Logics of Decision-making in the Justice and Home Affairs Council: Scope Conditions of Rationalist and Institutionalist Causal Mechanisms

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ABSTRACT

This paper presents some elements of an empirically grounded theory of decision-making processes in the Justice and Home Affairs (JHA) Council, the institutional "hub" of European cooperation in the area of internal security. It is argued that the nature of Council-based internal security governance may best be explored by specifying the conditions under which the members of the JHA Council tend to adhere to the logic of consequentiality, the logic of appropriateness, or both.

Apart from the general observations that JHA Council-based legislative action cannot be explained exclusively in terms of either a logic of consequentiality or a logic of appropriateness, on the one hand, and that the two logics of action tend to be invoked sequentially, on the other, this paper suggests the following conditions under which the logic of appropriateness may be activated in the JHA Council setting: internal security crises; tight deadlines; accumulated experience; inadequate resources; contradictory rules; and institutionalized consensus norms. Likewise, this paper suggests the following scope conditions of the logic of consequentiality: redistributive problems; coordination problems; membership incentives; and relative bargaining power.

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1. Research Question

The basic research question raised in this paper is whether and, if so, under which conditions, the members of the Justice and Home Affairs Council adhered to the logic of consequentiality, the logic of appropriateness, or both while deciding upon some of the legislative cornerstones of the emerging Area of Freedom, Security and Justice (see March and Olsen 1989, 1998, 2006a, and Aus 2006a, 2006b, 2007, 2008). The research objective of this paper, in other words, is to propose a number of contingent generalizations about the conditions under which the logics of consequentiality and appropriateness tend to be invoked in this particular institutional setting.

2. Rationalist and Institutionalist Perspectives on Decision-making Above the Nation-State

Students of the former European Economic Community have developed a number of sui generis perspectives on supranational governance in a politically integrating Europe, the most prominent of which is perhaps the multi-level governance approach (Hooghe and Marks 2001, Kohler-Koch and Rittberger 2006). The present paper, by contrast, applies two general political science perspectives, namely Rationalism and Institutionalism, to the empirical analysis of decision-making processes in the EU.

Rationalist and Institutionalist perspectives are based on different “micro-foundations,” i.e. they differ with respect to their explanatory understanding of political action. While Rationalists like Andrew Moravcsik assume that decision-makers carefully evaluate their options and choose the best alternative in terms of their expected utility, Institutionalists like James G. March and Johan P. Olsen tend to believe that political actors follow rules of appropriate behavior as defined by a specific culture. Strategic calculation is thus the social mechanism underpinning social-scientific narratives of instrumentally rational choice, whereas rule following allegedly drives the value-rational behavior of representatives of formally organized institutions. The basic logic of action emphasized by Rationalists and Institutionalists, in other words, is either the logic of consequentiality or the logic of appropriateness.

2.1 Rationalism and the Logic of Consequentiality

The rationality assumption underlying the main bulk of theory-oriented empirical research on decision-making processes in the Council of Ministers and elsewhere in the EU was qualified by Max Weber as the instrumentally rational ideal type:
Action is instrumentally rational (*zweckrational*) when the end, the means, and the secondary results are all rationally taken into account and weighed. This involves rational consideration of alternative means to the end, of the relations of the end to the secondary consequences, and finally of the relative importance of different possible ends (1978: 26; cf. Elster 2000).

Rationalists thus account for policy outcomes by assuming that actors – individuals and composite actors like national governments – adhere to the logic of consequentiality.

Applied to the empirical analysis of intergovernmental decision-making processes in the field of EU Justice and Home Affairs, a Rationalist perspective suggests that the process of European political integration – identified here with the process of laying the legislative cornerstones of the emerging Area of Freedom, Security and Justice – is driven by utility-maximizing and variably resourceful executive actors trying to come to negotiated agreements on matters of common concern. We may assume, then, that individual members of the JHA Council determine their support of, or opposition to, a given legislative draft or package deal on the basis of a calculation of advantage (cf. Thomson *et al.* 2006, Schneider 2008). We may also assume that processes of intergovernmental negotiation unfold against the backdrop of general “rules of the EU game” like the biannually rotating Council Presidency (Tallberg 2006, 2008a), and within the context of JHA-specific actor constellations. The latter will, depending on the legislative dossier at hand, *inter alia* reflect the split between Schengen and non-Schengen countries (Gehring 1998), particular “opt-out” and “opt-in” arrangements for individual Member States and the participation of Schengen-affiliated third countries (Kuijper 2000, Adler-Nissen 2009), the special role of the Group of Six (G6) of interior ministers (Aus 2006b), and the comparatively strong involvement of the European Council in Third Pillar matters (Monar 2006a, Tallberg 2008b). The negotiated agreements reached by uniquely selfish and utility-maximizing members of the species *homo oeconomicus*, in turn, may best be understood as equilibrium outcomes:

