: 13) can exist, for example, when one state focuses on peacekeeping to prevent refugees from needing to flee and another state focuses on asylum. In a sense, the first country is contributing less by absorbing fewer refugees in return for contributing more through peacekeeping. Using the same logic, money transfers to countries in return for them absorbing more refugees could be one type of 'multi-dimensional burden sharing regime'. Hathaway and Neve propose one type of money transfer scheme, a solution they call 'responsibility sharing allocations' (1997:203). Opposing quotas according to GNP (Grahl-Madsen 1982), Hathaway and Neve support temporary settlement in areas according to geographical and cultural proximity of the country refugees are fleeing. To 'offset inequitably assigned costs' they propose also that 'fiscal burden sharing will be guaranteed' which would include money transfers from Northern states to Southern states (1997:204).

Others have tested money-transfer mechanisms through theoretical models. Facchini et al. (2006) build a two country model to show that the possibility of cross-country financial transfers may increase strategic responses in democratic countries, leading to sub-optimal outcomes from the perspective of utilitarian social welfare. In addition,

countries where refugee absorption involves a high cost, or where other countries' absorption of refugees involves very few spill-over gains, may choose to take a unilateral policy approach (Czaika 2009: 103) as there is little incentive to pay another country to absorb more refugees.

Schuck, like Hathaway and Neve, supports money transfers to countries that have a greater number of refugees, but he does not recommend that refugees receive protection in any particular country. He proposes creating a union where states can voluntary join to accept a proportional quota of refugees (Schuck 1997: 246). States can then buy and sell their quota to other states within the block. He emphasises that all would be consensual, and on a regional or sub-regional basis, not a global one. States without large numbers of refugees at their borders may join in order to avoid absorbing large numbers of refugees in the future. Schuck (1997), like Hathaway and Neve (1997), presents his proposals as analogous to an insurance scheme where everyone will voluntarily agree to take part because of their own long-term self-interest. He also proposes that states within the block can sell quota-relief to countries outside the consensual block. Schuck notes that structural elements require that there be an 'agreement on the norms to share temporary and permanent protection needs in proportion to their "burden-bearing capacity"'. Perhaps Schuck uses the term 'norms' here in a similar way to Thielemann who, drawing on March and Olsen (1998: 7-10), views norms as expressing 'appropriateness' as opposed to the 'logic of expected consequences' where actors are strategic. If so, then a state would first need to hold an underlying belief about the appropriateness of absorbing refugees in proportion to their capacity before joining the scheme, in order for the scheme to function. However, if a country is acting according to the 'norm' of refugee protection because of the payments, actions are not directly taken as a result of 'appropriateness' but as a result of a cost-benefit logic. Though states may hold a norm and only be able to act on it with payments, the direct reason is still the payments, following a cost-benefit logic. Schuck explains that a central refugee status would decide who is and who is not a refugee, the quota set, and exceptions for particular national groups. If a country does not respect human rights, they cannot join the block or accept refugees until they do. A central agency would assure fair selling and buying, though its main goal would be ensuring human rights protection of refugees. This is because states already have an interest in ensuring that transactions go through even if they do not have an interest in ensuring protection for refugees. Furthermore, small instalments, paid on the condition of humane protection of refugees, would ensure that refugee rights are in place over time.

Anker et al. (1998) have critiqued the proposals of Schuck and Hathaway and Neve, arguing that Northern states will not be incentivised to provide cash to Southern states which provide greater protection, even if – and of this they are doubtful - there is money saved from the diminished need for individualised refugee status determination process in Northern states. Furthermore, even if money is transferred to Southern states, it may not be used for refugee protection. They also critique the moral soundness of the scheme, both because of its failure to protect refugees and because the plan creates a 'commodification' of refugees. Others, who are concerned about respecting the preferences of refugees, have expanded and modified the basic models of refugee quota trading. Mortaga and Rapoport's model (2010), for example, allows refugees to rank their preferences for country of destination.

Even as his plan has been critiqued and modified over the last sixteen years, Schuck's basic proposal remains particularly relevant for a discussion on the relationship between the EU and ENP in burden sharing, because his mechanism allows for a union of states to assign quotas voluntarily to each state within the union – such as the EU - yet also trade these quotas with states outside the union – such as ENP countries. Schuck's proposal is especially relevant in the current discussions because there is arguably implicit and explicit quota trading between the EU and ENP states. The completely voluntary nature of his plan is also unique, and may be especially relevant in an EU that has yet to

establish binding agreements with ENP countries concerning refugee protection. Though many of the critiques that arise in this article are also applicable to other money transfer schemes, Schuck serves as an important focal point for the overall critique by showing the limits to a voluntary scheme.

A CRITIQUE

Incentives

There are two main critiques regarding incentives. First, the perception of refugees as a public good – even if they are not – may diminish the incentive to stay in a quota trading insurance scheme. Second, even if refugee protection is not a public good or perceived as such, quota trading from above may still not function as predicted. Because both these critiques address the lack of incentive on the part of states, newer money transfer models that take into account refugee preferences, such as Mortaga and Rapoport 2010), do not sufficiently address this weakness even if their work is more sensitive to the preferences of refugees.

Refugee protection as a public good

Anker et al. (1998) address the argument that incentives may be weak. They point out that Northern states may have no interest in buying the insurance proposed by Hathaway and Neve (1997) and Schuck (1997) because they do not perceive refugees as a threat that is unstoppable; current border control mechanisms may suffice. Additionally, because many EU states do not feel that they will be receiving a significant number of refugees in the near future, there is little reason to join an insurance scheme, though an iterative game can create an incentive to cooperate in case a significant number of refugees suddenly enter a country in the future (Noll 2003: 242).

Building on this, one reason states may stop refugees reaching their borders is because refugee protection is viewed as at least partially a public good. If this is the case, even the prospect of a long 'shadow of the future' (Axelrod 1984: 126) in an iterative game (Noll 2003: 242) may not create an incentive to join an insurance scheme. Insurance works best if refugee protection is not a public good. If it was, individuals would have an incentive to free-ride (Thielemann, 2003b) and there would be no incentive to buy insurance voluntarily. Yet, refugee protection is currently partially a public good in the sense that, if one state deports a refugee to another state, the norm of refugee protection would largely be intact for all if the other state accepts the refugee, and the norm would be no less intact for all even if only one state is accepting all refugees. Czaika's model, for this reason, includes protection in another country as benefiting all countries that place value on refugee protection in general. This would be true even if refugee protection does not, as Suhrke (1999) claims, contribute to the security of all. A good that is a partial public good may require a partially involuntary requirement as a basis for a voluntary insurance scheme. Health care serves as an example for this argument. Like refugee protection, society may believe that health ought to be a public good, making it so, to an extent. For example, if wealthy patients pay for a doctor, and a doctor cannot morally or legally turn away a poor patient who shows up at their private emergency room, then health care becomes partially a public good that is susceptible to free riding by those who could afford to pay for emergency care. This can lead to sub-optimal health care for all. One reason that this does not happen is perhaps because the government requires all to pay taxes that contribute to both emergency and preventative medical care. The existence of government-funded hospitals, and government-funded health insurance, is the existence of required burden-sharing in health where all who work are required to pay for taxes that contribute to hospitals or

health insurance. Therefore, because the state, doctors, and society as a whole have largely decided that medical care should be a public good, one cannot opt-out in any given year from paying taxes which contribute to health care.

Perhaps refugee protection is not functioning as envisioned in the 1951 Convention partly because there is a perception that some country in the world may provide protection, yet there is no required involuntary mechanism for subsidising the protection, as exists in health care. Even if refugee protection is only partly a public good, the perception should still have the impact of free-riding, just as private doctors in private clinics saving some lives for free may have some impact on the ability of a completely voluntary insurance scheme to function. This critique is distinct from the arguments put forth by those who argue that Northern states may not perceive large refugee inflows as a risk (Anker et al. 1998: 299) because they have mechanisms for stopping refugees from entering their borders. It is also distinct from Thielemann's (2003b) comment that insurance schemes function best when all parties have the same risk perceptions. Rather, the critique here emphasises the impact of everyone perceiving refugee protection as something that ought to be a public good, and all behaving, some of the time, in a way that reinforces the perception of refugee protection as a public good, leading to free-riding.

Carbon trading serves as an example of a policy that, while certainly not sufficient to protect against global warming, is relatively successful compared to refugee protection mechanisms in that companies are lowering their emission levels within the EU. Carbon trading within the EU includes a required carbon emissions limit; for a member state of the EU, and a company within the EU, emissions limits are not voluntary, they are required, even if the buying and selling of emissions limits is voluntary. Even if the original legislation needed to pass by consensus, today all countries must continue to follow this as a condition for their continuing membership in the EU as a whole. The trading and selling of emissions outside the EU is possible partly because it is not voluntary for companies within the EU. Firms would not have an interest in buying and selling if there were no legal requirements regarding emissions. This is solved by simply forcing countries to have emissions standards within the EU. Similarly, EU countries should be forced to accept certain refugee quotas in order for an insurance scheme to be effective.

Pre-existing conditions

A second critique relating to the health insurance analogy accepts that refugee protection may not entirely be a public good or even perceived as such. Indeed, healthcare is not always a public good, even if it ought to be, yet the existence of voluntary health insurance may increase the overall health and welfare of a society. Even so, private health insurance does not allow any individual to opt-in at any point and receive the same benefits at the same cost. Rather, individuals with pre-existing conditions pay a higher premium if they have these conditions at the point of buying insurance. The reason an individual may be incentivised to buy catastrophic health insurance during a time when they are healthy is partly because buying health insurance after or during a sickness will be significantly more expensive.

In contrast, in Schuck's plan states do not receive a higher quota or less money in return for absorbing refugees when they join the union only after they have more than their quotas of refugees. It is perfectly rational for a country that has no interest in absorbing refugees regardless of payments to join only when they have more than their quota, thus avoiding a situation where they must accept the minimum quota or pay another country. Yet, if all acted this way, there may be no country to which to sell the extra quotas. This is not possible in a completely private sector health insurance scheme, because a private health insurance company demands higher premiums for anyone with

pre-existing conditions, thus incentivising individuals to join before they are sick. The reason private health insurance schemes can maximise their profits through such premiums for pre-existing conditions is because they are, in essence, competing against sickness without treatment. While Schuck creates a market mechanism for the trading of quotas, the cost of not joining the scheme does not fall on states, but on refugees. For this reason, it is unlikely that states will act as citizens in a health insurance scheme.

Therefore, even if refugee protection is not a public good and never will be, Schuck's quota trading plan – and arguably other completely voluntary insurance burden sharing plans (Hathaway and Neve 1997) - may not create the necessary incentives for states to join.

Cheating the system and inhumane conditions

Even if states appear to be incentivised to accept payments for refugee protection or are willing to pay other states for refugee protection, it is not clear that refugees are actually being protected within these states. The problem of human rights abuses within EU states and within ENP states is related to current burden-sharing mechanisms. As noted above, outsourcing of asylum processing is a method of preventing new refugees from entering the EU, leaving them in ENP countries. Protected Entry Procedures often come at the expense of spontaneous refugees (Noll et al. 2002) who may be fleeing a country that is not offering true asylum in the form of protection from human rights abuses, either because they are at risk of deportation to another country that abuses human rights or because they are abused within the host country. Schuck recognises this current problem and suggests small instalments, paid on condition of humane protection of refugees, to ensure that refugee rights are in place. The UNHCR would ensure that conditions are following those required in international law. There are four central critiques related to this plan.

Firstly, under the status quo, the UNHCR is not always fulfilling this role, especially in states that claim not to have the capacity to provide the conditions demanded in the 1951 Convention. Even when EU states do agree not to deport refugees – as when the agreement between Spain and Morocco fell through – this is partially possible because there are ways to prevent future spontaneous refugees from arriving, as shown with Denmark limiting entrance to Bosnians. If countries can already deport refugees back to first countries, without taking responsibility for the conditions refugees face in these first countries, and if countries can already prevent entrance, it is unclear why it would be in the interests of EU countries to pay first ENP countries to accept refugees. Even if they are willing to pay – as Morocco demanded of Spain – it is unclear why EU countries have an interest in ensuring that humane conditions are met.

Secondly, the market-orientated plan, within the context of the EU and ENP countries, can lead to even more human rights abuses if countries that currently abuse refugees join the trading system and now also have a financial incentive to keep refugees within their borders, by force if necessary. Or, alternatively, if the abusing country does not want to pay the price of more refugees in return for funds, it can illegally deport refugees back to their country of origin, accepting more refugees, and counting both the deported and newly arrived as part of the overall number in their country. Considering that Egypt (USCRI 2009) and Israel (European Commission 2010) both ENP countries, have been known secretly to deport recognised refugees back to Sudan, this is a possibility that must be taken into account.

Thirdly, the instalment scheme has limited power to address these problems. Any instalment paid by one country to another is one more reason for this paying country not to accept these refugees, because money has already been given. More importantly, there is no way of ensuring that the time it takes to pay all instalments stretches out

over the time period that the country of asylum must provide protection to the refugees. If refugees come from a country of origin that cannot be returned to for a period longer than the period for completing the payment of instalments, then the country of asylum can begin deporting refugees after all the instalments have been paid. This can be seen today. The UNHCR, whose funds come partly from EU states, pays developing states, including ENP countries, funds to cover the costs of accepting refugees. In a way, this is a type of instalment scheme, in that the UNHCR can stop the funds if initial refugees are abused. However, this did not happen on the ground in Egypt, where the Egyptian government continued to receive funds from the UNHCR for refugees accepted, up until over one hundred refugees were killed in front of the UNHCR offices by Egyptian security forces in Cairo in 2005 (Smrkolj 2010). Even after this event, the UNHCR continued to settle asylum-seekers inside Egypt, despite the fact that this settlement scheme was, according to many, the equivalent to refoulement (Fouda 2007: 512), due to the risks of staying in Egypt.

Finally, measuring the level of abuse is especially difficult. Entering a host country and asking if refugees are given their rights can be difficult if freedom of speech is limited within the country, or if refugees in particular are afraid to release information on their true conditions. For example, in Israel, an ENP country, Sudanese refugee children could not register in local public schools in Eilat. In interviews, when asked why they did not publicise this, or demand their rights to education, they responded that 'we do not want to have any problems, or be kicked out of the town'.[1] The fear that inhumane conditions create can also lead to fear of discussing such conditions. The worse the conditions, the more difficult it may be to assess those conditions.

Transparency in the process for Refugee Status Determination (RSD) is equally problematic. Schuck acknowledges that his plan would necessitate transparency of method for establishing who is and is not a refugee and in the allocation procedure and criteria for allocating quotas. However, within the EU, financial transparency arguably evolved through a gradual process (Cini 2008: 751). Once the policy passed, the commitment to the publication of the EU's Structural Funds was made permanent and countries could not simply opt out, as they could when the publication of the use of funds was done though national laws. Without ensuring this transparency, refugees' lives will be put at risk within countries that, under refugee quota trading, are now given a financial incentive to keep refugees within their borders.

Status quo bias and present-biased preferences

The arguments pertaining to incentives and cheating assume that the agents involved are rational. Present-bias preferences may play a role in states' actions, meaning they act in a way that is perhaps distinct from both a normative and cost-benefit logic. These biases may also assist in explaining why coordination has failed in the past and why EU states are not always prepared to provide funds to ENP states, just as Northern states are hesitant to provide sufficient funds to Southern states (Anker et al. 1998).

This bias has been addressed in both philosophy, when attempting to determine moral reasoning, such as Parfit who calls this 'the bias towards the near' (Parfit 2011: 46), and in behavioural economics, where status quo bias in human behaviour has been found to exist through controlled studies of human subjects. Schuck (1997) and others who propose quota trading (Mortaga and Rapoport 2010) and money transfers (Hathaway and Neve 1997) do not take into account the possibility of this non-normative and non-rational bias. There is evidence that this bias exists. Immediate deportations, before the public or human rights groups are aware that the refugee has made it to the country, are common by border patrols which do not have the resources or expertise to decide if an individual is a true refugee (Mertus 1998). There may be a bias for action to keep the status quo and deport, but once refugees have stayed in the country for a particular

time, then the status quo changes to be one where refugees are now in the country, and inaction may be more common. International law may also create a status quo bias. Noll (2003), for example, suggests that international law creates certain risks for states that deport refugees within their borders, in contrast to extra-territorial prevention of refugee entrance which 'costs' less in the form of legal repercussions.

Taking status quo into account, let us assume two countries, A and B, have the same level of normative belief in refugee protection and the same resources. However, country A has refugees directly crossing their border, and country B does not. Country A will deport as many refugees as it can at the border today, because of status quo bias. Country A will also not deport some refugees who manage to somehow stay in the country, also because of status quo bias because the status quo is now that there are refugees in the country. Country A has accepted exactly their quota. Country B is willing to pay country A money not to deport any new refugees in the future, though country B is far enough away to not necessarily be faced with the deportees from A.

Taking into account status quo bias, even if country A values refugee protection, the cost of accepting refugees it wants to deport today is both the cost of changing the status quo and the general resources needed to accept refugees. Both A and B will gain the normative value of protecting refugees, though B has none of these costs. Even if country B also fears these refugees will flee to country B, and its status quo bias for preventing new refugees will encourage it to pay country A to keep refugees, this is a more distant 'threat', and it is statistically a lesser threat compared to that faced by country A. In a sense, country B may be influenced by 'present-biased preferences' (O'Donoghue and Rabin 1999). That is to say, avoiding *future losses* from *future new refugees* for country B will not translate into as high a monetary value as country A's *current losses* from the *current new refugees*.

If the mental mechanism for present-biased preferences is that 'concrete mental representation' seems more valuable than theoretical rewards (Loewenstein 1996), then country A will expect to get a concrete mental representation reward in return for a concrete mental representation of accepting refugees. Country B is expected, in Schuck's model, to pay concrete mental representations in the form of funds for a more theoretically uncertain threat of future refugees. Country B will presumably be willing to pay less than what country A demands, because country B is gaining something theoretical only, while country A is paying the cost of the more concrete mental representation of allowing refugees to cross their borders or stay within their borders even though they have just arrived. If country B will not pay country A enough, no transaction will occur, and country A will illegally deport even if both A and B believe that deportation is normatively wrong on the same level.

Another possibility is that countries may be overpaid to keep refugees who have already lived in the country for long enough to become the status quo in status quo bias. These are the refugees who managed to stay in country A despite country A deporting some refugees. This, presumably, is less problematic, as refugees will still not be deported. However, more worryingly, citizens in country A may have exaggerated perceptions of the number of refugees within their country who have recently been absorbed compared to the number of refugees that citizens in country B perceive that country A has absorbed. Country A will, for this reason as well, demand far more money than country B is willing to provide in return for accepting more refugees. One can see today that many citizens have exaggerated perceptions of the percentage of refugees that they have provided protection to, perhaps a type of concrete mental representation influencing those perceptions. A British 2003 poll found that, on average, British people 'estimated that Britain had 23 per cent of the world's refugees' rather than the actual 2 per cent at the time of the poll (ICAR 2003). States with refugees may exaggerate the value they are giving to alleviate the world 'burden', making the cost they perceive as higher than the cost that other states perceive.

However, if a choice is presented as if it is the status quo, then perhaps the alternative will be accepted (Kahneman et al. 1991). If citizens view the quota requirement as the status quo, as opposed to a change from the current number of refugees accepted, then a quota system could encourage refugee hosting in countries that currently accept less than the quota to be agreed upon. However, any number above the quota may be viewed as changing the status quo, leading to illegal deportations of those who have managed to settle in the country, and who, today, may have been given some sort of protection. This could mean that refugees who arrive after a quota is filled would be put at greater risk if the trading mechanism fails.

Ethical Critique

If the plan puts refugees at great risk, Anker et al. (1998) point out, it is questionable on moral grounds. They also provide an argument for why the plan itself is not moral, irrespective of its ability to protect refugees (1998: 294). They claim that refugee quota trading creates 'commodification' of refugees. In response to this, one could just as well argue that the protection is the commodity traded, rather than the refugees, just as in a hospital it is the treatment which is the commodity, not the patient. Smith provides a slightly different ethical argument, comparing refugee quota trading to parents paying mercenaries to avoid their children being drafted into the military (Smith 2004: 137). Outsourcing one's moral obligations can create divides in society based on wealth and forcing those with fewer means to take the greatest risks. As distinct from Anker et al., one could understand Smith's argument as showing that refugee quota trading is the commodification of moral obligations which may be immoral.

This article attempts to show that refugee quota trading is even worse than the hiring of mercenaries and the outsourcing of one's moral obligations. With mercenaries, those fighting are being paid money for risk taking, and not only to fulfil a moral obligation. With refugee quota trading, the refugees are not being paid to take the risk – the accepting state is being paid, regardless of its history with the treatment of refugees. However, this still does not signify that refugees are a commodity if the payments to states are for their own protection. A purely utilitarian argument may hold that this is just if more refugees will be saved. A moral critique of the utilitarian nature of the plan must therefore question the morality of the plan even if more refugees are saved in this plan. To do this, a new critique is presented which explores the nature of reward and punishment.

Quota trading, in essence, awards countries for 'voluntarily' accepting refugees, when many of these refugees should, under the current policy, be able to access asylum without the receiving countries being rewarded for providing asylum. With refugee quota-trading, the final country to receive refugees would be rewarded for not breaking what is currently the law, rather than rewarded for receiving more refugees than is required under the law. Today, any country that rejects refugees automatically passes the buck to another country to accept the burden and this next country, in turn, also has the legal obligation to accept the refugees, not the voluntary responsibility. Schuck is legitimising non-refoulement as a voluntary action when states receive more than their quota, because it is something that is dependent on payment from another country, rather than punished when not followed. If non-refoulement was required in his plan, states receiving more than their quota as a result of other states rejecting refugees could not demand that another state pay it for absorbing refugees. It would need to absorb the refugees, both morally and legally, if every other country would deport the refugees to their country of origin.

While a deeper philosophical analysis is beyond the scope of this article, an example from within a country may demonstrate why quota trading may be intuitively unethical even if more refugees are protected. Within countries, high murder rates could arguably

justify a type of 'murder quota-trading' mechanism: all citizens who wished to murder would need a specified large number of points; each citizen is given one point upon birth, and citizens can buy and sell points. Any citizen that commits murder without the necessary points would have their point/s revoked, be imprisoned and unable to take part in the murder-quota trading mechanism in the future. Prison sentences would be shorter than today, as there already exists a positive incentive not to murder in order to sell one's points either directly or indirectly (through traders) to others who did wish to murder. The number of points needed to murder would result in a lower number of murders compared to the number of murders hitherto occurring. Such a mechanism could, potentially, lower murder rates – the incentive not to murder to sell points might be cheaper to organise compared to lengthy prison sentences and giving the option only to murder when one bought sufficient points would perhaps encourage potential murderers to wait, think twice, and kill sparingly in return for no prison sentence at all.

Most would view this as morally wrong. It is not wrong only because there may be practical limitations to such a mechanism. The ethical limitations surely dwarf any technical limitations. An action which is seen as unquestionably wrong, and which no human being should take, is being rewarded simply for not being taken. Similarly, refugee quota trading may be wrong because it rewards countries for fulfilling an obligation that ought to be punished if transgressed.

This is not to argue that, today, countries are not transgressing the principles of the 1951 Convention and 1967 protocol. The EU does not allow 'country shopping' between EU countries and between ENP and EU countries, even when many refugees are not shopping but fleeing. They may be fleeing an ENP country to Europe, out of fear that the ENP country will deport them back to their country of origin, or provide such inhumane conditions that they are arguably refugees of the ENP country, such as the condition for Sudanese refugees in Egypt in 2005 (Smrkolj 2010). They may be fleeing from one EU country to another. Darfur refugees who were threatened with deportation from the United Kingdom (Gilmore 2007), an EU member, could arguably qualify for genuine asylum in another EU country, without being blamed for 'shopping'.

If this is the current state of refugee protection, then perhaps the moral stance should be stated as such: even if it is morally better to punish a country for committing a crime than to reward a country for not committing a crime, this is only true if the same amount of lives is saved in both scenarios. At the very least, it is still better to save more lives through a mechanism that rewards countries for not committing the crime of illegal deportation than to spare lives through a mechanism that only punishes. However, a refugee quota trading mechanism must show that ensuring protection for refugees in countries which receive a reward for taking more than their quota will somehow be easier than ensuring protection for refugees in countries which are receiving a punishment for illegal deportations. The proponents of refugee quota trading have failed to establish this. Even if they had, there are still doubts as to the morality of the policy, just as murder quota trading would be unacceptable to many even under conditions where murder rates would go down as a result of the plan.

Furthermore, the problem with refugee quota trading is not necessarily that it is utilitarian at all, in the philosophical sense, as Anker et al. (1998) claim. The act of commodifying refugees – and certainly the psychological damage for refugees who feel they are being commodified – could very well be a 'bad' that a utilitarian would wish to avoid. In addition, even if one is only concerned with utilitarian social welfare, the reason punishment is used for heinous crimes is perhaps for reasons that are also utilitarian from the perspective of social welfare. If a punishment feels psychologically worse than the lack of a reward, perhaps due to loss-aversion (Kahneman and Tversky 1979), then a reward mechanism may be less effective. This argument is therefore potentially compatible with a range of philosophical perspectives and raises doubts as to the morality of an EU Refugee Fund that is used as an incentive payment to states to accept refugees.

This logic could be applicable to the case of EU-ENP relations in the sphere of refugee protection. Today, the EU often threatens to demote trade relations with countries that have poor records in human rights, including in the areas of illegal deportation of refugees. The ENP country reports have detailed information about the conditions and policy with regards to refugees and, at least officially, claim to build relations partially according to these and other human rights conditions (COM [2004] 373). There is a case to be made for demoting relations, without rewarding compliance with international refugee law, in order to uphold certain moral principles that may be distinct from optimising social welfare from a utilitarian perspective, or which may be consistent with utilitarian perspectives that take into account non-rational biases.

CONCLUSION

This article set out to show how the ability to deport ultimately makes any insurance plan incomparable to successful catastrophic health insurance schemes. States can opt in and out of a scheme strategically and the element of bias towards the present skews the ability for a purely rational incentive mechanism to encourage refugee absorption. Most importantly, this article suggested that a moral argument must show why the trading of refugee quotas may not be ethically sound even if more lives are saved, and this idea can be applied to current relations between EU and ENP countries. The failed agreements between Spain and Morocco, the failure of Bosnians to receive protection in Denmark, and the failure of the EU to absorb more refugees in proportion to states' GNP, are not only examples of failures of rational states to cooperate. They may have been a failure on the part of the EU to create the type of mechanism that takes into account the way rational and irrational states act in a world where deportation is still a possibility, and the way rational and irrational states ought to act in an EU that has yet to fulfil its international obligations set forth in 1951 and 1967.

These theoretical ideas could perhaps be better tested using a stronger, more complex theoretical analysis seen in the work of Noll (2003), Facchini et al. (2006), Czaika (2009), and Mortaga and Rapoport (2010). The analysis could also be greatly enhanced by testing the ideas against a broader array of policies and data, as done by Thielemann (2003a) within the context of the EU. The limited data on unauthorised deportations and abuses in countries with limited human rights may create challenges for testing the ideas against reality, yet it is possible to do so with extensive field work.

One may argue that, even when the idea of quota trading appears morally questionable, it still may appear more ethically sound compared to today's unequal distribution of contributions towards refugee protection. Perhaps it is not enough to show that quota trading is wrong, but that it is more wrong than the current policies. Nonetheless, there are other ways in which refugees can be protected through cash transfers, such as offering more funds to private NGOs and charities, or directly to refugees, rather than to host countries in return for greater asylum processing and refugee protection. Assuming the idea of refugee quota trading would be as difficult to implement as other less morally questionable forms of refugee protection and assistance, then quota trading should play no or only a limited role in the shaping of EU and ENP policies towards refugees. There may still be a place for cash transfers, but it must be done in a way that makes rational and moral sense.

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[1] Interview with Adam, September 12, 2009 in Eilat, Israel. Interviews were conducted with eight refugees on September 12th 2009 in two community centres.

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Conflicted Normative Power Europe: The European Union and Sexual Minority Rights

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Abstract

This paper will evaluate the extent to which the European Union (EU) manifests the ability to act as, and possesses the potential to develop into, a norm-setting bureaucracy in its external relations when it comes to the protection and promotion of sexual minority rights. In order to examine this, an overview of the theoretical notion of Normative Power Europe, as developed by Ian Manners, is offered. This is followed by an evaluation of the EU's international identity regarding LGBT rights. Ultimately it is concluded that the ability of the EU to shape international norms and values concerning this policy issue is severely undercut by a set of internal, institutional and conceptual inconsistencies. Only by overcoming this confliction and inconsonance can the EU develop into a full-fledged, credible and effective normative power in the case of sexual minority rights. It is concluded that the recently launched LGBT toolkit could constitute an important step in this direction.

Keywords

Normative Power Europe; Sexual Minority Rights; LGBT; Norms.

Since 2010 a chorus of high-ranking European Union (EU) officials has invoked the International Day against Homophobia and Transphobia (IDAHO) as an occasion on which to condemn discrimination on the basis of sexual orientation and gender identity, while simultaneously stressing the advances that have already been made in and by the EU. The official statements give the impression that the EU is in the vanguard of institutionalising and promoting sexual minority rights. Not only do all EU representatives stress the importance of human dignity and how homophobia constitutes a breach thereof, their statements are also rife with references to the principles, articles and legal documents upon which the EU is founded. This suggests that Europe is playing, or is aspiring to play, the role of a leading norm-setting bureaucracy in the global arena.

Furthermore, the EU's condemnation of the violation of the human rights of LGBT people seems to have received support on 1 December 2009, when the Charter of Fundamental Rights of the European Union (CFR) became legally binding upon all Member States, when implementing Community legislation, with the entry into force of the Treaty of Lisbon. Article 21 of the Charter expressly prohibits "any discrimination" based on, *inter alia,* sexual orientation (European Communities 2000). The ratification of the Lisbon Treaty made the CFR the first international document that explicitly prohibits this type of discrimination. As such, the EU appears to be leading by example.

This situates the EU's external policies on Lesbian, Gay, Bisexual and Transgender (LGBT) issues within the framework of Normative Power Europe (NPE). Developed by Ian Manners in the early 2000s, NPE represents a move away from more conventional interpretations of Europe's international sway. According to this perspective, the EU's ability to get external actors to do what it wants is not derived from a military *force de frappe*, as is commonly argued by realist conceptions of power, nor is it entirely borne out of economic might, as is assumed by Civilian Power Europe (CPE). Instead, the EU is thought to play a leading role in some policy areas or issues because the norms and values it holds are morally persuasive in and of themselves.

The applicability of the framework to the EU's role concerning sexual minority rights has not yet been subjected to academic scrutiny. In fact, while a limited number of authors have written on the development and status of sexual minority rights within Europe (see, for example, Beger 2004; Kochenov 2007, 2009; Swiebel 2009; Swiebel & Van der Veur 2009; Waaldijk & Clapham 1993; Weyembergh & Cârstocea 2006), scholarly work that centres upon the external dimension of this policy area itself is wanting (Kollman & Waites 2009: 2). This paper seeks to fill these lacunae by taking the intersection of

ethics and policy-making *in casu* sexual minority rights as a starting point. More concretely, the objective of this paper is to evaluate the extent to which the EU manifests the ability to act as, and possesses the potential to develop into, a normative power with regards to sexual minority rights. In the first section, Ian Manners' theoretical framework of Normative Power Europe (NPE) will be laid out. NPE will be situated within the historical context out of which it sprang up, after which its core tenets and propositions will be addressed. The second section investigates the fit between theoretical conceptions of the EU as a principled Maecenas of sexual minority rights and the practical reality of policy-making. It will become evident that the ability of the Union to credibly shape international norms and values regarding sexual minority rights is severely undercut by three types of inconsistencies: the EU is revealed to be internally, institutionally and conceptually conflicted.

From this, it can be concluded that the performance of the Union with regards to sexual minority rights is currently not in line with the tenets of Normative Power Europe. The EU can only develop into a full-fledged, credible and effective norm-setting bureaucracy in this policy area if it manages to overcome the contradictions it is riddled with. Ultimately, while the EU manifests some aspects of NPE in the case of sexual minority rights, and while it could develop into a more mature normative actor, it is argued that it is currently at best conceived of as a conflicted normative power.[1]

NORMATIVE POWER EUROPE

In theorising on the influence the European Union holds in international affairs, the notion of Normative Power Europe developed out of, and in reaction to, more traditional views that define the EU's international role in predominantly military or civilian terms. This is not to suggest a linear evolution from Realist Power Europe (RPE) into CPE and ultimately into NPE. Rather, while it is acknowledged that different conceptions of power continue to coexist, the idea is that norms and values have become a relatively more eminent part of the EU's international identity. The emphasis has thus shifted away from security and defence matters onto the trade realm and subsequently onto 'the ability to define what passes for "normal" in world politics' (Manners 2002: 236). This norm-setting ability is considered to be the defining feature of NPE.

The 'Normative Power Europe' Thesis

That the framework of Normative Power Europe should be analysed in connection with the debate on the EU's military and civilian power which engulfed many scholars in the 1970s and 1980s is indicated by the title of the foundational article in which Ian Manners developed the idea of NPE, "Normative Power Europe: A Contradiction in Terms?" (2002: 235). This title refers directly to the title of the article in which Hedley Bull (1982), the leading academic of the English School, discredited François Duchêne's concept of Civilian Power Europe. In fact, it is Bull's claim that ''Europe' is not an actor in international affairs, and does not seem likely to become one" that Manners ultimately sets out to disprove through conceiving of the EU as an ideational actor' (Bull 1982: 151). Manners suggests that Bull's military focus and Duchêne's civilian conception have become outdated and that it is not, or no longer, a contradiction in terms to call the EU a normative power.

In an attempt to undo the stranglehold that this civilian-military debate had on the theorising on the EU's international identity, Manners places an emphasis on the ideational dimension of the Union's external role. According to him, proponents and critics of CPE share a larger common ground than is commonly acknowledged. They are alike in their emphasis on the Westphalian Nation-State, the assumed prevalence of

European interests over universal objectives and their valorisation of physical forms of power, whether manifested militarily or economically, over the sway that values, norms and ideas might hold. Manners saw these attributes as no longer fully and adequately capturing European reality, and therefore introduced the normative power concept in order to advance the academic debate.

The normative difference that is at the heart of the Union's collective identity, which in turn enables the EU to shape what is 'normal' in the global realm, flows from three interconnected sources. Firstly, Manners (2002: 240) points to historical context: the Union emerged out of, as well as constitutes, a rejection of the nationalist antagonism that generated the Second World War. The second fountainhead concerns the Union's institutional hybridity, which turns the EU into a polity that defies classification both as a Westphalian State and as a standard international organisation. Thirdly, arguing that the EU is a value-based community is not a mere declarative statement; the genesis and development of the EU as a collective entity that is founded in and guided by fundamental principles is reflected by its legal constitution. This normative difference is illustrated by several treaty articles (see Article 3 (Lisbon) and Articles 6 and 11 (TEU)), as well as by references to international documents such as the European Convention on Human Rights (ECHR) and the Universal Declaration of Human Rights (UDHR) in EU legislation. In conjunction with its unique historical roots and unparalleled, fluid institutional framework, this legal constitution accords a normative dimension to the Union that definitively sets it apart from other institutional actors.

The NPE-framework depicts the EU's normative basis as consisting of nine core norms: sustainable peace, social freedom, consensual democracy, associative human rights, the supranational rule of law, inclusive equality, social solidarity, sustainable development, and good governance.[2] While it is self-evident that these norms often overlap and impact upon each other, they were legally enshrined at different times, reflecting the norms' historical contingency. The Charter of Fundamental Rights 'restates and re-emphasizes' all norms, save for good governance, and can therefore be regarded as the culmination of the legal articulation of the EU's normative difference (Manners 2002: 244). Moreover, while these principles might constitute a specifically *European* normative basis, they themselves transcend the EU; the specificity of the EU as a normative actor is in fact founded on norms that are taken to be 'universally applicable' (Manners 2008: 66).

If the EU is to be considered a true normative actor, it needs to actively promote these principles. Manners (2002: 244-45) outlines six such channels of norm diffusion. These different pathways reflect how the Union's normative ethics variably revolve around living by example, being reasonable and doing least harm (Manners 2008: 80). Consequently, the EU's normative identity is highly variegated; there is not but one way in which the Union can behave normatively in its external relations.

In order to substantiate his claims, Manners looked at the EU's norm advocacy in abolishing the death penalty. He argues that the EU successfully managed to frame capital punishment as a human rights issue that falls within the scope of the international community, and as such uncoupled it from the realm of the sovereign state. Following this reframing, the EU contributed significantly to the abrogation of death penalty statutes in a number of European states (Manners 2002: 249-51). This case study also illustrated the wide set of policy tools that the Union can make use of in the pursuance of its core and subsidiary norms. These findings were confirmed by Marika Lerch and Guido Schwellnus (2006: 312), who conclude that the EU is able to 'make coherent human rights arguments externally without being accused of hypocrisy'.

The abolition of the death penalty is only one illustration of how the Union has increasingly displayed this ability to act as a normative power by projecting its values and by 'promoting the establishment of related norms for the governance of international behaviour' (Bretherton & Vogler 2006: 42). Stefan Szymanski and Ron Smith (2005) see the Union's successful effort to insert a human rights suspension

clause into the EU-Mexico Global Agreement as lending support to Manners' thesis. Other research indicates that the EU's championing of the International Criminal Court (ICC) and the Kyoto Protocol in the international arena largely derives from universalist moral arguments and political convictions. Importantly, Sibylle Scheipers and Daniela Sicurelli (2007: 451-52) emphasise how the EU's normative power in both cases hinges on a progressive self-representation that is constructed in credible opposition to American laggardness and on creating binding rules. Martijn Groenleer and Louise Van Schaik (2007: 989-90) see unitary European actorness in the same cases as contingent on 'the internationalization of values [...] and norms'. Severe empirical and conceptual criticism notwithstanding, these examples thus lend support to the NPE-thesis by indicating how the Union has apparently been able to set international standards in several cases spanning different policy areas.[3] Whether this verdict applies to the EU's promotion of sexual minority rights is investigated next.

NORMATIVE POWER EUROPE AND SEXUAL MINORITY RIGHTS

In conceptualising the Union's international identity it has become almost prosaic to point out that the EU is an exemplar of multi-level governance rather than an institutional monolith. Concerning foreign policy, the fluidity and dispersiveness of the Union's institutional arrangements make coherence, congruence and consistency particularly difficult to attain. This hybrid identity is thus often associated with tensions and inconsistencies between roles and associated practices, which constrains the EU's external projection of power (Bretherton & Vogler 2006: 59).

As an illustration of this, Sophie Meunier and Kalypso Nicolaïdis (2006: 907), focusing on the EU's role in the global marketplace, note that the EU is indubitably a "power *in* trade", but that this does not automatically translate into being a "power *through* trade". The conclusion of their deconstruction of the image and self-representation of the Union as an economic powerhouse was rather sobering to Europhiles: the EU was a "conflicted trade power" in need of "strategies of reconciliation" (Meunier and Nicolaïdis 2006: 915).

Such an uncovering of the conflictions that flow from hybrid governance is especially critical at a time when the EU is arguably stepping up its efforts as a normative foreign policy actor. While the EU propagates values such as equality and non-discrimination internationally, it frequently violates these very principles due to the complex nature of its internal and institutional dynamics. This contradiction of outward saintliness and internal noncompliance might consequently hamstring the Union in its exercise of normative power. This section investigates this concern by placing the argument made by Meunier and Nicolaïdis in a normative context. Whereas their emphasis on trade recalls the notion of CPE, Manners' argument that this concept is incapable of capturing the growing significance of non-physical forms of power suggests the need for such a transposition.

This is certainly true in the case of sexual minority rights, where the rhetoric of EU actors has revealed a strong preference for value- and rights-based, non-coercive action, both within and outside of the EU's borders. Concerning Manners' typology of normative principles, the "reinforcement and expansion" of which 'allows the EU to present and legitimate itself as being more than the sum of its parts', the norm of associative human rights is evidently preeminent in the LGBT-related parts of its foreign policy (Manners 2002: 244). Inseparable from the human rights norm is the principle of the supranational role of law. Here cosmopolitanism is emphasised: the EU 'shall promote multilateral solutions to common problems, in particular in the framework of the United Nations' (European Union 2008). A third normative principle that has a bearing on the external protection and promotion of LGBT rights is inclusive equality, which is epitomised by Article 21 of the CFR. Of auxiliary importance are the norms of social solidarity, especially through combating social exclusion, and good governance, by virtue

of 'the participation of civil society and the strengthening of multilateral cooperation' (Manners 2008: 74). It is the interplay of these five principles that underlies the EU's norm entrepreneurship regarding sexual minority rights.

The remainder of this section will examine the extent to which this interplay is plagued by contradictions and fault lines that undermine the Union's credibility and, concomitantly, reduce the EU to a conflicted normative power with regards to the human rights of LGBT people. Three sets of contradictions will be addressed: internal, institutional and conceptual.[4]

Internal Inconsistencies

For the Union to be an effective and legitimate normative power it must exercise consistency between its internal and external policies. If the Union wants to speak authoritatively on LGBT-related human rights issues, it must thus not only reach a certain 'value consensus of *acquis éthique*' (Lerch & Schwellnus 2006: 312), but this *de jure* situation must also be reflected in the lived experiences of LGBT people in the EU itself.

However, a closer look at the intra-European dimension reveals that the human rights situation of LGBT people in the member states is far from a level-playing field. In 2006 and 2007 the European Parliament adopted a series of resolutions in which it remarked upon the surge of homophobia, in its many forms, in Europe (European Parliament 2006a; 2006b; 2007). These resolutions reveal that homophobia is notably rampant in the eastern member states, in particular in Poland and Lithuania. In Poland, leading politicians incited hatred and violence against LGBT people and the government announced a number of discriminatory measures in the field of education, such as drafting legislation 'punishing "homosexual propaganda" in schools' and firing openly homosexual teachers (European Parliament 2007). In 2009, the Lithuanian Parliament amended a law that prohibits the dissemination of public information to minors through which 'homosexual, bisexual or polygamous relations are promoted' (European Parliament 2009). The involvement of governmental actors in both countries hints at institutionalised homophobia.

These developments in part inspired the EP to ask the European Union Agency for Fundamental Rights (FRA) 'to launch a comprehensive report on homophobia and discrimination based on sexual orientation' in the member states (European Union Agency for Fundamental Rights 2009a: 3). This resulted in a legal and a social report. The results of the former were mixed. FRA partly lauded the many member states that have gone beyond the minimal legal requirements, but was particularly critical of the legal uncertainty surrounding transgender people in the EU, owing to the fact that discrimination of this group is not treated as either sex- or sexual orientation-based discrimination in almost half of the member states. Moreover, a number of EU legislative instruments 'do not take explicitly into account the situation of LGBT persons' (European Union Agency for Fundamental Rights, 2009a: 4). Such legislation concerns, *inter alia,* the freedom of movement, asylum and family reunification. In sum, the legal situation of LGBT people in the member states is seen as calling 'for serious considerations' (European Union Agency for Fundamental Rights 2009a: 4).[5]

These legal sore spots are compounded by the "worrying" and "not satisfactory" social situation (European Union Agency for Fundamental Rights 2009b: 3). The Agency argues that 'discrimination, bullying and harassment are pervasive throughout the Union and across a wide range of areas of social life, including the freedom of assembly, the labour market, education, the health sector, religious institutions, sports, the media and asylum (European Union Agency for Fundamental Rights 2009b: 8). More generally, Eurobarometer studies reveal that 'openness towards homosexuality tends to be quite

limited' (European Commission 2006) and that discrimination on the basis of sexual orientation is the most widespread form of discrimination in the EU, apart from ethnic origin-induced discrimination (European Commission 2008a). FRA also noted the particular vulnerability of transgendered people, who, as a minority within a minority, 'face more negative attitudes' than lesbians, gays and bisexuals (LGB) (European Union Agency for Fundamental Rights, 2009b: 15). The Agency's general conclusion is that it is "unacceptable", in a Union that prides itself on being founded on values that should obviate this very behaviour, that many LGBT people adopt a strategy of invisibility in order to avoid being discriminated against (European Union Agency for Fundamental Rights 2009b: 4).

