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European internal security

Towards supranational governance in the Area of Freedom, Security and Justice

CHRISTIAN KAUNERT

Christian Kaunert

EUROPEAN INTERNAL SECURITY

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常州大学山书馆
藏书章

MANCHESTER UNIVERSITY PRESS
Manchester and New York

distributed in the United States exclusively
by Palgrave Macmillan

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Published by Manchester University Press
Oxford Road, Manchester M13 9NR, UK
and Room 400, 175 Fifth Avenue, New York, NY 10010, USA

www.manchesteruniversitypress.co.uk

Distributed in the United States exclusively by
Palgrave Macmillan, 175 Fifth Avenue, New York,
NY 10010, USA

Distributed in Canada exclusively by
UBC Press, University of British Columbia, 2029 West Mall,
Vancouver, BC, Canada V6T 1Z2

British Library Cataloguing-in-Publication Data
A catalogue record for this book is available from the British Library

Library of Congress Cataloging-in-Publication Data applied for

ISBN 978 0 7190 7941 2 hardback

First published 2010

The publisher has no responsibility for the persistence or accuracy of URLs for any external or third-party internet web sites referred to in this book, and does not guarantee that any content on such web sites is, or will remain, accurate or appropriate.

Typeset in Minion with Lithos
by Action Publishing Technology Ltd, Gloucester
Printed in Great Britain
by CPI Antony Rowe Ltd, Chippenham, Wiltshire

EUROPEAN INTERNAL SECURITY

Manchester University Press

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Preface

The idea for this book originated in my PhD project at the University of Wales Aberystwyth, where I spent some excellent years until 2006. My most heartfelt thanks go to Mike Foley, an exceptional supervisor and great friend. Without his assistance, expertise and kind patience the book would not have been possible. My thanks also go to Alistair Shepherd. His assistance, expertise and endurance have been phenomenal. In addition I am very grateful to Thomas Christiansen and Charlie Burns, who shaped my project from the earlier stages with their ability to comprehend and to criticise at the right moment. This truly made it a much better book. Thanks very much also for the personal support. Furthermore, I am grateful to my former colleagues Roger Scully, Hidemi Suganami, Elena Korosteleva, Martin Alexander, Ken Booth, Richard Wyn Jones, Colin McInnes, Marie Breen Smyth, Jeroen Gunning, Jan Selby and Anwen Elias. They were wonderful colleagues in the Department of International Politics at Aberystwyth during my first year as a young lecturer from 2005 until 2006. In this regard I am also grateful to the Department of International Politics and the University of Wales Aberystwyth for their academic and financial assistance in facilitating this research, as well as the University Association for Contemporary European Studies (UACES) for financing my field research in Brussels. I would also like to thank the Commission officials, Council Secretariat officials and MEPs, as well as the JHA councillors in twenty-six Member States of the European Union and NGO representatives who gave so freely of their time in order to answer questions. In this context I am also grateful to the two external examiners of my PhD, Andrew Geddes and Brigid Laffan.

During work on the book I changed institutions a number of times. After being a young lecturer at the University of Wales Aberystwyth I took a position at the University of Maastricht, and at the University of Salford subsequently. I am most grateful to all these institutions for the support that enabled me to work on the project. I am also particularly grateful to a number of colleagues at the University of Salford. First, John Keiger has been an exceptional source of support, good words, encouragement and guidance. I would like to also mention Gaynor Johnson, Chris Murphy, Jonathan Colman, Lars Berger, Jim Newell, John Callaghan, Eric Grove, Jim Beach, Alaric Searle, Chris Birkbeck, Andrew Cooper, Gaynor Bagnall and Joanne Milner. Finally, I am also grateful for the constant support and the critical questioning of my ideas by my doctoral students, in particular Kamil Zwolski,

Alex MacKenzie, Sergei Mudrov, Viviana Merendino, Briony Callander, Stephen Rozee and Ulrike Hoffmann. In addition, I would also like to thank the Institut Barcelona d'Etudis Internacionals (IBEI), Barcelona, for its support during my research fellowship while I had the privilege of a sabbatical from the University of Salford, as well as the Université Libre de Bruxelles, which hosted me during my research stay in Brussels. I am also grateful to my colleagues from the Jean Monnet Centre of Excellence, Manchester, which embraces the University of Salford, the University of Manchester and Manchester Metropolitan University. I am especially grateful to Neil Nugent, Clive Archer, Stefan Berger and Dimitris Papadimitriou.