[The] game-theoretic conceptualization of interactions seems uniquely appropriate for modeling constellations that we typically find in empirical studies of policy processes…. In order to profit from the game-theoretic perspective, [it] is sufficient that the basic notions of interdependent strategic action and of equilibrium outcomes be self-consciously and systematically introduced…. If that is the frame of attention and interpretation, then everything else can, in principle, be left to empirical research and the development of empirically grounded theory (Scharpf 1997: 5, 7).
One can only know in retrospect which “game” the members of the JHA Council were actually “playing” (which does not rule out that one can expect to witness similar patterns of conflict and cooperation in future “games” of the same type or class), and should accordingly resist the novice’s temptation to model all kinds of policy interactions above the nation-state as a “Prisoner’s Dilemma.” One always needs to become familiar with the “structure of the situation” (Zürn 1992) at hand before jumping to game-theoretic conclusions.

2.2 Institutionalism and the Logic of Appropriateness

Institutionalists assume that “politics is organized by a logic of appropriateness” (March and Olsen 1989: 160) and that political behavior is first and foremost rule-driven. Institutional analysis typically oscillates between the organizational and micro levels, i.e. it tends to focus both on the political activities of formally organized institutions like the police and on the behavior of a policewoman carrying out her professional duties.¹

Organizational entities like FRONTEX, the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Neal 2009), systematically give precedence to and discriminate against certain courses of action by means of allocating resources, including personnel and money, according to particular organizational objectives such as preventing unlawful border-crossings (cf. Schattschneider 1960, Allison and Zelikow 1999). This is institutional “hardware,” so to speak. The organizing principles and standard operating procedures of a European border control agency may be compatible with “hardware” developed for other purposes, for example to enable the free movement of service providers on a global scale, but often they are not or only partly so. Inter-institutional tensions and collisions are thus not unusual in modern and functionally differentiated polities (cf. inter alia Orren and Skowronek 2004, Shapiro et al. 2006). Some authors even suggest that inter-institutional collisions are the most important

¹ By means of clarification, the Institutionalist approach I refer here to should be held separate from the work of Rational Choice Institutionalists like Kenneth A. Shepsle. See Hall and Taylor 1996, Aspinwall and Schneider 2000 for further reading on the various strands of Institutionalism in political science, all of which build on the seminal article by March and Olsen (1984).

In light of an interesting and yet conceptually misleading contribution by Harald Müller (2004), I may also note that rule following and the logic of appropriateness should not be equated with arguing and the logic of justification (Eriksen 1999). The latter social mechanism and behavioral logic figure prominently among deliberative-democratic theorists in general and Jürgen Habermas in particular; see Habermas 2007 for an elaborate discussion.
source of “war or civil war which may replace one definition of appropriateness with another” (March and Olsen 1989: 167).

With a view to the actor level, Institutionalists assume that political behavior is strongly affected by institutionalized norms and structures of meaning. The normative connotations of the logic of appropriateness (March and Olsen 2006a) are reminiscent of Max Weber’s dictum that “value-rational action always involves ‘commands’ or ‘demands’ which, in the actor’s opinion, are binding on him” (1978: 25). This vision of politics as an interpretation of life, and the corresponding presupposition that political actors have a sense of duty and obligation, respectively, may best be captured by the notion of institutional “software.”

The social mechanism of rule following is often mistaken for plain repetition, i.e. for Weber’s ideal-typical notion of traditional social action. Institutional actors, however, do not merely “copy and paste” existing behavioral scripts as “a matter of almost automatic reaction to habitual stimuli” (Weber 1978: 25), at least not under all circumstances. The politico-administrative reasoning of an “A grade” official employed by the European Commission, for instance, may also be determined by a relatively complex cognitive process allowing for a partial deviation from standard operating procedures, namely the self-conscious matching of a new situation with one’s professional role. (See Ucacer 2001 and Kaunert 2007 on the Commission’s role in EU Justice and Home Affairs.) A Commission fonctionnaire, then, will try to do what a Commission fonctionnaire is supposed to do while drawing up a legislative proposal on Community asylum policy, for example:

To describe behavior as driven by rules is to see action as a matching of a situation to the demands of a position. … What is appropriate for a particular person in a particular situation is defined by political and social institutions and transmitted through socialization. Search involves an inquiry into the characteristics of a particular situation, and choice involves matching a situation with behavior that fits it (March and Olsen 1989: 23).

Institutionalist research on Justice and Home Affairs cooperation in an integrating Europe aims to describe and account for the institutionalization of common European decision-making bodies, rules, and structures of meaning in the areas of asylum and immigration, internal security and criminal justice (cf. Stone Sweet et al. 2001, March and Olsen 2006b, Boin et al. 2006: 413-15). Again, the EU analyst is required to examine both the development of institutional “hardware” for the exercise of state-like domination above the nation-state and the emergence of institutional “software” such as “the institution of consensus” (Heisenberg 2005) in the Council of Ministers:
By providing a structure of routines, roles, forms, and rules, political institutions organize a potentially disorderly political process. By shaping meaning, political institutions create an interpretive order within which political behavior can be understood… (March and Olsen 1989: 52).