Perhaps the most significant conclusion of the report, however, is how greatly attitudes towards LGBT people vary across Member States. An attitudinal chasm can be observed between relatively open-minded countries such as the Netherlands and Sweden and less tolerant states such as Romania, Bulgaria and Latvia. Discrimination on grounds of sexual orientation is also perceived to be widespread in the Mediterranean Member States (European Commission 2009: 85).

Such differentiation is further evident in the *de facto* treatment of sexual minorities. As a case in point, while some countries consider homophobic intent an aggravating factor in the practice of hate speech or hate crimes, thirteen member states treat it as "neither a criminal offence nor an aggravating factor" (European Commission 2009: 37). The variance also becomes visible with respect to gay pride marches: while leading politicians in some EU Member States actively take part in such parades, the freedom of assembly has in recent years in fact been infringed in several Baltic and Eastern European states. These findings, in short, unveil the EU's motto of *Unity in diversity* as a double entendre and are suggestive of an ethical divide.

Two main conclusions can be drawn from this. Most optimistic is the assumption that the unsatisfactory human rights situation of LGB people could best be redressed once the new members were firmly bound by the Union's *acquis*. (O'Dwyer in Stenqvist 2009: 7) rejects this interpretation, however, by noting how 'the ability of the EU to impose pressure [...] has drastically diminished' following accession and how the EU must now rely on 'methods that are based on voluntarism'. Correspondingly, Dimitry Kochenov (2007: 460) describes the EU's actions in the 2004 and 2007 enlargements as 'timid, ill-focused, and stopped short of realising the potential for change'. More bleakly, ILGA-Europe (2004: 7) claims that sexual orientation 'has received limited attention in the EU enlargement process', suggesting that the rights of LGBT people were firmly at the bottom of the hierarchical pyramid of concerns that marked the accession talks. It is thus clear that the 2004 enlargement is more indicative of the Union's moral relativism than of normative ascendancy with respect to LGBT rights.

Finally, the opting out of the CFR by the United Kingdom, Poland and the Czech Republic is illustrative of legal incongruence at the EU-level. The opt-outs prevent the ECJ and national courts from finding these countries' laws to be in violation of the fundamental rights and freedoms declared by the Charter. As a consequence, the non-discrimination principle cannot be held to be binding with respect to sexual orientation. Even though the British and Czech exceptions were secured for reasons that were not directly related to sexual orientation, the opt-outs do impact negatively upon LGBT people. The same cannot be said for Poland; the political elite considered the CFR's provisions on moral and family issues, especially with respect to the legal recognition of same-sex unions, to be contrary to Polish culture (Anon 2007b). The Polish government also used the final meeting of the Intergovernmental Conference to append a declaration to the Lisbon Treaty stating that the Charter does not impinge on a member state's ability to legislate 'in the sphere of public morality, family law, as well as the protection of human dignity and respect for human physical and moral integrity' (European Union 2007). Resultantly, this display of *Europe à la carte* eats away at the Union's credibility in its foreign policy on sexual minority rights.

To conclude this subsection, it has become clear that the Union's potential to lead by example on rights-related issues concerning LGBT people is severely compromised by the observation that *de facto* and *de jure* homophobia and discrimination remain rife, or may even be on the rise, within the member states. Recent enlargements appear to have thrown the attitudinal chasm with respect to sexual morality and ethics into sharper relief. This incongruous human rights situation leaves the Union open to charges of double standards in its efforts to promote LGBT rights abroad.

Institutional Inconsistencies

Following from the EU's nature as a multi-actor constellation, and given the fact that several institutional actors have been invested with at least some political authority over or say in sexual minority affairs, it becomes possible to compare the positions that different EU bodies have taken regarding LGBT human rights. Such a comparison reveals that institutional arrangements not only make it difficult for the Union to speak with one voice, but that they, at times, appear to reach little more than cacophonous disagreement.

Even though its lack of formal (veto) competences might suggest that Parliament is relatively powerless in the area of human rights, it has in fact frequently acted as a patron of the LGBT community. Since the contentious and path-breaking Squarcialupi and Roth parliamentary reports (see European Communities 1984; 1994), the Parliament's positions on LGBT-related human rights issues are remarkably often consensual despite the EP being made up of groups that span the political spectrum. Even when some issues might prove contentious, 'human rights rhetoric appears on a very regular basis and is considered pivotal to all MEPs and parties' (Beger 2004: 80). Such a view is corroborated by the Fundamental Rights Agency (2009a: 9), which describes Parliament as having been 'consistently supportive of gay and lesbian rights'.

The record of the European Commission is mixed. On the one hand, it has been ascribed a role of "political entrepreneurship" (Swiebel 2009: 22). This partly accounts for the Europeanization of social policy, which has brought matters of sexual orientation and gender identity under a European purview, especially in relation to employment.[6] The Commission also funds NGOs with a view to maintaining a social dialogue with civil society. As ILGA-Europe's largest donor, the Commission has contributed to the professionalisation of LGBT interest representation. Furthermore, following the entering into force of the Amsterdam Treaty, Commission entrepreneurialism was at the heart of a watershed moment in the development of LGBT rights in the EU: the 2000 Employment Directive. On top of this, a 2008 proposal revealed the Commission's wish to 'implement the principle of equal treatment [...] outside the labour market' in order to address allegations that some grounds of discrimination are treated as relatively more equal (European Commission 2008b). In this light, the Commission seems to be a driving force behind the European-level institutionalisation of LGBT rights.

On the other hand, this apparent political avant-gardism needs to be put in perspective. Concerning the aforementioned directives, Swiebel (2009: 23) notes that the Commission could only be persuaded to act 'after strong lobbying' from NGOs and Parliament, and then did so with a considerable delay. Kochenov critically assesses the Commission's role in the enlargement process leading up to the 2004 and 2007 accessions. He notes how the Commission was 'unwilling to acknowledge and criticise the candidate countries' numerous problems' in the domain of sexual minority rights, eventually being forced to address them due to Parliament's tireless advocacy (Kochenov 2007: 479). As a case in point, in summarising Romania's compliance with the political subset of the Copenhagen criteria, the Commission in 1997 remained entirely silent on the human rights situation of LGBT people at a time when Romania '*de facto* criminalised consensual, same-sex relations between adults' (Kochenov 2007: 474; see European

Commission 1997a). Even though the Romanian situation was later redressed, this shows how the Commission has been infirm of purpose when it comes to sexual minority rights.

The Union's institutional set-up accounts for the rather passive role that the Council has played in the promotion and protection of LGBT rights. For example, it removed references to sexual orientation in proposals for three directives between 1996 and 1998.[7] Because it is comprised of government representatives from the different Member States, many of which are, as we have seen, rather unenthusiastic about gay rights protection, it has seldom played a leading role. This is connected to the Council's consensus-seeking tendency. Because such an institutional culture generally results in lowest-common-denominator policies, this fits poorly with how contentious LGBT rights are considered to be in certain member states.

Finally, the ECJ has been astoundingly conservative in most of its rulings on the rights of sexual minorities.[8] Whereas the Court has generally been accused of engaging in judicial activism, persistently promoting its 'own political agenda of European integration' (Kapsis 2007: 198), such behaviour has been absent regarding LGBT-issues. This is surprising, because court rulings could have brought this issue area, which by and large remains a member state competence in spite of greater European-level involvement in sexual minority rights, within a supranational scope.[9] The ECJ's general reluctance to advance LGBT rights at the European level has resulted in 'a conjugal hierarchy' topped by heterosexual married couples that can freely exercise the freedom of movement, while same-sex couples find their rights restricted (Kochenov 2009: 201). In the light of this paper's political focus, this legal point need not be elaborated upon (see also Beger 2000; Toggenburg 2009). It is, however, important to note that this conservatism has also had a decelerating effect on the development of LGBT rights at the European level, because cases at the Court impact upon the policy behaviour of the Community at large. The fact that the ECJ has at times 'simply refused to protect sexual minorities' (Kochenov 2009: 187) leads Kochenov (2007: 460) to conclude that it has a 'questionable gay rights record'.

In short, the EU's involvement in LGBT matters has shown considerable institutional fragmentation and differentiation. While this might present civil society actors such as ILGA-Europe with the opportunity to engage in venue shopping, its influence on the Union's external sway is mostly disempowering; its institutional inability to streamline its viewpoints and policy actions with regard to sexual minority rights strips the Union of external authority and credibility.

Conceptual Inconsistencies

Coherence and consistency are also found wanting in the EU's policies towards sexual minorities from a conceptual level. Both the Union's definition and application of the 'LGBT' concept evidence a lack of parallelism. Fundamentally, most European-level policies referring to sexual orientation and gender identity fail to define these concepts altogether. In the light of the academic debate surrounding these concepts, this lack of reflexivity is bewildering. Such debate has displayed a growing tendency to describe these terms as located on a spectrum rather than as categorical identity markers. This suggests against straightforward classification and points to the need for clear and consistent definitions when they are put to policy use. Virtually all EU documents, however, exhibit a lack of definitional clarity, which prepares the ground for arbitrariness and legal uncertainty.

Nonetheless, an upward trend appears to have been set into motion recently, because the FRA's social analysis, the Toolkit to Promote and Protect the Enjoyment of all Human Rights by Lesbian, Gay, Bisexual and Transgender People (Council of the European Union

2010), and a recent policy paper on transgender persons' rights in the EU requested by Parliament (Castagnoli 2010) to some extent define the different components of which the LGBT-concept is made up. The Agency has based itself on existing conceptualisations and has, where possible, aligned itself with accepted international principles. This is illustrated by its definitions of sexual orientation and gender identity, which have been directly taken from the *Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity*. The Yogyakarta Principles constitute an attempt to rectify the "fragmented and inconsistent" international response to human rights violations based on sexual orientation and gender identity (Anon 2007a: 6-7). The parliamentary policy paper also cites the Yogyakarta Principles. In conceptualising transgenderism and gender expression, FRA draws from definitions used by leading NGOs. The LGBT toolkit's interpretation of core concepts largely corresponds to these references. This illustrates how different EU actors have started to carefully embed their communications into the existing civil society dialogue on LGBT rights with a view to enhancing their authoritativeness. These developments could prepare the ground for a conceptual blueprint upon which future EU involvement in LGBT matters could be based, so as to improve the Union's coherence and consistency.

The scattered approach that the Union has taken to sexual orientation and gender identity is another grave cause for concern. Sometimes EU policies and statements box people of different non-mainstream sexual orientations and gender identities together, treating "LGBT" as a unitary concept, whereas such indivisibility is done away with on other occasions. At face value this might appear to be the case because LGBT people constitute a highly diverse group, and such heterogeneity inevitably brings about different challenges. Perhaps the most important distinction that has to be made here is between sexual orientation, defined by the Yogyakarta Principles as a person's 'capacity for profound emotional, affection and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender', and gender identity, which can be summarised as a person's 'deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth' (European Union Agency for Fundamental Rights 2009b: 24-25). Differentiated policy solutions thus imply a Union that is attuned to the specific needs of lesbians, gay men, bisexuals, transsexuals, transgendered people, intersex people and other sexual minorities that are frequently collapsed under the heading "LGBT people".

According to Swiebel (2009: 25), however, the real cause of the Union's conceptual inconsistency can be found in its "lack of competence" to fully take transgender and other gender identity issues on board. This explains why the Amsterdam Treaty, the Employment Directive and the CFR only apply the non-discrimination principle to sexual orientation. EU regulations also account for the fact that ILGA-Europe can only use Commission funding for its LGB-related advocacy and not for matters concerning gender identity (Beger 2004: 34). In consideration of the FRA's findings that attitudes towards transgender persons are significantly more negative compared to LGB people and that they might face very low acceptance by other LGBT people (European Union Agency for Fundamental Rights 2009b: 10 and 125), this legal imbalance is particularly distressing. Instead of paying due attention to a particularly vulnerable group, EU legislation thus makes transgender people more likely to being doubly marginalised.

In the cases that the EU does address transgenderism, such as in the Recast Directive, this is done with respect to equal treatment and non-discrimination on the basis of sex. The Union's provisions then only apply when the process of gender reassignment has been completed. This is estimated to cover only roughly 10 per cent of the transgender population, leaving a large number of people with a non-conforming gender identity in legal limbo (Castagnoli 2010: 5). This is in spite of the FRA's observation that 'there is no reason not to extend the protection' to those transgendered persons that are currently not covered by EU legislation (European Union Agency for Fundamental Rights 2009a: 131). While the Union thus verbally proclaims to be a staunch advocate of LGBT

people as a whole, its legal incapacity to adequately address the component of gender identity exposes such language as flawed.

Correspondingly, EU communications on sexual minority rights rarely mention bisexuality. There appears to be an 'incompatibility of "sexual orientation" with "bisexuality'" so that sexual orientation is reduced to either hetero- or homosexuality (Waites 2009: 145). In connection with EU-level LGBT politics, this effectively forces bisexuals in the Union to identify with, or conform to, one of these two categories in order to be recognised. Those who do not associate with the conventional categories of "LGBT" also lose out at the intersections. While Beger (2004: 71) rightly observes that the belief that legal reality can accommodate the fluidity of sexual and gender identities is 'a fantasy never to be fulfilled', and without trying to embark on a post-structuralist reading of LGBT politics at the level of the EU, this does illustrate anew the importance of bearing in mind the heterogeneity of the alleged LGBT "community" as well as how political discourse is invariably informed by the politics of identity.

A final conceptual contradiction concerns the relationship between Eurocentrism and cosmopolitanism. Even though European rhetoric contains many references to universal principles such as equality and non-discrimination, Kelly Kollman and Matthew Waites (2009: 7) argue that such "rigid universalism" can 'impede dialogue, and risks being perceived as part of Western imperialism'. Such perceptions are clearly at odds with the dialogue and persuasion upon which a legitimate NPE relies; a truly normative actor convinces third country representatives in a non-coercive manner of the moral supremacy of its arguments. This is especially applicable when sexual minority rights are introduced into the international political arena, because of the contentiousness of sexual politics and because of the leading role that European institutions have played in defining 'the rights of LGBT people as human rights' (Kollman, 2009: 38). Sexual minority rights are often perceived of as a specifically European social construct that is completely alien to many countries' domestic culture. Promoting LGBT rights through a cosmopolitan rhetoric runs the dual risk of further obscuring this power imbalance in defining sexual minority rights and of perpetuating the marginalisation of non-Western categories of sexual orientation and gender identity. This dialectical tension between European values and universalism is reflective of a Habermasian paradox according to which 'the common denominator for Europeanness is the universalist meaning of human rights' (Beger 2004: 80); for a norm to be a norm propagated by the EU, it must be universal, which automatically erodes its uniquely European character. Consequently, the very fact that the EU must actively frame sexual minority rights as a universal issue in its external relations puts a question mark over this very universality and, by implication, suggests a more Eurocentric ethics. It is not readily apparent how the advice of Immanuel Wallerstein (2006) to discard a "European universalism" in favour of a truly global universalism can be heeded with respect to sexual minority rights. The response of several African countries to the recent decision of the United Kingdom to withhold development aid to countries that ban homosexuality pointedly illustrates how the legitimacy of norm promotion is dependent on relieving the tension between Eurocentrism and cosmopolitanism (Anon 2011).

In conclusion, the Union's conceptualisation of LGBT people, and the way that this has been translated into actual policies, is fraught with disjunctures, definitional slippages and omissions of definitions. The Union will only be able to act as an effective and legitimate normative power in its relations with third countries if it embarks upon a volte-face by virtue of addressing these critical points.

CONCLUSION

The rhetoric of EU self-representations suggests that the Union's external relations regarding the human rights of LGBT people should showcase all the hallmarks of Ian

Manners' Normative Power Europe; the EU seems to possess the potential 'to define what passes for "normal'" when it comes to the global politics of sexual identity (Manners 2002: 236). Such a tentative conclusion is based on the observation that the Union's norm-setting activities in this issue area largely consist of declaratory politics and dialogue that are informed by cosmopolitan arguments, are promoted non-coercively, and are made more credible by evidencing that the Union is itself committed to and bound by the principles that it propagates. On the face of it, the EU is thus well-positioned to act as a normative power concerning LGBT rights.

Nonetheless, the Union's ability to project its sexual ethics into the international realm is severely hamstrung by a series of inconsistencies. Internally, even though European-level provisions should have created a situation of *de jure* equivalence with regards to the principles of equal treatment and non-discrimination, reports on the pervasiveness of institutionalised and societal homo- and transphobia showed how there is no *de facto* level-playing field. Institutionally, the Union's hybrid set-up predisposes it to an organisational inability to speak with one voice. Here, positive evaluations of Parliament as 'the most reliable ally for European NGOs in the advancement of social rights' (Beger 2004: 23) need to be placed aside more mixed or even critical interpretations of the LGBT rights record of the Commission, Council and the Court of Justice. Finally, at a conceptual level, the EU manifests definitional omissions, practical inconsistencies and conceptual tensions in addressing sexual minority rights.

The combination of these internal, institutional and conceptual inconsistencies produces a dissonance in the Union's external relations that may have a crippling effect on the EU's ability to shape international norms and values. These schisms directly call into question the Union's credibility, which, by implication, has the potential to corrode its authority in international affairs. As Elizabeth De Zutter (2010: 1117) has argued, identifying a normative power hinges, *inter alia*, on the '(perceived) consistency between role, norms and practice' (see also Lucarelli & Manners 2006: 207-209). EU policy concerning LGBT rights thus echoes the conclusion that 'normative power can be seen more as an ideal-type than a description of what the EU truly is' (Forsberg, 2011: 1192). In sum, because a truly normative actor relies upon the compelling integrity and righteousness of its values, a Union that is riddled with incongruence is not fully qualified to take up this role.

These sobering conclusions notwithstanding, recent policy developments are a cause for optimism in evaluating the fit between normative power and the Union's advancement of sexual minority rights in third countries. The Council launched the *Toolkit to Promote and Protect the Enjoyment of all Human Rights by Lesbian, Gay, Bisexual and Transgender (LGBT) People* in June 2010. The toolkit possesses the potential to overcome the majority of the inconsistencies that currently have an enervating effect on the Union's foreign policy on sexual minorities: it constitutes a policy instrument that is to be used across the EU's institutions and member states, it stresses non-coercive policy tools such as multilateralism and civil society dialogue, it is attuned to the particular vulnerability of transgender people and women, it provides conceptual and definitional clarity and it is replete with references to cosmopolitan law. Future research will have to closely monitor its development in order to see whether the toolkit can fulfil its promise of increasing the EU's normative strength in promoting and protecting the human rights of LGBT people in the EU's external action. Until such potential materialises, however, the role of the Union in this policy field is best summarised as that of a conflicted normative power.

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[1] The terminology follows Meunier and Nicolaïdis (2006), who describe the EU as a conflicted trade power.
[2] Even though Manners originally developed these nine principles in 2002, he slightly amended and qualified them in his 2008 article in *International Affairs*. This paper is written with the most up-to-date set of norms in mind.
[3] Space limits preclude an elaborate overview of the critique of NPE. Concerning empirical criticism, interested readers are referred to Lightfoot and Burchell (2005), Forsberg and Herd (2005), Zimmermann (2007), Scheipers and Sicurelli (2008), Kratochvíl (2008), Jones and Clark (2008) and Wagnsson (2010). Developments in North Africa and the Middle East, culminating in the so-called Arab Spring, sparked a scholarly debate on the EU's attempts at democracy promotion in the region. The tenor of most studies is contrary to the Normative Power Thesis (see Powel, 2009; Cavatorta & Pace, 2010; Durac, 2010; Bauer, 2011). For conceptual criticism, see Youngs (2004), Diez (2005), Hyde-Price (2006; 2008), Sjursen (2006), Merlingen (2007), Zielonka (2008), De Zutter (2010) and Forsberg (2011). Whitman (2011) offers a good up-to-date overview of the NPE literature.
[4] In addition, the Union appears to be instrumentally conflicted, because it can be argued that third countries' compliance with the norm that LGBT rights are human rights is more the result of the size of the European market than of the moral persuasiveness of the EU's argument. This is a comparatively minor point and is not developed further due to space constraints.
[5] Missing from this report is the difference in the age of consent for heterosexual (15) and homosexual (17) acts (see Waaldijk 2009).
[6] This began in 1996, when the Commission included a reference to sexual orientation in its proposal for a Parental Leave Directive (COM(96) 26). The reference was subsequently removed by the Council.
[7] The three proposals in question are the Parental Leave Directive (European Commission 1996), the Part-Time Workers Directive (European Commission, 1997b) and the Transfer of Undertakings Directive (amendment by the European Parliament, see European Communities 1997).
[8] Important cases in point are *Grant v South West Trains Ltd* and *D and Kingdom of Sweden v Council of the European Union* (European Court of Justice, 1998; 2001). This is not to deny the importance of the jurisprudence of the European Court of Human Rights (ECtHR), a court adopted under the auspices of the Council of Europe, to the development of LGBT rights in the EU. This topic is beyond the scope of this article, but the reader is referred to Graupner (2010) for an overview of cases at the ECtHR.
[9] This possibility exists because the ECJ is authorised to draw upon the European Court of Human Rights' interpretation of the ECHR. For a more elaborate explanation, see Kochenov (2007: 480-488).

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'Normal Parliament': Exploring the Organisation of Everyday Political Life in an MEP's Office

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Abstract

The Lisbon Treaty has again enhanced the role and powers of the European Parliament [EP] and therefore increased the workload of individual MEPs. However many citizens remain unaware of what MEPs do and how they represent them. This paper reviews the academic literature and argues that we need to know more about how individual MEPs practise European politics inside this institution. Throughout, it argues that ethnography can play a key role in opening up this institutional black-box and enhancing our understanding of this profession by focusing on daily activities and backstage processes. It begins by exploring the working environment of MEPs, which is characterised by shortage of time, constant travelling, information overload, and highly technical issues. Secondly, it describes strategies MEPs employ to pursue their aims here, namely: specialisation, filtering, employing assistants, and information management. Thirdly, it draws comparisons with other professional fields to remind us the EP is a normal professional work environment. The contributions are twofold: the article provides a deeper, more nuanced, and more holistic understanding of (individual) MEP behaviour; and also helps to demystify the profession and thus help alleviate the democratic deficit by beginning to close the gap between politicians and citizens.

Keywords

European Parliament; MEP behaviour; ethnography; anthropology of Europe

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To look at the history of the European Parliament [EP] is to see its powers gradually and continuously enhanced with each treaty (Scully 2007: 177). In merely 50 years, the EP has evolved from a token multilingual talking shop into a significant mainstream EU player (Scully 2007; Corbett et al 2003). Consequently, it has been called 'one of the world's most powerful elected chambers' (Hix et al. 2003b: 192) as the only directly elected international institution, selected every five years by over 500 million citizens. Despite its formal empowerment, the EP has a relatively low public profile and faces significant challenges with regards to connecting citizens to the Union (Scully 2007). After a week shadowing MEPs, BBC journalist Brian Wheeler said:

> Beyond those people who are paid to cover it, few people in Britain really know what goes on in Brussels and Strasbourg. There are 78 British Euro MPs but most people would be hard-pressed to name one of them ... let alone the ones that are paid to represent them. Most of the time people only tend to take notice of the EP when there is an election ... or when a British MEP is embroiled in a financial scandal, or when there is a story about crazy Eurocrats and their silly rules - the "straight banana" syndrome ... few could really say they know what these well-paid elected representatives actually do (13/1/2009).

Despite the EP enjoying significant new powers extended by Lisbon, Andrew Duff MEP (rapporteur on electoral reform) admits that 'for all its new authority parliament is still unloved' because 'the constitutional set-up of the EU is largely unknown by its citizens. Its 'government' is complex and confusing...the EU is known more for its law and bureaucracy than for its justice and democracy' (in Banks 9/11/2010). Academics have traditionally devoted less time to the EP, judging it less important than the other EU institutions (Scully 2007: 175). Despite attracting increasing academic interest as its powers have grown (Hix et al. 2003: 192), former Secretary-General Julian Priestley has lamented that 'there is relatively little on the life of the Parliament' (Priestley 2008: xi; see Watson 2010). We still know 'surprisingly little' about pre-plenary processes (Ringe 2010: 1-5), how MEPs perform their representative function (Scully and Farrell 2003), and what they do inside the glass fortress of Espace Léopold. Wodak (2009: 4, 25) discusses our lack of access to the politics *du couloir* and argues that academia needs to turn to the political backstage and explore how politics is done as an activity. This can

help us gainer a deeper, more nuanced, and more holistic understanding of MEP behaviour. The political field needs in-depth backstage research to demystify the profession which Wodak (2009: 25) argues could also help to reduce the democratic deficit, if these findings were disseminated for example through the media to the public. Ethnographic research can enhance our understanding of MEP behaviour by exploring everyday activities and revealing what this profession consists of.

This article responds to this context. It argues that we need to explore how individual MEPs practise politics here as an everyday activity. The article achieves this by exploring the organisation of daily political life from an MEP's office in Brussels. Throughout, it demonstrates that ethnography can play a key role in the endeavour to open up this institutional black-box and enhance our understanding of this profession by focusing on the daily activities and backstage processes occurring inside. The article is divided into three sections which build upon each other to address the gap outlined. It presents data from intensive fieldwork and immersion within this transnational community which enabled exploration of actors' daily activities, the ways they organise their time, perform duties, and practise European politics in this particular space. Exploring everyday behaviour allows us to investigate individual level strategies employed by actors. Firstly, the article explores the daily work environment MEPs face which is characterised by shortage of time, constant travelling, information overload, and highly technical issues. Secondly it describes the particular strategies MEPs employ to pursue their aims within this (work) context, namely: specialisation, filtering, employing assistants, and information management. Thirdly, it briefly reviews other work to draw comparisons with other professional fields to remind us that the EP is a *normal* professional work environment. I suggest these findings can help to demystify the profession and thus help alleviate the democratic deficit by beginning to close the gap between politicians and citizens, as Wodak (2009) recommends. This article provides a deeper, more nuanced, and more holistic understanding of MEP behaviour. It is based on seven months participant observation conducted via an internship with an MEP in 2010, 58 elite interviews, and other data collected for doctoral research (Busby: 2011).

WHAT DO WE KNOW ABOUT MEPS?

Early EP scholarship was descriptive and examined institutional development (Verzichelli and Edinger 2005: 255) but as their influence grew attention turned to the MEPs and EP politics (Blomgren 2003: 5; Noury 2002: 34). Broadly, the literature finds that the empowered EP has become an important institutional actor in the EU triangle and co-decision has meant that the EU now has 'what amounts to a bicameral legislature' (Corbett et al 2011: 397). Meanwhile sophisticated statistical analyses of roll call votes [RCVs] have found that, internally, the EP political groups are highly cohesive, voting occurs along ideological rather than national lines, there is a traditional left-right cleavage, and a competitive, consolidated two-plus-several party system (Ringe 2010: 1-5; VoteWatch.eu 2010; Hix et al. 2003a). The tradition of RCV-based studies has found that despite high heterogeneity, EP politics is not fragmented and unpredictable but has become increasingly structured (Hix et al. 2007: 3). Another important contribution has been the statistical rejection of the traditional functionalist assumption that MEPs *go native* in Brussels as voting records suggest many 'do not shift their activities - never mind their loyalties – from the national to the European level' (Scully 2005 and 1999: 16). These findings have led some to suggest we find 'politics as normal' occurring inside the EP (Ringe 2010: 1-5; McElroy 2006: 179). These *normalcy* debates have focused on comparing the EP with the competitive party systems and cleavages of European national parliaments and particularly the US Congress, in preference to a focus on the EP's sui generis nature (Yordanova 2011; Bale and Taggart 2006).

This body of statistical research has significantly contributed to explaining plenary voting patterns. However a gap remains and we know less about individual level activities and backstage pre-plenary processes, and wider activities encompassed by a broader approach to political behaviour. An EP assistant insisted that to understand the EP, you have to understand the process by which a dossier gets to the plenary floor (interview: 23/11/2010). We have less understanding of the everyday activities and interactions occurring inside the EP (Ringe 2010: 2) such as processes in committees, groups, the Conference of Presidents, inter-groups, and co-ordinator meetings. Some qualitative and mixed research has begun to open-up the institutional black-box by investigating committees (Whitaker 2011; McElroy 2006; Neuhold 2001), roles (Bale and Taggart 2006), lobbying, and *relais* actors (Judge and Earnshaw 2011; Rasmussen, 2005). However, McElroy says our understanding of EP legislative politics remains in its 'infancy' (2006: 176) and this is partly due to the under-socialised nature of the literature. Jenson and Mérand argue 'the focus on formal organizations and asocial norms begs for a more sociological approach that would encompass the informal practices, symbolic representations and power relations of social actors involved in European society' (2010:74). Whilst not wanting to reject analysis of formal structures, they suggest that research has been 'too distant from the actors 'making Europe' and the conflicts among them as well as the social representations that organize their actions' (2010:74). A new generation of scholars is taking up this mantle with qualitative methods and empirical analysis rather than modelling, and a more sociological approach (Favell & Guiraudon 2011; Georgakakis 2010, 2011; Jenson and Mérand 2010:74-6). Ethnography has much to contribute to this endeavour.

WHAT DOES ETHNOGRAPHY OFFER?

Ethnography, with its focus on mundane activities, perspectives, and routines, is a methodological approach which can provide a deeper understanding of the everyday practice of EP politics by individual MEPs. Ethnography puts people, meaning, and the real world of politics into analysis (Vromen 2010: 253; Schatz 2009). Gaining a deeper and more nuanced understanding of political behaviour means looking for 'order in the apparent disorder' and, in contrast to mainstream positivistic political science which seeks predictable and rational outcomes, starting by assuming 'doing politics' is a highly context-dependent activity (Wodak 2009: 26). Briefly, ethnography is 'the peculiar practice of representing the social reality of others through the analysis of one's own experience in the world of these others' (Van Maanen in Emerson et al. 1995: 10). Ethnographers study actors in their own setting, contextual factors, and seek to understand phenomena and actors on their own (emic) terms (Mitchell 2010; Eriksen 2001: 36; Gellner and Hirsch 2001; Denzin and Lincoln 1998). Ethnography is often equated with participant observation and some scholars describe it as a *sensibility*, an orientation to exploring the world where the field-site and participants reveal what is important and relevant (Ybema et al. 2009: 15; Cerwonka and Malkki 2007: 162). Immersion gives access to everyday rules and practices which go unquestioned as they are taken for granted as local common sense and therefore can have a real impact on the way politics is practised (Schatzberg 2008). Ethnographers explore the ways people 'come to understand, account for, take action, and otherwise manage their day-to-day situation' in their work setting (Rosen 1991: 1; see Busby 2011).

There are two notable ethnographic studies of the EP (Wodak 2009; Abélès 1993, 1992). Abélès found 'at once, the impression of dealing with a closed world with its own codes and ways of doing things' (1993: 1-2). He describes everyday life within this closed 'beehive-like' world, and says; 'what I found interesting was what I would call not the *organisation of time* but its *disorganisation* ... movement is so constant that one sometimes loses sight of the purpose behind all these perpetual comings and goings' (1993: 2). Abélès investigates the double nature of European political activity; namely the tension between MEPs' representative and legislative functions (1993: 18). I build on

Abélès' work by continuing to explore order behind the initial apparent chaos and constant movement, and individual MEP's ways of doing politics within this context.

Since Abélès's seminal research, enlargement has meant linguistic and cultural complexity has 'vastly multiplied' and Wodak asks how the EP now works 'given the huge array of sometimes contradictory factors' (2009: 58). Her work on the EP's backstage *politics as usual* raises similar themes. She explores frontstage performances and backstage *communities of practice,* and MEPs' strategies for dealing with the disorder (2009: 14). She finds politicians' everyday lives are as messy and unpredictable as they are organised. Politicians acquire tactics to pursue their agendas but their success depends on their position in the field, power relations, and knowledge management because 'much of what we perceive as disorder depends on inclusion in shared knowledge or exclusion from shared knowledge' (2009: 15-16). MEPs require three 'knowledges' to practise politics successfully: organisational, expert, and political knowledge (2009: 46). Ethnography is capable of detecting these intricacies to understand institutional life which may not be accessible to other methods (2009: 26). Wodak's shadowing found;

> in some ways, the multiplicity of orientations of MEPs appears to be functional for the way in which the EP operates ... in short, there is no simple description for the *job* of being an MEP ... depending on how individual MEPs organise their priorities, we find very different kinds of role/job definitions, various motives and agenda, differing visions, and multiple identities relevant for MEPs, both collectively and individually. However, we also encounter routinized patterns into which they have been socialised (2009: 111).

Wodak describes how MEPs construct multiple identities across different micro communities (2009: 113-155). Such research can illuminate what the act of representation consists of, such as constant meetings and enormous mobility (2009: 71-5). I continue to build on this by exploring the everyday strategies of individual MEPs within their work context and ways in which they handle their multiple roles at the everyday level.

Little ethnographic work has been done on the EU (Demossier 2011; Shore 2000) but the approach has been taken to other political institutions (see Schatz 2009; Joseph et al. 2007; Crewe 2005; Matthews 1960). The tradition has recently been summarised succinctly by Demossier who says the EU offers anthropologists 'a remarkable field' for studying institutions and power and in return anthropologists question notions of legitimacy (2011: 14). Medrano suggests sociologists have neglected the EU because they do not see a 'society' at the European level (in Jenson and Mérand 2010: 80) – a view a stint of ethnographic fieldwork in Brussels living among its natives in their transnational community quickly challenges (see Mundell 2010). Whilst political science may not be on the cusp of an ethnographic revolution, there is growing interest in its added value (Hilmer 2011; Wedeen 2010). This addition to the toolbox can mean the literature covering an institution or phenomenon is deeper, richer, and practices are better understood. Focusing on everyday activities enables deeper understanding of what encourages people to behave politically 'in the myriad of ways that they do' (Schatzberg 2008: 2) in complex institutions like the EP where decision-making is 'subject to a multitude of interests and a myriad of rules' (Noury 2002: 34). Ethnographers do not aim to make general claims about a group, but rather to understand wider processes occurring within the context (Cerwonka 2004: 5, 47) – e.g. what daily life in an MEP's office can reveal about the practice of EP politics by individual MEPs.

DAILY LIFE IN AN MEP'S OFFICE

Time: what week is it?

This section describes key characteristics of the context individual MEPs face in Brussels and are expected to practise politics within. This daily work environment is characterised by constant movement, a lack of time, information overload, and highly technical issues. To access this elite setting, one must first acquire an access badge. When observing MEPs and officials striding the seemingly endless grey corridors of Espace Léopold, you will soon notice these ubiquitous and essential items worn continuously around their necks, marking out the members of this transnational tribe, and the colour of their badge further demarcating their rank. Closer inspection shows what often occupies the reverse side of these lanyards is a business card edition of the EP calendar. This calendar is usually found on the wall of every EP office as it dictates what week it is, essential organisational knowledge for anyone hoping to meet with an MEP, influence, or take part in the decision-making process (Appendix 1). There are four weeks in the EP calendar; Committee (pink), Group (blue), Plenary (red), and Constituency (green) week, and the calendar is constantly referred to by those organising MEPs' political lives and activities around it.

Firstly, this system formally institutionalises these particular four priorities for MEPs and ensures time is allocated for these activities. As Wodak says, 'in some ways, the multiplicity of orientations of MEPs appears to be functional for the way in which the EP operates' (2009: 111). Time is reserved for MEPs routinely to perform their legislative and representative functions, if they choose to. Secondly, the calendar also dictates a particular ordering of these weeks; Committee, Group, Plenary, Constituency. Time is reserved for MEPs to return to their constituency to disseminate information about plenary votes and collect constituent views before the political cycle begins again. Staff are grateful for this slower paced week as the MEPs are absent, after the busy "Stressbourg" session, as Strasbourg week is referred to by some assistants because of the long hours and hectic schedules that constitute this week. Red Wednesdays and Thursdays indicate a mini-plenary in Brussels and committee and group time is allocated beforehand in the usual order. This particular order means the detailed legislative work is done *backstage* in Committee Week and the dynamic political work as voting lines are constructed in Group Week, so most of the hard work is done and decisions made before the highly ritualised session (or ceremony) in Strasbourg is performed. This ubiquitous artefact, the calendar, shows us how the EP's formal organisation temporally enables MEPs to perform their multiple roles across time and space, although they choose which policy and political issues to focus on within this structure and how they prioritise each role; e.g. MEPs may choose not to attend committee meetings or not to return to their constituency.

The working week in Brussels is Monday to Thursday, Friday being reserved for the constituency. The first thing an ethnographer/intern observes is the constant travelling expected from MEPs. As well as between Brussels, Strasbourg, and their constituency, this might also include Group Weeks held in other countries and committee and delegation trips. Most MEPs arrive in Brussels Monday lunchtime, their arrival being marked by increased traffic on Rue Belliard and the arrival of cars from the airport. They often depart Thursday afternoon or evening, depending on what events they attend. Therefore the time spent per week in Brussels or Strasbourg is often about three days, a situation which leads to the rushing around the building to get to meetings squeezed in around the EP calendar by their assistants, which is also described by Abélès and Wodak. The strict EP calendar and multiple working sites mean EP life follows a distinct rhythm, or ebbs and flows, felt throughout the Brussels Bubble. These include the daily flows of hectic preparation and briefing, demanding meeting cycles, quick lunches, and evening events; weekly and monthly flows of MEP arrivals and departures in Brussels and Strasbourg; and the EP's annual rhythm which is apparent throughout Brussels such as summer and winter recesses, monthly hyperactive plenary weeks, and annual events

such as the Sakharov Prize. This three day (Brussels) working week leads to a feeling that there is never enough time and time is a precious commodity for MEPs, something academics trying to get their 30 minute interview will doubtless have realised. MEPs' diaries are constantly full and are managed by assistants slotting 15 minute meetings in around the EP's official calendar of group, committee, and plenary meetings. Organising the diary is the first priority of the office; like a corner stone, little else will function if this does not and politics cannot be practised successfully.

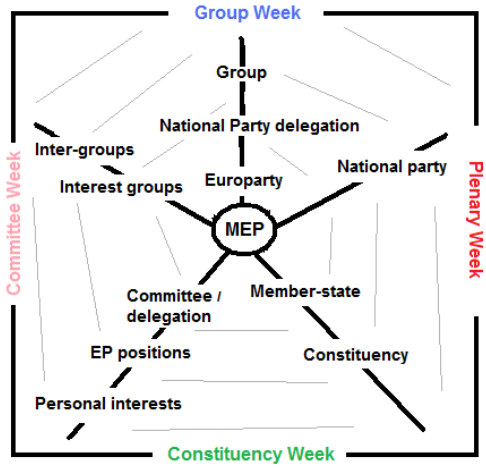
Information Overload

The number of emails, meeting requests, papers, and volume of mail an MEP's office receives every day can seem overwhelming. One day the MEP described us as 'suffering from information overload here', while an ALDE MEP said, even in his second term he finds the amount of information 'mind-boggling' (interview: 8/12/2010). A Green/EFA assistant said being in charge of the inbox can make you feel as though you are 'drowning' and this is the task new staff aim to move up and on from when they are no longer the newest member of the office as it is a 'bind' you cannot leave in case you miss something important (interview: 17/6/2010).

The two main sources of this information overload are the email inbox and pigeon holes, and the overload comes from the volume, variety, and detail of the information. Appendix 2 shows the variety of issues which vie for MEPs' attention; magazines, newsletters, and briefings present information on issues from nuclear power, green energy, and human rights, to pro-fur campaigns and baroque orchestras. The post comes from an array of sources from inside the EU institutions and outside from interest groups and constituents. The constellation of interests vying for MEPs' attention can be mapped from the emails offices receive every day. Appendix 3 categorises the emails received on three Wednesdays in June 2010. The office received an average of 194 emails per day, 262 in plenary week. The most frequent categories were: i) event invitations; ii) from interest groups; iii) about Written Declarations; iv) from the group; v) and were committee/delegation related.

This data gives us a window into the everyday life of an MEP and the groups and issues which demand their time and attention and constitute the everyday political landscape they inhabit. This constellation presents an individual MEP as an actor suspended at the centre of a web of interests which they must navigate, and which, over the course of the four calendar weeks which structure their time, tug for their attention with varying degrees of strength and urgency.

Figure 1: Suspended in a Web



Source: author's own diagram.

Whilst they may be perceived as suspended within this web, MEPs have a high degree of agency to decide how to prioritise and move around within it, how to spend their time in the Brussels Bubble, which issues to get involved with or disregard, and which interests to respond to. Again, this window reveals ways in which MEPs perform multiple roles at the everyday level, switching between functions in their daily activities.

Highly Technical Issues

As well as the volume and variety of issues which cross an MEP's desk every day, the issues discussed and debated and the legislation they work on is usually at a highly technical level. Political debates can concern deleting paragraphs or even changing individual words to alter the meaning of legislation; e.g. deleting the word 'directly' from a paragraph can make something more palatable to another political group. Negotiations are made even more delicate by the multi-lingual environment. As well as the legislation itself, MEPs and staff work within the institution's highly technical procedures. To pursue their (legislative or political) goals, MEPs and their staff need to know the different types of reports, voting procedures, and rules of procedure – key organisational knowledge as well as technical expert and dynamic political knowledge is required. To function here and communicate successfully, MEPs must master the EP's institutional language - its ubiquitous acronyms. As well as acronyms for committees, groups, institutions, and organisations, there are systems of symbols used within legislative documents and procedures to follow; to say nothing of acronyms for buildings and rooms. Some assistants told me, like everyone here, you will 'soon be speaking in acronyms'.

DAILY STRATEGIES

This section describes the particular strategies individual MEPs employ to pursue their aims successfully in this (institutional and work) context, namely; specialisation, filtering, employing trusted assistants, and information management. Observing and describing daily office life can help us understand the nature of the (micro) work environment MEPs face. Immersion in the office revealed strategies MEPs and staff employ to negotiate this context which can help us gain a deeper and more nuanced understanding of the everyday practice of EP politics. As Wodak says, 'politicians have acquired strategies and tactics to pursue their agenda more or less successfully' (2009: 15-16). However, like Belkacem (2011), my observation revealed that MEPs and the pursuit of their agenda cannot be thought of in isolation. The office unit is essential to an MEP's successful pursuit of their agenda.

Focus and Specialise

MEPs and staff interviewed described their experiences of EP political life and the strategies required to pursue goals successfully here. They were keen to stress the peculiarity of the institution: 'it is another world, you cannot imagine it ... it's very different ... if you don't actually work for the institutions, then you don't really understand how they work' (ALDE assistant, interview: 29/7/2010). They also described the EP's inclusive, egalitarian, and consensual disposition, which MEPs must acquire to operate successfully: 'the most important thing is to understand the culture of the place ... if you are not prepared to throw yourself into it at the beginning, you never really understand what it's about' (ALDE MEP, interview: 17/11/2010). What also emerged from the MEP interviews was a widely held perspective that to leave your mark successfully on legislation, an individual MEP must focus on and specialise in a narrow set of policy and/or political issues and gain a reputation as a specialist:

> almost without exception, the people who achieve the most here, are those who specialise in and therefore become specialists in, a very, very narrow range of issues. Those who are interested by lots of things and dabble in lots of things, tend not to get to the heart of any matter, but those who specialise ... are often those who end up determining the shape of policy (ALDE MEP, interview: 17/11/2010).

> we punch much above our weight ... the Greens were looked at as people with expertise ... there's an MEP from Luxembourg, who I think anybody in the Parliament would agree is the Parliament's expert on energy, even if you don't agree with him, people would respect the fact he is deeply immersed in his subject and knows it completely in depth ... we've had a much bigger impact on the shape of the Parliament, the way in which the majorities go, than some other MEPs (Green/EFA MEP, interview: 7/3/2009).