While writing the book I also benefited enormously from the criticism and insights of numerous experts in the field. I would like to thank in particular John Occhipinti, Mark Rhinard, Thierry Balzacq, Juliet Lodge, Maria O'Neil, Oldrich Bures, Paul Wilkinson, Paul Rogers, Christina Boswell, Javier Argomaniz, Adrienne Héritier, Katy Hayward, Jane O'Mahony, Ben Tonra, Christopher Kinsey, Emmanuel-Pierre Guittet, John Tonge, Wyn Rees, Claudia Hillebrand, Björn Müller-Wille, Adam Svensden, Giselle Bosse, Karolina Pomorska, Sophie Vanhoonacker and Amandine Scherrer. The support and expertise of the University Association for Contemporary European Studies has also been outstanding. I am particularly grateful to Sue Davis and Luke Foster, as well as Alex Warleigh-Lack, Richard Whitman, Amelia Hadfield, Jenny Fairbrass, David Galbreath and Kenneth Armstrong, as well as Eamonn Butler for his support in taking over the *Journal of Contemporary European Research* in September 2009.

Throughout the entire publication process the series editors, Thomas Christiansen and Emil Kirchner, provided very useful comments and suggestions during the main stages. The support by Tony Mason from Manchester University Press was also exceptional. Completing this book took place over a long period of time during which my private life had to make sacrifices at times. The work could not have been possible without the help and support of a number of people: first, my parents encouraged and supported me throughout my studies and helped me realise my ambition with their support emotionally, financially and intellectually. Moreover, friends in all parts of the world supported me throughout the duration of the project: special thanks to Scott Bryan, Florian Böck, Jarlath Boylan, Joan O'Donoghue, Jörg Schnermann, Marc Weegen, Christian Hofer, Mladen Karalic, Luis Felipe Caicedo, Derya Arslanbuga, Dorothee Fischer, Miles Vrahimis, Euros Jones Evans and Alex Platt. Finally, I would like to thank my wife, Sarah Leonard. Her support has been too great over the years to even mention the endless times of encouragement, support and patience.

C.K.

List of abbreviations

AFSJ	Area of Freedom, Security and Justice
CEAS	Common European Asylum System
CFE	Convention on the Future of Europe
CFI	Court of First Instance
CFSP	Common Foreign and Security Policy
COREPER	Committee of Permanent Representatives
CT	Constitutional Treaty
EAW	European Arrest Warrant
EAP	European Asylum Policy
EC	European Community
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
EEA	European Economic Area, now composed of Norway, Iceland and Liechtenstein plus the EU
EEC	European Economic Community
EP	European Parliament
EPC	European Political Co-operation
EMU	Economic and Monetary Union
EU	European Union, established by the Maastricht Treaty (TEU) and consisting of three pillars: EC, CFSP, JHA
EUROPOL	European Police Office, based in The Hague
IGC	Intergovernmental Conference
IGO	Intergovernmental organisation
IR	International relations
JHA	Justice and home affairs
LT	Lisbon Treaty
NATO	North Atlantic Treaty Organisation
NGO	Non-governmental organisation
PE	Policy entrepreneur
QMV	Qualified majority voting in the Council
SEA	Single European Act, signed February 1986
SPE	Supranational policy entrepreneur
TEC	Treaty establishing the European Communities
TEU	Treaty of European Union, signed at Maastricht, 7 February 1992
TFEU	Treaty on the Functioning of the Union

TOR	Treaty of Rome
UK	United Kingdom
UN	United Nations Organisation
UNHCR	United Nations High Commissioner for Refugees
US	United States of America

Contents

	List of tables and illustrations	*page* vii
	Preface	ix
	List of abbreviations	xi
1	Introduction	1
2	Supranational policy entrepreneurship and EU institutions	12
3	The historical genealogy of an Area of Freedom, Security and Justice	44
4	EU counter-terrorism co-operation and the role of EU institutions	63
5	The external dimension of counter-terrorism co-operation *with Dr Sarah Leonard*	90
6	The Common European Asylum System and border management: EU policy entrepreneurship?	121
7	The external dimension of EU asylum policy and border management *with Dr Sarah Leonard*	150
8	The Lisbon Treaty and the institutionalisation of the Area of Freedom, Security and Justice	177
9	Conclusion: Towards supranational governance in the Area of Freedom, Security and Justice?	210
	Bibliography	226
	Index	267