It is the stylized notion of perfectly integrated institutional “hardware” and “software” which renders an Institutionalist perspective on political institutions particularly useful for heuristic purposes.

3. Comparative Case Studies on Decision-making in an Area of Freedom, Security and Justice

This paper focuses on a handful of legislative “big bangs” in the area of EU Justice and Home Affairs, i.e. on the intergovernmental negotiation of a novel set of collectively binding European rules on imprisonment, civil liberties, and protection from political persecution.² This evolving layer of JHA-related supranational law affects both EU citizens and third country nationals in a direct and physical manner. Political scientists arguably have a professional duty to describe, analyze or account for such important political phenomena. They illustrate, after all, the transformation of political order in contemporary Europe (Olsen 2007) and, as Weber might have phrased it, the institutionalization of new forms of state-like domination on a regional scale.

The four cases I have selected for in-depth study and subsequent comparative analysis, namely the Eurodac Regulation (Aus 2006a), the Biometric Passports Regulation (Aus 2006b), the cross-pillar Facilitators Package (Aus 2007) and the Dublin II Regulation (Aus 2008), represent – judging by my own experience and by the empirically informed opinions of both policy practitioners and scholarly observers – some of the most important decisions ever made in the field of EU Justice and Home Affairs.³ At a minimum, the political

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² It may be noted in this context that the Justice and Home Affairs domain has probably been the most dynamic and expansive EU policy area since the European Union’s establishment in 1993. This is particularly evident with a comparative view to the development of the Union’s Common Foreign and Security Policy (see Börzel 2005: 222). For general overviews of the institutionalization of European cooperation in the area of internal security, see, among others, Knelangen 2001, Monar 2001, Mitsilegas et al. 2003, Occhipinti 2003, Apap 2004, Walker 2004, Kaunert 2005, Balzacq and Carrera 2006, Baldaccini et al. 2007, Davis Cross 2007, Guild and Geyer 2008.

³ One may, of course, disagree with the qualitative assessments made by myself and others. Valuable sources for would-be critics are the annual review section of the Journal of Common Market Studies
significance of the four EU measures mentioned above stems from the fact that they have replaced or are about to replace a number of national rules on asylum, policing and imprisonment.

My selective focus on important legislative developments should not conceal, however, that the JHA Council is first and foremost a supranational bureaucracy generating a large and cognitively unintelligible quantity of written material. As a matter of fact, the Council of Ministers formally adopted approximately one hundred JHA-related texts per annum during the nine-year period of 1998 through 2006 (see the annually updated “List of Texts Adopted by the Council in the JHA Area” compiled by the General Secretariat of the Council). The majority of these texts vanish in a post-national executive “black hole,” so to speak, as soon as they have been more or less consciously endorsed by the justice and interior ministers: “less than half of these texts – most of which are not formally binding – are published in the Official Journal” (Monar 2006b: 7). In the rather unlikely event that these texts are made available to a wider audience, the interested observer often finds that they simply deal with administrative routines such as monitoring Member States’ implementation of the Schengen acquis or with guidelines for carrying out specific law enforcement operations like collecting samples of seized drugs.

Even “hard” JHA-related legislative acts may be of an entirely self-referential administrative nature. (As commonly known, “hard” supranational law essentially consists of EC Regulations, Directives and Decisions.) Since these legislative acts take precedence over national rules and generally entail direct effect, they must, in accordance with the rule of law, at least be published in the Official Journal. A typical example of such a bill is the “Council Decision of 24 July 2006 amending Article 35 of Appendix 6 to the Staff Regulations applicable to Europol employees (2006/519/EC).” For EU citizens and students of the process of European political integration alike, it is necessary to distinguish such legislative measures from the political cornerstones of the emerging Area of Freedom, Security and Justice.  


It may be difficult for the lay person to distinguish very important from less important legislative acts adopted by the JHA Council. A possible way to describe (and justify) this process in social-scientific parlance is the following: “[When] a comparativist interprets significant historical outcomes, he or she selects extreme values on a more general dependent variable (for instance, social revolution is an extreme value on a general measure of social turmoil) and studies the cases with these extreme values exclusively. This practice is justified by the qualitative break that exists between extreme values and
The raison d’être for my case selection, to put it in a nutshell, is typically qualitative in the sense of selecting a small number of politically relevant and comparable cases instead of trying to provide a statistically representative, random sample of JHA Council-based decision-making processes (see Ragin 1987, and Heisenberg 2008 on how best to study the Council of Ministers).

4. Scope Conditions of the Logics of Appropriateness and Consequentiality in the JHA Council

A shorthand for my case-based findings is that I observed three different sequences of the logic of appropriateness (A) and the logic of consequentiality (C) in the Council: C → A (in case of the Dublin II Regulation); A → C (in case of the Eurodac Regulation); and A → C → A (in case of the Facilitators Package). The causal configuration of the Biometric Passports Regulation does not match with the sequencing pattern, however. The relatively complex causal mix of this case may be noted as A ∩ C, meaning that the negotiation of this Regulation was marked by an intersection of the two logics of action, i.e. by a unique causal conjuncture (Aus 2009) of rule following and strategic calculation.