The crucial role of specialisation becomes apparent when you see the number of issues about which MEPs are contacted daily by their constituents and committee/delegation memberships alone, as well as by their groups, parties, and interest groups (Kauppi 2011; Beauvallet and Michon 2010; Whitaker 2001; Bowler and Farrell 1995). The highly technical nature of EU legislation coupled with MEPs' lack of time means specialisation in a narrow range of policy issues becomes crucial for those aiming to leave their mark on legislation. Focus is channelled with committee and delegation memberships, but inspection of the MEP's diary revealed that time is available between formal meetings for personal interests to be cultivated outside the scope of their committees and these interests can be pursued through involvement in transnational organisations, inter-groups, or campaigns. As the Green/EFA MEP above suggests, building a reputation as a specialist is a way for individual MEPs to exert influence in proceedings. MEPs are accorded a high degree of freedom to pursue their interests in the 'Brussels bubble' away from their national parties and media and within political groups who do not control electoral lists and have few sticks with which to discipline MEPs. However, the downside was expressed by a senior Belgian MEP to *The Economist*:

> Star MEPs have more influence over the lives of European citizens and businesses than does any national parliamentarian ... 'But the frustration for an MEP is that you can do an amazing European job and not get any media attention'. This frustration is acute at election time, when MEPs sally forth in search of voters, only to be reminded that the public knows little of who they are or what they do—beyond a vague memory that MEPs enjoy lavish pay and perks (Economist 4/6/2009).

Assistants as Filters

MEP assistants are key players in the office unit and their backstage preparatory work is vital to the successful pursuit of an individual MEP's agenda. They play an important role in an individual MEP's achievement of focus and specialisation. Assistants, like secretaries anywhere, are often approached as troublesome 'gatekeepers' who must be negotiated before your interview (Fitz and Halpin 1995; Ostrander 1995). However observing their activities can show how this gate-keeping function is an important part of ensuring their MEP's success.

'Don't worry, you'll soon learn which ones are *actually* important' – this was the reassuring advice I received from my MEP's assistant as I stared at the number of emails appearing in our inbox on my first day. Assistants act as filters, stemming and regulating the flow of information to MEPs, allowing them to focus on their 'actually important' specialist issues. New staff are usually briefed on the MEP's priorities; i.e. their committee/delegation memberships, EP offices, constituency, key issues within these,

and any other interests. Essential basic tasks for office staff are to sort the post, emails, and phone calls, and to filter out irrelevant communications and extract relevant information for the MEP, to manage the information overload. Individual MEPs vary on how much they wish to know about issues outside of their specialist interests from the office - information therefore being obtained from the group and national party delegation [NPD] (Ringe 2010) and their own sources. By sitting in the 'airport lounge' or 'Mickey Mouse bar' on the third floor, you will soon observe MEPs striding to meetings, carrying files of paper prepared by their assistants, or with them in tow being briefed during a walk and talk. The second essential task of assistants is to organise their MEP's time in Brussels. They also filter meeting requests and prepare the MEP's diary by inserting personal meetings and events around the EP's core activities designated by the calendar. As stated, the diary is the cornerstone of the office and an MEP cannot practise politics in this hectic environment without a well-organised diary to structure and manage the limited time in which they have to practise politics. Knowing which meetings and events to prioritise is core organisational knowledge for assistants.

However, whilst the assistant's role is clearly important in organising MEPs' time, filtering information overload, and preparing briefings, the degree to which individual MEPs depend on assistants varies with their length of service, previous political and employment experiences, temperament, and information technology skills. However, by 'literally embodying the diary', briefing MEPs, and deciding what information reaches their desk, assistants can become powerful actors through managing flows of information (Wodak 2009: 117-118).

The Right Information

Assistants also seek out information their MEP *is* interested in. Having a network from which reliable, accurate, and detailed information can quickly be retrieved is crucial for an MEP to practise politics successfully in this highly technical, transnational, and hectic environment. Information required to convince colleagues of your position also needs to be in a digestible form of highly specialised knowledge. Assistants play a vital role in gathering information from a variety of sources and in preparing it in the form of digestible briefings, speeches, articles, and amendments, to help MEPs prepare to convince colleagues, a central element of the practice of the EP's (consensual) politics.

During fieldwork, I conducted a survey among the EP assistants[1] which, among other things, explored where that information which is regularly passed to MEPs is obtained from. The questions showed that information and advice are regularly obtained from a range of internal and external, political and administrative, and national and transnational sources. Information and advice are often found from within the office itself, from the internet and MEP. However from outside the office, the group and committee secretariats, and group and NPD colleagues are key routine sources, as well as many categories of external interest groups. The sources mentioned reiterate the familiar characters found in the 'web' that makes up the constellation of interests which surround MEPs in their everyday political life here.

Expert information is essential in the EP because of the highly technical nature of EU legislation. This is sought from specialised external interest groups, but also regularly by MEP offices from the (internal) group and committee secretariats and their advisors. An EP official explained that there is a lot of space for external experts and expertise because of the need for detailed information and a lack of time to find it, but internal experts are also important because of their (organisational) knowledge of political group, EP, and EU procedures and remits, which sometimes outsiders do not have sufficient knowledge of and advise tactics outside the institutions' scope and culture; e.g. recommending a plenary debate (interview: 24/11/2010). This again demonstrates the importance of being able to navigate the technical institutional landscape to pursue an

agenda successfully inside the EP. An ALDE MEP also said that to be successful, as well as getting on the right committee, learning the policy process, specialising, and being a rapporteur; it is important to 'go and have a cup of coffee with the key administrators', if you want to get anything done in this bureaucratic institution (interview: 17/11/2010).

Wodak discusses the relationship between information, knowledge, and power in the social world in relation to the EP. Possession of expert knowledge gives access to the political process. Her work shows understanding knowledge management is an important part of understanding how institutions work and finding order in this complex disorder:

> Establishing order ... is linked to 'knowledge management' which implies the power to include and exclude, form coalitions and alliances; in sum, to 'play the political game' ... The distribution of knowledge is, of course, a question of hierarchy and power, of access, in organisations (2009: 26).

Examining actors' knowledge management practices, acquisition strategies, everyday information flows, and who is included and excluded in these, can help us gain a deeper and more nuanced understanding of the everyday practice of politics by individual MEPs. This can help us understand the strategies required to be successful within a particular institutional context (Belkacem 2011).

The First Port of Call

Over time, MEPs and their office build up a network of individuals and groups with whom they share and from whom they obtain (expert) information to help them practise politics. When I started the fieldwork internship, my MEP's assistant advised it was important I went to the NPD and NPD assistants' meetings and got to know the other offices and what they did. If I ever had any questions then not to worry as I could call these offices for advice; the NPD offices therefore acting as our first port of call. In these meetings, MEPs and assistants updated each other on their work (particularly committee work) and shared information and resources with each other regularly. This again enables individual MEPs to focus on their own specialist areas whilst knowing they will be regularly updated on others by these colleagues with whom they share ideological and national preferences (Ringe 2010).

My MEP soon gave me a research task which involved contacting a number of MEPs from other NPDs in our group for information to put together a briefing. He said this would also help me get to know other MEPs of our group which would be very useful for me. MEPs and their offices of the same committees often worked together and knew each other well. Once an MEP becomes a rapporteur or shadow and becomes involved in the detailed work of a report, the first people they are likely to contact are the group co-ordinator, relevant group Policy Advisor, and Committee Secretariat advisors. Relations are therefore built up and away from the office epicentre, with NPD and group colleagues occupying the nearest circles. The widely acknowledged lack of formal training provided by the EP for new MEPs and assistants (particularly those joining part way through a term or year respectively), means the NPD and group play a crucial role in socialising newcomers into the routines, habits, and codes of the institution. Three MEPs said it took about a year to learn how to operate (interviews: 17/11/2010, 15/12/2010) and one described a 'buddy' system his NPD had arranged after their previous experience (interview: 8/12/2010).

The NPD and group are key agents of socialisation into EP working practices and knowledges for individual MEPs; they 'provide ways to teach newcomers the routines of the organisation in terms of specific expertise' (Wodak 2009: 13). Socialisation can take a long time and at first routines can seem chaotic (Wodak 2009: 14-15), but NPDs and groups, their staff and members, help newcomers to cope with the complex and

overwhelming work context described and to see the order in the disorder which enables them to pursue an agenda successfully. Regular interaction between actors within these structures and information sharing which occurs within them continues to be a key strategy for MEPs aiming to leave their mark on EU policy and/or politics. This first stepping-stone – exploring daily life in an individual MEP's office where information to help them make decisions and convince colleagues is filtered, sought, and collated, and the role of their NPD and group colleagues is key - is the first on a path by which we can gain a deeper, more nuanced, and more holistic understanding of individual MEP behaviour and the everyday practice of politics inside this institution.

A NORMAL PARLIAMENT?

So far, this paper has explored the daily work context MEPs face in Brussels and described some of the everyday strategies they employ to pursue their agenda successfully within this context. The characteristics and strategies described may appear familiar to many readers, evoking everyday experiences in their own professional field and workplace, as ethnography is wont to, making the strange familiar and the familiar strange (O'Reilly 2009: 158). Thus, this section briefly reviews ethnographic research in other (exemplary) workplaces and draws comparison with other professional fields to remind us that the EP is a normal professional work environment, as well as potentially a *normal* parliament which has been a central concern of the literature. This brings us full-circle to the context of this article which opened by describing a wider lack of knowledge of and engagement with the EP and its argument that we need to explore and disseminate information about how MEPs practise EP politics (i.e. what this profession consists of) to paint a more humanising picture to close the gap between politicians and citizens.

EP research has often focused on trying to ascertain whether the EP is a normal parliament to explain outcomes by testing congressional theories and comparing it with the US Congress and national parliaments. Research has investigated group cohesion, plenary voting patterns, and whether MEPs go native (Yordanova 2011; Hix et al. 2007; Scully 2005). The findings have led some scholars to stress the EP's normal rather than sui generis nature as voting patterns, behaviour, and cleavages reflect those of other legislatures (see Ringe 2010: 1-5; McElroy 2006: 179). Ethnography contributes a different perspective to this debate. It reminds us that as well as a potentially normal parliament, the EP is also a normal professional field and workplace, which opens up another way for people to understand this institution and its natives and their activities.

Wodak (2009: 25; 1996: 170) says the latent order behind the apparent chaos in the EP reveals common features with other social and professional fields. Her research on communication barriers in a number of institutions shows gulfs and misunderstanding between professionals and outsiders due to technical jargon and structures (Wodak 1996: 1-3). Professional discourses are used which exclude outsiders and serve certain functions of power, justification, and legitimation (Wodak 1996: 170). Luyendijk (2011) describes similar findings, demonstrating that ethnographic research on elite groups is increasingly important where their activities have a wider impact on citizens. He conducted ethnography among bankers because 'what happens in the City of London affects everyone, but most of us know very little about the people who work there – or what they do all day' (2011). Luyendijk finds generalisations about 'bankers' obscure many different activities and roles which exist in the sector and that ethnographic work can paint a more 'humanising' picture. He also finds that they have much in common with other professionals as one banker compared himself with a GP: 'you spend many hours memorising terms (body parts, diseases, treatments) and learning to recognise patterns. Then you put in very long hours and collect a nice salary, while employing your jargon to intimidate outsiders' (2011).

Ethnography has been conducted in many organisations (Jiminez 2007; Gellner and Hirsch 2001; Schwartzman 1993); in fact, 'name the organisation and some ethnographer has written about it in some depth' (Levin 2003: 9). Latour and Woolgar's (1986) work is a notable and helpful example. They conducted participant observation with scientists in their labs to explore activities involved in the production and circulation of knowledge, and the social construction of 'facts'. They needed the demystification of the difference between facts and artefacts to show that 'reality was the consequence of the settlement of a dispute rather than its cause' (1986: 236). To understand scientists' behaviour, we must observe everyday actions such as out-manoeuvring a competitor so that science is similar to any other political field of contention (1986: 237; also Latour 1987). The resulting portrayal is that scientific activity is not about 'nature' but 'is a fierce fight to construct reality' and the lab is the workplace which makes this construction possible (1986: 240). A second way of understanding laboratory life draws on order from disorder; the 'transformation of a set of equally probable statements into a set of unequally probable statements amounts to the creation of order' (1986: 244). This is the result of training staff to create order from disorder through precision in measurements and recordings, because keeping track through meticulous records is how they see patterns emerge out of disorder (1986: 245). In science, few facts emerge and each scientist strives amid a wealth of chaotic events. When participating in controversy, they will find themselves immersed in a storm of political passions (1986: 252) – a situation which may sound familiar to politicians. Ethnography can help de-mystify science and scientific facts to help us understand them as human, social processes and build a bridge between scientists and society:

> if the public could be helped to understand how scientific knowledge is generated and could understand that it is comprehensible and no more extraordinary than any other field of endeavour, they would not expect more of scientists than they are capable of delivering, nor would they fear scientists as much as they do (Salk in Latour and Woolgar 1986: 13).

Likewise, ethnography can paint a more human and realistic picture of political life. Through an ethnographic approach, I have explored the everyday practice of European politics by individual MEPs inside the EP; the activities constituting this profession, relationships between actors, and their everyday strategies. I have begun to explore how these activities and processes contribute to processes and outcomes. Ethnography can enhance our understanding of the behaviour of individuals within institutional contexts, and further dissemination could help inform citizens about what MEPs do in Brussels, the complexities, opportunities, and limitations they face. These findings help increase understanding of this profession by showing how familiar mundane aspects of this workplace are, making it more accessible because, as Andrew Duff MEP says, for many it remains that '*Europe* is elsewhere out there' (in Banks 9/11/2010). In fact the mundane daily activities of the MEP office reflect life in many other professional fields (e.g. science, banking, medicine and academia) where practitioners also feel the pressure of time, information overload, technical and bureaucratic procedures, and, to do their job successfully, they focus, specialise, filter unwanted information, know where to look for accurate information, and rely on colleagues for advice and support.

CONCLUSION

Whilst the EP literature has grown with the institution's empowerment, much of this research has focused on (predicting) plenary voting behaviour. It has taken a 'broad brush' approach and left us with less understanding of the political life of this institution, backstage processes, and the activities of individual MEPs (Ringe 2010: 1-5). Ethnography, which approaches politics as a context-based activity practised by individuals, can help address this gap and explore the everyday strategies MEPs employ within their institutional work setting to practise politics successfully. By taking an

inductive approach, ethnography enables us to explore actors' priorities in their own words and on their own terms and to discover new material about the subtleties and nuances of the everyday practice of EP politics inside this institutional black-box by individual MEPs, which may not be accessible via other methodological approaches. However, we discover that everyday life is not so exotic and can draw comparisons with other professional fields to enhance understanding. In-depth ethnography can help de-mystify this profession and make it more human and accessible for outsiders, an increasingly important issue for democratic institutions which face a disillusioned and apathetic electorate who feel distant from their representatives; whilst simultaneously the EP has more influence over legislation which increasingly touches their lives.

This descriptive paper has explored how individual MEPs practise politics inside the EP by exploring the organisation of daily political life from an MEP's Brussels office. It has explored their daily activities, organisation of time, how they handle multiple roles, and where they obtain information from, in the everyday practice of EP politics. Throughout it has demonstrated that ethnography can play a key role in the endeavour to open up this institutional black-box and enhance our understanding of this profession in response to Wodak's call (2009) for academics to open up the political field and explore politics as usual. The principal aim of (organisational) ethnography is 'to uncover and explicate the ways in which people in particular work settings come to understand, account for, take action, and otherwise manage their day-to-day situation' (Van Maanen in Rosen 1991: 12). The paper has begun to address the gap in the literature by presenting data from intensive fieldwork on three inter-related areas which have built the argument of this paper. The daily work environment MEPs face is characterised by shortage of time, constant travelling, information overload, technical issues, and bureaucracy. MEPs employ particular strategies to navigate and pursue their aims successfully within this (work) context: specialisation, filtering, employing assistants, and information management. In particular, they rely on trusted assistants and NPD and group colleagues for information to practise EP politics successfully. These descriptions of mundane aspects of daily political life illuminate similarities with everyday life in other professional fields and workplaces and make the strange familiar. This paper has suggested that these findings can help to demystify this profession and that, if disseminated, they can help alleviate the democratic deficit by beginning to close the gap between politicians and citizens. This is the wider contribution this paper makes. To the EP literature, it contributes by beginning to provide a deeper, more nuanced, and more holistic understanding of individual-level MEP behaviour inside this institutional space.

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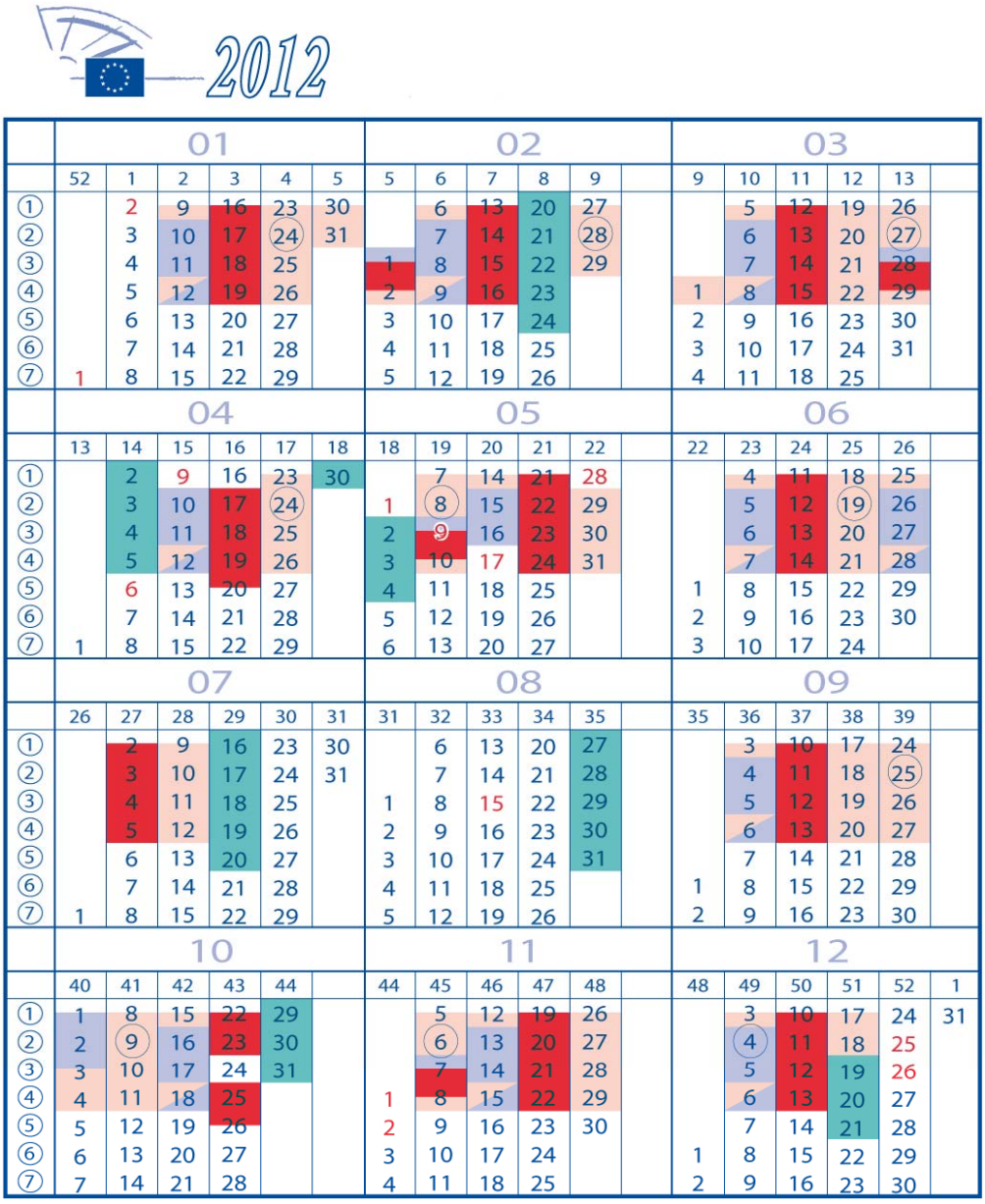
[1] 48 assistants and interns responded from across 20 nationalities and 7 groups.

APPENDIX 1: 2010 EP CALENDAR



Неделя / Domingo / Neděle / Søndag / Sonntag / pühapäev / Κυριακή / Sunday / Dimanche / Domhnach / Domenica / svētdiena / sekmadienis / Vasárnap / Il-Ħadd / Zondag / Niedziela / Domingo / duminică / nedeľa / nedelja / Sunnuntai / söndag

Сесия / Sesión / Zasedání / Session / Plenarsitzung / Istungjärk / Σύνοδος / Session / Session / Seisiún / Sessione / Sesija / Sesija / Ülés / Sesjoni / Zitting / Posiedzenie / Sessão / Sesiune / Zasadnutie / Zasedanje / Istunto / Sammanträdesperiod

Комисии / Comisiones / Výbory / Udvalg / Ausschüsse / Komiteed / Επιτροπές / Committees / Commissions / Coistí / Commissioni / Komitejas / Komisijos / Bizottságok / Kumitati / Commissies / Komisje / Comissões / Comisii / Výbory / Odbori / Valiokunnat / Utskott

Групи / Grupos / Skupiny / Grupper / Fraktionen / Fraktsioonid / Ομάδες / Groups / Groupes / Grúpaí / Gruppi / Politiskās grupas / Grupės / Képviselőcsoportok / Gruppi / Fracties / Grupy / Grupos / Grupuri / Skupiny / Skupine / Ryhmät / Grupper

Външни парламентарни дейности — седмици за работа в избирателните райони / Actividades parlamentarias exteriores — semanas de circunscripción / Vnější parlamentní činnost — týdny vyhrazené pro volební obvody / Ekstern parlamentarisk virksomhed - valgkredsuger / Externe parlamentarische Aktivitäten - Wahlkreiswochen / Väljaspool parlamendi töökohta toimuv tegevus — töönädalad valijatega / Εξωτερικές κοινοβουλευτικές δραστηριότητες - εβδομάδες εκλογικής περιφέρειας / External parliamentary activities-constituency weeks / Activités parlementaires extérieures-semaines de circonscription / Gníomhaíochtaí parlaiminteacha seachtracha - seachtainí toghlaigh / Attività parlamentari esterne - settimane di collegio elettorale / Parlamenta ārējie pasākumi — nedēļas, kad deputāti tiekas ar vēlētājiem / Išorinė Parlamento veikla. Susitikimų su rinkėjais savaitės / Külső parlamenti tevékenységek — választókerületi hetek / Attività parlamentari esterni - ġimgħat tal-kostitwenza / Externe parlementaire activiteiten - achterbanweken / Zewnętrzne działania parlamentarne — tygodnie pracy w okręgach wyborczych / Actividades parlamentares externas — Semanas de circunscrição / Activităţi parlamentare exterioare — săptămâni de circumscripţie / Vonkajšie parlamentné činnosti — týždne vo volebných obvodoch / Zunanje parlamentarne dejavnosti — tedni v volilni enoti / Toiminta parlamentin ulkopuolella — vaalipiiriviikot / Externt parlamentariskt arbete — valkretsveckor

Помирителен комитет / Comité de Conciliación / Smírčí výbor / Forligsudvalget / Vermittlungsausschuss / Lepituskomitee / Επιτροπή συνδιαλλαγής / Conciliation Committee / Comité de Conciliation / Coiste Idir-réitigh / Comitato di conciliazione / Samierināšanas komiteja / Taikinimo komitetas / Egyeztető Bizottság / Kumitat ta' Konċiljazzjoni / bemiddelingscomité / Komisja Pojednawcza / Comité de conciliação / Comitet de conciliere / Zmierovací výbor / Posredovalni odbor / Sovittelukomitea / Förlikningskommitté

APPENDIX 2: MORNING POST

July Post

1. A magazine on how the EP has banned seal imports from Canada.
2. A dinner invitation from an inter-group with a discussion on the single market in the twenty-first century and how to make it greener and more efficient.
3. A CV from a graduate asking for an internship.
4. A reply from a group colleague to a request for information.
5. A regular circular from a Commission DG.
6. A pro-fur leaflet.
7. An information sheet on exiled Iranians who protested about human rights and an invitation to a rally.
8. An academic survey.
9. An advert to sign a Written Declaration on stopping the building of a nuclear power station affecting another EU member state.
10. A pamphlet on stopping smacking children and a sticker to wear for the awareness day.
11. Bulletin magazine from the former MEPs association.
12. Invitations to EP events on: Turkish accession, how football can change lives, drugs and international terrorism, women in business and human rights, climate change, how copper is important to everyone.
13. A report from an NGO on poverty in selected countries.
14. A local farmers magazine.

September post

1. New Europe.
2. European Voice.
3. Euroview magazine - the magazine of European business in Taiwan.
4. EU baroque orchestra newsletter.
5. Eurogroup for Animals newsletter.
6. Letter from a computer science research institute about their activities.
7. Response from a Commissioner about a constituency letter.
8. Second Response from a Commissioner about a constituency letter.
9. Thank you from a Commissioner about a constituency visit.
10. Three standard letters from constituents (via an interest group) on the banning of battery cages for hens.
11. Standard letter from an interest group asking us to write to the Commission on their behalf.
12. Moroccan High Commission for planning - a magazine on human development in an emerging country.
13. University of Munich, economic research institute letter.
14. Magazine - independent review on European security and defence.

15. Newsletter from Malabo (Equatorial Guinea).
16. National Democratic Institute - 25 years newsletter.
17. Most - quarterly bulletin of the Slovenian business and research association.
18. Food Today - European food information Council newsletter.
19. ERA (Europaische rechtsakademie, Academy of European Law) - invite and registration form for annual conference on European food law.
20. Advert from an MEP – asking to sign written declaration on reducing trans fatty acids in food to two per cent.
21. Human Rights Watch magazine - India focus.
22. Response from a Commissioner about a constituency letter.
23. Leaflet - from Advisory committee on fisheries and aquaculture - a body for dialogue with the fishing industry.
24. Invitations: concert to celebrate a state's independence, 'Energy Efficiency - smart metering / smart grids', Bavarian representation dinner roundtable, London Olympics committee event invitation.

APPENDIX 3: EMAIL COUNTS (3 WEDNESDAYS IN JUNE 2010)

	Plenary week	Group week	Committee week	Average
TOTAL	**262**	**181**	**138**	**193.7**
Event invitations	34	52	32	39.3
Interest groups (lobbies, NGOs, research groups - policy briefings, press releases, newsletters and requests)	26	33	18	25.7
Written Declarations	44	2	0	15.3
Political Group	23	11	10	14.7
Committee/delegation related	12	11	21	14.7
National party delegation	21	10	12	14.3
Personal Interests	19	10	7	12.0
EP internal - press and notices, quaestors, library	19	7	9	11.7
Internal Brussels office (including travel arrangements)	15	11	6	10.7
Junk emails	10	8	7	8.3
Inter-groups	9	7	1	5.7
Standard issues emails (from individuals via interest groups)	6	3	6	5.0
Constituency issues and visits	7	3	3	4.3
National party	6	2	3	3.7
National EP office and permanent representation	2	6	2	3.3
Housing adverts	3	3	0	2.0
Letters signing requests	3	2	0	1.7
National media	2	1	0	1.0
Council & Commission	1	1	1	1.0
Europarty	1	0	0	0.3
Other political groups	1	0	0	0.3

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Introduction: Privacy and Surveillance Policy in a Comparative Perspective

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Introduction

While the history of European and international regulation of surveillance can be dated back to the early 1970s, in recent years we have witnessed the field achieve a central position both in terms of European policy circles, as well as in academic research. Four interrelated factors have functioned as conduits for the development of a distinct policy field with specially designated regulatory mechanisms, policy communities of experts, decision-makers and advocates, and not at least discourses that constitute both the regulative and cognitive policy frames.

First, the evolution, and convergence, of new Information- and communication technologies (ICTs) from the 1960s and onwards, has provided governments, private industry and individuals with unprecedented possibilities to retrieve, gather, process and distribute personal data and information thereby causing a constant monitoring of us as individuals (Zuboff, 1988). While the advent of the Internet has become the essential symbol of this account, one should take into consideration that there is more to it than just the graphic interface of the World Wide Web. Second, the past twenty to thirty years of trade integration in the world, or so-called 'globalisation', has necessitated transnational regulation in a number of areas including issues regarding the privacy of personal information. This process has resulted not only in the convergence of privacy regulations (such as within Europe, and between Europe and other states), but has been the vehicle for trade conflicts between different privacy regulation cultures (such as in the trade disputes between the US and the EU) (Bennett and Raab, 1997; Long and Quek, 2002; Kobrin, 2004). Third, privacy, understood as both an individual and a social value, has increasingly become incorporated in the list of international human rights established by organizations such as, for example, the UN, OECD, and the ECJ. The promotion of privacy as a universal human right has affected both international and international regulation in a number of areas such as bioethics, security, data protection and copyright protection. Finally, the 9/11 events, and the envisaged threats of global terrorism have resulted in massive investments in security technologies and measures around the world of which the vast majority (by default) impose some kind of privacy intrusion (Argomaniz, 2009). Consequently, there is a constant debate on how to balance alleged demands for further security measures in society with privacy considerations (Posner and Vermeule, 2007). This development has led several voices to talk about the emergence of a 'surveillance society' which means not only pervasive monitoring, but also a situation where surveillance becomes socially accepted, and citizens willingly treated as surveillance subjects (Lyon, 2001).

This development in policy-making has evoked an interest in interdisciplinary studies of surveillance and privacy; in the particular the social effects of constant surveillance. The study of the regulation of surveillance is in this context an important sub-field composed of academics from, in particular, law studies, criminology, sociology and political science.

The aim of this special section is to provide space for comparative European studies of the regulation of privacy and surveillance, otherwise lacking within existing literature in the field. Many of the current national case-studies describing the present legal situation might be of value to a more practitioner-oriented audience (e.g. those business communities who take an interest in the regulation of cross-national e-business, or the security industry), but are of little, if any, interest to students of public policy. The ambition of generating comparative studies also entails the need to bring the surveillance regulation academic discussion out of its isolated disciplinary niche-position (some have even called it a 'ghetto') where it has resided for many years now, and integrate it within a broader academic public policy and regulation debate.

The works presented in this special section are to a large extent the joint product of working group four (Public policy and regulation of surveillance) under the European Cost Action IS0807: *Living in Surveillance Societies* (LiSS). The articles constituting this

special section evidence the utility of a comparative analytical approach within the study of privacy and surveillance regulation, focusing on issues including: privacy impact assessments; governance of the Internet and blocking procedures; and, surveillance by intelligence agencies.

In their article 'Mediating Surveillance: The developing Landscape of European Online Copyright Enforcement', Jon Bright and José R. Agustina show how the attempt to regulate online life can be characterised as the 'mediation' of surveillance. As Bright and Agustina critique, surveillance has been understood as 'a two actor relationship' ignoring the role and influence of actors who mediate surveillance. Bright and Agustina develop the concept of mediation in surveillance through a case study of the UK, France, Spain and Italy. Their comparative research shows a wide range of actors involved in the control of the Internet, and diverse national contexts and regulation.

The topic of regulation and control of the Internet is further explored within the contribution by Katalin Parti and Luisa Marin's contribution, titled 'Ensuring Freedoms and Protecting Rights in the Governance of the Internet: A Comparative Analysis on Blocking Measures and Internet Providers' Removal of Illegal Internet Content'. By a comparative study of Germany and Hungary, they analyse the strengths and shortcomings in measures for 'cleansing' the Internet of illegal and harmful content such as child pornography. Two central findings become apparent in both the contribution by Parti and Marin and that by Bright and Agustina: 1) the involvement of non-state actors, and, 2) the interdependence between private actors who execute the blocking of online content and the state that provides regulatory and financial support.

The challenge of regulation and surveillance is elaborated through the comparative study by David Wright, Rachel Finn and Rowena Rodrigues, 'A Comparative Analysis of PIA in Six Countries'. Privacy impact assessments (PIA) are one of the new features in the proposed European Data Protection Regulation (European Commission, 2012), intended to balance the need for surveillance against the intrusion of privacy and other potential costs resulting from that surveillance. By comparing existing PIA policies in six Anglo-American countries (Australia, Canada, Ireland, New Zeeland, the UK and US) they are equipped to critically assess PIA methodology and policies, and are able to identify best practice elements that can be used to improve Article 33 in the proposed Data Protection Regulation.

The theme of weighing such conflicting interests - i.e. surveillance versus privacy – joins all the articles in this special section. Wright, Finn and Rodrigues analyse, in a European context, a new methodology for balancing, while Bright and Agustina as well as Parti and Marin focus upon a new area of regulation. A broader historical perspective is brought to the special section through the article by Aleš Završnik, 'Blurring the Line between Law Enforcement and Intelligence: Sharpening the Gaze of Surveillance?'. Comparing the US and Slovenia, Završnik traces the 'erosion of boundaries between police and intelligence agencies' up to the present and its consequences for the privacy-surveillance nexus. All contributors to this special section include within their comparative analysis a series of recommendations towards how policy makers and other relevant actors can balance conflicting interests in the highly charged politics of surveillance and privacy.

* * *

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Mediating Surveillance: The Developing Landscape of European Online Copyright Enforcement

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Abstract

After a period of relative laissez faire, governments around the world are beginning to attempt to regulate online life, for a variety of reasons, through various mechanisms of surveillance and control. The drive to enforce the respect of copyright is at the forefront of these attempts, a highly controversial topic which pits proponents of the rights of the creative industry against advocates of freedom of speech. Apart from their inflammatory nature, one distinguishing characteristic of most of these schemes is that they are *mediated*: that is, they are conducted with the help of third parties, most often internet service providers. The mediation of surveillance is something as yet relatively underexplored by the field of surveillance studies, whose theoretical tools are by and large focussed on a two way relationship between watcher and watched. This article seeks to remedy this deficit, by examining the dynamics of mediation in the context of online copyright enforcement. We argue that, far from being a neutral process, the displacement of surveillance to third parties has a crucial impact on the way in which it is conducted. In particular, the expanding capacity of mediators becomes a reason for justifying surveillance in and of itself.

Keywords

Copyright; Information society; Internet

The study of surveillance, whilst taking in a huge variety of situations and practices, most frequently concerns some sort of relationship between watcher and watched. This conceptualisation of surveillance as a two actor relationship, while clearly of use in many situations, nevertheless has the potential to exclude other parties who play an important role in structuring social control. As Aaron Martin et al. argue:

> 'Traditional ways of understanding surveillance, by focussing on the increasing capabilities of the surveyors and the expansion of surveillance to include previously exempt groups, reinforce the conception that surveillance is a party for two: an exclusive relationship between the surveyor and her subjects. Looking at the world this way not only ignores some of the actors who resist surveillance, but also excludes the assemblages that conduct the surveillance.' (2009: 215)

The surveillance of online space is a case in point. Like the technology of the internet itself, regimes of control online work not through a two way relationship between watcher and watched, but by distributing functions to a heterogeneous network of actors. These actors, of which the internet service provider is the most obvious example, may have little interest in pursuing a particular surveillance function; yet legislation, court decisions, and regimes of liability can nevertheless compel them to do so. The mediation of surveillance online is more than simple delegation, from a superior to a subordinate: it is a type of *deputization*, a (perhaps unwilling) co-option of private actors into the aims of the surveillance system (Michaels 2010). This mediation is something which as yet remains under-theorized and underexplored in literature on surveillance studies.

This article explores the mediation of surveillance online, placing particular focus on the enforcement of online copyrights in Europe. It aims to make two major contributions to the literature. In the first section, it seeks to define theoretically the concept of mediation, relating it to a broader literature on the notion of the surveillant 'assemblage'. The key characteristics of surveillance mediation are explored, and several expectations about mediation are advanced. Secondly, it provides a comparative overview of legislation relating to online copyright in four European countries (the UK,

France, Spain and Italy). This empirical material allows us to better flesh out how the concept of mediation works in practice.

MEDIATION SURVEILLANCE: THEORETICAL REFLECTIONS

David Lyon, perhaps the leading author in the field or surveillance studies, defines surveillance as 'focused, systematic and routine attention to personal details for the purposes of influence, management, protection or direction (2007: 14). This is, as Lyon intends, is a broad definition: a wide range of human activity in a diverse set of fields could therefore be said to constitute some kind of surveillance (Lyon 2007: 25-45). Much early work on surveillance studies focussed on large public institutions such as schools, prisons and the military created during the broader construction of the modern Nation State (see, inter alia, Dandeker 1990, Giddens 1987). This work emphasised the important role such institutions played in the construction of identity, a concept which was perhaps most fully expressed through Michel Foucault's reading of Jeremy Bentham's "panopticon" (1975), which described a centralized, all embracing institution which completely defines those within its gaze ("soul training" as Haggerty and Ericson call it – 2000: 615). Also, more importantly for our purposes, it presented surveillance as a generally two way relationship: between surveillant institution and surveilled subject.

More recent literature has started to broaden the focus of surveillance studies, to look not only at state based forms of social control but also private institutions and different forms of public-private partnerships. As the focus of the field has shifted, the usefulness of the panopticon (and other concepts based around it) started to come into question (see Haggerty and Ericson 2000, Haggerty 2006). Newer types of surveillance (such as customer tracking schemes or the cookies installed by many websites) seemed to have aims much more mundane than 'soul training', while the networked nature of contemporary surveillance appears at odds with the description of one overarching institution.

In response to this apparent need, drawing on the work of Gilles Deleuze and Félix Guattari (1980), Kevin Haggerty and Richard Ericson developed the concept of the "surveillant assemblage" to help better describe this new turn in surveillance studies (while David Lyon has also made some remarks in the area, see Lyon 2007: 111-115). Deleuze and Guattari's more general concept of "assemblage"[1] is inspired by their reflections on the "rhizome", a type of plant which connects a variety of apparently separate shoots through an underground root system. Haggerty and Ericson regard contemporary surveillance as rhizomatic because apparently separate systems can nevertheless be joined, and work together, even in the absence of a centralized driving logic. An assemblage is decentralized, constantly shifting, and animated only by a range of temporary "desires" (Haggerty and Ericson 2000: 609), which are loose imperatives to organise and control information rather than affect changes in personality.

The assemblage is important for surveillance studies because it permits a change of focus, away from watcher and watched towards connections between surveillance system: what causes them to develop, and how different types of connections might have different types of effects. It permits, in other words, the study of multi-actor surveillance networks, breaking out of the traditional two way paradigm. However, while the term assemblage is by now also 'a conceptual benchmark in the surveillance literature' (Hier 2003: 400), its potential as a concept has remained mostly underexplored: there has been little literature dedicated to fleshing out the mechanics through which assemblages work, nor what type of expectations the appearance of an assemblage should generate.

In this article, we explore one crucial aspect of the surveillant assemblage: the fact that some or all of the work of surveillance is distributed onto a variety of different actors, which we call "mediation". We define the mediation of surveillance as occurring when some or all of the "activity" of surveillance defined by Lyon is conducted by agents outside of the direct control of the surveillance institution. For example, banks act as agents of surveillance when they check the transactions of their customers for financial fraud (Bergström et al. 2011). Airlines act as agents when they enforce the visa regulations of countries that they are flying to (Guiraudon 2003). And, in our area of focus, internet service providers act as agents when they are called upon to both carry out surveillance and sometimes even control the activities of their customers. This mediation is crucial to the assemblage as a whole (without it, no systems would "assemble").

We advance three major hypotheses about the mediation of surveillance. Firstly, we expect it to occur in situations where institutions conducting surveillance have incomplete power or information. While they might have the ability to successfully deputise other social actors into their surveillance system, they are unable (for financial, technical, legal or other reasons) to carry out the surveillance themselves. Mediation, in this reading, is a sub-optimal solution for a surveillance system, even if it might be financially or practically more viable. For example, Michaels notes how in the US, in the climate following 9/11, delivery companies were encourage to report suspicious behaviour in any of the premises they visited (Michaels 2010). The security services were interested in these companies because they had a kind of access to individual homes and dwellings which it would be impossible for the police to duplicate without a warrant. This contradicts somewhat the description of the assemblage which Haggerty and Ericson advance: for them, assemblages are indicative of the increasing power and spread of surveillance institutions (they see the development of a 'monumental tide of surveillance which washes over us all' - Haggerty and Ericson 2000: 609).

Secondly, we expect a significant degree of coercion to be required in the mediation of surveillance. Though Haggerty and Ericson theorise assemblages whose constituent parts cooperate to mutual benefit, in our reading mediators of surveillance rarely have an outright incentive to pass on information. Banks, for instance, have to go to significant time and expense to check their customers are not conducting financial fraud. The only way to persuade them to do so is to impose heavy regimes of liability, backed up by checks and financial sanctions. Finally, we expect the mediation of surveillance through third parties to have significant consequences for the effectiveness through which it is carried out, the opportunities that those who are "surveilled" have to resist the system, and the overall outcomes of the institution. Mediating surveillance, in other words, may create new opportunities for both watcher and watched. This is something which the literature has so far left underexplored.

In this article, we aim to explore these expectations through the example of online copyright enforcement in Europe. The internet as an environment presents an excellent opportunity to explore mediation because it represents a peculiar regulatory challenge for national governments. Its transnational nature challenges laws and regulations based around national political systems. Its design means that its users are relatively anonymous, or at least very complicated to identify from a legal point of view. Finally, its constantly evolving technology challenges attempts to create workable governance solutions, which will often be out of date even before they are brought into law.

Because of this challenge, we argue, governments are especially likely to resort to mediation. The major actor which is called upon to mediate surveillance online is the internet service provider [ISP]. ISPs are uniquely placed to observe the actions of their users. As Paul Ohm puts it:

> 'Because the ISP is the gateway—the first hop—to the Internet, almost any communication sent to anybody online is accessible first by the ISP. Like the

> naked eye, ISPs can view our online activity across the Internet landscape, seeing everything we do regardless of destination or application. In fact, no other online entity can watch every one of a user's activities, making the ISP's viewpoint uniquely broad.' (2009: 1438)

ISPs are also uniquely positioned to help other actors observe the actions of internet users. When a connection is made to a website, for instance, all the website sees is an IP address. This IP address cannot straightforwardly be connected to a particular individual[2]. IP addresses can, however, be connected to the person or institution which allocates the IP address. These institutions, which are most often ISPs, are allocated chunks of IP addresses by regional "internet registries", which themselves receive them from the Internet Corporation for Assigned Names and Numbers [ICANN], the private organisation dedicated to allocating IP addresses (for an overview see Muller 2008: 4-6). Upon request, the ISP in question should be able to connect a given IP address with a particular account holder. In other words, ISPs occupy a special position in internet architecture. In Jon Zittrain's words, they represent natural "points of control" of content produced online (2003).

Contemporary governments are currently pursuing a wide variety of policy initiatives aimed at regulating certain aspects of online life, and thus reducing certain types of harmful activity such as distribution of terrorist material, incitement to religious hatred, the sale of extreme or child pornography and the violation of copyright and intellectual property rights. In this article, we choose to focus on the last aspect, largely because legal regimes surrounding the protection of copyright online are probably the most well developed, and hence provide more material for investigation and comparison.

We pursue a comparative analysis of four different countries (the UK, France, Italy and Spain). A comparative analysis is helpful in this instance because of the diversity of European approaches to the regulation of copyright enforcement. Looking at the mediation of surveillance in different contexts will allow us to highlight general characteristics relevant to the theory of assemblage in a way that a single case study would not. We chose to focus on these four countries in particular for several reasons. Firstly, they present a range of different stances on copyright enforcement, ranging from the more punitive approaches of the UK and France to the relatively lax stance adopted in Italy and Spain. Secondly, they have a variety of different legal systems and cultures, from the common law of the UK to the civil law of the three continental countries. Finally, they have diverse approaches to the question of digital "civil liberties": in particular, they have data protection authorities of diverging strengths.