List of tables and illustrations

Tables

4.1 European institutions as SPEs in EU counter-terrorism *page* 83
5.1 European institutions as SPEs in the external dimension of counter-terrorism relations 117
6.1 The Commission as an SPE in EU asylum policy 148
7.1 The Commission as an SPE in the external dimension of EU asylum policy 175
8.1 The Commission as an ideal SPE in the AFSJ on the constitutional level 209

Figures

2.1 The significance of the European Commission: an analytical matrix 19
3.1 The norm matrix for the Area of Freedom, Security and Justice 61
4.1 11 September 2001: the EU at a normative crossroads 72
6.1 Mapping developments in EU asylum policy 140

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Introduction

'Thank you, Ireland! It's a great day for Ireland; it's a great day for Europe' (*EUobserver*, 3 October 2009). The words of European Commission President Jose Manuel Barroso expressed the feelings of many decision-makers in Brussels. Ireland's strong 'Yes' to the Lisbon treaty on 2 October 2009 was greeted with widespread relief in Brussels. 'The Irish people have spoken with a clear and resounding voice', a result much welcomed by the Irish Taoiseach, Brian Cowen. He called the Irish vote a 'declaration of intent to remain at the heart of Europe'; 67.1 per cent of the Irish electorate voted in favour of the Lisbon Treaty, while 32.9 per cent voted against. This represents a 20 per cent swing to the 'yes' side when compared with Ireland's rejection of the Lisbon treaty in June 2008 (*EUobserver*, 3 October 2009).

Less obvious to the general European public, the European Commission had become one of the more contentious actors during both Irish referenda on the Lisbon Treaty. Firstly, during the first Irish referendum on the Lisbon Treaty in June 2008, Irish government officials perceived that the fear of losing the 'Irish commissioner' contributed to the success of the 'no' vote. Consequently, Ireland was promised that it would keep its commissioner as part of guarantees EU leaders gave the Irish government in return for holding a second referendum (Euractiv, 15 October 2009). It was agreed to maintain the level of one commissioner per member state if the Lisbon Treaty was ratified in Ireland. As a result of these new promises, the right to an 'Irish commissioner' became one of the selling points for the Lisbon Treaty by the Yes side during the second referendum in October 2009. Secondly, the Commission entered the Irish Lisbon debate by coming under fire for 'gross interference' (*Telegraph*, 29 September 2009) by Patricia McKenna, a former Green MEP who opposed the Lisbon Treaty. Finally, even after the massive success of the 'yes' side, the European Commission stayed at the forefront of the political debate on the role of Ireland in the European Union (EU). In addition to Ireland formally proposing an Irish commissioner candidate early, the Irish government was urged to review its position on key EU portfolios, particularly in the justice and home affairs field, where in recent years Ireland has tended to follow the British line. Both these issues are at the heart of this book: (1) the role of the European Commission and institutions more generally, as well as (2) the policy area of justice and home affairs.

Yet is the Commission so important, actually? If it is not important, why is the right to an Irish commissioner a 'selling point' in the political debate on ratification? These questions link to the subject of debates of long-gone time periods. The question of how important the European Commission is in EU policy-making is even the object of legendary fiction from the early 1980s. In the famous BBC comedy series *Yes, Minister*, the episode 'The devil you know', first broadcast 23 March 1981, deals extensively with the alleged powers of the EU. The fictional character, UK Minister Jim Hacker, becomes upset about the (then) European Economic Community (EEC). A supposed EEC directive 'from Brussels' creates difficulty for his idea of placing a single British order for word processors, thus creating obstacles to 'British' investment in technology. His head of the civil service, Sir Humphrey Appleby, debates with him the pros and cons of the EU, Hacker criticising the Brussels 'gravy train' and his civil servants defending it. Subsequently, as a twist in this episode, Minister Hacker is suggested to become one of the new EU commissioners himself. In the evening, at home with his wife, Hacker laments that if he left Westminster his political career would be a failure. Needless to say, during the course of the next day the argument reverses: the Minister can see the personal benefits that go with a commissioner's position, while his civil servant, Sir Humphrey, can now suddenly appreciate all the disadvantages. In the end, while the Minister is confused, Sir Humphrey manages to convince him to stay in London. Hacker decides to defy the EU directive and to go ahead with his original plan for the word processors: that would be politically popular.