My observations lend empirical support to March and Olsen’s conjecture that “[political] action generally cannot be explained exclusively in terms of a logic of either consequences or appropriateness” (1998: 952). Of perhaps even greater interest to the reader, however, are the conditions under which the logics of consequentiality and appropriateness were (either sequentially or simultaneously, but never exclusively) invoked in the JHA Council setting. Empirically grounded knowledge of such conditions should be of particular interest to model-builders attempting to bridge the Rationalist-Institutionalist divide in political science and contemporary European Studies (cf. Checkel 2007). Let me begin this discussion with a cumulatively contingent synopsis of the scope conditions of the logic of appropriateness in the JHA Council.5

5 I would like to underline at this point that scope statements merely delineate or constrain the domain of application of theoretical ones (cf. Aus 2009: 174). The following discussion is therefore as much an inductive exercise as it is a dialogue with the relevant theoretical literature.
4.1 Scope Conditions of the Logic of Appropriateness

Internal Security Crises. Monica den Boer once noted that “the impact of internal security crises (the Dutroux-case in Belgium, the 11th of September attacks, and lately the bombings in Madrid) on the EU is very strong” (2004: 2). Den Boer did not describe in any detail how internal security crises influence the EU agenda, nor did she explain this politically remarkable phenomenon. In order to push this JHA-specific research frontier a step forward, the following paragraphs will suggest that internal security crises tend to invoke the logic of appropriateness. Furthermore, I will argue that the logic of appropriateness tends to be invoked during the early stages of such crises because of the professional inclination of top politicians like former interior minister Nicolas Sarkozy to publicly display their willingness and ability to exercise strong political leadership in the face of heightened media attention and perceived or real threats to homeland security.

Internal security crises may be understood as performance crises for the police and judicial authorities, i.e. as instances of negative feedback indicating that existing policies and administrative routines in the domains of counter-terrorism and organized crime, for example, have spectacularly failed. A theoretically viable political response to a performance crisis is to analyze what went wrong and why it went wrong, and to introduce legislative and/or administrative changes that are likely to fix the problem at hand or the system at large. In short-lived political practice, however, internal security crises are also opportunities to demonstrate that no wheel shall go unreinvented. On the political level, in other words, internal security crises tend to trigger symbolic affirmations of existing rules, standard operating procedures and structures of meaning:

Core values and proven methods become anchors in stormy seas; crisis is not a time for exploring new options that pay off in the long run only. … Successful crisis leaders restore political confidence in the effectiveness of pre-existing policies and institutions (Boin and ‘t Hart 2003: 549-50).

When an interior or justice minister tries to meet the demands of his/her professional role in times of crisis, he/she instinctively subscribes to March and Olsen’s dictum that “confessions of impotence are not acceptable; leaders are expected to act” (1989: 90). Political leaders who successfully demonstrate their willingness and ability to act resolutely and rapidly in the face of “threats to the basic values they [have] sworn to uphold” (Stern 2003: 2) can potentially increase their charismatic appeal in relation to other politicians (see Pillai 1996 for laboratory confirmations of this effect). What an interior or justice
minister is not supposed to do in a situation like this, on the other hand, is to publicly declare that the rules he/she had authorized, and/or avoidable mistakes on the part of the security forces under his/her control, were responsible for the tragic death of dozens or hundreds of people. According to the empirically informed opinion of the crisis researchers Arjen Boin and Paul ‘t Hart, the latter type of self-criticism “amounts to political hara-kiri” (2003: 548). Citizens and the mass media expect political leaders to rise to the occasion – or to give up their public office.

This variant of rule following manifested itself very clearly in the Facilitators case: the Dover tragedy of 18 June 2000 triggered a passionate and ad hoc reaction inter alia on the part of the heads of state or government. Symbolic affirmations of the Union’s willingness and ability to exercise effective control over its borders by any means necessary were more important in this context than a careful review of EU policies in the domains of asylum and immigration as suggested by the Commission. (The Commission’s services fully understood but did not necessarily share the electoral concerns of selected national governments.) Elements of shock and zeal invoking the logic of appropriateness on the highest political level were also present in the Passports case, at least with respect to the Bush Administration’s reaction to the devastating terrorist attacks of 11 September 2001 and in regard to the European Council’s response to the Madrid bombings of 11 March 2004 (cf. Bossong 2008). With a view to the Eurodac case, the Schengen Executive Committee’s ad hoc reaction to the refugee crisis of 1997-98 displayed similar traits.6