Before turning to our case studies, we will provide a brief overview of the legislative situation at the European level, which forms the background context for all our four cases. As Ohm argues, up until now ISPs have made relatively little use of their position as an unrivalled internet "point of control" (2009)[3]. Indeed, for the most part, their eyes have remained shut to the activities carried out by their customers. One important reason for this, in Europe, is that the potential liability of ISPs (and other intermediaries) for crimes committed by users of their services was curtailed significantly by the European Electronic Commerce Directive [ECD] (Directive 2000/31/EC), adopted in the year 2000 and since then transposed into law in Member States (see Pearce and Platten 2000). This piece of legislation aimed to harmonise certain rules on ISP liability, following several court cases in EU Member States (Pearce and Platten 2000: 372). In particular, it aimed to establish a common minimum standard of protection for ISPs, which Member States could widen if they wished to, but not go below (Stalla-Bourdillon 2011: 52). It did so by establishing specific exemptions, also called "safe harbour provisions", for third party content which ISPs cache, host or transmit (Peguera 2010: 151). The directive also specifically forbade Member States from introducing legislation which required those transmitting content to systematically keep it under surveillance. This directive reinforces the absence of surveillance in online space in Europe. It creates a situation where an ISP has little to gain[4], and potentially much to lose, by knowing

what is transmitted over or hosted on its networks (for a discussion see Bodard 2003: 268-269).

The ECD does not provide ISPs with the freedom to completely ignore illegal content. In particular, it does require those hosting such content (that is, storing it on their servers) to remove it expeditiously once they have "actual knowledge" of its presence, a so called "notice and takedown" procedure (Moore and Clayton 2009). Importantly, as Pablo Baistrocchi points out (2003: 124-125), it does not specify exactly how such a procedure might take place, leading to a diversity of opinions about what constitutes such knowledge (from a prior decision of a court to an email from a third party) and what format those wanting to provide such knowledge have to give it in (for example, can a rights holder email Youtube asking that all examples of its work be removed from its servers, or does it have to provide a specific link to each individual example of infringement? – see Peguera 2010). While little detailed research exists on the extent to which notice and takedown is used within Europe, studies which have taken place seem to suggest that ISPs act quickly to remove content simply on the basis of email notification, while conducting little checking of the veracity of the claims (see e.g. Nas 2004).

The existence of such procedures encourages those with an interest in the legality of internet content to engage in the active surveillance of the online environment (as Katyal, 2004, argues), looking for ISPs hosting illegal content, in order to ask them to remove it; and, in recent years, several pieces of legislation have attempted to extend this ability.[5] At the forefront of these efforts has been recent legislation aimed at combating copyright infringement, frequently referred to as "piracy". While all of this legislation differs, it also has one thing in common: the important position of the ISP in the production of surveillance and control. As Fanny Coudert and Evi Werkers put it, 'copyright societies are currently pushing for increased private enforcement of intellectual property rights on the Internet, in particular by trying to involve Internet Service Providers (ISPs) in their combat against copyright infringements' (2010: 50).

The EU continues to legislate in the area. However, in the absence of European wide agreement on what to do, many important decisions have been left to Nation States (for example, in 2008 the ECJ decided that there was no obligation for an ISP to disclose the IP addresses of its users under European law, but neither was it prohibited, passing the responsibility to Member States to decide – see Coudert and Werkers 2010: 51). This situation has led to considerable diversity within European States over the regulation of copyright online, making it an especially fertile area for comparative analysis. In the next four sections, we present an overview of the situation in our four countries of study, focussing on the most recent developments in legislation.

UK

We will begin with the situation in the United Kingdom. The Digital Economy Act, which became law in Britain in June 2010, contains two measures designed to restrict online copyright infringement (sections 3-18 of the act). Most controversial amongst these is the creation of "copyright infringement reports" [CIR], a tool which a rights holder can use to initiate a system of sanctions against individuals thought to be violating copyright. The precise mechanics of a CIR are set out by the "Initial Obligations Code", a set of rules to be created by Ofcom, the UK's independent regulator of the communications industry. At the time of writing this code was available in draft format only (see OFCOM 2011: 42-64), and had yet to be ratified by parliament, hence some of the details provided here may be subject to change. Nevertheless, the draft version provides a good idea of how the act could work in practice.

According to the wording of the act, if it appears to the copyright owner that a certain IP address has infringed on their copyright, they have the right to submit such a report to the internet service provider responsible for the IP address (OFCOM 2011: 45), who is then responsible for sending details of the report on to the person who holds the account (OFCOM 2011: 51-52). Rights holders are also allowed to request from ISPs aggregate "infringement lists" of those subscribers who have had at least three copyright infringement reports relating to their work (OFCOM 2011: 48), so as to pursue litigation against them. Furthermore, the Secretary of State may decide to impose "a technical obligation" on the ISP to limit the access of the internet subscriber in some way. This may include reducing the bandwidth available to the user (making downloads of large files like films impractical), preventing (or trying to prevent) peer-to-peer connections, or conducting more invasive surveillance of the user's account. Or it may simply involve suspension of the individual's internet access.

All these measures amount to increased incentives for copyright holders to monitor the behaviour of individuals using the internet as a means of watching or listening to copyrighted material (especially those connected to peer-to-peer networks). This incentive has not gone unnoticed: a recent study claimed that several companies were engaged in the en masse collection of information (particularly IP addresses) about those using peer-to-peer technology; many of which appeared not to be copyright holders per se, but rather private companies who might intend to sell this information on at a later date.

The Digital Economy Act also contained provisions for injunctions to be provided against specific locations on the internet (sections 17 and 18), which would have required service providers to prevent their subscribers from having access to these locations. Again, the motivation is copyright: the secretary of state can make provision for the injunction only when a court is satisfied that the website is facilitating access to "a substantial amount of copyright material", either by hosting it itself or, potentially, by linking to it. Even before these measures have been implemented, a UK High Court granted an order on behalf of the Motion Picture Association requiring British Telecom [BT], the largest British ISP in terms of subscriber numbers, to block access to "Newzbin2", a file sharing website, the first time such an order had been granted in the UK ([2011] EWHC 1981 (Ch)). This case turned on an argument about whether BT had "actual knowledge" that its subscribers were using its services to infringe copyrighted material, and thus could be served an injunction under the provisions of the information society directive (Directive 2001/29/EC). The judge determined that they did (Article 157 of the judgment). The ruling was widely viewed as potentially the first of many, as future injunctions claims are unlikely to be challenged (Ashford 2011). Also of importance was the fact that Newzbin2 was not hosted in the UK, making blocking the only sanction the MPA could realistically pursue in UK courts. BT already takes step to block some websites on the internet through an inbuilt filter called "cleanfeed", which had been developed to block websites suspected of containing child pornography, in collaboration with the "internet watch foundation", a non-profit organisation which encourages members of the public to submit links to potentially offending material (and thus itself an interesting example of public participation in online surveillance). Newzbin2 could in theory be added quite simply to this filter, something which proved important in the judgment. However, it is unclear whether BT will really be able to effectively block the site (see Clayton 2011), and, importantly, what the court will require them to do if they are not (Halliday 2011).

To what extent the provisions of the Digital Economy Act will be implemented remains to be seen, though despite legal challenges Ofcom appears set to press ahead. Nevertheless, several conclusions can be drawn for the more general topic of surveillance mediation. Firstly, we can see that surveillance of online copyright in the UK is essentially a four way relationship, between companies hosting potentially infringing material, companies providing internet access, individuals using that access and rights

holders themselves. The government is involved only to the extent that it sets the rules of the game in terms of what power rights holders have to oversee the use of their material. Secondly, we can see that the decision about where to locate the surveillance (with the ISP) depends crucially on what knowledge they have; something which is fiercely debated in court. Thirdly, as Aaron Martin (et al. 2009) speculated, the inclusion of mediators serves to increase potential points of resistance to surveillance, demonstrated by continuing legal challenges to both the DEA and other types of internet blocking.

FRANCE

We will now turn our attention to France, where, in 2009, a new administrative authority was created: the *Haute Autorité pour la Diffusion des Oeuvres et la Protection des droits sur l'Internet* [HADOPI] ("High authority for the distribution of creative work and the protection of copyrights on the internet")[6]. Hadopi aims to combat illegal file sharing through a system of surveillance of peer-to-peer traffic, supplemented by a system of sanctions known as a "graduated response" (Meyer and Van Audenhove 2010; Dejean et al. 2010)[7]. The HADOPI body itself acts as a coordinator of the sanctions. Online copyright holders are allowed to send in reports of apparent copyright infringement to HADOPI, which checks that these reports contain sufficient information to warrant a response. If so, the body sends a series of letters to the person who owns the connection suspected of infringing. Two warning letters are sent; upon receipt of a third complaint, the case is sent to a judge[8], who decides if there is sufficient evidence to warrant suspension of the internet account.

While in theory a variety of methods are available to rights holders who wish to look for online infringements, in practice the majority of infringement reports are sent by Trident Media Guard [TMG], a private company contracted by music industry rights holders in France. TMG conducts surveillance on peer-to-peer networks on the basis of a library of 10,000 different pieces of music (which is updated periodically), and sends infractions on to HADOPI (Rees 2010e). Up to 25,000 submissions per day are allowed, while TMG also retains this information for use in potential prosecutions (Rees 2010a).

The law was very recently introduced, so it is too early to say with any great certainty how effective it will be. Preliminary evidence is mixed. HADOPI themselves conduct online polling to try and establish their own impact, and their most recent survey (HADOPI 2011) seemed to indicate some success: 41 per cent of those asked indicating that the law had compelled them to change the way they gain access to copyright material online. However, a survey conducted by Sylvain Dejean et al. (2010), seemed to suggest that many users may simply be switching to other methods of illegal viewing, rather than purchasing content lawfully. This highlights once again the important impact that changes in technology can have undermining systems of surveillance.

The HADOPI law is interesting for the mediation of surveillance for several reasons. Firstly, it recognises the fact that, even with the help of an ISP, an IP address may be difficult to securely connect to an individual person: an internet contract holder might possess more than one IP address (for example, a home wifi network might have several different computers connected to it), more than one computer might use the same IP address, and more than one person might use the same computer. As we expected in other words, mediation of surveillance occurs when the surveillant institution (in this case rights holders) have limited information. However, it transforms this previously anonymising characteristic of the internet into a way of deciding where to place surveillance: with the holder of the internet account. As the law puts it, it is the subscriber's obligation to secure their internet access, and to make sure it is not used for illegal downloads[9]. Hence here in fact it is not so much the ISP but the individual subject who is employed as the mediator of the mechanism of surveillance.

Secondly, the system of graduated response develops a new regime of sanctions. The warning letter to the subscriber serves to remove any sense of perceived anonymity online: upon receipt, the user will become aware that at least some of their actions are being monitored. This is designed to lead them to modify their own behaviour, either by changing their own online activities or monitoring the activities of others who use their internet connection. The warning letter also contains information about security measures the subscriber can take in order to obstruct illegal downloads, such as the installation of various types of security software. If repeated infractions are discovered, the law allows the complete suspension of a user's internet access for a period of up to a year; but this suspension may be reduced or even eliminated, if the user accepts the installation of security software. Sanctions therefore become a mechanism of ensuring the participation of mediators (while the aim of modifying user behaviour invites comparisons with the "panopticon" style of surveillance mentioned above).

Thirdly, in contrast to the UK, it is important to note the central place of the HADOPI body in the surveillance system, acting as a clearing house for infringement reports. HADOPI has been designed to accept automatic submissions of infringing IP addresses, which presents the first genuine opportunity to enforce copyright through the *en masse* sanctioning of individuals. In late 2010, HADOPI was sending several hundred warning emails per day, though it aimed to raise that number to 2,000 by the end of the year (Rees, 2010f). While, as Nicola Lucchi points out, 'this is much lower than the number of illegal downloads actually committed', and certainly lower than the number of complaints it was receiving from TMG, it still represents an astonishingly high figure (Lucchi 2011: 25). TMG have since confirmed that the IP addresses sent will not be checked individually by a human operator: the system, in other words, is entirely automatic from complaint to sanction (Champeau 2010b).

ITALY

We will now turn our attention to the case of Italy. In March 2010, the so called "Decreto Romani", named after the Minister for Economic Development Paolo Romani, was approved by the Council of Ministers (Apa and Besemer 2010). The decree made a series of modifications to Italy's media law (the *"Testo Unico dei servizi di media audiovisivi e radiofonici"*). One of the most important of these was the attribution of responsibility for regulating copyright online to the *"Autorità per le Garanzie nelle Comunicazioni"* [AGCOM], Italy's national communications regulator.[10]

On the 6th of July 2011, AGCOM approved a draft regulation (668-10), which it opened to public consultation before the final text, in November 2011 (Scorza 2011). The regulation itself has two main parts. The first deals with a series of measures designed to help stimulate the legal market for online media. The second, of more interest to the present discussion, sets out a range of sanctions designed to combat copyright theft. Unlike the Hadopi law and the Digital Economy Act, the AGCOM regulation deals only with internet service providers, and targets especially those hosting content. It provides a two stage procedure for those who suspect their copyright has been infringed upon (AGCOM, 2011), though it should be noted that wide exceptions are provided for educational, scientific and not for profit use.

In the first place, the rights holder can submit a report to the host provider of the website, detailing the sites which are alleged to have infringed upon copyright (the format for which is set out in AGCOM 2011: 15). If the host does not agree the material infringes, or otherwise fails to remove the content, the matter can be passed to AGCOM, which has ten days to undertake a process of deliberation. After this time, the authority will either order the removal of the material, or its reinstatement. The website host is liable to pay a heavy fine if they do not comply with the results of the order. If the host is outside of Italy, AGCOM will send several messages asking them to remove the

content; if this is unsuccessful, they will refer the matter to the courts. Whether the site is foreign or not, AGCOM will also have the power to request internet service providers to block access to specific sites which are deemed infringing (Article 14 and 15; Boresa 2011).

In many respects, the AGCOM regulation does little more than formalise the notice and takedown procedure which was partially created by the ECD. In particular, the aim was to make this procedure effective, as before even if it did theoretically exist there was little possibility of effective enforcement. This absence of functioning notice and takedown procedure was a major contributing factor in Italy's inclusion on the US Trade Office's "Watch List" of countries with, in their opinion, deficient intellectual property regimes, something which itself seems to have been a motivation behind the AGCOM regulation (AGCOM 2011: 38). The AGCOM case highlights a further aspect of the mediation of surveillance: how the mediator may have much less incentive to resist surveillance than the individual. The ISP must take responsibility for the content it hosts, paying fines if it does not remove it expeditiously, and facing legal battles to keep content online.

As Marco Pierani and Mauro Vergari note, ISPs will have little incentive to contest requests received to remove material, as it was not theirs originally (2010: 62-63). While the person who uploaded the content might conceivably wish to complain, the hoster is not under any obligation to inform them that the process is going on, making it likely that any request will be automatically complied with. Unlike in France and the UK therefore, the mediation of surveillance here, somewhat paradoxically, removes the subject of surveillance (that is the person uploading the content) almost entirely from the equation. This serves to reverse the position of knowledge of copyright infringement quite radically. Rather than a situation where absolute knowledge is required of an infringement, something which ISPs were hardly likely to obtain, the slightest suspicion could become grounds for the removal of content. Clearly, as in France, if the potential volume of requests approaches that seen in France (with TMG sending 25,000 requests per day, albeit in the context of peer to peer sharing rather than hosting), it is possible that ISPs will not even have time to confirm their *prima facie* veracity, let alone contest ones that do not appear credible. Here the system may tend towards full automisation.

However, also of interest in this context are related legal judgments in the area. Of particular relevance is the Peppermint case (AGCOM 2011: 13; Caso 2007). In this case, a private company acting on behalf of Peppermint records collected the IP addresses of several thousand users of peer-to-peer networks; Peppermint records went to court to seek the names of those users. The court established that the ISP could not provide them. Furthermore, the Italian Data Protection authority established that the very act of collecting the IP addresses was illegal, as there were no grounds providing for it in the Italian Data Protection Act (Coudert and Werkers 2010: 60). In contrast to the UK and France, therefore, Italy erects a specific barrier to the prosecution of individuals in the online environment, creating a natural obscurity which hides their identities (something which is another factor in Italy's continuing presence on the US Trade Office Watch list), and also limiting the likely involvement of third party companies such as Trident Media Guard.

SPAIN

The recent approval of the Sustainable Economy Law has introduced significant changes in the methods through which copyright infractions are combated in Spain. The relevant parts of this law, known as the *"Ley Sinde"* in reference to the Minister for Culture Ángeles González-Sinde who was responsible for its drafting, has generated an intense debate in both social and political spheres, promoted especially by associations of internet users in the defence of universal access to culture and freedom of expression.

Spain adopts a particularly permissive stance towards online file sharing, with wide exceptions for those who download content for private, non-commercial use. In fact, in its 2011 report, the US Congressional Anti-piracy Caucus placed the Iberian country among the top five countries worldwide with the most illegal downloads (the others being Canada, China, Russia and the Ukraine), arguing that illegal downloaders from peer-to-peer networks act with "near impunity" (CIAPC 2011: 4).

The Sinde Law was designed to alter this situation somewhat. However, it is not directed specifically towards consumers, rather, the principle target of the *Ley Sinde* are the intermediaries which facilitate the illegal download of content, in particular web pages which contain links to files for peer to peer download (Peguera 2010: 163). In this respect, the *Sinde* law has more in common with the *Decreto Romani* in Italy than the Hadopi or Digitial Economy laws in France and the UK, as it does not target individual users. However, the text of the *Ley Sinde*, whose precise functioning awaits further definition, is ambiguous. It allows the adoption of measures against service providers who act 'for profit, directly or indirectly, or who have caused or is susceptible to causing patrimonial damage'. So while in theory it is aimed only at web pages containing lists of links to pirated material, in practice this formulation could apply to a wide variety of services and situations.

The mechanism through which these websites are targeted is also similar to that of the *Decreto Romani*. The law aims to endow the Intellectual Property Commission, part of the Ministry of Culture, with the power to restrict the activities of these types of web pages, up to and including requiring their eventual closure. This administrative organ establishes in the first instance whether a website is indeed violating intellectual property rights. Following a heated debate, it was determined that the administrative body will not be able to order the takedown of the website without authorisation from a judge, as web pages are a type of media, which, following article 20.5 of the Spanish constitution, cannot be shut down without a court order (Peguera 2010: 164). However, the court themselves will not be able to assess the alleged copyright violation, but only confirm the constitutionality and proportionality of the measures proposed. Their inability to rule about the existence of the claimed infringement will, somewhat paradoxically, make it very difficult to confirm this proportionality.

Furthermore, current case law provides little legal basis for the act. Existing court decisions have consistently rejected the idea that the mere fact of creating a hyperlink could be an infraction of the Intellectual Property law, regardless of what type of page the link points to. In this way, as Miquel Peguera argues, the *Ley Sinde* appears like an administrative way of achieving something that the courts have been so far denying (Peguera 2010: 165). As the *Ley Sinde* has not reformed the underlying Intellectual Property Law upon which previous judicial decisions are based (by, for example, establishing clearly that linking constitutes an infringement, or creating the offence of contributory infringement seen in other jurisdictions) the *Sinde* Commission will conduct its work in the absence of a proper legal basis: in fact, they will be forced in a sense to ignore existing interpretations of the law made by the judicial system. Here we can see, in other words, that the creation of intermediaries not only creates points of responsibility and resistance, but can help to shift these points as well. The creation of the *Sinde* law was an attempt to deliberately bypass judicial control of copyright enforcement, or at least limit it to a procedural check rather than a substantial determination of the merits of an individual case.

ANALYSIS: THE EFFECTS OF MEDIATING SURVEILLANCE

A complex "assemblage" of actors are implicated in the control of the internet: private actors, internet service providers, autonomous regulators, as well as of course legislators and the judiciary. In Europe, this situation is further complicated by quite diverse

national contexts, with only weakly harmonised community law. While France and the UK have implemented a range of increasingly aggressive pieces of online surveillance technology, Italy and Spain have taken different approaches, with their courts especially limiting to a great extent what types of online activity can be controlled. Despite this variety of approaches, a few general conclusions can be drawn about the mediation of surveillance. In this section, we seek to draw these conclusions out.

The first conclusion relates to the selection of surveillance mediators. Surveillance is distributed onto the "points of control" which are perceived to be capable of achieving it. As we outlined above, ISPs are the most frequent mediator of online surveillance; but they are by no means the only one. Individual users are also being pressed into taking legal responsibility for the surveillance and protection of their own internet connections, at least in the UK and France, which is a way of getting round the difficulty of securely connecting an IP address to a particular person. This may place these users in the invidious position of having to regulate the activities of their friends and family members, who may also be using their connection. Meanwhile, rights holders themselves can also act as a point of control, exploiting the overall visibility of the internet to conduct surveillance of their own works; and they frequently have done, often through privately contracted firms. Differing national viewpoints on the practice exist, but where it is allowed, this "privatization" of copyright enforcement presents an enormous data gathering opportunity for private firms (Scorza 2008: 87), and also allows them to be somewhat selective in what rights they actually enforce; in the US at least they have tended towards tolerating many types of use (Katyal 2009). It is a tendency that also seems to risk disadvantaging smaller rights holders, who perhaps lack the capacity to effectively police their work (Meyer and Van Audenhove 2010: 77).

This distribution of responsibility points to the importance of the *capacity* of mediators to regulate surveillance, which is one of the crucial means through which such mediators are selected. Many ISPs have attempted to argue, as in the Newzbin case, they do not have the ability to conduct the surveillance being assigned to them as they are not in a position to know when content is infringing. ISPs can also argue that they do not have the financial capacity to fulfill their surveillance obligations, and many pieces of legislation refer to the need for the duties imposed on ISPs to be proportionate in terms of the effort required, or have (as in the example of OFCOM's code of conduct) restricted their obligations only to larger ISPs. The capacity of mediators, crucially, is not fixed. The way information flows online is mutable in a variety of ways; and the speed with which this changes can defy conventional regulation attempts. The displacement effect of online surveillance can be high, as the cost of changing to a different form of communication is quite low for users. So, as we noted in the French case, the rise of streaming media makes it less necessary for copyright infringers to use peer-to-peer technology, which erodes the utility of the Hadopi law. In the case of the DEA, meanwhile, the difficulty of blocking websites for any length of time was acknowledged, especially acute in, for example, the broadcast of live sports events. But it may also cut the other way: the changing makeup of service providers themselves could in fact increase both their capacity and even their incentives to control online users. As we noted in the Newzbin case, the pre-existence of a filter makes it easier for more websites to be added.

A second conclusion is that mediation of surveillance also implies the mediation of sanctions; and these sanctions can be inexact. Points of control are proxies for the subject of surveillance (Kreimer 2006), providing a sort of indirect and in many cases approximate access. As several commentators have noted, the potential suspension of internet access punishes all users of that account, even if only one of them had committed any infringement. The blocking of websites presents a similar problem: an IP address can encompass a website with both legal and illegal functions, or may well even encompass several websites. This approximation of access is something that can cut both ways. On the one hand, it seems likely that punishments handed down might be

too broad, unjustly falling on innocent victims. On the other, it also provides potential for infringing material to hide amongst the crowd, in a certain sense. In this respect, it is interesting to note the careful consideration made in the Newzbin case of whether any part of the site offered legal content; in the future, we may well see copyright infringing sites adding legal sections to their websites, in the hope of evading being blocked.

Finally, and perhaps most importantly, the distribution of surveillance onto mediators also serves, as Martin et al. have noted (2009), to distribute the possibilities for the resistance of that surveillance. By acting as a point of connection between rights holders, internet users and ISPs, administrative bodies can both regulate how surveillance is performed (by formalising notice and takedown procedures and thus guaranteeing rights) and facilitate its execution (by automating procedures to sanction individuals). ISPs themselves can, in certain circumstances, check individual claims made by rights holders against them, as in the notice and takedown procedure formalised in the AGCOM regulation, or the copyright infringement reports to be made under the DEA. Here, the worry is of course that the ISPs themselves will have little incentive to contest these on a case by case basis.

CONCLUSION

We will conclude with some brief remarks about the future of surveillance of copyright online, which illustrate the importance of understanding the dynamics of the mediation of surveillance. While media lobbies remain powerful, and their business models remain open to online abuse, the development of copyright enforcement is likely to continue to be a topic of interest: more legislation undoubtedly awaits. Several areas of change are important. The diversity of national opinion on the subject means that EU legislation on issues such as graduated response seems unlikely in the near future (Meyer and Van Audenhove 2010: 73)[11]: however other pieces of EU legislation such as the recently negotiated telecoms package may well turn out to be important in the area (Horten 2011), while the EC is also in the process of negotiating recommendations on notice and takedown procedures, albeit ones targeted more at xenophobia, terrorism and child pornography than copyright offences (McNamee, 2010). Different national initiatives are also likely to continue, as legislators struggle to accommodate the demands of both the creative industry and international trading partners such as the US. Furthermore, the continuing evolution of web services will mean the continuation of an active role for the courts in deciding the applicability of old rules to new contexts. The rise of Web 2.0 services also deserves a mention in this regard: sites such as Youtube blur the distinction between content provider and content hoster (though most decisions have extended the liability protection of the ECD to cover these types of services, providing they have efficient notice and takedown procedures – see Viola et al 2010). Recent US court cases on whether safe harbour protection can be extended to those providing "cloud services" (Rosenblatt 2011) and on the exact nature of the knowledge required to bring about ISP liability (Gray 2011) may well be duplicated at some point in Europe. While it is difficult to predict with any certainty what direction these initiatives will take, one area which seems likely to be the focus of conflict is that of outright blocking: either through the disconnection of users who are deemed to have committed copyright offences, or the blocking of (foreign) websites from entire national internet spaces. The symbolic finality of this blocking has made it a focal point of resistance: the idea of user disconnection, for example, has been criticised by the European Parliament, European Data Protection Supervisor (EDPS 2010), and the UN Special Rapporteur for Human Rights (Human Rights Council 2011); while the idea of website blocking was seen as potentially contrary to EU law in a recent opinion of an ECJ advocate general (OSCE 2011: 143).

Given the strength of these opinions, it seems quite likely that both legislators and courts will move in the direction of requiring increased surveillance of infringing user's

accounts, rather than outright disconnections or blocking, at least in a majority of cases (as Katyal suggests, in the US record industries are also moving from hard sanctions such as prosecution to more passive types of surveillance – see Katyal 2009). Several technical options may be available to them: in the UK, it has been proposed that account speed be limited enough to make downloading infeasible, whilst in France the SCPP are continuing the development of filtering software which blocks access to specific files (Rees 2010e). These solutions may seem, *prima facie*, less extreme, but they bring with them the worrying possibility of the continued development and normalisation of online surveillance technology. As we argued above, the mere existence of this technology affects legal decisions about whether it should be used, as it reduces costs for the mediator of surveillance. This could lead to a potential ratchet effect, whereby each decision compelling the use of surveillance tools furthers their development, making subsequent uses more likely. It is in this are that understanding the dynamics of the mediation of surveillance becomes crucial.

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[1]Though beyond the scope of the present article, it is worth mentioning that debate exists about the appropriateness of "assemblage" as a translation of the French word *agencement* originally employed by Deleuze and Guattari. See Phillips 2006 for a brief overview.

[2] Of course, many websites have mechanisms, such as cookies, or ask for information, such as a username and password, which *try* to identify their users. But only the ISP is capable of knowing for certain to whom an IP address is allocated.

[3] Ohm was talking specifically about ISPs based in the US. However the point applies in Europe as well.

[4] With the rise of what is known as "Deep Packet Inspection" technology, some are beginning to argue that ISPs might develop their own commercial interest in knowing what is transmitted over their networks. Deep Packet Inspection is however beyond the scope of the present article.

[5] As yet, no legislation exists which aims to substantially reverse provisions of the ECD (indeed, the safe harbour provisions were once again reaffirmed in the EU's 2009 Universal Services Directive - see Viola et al, 2010).

[6] In France, Spain, and Italy, there exists no direct translation of the term "copyright". Rather, there is what might be translated as the "Right of the Author" (*droit d'auteur, diritto d'autore, derecho del autor*).

[7] A peer-to-peer network is one which enables the direct connection of two computers across the internet, a connection which can be used for a variety of purposes, such as the transmission of files. (Riehl, 2001)

[8] The necessity of judicial authorisation for the suspension of internet accounts was a key point in the legislative debate over Hadopi. (Lucchi, 2011)

[9] This obligation was actually introduced by a preceding piece of legislation.

[10] Although this responsibility had been accreting little by little in various preceding pieces of legislation (Aria, 2011: 3).

[11] There was some speculation that it would form part of the recently negotiated Anti-Counterfeiting Trade Agreement, but in the end this proved not to be the case (see DG EXPO 2011: 57).

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Ensuring Freedoms and Protecting Rights in the Governance of the Internet: A Comparative Analysis on Blocking Measures and Internet Providers' Removal of Illegal Internet Content

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Abstract

Removing illegal or harmful material from the internet has been pursued for more than two decades. The advent of Web 2.0, with the prominent increase and diffusion of user-generated content, amplifies the necessity for technical and legal frameworks enabling the removal of illegal material from the network. This study deals with different levels and methods of Internet 'cleansing' measures, comparing government regulated and Internet service provider based removals of illegal Internet content. The paper aims at putting the regulatory option of internet blocking measures into the broader perspective of the legal framework regulating the (exemption from) liability of Intermediary Service Providers (ISPs) for user-generated contents. In addition, the paper suggests proposals on which regulatory options can better ensure the respect of freedoms and the protection of rights. The paper introduces several significant cases of blocking online copyright infringing materials. Copyright related blocking techniques have been devised for business reasons – by copyright holders' associations. It must be recalled, however, that these blocking actions cannot be enforced without the states' intervention. These business-level actions become isolated if they are not supported by both the European Union and its Member States. Conversely, state-centred initiatives cannot work out without the private sector's cooperation. Internet service providers play a crucial role in this cooperative framework because of their task of providing access to the Internet and hosting web contents.

Keywords

Soft-Law regulation; Self-Regulation; Hard-Law Regulation; Internet Blocking; Notice and Take-down procedures; Intermediary Service Provider, Liability; E-Commerce Directive

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In the past 20 years there have been many attempts to remove illegal or harmful online content. The first solutions were devised to block unsolicited electronic advertisements, so called *spam*, so that junk mail does not slow down the speed of internet connections. These solutions were applied by users individually, and also often by ISPs for the protection of their users. The need to block unwanted content, however, gradually appeared on higher levels with time.

There are several regulatory options to remove illegal internet content.[1] Solutions for blocking illegal Internet content usually require the substantial involvement of base level actors, such as private users and ISPs. This refers to decentralised, partially self-regulated, or bottom-up measures applied by private parties such as users and ISPs. A decentralized enforcement measure includes *primary, user-level protection* with firewalls, and filter software, whereas institutional filter measures protect users more at the community-level, for example when a school, library or employer filters contents in the interests of their users (schoolchildren, visitors to the library, employees). Another *regulatory option* is characterised by the ISP's intervention, installing filter software in their systems that stop unsolicited advertisements and junk mail to get through to the users. The introduction of *shared filter systems* designed by several service providers jointly is usually applied on the basis of codes of conduct. Such filters also function as quality assurance, and are installed to guarantee service quality on the one hand, and to provide equally high quality service to all users on the other, blocking unsolicited mail and ads. In this sense, private regulatory measures are applied ex post, when infringement of copyright or individuals' rights are detected. Another instrument is the

[1] Illegal internet content is a category which is not yet defined at the European level, as it relates to the national legislation of the Member States. Recently, the European Data Protection Supervisor (EDSP) has expressed the necessity for "a more pan-European harmonised definition of the notion of 'illegal content' for which the notice-and-action procedures would be applicable". See: 'EDPS formal comments on DG MARKT's public consultation on procedures for notifying and acting on illegal content hosted by online intermediaries', p. 1.

N&TD procedure, foreseen by Article 14 of the e-Commerce Directive.[2] This requires that, whenever the ISP has knowledge of illegal activity, it should act expeditiously to remove or disable access to the information. This means that the action is taken ex post, only when there is a notice of an illegal material by a user or other actor. According to the directive, the procedure can be more or less forged by Member States' legislations, and thus involves court or administrative authority. Actually Member States are entitled to establish procedures governing the removal or disabling access of information. This is also an element of decentralization. The practical enforcement of this process welcomes the contribution of private actors involved, through codes of conduct. In this respect, one should observe that N&TD procedure could be framed as decentralised, multi-actor driven and ex post.

By contrast, we have another regulatory option for dealing with illegal internet content, i.e. blocking measures. As such, this regulatory option implies a choice for centralised and ex ante process of indicating the illegal internet content, and the ISPs are required to enforce it. This option is acknowledged as potentially the most invasive regulatory option, so its impact on individual freedoms has to be considered. Within the framework of blocking measures, state enforcement agencies usually require ISPs to block contents that are illegal or constitute serious crimes. Obliging the ISPs to monitor and filter users' online activities and remove all 'illegal content' found in their network is a top-down initiative introduced by the governments as ex ante solutions, and have to be followed strictly by the private sector. This solution provides a stroke-of-the-pen removal of illegal contents in a standardised process. However, such centralised, ex ante, and top-down measures can breach ISPs' rights to freely conduct business, as well as individuals' rights to privacy, free speech and the protection of personal data.

On the other hand, decentralised regulatory models have also their weak points as such measures can be institutionalised in different ways, providing different rules for the removing process thereby undermining the success of the removal. Decentralised regulation is not unified, as we cannot be sure whether all public institutions indeed install filter software. Moreover, certain methods are not capable of blocking all illegal content. A typical example of this is keyword filtering applied by users, where there is a danger of over- or under filtering, and it is often determined by the level of experience of a given user and his skills. A further problem may arise when the software only filters content it was ordered to filter by the user, but other illegal websites are allowed through, or when a child easily bypass the filter settings of the parent. In the following section, we will discuss some of the controversial aspects of central level internet-blocking initiatives.

BLOCKING MEASURES AND THE EUROPEAN FRAMEWORK REGULATING ISPs' LIABILITY

As internet access became more publicly available, content-related crimes ensued. The European Union recognised the threats posed by the dissemination of harmful online content relatively early, and therefore started the work on establishing the foundations of concerted protective measures in the late 1990s, as it is also clear from the arsenal of European and international regulations related to the sexual exploitation of children,[3]

[2] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), [2000] OJ L178/1.

[3] Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse of 25.10.2007 (CETS No.: 201); Council framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography Official Journal L 013, 20/01/2004 P. 0044 – 0048; and Proposal for a Directive of the European Parliament and of the Council on combating the sexual abuse, sexual exploitation of children and child pornography, repealing Framework Decision 2004/68/JHA Brussels, 29.3.2010 COM(2010)94 final.

cybercrime[4] the global fight against terrorism,[5] attacks against information systems,[6] and organised crime,[7] just to mention the most important ones. Though the above listed regulatory pieces do not necessarily mention removing, or blocking, access to illegal internet content, the aim of the Member States of jointly stepping up against the illegal contents suggests the need of developing centrally coordinated protective measures in the realm of the internet thereby protecting its citizens. However, in so doing, precautions must be taken so that the state does not prejudice basic citizens' rights (freedom of speech, expression and information) while protecting the citizens, ensuring national security and enforcing the law (Magaziner 2000).

The outer boundary: the European Convention for Human Rights

While the States' intentions to regulate internet can be justified with the protection of legitimate purposes, such as crime fighting and rights' protection, the same attempts can also disguise surveillance purposes, which eventually could undermine the overall freedom *of* internet and freedom online. That is why it is important in the governance of the internet that every public power's intervention is justified by an overriding public interest, secured by the compliance with the legality principle, and bound by a full respect of the principle of proportionality. This outer boundary to the freedom of internet has been put also by a judgment of the European Court for Human Rights, in the case of K.U. v. Finland.[8] More precisely, the merit of this judgment is to provide an outer boundary to the freedom of confidentiality of the internet service provider, which cannot lead to the point that unlawful activities cannot be taken to justice. In the specific case, the applicant was 12 years old when an unknown person had placed without the applicant's knowledge an advertisement on a dating Internet site in his name. The advertisement contained some of the applicant's personal information (name, phone number, link to a personal page with photo and other details) and included a sexual connotation. The applicant became aware of this as he was exposed to grooming behaviour from persons on the Internet.

Under the Finnish regulation in place at that time, the internet service provider refused to reveal the identity of the IP address-holder in question under the law of confidentiality in telecommunications. The Helsinki district court refused to oblige the service provider to disclose the telecommunications identification data in breach of professional secrecy, lacking an explicit legal provision authorising it. More precisely, 'malicious misrepresentation', was not an offence authorising police to obtain telecommunications identification data under the legal provisions of the time. This position was upheld by supreme domestic courts. The final result was that the applicant never got access to the identity of the person in question, and the managing director of the Internet service could not be prosecuted because the alleged offence had become time-barred.

The Strasbourg Court found that this case violated the right to private life, as defined in Article 8 of the European Convention of Human Rights, 'a concept which covers the physical and moral integrity of the person'.[9] In the reasoning of the Court the right protected at Article 8 does not lead merely to a negative obligation from the state, but entails also a positive obligation that 'might involve the adoption of measure designed to secure respect for private life even in the sphere of the relations of individuals among

[4] Convention on Cybercrime of the Council of Europe of 23.11.2011 (CETS No.: 185).
[5] EU Council Framework Decision 2002/475/JHA of 13.6.2002 on combating terrorism (O J L 164/3 of 22.6.2002) as amended by Council Framework Decision 2008/919/JHA of 28.11.2008 (OJ L 330/21 of 9.12.2008); Council of Europe Convention on the Prevention of Terrorism of 16.5.2005 (CETS No.: 196).
[6] EU Council Framework Decision 2005/222/JHA of 24.2.2005 on attacks against information systems (OJ L 69/67 of 16.3.2005).
[7] United Nations Convention Against Transnational Organized Crime of 8.1.2001 (A/Res/55/25).
[8] Judgment of 2 December 2008, K.U. v Finland, application no. 2872/02.
[9] See Court's judgment, para. 41.

themselves'.[10] States do enjoy a margin of appreciation in fulfilling the obligation arising from the Convention, a margin which is nevertheless bound by limits. The Court, while acknowledging that 'freedom of expression and confidentiality of communications are primary considerations and users of telecommunications and internet services must have a guarantee that their own privacy and freedom of expression will be respected', takes the position that 'such guarantee cannot be absolute and must yield on occasion to other legitimate imperatives, such as the prevention of disorder or crime or the protection of the rights and freedoms of others.'[11]

THE ISP'S LIABILITY FOR USER GENERATED CONTENT

The underlying question is whether the ISP can be held liable for user-generated content, and if so, under which circumstances and conditions. ISPs are service providers offering access, data transmission, storage space, proxy, and/or search services to content providers (users). The liability of ISPs is regulated at EU level by the Directive 2000/31/EC on e-commerce (hereinafter E-Commerce Directive).[12] The E-Commerce Directive aims to harmonise national laws on information society services relating to the internal market and, among others, the liability of such intermediaries in order to contribute to the 'proper functioning of the internal market by ensuring the free movement of information society services between the Member States.'[13]

The Directive grants the service provider exemption from liability for the services of "mere conduit", "caching" or "hosting". The ISP is not responsible for contents uploaded by users, neither for copyright or privacy infringements, nor for damages, as so far certain conditions. The ISP must not have initiated the uploading or transmission itself, and should not have been involved in the selection of receiving parties, or sorted or modified (edited) the contents uploaded by the users. This includes the automatic transmission of data and the transitional or temporary storage of these provided that the service exclusively includes data transmission and storage, and that the service provider did not store the data transmitted this way longer than the minimal length of time needed for transmission.[14]More precisely, and defining "mere conduit", the E-Commerce Directive stipulates that if the service provided by the ISP consists of the 'transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network', the ISP shall be exempted from liability if it: '(a) does not initiate the transmission; (b) does not select the receiver of the transmission; and (c) does not select or modify the information contained in the transmission.'[15]

The legal framework for hosting services has the same *rationale*. Given that "hosting" consists in the storage of information provided by a recipient of the service, the ISP is exempted from liability if it does not have 'actual knowledge of illegal activity or information', or, 'upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information'. There is no general obligation to monitor bearing on the ISP, nor a general obligation of actively seeking facts or circumstances indicating illegal activity. However, Member States may well establish obligations 'promptly to inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or obligations to

[10] *Ibidem*, para. 43.
[11] *Ibidem*, para. 49.
[12] Directive 2000/31/EC of The European Parliament and of The Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) Official Journal L 178, 17/7/2000 P. 0001-0016.
[13] Quotes from Art. 1, E-Commerce Directive.
[14] See Preamble (46) and Art. 12-14 of the E-Commerce Directive.
[15] Art. 12, E-Commerce Directive.

communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements.'[16]

Furthermore, once an illegal activity is ascertained, according to the Member States' legal systems,[17] the ISP has the duty to cooperate with public agencies in the removal of the breach: every provision granting exemption from liability is indeed closed by a corresponding provision enabling domestic courts, or administrative authorities, to require the ISP to terminate or prevent an infringement.[18] As to hosting services, Member States are entitled to 'establish procedures governing the removal or disabling access to information.'[19]

The highly controversial[20] Data Retention Directive[21] (DRD) also regulates ISPs' obligations. It 'aims to harmonise Member States' provisions concerning the obligations of the providers of publicly available electronic communications services or of public communications networks with respect to the retention of certain data which are generated or processed by them, in order to ensure that the data are available for the purpose of the investigation, detection and prosecution of serious crime.'[22] The Directive orders Member States to regulate ISPs to catch traffic, location and related data types and keep it for 6 to 24 months. When the ISP gets an order from the local law enforcement agencies, it has to transmit the stored data for investigatory and jurisdictional purposes. One can argue that this is an obligation involving monitoring activity. However, ISPs could monitor their users' activity even without catching and storing their data, and moreover the DRD does not explicitly refer to "monitoring". On the contrary, it highlights that the ISPs only have to 'retain' certain data categories from deletion. Nonetheless, most of the data types addressed by the DRD are so called Charging Data Records (CDRs) which are recorded by the ISPs automatically, for business purposes, in order to charge users for the service. There are significant debates in the Member States criticising the transposing legislations for infringing civil rights on grounds of legality and proportionality, as well as for breaching the traditional data protection principle of purpose limitation. Several Member States' attempts to transpose the directive to national legislation have been subject to constitutional challenges for the very reasons indicated above.[23] The constitutional challenges DRD faced at domestic level have urged the Commission to prepare a recast. However, considering the prejudicial nature of another piece of legislation, the e-Privacy Directive,[24] the recast of the DRD has been put on hold.[25] However, the DRD is not aimed to plant the task of "monitoring" or "investigating" in the hands of the ISP. Consequently, their liability does not embrace a responsibility for user generated content either. The most recent European legislation confirms the limitation of the liability of the provider: directive

[16] Art. 15, E-Commerce Directive: "No general obligation to monitor".
[17] See Art. 12, para. 3; Art. 13, para. 2; Art. 14, para. 3, E-Commerce Directive.
[18] See Art. 12, para. 3; Art. 13, para. 2; Article 14, para. 3, E-Commerce Directive.
[19] Art. 14, para. 3.
[20] According to the European Data Protection Supervisor the DRD is "the most privacy invasive instrument ever adopted by the EU". Source: European Data Protection Supervisor, 'The moment of truth for the Data Retention Directive', 3 December 2010, p.1.
[21] Directive 2006/24/EC of the European Parliament and of the Council 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, Official Journal L 105/54, 13.4.2006.
[22] Art. 1 para. 1, DRD.
[23] In 2009 Romania, in 2010 Germany, and lately, in 2011 the Czech Republic, Cyprus and Lithuania.
[24] Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications).
[25] Source: Statewatch: "EU: Revision of Data Retention Directive put on hold with "no precise timetable" for a new proposal". At http://www.statewatch.org/news/2012/aug/04eu-mand-ret.htm, accessed 11.09.2012.

2009/136/EC[26] reaffirms that the provider cannot be liable for merely transmitting user-generated information ("mere conduit" rule), and confirms that it is not a provider's task to define what is lawful or harmful in respect of content, applications and services. According to the directive, the ISP has still no obligation to monitor contents, and therefore has to remove the content concerned by a notice.

According to the legal pieces referred to above, it is mainly the producer of the content who is responsible for the content published online. So if the publication of the content involves copyright infringement, or does not respect the privacy rights of others, the European regulator has placed the liability only on the content's uploader (Viola de Azevedo Cunha et al. 2012). In a typical case, the producer of the content is the individual user, who as such uploads his family videos to an online video sharing channel, uploads his images to a social network site, publishes his opinion in a blog or forum, or creates online content in another way (e.g. edits websites). The question is when the service provider actually qualifies as a content provider. For example, can and should s/he be held liable as a content provider, albeit not uploading the content itself, it nevertheless has classified it and selected it on the basis of some principles (popularity index, compliance checklist, etc.)? Is the service provider a content provider if it adds new content (hyperlinks, advertisements, etc.) to the original one uploaded by the user? Advertisements may be further divided into ones of a content related, or not related, to the user-content (published independent of the latter on the same site), and into profit-oriented and non-profit advertisements.

If the ISP only ensures the technical platform and conditions for uploading contents and an access to the internet, the question arises in which cases it is actually responsible for the contents uploaded by the user. If it was aware of the content being illegal and did not remove it within the required timeframe (which further brings up the question whether it has to wait until the notification and removal request to the user, or has to remove the illegal content without such); or if it was not aware of the content being illegal, but it edited, labelled and forwarded it; and if it was not aware of the content being illegal, and it only provided the technical platform for its publication. In the latter two cases the question also arises whether the service provider has a surveillance obligation; that is whether he has to monitor the legal compliance of content published on his platform.

Some clarification comes from the recent case law of the European Court of Justice (ECJ), in particular the judgments *Google v. Louis Vuitton*,[27] and the *L'Oréal v. eBay* case.[28] While in the first case, the Court has recalled that the neutrality principle is the basis for the exemption from liability, in the second case the Court took the approach that if an operator of a marketplace plays an active role, it can therefore not be exempted from liability granted by the Article 14 of the E-Commerce Directive, referring to "hosting" services.[29] The Court further stated that 'Where, by contrast, the operator has provided assistance which entails, in particular, optimising the presentation of the offers for sale in question or promoting those offers, it must be considered not to have taken a neutral position between the customer-seller concerned and potential buyers but

[26] Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws. Official journal L 337 18.12.2009 P. 0011-0036.

[27] European Court of Justice, Joined Cases C-236/08 to C-238/08, Google France, Google, Inc. v Louis Vuitton Malletier (C-236/08), Viaticum SA, Luteciel SARL (C-237/08), Centre national de recherche en relations humaines (CNRRH) SARL, Pierre-Alexis Thonet, Bruno Raboin, Tiger SARL (C-238/08), Judgment of the Court (Grand Chamber) of 23 March 2010, [ECR 2010-2417].

[28] European Court of Justice, Case C-324/09, *L'Oréal v eBay*, Judgment of 12 July 2011, OJ C 269, 10.09.2011, p. 3.

[29] *L'Oréal v. eBay*, para. 123.

to have played an active role of such a kind as to give it knowledge of, or control over, the data relating to those offers for sale. It cannot then rely, in the case of those data, on the exemption from liability referred to in Article 14(1) of Directive 2000/31.'[30]

Considering that recent internet platforms run by global commercial companies have shaped a new generation of internet sites labelled under Web 2.0, it is all the more relevant to analyse whether the legal framework in place can still offer solutions that can be working also for new situations. It is not a case that Advocate General Jääskinen, in its Opinion on the *L'Oréal* case, has criticized the neutrality principle as the basis for the exemption from liability, principle upheld by the Court in its earlier case *Google v. Louis Vuitton*. The Advocate General has suggested avoiding to sketch out parameters of a business model that would fit to the hosting exemption, proposing to focus instead on the type of activity, and state that 'while certain activities [...] are exempted from liability, as deemed necessary to attain the objectives of the directive, all others [...] remain in the 'normal' liability regimes of the Member States'.[31] Then the question remains: can the plethora of internet pages of the Web 2.0 still benefit from the neutrality principle, which entails that the activity of the ISP is 'of a mere technical, automatic and passive nature', and that the service provider 'has neither knowledge of, nor control over the information which is transmitted or stored'?[32]

REGULATORY OPTIONS FOR BLOCKING ILLEGAL CONTENT IN PRACTICE: THE GERMAN AND THE HUNGARIAN CASE

In the past few years, there have been several solutions for centrally filtering illegal content spread over the internet. In addition to the instruments of blocking not being too effective, these also demand a significant effort, and involve the infringement of citizens' rights.[33] The government-level control of the internet is most often implemented as part of the efforts to fight online child abuse, or other harmful actions that are considered to be dangerous to individuals and the public. However, the lesser the damage caused by encountering the given contents on the user's website is, and the longer the causal chain between the damage suffered and encountering the content; the less justification is there for applying such harsh measures as blocking content. In this section, we introduce a few solutions that governments apply in order to comply with their obligations regarding the blocking of illegal content.

Germany is the economic engine member of the European Union, which is reflected by the fact that it is one of the countries of the world having the highest level of internet access and penetration.[34] On the account of its historical experiences, considerable efforts have been taken to balance security measures and citizens' freedoms and rights. Consequently, it is one of those European countries where civil rights' defenders speak out loudest against centrally generated internet blocking measures. Based on this the German case is discussed in much details concerning regulatory options.

German law has implemented the "mere conduit" rule of the E-Commerce Directive in Section 10 of the multimedia act (*Telemediengeset*z: TMG). Under the said section, the ISP cannot be held liable for user-generated content, except if it fails to identify contents

[30] European Court of Justice. Case C-324/09. Judgment of 12 July 2011, para. 116.
[31] Advocate General Jääskinen, Opinion on the case *L'Oreal v. Google*, para. 149.
[32] *Google v. Louis Vuitton*, cit., para. 113.
[33] For a recent and holistic approach see: Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue. United Nations Human Rights Council. Available at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf; [11 October 2011]
[34] Germany ranges the sixth country in the world, and the first in Europe with the highest number of internet users (67,4 millions of users). http://www.internetworldstats.com/stats.htm, accessed 27 September 2012.

as illegal due to negligent ignorance or contingent intent (*dolus eventualis*). Analogous to that – in accordance with the Teleservices Act (*Teledienstgesetz*: TDG) and the contract of the German state with media service providers (*Mediendienstestaatsvertrag*: MDStV) – the access-provider cannot be held liable for damage caused by users to third parties on websites offering auction services if a provision to that effect is contained in the general terms and conditions. However, there may still be accessory liability of the service provider in some cases. In that sense, the direct offender (the user) is not solely responsible for the damage he causes to third parties, and the service provider, who knowingly or casually contributes to the infringement of the rights of the third parties, has also liability: provided that the service provider had no obligation to observe in the first place. In line with a decision of the Federal Court of Justice, as soon as the ISP gains knowledge of the infringement of a third party's rights, he has to take immediate precautions to avoid a repeated offence (by removing the content, blocking the infringing user, or suspending the user's rights).

In Germany, a bill[35] proposing the blocking[36] by ISPs of child abuse depictions spread over communication networks was published on May 5, 2009. According to the bill, the Federal Criminal Police Office of Germany (*Bundeskriminalamt*: BKA) has to maintain a list of FQDNs,[37] IP-addresses and URLs to multimedia materials, which under the German criminal code contain child pornography, or which refer or contain links to such content. The BKA issues an updated blocking list every working day for bigger ISPs to whom the legislation applies. ISPs serving at least 10,000 users in their normal course of business have to take all 'appropriate and due technical steps to block the access to multimedia content featured on the list' within six hours at the latest. The blocking must be realised at least on "domain-level". The ISP has to inform the user who published the illegal content of the reasons for the blocking and the contacts of the BKA by way of a "stop notice", in case the originator of the content should object to the blocking. Service providers carrying out blocking measures are entitled to collect and use personal data, to the extent necessary for the blocking, and are obliged to hand over these data to the investigative authority for the purpose of criminal proceedings. The bill was adopted at the meeting of the German parliament on 18 June 2009. The legal instrument entered into force in February 2010, but could not be enforced, and lately the disputed law has been dropped.[38] The act was attacked on the grounds of not being satisfyingly efficient, while it intervenes disproportionately in the practice of fundamental citizens' rights, and does not spare the rights of the internet service providers either.

Blocking may often have harmful side-effects; simple blocking methods (such as the German solution, that is the DNS-level manipulation of domains) are often not too effective, as illegal and legal contents belonging to the same domain name cannot be clearly separated which can result in either over- and under-filtering. Contents are often over-filtered; legal contents, or links to legal websites, are often blocked from access curbing the freedom of information. However, as a result of the same method, under-filtering can take place as well, thus illegal contents can remain available. The German solution has one rather special aspect, namely that it only applies to contents available

[35] Entwurf eines Gesetzes zur Bekampfung der Kinderpornographie in Kommunikationsnetzen. Drucksache 16/12850, 05.05.2009, and Gesetzesbeschluss des deutschen Bundestages. Drucksache 604/09, 19.06.09 Available: http://www.bundesrat.de/cln_090/SharedDocs/Drucksachen/2009/0601-700/604-09,templateId=raw,property=publicationFile.pdf/604-09.pdf, accessed 12 April 2010.

[36] Even though semantically speaking filtering and blocking do differ – in that filtering involves monitoring, while blocking the prevention of the dissemination of already identified content –, we wish to use these expressions synonymously in this study.

[37] *Full Qualified Domain Name*, which exactly defines the location of the domain in the domain hierarchy.

[38] In February 2011 the German Working Group against Internet Blocking and Censorship (AK Zensur) lodged their complaint against the German law on Internet blocking to Germany's Constitutional Court. In April 2011, Germany's governing Conservative and Liberal parties agreed in a coalition committee meeting that the disputed law on Internet blocking of child abuse material will be dropped. Source: German Internet blocking law to be withdrawn. Available at: http://www.edri.org/edrigram/number9.7/germany-internet-blocking-law, accessed 1 November 2011].

through bigger German access providers, so those who access the Internet through smaller, or foreign service, providers, can still access the illegal content.[39]This situation shows how the ubiquity of internet hardly can be controlled and counteracted through a State's unilateral measures, which are mainly limited to enforcement within the territory of the State. The efficiency of blocking is not proportionate to the degree of intervention in constitutional rights and fundamental freedoms, as blocking measures affect the freedom of information and expression, while they do not ensure necessary protection to victims and users.

It is often mentioned that one of the positive results deriving from the introduction of domain-based blocking in Germany is that the online surfing of users also can be tracked. This offers the opportunity for launching criminal proceedings against the "consumers" of child pornography. The most important principle of the concept is that blocked domains point to child pornography contents; therefore criminal proceedings can automatically be launched against those who try to bypass the block, e.g. by switching to other service providers' network. Bypassing the block would namely be evidence for the intentional nature of the preparation for acquisition of the illegal material (offending behaviour). (Sieber 2009: 657) A further concern regarding the German legislation is that the blocking list may be compiled and updated without a judge's approval, as there is no independent body assigned to supervise the decisions of the investigative authority. The critics claims that the black list (according to which the ISPs would be obliged to block illegal contents) cannot be compiled by one single authority; just the updating process would be an excessive burden for the BKA's personnel. In addition, an independent control function as a guarantee of free speech should be embedded into the process by the court, in accordance with a general normative perspective.

The liabilities of the ISPs legally required to block was not defined in the German act in depth. It was also unclear which was the obligation of the service provider as to blocking, considering that the legislation only prescribes the "minimum" level of blocking of domains for service providers. Furthermore, whether the service provider has other obligations in relation to blocking was not defined by the law. (Sieber 2009) According to this piece of legislation that finally did not enter into effect, the German multimedia act (TMG) stipulated that if the internet service provider had implemented the blocking as required, he was acquitted of any responsibility in respect of all illegal content allowed through (safe harbour clause). However, the act did not stipulate what steps the service provider should take after implementing blocking measures according to requirements, but without positive results. It was not clear whether the service provider is acquitted from his obligations if he introduces further blocking measures that continue to be unsuccessful. Moreover was unclear whether internet service providers might have claims to damages vis-à-vis the State in relation to the collateral blocking of legal content.

TMG stipulated that access providers have to record the data of users publishing illegal content on domains featured on the blacklist, and surrender those to the investigating authority for law enforcement purposes. This way, however, not only the data of those publishing the contents, but also the IP-addresses of those downloading the same contents could be established by the investigative authority. This meant that the service provider interfered with the rights of the users to freely dispose their information, and that downloading blacklisted contents might be compromising to the users and misleading for the investigative authority. There might have been investigations which have been launched in cases where the *legal* website, which the user was actually looking for, contained an illegal link or featured on the blacklist.

The above described domain-based internet-blocking technology, relying on blacklists and the concept built on it, are not proportionate to the envisaged goals. Due to over-filtering, it intervenes more drastically in the basic freedoms of citizens than the severity

[39] On reliability of blocking measures see http://www.opendns.com, accessed 1 November 2011.

of the damage caused by the online behaviour.[40] Child pornography, and the related phenomenon of paedophilia, is among the most serious crimes, which also the ECtHR requires States to be especially vigilant on. However, it is important to understand that it is *not* the freedom of expression of criminal offenders and the freedom of getting (illegal) information that is compromised by blocking illegal content. But central (government-level) blocking measures are inappropriate, because they usually apply domain-based blocking, as described in the German case above, which blocks not only illegal internet contents, but impairs such functions as mailing and other online services (e.g. IGroups services) not illegal as an application in itself. Moreover, with the continuous extension of blocking lists, more and more legal content and internet-functions may be lost.

The system of links and hyperlinks, and the liabilities for contents that the links and hyperlinks point to are not regulated by either the Council of Europe, or the European Union, so it comes down to the national legislation of the Member States. In Germany, court practice (in this case a court rule of the Berlin municipal court in 1997) equates liability for links and hyperlinks with the liability for the creation of websites (and content provision). The rule of the Berlin court stipulated that a hyperlink pointing to a website containing illegal content has the same promoting and encouraging effect to the crime, as the website itself, for which reason it is as much an object of crime as the website's content.[41] This in turn constitutes a basis for the liability for contents made available in the indirect system of links.[42] The liability of search engine operators in Germany is not clearly regulated, as the legal regulations have no relevant provisions, and the case law on the matter is not consistent. In a case initiated on the grounds of a lawsuit filed by trademark holders, several lower courts has established that operators of search engines are not accountable as accessories for the trademark infringements committed by their users, not even if the users carried out their actions by opening (clicking on) ad-words and sponsored links they themselves placed there. Using the very opposite logic, however, courts established the accessory liability of search-engine service providers for the placement of sponsored links pointing to foreign online gambling websites.[43]

Despite the fact that the above described legal regulations on internet blocking have not entered into effect, there is a practice of blocking illegal online content in Germany on a case-by-case basis as it is unconstitutional to propagate any Nazi ideology in Germany. Such was the 2002 order of the district government of Düsseldorf for blocking, which bound the German access providers not to allow Nazi propaganda through websites hosted on US servers.[44] The higher administrative court of Münster acceded to the blocking order, and in their reasons described that the blocking order concerned is necessary to stem the revival of the German extreme right-wing ideology. Such a blocking order, however, has to meet the requirements of proportionality and technical plausibility. The occasional orders for IP-address blocking, domain name server modification and proxy server installation to access providers from courts are good

[40] There is no research available as to what actual damage is caused by encountering depictions of child pornography – neither among adult or child Internet users. It is on the other hand clear that by only applying central filtering, users may not be protected from encountering illegal content. For this reason, every Internet filtering measure should be accompanied by appropriate information (dissemination of knowledge, education, danger-awareness) specialized for specific age groups. For more see: See also: „A Google és a Yahoo is az ausztrál Internetellenőrzési tervek ellen" Sg.hu, Informatikai és Tudományos Hírmagazin February 18, 2010 Available at http://www.sg.hu/cikkek/72596/a_google_es_a_yahoo_is_az_ausztral_internetellenorzesi_tervek_ellen, accesed 18 Ferbuary 2010.

[41] AG Berlin, 260 DS 857/96, 30. Juni 1997: http://www.netlaw.de/urteile/agb_01.htm, accessed on 18 February, 2010.

[42] The responsibility for content made available through other technical solutions – such as by search engines – is not clearly defined.

[43] Study on the liability of Internet Intermediaries. Country Report – Germany. By prof. dr. Gerald Spindler, University of Göttingen, 2007 Available at: http://ec.europa.eu/internal_market/e-commerce/docs/study/liability/germany_12nov2007_en.pdf, accessed 12 October 2011.

[44] Bezierksregierung Düsseldorf, Aktenzeichen 21.50.30, 6 Februar 2002 Available at: www.artikel5.de/rohetexte/sperrverfueg.pdf, accessed 12 October 2011.

examples. Meanwhile, the Bundesgerichtshof ruled out in 2000 a new principle, according to which e.g. the content provider of a website denying the Holocaust uploaded to a server in Australia can be held liable for the crime (denying the Holocaust) in Germany, even if the offender is an Australian citizen. The decision, however, clearly ruled that the ISP hosting the illegal content cannot be held liable.[45]

In several EU Member States, courts have developed a measure called ''notice and stay down'', applied instead of the ''notice and takedown'' measure introduced by the E-Commerce Directive. According to notice and stay down, search engine providers like Google are obliged to introduce a permanent monitoring system which permanently survey and filter out illegally uploaded and circulated internet content – without a notification from the authorities. In July 2012 the Paris Court of Cassation laid down decisions in four different cases annulling the monitoring obligations of the ISPs ordered by lower courts, and reintroducing notice and takedown measure into the practice as it is stated by the E-Commerce Directive. Consequently, ISPs are no longer obliged to identify and remove illegal internet content without order, only when the entitled party warns it to do that. Similarly, a July 2012 court rule of the High Court of Hamburg obliges a file-sharing service provider to monitor the files shared on its network. The decision prescribes RapidShare file-sharing provider to actively monitor the files appearing on its site, and remove illegally uploaded (shared) ones. According to the decision, providing the space for file-sharing is not a passive service, but an active one – as it is "sharing" and not "storing" files. The provider becomes an accomplice of the file-sharer, as he facilitates file-sharing.[46] These decisions are followers of the Court of Justice's statement dating back to late 2011. In November 2011 the European Court of Justice stated, that Member States must not put ISPs under any obligation to endorse illegal police activities and thus providing surveillance of users.[47] The ECJ ruled that national court's order to force ISPs to implement filter systems, installed at ISPs' own expense and used for an unlimited period of time, would breach the ISP's rights to conduct business freely, and would infringe individuals' rights to privacy and personal data protection.

The impact of German law making and court decisions is neither economically, nor politically negligible for other European countries. In this respect, especially transitional countries of Eastern and Central Europe have to be mentioned, whose legal development has historically been influenced by the German law-making traditions for centuries. Hungary is one of these countries. Besides that it is historically linked to Germanic traditions by several strings, the Hungarian development is worth analysis because its development on the field of internet freedom is, paradoxically, diametrical. While Hungary as a member state of the European Union has to comply with EU law, its national case law does not reflect the Union's law. An example of this is the deficit of handling illegal content hosted on servers in foreign countries.[48] Nevertheless a rather radical step was taken by the lawmakers when 'making illegal Internet content unavailable will be introduced as a new sanction into the criminal code in2013. This

[45] Az: 1 StR 184/00 vom 12. Dezember 2000 Available at: www.rechtsanwaltmoebius.de/urteil/bgh_auschwitzluege.pdf, accessed 12 October 2011.
[46] Julien, L.: Allemagne: RapidShare doit surveiller les contenus après notification. Numerama, 17 July 2012. http://www.numerama.com/magazine/23198-allemagne-rapidshare-doit-surveiller-les-contenus-apres-notification.html.
[47] Judgement of the Court (Third Chamber) of 24 November 2011. Scarlet Extended SA v Societé belge des auteurs, compositeurs et édieurs SCRL (SABAM) http://curia.europa.eu/juris/document/document.jsf?docid=115202&doclang=EN&mode=&part=1, accessed 21.09.2012.
[48] For instance, until this day, not an adequate legal answer could be taken against Kurucinfo.hu portal, which is a Hungarian language website inciting to hatred against Hungarian minority groups, hosted by a U.S. based server.

sanction will be imposed against the user who uploads illegal material, obliging the service provider to remove the content in question, or at least make it unavailable.[49]

The sanction could be an adequate answer to the appearance and spreading of such websites like *pedomaci.hu*, which used to recycle images of underage children, uploaded to other websites (or social network websites), added titles and comments of a sexual nature, and published the images. The aim of the website, however, was not to cause damage to the victims (even if this is what they have achieved with their defamatory and privacy abuse activities), but to generate revenues from the advertisements placed on the website. The host provider of the website was a so-called anonymiser service provider, who guaranteed anonymity to all the uploaders of websites hosted by him. In 2009 and 2010, the hotline for reporting illegal contents and the police received several reports from the parents of children who featured in the images, because the website published these images without their consent, with defamatory, libellous, and humiliating comments. No criminal proceedings were launched because the public prosecutor's office ruled that the persons shown in the pictures waived their title to the images as personal data by voluntarily uploading those to (other, social) websites, as by doing so, they actively enabled anyone to freely dispose of the images.[50] The website's domain-name was removed by the registration authority, after it was called upon by Hungarian hotlines and civil rights organisations ,for the reason that the *name* of the website is in itself illegal, as it refers to the sexual exploitation of minors (*pedomaci* means "paedobear", where "paedo" stands for "child", and "maci" for "little bear"). At the same time, the host provider removed the offensive content at the request of the hotline. After that, however, the website was once more uploaded to the server of a host provider registered in the US with the web address pedomaci.net, and the website is still available today with a similar content and purpose.

Besides radicalisation, a liberal ridge is also discernible, according to which copyrighted material downloaded for private non-profit purposes and also the sharing of such material will be decriminalised in the new criminal code.[51] With this provision, Hungarian law-making trend makes a reverse turn and goes liberal. On 1 January 2011 the new Hungarian media law entered into effect, and gives the government the power to control the internet. Unlike previous legislation, it does not distinguish between traditional and new media as they are all subject to strict standards. According to critics, the new media law extends the protection against content, ranging from hate speech to unintentional insult and incitement to hatred. For content published on internet press outlets, websites and forums, the ISP is liable to the same extent as for services related to e-commerce (as a consequence, the forms of liability described in the E-Commerce Act apply to him). If he fails to remove offending content at the request of the victim, or the press supervision authority, then he will be held liable as if he was the content provider. Currently, however, there is no practice for settling debates arising from the media act.

There are many unresolved issues in relation to this example based on which we may say that the legal regulation of online abuse in Hungary still leaves a lot of loopholes, and therefore needs to be amended in the future whereas practice will be a consequence of court rules . It was civil rights organisations and hotlines for reporting illegal content that did the most to address the situation, which shows that informal self-regulatory

[49] Making electronic data terminally unavailable, Act 100 of 2012 Section 63 Subsection 1g.
[50] It is another fact however, that recycling personal data online does not include the users' consent to misuse their private information per se. We can witness a debate in Germany on similar grounds: In the statement of 14 July 2011, the federal government acknowledged the relevance and conduct of criminal investigations on social networking pages. According to the government's view, the pseudonymous participation of a covert investigation agent on a social networking website does not require a specific legal basis since there is no legitimate expectation of privacy on websites which do not require a verification of identity by registration. According to data protection concerns, it does not correspond to the constitutional requirements. See more: Drs. 17/6587 "Antwort auf eine kleine Anfrage der Fraktion 'die Linke'" (Drackert 2011).
[51] 2012. évi C. tv. 385.§ (5) bek.

measures are more suitable to cover the legal loopholes in disputes related to online contents.

NOTICE AND TAKEDOWN (N&TD) PROCESS AS A DECENTRALISED, EX-POST AND MULTI-ACTOR OPTION FOR REMOVING ILLEGAL INTERNET MATERIAL

How the definition of child pornography varies, is also demonstrated by the following campaign. In May 2009, a German user wrote to altogether 348 service providers all of whose contents were featured on the different publicly available European blocking lists. In the 12 hours following this email, ten service providers removed close to 60 depictions. However, 250 service providers replied that their inspections only revealed legal content.[52] This shows that there is a lot of content of disputed character that the users cannot access due to blocking. However, blocking does not delete illegal content which continue to be available, e.g. by technically bypassing the filter, or by subscribing to other (smaller or foreign) ISP not obliged to apply blocking measures.

The fight against illegal contents can only be successful if the content is removed from the host servers. This is promoted by the international network of hotlines,[53] which receives reports of illegal contents. The hotlines send an N&TD warning to the service provider, in which they request him to remove the illegal contents from his websites. We need to differentiate between N&TD procedures involving the direct and the indirect notification of the host provider. If the investigating authority informs the national hotline about the illegal content, thereafter the hotline turns directly to the ISP to have the content removed this makes the response significantly faster. INHOPE, the biggest international umbrella organisation of ISPs, accepts new members on condition that they subscribe to the N&TD principles of supporting investigating authorities and providing relevant and fast information. The original, so called indirect notification procedure did not use to involve the hotlines, so the police had to approach the individual ISPs in each case to get the contents removed. This was a significantly slower process in because the ISP judged the N&TD orders on a case by case basis. However, the new direct notification system involves the national hotlines in the notification chain and can skip the content verification. National hotlines must apply a special code of conduct developed by INHOPE (in 2010) for qualifying the content. Still, fastness and directness[54] could only be ensured after the European Commission in charge of the financing of the hotlines made it compulsory for hotlines in 2010 to apply N&TD, and the related best practices.[55] The network of hotlines is, as we see, a positive example of self-regulation. It ensures an informal system of contacts which approaches ISPs in accordance with standardised procedural rules developed for the coordination activities of INHOPE, and ISPs are then obliged to remove the content in question.[56]

Member States acknowledge and promote the significance of N&TD procedures in relation to a growing number of crimes. Accordingly, the Council of Europe's Cybercrime Convention managed to get a recommendation accepted as a separate act on the promotion of the self-regulation of harmful content, which encouraged user-level,

[52] Alvar Freude: Löschen statt verstecken: Es funktioniert! AK Zensur, 27 Mai, 2009 Available at: http://ak-zensur.de/2009/05/loeschen-funktioniert.html, accessed 12 October 2011.
[53] The biggest international hotline network is INHOPE established in 1999, which by now has a national hotline in 33 countries. Germany has been a member since 1999, Hungary since 2005. Currently, there are three hotlines in Germany and one in Hungary with a membership in INHOPE. For the list of INHOPE members see: https://www.inhope.org/en/hotlines/facts.html, accessed 12 October 2011.
[54] According to the 2010 statistics of INHOPE, N&TD procedures for ISPs in the same country or in an EU member state take about 12 to 36 hours, while the mean takedown time in the case of US-hosted material is approx. 24 to 48 hours. See: INHOPE Annual Report 2010 Available at: http://www.inhope.org/Libraries/Annual_reports/2010_Annual_report.sflb.ashx; [12 October 2011]
[55] For more see: http://www.inhope.org/system/files/INHOPE+BROCHURE.pdf and also http://www.cl.cam.ac.uk/~rnc1/takedown.pdf, accessed on 12 October 2011.
[56] On different N&TD regimes see: Moore & Clayton, 2008.

voluntary-based internet filtering, ahead of its time in 2001, including the labelling of websites, age verification system, and personal identification codes.[57] By contrast, a recent proposal (2010) to replace EU directive 2004/68/EC[58] would require Member States to ensure a unified compulsory blocking of all websites aimed at the sexual exploitation of children which has met some opposition. At the debate of the EU Civil Liberties Committee held on 12 January 2011, 11 out of 12 representatives were against making blocking compulsory for Member States. The arguments included that there is less and less static surfaces (websites) that can be blocked in practice, and that the disseminators of child pornography exchange their recordings less on the internet, and more on P2P networks, to which the blocking mechanisms are technically ineffective. And if the service provider still wants to make a website unavailable, this would immediately alarm the criminals, and would make the preparation of a successful action against them impossible.[59]

Applying the N&TD procedure would also make it possible for content providers (users, citizens) to be aware of their rights. One of the basic criteria for the rule of law is that regulations need to be transparent, based on which the consequences of citizen's behaviour are predictable, and the right to fair procedure, which is based on transparency and the right to objection (equal fighting chances principle). The introduction of the N&TD procedure – instead of blocking[60] – would make the processes not only more transparent, but also more efficient in the perspective of the courts' administration, relieving courts of a burden; the court would indeed need to examine only cases where the content provider raised an objection against the notice to remove the content. (Burkert 2000) At the same time, the general introduction of N&TD would likely encourage the *voluntary action of citizens* and altruism, which are the basis for the regulation of the internet. The internet cannot be regulated from the 'outside', by an external entity. It is the user community that can do the most for the 'cleanness' and legality of online content. For this, however, users should be able to inform themselves about the legality of the contents they publish. (Sieber 2000)

EUROPEAN AND GLOBAL TRENDS IN BALANCING CENTRALISED AND DECENTRALISED REGULATIONS

On the basis of the above we have demonstrated the functioning and the shortcomings of state regulated blocking measures and in contrast demonstrated how effective N&TD process can be: in particularly in cases of eliminating sexual child exploitation content. However, government based blocking has been applied in other sectors as well (e.g. copyright infringement) and as the following examples show self-regulatory measures (such as applying code of conducts to regulate illegal internet content) cannot function well without some form of central authorisation – stipulated by the state or the European Commission.

[57] Council of Europe Committee of Ministers Recommendation Rec(2001)8 of the Committee of Ministers to member states on self-regulation concerning cyber content (self-regulation and user protection against illegal or harmful content on new communications and information services) Available at: https://wcd.coe.int/wcd/ViewDoc.jsp?id=220387&Site=CM; accessed on 12 October 2011.
[58] Proposal for a Directive of the European Parliament and of the Council on combating the sexual abuse, sexual exploitation of children and child pornography, repealing Framework Decision 2004/68/JHA Brussels, 29.3.2010 COM(2010)94 final.
[59] On the public debate on EU wide blocking measures held in the Civil Liberties Committee on 10 January, 2011 see: EDRi-gram – Number 9.1, 12 January, 2011 Available at: http://www.edri.org/book/export/html/2491, accessed 12 October 2011.
[60] Stellungnahme: Aktuelle Berichterstattung zu „Löschen statt Sperren" Available at: http://www.eco.de/verband/202_8112.htm, accessed on 12 October 2011; Stephan Löwenstein: Löschen von Kinderpornos gelingt selten. Frankfurter Allgeimeine Politik. Available at: http://www.faz.net/aktuell/politik/inland/internetseiten-loeschen-von-kinderpornos-gelingt-selten-11008405.html, accessed on 12 October 2011.

Copyright regulation may provide a good example of these trends and their implications. France may not be a pioneer of government-level internet-control, but it is indeed the first EU Member State where internet blocking was introduced (maybe with the exception of the abovementioned German attempts to block illegal contents where the law never entered into effect). The so called HADOPI Act entered into effect in 2009 in France[61] prescribes a system of "graduated response" consisting of three steps (also called the 'French three strikes' against copyright infringement) under which the ISP has to give internet users downloading copyrighted material repeated warnings. If the first and the repeated warning produce no results, the users may be fined depending on the approval of a judge, or their internet connection may be suspended.[62]Modelling HADOPI, a similar sanction is to be introduced into the German Criminal Law in 2012, which will be a preliminary warning system (*vorgerichtliche Warnhinweismodell*) against illegal downloading practices of the user.[63] The warnings would be applied particularly against users of P2P networks, followed by the termination of the internet access of the user (*Zugangsperren von Internet*) consequently.

The U.S. introduced their Copyright Alert System in July 2011, which formulates unified regulations for the action by service providers against users committing copyright infringement (5 or 6 strikes law against copyright infringers). Service providers have had the practice of suspending the IP-addresses of those users committing mass copyright infringement for some time, but only at the express request of the victim. The current setup, however, works on the basis of a Common Framework, which unifies and partly automates the suspensions, and is based on a state-of-the-art system, which is also used in the fight against credit card fraud. Every bigger ISP joined the programme in the U.S., which ensures that blocked users cannot regain access to the internet by switching ISPs. In line with the policy, the service provider sends out electronic warnings to the users at the request of the beneficiary of the copyrights, and should this fail to bring results, as a last 'strike' he reduces the bandwidth of the user's connection, and may even suspend the IP-address of the rogue user, who will then have no internet connection at all. Parallel to the suspension, the service provider hands out the personal data of the offender to the copyright protection organisation, who will oblige the user to participate in a copyright "consultation". The Recording Industry Association of America (RIAA) as the initiator says that the programme primarily has an informative and educational purpose (as according to surveys the majority of users are not even aware that by downloading intellectual and artistic works they commit a crime), ISPs may join the programme voluntarily, and its most important goal is not punishment, but providing information, while they are still not obliged to monitor users.[64] Users' rights organisations on the other hand say that service providers were under pressure to join the programme, and the final – sixth – strike, the blocking of the IP-address is not only applied as a last resort, but at their discretion, as the Digital Millennium Copyright Act (DMCA) stipulates that the ISP has to give a warning of the possible suspension to the user. Should this be omitted, the DMCA terminates the safe harbour clause of the ISP,

[61] HADOPI: *Haute Autorité pour la diffusion des œuvres et la protection des droits sur Internet*, or "law promoting the distribution and protection of creative works on the Internet" Available at: http://www.senat.fr/dossier-legislatif/pjl07-405.html, accessed 12 October 2011.
[62] The United Kingdom passed a Digital Economy Act in 2010 that contained similar provisions.
[63] Ferner, J. (2012) Droht in Zukunft eine Sperre des Internetzugangs bei Rechtsverletzungen?, 3 February 2012. http://www.ferner-alsdorf.de/?p=6543; Staatssekretär Otto begrüßt neue Studie zur Bekämpfung von Internetpiraterie. Pressemitteilung 3: Februar 2012. www.bmwi.de/DE/Presse/pressemitteilungen,did=474200.html. See also Schwartmann et al. (2012) Vergleichende Studie über Modelle zur Versendung von Warnhinweisen durch Internet-Zugangsanbieter an Nutzer bei Urheberrechtsverletzungen – im Auftrag des Bundesministeriums für Wirtschaft und Technologie I C 4-02 08 15-29/11. Januar 2012. http://www.bmwi.de/BMWi/Redaktion/PDF/Publikationen/Technologie-und-Innovation/warnhinweise-kurz,property=pdf,bereich=bmwi2012,sprache=de,rwb=true.pdf.
[64] See Dave Parrack: U.S. ISPs agree to be copyright cops. TechBlorge, July 7, 2011 Available at: http://tech.blorge.com/Structure:%20/2011/07/07/u-s-isps-agree-to-be-copyright-cops/; [12 October 2011]

which means that the ISP can be held liable for the infringing activities of the user, as if he himself had committed those.

Organisations protecting the freedom of the internet and users' interests criticise this initiative and point out that it represents the interests of market actors one-sidedly.[65] The user only has the option of defence in the last phase – i.e. suspension – which may be particularly controversial as regards hospitality and catering outlets offering free wireless internet connections. The educational goal is compromised by the fact that the user is not referred to an independent and unbiased information website in the programme, but has to contact the copyright protection organisation (Centre for Copyright Information), which will obviously give priority to market interests over objectively informing the user.

Civil society groups emphasise that steps to control the internet by governments with the involvement of the ISPs are one-sided and forcible, and are only seemingly voluntary, as service providers would be turned into "quasi online policemen" by the measure. Service providers' organisations stand by the rights of ISPs and their users, and instead of protecting state or market interests, rather support total self-regulation, that is mainly the unified application of N&TD.[66]

We saw that the State can only carry out its controlling activities with the active involvement of service providers, which is the technical platform. In these relations, ISPs very often have no other choice but to cooperate with state or market-based interest groups. Otherwise they are not acquitted of the liability for user generated illegal content or illegal user activity. Online copyright debates shed some light to the correlation between market interests and the activities of ISPs. In 2011, the public prosecutor's office of Dresden launched a concerted raid against the German movie streaming platform Kino.to which involved house searches in several EU Member States of those publishing copyrighted material on the platform. The police seized the domain-name Kino.to, and several users who uploaded streams were disconnected from the web. Kino.to only provided the platform whereas the illegal activity, i.e. the copyright infringement, was carried out by the users. That being said, it is obvious that the operator of the platform had to be aware of the illegal activities of the users. The platform operator also generated revenues from the advertisements placed on the site. After the German raid, the biggest Austrian ISP UPC.at also blocked for public access to Kino.to based on a previous court order. At the time of the writing of this study, there are no final court decisions in any of the cases, but the trend is clearly outlined: to assert market interests, service providers are even willing to block websites offering a platform to illegal activities. Another example is the filter incorporated into Google's search engine service, which no longer offers the auto complete function for any searches including the string "torrent".

The following case sheds light on the cooperation of the state and service providers from a different angle. It shows that the measures and standards (code of conduct) of service providers introduced for their own quality assurance and smooth operation, and also consumer protection, cannot work without a contribution from the state and the support of the industrial sector. The content verification system was introduced by ISPs registered in Germany in 2003 (based on the German state's contract with ISPs for the protection of youth media). This basically meant the application of the PEGI system (Pan European Age Verification system), which verified the age and the type of media involved. Then in 2010, German internet content providers started verification on their

[65] Abigail Phillips: The Content Industry and ISPs Announce a "Common Framework for Copyright Alerts": What Does it Mean for Users? July 7, 2011 Available at: https://www.eff.org/deeplinks/2011/07/content-industry-and-isps-announce-common, accessed 12 October 2011.

[66] See for example Oliver Süme's claims against access blocking: Three strikes gegen filesharing. Abschalten ist unverhältnismäßig. Available at: http://www.taz.de/Three-Strikes-gegen-Filesharing/!75932/, accessed 12 October 2011.

own websites, but as the verification were not compulsory not all websites were involved, which made the system unreliable. Quality factors varied among the different German federal States (*Länder*), and in December 2010 the government took the new website-verification system designed by the ISPs off the agenda for political reasons. This is an example of how decentralised regulatory efforts cannot work without political and government support.

On the other hand, the decentralised regulation of N&TD has its own shortcomings as well. The process of removing illegal material by ISPs can differ service to service, so N&TD rules may be applied slightly differently. An example to this is the Newsbin2 case in the UK, where it has been shown that ISPs are very reluctant to remove illegal content or disable access to such material unless a court orders them to do so. Newsbin2 is a website providing links to a large amount of copyrighted material including films, music and computer games. The Newsbin2 precedent was set following a lengthy legal battle between the ISP and copyright holder film studios – including Disney and Fox – insisting that the service provider should remove the contents displayed, claiming that allowing users downloading their copyrighted material infringed their rights. The High Court ordered UK's biggest ISP to block its customers' access to Newsbin2 website and all other IP addresses or URLs that the operators of Newsbin2 may use.[67] This ruling was based on the Copyright, Designs and Patents Act in the UK which allows domestic courts to grant an injunction against an ISP to block access to the illegal content if the ISP had an actual knowledge of someone using its website for illegal purposes. Since the Newsbin2 injunction in 2011, the British Recorded Music Industry has also called the ISP to block access to Pirate Bay, a file-sharing website pursuing and allowing illegal activity to its users. However, the ISP has said it would only block access to Pirate Bay, if a court orders so.[68] Because the process of N&TD varies by individual cases and by ISPs, the EU Commission concluded in 2012, that a global resolution to this problem would be necessary to ensure consistency of the rules.[69]

CONCLUSION

Central (government based) internet blocking is applied first of all to filter out the most serious crimes – such as children's sexual exploitation – from the web. Governments turn to this central internet "cleansing" method in order to protect their citizens – and especially the most vulnerable group of society – from getting hurt and misused. Central level internet blocking requires rigorous obligations of cooperation on the Intermediary Service Provider's side. Since ISPs are responsible for providing access to, and hosting user generated contents on, the internet they can control the users' online activities, store (and provide) users' data to law enforcement agencies (on request). To conclude, ISPs are the practical executers of internet blocking. Nevertheless, this key position raises questions on ISPs' liability for user generated contents.

The EU clearly regulates the liability of ISPs. Case law of ECtHR, ECJ and the Member States also tend to exclude ISPs liability for user generated contents. Besides the fact that there is the interest of preventing serious crimes at risk, it is also important to understand the side effects related with surveillance (dataveillance) and the threats for liberties implied by government-based internet blocking regimes. The first significant shortcoming of central internet blocking is its improper technique of filtering out illegal

[67] [2011] EWHC 2714 (Ch) Case No: HC10C04385 http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Ch/2011/2714.html&query=Newzbin&method=boolean, accessed 21 September 2012.
[68] Sky follows BT in blocking Newsbin2. Out-Law.com 19 December 2011. Available: http://www.out-law.com/en/articles/2011/december/sky-follows-bt-in-blocking-newzbin2/; [21.09.2012]
[69] EU Commission will clarify website notice and takedown procedures. Out-Law.com 12 January 2012. Available: http://www.out-law.com/en/articles/2012/january-/commission-will-clarify-website-notice-and-takedown-procedures/, accessed 21.09.2012.

contents. It can over- and under-filter unrequested contents at the same time, meanwhile though, almost all blocking methods can be bypassed, and are therefore not truly efficient. Last but not least, blocking measures do not represent a solution, in the sense that they do not contribute to the repression of most serious crimes by law enforcement agencies. Top-down regulated blocking can be applied only with the side effect of infringing fundamental digital rights (free speech, free access to information and freely use of online applications is not illegal *per se*). It is not effective, and the necessity-proportionality criterion is, by contrast, easily compromised. 'While governments can play an *active* role in adopting legislation, promulgating guidelines or initiating education programmes, their role in self-regulation can be [only] characterized as *supportive* of measures (nominally) initiated by industry to avoid the heavier hand of regulation.' (Friedewald et al. 2009: 224) Self-regulatory measures such as research guidelines and codes of conducts can supplement governmental measures. They can be put in effect faster than centrally introduced measures that need to go through several bureaucratic hoops. While central regulative measures can be difficult to enforce, self-regulation is sometimes asymmetric and unbalanced. (Friedewald et al. 2009)

Bottom-up, ISP level regulation methods of internet blocking, serving on one hand the elimination of illegal web content and ensuring content quality on the other, work out positively not only by eliminating (removing) child exploitation contents but also other, less serious crimes such as copyright infringement. The internet is decentralized by definition, so that this network structure should be followed when sketching up filtering structures and solutions. The more actors we allow to join this "programme" (not only Government agents and the ISPs, but also ISPs' associations, the business sector and users' associations as well), the easier will it be to achieve our goal to select and eliminate illegal contents.

The expression "blocking" suggests that the internet can be easily and simply "cleared" of illegal content, but nothing is further from the truth. Internet blocking involves a complex technical process demanding contributions from *several stakeholders*. Internet blocking cannot be achieved properly (i.e. respecting the necessity-proportionality testes and also fulfilling technical punctuality) either by centralised or by decentralised regulation exclusively. The ideal solution requires a comprehensive and reciprocal *cooperation* between the stakeholders involved. If we look at the dynamics of top-down and bottom-up regulations in the world, we can see two *prima facie* opposite processes emerging. One is the effort of states to gain control over the internet, and thereby fight illegal online activities; a strategy which clashes with the activities of ISPs and civil society organizations, and who campaign for the unlimited and control-free development of the internet. The other trend involves the same direction; the increasingly closer intertwining of the two areas, the public and private spheres, but without a coercive measure of the state. Internet governance is the territory where public and private sector voluntarily cooperate.

In this article we have shed light to *the notice and takedown procedure* applied as a bottom-up, decentralized, ex post method especially successful in fighting online child exploitation. This is a plausible example of the *intertwinement of the state and the ISPs*, as even a well-developed decentralized regulatory measure can only create a unified, standard platform and achieve success in practice when governed and coordinated by a central body such as the ISPs' association (INHOPE) and the European Commission. Meanwhile, even the role of local law enforcement agencies is important in achieving the goals. While the state's efforts to implement internet-blocking cannot be realized without the active contribution of the ISPs, the opposite is also true: ISPs' regulatory mechanisms can only work properly with the political or financial support of the state and the market sphere. In the interest of ensuring the European principle of subsidiarity and improving efficiency indices, the state has to allow lower level regulatory solutions, whose evolution dates back to the birth of global electronic networks, and where the application promotes community crime prevention, the improvement of digital literacy,

user awareness, and the respect of fundamental digital rights. Our argument is that the notice and takedown procedure is currently one of the most refined and wide-spread form of these regulatory solutions used successfully in several countries in Europe. We can thus conclude that central regulation of internet blocking cannot provide full protection as it suffers from significant shortcomings, and, does not show respect to fundamental digital rights. Nevertheless, regulatory measures applied by ISPs are equally not eligible for eliminating illegal contents in themselves, when the state does not step up as an enforcing body.