All of the above does not rule out that another team adhering to the logic of consequentiality may take over once politically significant decisions have been made in accordance with the logic of appropriateness. In fact, this is precisely what can be observed in the Facilitators case. If it is indeed possible to empirically associate (all other things being equal) the logic of appropriateness with important decisions on the political level and the logic of consequentiality with minor refinements on the administrative level, then one may reasonably stipulate the following:

6 Against this background, one should, in my view, be careful to advance the Functionalist claim that transnational threats as such – rather than the mass media-generated threat perceptions of ordinary citizens and politicians’ frequently ad hoc reactions to perceived or real internal security crises – drive the process of European cooperation in the Area of Freedom, Security and Justice. We know, for example, that the threat awareness of EU citizens vis-à-vis JHA-related issues tends to increase (decrease) with lower (higher) levels of education (see Eurobarometer 2009, and the workshop description by Christiansen and Rhinard).
[In the event of an internal security crisis in the EU calling for an immediate political impetus by the European Council and/or the JHA Council,] rules are seen as the precondition of calculation and the unfolding of consequential rationality. Only after important sources of contingency have been resolved by rules are the remaining (relatively minor) contingencies susceptible to resolution by deliberate rational calculation of alternatives (March and Olsen 1998: 953).

**Tight Deadlines.** As Gary Klein (1993) and others have demonstrated, tight deadlines tend to promote rule following, and decision-making under time pressure is essentially a non-analytic pattern-matching process.

The recognitional nature of decision-making under pressure was particularly evident in regard to the Irish Presidency’s (successful) efforts to meet the U.S. deadline in the Biometric Passports case. In case of Eurodac, the forthcoming accession of Austria and Italy to the Schengen space facilitated the reproduction of Schengen-specific operational blueprints vis-à-vis irregular border-crossers and would-be asylum applicants. Likewise, the European Council’s deadlines or political interventions in the Dublin II and Facilitators cases motivated the JHA Council to order its subordinate bodies to speed up the process of reaching early agreements on the two legislative files – with all that that entailed for the careful weighing of policy alternatives.

Paradoxically, all of this haste caused a considerable delay in the Facilitators case (at least with respect to the formal adoption of the legislative package) due to selected national parliaments’ value-rational defense of the principle that legislative measures in the domain of EU criminal law must live up to appropriate parliamentary scrutiny. This inter-institutional interaction effect, one may note in passing, is probably not well understood by the members of the JHA Council and European Council who “do not [necessarily] run to the same clock” (Goetz 2009: 210) as national parliamentarians.

**Accumulated Experience and Competency Traps.** March and Simon (1993) once remarked that law enforcement agencies may regard criminalizing an activity as the obvious way of eliminating it. This police-specific line of reasoning is a variant of the popular saying, “If the only tool you have is a hammer, you tend to see every problem as a nail.”

A standard and technologically more and more refined police tool is the collection, storage and comparison of fingerprints. The idea of applying this police-specific solution to a new set of political problems strongly influenced both the Eurodac and Biometric Passports
cases. The dynamics of experience-based social action also manifested themselves in the Facilitators case, at least with respect to the path-dependent development of the Schengen *acquis* on human smuggling.\(^7\)

*Inadequate Resources.* On July 30, 2007, Lorenzo Cesa, the leader of the Union of Christian Democrats in Italy, reportedly responded to the resignation of one of his deputies over a scandalous liaison with a prostitute in Rome by demanding a “family reunion stipend” for Italian members of parliament since “loneliness is a very serious thing” (quoted in *TIME* magazine of August 13, 2007, p. 37). Mr. Cesa’s political demand might seem preposterous to the non-Latin observer, but it is rather typical of the way that civil servants tend to deal with a perceived or real lack of resources. The standard administrative response to a lack of money, personnel or equipment for the effective enforcement of national or supranational rules is not to question the rules as such, but to request additional resources.

I have documented this line of reasoning in the Dublin II, Eurodac and Facilitators cases, i.e. with respect to the demand for additional resources in the fields of asylum, immigration and external border control. These demands, in turn, reflected the execution of selective enforcement and regularization programs *inter alia* in Greece, Italy and Spain. (My cases do not cover the JHA-related enforcement record of Romania, for example, but one may reasonably assume similar practices in this particular country and other newly acceded Member States.) The Passports case may also be subsumed under this category, since the “general approach” hammered out by COREPER was essentially geared towards extending the timeframe for the administrative enforcement of the fingerprinting requirement. The Biometric Passports case, in other words, sheds light on an alternative way to deal with administrative overload, namely to simply postpone the relevant task.

*Contradictory Rules and Institutional Collisions.* The logic of appropriateness may also be invoked in a typically legal fashion if the rule in question turns out to contradict or collide with other rules and thus seems to call for legal systematization efforts.