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A Comparative Analysis of Privacy Impact Assessment in Six Countries

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Abstract

The European Commission is revising the EU's data protection framework. One of the changes concerns privacy impact assessment (PIA). This paper argues that the European Commission and the EU Member States should draw on the experience of other countries that have adopted PIA policies and methodologies to construct its own framework. There are similarities and differences in the approaches of Australia, Canada, Ireland, New Zealand, the UK and US, the countries with the most experience in PIA. Each has its strong points, but also shortcomings. Audits have identified some of the latter in the instance of Canada. This paper provides a comparative analysis of the six countries to identify some of the best elements that could be used to improve Article 33 in European Commission's proposed Data Protection Regulation.

Keywords

Privacy impact assessment, data protection impact assessment, compliance check, stakeholder consultation, risk management, Data Protection Regulation

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The European Commission has proposed a major revision to the European Union's data protection framework. The proposed Regulation, released on 25 January 2012, represents the biggest overhaul in data protection since the Data Protection Directive (95/46/EC) was adopted in 1995. Article 33 of the proposed Regulation obliges organisations to conduct a 'data protection impact assessment' where processing operations present specific risks to the rights and freedoms of data subjects (European Commission, 2012). The Commission had already signalled its interest in privacy impact assessment (PIA) as an important instrument in the data protection toolkit well before publication of the proposed Regulation. For example, the Commission issued a Recommendation in May 2009 in which it said that 'Member States should ensure that industry, in collaboration with relevant civil society stakeholders, develops a framework for privacy and data protection impact assessments. This framework should be submitted for endorsement to the Article 29 Data Protection Working Party' (European Commission, 2009). Although the Art. 29 WP rejected industry's first attempt, it did endorse a revised framework in February 2011. In its endorsement, the Art. 29 WP said that risk management 'is an essential component of any Privacy and Data Protection Impact Assessment Framework' (Art 29 WP, 2011). It also welcomed 'the explicit inclusion of a stakeholder consultation process as part of the internal procedures needed to support the execution of a PIA'. The Art. 29 WP concluded its Opinion with the observation that 'A PIA is a tool designed to promote 'privacy by design', better information to individuals as well as transparency and dialogue with competent authorities.'

A further example of the EC's interest in PIA was its co-funding the PIAF project[1], which was carried out by a consortium of Vrije Universiteit Brussel, Trilateral Research & Consulting and Privacy International. PIAF is the acronym for a Privacy Impact Assessment Framework. The 22-month project began in January 2011 and finished in October 2012. It reviewed existing PIA methodologies in those countries with the most experience in PIA, i.e., Australia, Canada, Ireland, New Zealand, the UK and the US.

This paper draws on the research undertaken in the PIAF project as well as other PIA-related sources to provide a comparative analysis against 18 benchmarks of privacy impact assessment policies and methodologies used in the above-mentioned countries. Among the benchmarks or points of comparison are whether PIAs are mandatory, whether they are to be published, whether they deal with just data protection (information privacy) or include other types of privacy within their scope, whether they

support consultation with stakeholders, whether they provide for third-party review or audit, and so on. Our paper breaks new ground by providing a comparative analysis of the key features of the PIA policies and methodologies in each country in order to make recommendations for construction of an optimised PIA policy and methodology for use within EU Member States (and elsewhere) based on the best elements of existing policies and recommendations.

LEARNING FROM THE EXPERIENCE OF OTHERS

Although there are differences between the PIA policies and methodologies in the six above-mentioned countries, one can also see an increasing convergence in approaches, in good part because later countries, the UK and Ireland, have sought to learn from the experience of others. The increasing convergence is manifested by, for example, the emphasis on stakeholder consultation which features strongly in the UK and Irish PIA guidance documents, but less so or not at all in some of their antecedents. Convergence is also seen in definitions too, for example, of the term "project". Even certain phrases (PIA is described as "an early warning system") turn up again and again.

In this paper, we define PIA as a methodology for assessing the impacts on privacy of a project, technology, product, service, policy, programme or other initiative and, in consultation with stakeholders, for taking remedial actions as necessary in order to avoid or minimise negative impacts. A PIA is more than a tool: it is a *process* which should begin at the earliest possible stages, when there are still opportunities to influence the outcome of a project. It is a process that should continue until and even after deployment of the project.

While we discuss "privacy impact assessment" throughout this paper, the reader may wish to note that the European Commission has devised the terminology "data protection impact assessment". In its RFID Recommendation, it refers to "privacy and data protection impact assessment" (European Commission, 2009). We prefer the original term of privacy impact assessment, because we view data protection (information privacy) as only one type of privacy, and government agencies and companies should consider as well the risks to other types of privacy in any initiative they develop. Roger Clarke (1997, 2006) has identified four types (dimensions is the word he uses) of privacy – privacy of the person, of personal behaviour, of personal communications and of personal data.[2] All types of privacy should be taken into account in a privacy impact assessment. A data protection impact assessment is too limited in scope.

Paul De Hert (2012: 34) has criticized data protection impact assessment as merely a compliance check, 'simply checking the legal requirements spelled out in the European data protection framework'. He points out (De Hert, 2012: 33) that the Charter of Fundamental Rights of the European Union differentiates between privacy (Art. 7) and data protection (Art. 8). 'Depending on the nature of the data used, personal data and/or location data and/or traffic data, and depending on the nature of the processing involved (private, public, law enforcement), one can establish a checklist based on these regulations that when carried out properly will make up the data protection impact assessments. No more and no less (De Hert, 2012: 35). He goes on to argue that 'Beyond compliance checks with legal regulations, one must consider more qualitative requirements that have to do with legality, legitimacy, participation and, especially, proportionality… These qualitative principles – accounting for the difference between a compliance check and a true impact assessment – are key considerations in determining whether privacy is respected in the context of the ECHR [European Convention on Human Rights] and the relevant case law of the ECtHR [European Court of Human Rights] (De Hert, 2012: 38). Like Clarke, De Hert finds that privacy goes beyond data protection: 'the privacy right has served as a catch-all tool, covering a sophisticated collection of interests, ranging from intimacy, sexual choice, personal identity, moral and

physical well-being, reputation, formation of human relationships, health and environmental protection, collection of and access to personal information (De Hert, 2012: 39). For these and other reasons, we prefer the term privacy impact assessment over data protection impact assessment. The former is wider-ranging and can catch intrusions and compromises that may not be caught by a data protection impact assessment.

WHAT MAKES A GOOD PIA?

While the PIA literature is not voluminous (but is growing), researchers have identified criteria that make a "good" PIA. These include what a PIA is, how it should be conducted, what it should contain and how organisations undertaking PIAs should be supported, and how PIA recommendations should be implemented and monitored.

Roger Clarke (2011) and Colin Bennett (2007) argue that a PIA must be more than a compliance check with relevant privacy and data protection legislation. Experts agree that PIAs are especially effective if they are "pre-decisional", i.e., published before a system design or regulatory process is completed (Dempsey, 2004), which Bennett (2007: 13) argues allows for a significant amount of internal review and analysis before a technology or system is implemented. PIAs should also be regarded as a process that continues alongside the development of a project (Dempsey, 2004). PIAs should be regularly reviewed and may need to be updated if the technology or system is altered in any way. As such, a PIA should be understood as a "living" document, not a task which has been completed. Given these issues, we identify the following criteria against which to analyse PIA processes in the six countries. A PIA should:

- Be more than a compliance check;
- Be a process;
- Be reviewed, updated and on-going throughout the life a project.

Regarding how a PIA should be conducted, PIA experts regard stakeholder consultation as a key issue. Kenneth A. Bamberger and Deirdre K. Mulligan (2008) argue that consultation with a range of different stakeholders is one of the key ways in which privacy issues are identified and possible solutions are reviewed. According to these authors (2008: 87), a 'lack of explicit mechanisms for public participation in the PIA process…limits the opportunities for outside experts to assist the agency in identifying the privacy implications of often complex technological systems'. As a result, a PIA should integrate consultation with external stakeholders.

Experts have also agreed that a PIA should be a forum for the identification of problems *and* solutions. A PIA should identify risks to privacy as well as information about how those risks can be mitigated (Rotenberg, 2006: 24-25). Rotenberg further states that a PIA can enable an analysis of the scope, the legal basis and efficacy of the system as well as the effect of the system on privacy interests. Furthermore, as noted above, "privacy", as a concept, includes a number of different facets or dimensions or types, and as such, a PIA should identify privacy risks associated with each type of privacy, not only information privacy or data protection. PIAs should also have the potential to 'avoid, mitigate, stop or suggest alternative solutions to privacy risks, as well as the ability to modify plans accordingly' (Tancock et al., 2010: 120). As such, a PIA should:

- Identify privacy risks;
- Address all types of privacy;
- Identify possible strategies for mitigating privacy risks.

Clarke (2009) argues that guidelines for conducting a PIA, including suggestions for how the report ought to be structured and what information it ought to include, should be established and made publicly available. Organisations should also be assisted in

understanding that a PIA is good business practice and part of an effective risk management strategy (Tancock et al., 2010). This could lead to increases in public trust and corporate reputation. In relation to their review of PIAs in US government agencies, Bamberger and Mulligan (2012) also find that the creation of an external oversight structure for the conduct of PIAs and a chief privacy officer within the organisation to oversee and approve the PIA both contributed to the successful implementation of PIAs in that sector. Consequently, an effective PIA depends upon the provision of:

- A suggested structure for the PIA report;
- An encouragement to publish the PIA report;
- An encouragement to have PIA reports signed off by senior management (to foster accountability);
- A policy that provides for third-party, independent review or audit of the completed PIA document.

We use these benchmarks to assess the PIA policies and methodologies in the six countries with the most PIA experience. We also actively seek out examples of best practice in addition to the guidelines mentioned above to construct an optimal PIA methodology for Europe.

Australia

We begin our review of PIA methodologies with Australia and, in particular, two guidance documents, one produced by the Office of the Privacy Commissioner of Australia and the other produced by the Office of the Privacy Commissioner of Victoria.

Office of the Privacy Commissioner of Australia

The Office of the Privacy Commissioner (OPC) published its *Privacy Impact Assessment Guide* in August 2006, and a revised version in May 2010. The *Guide* is addressed to those who undertake a PIA, irrespective of whether they are from government agencies, the private sector or not-for-profit sector (i.e., civil society organisations). This is an important point to note. Any organisation, from whatever sector, should undertake a PIA if it is planning a project that might pose risks to privacy. However, there is no legislative requirement in Australia to conduct a PIA. It does not impose a particular PIA style ("There is no one-size-fits-all PIA model.") but suggests a flexible approach depending on the nature of the project and the information collected.

The Australian PIA Guide makes the point (at p. iii) that information privacy is only one aspect of privacy. Other types of privacy include privacy of the body, privacy of behaviour, privacy of location and privacy of communications, as mentioned above. It defines a project as 'any proposal, review, system, database, program, application, service or initiative that includes handling of personal information'.[3] Note that the definition excludes proposed policies or legislation. The *PIA Guide* says (p. viii) a PIA should be an integral part of the project from the beginning. A PIA should evolve with and help shape the project, which will help ensure that privacy is "built in" rather than "bolted on" (which echoes the same wording used in the ICO *PIA Handbook*).

The *PIA Guide* says (p. x) that 'Consultation with key stakeholders is basic to the PIA process.' The Privacy Commission encourages organisations, "where appropriate", to make the PIA findings available to the public (p. xviii).[4] The PIA Guide says (p. x) publication 'adds value; demonstrates to stakeholders and the community that the project has undergone critical privacy analysis; contributes to the transparency of the project's development and intent'.

Although the *PIA Guide* acknowledges different PIA models, it says (p. xii et seq.) there are generally five key stages in the PIA process:

1. Project description;
2. Mapping the information flows and privacy framework;
3. Privacy impact analysis;
4. Privacy management;
5. Recommendations.

The *PIA Guide* (p. xix) says the Office of the Privacy Commissioner has no formal role in the development, endorsement or approval of PIAs. However, subject to available resources, the Office may be able to help organisations with advice during the PIA process.

Victoria Privacy Commissioner (OVPC) PIA Guide

Roger Clarke has described the PIA guide produced by the Office of the Victorian Privacy Commissioner (OVPC) as 'one of the three most useful guidance documents available in any jurisdiction, anywhere in the world' (Clarke, 2012: 139). The current OVPC *PIA Guide* dates from April 2009. It is the second edition of the guide originally published in August 2004.

The OVPC *PIA Guide* is primarily aimed at the Victorian public sector, but it says it may assist anyone undertaking a PIA. Like the Australian OPC *Guide*, it says that privacy considerations must be broader than just information privacy; bodily, territorial, locational and communications privacy must also be considered. It sets out various risks thematically linked to Victoria's privacy principles as well as possible strategies for mitigating those risks. A template provides the structure of a PIA report, which the user can adapt to his or her circumstances.

The *Guide* uses (at p. 5) the word "project" to encompass any type of proposed undertaking, including "legislation" and "policy", which are not mentioned in the Australian OPC *Guide*. It says the size or budget for a project is not a useful indicator of its likely impact on privacy. The *Guide* recommends that a simple threshold privacy assessment be routinely conducted for every project to determine whether a PIA is necessary. The *Guide* has 17 simple yes/no questions (e.g., will the project involve the collection of personal information, compulsorily or otherwise?). If the answer to any of the questions is yes, the organisation should seriously consider initiating a PIA.

The *Guide* says (at p. 6) up-front commitment from an organisation's executive to the conduct of PIAs is needed to ensure buy-in to the PIA's eventual recommendations. The *Guide* advocates publication of the PIA report: releasing the report gives the public an opportunity to express concerns and have them addressed before a project has been implemented. The *Guide* says the PIA should be dynamic, updated as changes are contemplated to projects.

Organisations should consult early with the privacy commissioner if:

- There is a large amount of personal information at issue;
- The project involves sensitive information;
- There will be sharing of personal information between organisations;
- Any personal information will be handled by a contracted service provider;
- Any personal information will be transferred outside Victoria; or
- There is likely to be public concern about actual or perceived impact on privacy.

Like most other guidance documents, the *Guide* says that a PIA should assess not only a project's strict compliance with privacy and related laws, but also public concerns about

the wider implications of the project. It cites the New Zealand *PIA Handb*ook which notes that 'Proposals may be subject to public criticism even where the requirements of the Act have been met. If people perceive their privacy is seriously at risk, they are unlikely to be satisfied by [an organisation] which justifies its actions merely by pointing out that technically it has not breached the law' (OPC, 2007: 24).

The *Guide* says that public consultation as part of the PIA process not only allows for independent scrutiny, but also generates confidence amongst the public that their privacy has been considered. Public consultation may generate new options or ideas for dealing with a policy problem. If wide public consultation is not an option, the *Guide* says the organisation could consult key stakeholders who represent the project's client base or the wider public interest or who have expertise in privacy, human rights and civil liberties.

The *Guide* (at p. 20) generally recommends publication of the report, but recognizes some considerations, such as security, may influence the decision to publish. In such cases, it says that a properly edited PIA report would usually suffice to balance the security and transparency interests. One option is to publish both the PIA report and the organisation's response to its recommendations, and then seek feedback through consultation on whether the proposed response is acceptable to stakeholders, whether the project should proceed, or which option/s to follow.

Canada

In Canada, policy responsibility for privacy impact assessment in the federal government lies with the Treasury Board of Canada Secretariat (TBS, 2008), which defines PIA as "a policy process for identifying, assessing and mitigating privacy risks". TBS promulgated a new Directive on Privacy Impact Assessment in April 2010. The directive ties PIAs with submissions to the Treasury Board for program approval and funding. This is one of the strongest features of Canadian PIA policy. PIAs have to be signed off by senior officials, which is good for ensuring accountability. The PIA is to be "simultaneously" provided to the Office of the Privacy Commissioner. Institutions are instructed to make parts of the PIA publicly available, i.e., an overview and PIA "initiation", and specified "risk area identification and categorisation". Exceptions to public release are permitted for security as well as "any other confidentiality or legal consideration". Heads of government institutions are responsible for monitoring and reporting their compliance with the PIA directive and the TBS 'will monitor compliance with all aspects of this policy' (TBS, 2008, 6.3.3).

The TBS does not approve PIAs; it only reviews them to ensure that the assessment is complete (TBS, 2010, 8.1.1). The TBS requirements put the emphasis on completion of a PIA report, rather than PIA as a process. The directive makes no provision for stakeholder engagement. Nor does it address the benefits of undertaking a PIA and finding solutions to privacy risks[5]. While the directive does not refer to the TBS's PIA Guidelines, these are still recommended even if they have not been revised since August 2002.

The first step in the PIA process is to determine whether it is required, and the first question to ask is, "Is personal information being collected, used or disclosed in this initiative?" If the answer is "no", then a PIA is not warranted. If the answer is "yes" or "maybe", officials should then go through the checklist of 11 questions on the first page of the guidelines. These questions are somewhat like those in the privacy threshold assessment used in the Australian OPC and Victoria PIA Guides, among others. Also like those guides, the TBS PIA Guidelines are based upon privacy principles – in this case, those in the Canadian Standards Association's *Model Code for the Protection of Personal Information*[6] as well as federal privacy legislation and policies.

Other PIA guidance documents state that the purpose of a PIA is to identify and mitigate privacy risks. Interestingly, the TBS Guidelines state that 'a key goal of the PIA is to effectively *communicate* the privacy risks… [and] to contribute to senior management's ability to make fully informed policy, system design and procurement decisions' (TBS, 2002, 2). The Guidelines identify several common privacy risks, such as data profiling/data matching, transaction monitoring, identification of individuals, physical observation of individuals, publishing or re-distribution of public databases containing personal information and lack or doubtful legal authority.

The Guidelines include two questionnaires to help identify privacy risks or vulnerabilities in the proposal and to facilitate the privacy analysis. The questionnaires include a "yes" or "no" field as well as a "Provide details" field for explaining how a particular requirement is met or why it is not met. The Guidelines say that departments and agencies can undertake generic or overarching PIAs where proposals are similar or interrelated to avoid duplication of effort.

Alberta

In 2001, the Office of the Information and Privacy Commissioner (OIPC) of Alberta introduced its first Privacy Impact Assessment (PIA) questionnaire. In the following eight years, according to the OIPC, the practice of privacy impact assessments matured and the number of PIAs increased dramatically. In January 2009, the OIPC revised its PIA template and guidelines (OIPC, 2009). Those submitting PIAs are advised to consider the feedback from the OIPC before they implement their projects covered by Alberta's Health Information Act (HIA). Otherwise, if the OIPC identifies privacy concerns, 'it may be necessary to make expensive and time-consuming changes to your project late in the development cycle' (OIPC, 2009: 5). The OIPC appears to exercise much more power than most of its counterparts. Not only are PIAs dealing with health information mandatory, they must be submitted to the OIPC before implementation of a new system or practice. If the OIPC finds shortcomings, projects can be turned down or forced to make costly retrofits. It appears to play a much more activist role in reviewing PIAs than many of its counterparts elsewhere.

The OIPC points out that "acceptance" of a PIA is not approval. It only reflects the OIPC's opinion that the project manager has considered the requirements of the HIA and has made a reasonable effort to protect privacy. The OIPC says "custodians" of health information should review their PIAs as new practices and technologies evolve after projects are implemented and new threats to privacy may also develop. Custodians should advise the OIPC of any resulting changes to the PIA. The OIPC says if a member of the public makes a complaint against the custodian's organisation, it may review previously submitted PIAs.

Unlike other PIA methodologies that say PIAs should be initiated as early as possible, the OIPC PIA Requirements say that, generally speaking, the best stage at which to do a PIA is after all business requirements and major features of the project have been determined in principle, but before completing detailed design or development work to implement those requirements and features, when it is still possible to influence project design from a privacy perspective. The PIA must include details on the project's information security and privacy policies and procedures. The Alberta PIA Requirements are unusual in making mandatory the format for HIA PIAs. The OIPC advises custodians that if they do not provide enough detail, the OIPC will ask for clarification, which will increase the overall PIA review time and delay the project.

Ireland

The Health Information and Quality Authority (HIQA) produced a PIA Guidance (HIQA, 2010b) following its review of PIA practice in other jurisdictions (HIQA, 2010a), which found a growing convergence in what constitutes best practice in relation to PIAs. The Guidance says the primary purpose in undertaking a privacy impact assessment is to protect the rights of service users. The PIA process involves evaluation of the broad privacy implications of projects and relevant legislative compliance. Where potential privacy risks are identified, a search is undertaken, in consultation with stakeholders, for ways to avoid or mitigate these risks. It says that a PIA in its own right may not highlight all privacy risks or issues associated with an initiative. A PIA is a tool; it depends on service providers' having the correct processes in place to carry out the PIA. These include identification of the stakeholders for the assessment, selection of those with the necessary knowledge and skills to carry out the PIA and involvement of senior managers in order to implement the PIA recommendations. It is essential that the PIA is regularly updated to reflect any changes to the direction of the initiative to ensure that all discoverable privacy issues are addressed.

The PIA should generally be undertaken by the project team. It may, however, be appropriate to consult service users as part of the PIA process. The service provider is ultimately responsible for the completion of the PIA and for implementing any changes to the project plan following recommendations from the PIA. PIAs should be reviewed and approved at a senior level with each PIA report being quality assured by senior management. Like the Alberta PIA Requirements, the Irish Guidance says that if a PIA is conducted too early, the results will be vague as there may not be enough information available about the project, its scope and proposed information flows to properly consider the privacy implications and as such the PIA may need to be revisited. The PIA process should be undertaken when a project proposal is in place but before any significant progress or investment has been made. The findings and recommendations of the PIA should influence the final detail and design of the project.

The project manager should explain the option(s) chosen for each risk and the reasoning behind the choices. If there is a residual or remaining risk, which cannot be mitigated, the project team must decide whether or not it is acceptable to continue with the project. The Guidance says consultation with stakeholders and members of the public about the privacy risks associated with the project can prove valuable. Consultation can help in discovering the impacts of some privacy risks. Consultation is a way to gather fresh input on the perceptions of the severity of each risk and on possible measures to mitigate these risks. Feedback gained and any changes made to a project as a result of stakeholder engagement should be included in the PIA report.

The Health Information and Quality Authority favours publication of PIA reports as it builds a culture of accountability and transparency and inspires public confidence in the service provider's handling of personal health information. Completed PIA reports should be published and presented in a reader-friendly format.

New Zealand

The origins of privacy impact assessment in New Zealand date back to at least 1993, to the legislative requirement under section 98 of the Privacy Act 1993 to undertake Information Matching Privacy Impact Assessments (IMPIAs).[7] IMPIAs are legally mandatory assessments involving an examination of legislative proposals that provide for the collection or disclosure of personal information and used for an information-matching programme (OPC, 2010). The Office of the Privacy Commissioner (OPC) issued guidance on their implementation in 1999 (OPC, 2008).

The OPC (2007) published a *PIA Handbook* in October 2002 (reprinted in 2007). The *Handbook* defines a PIA as a 'systematic process for evaluating a proposal in terms of its impact upon privacy' (2007: 5), which can help an agency to identify the potential effects of a proposal on individual privacy, examine how any detrimental privacy effects can be overcome and ensure that new projects comply with the information privacy principles. A PIA is thus a 'valuable tool for businesses and governments which take privacy seriously' (2007: 3).

The *Handbook* is useful for 'projects with a technological component, especially e-commerce and e-government initiatives', though it also aims to help businesses, government departments and others operating offline. According to the *Handbook* (2007: 6), PIAs are an "early warning system" for agencies to enable them to detect and deal with privacy problems at an early stage so that privacy crises are averted. The *Handbook* offers (2007: 21-28) in-depth practical advice on how to prepare privacy impact reports.

The *Handbook* outlines the following reasons for public and private sector agencies to conduct PIAs. First, PIAs are a 'tool to undertake the systematic analysis of privacy issues arising from a project in order to inform decision-makers', they thus function as a credible source of information. Second, a PIA enables a business to learn about the privacy pitfalls of a project (rather than its critics or competitors pointing them out) and helps save money and protect reputation. Third, a PIA fixes privacy responsibility with the proponent of a project – project proponents can "own" problems and devise appropriate responses. Fourth, a PIA encourages cost-effective solutions saving the expenses involved with meeting privacy concerns as a "retrofit". Fifth, a PIA leads to an initiative being privacy enhancing rather than privacy invasive. Sixth, reviews of PIA reports by the Privacy Commissioner add value to the PIA process. (*Handbook*, 2007: 11)

The *Handbook* recommends (2007: 14) minimizing the duplication of PIA efforts by undertaking generic or overarching PIAs where planned projects are similar. The *Handbook* suggests (2007: 21) the following contents for PIA reports:

- Introduction and overview;
- Description of the project and information flows;
- The privacy analysis (collecting and obtaining information about use, disclosure and retention of information);
- Privacy risk assessment;
- Privacy enhancing responses;
- Compliance mechanisms;
- Conclusions.

The *Handbook* outlines the following risks:

- Failing to comply with either the letter or the spirit of the 1993 Privacy Act, or fair information practices generally;
- Stimulating public outcry as a result of a perceived loss of privacy or a failure to meet expectations regarding the protection of personal information;
- Loss of credibility or public confidence when the public feels that a proposed project has not adequately considered or addressed privacy concerns;
- Underestimating privacy requirements with the result that systems need to be redesigned or retrofitted at considerable expense.

The *Handbook* recommends (2007: 21) that the PIA report is best written with a non-technical audience in mind and that it be made publicly available (2007: 19) (either in full or summary on an organisation's website). The *Handbook* mentions consultation with stakeholders (2007: 26) but does not outline the consultative process. The agency conducting the PIA may consult the Privacy Commissioner. It may receive the PIA report

for information only or offer feedback and constructive suggestions. PIAs are generally not mandatory in New Zealand, however, section 32 of the Immigration Act 2009 explicitly requires that PIA be conducted if biometric information is processed.

John Edwards, a PIA practitioner in New Zealand, comments that there are 'different assumptions among clients, regulators and others as to what the assessment process is intended to do and is capable of delivering'; assessments based primarily on compliance are not 'going to be a comprehensive review of privacy issues' (Edwards, 2012: 198).

UK

The Information Commissioner's Office (ICO) commissioned a team of experts, coordinated by Loughborough University, to study PIAs in other jurisdictions (Australia, Canada, Hong Kong, New Zealand and the United States) and identify lessons to guide PIAs in the UK (ICO, 2007a). That same year, the ICO published a *PIA Handbook* (ICO, 2007b) making the UK the first country in Europe to do so. The ICO published a revised version in June 2009. According to the ICO, a PIA is 'a process which helps assess privacy risks to individuals in the collection, use and disclosure of information. PIAs help identify privacy risks, foresee problems and bring forward solutions.'[8]

The Cabinet Office, in its Data Handling Review, called for all central government departments to 'introduce Privacy Impact Assessments, which ensure that privacy issues are factored into plans from the start' (Cabinet Office, 2008a: 18). It accepted the value of PIA reports and stressed that they will be used and monitored in all departments. PIAs have thus become a 'mandatory minimum measure' (Cabinet Office, 2008b: Section I, 4.4).

The ICO (2009: 3) envisages a PIA as a process, separate from 'compliance checking or data protection audit processes', that should be undertaken when it can 'genuinely affect the development of a project'. (The *Handbook* uses the term "project" as a catch-all; it can refer to 'a system, database, program, application, service or a scheme, or an enhancement to any of the above, or an initiative, proposal or a review, or even draft legislation' (2009: 2).

According to the *Handbook*, a PIA is necessary for the following reasons: To identify and manage risks (signifying good governance and good business practice); to avoid unnecessary costs through privacy sensitivity; to avoid inadequate solutions to privacy risks; to avoid loss of trust and reputation; to inform the organisation's communication strategy and to meet or exceed legal requirements.

The *Handbook* places responsibility for managing a PIA at the senior executive level (preferably someone with lead responsibility for risk management, audit or compliance). The ICO does not play a formal role in conducting, approving or signing off PIA reports. It does, however, play an informative and consultative role in supporting organisations in the conduct of PIAs. The ICO views the PIA process as including identification of and consultation with stakeholders. It distinguishes between a full-scale PIA for large and complex projects and a small-scale PIA for smaller projects. It sets out 15 questions to help determine which is appropriate for a given project.

Warren and Charlesworth (2012) contend that there are several problems with the UK PIA system, one of which is the lack of review and oversight. They also point out the 'apparent lack of PIA cross-fertilization across departmental boundaries' and the 'relatively "hands-off" oversight' raises doubts about the efficacy of governmental PIA processes. They also point out that there is no formal process of external review of PIAs in the UK by central agencies or by the ICO (which functions largely as an advisory body in this respect).

Warren and Charlesworth further note that, in the UK, as in other places, there is:

- No consistent process for ensuring effective consultation with stakeholders, notably the general public, e.g., a register of ongoing PIAs, consultation periods and relevant contact details;
- No consistency in reporting formats for PIAs, whether in draft or completed, e.g., a PIA might be reported in a detailed 62-page document, or simply mentioned in a paragraph in a general impact statement[9]; and,
- No strategy for ensuing that, where PIA decisions and reports are made publicly available, they are easily accessible, perhaps from a centralised point, e.g., the UK Office of Public Sector Information (OPSI) or the ICO.

USA

In the United States, privacy impact assessments for government agencies are mandated under the E-Government Act of 2002. This Act states that PIAs must be conducted for new or substantially changed programmes which use personally identifiable information. Personally identifiable information (PII) is defined as 'any information that permits the identity of an individual to be directly or indirectly inferred' (DHS, 2007: 8). The processing of PII in the US is also covered by Fair Information Practice Principles (FIPP) from the Privacy Act of 1974.

Section 208 of the E-Government Act requires that PIAs be reviewed by a chief information officer or equivalent, and should be made public, unless it is necessary to protect classified, sensitive or private information contained in the assessment. Agencies are expected to provide their Director with a copy of the PIA for each system for which funding is requested. Each agency Director must issue guidance to their agency specifying the contents required of a PIA.

Roger Clarke (2009: 128) argues that some organisations are seeking to 'forestall legislative provisions' for PIAs by creating and supporting industry standards. Clarke argues that 'these processes have lacked the least vestige of consultation with people, or with their representatives or advocates for their interests.' He further notes that 'the ideology of the US private sector is hostile to the notion that consumers might have a participatory role to play in the design of business systems. This is of considerable significance internationally, because US corporations have such substantial impact throughout the world. (Clarke, 2009: 128).

On 26 Sept 2003, the Office of Management and Budget (OMB) issued a Memorandum to heads of Executive departments and agencies providing guidance for implementing the privacy provisions of the E-Government Act (OMB, 2003). The guidance directs agencies to conduct reviews of how information about individuals is handled within their agency when they use information technology (IT) to collect new information, or when agencies develop or buy new IT systems to handle collections of personally identifiable information. Agencies are required to conduct privacy impact assessments for electronic information systems and collections and, in general, make them publicly available. PIAs should also be performed or updated when changes to an existing system create new privacy risks.[10] Agencies must also update their PIAs to reflect changed information collection authorities, business processes or other factors affecting the collection and handling of information in identifiable form. Government contracts 'that use information technology or that operate websites for purposes of interacting with the public' or "relevant" cross-agency initiatives should also be the subject of a PIA (OMB, 2003: Attachment A).

Agencies are also directed to describe how the government handles information that individuals provide electronically, so that the American public has assurances that

personal information is protected. The OMB specifies what must be in a PIA and, in doing so, it puts an implicit emphasis on the end product, the report, rather than on the process of conducting a PIA. Agencies should not include information in identifiable form in their privacy impact assessments, as there is no need for the PIA to include such information. Thus, agencies may not avoid making the PIA publicly available on these grounds. Agencies are required to submit an annual report on compliance with this guidance to OMB as part of their annual E-Government Act status report.

Table 1: Principal Similarities and Differences between the Different PIA Guidance Documents

Features The PIA guide…	**Australia**		**Canada**		**IE**	**NZ**	**UK**	**USA**
	National	Victoria	National	Alberta				OMB
Reviewed here, was published in	May 2010	Apr 2009	Aug 2002	Jan 2009	Dec 2010	Oct 2002 to 2007	Jun 2009	Sep 2003
Says PIA is a process	✓	✓	✓		✓	✓	✓	✓
Contains a set of questions to uncover privacy risks (usually in relation to privacy principles)	✓	✓	✓		✓	✓	✓	
Targets companies as well as government	✓	✓		✓	✓	✓	✓	
Addresses all types of privacy (informational, bodily, territorial, locational, communications)	✓	✓						
Regards PIA as a form of risk management	✓		✓		✓		✓	✓
Identifies privacy risks	✓	✓	✓		✓	✓	✓	
Identifies possible strategies for mitigating those risks		✓				✓		
Identifies benefits of undertaking a PIA	✓	✓	✓		✓	✓	✓	
Supports consultation with external stakeholders	✓	✓			✓		✓	
Encourages publication of the PIA report	✓	✓	Summary	Summary		✓	✓	✓
Provides a privacy threshold assessment to determine whether a PIA is necessary	✓	✓	✓		✓		✓	✓
Provides a suggested structure for the PIA report	✓	✓	✓	✓		✓	✓	✓
Defines "project" as including legislation and/or policy		✓						
Says PIAs should be reviewed, updated, ongoing throughout the life a project	✓	✓		✓	✓	✓	✓	✓
Explicitly says a PIA is more than a compliance check	✓	✓	✓				✓	
The PIA policy provides for third-party, independent review or audit of the completed PIA document.			✓	✓		✓		✓
PIA is mandated by law, government policy or must accompany budget submissions.			✓	✓	✓		✓	✓
PIA reports have to be signed off by senior management (to foster accountability).		✓	✓	✓	✓			✓

A COMPARISON OF PIA POLICIES AND METHODOLOGIES IN THE SURVEYED COUNTRIES

Table 1 identifies the principal similarities and differences between the different PIA guidance documents analysed in this paper based on the recommendations that make a "good" PIA. In addition to the recommendations discussed above, our review has also identified other best practice elements that we feel a successful PIA methodology or policy should include. It should also:

- Contain a set of questions to uncover privacy risks (usually in relation to privacy principles);
- Target companies as well as government departments;
- Regard PIA as a form of risk management;
- Identify benefits of undertaking a PIA;
- Provide a privacy threshold assessment to determine whether a PIA is necessary;
- Define "project" as including legislation and/or policy;
- Mandate the PIA by law, government policy or as an accompaniment to budget submissions.

Best elements

From our review and analysis of the above-referenced PIA methodologies, we have identified elements (practices) that could be used to construct a state-of-the-art European PIA policy and methodology. Following the structure of the discussion of "good" PIA criteria above, this section categorizes our recommendations for an optimised PIA methodology for the EU in terms of what a PIA should be, how it should be carried out, what it should contain and how organisations undertaking PIAs should be supported or encouraged. Several of these "best elements" are mentioned, albeit briefly, in Article 33 of the European Commission's proposed Data Protection Regulation. We refer to those. Where the best elements are absent, we recommend that decision-makers in the European Commission, Member States and industry take those into account in formulating an optimal PIA policy.

What a PIA should be

A PIA should go beyond a simple check that a project complies with legislation and engage stakeholders in identifying risks and privacy impacts that may not be caught by the compliance check. Article 33(4) says a data controller 'shall seek the views of data subjects or their representatives on the intended processing, without prejudice to the protection of commercial or public interests or the security of the processing operations' (European Commission, 2012).

Many PIA guidance documents, such as the ICO *Handbook*, emphasize PIA as a process, not simply an exercise aimed at producing a report. The report documents the PIA process. A PIA should continue after the report is published. PIAs should be embedded as part of the project management framework. The PIA should be reviewed and updated throughout the duration of a project. Article 33, as currently drafted, seems to place its emphasis on preparation of the PIA report. If Article 33 is revised before the proposed Regulation is adopted, then the EC could add some wording that emphasises PIA as a process.

How and under what circumstances it should be carried out

PIAs should be undertaken with regard to any project, product, service, programme or other initiative, including legislation and policy. Article 33 says a PIA (or rather a data protection impact assessment) should be carried 'Where processing operations present specific risks to the rights and freedoms of data subjects' (European Commission, 2012). (The Article 29 Data Protection Working Party has suggested amending this provision by inserting the words "likely to" before "present" (Art. 29 WP, 2012: 16)

The Victoria *Guide* points out that a project need not be large to be subject to a PIA, nor is the size or budget of a project a useful indicator of its likely impact on privacy. The project does not even need to involve recorded "personal information"; for example, a program that may include the need for bodily searches can still impact on privacy even if no personal information is recorded.

A PIA should be started early, so that it can evolve with and help shape the project, so that privacy is "built in" rather than "bolted on". A PIA should be initiated when it is still possible to influence the design of a project. Article 33 implies that a PIA should be conducted early when it refers to "the envisaged processing operations" (European Commission, 2012).

Several of the PIA guidance methodologies (e.g., Australia, UK) say that "Consultation with stakeholders is basic to the PIA process." Engaging stakeholders, including the public, will help the assessor to discover risks and impacts that he or she might not otherwise have considered. A consultation is a way of gathering fresh input on the perceptions of the severity of each risk and on possible measures to mitigate these risks. Feedback gained and any changes made to a project as a result of stakeholder engagement should be included in the PIA report. As noted above, Article 33 contains a provision whereby data controllers shall seek the views of data subjects or their representatives.

PIAs should be applied to cross-jurisdictional projects as well as individual projects. PIAs should invite comments from privacy commissioners of all jurisdictions where projects are likely to have significant privacy implications and ensure that such projects meet or exceed the data protection and privacy requirements in all of the relevant countries. Recital 72 of the proposed Data Protection Regulation, while it does not include cross-jurisdictional projects per se, does say 'There are circumstances under which it may be sensible and economic that the subject of a data protection impact assessment should be broader than a single project, for example where public authorities or bodies intend to establish a common application or processing platform or where several controllers plan to introduce a common application or processing environment across an industry sector or segment or for a widely used horizontal activity' (European Commission, 2012).

What it should contain

The PIA should identify information flows, i.e., who collects information, what information they collect, why they collect it, how the information is processed and by whom and where, how the information is stored and secured, who has access to it, with whom is the information shared, under what conditions and safeguards, etc. Information privacy is only one type of privacy. A PIA should also address other types of privacy, e.g., of the person, of personal behaviour, of personal communications and of location. Article 33 focuses on "data protection" only. Hence, this is a major limitation of the proposed Regulation as currently framed.

A PIA guidance document should include an indicative list of privacy risks an organisation might encounter in initiating a new project, but should caution project managers and assessors that such a list is not exhaustive. The questions most PIA guidance documents

include can help stimulate consideration of possible privacy impacts. Article 33(2) contains a list of risks. The PIA should also include a discussion of what solutions to the privacy risks were identified, what potential changes were considered to mitigate those risks and how the system or technology was modified or changed to address those risks. The PIA should specify who undertook the PIA, how they can be contacted for more information and where to find further information and other sources of help and advice. Article 33 does not go into this detail.

How organisations should be supported or encouraged to undertake PIAs

PIA guidance documents should be aimed at not only government agencies but also companies or any organisation initiating or changing a project, product, service, programme, policy or other initiative that could have impacts on privacy. Article 33 refers to data controllers and does not limit itself to just government agencies. Hence, companies would also have to adhere to its provisions.

A project manager or whoever leads a PIA typically needs to bring together different skill sets in order to carry out the PIA. A guidance document will help the project manager when it identifies the variety of skills required for undertaking a privacy impact assessment. Article 33 does not go into this level of detail.

Although some PIA guidance documents, such as the New Zealand *Handbook* and the ICO *Handbook*, say that "no one size fits all" in PIA, most guidance documents offer a structured approach to the PIA process and preparation of a PIA report. In the case of Alberta, the format is mandatory. The Irish Health Information and Quality Authority has developed a sample PIA report based on its Guidance to help assessors. The Victoria Privacy Commissioner includes a template that provides the structure of a PIA report, which the user can adapt to his or her circumstances. Article 33 specifies what a PIA report should contain "at least".

Questionnaires are helpful in stimulating consideration of privacy impacts, but they become mere checklists if respondents only have to answer yes or no. The best questionnaires require some explanation or details of how the PIA addresses the issues raised by each question. Data protection authorities (privacy commissioners) should make it easy for project managers, assessors and others to find a link for downloading the PIA guidance, preferably on their home page. A PIA guidance should include a list of references to other PIA guidance documents and actual PIA reports. It should draw on the experience of others to make the guidance more practical and effective. The New Zealand handbook has a useful bibliography of national and international PIA resources. Article 33 does not go into this level of detail.

Governments especially should create a central registry of PIAs, so that particular PIA reports can be easily found. Publication of PIA reports will enable organisations to learn from others. Article 33 does not contain such a provision. A PIA report should normally be publicly available and posted on an organisation's website so as to increase transparency and public confidence. If there are security, commercial-in-confidence or other competitive reasons for not making a PIA public in full or in part, the organisation should publish a redacted version or, as a minimum, a summary. The public has a right to know if their privacy will be impacted by a new project or changes to an existing project. A properly edited PIA report can balance the security and transparency interests. Article 33 makes no explicit mention regarding publication of the PIA report.

As many organisations, especially those from the private sector, may resist undertaking a PIA, a guidance document should highlight the benefits of undertaking PIAs and how they will help an organisation. For example, in New Zealand, PIA is regarded as an "early warning system". Other PIA guidance documents have picked up on the same wording.

Article 33 refers only to the risks. There is no mention of the benefits. Privacy commissioners or other leaders should identify and publish particular PIA reports as examples of good practice. Article 33 does not contain any such provision. A PIA guidance document should be updated from time to time, as happens in several countries. Article 33 is silent on this. PIA should have up-front commitment from an organisation's senior management. Senior management should be held accountable for the proper conduct of a PIA and should sign off the PIA report, as the Treasury Board Secretariat (TBS) of Canada requires. Funding submissions should be accompanied by a PIA report. TBS policy also requires that government departments and agencies copy the PIA report to the Privacy Commissioner, which we also find to be a good practice. Article 33 does not contain such a provision. PIA should be part of an organisation's overall risk management practice.

Privacy commissioners do not generally approve PIAs; however, they may review them and provide guidance on improving them. Article 33 does not contain such a provision. PIA reports and practices should be audited, just as a company's accounts are audited. An audit will help improve PIA practice, as the Office of the Privacy Commissioner of Canada found following its major audit of PIAs in 2007. To increase their effectiveness, PIAs should be subject to external oversight. Article 33(7) says 'The Commission may specify standards and procedures for carrying out and verifying and auditing the assessment'.

CONCLUSION

Europe has an opportunity to develop a state-of-the-art PIA policy and methodology. It should benefit from the experience of others, notably the countries analysed in this paper, and construct a PIA framework based on the "best" elements of existing policies and methodologies, i.e., those elements recommended by the authors as well as other PIA experts. This paper has provided a comparative analysis of PIA methodologies in the six countries with the most experience of PIA and identified some of the elements that could be used in a European PIA policy and methodology. The findings of this paper can be used by policy-makers and industry decision-makers to "flesh out" the rather sketchy provisions for PIA in Article 33 of the proposed Data Protection Regulation. In the preceding section of this paper, we have identified which of our findings correlate with Article 33 and where there are lacunae in Article 33 that could be filled by our recommendations.

* * *

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[1] www.piafproject.eu. Last accessed: 17 March 2013.

[2] Wright (2011a) has identified seven types of privacy – the four identified by Clarke, plus privacy of location, privacy of thought and feeling, and privacy of the group or association.

[3] The UK Information Commissioner's Office *PIA Handbook* uses a similar definition (ICO, 2007).

[4] The Privacy Commissioner acknowledges (p. xviii) that there may be circumstances where the full or part release of a PIA may not be appropriate. For example, the project may still be in its very early stages. There may also be security, commercial-in-confidence or, for private sector organisations, other competitive reasons for not making a PIA public in full or in part. However, transparency and accountability are key issues for good privacy practice and outcomes, so where there are difficulties making the full PIA available, the Commissioner encourages organisations to consider the release of a summary.

[5] Although the PIA Directive does not mention benefits or solutions, the PIA Guidelines do mention potential outcomes, which can be regarded as benefits or solutions.

[6] http://www.csa.ca/cm/ca/en/privacy-code. Last accessed: 17 March 2010.

[7] For contents of IMPIAs, see OPC, 2008.

[8]http://www.ico.gov.uk/for_organisations/data_protection/topic_guides/~/media/documents/library/Data_Protection/Practical_application/PRIVACY_IMPACT_ASSESSMENT_OVERVIEW.ashx. Last accessed: 17 March 2013.

[9] See, for example: Department of Communities and Local Government, *Making Better Use of Energy Performance Data: Impact Assessment*, Consultation, March 2010; Department for Transport, *Impact Assessment on the Use of Security Scanners at UK Airports*, Consultation, March 2010.

[10] See http://www.whitehouse.gov/omb/memoranda/m03-22.html for a list of these examples.

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Blurring the Line between Law Enforcement and Intelligence: Sharpening the Gaze of Surveillance?

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Abstract

To an ever-increasing extent, law enforcement agencies work with and rely on information obtained and passed to them by intelligence services. However, in comparison to the police, intelligent services face much less regulation or supervision. Contrasting levels of regulation and supervision pose a problem where the institutional and functional borders between intelligence and police agencies are increasingly blurred. For example: new 'hybrid' police-intelligence institutions have sprung up; information is freely exchanged between police and intelligence organisations; and information gathered by intelligence agencies is used in criminal proceedings. But an impulsive blurring of organisational boundaries is not a solution to growing fears of terrorism and serious cross-border crime. Secret or sensitive information should be used in a way that balances the need for intelligence gathering with the right of the defence to examine incriminating evidence.

Keywords

Law enforcement; intelligence; boundaries; criminal procedure; European Court of Human Rights; surveillance; Central and Eastern Europe; Slovenia

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The boundaries between different agencies in the control and security domain – organisations such as the administrative authorities, special inspection services, municipalities, the police, intelligence services, the army, private security services and non-governmental organisations – are becoming increasingly indistinct (Bigo 2005; Loader 2002; Bayley & Shearing 2001). This blurring has produced what some describe as a state of 'security androgyny' (Easton et al. 2010) where the military adopts a more constabulary role (Easton et al. 2010), the police adopts a paramilitary role and shifts towards an intelligence-type of modus operandi, while intelligence work becomes ever more engrained in everyday law enforcement, of which internal security challenges take up a growing share (Lutterbeck 2005).

The merging or overlapping of powers between law enforcement and intelligence agencies raises deep concerns about contemporary public policy and civil liberties. Together with other shifts in the field of security (e.g. privatisation) the blurring may well lead to a state of arbitrary 'feudal security' (cf. Wakefield 2005). The issue addressed here is thus whether the erosion of boundaries between police and intelligence agencies can undermine the rule of law and infringe disproportionately and unnecessarily upon civil liberties. More specifically, the present article will address the question of whether and how the police can bend the rules of criminal procedure by making intelligence information available for use in court. From the perspective of intelligence agencies, this means considering their new role in domestic security, their relationship to the police and their freedom from the mechanisms which regulate police operations.

The institutional separation of law enforcement and internal security from (foreign) intelligence gathering in most cases predates the Second World War (Sweet 2010). The line was drawn firmly by most countries after the Second World War. Subsequently, the Cold War had enormous impact on the way security institutions themselves and the boundaries between them developed (cf. Janssens 2010; Broesder et al. 2010; De Weger 2010; Lutterbeck 2005; Bigo 2000; Kraska 1996). When the USA, for instance, established the Central Intelligence Agency (CIA) within the National Security Act of 1947, the act required that the CIA have no police, subpoena, or law enforcement powers or internal security functions. Meanwhile Central and Eastern European (CEE) countries on the other side of the Iron Curtain separated their security actors with a similar dividing line. Police agencies were to be concerned with internal security, while secret intelligence services occupied themselves with threats to national security from

'the enemy outside'. The question of the proximity of these two fields resurfaced in the CCE region after the collapse of the centralised authoritarian regimes in the 1990s, as new democracies attempted building political systems based on the rule of law and respect for fundamental human rights and liberties.

Almost everywhere one looks on either side of the Iron Curtain, in the USA from the 1970s and in CEE countries from the 1990s, liberal democracies tended to construct a strong 'information wall' between intelligence and law enforcement. Moreover, law enforcement was conceived as being a mainly reactive activity, and foreign intelligence as a proactive one. But later, at the beginning of the twenty first century and most notably after the terrorist attacks in New York, Madrid and London, the boundaries started to shift again and the separation between security actors became blurred.

Seen from a longer historical perspective, the current relaxation of borders in the control and security domain is not at all new. The influence of different agencies has varied over time and so has the kind of work they carry out. A full account of these evolutions is obviously beyond the scope of the present discussion. The focus here will thus be on how law enforcement and foreign intelligence work has overlapped, in institutional, functional, operative, technological and spatial terms, over the last two decades. We may summarise the resulting blur as follows: institutionally, new hybrid agencies and organs have been formed to facilitate cooperation and information exchange. In spatial terms, law enforcement agencies have started focusing on external threats in 'peacekeeping and stabilisation operations' (cf. Last 2010) while intelligence agencies began turning to domestic threats. In functional and operative terms 'intelligence-led policing' is increasingly the prototype of all police work (cf. Lemieux 2008) and police forces have been permitted to employ more invasive secret service-type powers (examples would include digital searches with on-line 'Trojan horses' that fall outside the scope of judicial overview[1] and video surveillance enhanced with face-recognition or registration plate-recognition systems).[2]

The blurring of these boundaries cannot be assessed simply as a positive or negative development. It can be interpreted in several contradictory ways: as complementary or competitive; as a trend providing a security net; or one demolishing the safety net of human rights. Hermetically sealed dividing lines between police and intelligence lead to unjustifiable inefficacy and inefficiency on both sides, and agencies should obviously be allowed to exchange relevant information. But the examples to be outlined in this paper will show that impulsively blurring the boundaries between these fields is not a solution to growing fears of terrorism, cross-border crime and irregular migration. Walls torn-down raise the level of 'emergency criminal law' (Vervaele 2005) and lead us towards a 'pre-crime society' (Zedner 2007).

This paper does not consider the numerous other ways in which the boundaries between security actors are growing more indistinct, notably with the growing involvement of military forces in domestic security operations (the 'constabularisation' of the military). This is seen when armed-forces personnel undertake work developed in and for peacetime situations, such as supporting civilian crisis management activities, enabling the return of refugees, supporting elections, developing and maintaining infrastructure and even escorting children on field trips or to schools (den Boer et al. 2010: 224). The article also does not cover the increasingly important issues of intelligence obtained from private parties and the privatisation of the intelligence network itself.

Instead, the article will begin by reviewing the state of existing research in the fields of International Relations and Public Policy about security actors and changes they face in contemporary liberal democracies. A more descriptive approach at the beginning of the discussion will then seek to paint a 'bigger picture' of the institutional changes seen in the control and security domain. The pages below then continue with a brief historical overview of how the boundaries between two selected security actors have developed. In order to avoid a more general discussion about overall trends in western liberal

democracies, the article offers two country-specific case studies. The first deals with the case of boundaries fading between two security actors in the USA, which contains the largest network of intelligence services in the western world and has served as a model for many of the world's 'emerging democracies' and 'transitional' countries. Additionally, as a protagonist in the Cold War the USA had paramount influence in the development of (foreign) intelligence around the globe. The second case study presents the blurring of police and secret service activity from the CEE region, specifically the former Yugoslavia and one of its successor-states, the Republic of Slovenia. A pragmatic reason for the selection is that the shifts being analysed here have been extremely understudied in the CEE region (except with regard to the situations in the former war zones of Bosnia and Herzegovina and Kosovo). A more substantive reason is that these countries have only recently set in place new institutional arrangements for their central security actors (the police, military, intelligence and private security industry). In the 1990s and 2000s CEE countries underwent profound political, legal, economic and social changes, and, in the case of the former Yugoslavia, even warfare. After the collapse of centralised political regimes, which depending on the country and the period were mostly authoritarian, these countries were expected to copy the institutional arrangements of the countries standing on the 'free' side of the Iron Curtain. But the provision of these 'good examples' in the West then began spurring significant social, economic and technological changes of their own. The 'Western' prototypes for 'Eastern' application were themselves being profoundly revised in the face of new types of 'asymmetrical' security threats – threats posed by non-state actors, terrorism, globalised organised crime, aided in part by a revolution in information technology which brought means of surveillance beyond the dreams of the Stasi or UDBA.

Moving on from these case studies, the article then turns to the means being used to create and exploit the overlap of police and intelligence. It shows how institutional blurring is occurring in the form of new hybrid police-intelligence institutions, through enhanced cooperation and intensified information sharing and exchange between law enforcement and intelligence agencies. It also traces the way intelligence agencies have begun addressing internal security at the same time as new intelligence-style modus operandi have been adopted by the police. In attempting to answer the question posed in its title, the article then moves on to focus in more detail on the use of information gathered by intelligence agencies in criminal proceedings. From there it tackles the changes the two selected security actors face from a legal perspective, or more precisely, from a criminal law perspective. It considers overview mechanisms in cases where intelligence services provided crucial information to law enforcement agencies. The 'information laundering' (Vervaele 2005) which results from this state of affairs is presented as an outcome of the information wall between police and intelligence being demolished; and as such the reason why the overlapping of police and intelligence activity must be seen as a harmful policy so far as civil liberties are concerned.

EXISTING RESEARCH ON DISAPPEARING BOUNDARIES BETWEEN SECURITY ACTORS

It has been noted frequently in recent years how the security landscape is 'changing profoundly' (e.g. Easton et al. 2010) and how the boundaries between actors within the control and security domain are blurring, overlapping or disappearing altogether. Attention has been drawn to the important questions such trends raise with regard to legal safeguards and respect for human rights (Easton et al. 2010; Andreas and Price 2001). Several of the essays collected in Easton et al. (2010) examine aspects of the blurring boundaries, but focus particularly on how the military is undergoing a process of constabularisation at the same time that the police are experiencing one of militarisation. The focus of several parts of the book is on how the roles of the two have evolved in peacekeeping and stabilisation operations (e.g. Janssens 2010, Last 2010).

The book also tackles the various types of constabulary force employed as 'bridging actors' between the police and military (Neuteboom 2010).

Others (O'Neill, Léonard and Kaunert 2011) point out how security policy developments in Europe have been breath-taking both in speed and scale, and how institutional rearrangements in the EU have gone hand-in-hand with theoretical developments in Security Studies. The definition of security as referring to the security of the state, as threatened by the military power of other states and defended by the military power of the state in question (Mutimer cited in O'Neill et al. 2011), is now widely viewed as being inadequate to cover the changing international environment that developed after the Cold War. Since then Security Studies has been dominated by the so-called widening-deepening debate, in which the widening dimension has focused on the extension of security to other issues or sectors beyond traditional military concerns, while the deepening dimension has questioned whether entities other than the state – such as the EU, for example - should be able to claim they suffer security threats (Krause and Williams cited in O'Neill et al. 2011). These authors raise an important question for future research: why is it that some issues come to be socially defined as matters of security while others escape securitisation?

The traditional institutional divides began changing as longstanding notions of internal (domestic) and external (international) threats became obsolete. As noted by Bigo (2005, 2000), today we are witnessing a transnationalisation of security and this in turn has had far-reaching consequences for the rearrangement of the respective roles of internal and external security agencies. But as Lutterbeck (2005: 232) also critically observed, this had a profound effect on all security actors, although the research literature to date has only been able to tackle in-depth the shifts affecting policing and the domestification (also policisation or constabularisation) of the military. This gap is therefore one the present article begins to fill.

Notwithstanding the lack of detailed study, a few scholars have considered the blurring of law enforcement and intelligence agencies at a more or less introductory level. Focusing exclusively on intelligence activities and agencies in Europe, Svendsen (2011) observes that in the early twenty first century we witnessed greater levels of intelligence co-operation than seen previously. He highlights 'a plethora of overlapping international intelligence liaison arrangements' (Svendsen 2011: 537) that he groups in three broad categories: bilateral relationships, multilateral Europe-centred arrangements for national intelligence services (e.g. Club de Berne, the Counter Terrorist Group formed after 9/11, the Middle European Conference, the plethora of NATO's overlapping intelligence-associated arrangements, Open source intelligence (OSINT) partnerships) and a category encapsulating the European Union's intelligence arrangements, which allow for pockets of specialist intelligence liaison within the EU framework as part of the EU's Common Foreign and Security Policy and, as of 2010, the Common Security and Defence Policy (e.g. the EU Satellite Centre (SatCen), the Joint Situation Centre (SitCen), the EU Terrorism Working Group, MONEYVAL).

The increasing proximity of law enforcement and foreign intelligence activities has received some attention in analysis of the post-Cold-War United States. For instance, Andreas and Price (2001) claim that the American 'national security state' has increasingly been transformed from a 'war-fighting' state into one focused on 'crime-fighting' and that this shifting security agenda has led to the growing convergence of law enforcement and foreign intelligence. Lutterbeck (2005), on the other hand, analysed internal and external security in Europe and distinguished three shifts toppling the wall between the two security actors: a shift in the focus of foreign intelligence agencies towards internal (or transnational) security challenges, enhanced cooperation between intelligence services and law enforcement bodies, and a shift towards intelligence-style modus operandi by police agencies (Lutterbeck 2005: 238–241).

Others have tackled the leaky boundaries between police and intelligence from the perspective of a pluralisation of policing (Loader, 2000) or 'plural policing' (Crawford et al. 2005). In discussing the 'enhanced policing capacity in Europe', Loader (2002: 133) observes that the 'core business' of the supranational institutions, such as the European Police Office (Europol) or the European Public-Prosecutors' Office (Eurojust), lies precisely in the 'exchange of information and intelligence'. Similarly, the enhanced policing capacity seen across Europe in the wake of intergovernmental co-operation is attributed to policing efforts being centralised and co-ordinated. For example, intelligence on criminal activities has become shared more efficiently than before, and there has been the creation of a transnational police elite orientated to 'forging common 'solutions' to common 'security' problems' (Loader 2002: 133).

To sum up, the existing literature has tackled the following changing roles between security actors with respect to: (1) a constabularisation or policisation of the military (Broesder et al. 2010; Easton et al. 2010); (2) a militarisation of policing (Last 2010; Kraska 2007; Lemieux and Dupont 2005); (3) an increasing role played by the intermediary actors filling the 'security gap' between military and police, such as gendarmerie forces (see Neuteboom 2010); (4) an increasing role taken on by private security companies in peace-keeping operations and increasingly in domestic settings (Završnik 2012); (5) a policisation of foreign intelligence work (Lutterbeck 2005); and, (6) an 'intelligence-isation' of policing (e.g. Lemieux 2008).

The disappearing boundaries between security actors should be distinguished from the boundaries between security areas (border control, police, defence, intelligence, prison and justice reform etc.). For analytical purposes, it is important to note that the former is an organisational divide, while the latter addresses functions that actors execute. The convergence can thus be observed at different levels, such as at a functional level (e.g. the growing involvement of intelligence services in domestic security missions), an operative level (the police becoming more proactive) and a technological level (with the police increasingly using surveillance technologies).

The present article contributes to existing scholarly work by providing additional case studies to illustrate the disappearing boundaries between law enforcement and intelligence agencies from CEE countries. By comparing the institutional arrangements of the selected security actors from behind and in front of the Iron Curtain, the article will highlight some trans-national features of the two institutions that transcend the national specifics I shall turn to in the following sections. By comparing two examples from both sides of the Cold War divide, it will become clear that the fundamental issue in such institutional reconstruction work is how two legitimate interests can be balanced: namely the state's interest in providing security on the one hand and the individual's right to due process of law on the other. The proximity between law enforcement and intelligence agencies is a matter of degree and dependent on many political, economic, even emotional (fear of crime) and other contingent factors. These factors can be shown only by looking in detail at the relevant features of a chosen state, its formation in *statu nascendi* and its international security situation. It is historical analysis of this kind that is taken up in the following section.

HISTORICAL OVERVIEW OF THE OSCILLATING BOUNDARIES BETWEEN LAW ENFORCEMENT AND INTELLIGENCE AGENCIES

A distinct concept of the police force emerged in the nineteenth century as countries sought the best means of keeping 'streets safe' that would simultaneously resemble and yet be distinct from the military and operate as a kind of 'civilised security' (Jauregui 2010). Countries separated forces providing internal security from those providing external security and some countries also formed a bridging actor in the form of a paramilitary force or gendarmerie. Generally, the police focused on internal safety and

became regulated by a legal regime of criminal procedure, while intelligence operations, such as intercepting hostile foreign communications, fell under the remit of intelligence services geared to monitor threats to national security from other states. Consequently, intelligence agencies operated only under (political) parliamentary control or very limited judicial control executed by the highest court in the jurisdiction. They have been allowed to operate under much higher degrees of secrecy in order to protect their sources. One immediate result of the lassitude with which their work was supervised was that while information gathered by the police was admitted in court as evidence, that gathered by intelligence agencies was not and could only serve as circumstantial evidence or a prompt for further criminal investigation; which would then be conducted by the police as criminal procedure dictated.

The boundaries between law enforcement and (foreign) intelligence that I claim are overlapping should thus in fact be regarded as artificial from the beginning. In other words, the law enforcement and intelligence communities have always exchanged information, although the formalisation of the exchange and legal power of the information being passed back and forth naturally varied with given periods and countries. The boundaries are, as den Boer et al. put it (2010: 226), 'a human construct that serves specific purposes, including political, and depends on the time and place in which they are active'.

The history of intelligence and law enforcement agencies described above is thus painted with a very broad brush. More detail can be offered by taking into account the specific purposes emerging at a particular a time and place. The discussion here will thus continue by presenting two examples, those of the USA and Slovenia, the world's largest and most powerful democracy and a newly established sovereign state in the north of the former Yugoslavia, which became independent in 1991. These countries are different, if not antipodal, in several aspects. They differ not only in terms of their size and age, but also their legal traditions (Anglo-Saxon v. Continental) and the sides they took in the bi-polar division of the world during the Cold War. Although technically non-aligned, Yugoslavia belonged in broader terms to what was viewed as the Communist bloc. The last factor is crucial for two reasons. Firstly, the bi-polar division of the world was sustained because countries in both blocs (together with the non-aligned group) developed very similar security institutions (and, of course, engaged in very similar activities) and secondly, the end of the Cold War was, amongst other things, a significant cause behind the disappearance of boundaries taking place today in the security domain.

Although the mainstream literature on the folding and breaking of these boundaries repeatedly documents the highly problematic domestic surveillance activities of intelligence agencies in the Eastern bloc, one should recall the intensity with which secret services in the West also kept their own populations under observation. For instance, the notorious Watergate affair disclosed the US government's involvement in domestic surveillance. Other leaks in the 1970s brought to public attention how the American surveillance community was increasingly involved in counterterrorism, counter-narcotics, and other non-proliferation activities carried out by law enforcement agencies (Manget 2007). Similar events occurred during the Cold War in Western Europe, where a secret NATO organisation called 'Gladio' was used to manipulate the political climate in many European countries, (e.g. France, Belgium, Switzerland, Italy) and to resist a Soviet invasion (Ganser 2005).

Given the extent to which intelligence agencies are involved in protecting the security of the state, as the examples of the USA and Slovenia will show, they form an inherent part of a sovereign state's authority and are never subjected to normal judicial review. What changed with the end of the Cold War was that intelligence operatives in both the Western and Eastern blocs became deprived of their main targets. This sparked a frantic search by these agencies for new fields of activity (Klerks 1993) and led to the walls between the pastures of law enforcement and intelligence being undermined and

knocked down, allowing bulls to charge freely and perhaps the occasional wolf to enter the fold. The historical background of the two countries reveals how, despite the manifold differences between them, the need for firm separation between the agencies in question was at first recognised in both blocs for very similar reasons. But let us first turn to the early United States.

Nathan Hale is usually considered the first American spy and was hung by the British during the Revolutionary War (Sweet 2010). At the time there were no laws regulating the intelligence community as a whole in America, but intelligence functions clearly existed from the time before American independence. According to Sweet (2010), intelligence in the USA has its earliest roots in the American Revolution and Benjamin Franklin could be considered the first intelligence officer operating on behalf of the United States. '[In Paris] he had a twofold mission: to get military and economic assistance from France, and to establish and run a network of agents in London following developments in the British government' (Holt in Sweet 2010: 340). This early period of unregulated intelligence in the USA is very similar to the situation in the former Yugoslavia after the Second World War and its northern successor, Slovenia, in the early nineties, as discussed next.

The organisation of intelligence in the former Yugoslavia followed the Soviet Union model, separating the regular police (Milicija) and secret police (early name OZNA, renamed UDBA in 1946 and later SDV in 1967). UDBA was an agent of communist ideology established in each of the six republics that together constituted the federal state. It was established in 1946 and abolished as SDV in 1990. During this period it underwent substantial reforms, most notably in 1952 when it ceased to be a part of the military and after abuses that surfaced in the 1960s. In 1966, the supreme political body of the federal state (Centralni Komite Zveze Komunistov Jugoslavije) claimed that the intelligence service should be strictly bound by the law (i.e. by the principle of legality) and operating within the public's oversight (Pusić 1985: 54). For an understanding of its early role, it is crucial to contextualise its position in the wider international transformations after World War II. The new Yugoslavia (SFRY) was then under enormous pressure from both the Soviet bloc and the Western countries. It was not yet a firm and cohesive entity either internally or externally. In the first 15 years after the war, UDBA's primary tasks related to domestic security, such as to discover and suppress the activities of former German collaborators, pro-monarchy forces from abroad and special agent groups that were trying to displace the governing elite and induce a coup d'état (Pirjevec 2011). After the 1948 dispute of Yugoslavia with Cominform (Communist Information Bureau – the international communist movement), i.e. between Stalin and Tito, Yugoslavia leaned to the West, but remained relatively independent of both of the blocs. It started to shape the so called 'third way' in the form of the non-aligned movement that embraced three quarters of the world population soon after its inception.

On the other hand, the Yugoslav army was another strong political actor, a state within a state which never submitted to political or any other form of review with its own intelligence service. Its engagement in political life surfaced only occasionally into public view, especially in the 1980s with the rise of critical movements in the northern Yugoslav republics of Slovenia and Croatia. The army then claimed that appeals to convert the country to a democratic political model and submit it to the checks of a civil society were threats to constitutional order and the sovereignty of the federal state, i.e. a prime intelligence domain. But the noteworthy particular in this conflict, especially with regard to the Balkan War that resulted in the 1990s, is that the Yugoslav military system consisted not only of the centralised Yugoslav People's Army (Jugoslovanska ljudska armada; JLA), but included also special complementary armed divisions called the Territorial Defence Forces (Teritorialna obramba; TO) (Bolfek 2010).

The trigger for the development of the TO occurred in 1968 when the seizure of Czechoslovakia by Warsaw Pact troops gave a ferocious warning to Yugoslavia that its

military and political position was precarious in the extreme (Bolfek 2010). Having realised that Yugoslavia would not be able to defend itself from an eastern attack, the military and political establishment decided to use the fruits of experience from Partisan guerrilla warfare during World War Two. A new military protocol, 'The Doctrine of Total People's Defence' was drawn up, and the high command of the TO was established in 1968. A new system of Territorial Defence Forces was formed within republics, municipalities, local communities, and even labour organisations. The TO was different from a typical military organisation. It remained subordinate to the JLA, but the command language was local (i.e. Slovene in Slovenia and not the official Serbo-Croatian language) and the public accepted its members as soldiers of the individual republics rather than the Yugoslav federation. With the decentralisation of the federal state of Yugoslavia in 1974, the TO was further transformed to constitute the armed forces of particular Yugoslav republics, setting the conditions for the new separate republican armies which became so active in the 1990s (Bolfek 2010).

These two armies and their parallel intelligence agencies significantly marked the dissolution of the federal Yugoslavia in the 1990s. When the federal authorities issued an order commanding TO units to surrender their arms to the JLA (issued on 15 May 1990), some TO units did hand over their weapons, but many of those established within municipalities and local communities refused to comply. In response to the order to disarm, a group in Slovenia called the 'Network for the Deployment of National Protection Forces' (Manevrska struktura narodne zaščite; MSNZ) was formed from a group of police officers (Milicija) and TO members who came under the command of the Republican Secretariat of Defence and Republican Secretariat of the Internal Affairs. This armed formation secured the country three months later by repelling an attack from the JLA, thereby safeguarding the independence of Slovenia. The activities labelled as crimes against the constitutional order were viewed *ex post facto* as heroic acts establishing a new independent state.

This brief historical overview shows how the boundaries between different actors within the control and security domain are predominantly determined by circumstances, time and place. The position a particular agency occupies in the control and security domain is always the result of how that domain has evolved in a particular country. Countries in *statu nascendi* tend to rely increasingly on intelligence activities both to provide internal stability and to secure the state's place in the international order of states. In both countries one can discern the type of 'pre-legal violence' conducted by the intelligence agencies establishing the law, as described by Walter Benjamin in his opus. Only gradually, as the crisis situation subsides, is it possible for the intelligence and police to go their separate ways (e.g. after 1952 in former Yugoslavia). When this separation does occur, in a democratic country the bulk of the intelligence community remains in some connection with the armed forces, with each branch of the military retaining its own intelligence departments and personnel.

Returning to our two examples, it should go without saying that there are innumerable differences, qualitatively and quantitatively, between the security domains of Slovenia and America. A general pattern is discernible nonetheless in a common effort to segregate the fields of law enforcement and military intelligence. However, over the past dozen years or so, that segregation has been placed under great strain in both countries (Best 2007 in Sweet 2010: 340): cross-border crime, organised crime and the sensational terrorist attacks at the beginning of the new millennium set in motion a process which has brought the separate agencies closer again. The question to be addressed in a later section is how the regulation of their work has evolved. As we shall see, the proximity of both actors led to very similar safeguards and checks being set in place in both the United States and Slovenia, and also at a European level by the European Court of Human Rights. But first let us verify the thesis that law enforcement and intelligence are indeed becoming ever more closely intermeshed: where is the linkage between the agencies most manifest?

WAYS IN WHICH THE LINES BETWEEN LAW ENFORCEMENT AND INTELLIGENCE AGENCIES ARE DISAPPEARING

Proximity through hybrid institution and omnibus legislation

It was found that security actors could be brought closer together by forming new hybrid institutions to connect them. Such institutions began to emerge extensively at the beginning of the twenty first century in the majority of European countries (Lutterbeck 2005) and the United States. The main justification for such institutional rearrangements was that they would foster information sharing and provide separate institutions with stronger and more integrated analytical expertise.

To improve cooperation between law enforcement and intelligence communities, the US Department of Justice created the Executive Office for National Security. This coordinates those activities of the Justice Department that involve national security issues, acts as a forum for developing national security policy and serves as a focal point linking the Justice Department with other agencies on matters of national security. Other new institutional mechanisms to facilitate better collaboration in the US context include the Intelligence-Law Enforcement Policy Board, co-chaired by the deputy director of the CIA and the deputy attorney general, the joint Intelligence-Law Enforcement Working Group, and the Special Task Force on Law Enforcement/Intelligence Overseas (Andreas and Price 2001).

The post-socialist process of economic, political and social transition which Slovenia underwent put the smaller country in a different position. Marked by ruthless privatisation and the denationalisation of once public property, with relatively high rates of systemic corruption, the newly established state lacked the resources and political determination to transform completely the institutional arrangement of its security actors that had existed at least from the 1960s onwards. It seems that the governing elite did not have an interest in establishing strong security apparatuses. UDBA was disbanded, but at the same time the newly established intelligence agency (SOVA) was left in a relatively weak position: secret documents were stolen from archives, agent networks revealed to the public etc. If other countries changed intelligence agencies into overwhelming ('dangerous') domestic security actors by deepening (e.g. with new powers in existing working areas) and widening (in the domestic domain) their powers, the newly established state has not been able to replace the old intelligence agency with a strong but democratically confined guardian of national interests. The example of the National Bureau of Investigation created in 2010 shows how even less ambitious projects to adapt law enforcement to the increasing problems of corruption, organised crime and other serious cross-border crime have been blocked.

The motive for the formation of the Bureau was to increase the efficiency, efficacy and autonomy of law enforcement in detecting and investigating serious criminal offences, for example, economic and financial crime, through a multidisciplinary approach in the form of a one-stop office with special investigation teams based at the same location. It was also conceived as a body to co-ordinate other institutions (the Tax Administration, the Customs office) on a national and international level. But despite the Bureau being merely a new criminal investigation unit of the General Police Administration, positioned within the Criminal Police Directorate, it already faces governmental criticism on account of its autonomy.[3] Since the future of a criminal investigation unit within the police is itself uncertain, enhanced cooperation between the law enforcement and intelligence communities or substantial institutional rearrangements seem very distant options, a crucial aspect for the arguments advanced in this article.

The institutional arrangement of security actors should provide a proper balance between competing interests and not neglect interests, either by tearing down the institutional and functional divides between security actors and putting civil liberties at risk or, as the Slovenian example shows, by limiting the state's legitimate interest in

providing national security. The other means of increasing proximity between security actors is the use of special omnibus legislation that traverses and amends numerous regulations from a certain perspective or in pursuit of a set objective. The USA PATRIOT Act 2001,[4] rushed through Congress in October 2001, has been understood by many as 'the most wide-ranging law passed in recent memory' (Sweet 2010: 343). The act gave the government significant new powers to conduct electronic surveillance of the internet and to foster information collection and information sharing. It granted the government wider authorities, enhanced surveillance techniques, and enabled swifter prosecutions and the imposition of severer sentences. This was achieved by amending at least 12 federal statutes, mandating dozens of new reports, and directly appropriating USD 2.6 billion (Sweet 2010).[5]

The shift of intelligence towards internal security

The policisation of foreign intelligence agencies started in the early 1990s when intelligence agencies in European countries entered various new domains previously regarded as the preserve of the police. The Slovenian Intelligence and Security Agency (SOVA) moved towards internal security challenges with amendments adopted in 2003, although these changes did not significantly alter the direction of the overall trend of undermining the power and reputation of the new agency.

But there was another unfortunate practice of the agency related to the transition period. As we shall see later, there was a secret arrangement between SOVA and the police allowing the former to monitor electronic communications that should in fact only have been available to the police. But in general, SOVA's remit was to provide intelligence relevant for safeguarding the security, political and economic interests of the state from *foreign* threats only until 2003. But the amending provisions now empower SOVA to conduct *domestic* surveillance of telecommunications, albeit under the supervision of the President of the Supreme Court of Slovenia.

The extension of the Slovenian central intelligence and security service into the domestic security domain nevertheless offers another insight into the possible consequences of relaxing or removing institutional boundaries. Intelligence services can also suffer from loss of (distinct) powers and identity. A close reading of the Slovene Intelligence and Security Agency Act (the SOVA Act hereafter) amended in 2006 indicates that SOVA's shift into the domestic realm was accompanied by an increasing 'juridicisation' of its activities. This, I suggest, not only goes hand-in-hand with the overall trend of undermining the power of the new Slovenian intelligence agency, but also shows how *any* intelligence agency can suffer from loss of distinct identity when moving into the new security domain. For instance, a request from SOVA to intercept the telecommunications of an identifiable individual must be approved by the judiciary (here the President of the Slovenian Supreme Court) and not just by the director of the agency. Furthermore, it can only be authorised by a 'written order issued for each individual case', if it is 'very likely' that the security of the state is at risk (Article 24 of the SOVA Act). The introduction of a standard of proof that the agency must meet in order to obtain this written order also pushes the intelligence agency closer to the restraints and regulations placed on law enforcement. There is no doubt that as its sphere of operation comes to encompass domestic security, the intelligence service should be subjected to increased judicial review, to the same extent as law enforcement agencies. But this can also cripple the service's surveillance powers and also open to question why a separate intelligence service should exist at all.

The shift of intelligence towards the field of internal security is similar in the USA. According to Andreas and Price (2001: 41), the government started using rhetoric explicitly in favour of changing the 'traditional' domains of intelligence employment as early as July 1995, when President Clinton ordered intelligence agencies to prioritise

such 'transnational threats' as organised crime in addition to their traditional concerns. The new CIA orientation towards domestic security is reflected in the establishment of the Director of Central Intelligence (DCI) Crime and Counter-Narcotics Center where Drug Enforcement Administration and FBI agents are assigned to work with the CIA (Andreas and Price 2001: 41).

The shift of police towards intelligence

The 'intelligence-isation' of police agencies should be read in the sense that they have been resorting to ever more sophisticated surveillance technology in recent years, and have been granted much more intrusive investigative powers in order to use it. In doing so they have brought their modus operandi closer to that of intelligence agencies (Lutterbeck 2005:240). Technologically enhanced surveillance is changing policing into an 'almost entirely informationalised activity' (Loader 2002: 142). This turn goes together with the new tendencies towards creating a 'pre-emptive' criminal justice model (Zedner 2007) or 'preventive law enforcement' (Cole and Lobel 2007) whereby criminal justice actors are orientated not only to crimes already committed, but also to detecting the perpetrators of crimes that have yet to take place. Increasingly, the police 'trawl' through databases in order to match the names they contain against a pre-determined profile. Such police searches are commonly intelligence-led – based on secret information beyond the reach of legal contestation and carried out as part of European (rather than just national) policies (Brown and Korff 2009: 125).

Another way of overcoming the boundaries between the core agencies in the control and security domain is subtler yet still more effective. Today the quality of all police work is measured from an intelligence perspective, or as Lemieux (2008) puts it, intelligence-led policing has become the template for all police work. Converging the police and intelligence communities' cultures, guiding value systems and principles of work through joint training programmes can raise levels of trust between agencies and thus foster the confidence necessary for information sharing, but today law enforcement is increasingly driven by 'the idea that all police work, including patrol, should be intelligence led... [And this is] causing a "minor revolution"' (Lemieux 2008: 163).

Information sharing and exchange

Information sharing and exchange does not in itself blur the institutional barriers between agencies, but the nature of the large-scale information sharing activities being carried out does shed new light on the position of intelligence activities in the law enforcement domain. The resources spent on and the knowledge developed by such large-scale information gathering and analysis is de facto changing police officers into intelligence actors or intelligence material users. It would be too contentious to claim that the right to be free of unwarranted surveillance by law enforcement agencies is being directly jeopardised. The information exchange being carried out by large-scale EU information management systems (e.g. SIS II, VIS, EURODAC, API, ECRIS, PNR etc.)[6] is regularly facilitated horizontally, i.e. only *among* police personnel. But the large-scale cross-border information management is causing the cultural borders between law enforcement and intelligence communities to disappear.

Some EU initiatives are having a direct impact on the functional borders among agencies in the control and security domains. At the end of May 2004, the European Commission issued a Communication to the Council of Europe and the European Parliament the aim of which was enhancing access to information by law enforcement agencies - EU information policy (European Commission 2004). This would then facilitate the free movement of information between the competent authorities of the member states. The

Commission claimed: 'Compartmentalisation of information and lack of a clear policy on information channels hinder information exchange' (European Commission 2004: 3). The final goal of the Commission set forth in the document was ambitious: it proposed introducing intelligence-led law enforcement at local, national and European levels.

The pro-active agenda advocated in the Communication aimed precisely at overcoming barriers between the law enforcement and intelligence communities. The intention of the Commission is to improve information exchange

> not only between police authorities, but also between customs authorities, financial intelligence units, the interaction with the judiciary and public prosecution services, and all other public bodies that participate in the process that ranges from the early detection of security threats and criminal offences to the conviction and punishment of perpetrators (European Commission 2004: 4).

To paraphrase Haggerrty and Ericson's notion of 'rhizomatic surveillance' (2000), such 'rhizomatic data-sharing' blurs the functional boundaries between agencies even further.

The European Criminal Intelligence Model (ECIM), the construction of which the Commission set in motion with the Communication, is further supported by a set of minimum standards for national criminal intelligence systems. The latter should enable compatible threat assessments at the European level and be based on comparable core elements for effective access, collection, storage, analysis and exchange of data and information. The Commission claims, amongst other things, that intelligence agencies could and should play an important role in the fight against crime and that police work and judicial activity should both rely more on intelligence. In other words, the ECIM is a policing plan for co-ordinating the investigation of organised crime throughout the EU, a plan based on a method of 'intelligence-led policing' (cf. Brady 2007: 17).

Another instrument for the regulation adopted at the EU level for collating, analysing and enhancing information from intelligence and police services is a special Counter-Terrorism Task Force established within Europol. The Task Force was re-established as a separate entity after the terrorist bombings in Madrid. This specialised unit consists of terrorism experts and liaison officers from police and intelligence services of the EU member states. Its brief is to collect all relevant information and intelligence concerning the current threat of terrorism in the European Union; analyse the collected information and undertake operational and strategic analysis; and formulate threat assessments, including targets, modus operandi, and security consequences.

While Europol is very protective of the role it takes in specific cases, it is difficult to assess the blurring taking place at the EU level. The concrete accomplishments achieved through liaisons between agencies are often achieved by European counter-terrorism officials meeting separately from EU Ministers. Deflem (2006: 346) reports how several meetings of police and intelligence officials were held ('EU Police chiefs') to discuss the Madrid attacks immediately after the bombings there in 2004. In Dublin, the European Chiefs of Police Task Force, representing all 25 (then current and future) EU states, held a two day conference with representatives of Europol, Interpol, and police officials of Norway and Iceland. Coinciding with the police meeting was an additional meeting of intelligence chiefs from five European nations (Britain, France, Germany, Italy and Spain) in Madrid. Similarly, a few days after the 7 July bombings in London, a confidential meeting of police, intelligence officials and forensic experts was held at Scotland Yard.

There are two other important documents with regard to information sharing and exchange at the EU level. First, there is the Hague Programme (European Council 2004), which sets out the principle of availability of information and access to information and invokes the goal of setting up and implementing a methodology for intelligence-led law enforcement to follow at EU level. Second, there is the Treaty of Prüm (Council of the

European Union 2005), also referred to as the Prüm Convention or the Schengen III Agreement from 2005, adopted outside the EU framework and later subsumed into the provisions of EU law for police and judicial cooperation by Council Decision 2008/615/JHA (Council of the European Union 2008).[7] The Treaty of Prüm implements the Hague programme. Its objective is the 'further development of European cooperation, to play a pioneering role in establishing the highest possible standard of cooperation especially by means of exchange of information' (Council of the European Union 2005: 3). Further developments at the EU level are expected from the new European Information Exchange Model in 2012 as indicated in the Commission's Stockholm Programme Action Plan (European Commission 2010).

The question that arises at this stage is why the proximity of the agencies discussed here should be viewed as problematic in the first place. I have claimed throughout this article that the ever-closer relationship between police and intelligence agencies undermines the right to a fair trial. Information gathered by intelligence agencies typically reveals concrete actions by definite individuals. Should such information be used only to shape policy-makers' decisions and set overall policies, or should it be used to prosecute actual suspects? There is no straightforward and general answer to this question. But some countries such as the USA and Slovenia have set up special balancing procedures for cases where the interests of the state in pursuing security collide with individual human rights. Because Slovenia is a member state of the Council of Europe, the concern now will be to gain an overview of the European Court of Human Rights' decisions regarding such balancing procedures.

LIMITING THE USE OF INTELLIGENCE DATA IN CRIMINAL PROCEDURE

Information gathered by intelligence services can be used in criminal proceedings in several ways (Vervaele 2005: 3, 24). First, such information can be used as a lead for initiating criminal investigations. This is unanimously regarded as the least problematic issue. Second, intelligence information may give rise to reasonable suspicion or another standard of proof or form a sufficient basis for the use of coercive measures sanctioned under criminal law. Such use of intelligence can be regarded as information laundering (Vervaele 2005: 25), since the information concerned is issued by a different body to the one which first gathered it and is wrapped in the veil of 'confidential sources'. Third, there is the use of information *directly* provided by intelligence sources as legal evidence in criminal proceedings (through the use of secret evidence in ex parte procedures). This is the issue that provokes the most intense debate. As with the second type of usage, information used directly in this third manner is subject to no legal check before it is collected, and subsequently acquires the status of legal evidence without any safeguards.

Limiting the use of intelligence in the U.S.

The foundations for regulating intelligence and establishing its legally non-binding nature can be traced as far back as the writings of the American Founding Fathers. Thomas Jefferson wrote to a friend:

> A strict observance of the written laws is doubtless one of the high duties of a good citizen, but it is not the highest. The laws of necessity, of self-preservation, of saving our country, by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us: thus absurdly sacrificing the end to the means (Manget 2007).

In other words, intelligence was always supposed to be governed by a law of self-preservation that stands above the written (state-imposed) law. The sense that the law

of self-preservation governed secret intelligence activities, as Jefferson explained, added to the Federal Judiciary's reluctance to exert its jurisdiction in such areas (Manget 2007).

This reluctance to regulate intelligence activities began to dwindle later in the 1970s, prompted by a number of cases in which intelligence deviated from its traditional role. The activities of the executive branch at this time came under growing scrutiny from the press, the public, Congress and the Federal Judiciary. Since then judges have fashioned their own procedures to balance the competing interests of the state and those of an individual falling under the state's gaze (Manget 2007).

The Classified Information Procedures Act (CIPA) passed in 1980 began regulating the use of intelligence and defined a procedure for balancing government's right not to disclose evidence against a suspect with the suspect's right to a fair trial. In order to avoid previous ad hoc treatments of the issue, the CIPA's procedure set the conditions under which classified information can be reviewed by means of regular criminal procedures for establishing the discovery and admissibility of evidence before the said information is publicly disclosed. Judges were allowed to determine issues presented to them both in camera (in chambers) and ex parte (presented, that is, by only one side, without the presence of the other party). Both interests were thus met. Classified information was revealed to the defendant to the extent necessary to ensure a fair trial and the government was allowed to minimise the quantity of classified information being put at risk of public disclosure by offering unclassified summaries or substitutions for sensitive materials.

Limiting the use of intelligence in Slovenia

Despite the formal separation of law enforcement agencies from the new intelligence agency, the Slovenian Intelligence and Security Agency (SOVA), formally established as an independent agency in April 1989, continued to focus on internal affairs for quite some time after the declaration of independence in the early 1990s. It took two decades for the Constitutional Court of the Republic of Slovenia to rule on a proper minimisation procedure (or so- called 'information-screening wall') in decision Up-412/03 in 2011 (Gorkič and Šugman Stubbs 2010). The Constitutional Court thus finally separated the functioning of the intelligence agency from that of law enforcement.

In the same decision (Up-412/03) the Constitutional Court revealed a secret agreement from 9 September 1993 between the Ministry of Interior (police) and SOVA. The Court was called upon to rule on the constitutional complaint of an appellant who asserted that his right to privacy (vouchsafed by Article 35 of the Constitution of the Republic of Slovenia) and privacy of correspondence and other means of communication (Article 35 of the Constitution of the Republic of Slovenia) had been violated by SOVA's execution of secret surveillance. The appellant was suspected of drug trafficking and a court ordered that secret surveillance of his telecommunications be carried out. Legally, the monitoring of electronic communications by the use of listening and recording devices must be implemented by the police, according to an explicit provision of the Criminal Procedure Act (then § 2 and now § 5, Article 152 of the Criminal Procedure Act). However, according to the secret agreement, SOVA was authorised to carry out monitoring instead of the police, because the police 'was not in possession of listening and recording devices'. The police, noted the Constitutional Court, is 'the competent agency in a democratic society vested with powers to prevent and repress crime including the legitimate use of force' (§ 13 of the Up-412/03 decision). By defining the agency authorised to execute an order (an investigating judge) and the form of an order (written), the legislator indicated that not only the ordering phase, but also the executing phase is of great importance. The Constitutional Court held that the appellant's right to privacy and privacy of correspondence and other means of

communication had been violated. The records gathered by the intelligence agency were thus to be excluded from the new trial.