The Facilitators case has shown that overlapping, inconsistent or contradictory sets of EU rules can, subject to the active involvement of legal professionals like the members of the

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\(^7\) For further reading on accumulated experience and the logic of appropriateness, see *inter alia* Börzel 2002: 230. See also Pierson 2004 on positive feedback, Bigo on “the creation of a transnational field of professionals of security” (2008: 97), and the empirical contributions by Johnson and Williams 2007, Bellanova 2008 on DNA databases and the Treaty of Prüm.
Council Legal Service, trigger fateful legal battles between EU institutions. The spectacular judicial resolution of the “Commission vs. Council” dispute in the Facilitators case (cf. Mitsilegas 2008) should not conceal, however, that the Eurodac case displayed similar dynamics, at least with respect to the struggle between the Council and the Commission over implementing power.

It has also become clear that the negotiation of both the Dublin II Regulation and the Facilitators Package was accompanied by serious clashes between the Council of the EU and the UNHCR over the potential violation of the human right to seek and to enjoy asylum from persecution (cf. Betts 2009). The human rights relevance of the JHA Council’s legislative proceedings was also demonstrated by the apparent infringement of the UN Convention on the Rights of the Child in the Eurodac case, and by the violation of the human right to privacy in both the Eurodac and Passports cases. Again, such contradictions may be resolved by elaborating a hierarchy of rules. In the JHA Council context, this tends to give precedence to the EU rule simply because an EU rule is clearer than a non-EU rule.8

Last but not least, the incorporation of the Schengen acquis into the legal order of the EU in 1999 resulted in a geographically diverse patchwork of EU rules relating to the free movement of persons in Europe. The Council Legal Service might have a clearer picture of the geographical confines of the Area of Freedom, Security and Justice. Yet I suggest that many EU citizens will find it rather confusing that the Biometric Passports Regulation cannot apply in the UK and Ireland but must be enforced in Norway and Iceland, for example (European Court of Justice 2008).

Institutionalized Consensus Norms and Horizontal Coordination. Sixthly and finally, I observed empirical manifestations of “the institution of consensus” (Heisenberg 2005) in the JHA Council. The Dublin II case, for example, lends support to the idea that the JHA Council’s legislative proceedings in general and their final stages in particular are strongly influenced by a Council-specific consensus-gathering approach (see Hayes-Renshaw et al. 2006). The cooperative effects of institutionalized consensus norms were also present in the Facilitators and Passports cases.9

8 For further reading on prescriptive clarity, see March and Olsen 1998: 952; 2006a: 703.
9 These findings are in line with the statistical data compiled by Hayes-Renshaw and Wallace (2006: 284), which show that not a single negative vote was cast by any member of the JHA Council between 1998–2004. Interestingly, the eastern enlargement of the EU-15 in 2004 does not seem to have affected this institutionalized informal rule. In fact, “the share of contested decisions [even] appears to
From an organizational perspective, it is important to note in this context that relatively high-ranking committees like the Article 36 Committee are supposed to ensure the horizontal coordination of a wide range of legislative items scrutinized in more detail by the JHA Council’s working groups (see Aus 2008: 117). It should thus not come as a surprise that the members of the Strategic Committee on Immigration, Frontiers and Asylum (SCIFA), for example, have learned to evaluate asylum-related files in conjunction with illegal immigration dossiers. The relevant practices of SCIFA and/or the JHA Counselors in the Dublin II, Passports and Facilitators contexts are cases in point. The foreign ministry affiliated ambassadors in COREPER II reporting directly to the justice and interior ministers are probably even more “horizontally” oriented than their lower-ranking colleagues from the justice and interior ministries participating in SCIFA and the Article 36 Committee. In all of these instances, however, a precondition for the politically “creative” horizontal coordination of different files is the relevant committee’s insulation from domestic politics and public scrutiny.10

4.2 Scope Conditions of the Logic of Consequentiality

Redistributive Problems. The heated debate over changing the voting weight of Member State X vis-à-vis Member State Y in the Council, which nearly crippled the European Council’s ability to formulate a cautious mandate for the Intergovernmental Conference on the so-called Reform Treaty or Treaty of Lisbon (cf. Carrera and Geyer 2008 for an analysis of JHA-related provisions), illustrates that some of the most protracted conflicts in the EU revolve around redistributive issues. The “zero sum” character of redistributive “games,” interpreted by Scharpf and others as constellations of “pure conflict,” potentially leads to negotiation failure and thus to the continuation of the status quo – unless the contracting parties can strike a comprehensive “package deal.” (The “package deal” on postponing the entry into force of the

10 Cf. Lewis 2005 on standards of appropriate behavior within COREPER. Lewis prefers the label “high issue density/intensity” to horizontal coordination. The difference between Lewis and myself may be marginal, but I would suggest that “high issue density/intensity” essentially flows from an organizing principle; cf. Egeberg 2004.
“double majority” voting system until 2017 in combination with a new Treaty provision on EU energy policy “in a spirit of solidarity” is a case in point.) The perhaps most obvious scope condition for the invocation of the logic of consequentiality in the Council, in short, is that the issue at hand displays redistributive properties (cf. Scharpf 1997: 70).

The negotiation of the Dublin II Regulation on Member States’ mutually exclusive responsibilities for considering asylum claims has documented the non-cooperative dynamics of such “zero sum games” played out in the JHA Council setting. On a higher level of abstraction, the Dublin II case points to the emergence of a center-periphery cleavage in the domain of Community asylum policy. Even though the routes of irregular border-crossers and would-be asylum applicants generally lead from south to north and from east to west (an overall trend, that is, which is probably not going to change much in the foreseeable future), the advocates of the Dublin II Regulation boldly claimed that the European Community could and should reverse the direction of these flows.

The strategic objective of the government representatives of asylum destination countries like Germany was to reduce the (comparatively large) number of asylum seekers residing in their own country by shifting the burden of refugee protection elsewhere, i.e. to countries of “first contact” with the Area of Freedom, Security and Justice. Government officials of European asylum transit countries like Italy, on the other hand, naturally showed no interest in such a redistributive scheme – even though they could, of course, themselves try to shift the processing burden to third countries located further south or east via Community readmission agreements and the like. (The latter option is not always a viable one in administrative practice, however, since it obviously depends on the cooperation of third countries like Morocco and/or may encroach upon non-derogatable principles of international refugee law in general and the principle of non-refoulement in particular.) The active pursuit of these mutually exclusive strategies led to prolonged legislative deadlock on the Dublin II dossier, i.e. to a situation in which at least one delegation preferred non-agreement over agreement. Delegations accordingly entered reservations on different versions of the draft Regulation from October 2001 through November 2002. The Rationalist deadlock hypothesis, in short, carries us a long way in the Dublin II case.

11 See Naurin and Wallace 2008: 6 on the north-south dimension as “the most visible conflict dimension” in the Council more generally. Please note that the (geographical) north-south pattern in the Council differs from the (ideological) left-right pattern of political contestation both in the European Parliament (Hix and Noury 2007) and in national politics (Hooghe et al. 2004).
As a Community instrument for the effective enforcement of the Dublin II Regulation, the Eurodac Regulation unsurprisingly displayed a similar pattern of executive interaction (see, however, the part on membership incentives below). While destination countries like Germany, France and the UK were and still are eager to “feed” the Central Unit with biometric data because it increases their chances of generating “foreign hits,” the opposite holds true for transit countries like Greece, Italy and Spain. The Commission’s services now responsible for “managing” the fingerprint database inherited this not easily “manageable” problem from the Council, and the only legislative amendments in sight relate to opening up Eurodac for police and counter-terrorism purposes (cf. Council 2007, Commission 2008a).

Coordination Problems. For heuristic purposes, the constellation of “pure conflict” sketched out above in connection with redistributive problems par excellence may usefully be contrasted to a constellation of “pure coordination.” In empirical practice, the latter constellation usually gives way to “bargaining games over the precise terms of mutually beneficial cooperation” (Moravcsik 1998: 51). Instead of expecting to witness pure coordination games to be played out in the JHA Council setting, in other words, one should be prepared to encounter so-called mixed-motive games that entail both cooperative and non-cooperative elements.

The Battle-of-the-Sexes metaphor I have employed to represent the dynamics of executive interaction in the Passports case belongs to “the large class of ‘games of coordination with conflict over distribution’” (Scharpf 1997: 74; see my discussion in Aus 2006b on facial images vs. facial images plus fingerprint biometrics as alternative, equally viable and yet politically disputed technical solutions to the coordination problem at hand). Likewise, my game-theoretical interpretation of the Facilitators case as a Stag Hunt game has much in common with a game of pure coordination – except for the fact that individual players in a Stag Hunt may, for whatever reason, also have an incentive to defect. (In this particular case, the incentive to defect or to derogate from the envisioned scheme to impose harsh penal sanctions against human smugglers and/or helpers of would-be asylum applicants stemmed from the variable degree to which individual Member States were actually affected by the substantive problem; cf. Aus 2007.) Both Battle-of-the-Sexes and the Stag Hunt, at any rate, have a strong cooperative flavor since all parties involved can potentially benefit from common European rules on harmonized technical standards for interoperable biometric passports, for example. It is the perceived or real prospect of mutually beneficial policy coordination in fields like illegal immigration and criminal law in an area without internal
frontiers which can provide the members of the JHA Council with a strong incentive to choose an EU solution rather than unilateral or coalitional alternatives.

Membership Incentives and Conditionality. Frank Schimmelfennig (2005) has suggested that the social mechanism of strategic calculation may also be triggered in the context of a candidate country’s accession negotiations with the EU. Schimmelfennig’s argument is relatively straightforward: full EU membership will only be granted if all EU conditions have been met by the candidate country. Prospective members try to figure out whether the benefits associated with EU membership weigh heavier than the costs of adapting to the *acquis communautaire*.

As of May 1999 the EU *acquis* has included the Schengen *acquis* (cf. Commission 2008b). That does not necessarily imply, however, that all EU Member States enjoy the benefits of unrestrained mobility and a relatively high level of safety within the Schengen area. Before being allowed to join the Schengen space, a given Member State government has to demonstrate that it has fully transposed and effectively enforced the Schengen rules on external border management, visa policy, police cooperation, and so forth. If these conditions have not been met, its nationals might be subjected to extensive border checks not unlike those applicable to third country nationals.