The Constitutional Court made another groundbreaking ruling effecting the proximity between law enforcement and intelligence in Slovenia with decision U-I-271/08 from 24 March 2011, which stipulated that confidential evidence may be concealed from the defence for three reasons: when national security is concerned; when witnesses at risk of reprisals need to be protected; or, when police investigation methods need to be kept secret. The minimisation procedure contested before the Court was the following: when the police wished to conceal evidence for the above reasons, the defence could request that the Minister of the Interior relieve a police agent or other individual assisting the police of their duty to keep information secret (Article 56 of the Police Act). However, the Constitutional Court held that such a minimisation procedure would violate the defendant's right to judicial protection, which provides everyone with the right to have any decision regarding his or her rights, duties and any charges brought against him or her made by an independent, impartial court as constituted by law (Article 23 of the Constitution of the Republic of Slovenia).

The Court nevertheless admitted that the equality of arms does not require a complete disclosure either of incriminating evidence or indeed evidence benefiting a defendant. The rights of the defence are not absolute and evidence may be kept secret in special circumstances, if such a measure is necessary and proportionate, stipulated the Court. But the Court also ruled that when immunity is claimed for a document in the public interest, it is for the court to decide whether the claim should be upheld or not. The regulation that vested such powers in the Minister of the Interior thus also violated the defendant's right to defend him or herself.

The Court outlined the proper minimisation procedure to be followed until the Police act is amended: when the prosecution claims public interest immunity for evidence and the Minister of the Interior does not relieve a police agent or other person of their duty to keep information secret, the Minister must inform the president of the Court of Appeal about the situation, providing an explanation and his decision. The president of the Court of Appeal must then trigger an ex parte procedure and notify the defence that the procedure has begun. The minimisation procedure remains adversarial only to the extent permitted by the nature of the concealed evidence. The president of the Court of Appeal makes a decision after an in camera hearing and the decision is final.

The use of intelligence in the ECtHR case law

The European Court of Human Rights (ECtHR) has ruled on the use of intelligence information in criminal proceedings in cases involving the use of evidence provided by anonymous witnesses, undercover agents, informants and agents provocateurs. The court's case law unveils the growing intelligence powers discernible in 'regular' criminal procedure and a permanent threat to the rights to liberty (Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms; ECHR) and a fair trial (Article 6 ECHR).

Regarding the second manner in which information gathered by intelligence agencies is used in criminal proceedings, that is when intelligence information forms a sufficient basis for the use of coercive measures under criminal law, the ECtHR admitted in *Fox, Campbell and Hartley v. UK* (1990) that in the case of terrorism intelligence is often used that may not be made public, not even in a court of law, without endangering the source. The central question in the case was whether authorities must disclose information, and if so, *which* information in order to enable a test of the lawfulness of the arrest in the event that it was based on confidential intelligence. The court concluded that 'the respondent Government has to furnish at least some facts or information

capable of satisfying the Court that the arrested person was reasonably suspected of having committed the alleged offence'. It subsequently decided that there had been a violation of Article 5(1)(c) of the ECHR.

The other question that emerged before the ECtHR is *who* should perform the balancing act. In *Chahal v. UK* (1996) the ECtHR dealt with the proper procedure to be followed when the prosecution claimed public interest immunity. It emphasised that the balancing exercise must be performed by the judge and not by panels without judicial competence.

The procedure on *how* to balance the right to disclosure of evidence with other interests, such as national security, was tackled in *R. v. Davis, Johnson and Rowe* (1993) (UK) and later by the ECtHR. The Court of Appeal held that it was not necessary in every case for the prosecution to notify the defence when it wished to claim public interest immunity, and outlined three different procedures to be adopted. The first procedure, which must be followed in all cases, stressed the Court, was for the prosecution to give notice to the defence that they were applying for a ruling by the court and indicate to the defence at least the category of the material that they held. The defence would then have the opportunity to make representations to the court. Second, however, where the disclosure of the category of the material in question would in effect reveal information which the prosecution contended should not be disclosed, the prosecution should still notify the defence that an application to the court was to be made, but the category of the material need not be disclosed and the application should be delivered ex parte. The third procedure the Court set forward would apply in exceptional cases where revealing even the fact that an ex parte application was to be made would in effect disclose the nature of the evidence in question. In such cases the prosecution should apply to the Court ex parte without notifying the defence.

This case was brought before the ECtHR because the defence claimed the Court of Appeal should order the prosecution to disclose the name of any person to whom any reward money had been paid for information given to the police. In *Davis and Rowe v. the UK* (2000) ECtHR declared the trial of these appellants to have been unfair and that Article 6 § 1 of the ECHR had been violated. The Court held that English law requires that the prosecution authorities disclose to the defence all material evidence in their possession for or against the accused. But the Court also asserted:

> … the entitlement to disclosure of relevant evidence is not an absolute right. In any criminal proceedings there may be competing interests, such as national security […], which must be weighed against the rights of the accused. […] In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. However, only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6 § 1 […] (§ 61 and § 62 of the judgement).

The ECtHR concluded that during the Davis and Rowe trial in the first instance the prosecution had decided, without notifying the judge, to withhold certain relevant evidence on grounds of public interest. Such a procedure, whereby the prosecution itself attempts to assess how important concealed information might be to the defence and weigh this against the public interest in keeping the information secret, does not comply with the requirements of Article 6 § 1.

Lastly, in *Edwards and Lewis v. UK* (in 2003; upheld by the Grand Chamber in 2004), the ECtHR ruled on the question raised by the third way in which information gathered by an intelligence agency can be put to use, i.e. whether such information may be used as a legal proof in criminal proceedings. In this case the defence was not informed of the type of evidence involved, since it was obtained by agents provocateurs and the prosecution applied for an ex parte procedure, but the material in question was later used as evidence in the trial. Moreover, the undercover police officer concerned was the

only witness called during the hearing and was questioned anonymously. It was thus even more crucial for the defence to be able to verify whether this constituted entrapment by the police. The ECtHR established a violation of Article 6 § 1 of the ECHR.

To conclude, the intelligence services have the task of recognising future or current threats to the democratic legal order and subsequently alerting the competent authorities of these threats. Law enforcement should thus be informed of the outcomes of intelligence operation, although it remains crucial that the secret intelligence information is used in criminal courts only under certain special conditions. Criminal proceedings should include the so-called minimisation procedure, fashioned in a way that both protects sensitive intelligence information and enables the defence to examine incriminating evidence at the same time.

CONCLUSION

Discussion of the boundaries between different actors within the control and security domain is shaped first and foremost by questions of history and place. The cases of USA and Slovenia presented here demonstrate how when both nations gained independence, the paths of intelligence and law enforcement were divided. The intelligence communities then worked in separate fields for years (Best in Sweet 2010: 340) until cross-border crime, growing organised crime and later the sensational terrorist attacks of the early 2000s, or the shifts in perception of the real security threats posed by such attacks, set in motion a process by which the spheres of intelligence and police work drew closer once again.

What has changed today is that law enforcement is becoming more reliant on intelligence and is focusing more on the task of detecting future risks of crime and disorder. The perception that the problems of terrorism, organised crime, cybercrime, human trafficking and other forms of serious crimes threaten the very foundations of democratic nation states has encouraged or excused moves to close the gap between agencies in the control and security domain. These threats, whether perceived or real, made law enforcement officers not only the first responders but also first preventers of crime and disorder. These changes expanded the role of intelligence and led to an enhanced policing capacity. They facilitated the exchange of information between law enforcement agencies and the intelligence community. They triggered the formation of new hybrid organisations. They merged police and intelligence cultures. They raised special far-reaching 'omnibus' legislation. And finally, they pushed information gathered by intelligence services for use into criminal proceedings. This last development involved by-passing fundamental criminal procedure rights (such as the right to a fair trial) in all jurisdictions which have not installed a special minimisation procedure to balance the rights of the government with the defendant's right to due process of law. It may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest (e.g. not to compromise a source of intelligence or disclose the methods and means of police work). Despite these developments, the article argues that these balancing acts between defendants' right to a fair trial and public interests should be performed by an independent judicial body. Categorisations such as police, intelligence or military should thus remain distinct and discrete regardless of the undoubted facts that the security actors themselves are 'only human', and that in practice their work overlaps and requires a great deal of communication and co-operation: those facts provide the very reason why criminal proceedings should be protected by keeping the official and legal lines between intelligence and law enforcement as absolute as possible.

The article does not tackle other equally important boundaries in the control and security domain, especially not the process of privatisation of intelligence activities. With the deepening of the financial crisis in Europe member states are forced to outsource their

security-related tasks to the 'free market' and to delegate them to the European level. But private companies are not as intensely regulated as states when conducting intrusive, for instance, surveillance measures for their clients. And the same could be said for the EU institutions. The biggest threat to civil liberties should be expected to come from private and not public security agencies in the future. Future research should also analyse other negative aspects of blurring boundaries between the two selected security actors, not only the information laundering effect. Lastly, it would be of great benefit if future research would also tackle the positive outcomes of blurring boundaries, such as the trend towards increased regulation of intelligence agencies. This was only briefly mentioned in the article, but deserves an in-depth elaboration on its own.

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[1] The Bundestrojaner ('Federal Trojan') affair in Germany, for instance, exposed the possibilities of Federal Police malware.
[2] The New York Police Department is supposed to be launching a 'Domain Awareness' computer system that links existing police databases with live video feeds, including cameras using vehicle license plate recognition software.
[3] New proposal for the Act on Police Organisation and Work (ZODP) from September 2012. More at www.dnevnik.si/novice/slovenija/1042550385, accessed 12 August 2012.
[4] PATRIOT is an acronym for 'Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001'.
[5] Similar far-reaching amending legislation was adopted in Germany, where The Counter-Terrorism Act significantly improved the sharing of information between authorities by amending at least 14 laws. More at http://www.bmi.bund.de/EN/Themen/Sicherheit/Terrorismus/SichBehoerden/SichBehoerden_node.html, accessed 16 August 2012.
[6] See the Communication from the Commission to the European Parliament and the European Council, Overview of information management in the area of freedom, security and justice (COM(2010)385 final, 20 July2010).
[7] The European Council's Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime.

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Commentary

Pressing the Reset Button in Euro-Mediterranean Security Relations?

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Abstract

Almost two decades after the Barcelona Declaration, the European Union (EU) is still struggling to engage positively with its southern neighbours. Security has been the key concern in this relationship, with the EU putting forward a short-term agenda, often inconsistent with the policies, institutions and long-term goals of the Euro-Mediterranean Partnership. This article argues that the so-called Arab Spring has induced a soul-searching process within the European institutions that has opened the possibility for Brussels to reinvent its relations with the Middle East and North Africa countries, particularly in the field of security.

Keywords

Mediterranean; European Security; Arab Spring

Security is a central concept in the understanding of Euro-Mediterranean relations (see e.g. Joffé 2008 and Pace 2010). Since 1995, with the institutionalisation of the Euro-Mediterranean Partnership (EMP), and later with both the European Neighbourhood Policy (ENP) and the Union for the Mediterranean (UfM), the European Union (EU) has developed a myriad of policies and strategies vis-à-vis its southern neighbours with a clear security outlook. Such an approach has exposed the limits of the normative dimension (Manners 2002) of the EU's policy towards its neighbourhood, reinforced the status quo in autocratic regimes, and placed the EU in a weaker position to influence the 2011-12 events (the so-called Arab Spring) in its Southern neighbourhood.

This article's claim is that the reforms and revolutions that occurred and are still occurring in the southern Mediterranean have provided the EU with a unique opportunity to press the 'reset' button and re-energise its Euro-Mediterranean policy. To do so, it will certainly need to review its security understanding of the region, in particular whether it is willing to accommodate the security interests of its neighbours in a common understanding of Euro-Mediterranean security, or whether it intends to proceed, as it has done, particularly since 9/11, on a clear path of prioritising short-term security concerns. A preliminary overview of the EU's reaction to the events in the region tells us that such a security-paradigm shift has, despite the many measures and policies adopted by Brussels since 2011, yet to materialise.

This article first briefly addresses the institutional evolution of the EU's relation with its southern neighbours until 2011 from a security perspective. The second part analyses Brussels's reaction to the Arab Spring, with a focus on the policies and instruments proposed in order to face the southern Mediterranean's changing political landscape. Finally, the article will conclude with some reflections on how the EU might 're-frame' its approach vis-à-vis a post-Arab Spring Middle East and North Africa (MENA) region.

SECURITY IN THE EURO-MEDITERRANEAN RELATIONSHIP

The Euro-Mediterranean relationship had its basis in Brussels's belief that, by creating the necessary economic conditions, it would be possible to develop the MENA region and ultimately create a free trade area in the Mediterranean that would also be a zone of peace and prosperity. This inherently liberal project of security through trade was first attempted in the 1970s (Gomez and Christou 2004: 188), with the formation of the Global Mediterranean Policy in 1972 (Joffé 2008: 150). Even though the policy had limited success, it meant that the European Community (EC) was able, for the first time, to conceive of the region as a whole (Edmunds 2008). The political importance attached

to it was, however, limited with the countries in the region finding themselves 'increasingly marginalized' (Gomez and Christou 2004: 189). Oddly enough, the most visible consequence of this rapprochement to the south would be the significant increase of the trade deficit of the Mediterranean countries with the EC – from four million Ecu in 1973 to nine million in 1979 (idem).

With the Cold War and its ideological geopolitics on the wane, Europe's interest in its southern neighbours was reinvigorated. Multiple initiatives were created such as the 5+5 initiative or the Western European Union (WEU) Mediterranean Dialogue. Both focused on the Maghreb region, which was an area of particular concern in terms of migration, as made clear by an aide of the then French President Jacques Chirac when he said: '[i]f we don't help North Africa, North Africa will come to us' (European Voice 1995).

Whatever the underlying motivations or the external perceptions, the success of the Oslo Accords in 1993 meant that the EU had an extraordinary opportunity to devise a policy encompassing the Maghreb, the Mashreq and Israel. The starting point was not particularly hopeful, given that Europe's investment in the region accounted, in that period, for less than three per cent of the EU's total, 'way behind EU investment in Asia and Latin America' (European Voice 1995). However, the establishment of the EMP meant that the EU would invest about two billion USD per year in the region, bringing with it the promise of dramatically shifting the pattern of economic and financial relations between both margins of the Mediterranean (Joffé 2005: 38). Institutionally, the partnership would be divided into three 'baskets': political and security; economy and finances; and, finally, social, cultural and human. Underlying the partnership was the neo-liberal 'logic that free-trade, increased private investment and macro-economic reform would stimulate socio-economic development, industrial modernisation and macro-economic reform' (Gomez and Christou 2004: 190); the belief in the economy as the answer to security concerns.

Despite its commercial and economy-related focus, the EMP was, in essence, an EU-led security project (Pace 2010, 433). The promise was to create the conditions for a productive dialogue between all partners (Soler i Lecha 2010: 234), an 'inclusionist approach' (Pace 2010: 432); an approach that should have resulted in a security area defined loosely as the Euro-Mediterranean space. In practice, though, the EMP failed in most accounts to 'live up to the expectations' (Del Sarto and Schumacher 2005: 17) in many sectors, including as a security project, as it was 'unable to create [either] a safer and more stable Euro-Mediterranean space, [or] a common narrative for Mediterranean security' (Soler i Lecha 2010: 233). In that regard, its inclusionist understanding of security was rapidly replaced 'by an 'exclusionist' policy, where the reduction of illegal migration from the south [took] top priority in EU security discourse' (Pace 2010: 432).

The EU adopted a securitized (see e.g. Buzan et al. 1998) approach to the region which was often embraced by political leaderships in the South, happy to see their regimes reinforced by a securitized view of their own society, such as in Tunisia, where President Ben Ali took the opportunity to 'monopolize the political scene' (Joffé 2008: 158), while repressing 'dangerous' Islamist movements. This resulted in a 'stability partnership' convenient to both the EU and the southern Mediterranean leaders (Behr 2012: 76). In that regard, 9/11 did not contribute to a dramatic change in Europe's security discourse towards the Mediterranean. It reinforced it, and eventually gave it a clearer, over-arching narrative within the Global War on Terror (GWOT) discourse, actively contributing to the macro-securitization of terrorism (Buzan and Wæver 2009). However, the key features of this discourse had already been defined in the 1990s.

THE EU AND THE POST-9/11 MEDITERRANEAN SECURITY LANDSCAPE

The EU's reaction to 9/11 in its Mediterranean neighbourhood led to institutional (both internal and external) and policy changes. The EU's most structured response to the changing security landscape came with the definition of a security strategy that defined the main axis of the EU's external relations from a security standpoint, with a special emphasis on its relations with the eastern and southern neighbours. Indeed, the 2003 *European Security Strategy* defined the security of EU's neighbourhood as one of its main strategic objectives. According to the document it was 'in the European interest that countries on our borders are well-governed' as 'neighbours who are engaged in violent conflict, weak states where organised crime flourishes, dysfunctional societies or exploding population growth on its borders all pose problems for Europe' (2003: 2). In more detail, the EU expected to 'promote a ring of well governed countries' with whom it could 'enjoy close and cooperative relations' (idem: 8). The 2004 European Neighbourhood Policy (ENP) was, to a large extent, the outcome of this security concern.

Even though the ENP started to be prepared before the presentation of the *European Security Strategy,* its final version embodies the concerns stated in that document (Aliboni 2005: 1). The ENP was initially proposed by the United Kingdom and Sweden (Tassinari 2005: 8) in November 2002 during a General Affairs and External Relations session, and again in December during the Copenhagen Summit. In March 2003, the European Commission presented *Wider Europe – Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours* and, one year later, in May 2004, the strategy that framed the ENP. Through the negotiation and implementation of action plans, it was expected that neighbouring countries in the east (Armenia, Azerbaijan, Georgia, Moldova and Ukraine) and south (Algeria, Egypt, Israel, Jordan, Lebanon, Morocco, Palestinian Authority and Tunisia) would move 'closer to the EU' (Commission 2003: 3) by implementing measures in areas such as political dialogue and reform; justice and home affairs; energy, transport, information society, environment and research and innovation; and social policy and people-to-people contacts.

In practice, the access to the EU internal market was the only visible incentive on offer (Tocci 2005: 24), and there was no clear path on how to get there. In the Barcelona Process, part of this path had been delineated by a more integrated southern Mediterranean. In the ENP, the role of regional horizontal cooperation was poorly defined (Del Sarto and Schumacher 2005) and ultimately distant from its other clear goal of differentiating between those countries that could progress faster (Balfour and Rotta 2005: 13). Despite stating in the 2003 document that '[i]n the context of a new EU neighbourhood policy, further regional and sub-regional cooperation and integration amongst the countries of the Southern Mediterranean will be strongly encouraged' (Commission 2003: 8), little was actually done in that regard. In short, the EU was not offering a true partnership but rather a relationship based on 'dependence' (Leonard, 2005: 107). The prospect of the ENP working as a trigger for sustainable development of the region was thus limited from the very start (Del Sarto and Schumacher 2005: 20).

This, arguably, was further evidence that the EU was primarily motivated by security and not normative concerns. Security certainly affected the ENP in both discourse and practice. The EU was, in the wording of the 2003 Commission document on Wider Europe, looking for a joint approach to address 'threats to mutual security, whether from the trans-border dimension of environmental and nuclear hazards, communicable diseases, illegal immigration, trafficking, organised crime or terrorist networks' (Commission 2003: 6). Some of these security issues were repeated in 2007, when the Commission, again focusing on conflicts, highlighted their potential consequences in terms of 'unmanageable migratory flows, disruption of energy supply and trade routes, or the creation of breeding grounds for terrorist and criminal activity of all kinds' (Commission 2007a: 6). This centrality of the security discourse contributed to a double process of division between high-priority and low-priority areas of action and between 'liberal' and 'illiberal zones of civilization', the former constituted of the EU members and

the latter the countries responsible for the 'dirty work' (Pace 2010: 432) of counter-terrorism. For instance, for the EU, it was more important to focus on Tunisia and Egypt's contribution to its counter-terrorism policy rather than on how those countries were performing in terms of political reforms.

By securing a cooperative relationship with southern Mediterranean regimes, the EU not only contributed to the reproduction of the status quo (Balfour 2011), it ended up 'enabling further insecurity and instability in the south' (Pace 2010: 432). The need to secure Europe caused European leaders to promote friendly relations and establish less than ethical agreements with regional dictators, such as the 2009 agreement between Italy and Libya, in which the former was allowed to return migrants to the latter without assessing whether they required international protection (Vogel 2011).

Regarding the division between high and low priority areas, a brief content-analysis of some of the action plans that have been approved for the region and respective annual reviews reveal a tendency to over-emphasise security-related issues, limiting the use of terms such as democracy or governance to a minimum.

Table 1: Security and Democracy in the ENP documents

	Action Plan		2008 Report		2009 Report		2010 Report	
ENP	**Sec.**	**Dem.**	**Sec.**	**Dem.**	**Sec.**	**Dem.**	**Sec.**	**Dem.**
Egypt	36	4	13	4	15	3	13	4
Israel	19	4	8	4	6	4	9	6
Morocco	25	3	13	3	13	3	9	7
Tunisia	28	6	13	6	13	3	13	5
Total	108	17	47	17	47	13	44	22

Source: Commission of the European Communities (2005a, 2005b, 2005c, 2005d, 2007b, 2008a, 2008b, 2008c, 2008d, 2009a, 2009b, 2009c, 2009d, 2010a, 2010b, 2010c, 2010d).

As seen in table 1, the term 'security' is used much more frequently than 'democracy' in the action plans, almost ten times more in the cases of Morocco and Egypt. There is no single case, counting both the action plans and reviews, in which this tendency has been reversed. The best results come from Israel and Morocco in the 2010 review (issued in 2011) in which they almost reach parity between the two concepts. This modest exercise does not allow for an extensive analysis of the content of these documents. It does however authorise the simple conclusion that security is a concept disproportionally more present in these documents than that of democracy.

The creation of the Union for the Mediterranean (UfM) is, to an extent, the corollary of this distorted policy between Europe and its Mediterranean neighbours. Underlying the establishment of the UfM was the acknowledgement of the difficulty in reforming the regimes in the MENA region and the need to re-focus on the development of technical issues (such as maritime safety, renewable energy or water storage), hoping that, in the long-term, some sort of spillover effect would allow these countries to become more democratic and free. It was an initiative actively promoted by French President Nicolas Sarkozy that was to include states on both sides of the Mediterranean, but not necessarily other European states. As expected, such an initiative was not particularly

well received in Brussels or other European capitals, and Sarkozy was forced to 'Europeanize' the initiative by integrating the Euro-Mediterranean Process under the title *Barcelona Process: Union for the Mediterranean*. The result has been a 'stalemate virtually since its [the UfM] earliest stages' (Amirah-Fernández and Soler i Lecha 2011: 2).

At the turn of the decade, the EU thus had an ENP in need of deep reform and a UfM that had integrated the EMP, and given it a more functionalist twist. Neither worked particularly well, but both showed a deep concern in promoting the stability of the neighbourhood (and, as a logical consequence, Europe's security), more than its democratisation (Dennison and Dworkin 2011: 9). Almost two decades after the signature of the Euro-Mediterranean Declaration, the EU was as unprepared to deal with the MENA region as it was in 1995; embroiled in a complex web of institutions with little political clutch and limited appeal to its southern neighbours. That would be rather visible when the first signs of discontent gave way to massive demonstrations, first in Tunisia, and soon after, across the whole region.

THE ARAB SPRING AND THE EU'S RESPONSE

Europe was taken by surprise with the events triggered in North Africa that would become known as the Arab Spring. It 'came late and off-balance to the protests, and worse, came to the revolutions without a shred of unity' (Torreblanca 2011). In addition to all the shortcomings in the EU's Mediterranean policy before 2011, the EU was now more concerned with its own financial crisis than with the success of the EU-Mediterranean relationship (Behr 2012: 77). The response was unclear (and slow) regarding Tunisia, late in relation to Egypt (Föderl-Schmid 2011), and strong-worded but ultimately 'marginal in the process that ensued' regarding Libya (Biscop 2012: 75). The same could be said of the conflict in Syria, where the EU has played a secondary role thus far. In Algeria, Bahrain, Yemen and Iraq, the EU refrained from taking any significant measures, while it enthusiastically endorsed the timid political reforms approved in Morocco and Jordan (Behr 2012: 79). Two years or so later, the same argument could be used regarding the latest developments in Egypt, with the EU supporting the political transition in the country despite Mohamed Morsi's attempt to expand significantly his executive powers (Norman 2013).

Some of the European early reactions to the Arab Spring clearly revealed the full extent of the intimacy between repressive regimes and European democracies. For instance, French foreign minister Michèle Alliot-Marie offered Tunisia France's expertise on crowd control after the first signs of unrest in the North African country. A few weeks later, and despite the regional unrest, David Cameron found it appropriate to head, together with more than 30 businessmen, to the Gulf region to promote the UK's defence industry. This was not uncommon, as illustrated by Amnesty International's report that in 2011 several European countries sold weaponry to the regimes they were criticising for using excessive violence against their own people. Further, a close look at the 2010 EU progress report on Egypt, for example, reveals that Cairo was closely working with the EU in security-related issues in the months preceding Mubarak's toppling. According to the document, Egypt was now part of a group of third countries with whom the EU was 'to conclude a framework agreement on their participation in EU crisis management operation'. In addition, Egypt was also actively working to 'deepen its cooperation' with the EU in counter-terrorism related issues (EC and HR 2011b: 8).

Once more, security concerns, particularly the potential inflow of migrants, were Europe's major concern as friendly regimes tumbled in Tunisia and Egypt. In a January 2011 European Council declaration (more than a month after the initial popular demonstrations in Tunisia), the heads of state and government of the EU expressed, in the first nine points of the declaration, their concerns and hopes regarding the unfolding

of events in Tunisia, Egypt and Libya. The following three points were, however, dedicated to the problem of migration movements, in which the European leaders stated their 'support to improve the control and management of borders and measures to facilitate the return of migrants to their countries of origin' (European Council 2011: 4). The first months of the Arab Spring therefore revealed the same EU security mind-set that had marked Euro-Mediterranean relations in the previous decade and that, in the concrete case of the MENA uprisings, led, in the words of former President of the European Commission Jacques Delors and former European Commissioner António Vitorino, 'to disproportionate insistence on the possible negative consequences of the ongoing 'revolutions', in terms of migration and radicalization' (2011).

Policy wise, the Arab Spring happened at a time in which the EU was reforming its ENP, for the first time since the Lisbon Treaty came into effect. The general revision of the policy and the adoption of specific measures for the southern Mediterranean were, to an extent, part of the same process. Regarding its southern dimension, there was the recognition by the EU that past mistakes had been made. According to European Commissioner Stefan Füle, even though the 'EU has always been active in promoting human rights and democracy in our neighbourhood' it is also clear that 'it has often focused too much on stability at the expense of other objectives and, more problematically, at the expense of our values'. As a result 'the time to bring our interests in line with our [European] values' (2011, 2) had arrived. These are particularly relevant words as they not only recognise the EU's wrongdoings (Balfour 2012), but they also highlight the mismatch between the values upheld by the EU and the ways in which it attempted to fulfil its interests. Similarly, the European Council President Herman Van Rompuy recognised that '[b]etting on stability alone therefore can not be the ultimate answer' (Van Rompuy 2011). At stake was not only the future of EU-Mediterranean relations, but also the credibility of the EU as a global actor.

Moving beyond mere rhetoric, the EU put forward both a revised ENP and a set of policies particularly directed at the Mediterranean, such as the Partnership for Democracy and Shared Prosperity with the South Mediterranean, the Dialogue for Migration, Mobility and Security with the Southern Mediterranean Countries, the Support for Partnership Reform and Inclusive Growth (SPRING) programme, and the Civil Society Facility (to both the Mediterranean and Eastern Europe). From the EU standpoint, these approaches are to contribute to levelling the playing field between Brussels and its neighbours. They are based on a 'more for more' principle, in which each partner country has increasing access to the EU's funding opportunities policies as it fulfills its reform commitments, and on 'mutual accountability and conditionality' (Füle 2011), in which the EU is as accountable to its neighbouring partners as those partners are to the EU. The latter is supposed to fulfil Brussels's promises based on what became known as the three Ms (money, mobility and markets) whereas the former are responsible for implementing the reform commitments negotiated with the EU. According to the official discourse, Brussels is actively involved in supporting these countries' reforms, in an attempt to help them build a 'deep democracy', of 'the kind that lasts' (EC and HR 2011a: 2). Moreover, the EU has also appointed a Special Representative to the region with the aim of working more closely with all the relevant stakeholders of the transition and reform processes undergoing in the region. An additional (when compared with the original budget) EUR 1 billion was allocated to the ENP (South and East) to cover these policies and the EU has also managed to guarantee additional funding lines from other international institutions and partner countries (particularly through the G8-Deauville initiative).

It is unclear at this point whether these measures will succeed in contributing to the democratization of southern Mediterranean or to the strengthening of ties between the EU and the countries in the region. Thus far, and in line with the view of some regional experts, the EU is, despite the historical events unfolding in the MENA region, still to change its neighbourhood paradigm (Behr 2012: 87). This has consequences. For a start, the EU seems increasingly to have to compete (and necessarily) cooperate with

other actors in the region: the Arab Gulf, Iran, Turkey, Russia and China. The Mediterranean is no longer (if it ever was) the EU's backyard, which means that the EU's policy shortcomings might result in someone else's increased influence in the region. Brussels has, to some extent understood that, and has developed ties with the Arab League and the Gulf Cooperation Council (GCC) and is, through the Special Representative, attempting to provide a permanent dialogue with regional stakeholders. It does however seem to lack the will and the policy imagination to guarantee a significant influential role next to its southern neighbours.

For all the rhetoric, both the new and the amended policy frameworks within which it relates to the region remain unbalanced (maintaining a vertical relationship between Brussels and its neighbours); underfunded (particularly when compared with the values the GCC is investing in the region); and if anything, more complex and difficult to understand for the common citizen on both sides of the Mediterranean (who often do not how to benefit from the opportunities provided by the EU's credit lines as a result of the involvement of so many councils, groups, policies and plans).

In security terms, there remains a one-sided understanding of the risks and challenges both sides face. For instance, in the recently presented *Supporting closer cooperation and regional integration in the Maghreb: Algeria, Libya, Mauritania, Morocco and Tunisia*, the Commission and the High Representative identified as one of the main challenges facing the Maghreb, 'Global Threats', that correspond to the Al Qaida threat in the Maghreb and Sahel region. It is puzzling why in a document dedicated to the Maghreb it was necessary to include a sub-section on 'global' threats; more so that the EU finds it acceptable to identify what is a 'paramount concern in the [Maghreb] region' as if it belonged to it; as if it could speak for the whole region. This is the type of prescriptive analysis that has informed the Euro-Mediterranean relationship since its early days and that has qualitatively to change if the EU is to remain a credible partner in the region.

REVAMPING THE EURO-MEDITERRANEAN RELATIONSHIP: OLD WINE IN NEW BOTTLES?

Concerned with the potential flux of refugees, anxious about the establishment of theocracies in the neighbourhood, crudely honest about its less than ethical relations with some of the now deposed regimes, and mostly focused on sorting out its own internal financial problems, the EU took some time to react in a concerted manner to the unfolding Arab Spring. As seen above, the EU responses have involved a good degree of self-censorship and an enhanced reform-orientated discourse. Translating it into a coherent approach towards the region will certainly be a complex and long process. The fact that this is the first attempt to renew the institutional relationship after the Lisbon Treaty came into force will potentially allow for a more competent handling of the issues and policies at stake (EC and HR 2011a: 1). Having the tools and the policies, it remains to be seen how effective these new policies will turn out to be. So far, the results are far from perfect.

The problems are wide and deep, starting with the EU's lack of institutional creativity when dealing with its southern neighbours. The EU has largely reproduced the same 'solutions' it has been offering since the onset of the Barcelona Process: privileged access to market, incentives for market liberalisation, south-south cooperation, a differentiated approach between countries (a principle included in the 2004 ENP), strong rhetorical but limited financial support to civil society initiatives (Behr 2012, 83).

As argued by Kristina Kauch, '[i]If the EU is to preserve its influence in the MENA over the coming decade, it must come up with something qualitatively new' (2012: 2); it will have to support 'the broader goal of popular empowerment' while avoiding assessing it from a supposedly 'fixed European political model' (Dennison and Dworkin 2011: 3). This

will require Brussels to accept it must deal with political parties of different backgrounds, including conservative Islamic ones, if necessary. In order to do so, it is crucial for the EU to fine-tune its balance between security and reform.

The issue is more complicated than a mere trade-off, given that member states will certainly not accept jeopardising their security for what they see as potentially destabilising political movements that ultimately might not cooperate in security related matters. But again, the issue is also not just about the fear of Islamic parties and their potentially negative consequences. Indeed, the problem is the same today as in 1995 and the Barcelona Process: what security and for whom? In that field, the EU remains mostly focused on guaranteeing the latter instead of meaningfully considering the former. It is time to press the reset button.

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Book Review

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Setting the Watch. Privacy and the Ethics of CCTV Surveillance
by Beatrice von Silva-Tarouca Larsen

Hart Publishing, ISBN: 9781849460842 (hb)

In 2012, the US Supreme Court ruled (United States v. Jones 565 U.S. 2012) that the police violated the Constitution when they placed a Global Positioning System tracking device on a suspect's car and monitored its movements for 28 days. A set of overlapping opinions in the case collectively suggested that a majority of the Justices were prepared to apply broad privacy principles to bring the Fourth Amendment's ban on unreasonable searches into the digital age, when law enforcement officials can gather extensive information without ever entering an individual's home or vehicle. In debating the rationale for the decision, Justices were divided, with the majority saying the problem was the placement (or setting) of the device on private property. Moreover, five justices also discussed their discomfort with the government's use of or access to various modern technologies, including video surveillance in public places, automatic toll collection systems on highways, devices that allow motorists to signal for roadside assistance, location data from cell phone towers and records kept by online merchants.

Setting the Watch comes to give answers to such kind of privacy issues, which are necessarily growing in a digital era. Technology makes the process of *setting the watch* a significantly more relevant element of analysis. In her book, Beatrice von Silva-Tarouca Larsen examines in depth the core concept of privacy in public space. By dealing with CCTV's impact on privacy interests in public space, the author analyses a range of legal and ethical issues around the conflict between public interests in implementing public CCTV on the one hand and claims relating to an individual's privacy interests on the other. Through her very well-written book, she shows the reader how in our society the demands for knowledge and control to advance public welfare often conflict with the private interests of the individual in relation to their secrecy, seclusion and anonymity (p. 12).

Mainly using a liberal and fundamental rights perspective, the book criticises the widespread growth of public CCTV in recent decades. The author also presents a set of empirical studies showing that CCTV is ineffective in preventing crime. In her well-shaped rationale, she argues that CCTV should be restricted to the most crime prone areas, should show verifiable effective outcomes, and should be subject to more strict regulation. But most importantly the author argues for the existence of a right to anonymity in public places and that most of the time, CCTV constitutes an unnecessary violation of such a right. In doing so, she proposes a set of spatial and normative boundaries and reveals the moral dimensions of the conventions of the so-called 'civil inattention'.

As the author states at the outset, her *Setting the Watch* is based upon Andrew von Hirsch's conception of privacy in public space. In her first chapter, she summarises and develops von Hirsch's 'three circle theory' and proposes the need to define a right to anonymity in the public space. Certainly, Andrew von Hirsch's concepts of privacy and anonymity have a dominant influence on her book. In fact, it could be said that her book is a thorough development of von Hirsch's brilliant chapter 'The Ethics of Public

Television Surveillance' in *Ethical and Social Perspectives on Situational Crime Prevention* (von Hirsch, Garland, and Wakefield 2000). Seen from certain critical perspectives, the book tends to emphasise the lack of verification of the impact of CCTV on crime prevention and exaggerate the impact on individuals. Accordingly, many might be sceptical of the author's claim in her Preface that 'being watched by millions of cameras as we go about in public does something to us and it makes us change how we behave'. However, as the author argues, while populist perceptions can be taken into consideration, just because some do not mind being observed all the time does not make CCTV non-intrusive from a normative point of view. The problem is that she also uses empirical arguments to restrict the use of CCTV; so, it could be said, her normative and empirical arguments should answer normative and empirical objections. In some way Law and Political Sciences perspectives have languages and foundations that are difficult to harmonise.

In this sense her utilitarian arguments that supposedly come to support her rationale could be considered problematic when looked at in relation to some other public interests. At this point one should ask if the normative and empirical planes are really such separate worlds. Moving beyond a solely legalistic viewpoint and relying throughout the text on a strong normative or deontological perspective, her utilitarian arguments are based on a claim of CCTV's inefficacy in preventing crime and on the supposed high impact on individuals' privacy interests and concerns, when both line of arguments are far from proven to date. Despite her view that 'crime prevention relates to the interest in security, not to the interest in feeling secure' and therefore crime prevention should be based on a rational understanding of risk, not on subjective anxieties (p. 126), in fact, such subjective interests continue to be of public interest. In this sense, von Silva-Tarouca Larsen's dismissal that fear of crime will not play a role and be a factor in balancing opposing interests is improbable. Here a reference to Webster's 2009 contribution in *Surveillance & Society* is useful, in which he concludes that a 'policy perspective' approach to understanding the CCTV revolution is illuminating as it highlights the complex intertwined interactions between government, policy-makers, the media and other stakeholders, and that CCTV does not necessarily have to 'work' if it meets other purposes.

Setting this aside, the legal-ethical approach she develops and her deep definition of privacy and its boundaries are noteworthy. Despite the large body of literature on privacy issues, until von Hirsch's contribution, and now its further development in *Setting the Privacy*, there has been no such detailed description of the ethical foundation of the privacy concept in the public space. Moreover, through *Setting the Watch* one is introduced to or can better understand the philosophical concept of privacy that underpins it.

In conclusion, *Setting the Watch* builds the argument that there should be a right to privacy, which extends to anonymity in public space, and that public CCTV can be a threat to that right. Through a well-developed rationale, it also sets out some principles for more effective governance of CCTV. Here the author advocates that the implementation of public CCTV schemes should be conditional upon a comprehensively documented and significant criminal threat. Before such a statement some might ask why minor incivilities and other crimes should be excluded from the ambit of CCTV at the expense of focussing upon only narrow street crimes. Once again the author supports her assertions through rational and empirical evidence related to crime prevention in the strictest sense. However, she fails to state that: (i) other public interests might be relevant (especially fear of crime); (ii) we do not have evidence of incivilities reduction through CCTV systems; (iii) and the alleged impact on civil rights cannot be assumed only because CCTV systems are in operation. Also, by her own logic, it could also be required that the potential risk of violation of privacy interests by public officers should also be empirically proven. Finally, some ex ante requirements seem adequate and proportional in terms of practising good governance. In this regard, the author could

have made reference to the governance experiences in this field of Spain and France, two of the very few countries where use of CCTV has to pass a process of prior authorisation, whereby all applications to install police-monitored CCTV have to be approved by an independent Commission of Guarantees.

Book Review

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The Delphic Oracle on Europe: Is there a Future for the European Union?
by Loukas Tsoukalis and Janis Emmanouilidis (eds)

Oxford University Press, ISBN: 9780199593842 (hb)

At a time of uncertainty in Europe, Loukas Tsoukalis and Janis Emmanouilidis have edited a book which examines developments, past and present, in the European Union, with the aim of providing insights into what is likely to happen in the future. Both the book and its title emerged from a seminar held in 2009 by the Hellenic Foundation for European and Foreign Policy. The purpose of the conference was to think forward about the EU, particularly in respect of the likely consequences of the Lisbon Treaty, of European economic governance and the role that the EU should play globally.

The volume is arranged into three independent parts, each distinct from the other and focused on specific subjects. The first part, 'Institutions and Leaders', begins with a study by Jonas Béraud on the implementation of the Lisbon Treaty, exploring the consequences for the decision-making process, budgetary procedures and the role of national parliaments. The author argues that the consequences of implementation are overrated, and that in spite of some institutional reform fatigue such changes, although discreet, will continue. Overall, the article provides an insightful analysis on what to expect from the implementation of the treaty. A second chapter, written by Olaf Cramme, focuses on the question of leadership in an enlarged EU, with its new political constraints, with the weakening of the European Commission and in the context of new and old member states' coalitions. By providing a useful and intuitive analysis on the supply and demand sides of political leadership, the author concludes that the European Council has more potential than the Commission as regards leadership potential, and foresees that in the enlarged EU the weight of diplomacy will be most considerable and appealing. The final chapter of this section, by Josef Borrell Fontelles, former European Parliament (EP) President, is dedicated to the role of the EP in the near future, which the author (unsurprisingly given his history) argues will sit at the core of the EU and its decisions, acknowledging and describing the EP as the institution that most benefited from the Lisbon Treaty. It is an insider's and a politician's view, which also offers a set of propositions to enhance the EP's role in the EU's institutional architecture.

The second part, 'New European Contract', is comprised of five chapters, covering the single market, social Europe and the environment. Pier Carlo Padoan writes, in a sceptical manner and adopting an integrationist view, about Europe's economy after the crisis, identifying the challenges to be addressed but also questioning whether they will be dealt with or not. The following chapter, by Dieter Helm, discusses how Europe has been living beyond its environmental resources, by tackling key issues such as sustainable growth, green investment, infrastructure and climate change and concludes that aside from the fashionable political trend to address climate change in relation to green growth and job creation, the lack of policy analysis is both remarkable and regrettable, something that the author attempts to put right with this chapter, providing a good foundation on which others can build. The focus of André Sapir's chapter is on the governance of the Euro area and its connection to the economic and financial crisis, acknowledging the need to rethink European economic governance, and to implement some form of political and fiscal union among Eurozone members. Regarding the political

economy of the single market, the policy-orientated chapter by Roger Liddle argues in favour of more government activism and an audacious approach to facilitate economic growth and to revive the Single Market by complementing liberalism with intervention. Finally, this section ends with a chapter about the future of social Europe by Philippe Herzog, who defends the need for member states to coordinate better between themselves and to adopt, at the EU level, more common policies, namely towards the creation of a real European labour market and the establishment of a New Deal, one that aggregates common policies which enhance human investment and create public goods.

Part III, 'Global Role', is dedicated to foreign policy, with three chapters questioning the EU's strategy, its *leitmotiv* and risk management. Overall, this section evinces the most sceptical approaches, but introduces interesting points of view and prospects on the subject. The section begins with a study by Jolyon Howorth about both the Common Foreign and Security Policy and the European Security and Defence Policy, where the author argues that the EU needs to find a strategic vision in a changing international system, in order to be a major player in the future and not be marginalised. Zaki Laïdi's chapter in its turn is sceptical about the EU coming to an agreement on future capabilities, on whether it will be able to develop and implement a common tactical strategy, and even further if it is capable of making joint decisions. Janis Emmanouilidis contributes the final chapter, where he points out the loss of attractiveness of the European project, which may lead to the marginalisation and global irrelevance of the EU.

The final chapter of the book is written by another of its editors, Loukas Tsoukalis, who not only claims to have consulted the Oracle of Delphi, but also that the prophetess has given him answers to the questions posed throughout the book, saying that in the next few years 'the key challenge for Europeans will be to identify and collectively defend common interests and values'. Broadly, Tsoukalis writes about the political and economic crisis that has characterised Europe at the beginning of the 21st century and the reasons behind it, and argues that the European model as we know it will need to be modified so it can maintain its key features.

Readers interested in understanding what Europe's future may look like will find this a useful, well-researched source. Its wide range, however, is both a strength and a weakness. The book is a valuable collection of compiled reflections on Europe but as such it also sometimes lacks consistency. Overall, the authors have delivered a book that examines Europe's present challenges, offering different views on the state of EU affairs and possible policy orientations, ending with some, even if cautious, optimism. As a mix of different policy trends, interpretations, and future prospects, the book provides a fresh new look on some matters and could be a useful text for all those interested in EU politics and Community developments in general and for researchers and policy makers in particular.