The Eurodac case is a good example of the impact of membership incentives and conditionality on prospective Schengen members. The Schengen group’s “carrot and stick” approach towards Austria, Italy and Greece at first seemed to yield concrete results, including the collectively endorsed fingerprinting requirement vis-à-vis irregular border-crossers and would-be asylum applicants. After Austria, Italy and Greece had joined the Schengen area and the Council had formally adopted the Eurodac Regulation, however, it turned out that some of these newly acceded Schengen governments had “talked the talk,” but not “walked the walk.” The Greek authorities’ non-cooperative practice of not sending any fingerprint data to the Eurodac Central Unit or of deliberately delaying the transmission of such data for an average period of four weeks is a case in point. The combination of pre-accession compliance and post-accession non-compliance with the Schengen *acquis* is strongly indicative of strategic executive behavior.

Membership incentives and conditionality also played prominent roles in the Passports case. All Member States’ governments had strong interests either in maintaining their privileges under the U.S. visa waiver program or in joining this scheme at a later stage. A
disruption of transatlantic travel, on the other hand, would have been very costly both in political and economic terms.

The Dublin II case may also be subsumed under this category. In this case, however, the strategic objective of the majority of “old” Member States was to reach a political agreement on Dublin II before the ten “new” Member States would be able to participate in the relevant decision-making process in the JHA Council.

Relative Bargaining Power. Does it strengthen a government’s relative bargaining power in the JHA Council if it represents Germany rather than Malta? Many people would intuitively answer this question in the affirmative. The reason why this intuitive answer is arguably the correct one even under the condition of the unanimity requirement in the JHA Council is that the relative bargaining power of a given delegation may be measured in terms of its ability to make “credible threats to veto, exit, and exclude other governments” (Moravcsik 1998: 52; emphasis added). Without doing injustice to Moravcsik’s theoretical underpinnings, one may reformulate his argument by simply stating that some governments have access to certain political opportunity structures, while others do not (and that everyone is aware of this pattern of asymmetric interdependence in Europe).

The Passports case provides a good illustration of the impact of relative bargaining power on legislative outcomes in the field of EU Justice and Home Affairs. This not only holds true for the credible U.S. threat to exclude non-compliant EU Member States from the visa waiver program. More importantly for the JHA Council-specific topic of this paper, it also holds for the very strong coalitional bargaining power of the G5 vis-à-vis Estonia and other EU countries (cf. Aus 2006b).

Apart from the former G5’s (today’s G6) successful demands to open up Eurodac for police and counter-terrorism purposes, the negotiation of the Eurodac Regulation also fits into this category. What we are looking at in this Schengen-related intergovernmental context is the relatively strong influence of Germany and France in connection with the credible German-French threat to exclude Austria and other accession countries from the Schengen space.

Likewise, the coalition inter alia of Germany, France, and the UK in both the Dublin II and Facilitators cases lends empirical support to Moravcsik’s claim that “coalitional dynamics tend to favor large states, whose participation is necessary to [form] more viable coalitions” (1998: 64; see Naurin and Lindahl 2008: 71 on the central network positions and thus relatively strong influence of the UK, France, and Germany in the EU-15 Council, and of
Germany, the UK, and France in the enlarged Council of Ministers; see also Tallberg 2008b: 703 on the self-perceived dominance of France, Germany, and the UK among the heads of state or government).

5. Summary

The principal theoretical objective of this paper has been to propose a number of contingent generalizations about the conditions under which the members of the Justice and Home Affairs Council tend to adhere to the logic of appropriateness, the logic of consequentiality, or both while drafting important legislative acts. Apart from the general observations that JHA Council-based legislative action cannot be explained exclusively in terms of either a logic of consequentiality or a logic of appropriateness, on the one hand, and that the two logics of action tend to be invoked sequentially, on the other, this paper suggests the following conditions under which the logic of appropriateness may be activated in the JHA Council setting: internal security crises; tight deadlines; accumulated experience; inadequate resources; contradictory rules; and institutionalized consensus norms. Likewise, my case studies and the relevant theoretical literature suggest the following scope conditions of the logic of consequentiality: redistributive problems; coordination problems; membership incentives; and relative bargaining power.

The scope conditions mentioned above should certainly not be “overgeneralized” to a wider population of cases and/or politically less relevant cases of legislative action by the JHA Council. In addition, further theory-driven comparative case study research would be needed in order to corroborate whether the conditions I have identified are sufficient, or only jointly sufficient in combination with other conditions, to trigger the social mechanism of rule following or strategic calculation. In spite of these caveats, however, I would maintain that the tentative findings reported above may help us to gain a better understanding of politically significant decision-making processes in the emerging EU Area of Freedom, Security and Justice.

References