This episode in *Yes, Minister* exposes very clearly ambivalence towards the European Commission. Popular discourse often depicts the EU as an 'undemocratic and bureaucratic monster' imposing its will upon the unwilling and 'sovereignty-less' member states, as indicated by the examples above. The political debate across European countries during the ratification process of the Lisbon Treaty (signed in December 2007), especially Ireland during its two referenda in June 2008 and October 2009, revealed these old stereotypes. The media focus is upon all the negative attributes accorded to the EU – undemocratic, bureaucratic and, ultimately, not 'sexy'. Yet, of course, there is an inherent contradiction in this depiction: either the European Commission (which is often taken as the only representative of the EU) is extraordinarily powerful, and can impose its will upon the member states, or, rather, it is of little importance. Why else would Hacker want to stay in Britain if all power were delegated to the EU? This book will shed new light on such issues by examining the powers of the EU institutions in the policy-making process.

What is this book about?
EU institutions in the Area of Freedom, Security and Justice

This book argues that it is important to evaluate the role of EU institutions for the process of European integration. This debate falls within the dispute between intergovernmentalists (Hoffmann, 1966, 1982; Moravcsik, 1993), supranationalists (Haas, 1958, 1964, 1967; Lindberg, 1963; Lindberg and Scheingold, 1970, 1971; Stone Sweet and Sandholtz, 1997, 1998; Stone Sweet et al., 2001), and institutionalists 'somewhere in between' (Pollack, 1997a, b, 2003; Hix, 1994, 1998; Tallberg, 2002, 2003, 2006, 2008; Beach, 2004a, 2005a; Kaunert, 2005, 2007, 2009) concerning the role of EU institutions in the process of European integration.

Neofunctionalism (the early form of supranationalism), the 'mainstream approach' in the early years of European integration with Haas (1958, 1967) and Lindberg (1963) as the main scholars, used to portray integration as an incremental process where integration in one policy area triggers more integration in other areas due to 'spill-over effects'. This was later countered by intergovernmentalists, such as Moravcsik (1991, 1993, 1998, 1999a, b), who suggested that European integration can best be explained as a series of rational choices made by national leaders (Moravcsik, 1998, p. 18). Nowadays 'institutions matter', especially the Council of Ministers. Some scholars have addressed the question of the sources of bargaining power (Bailer, 2004), the modes of negotiation (Elgström and Jönsson, 2000, 2005), the patterns of coalition formation, the scope for leadership (Tallberg, 2002, 2003, 2006, 2008) and the impact of norms on negotiation behaviour (Lewis, 2005).

This book suggests a reconceptualisation of the framework of supranational policy entrepreneurs (SPEs), which is often referred to by the academic literature that discusses the role of agency in European integration (Moravcsik, 1999a; Hix, 1994, 1998; Pollack, 1997a, b, 2003; Tallberg, 2002, 2003, 2006, 2008; Beach, 2004a, 2005a; Stone Sweet and Sandholtz, 1997, 1998; Stone Sweet et al., 2001; Kaunert, 2005, 2007, 2009). The concept of a political entrepreneur is grounded in the work of Kingdon within the context of US politics. Kingdon (1984, p. 173) suggests a policy-making model starting with the identification of a problem (first stream), which is then followed by a search for alternative solutions (second stream) and a decision among these alternatives (third stream). On some occasions, a 'policy window' opens for the adoption of certain policies. Policy entrepreneurs, 'advocates ... willing to invest their resources – time, reputation, money' (ibid., p. 188), stand at this window in order to propose, lobby for and sell a policy proposal. However, as will be demonstrated in Chapter 2, this conceptualisation needs to be extended by using constructivist insights of norm construction and entrepreneurship (Kaunert, 2007, 2009).

Why is it important to reconceptualise policy entrepreneurship? At the political bargaining stage (the politics stream), where decisions amongst

different alternatives are taken, the EU is dominated by member states preferences and interests. This is especially the case for the third pillar decision-making through the Council of Ministers. In principle, this would indicate the benefits of a liberal intergovernmental analysis for this policy area. In this view, European integration can best be explained as a series of rational choices made by national leaders and dominated by national interests (Moravcsik 1991, 1993, 1998, 1999a, b). Thus EU integration occurs due to (1) a change in interests within the member states, or (2) the result of a grand political bargain. The role of international institutions is merely to bolster the credibility of interstate commitments (Moravcsik, 1998, p. 18) by ensuring that member states keep their promises and thus dare to agree to a mutually favourable solution without the fear of 'free-riders'.

But where do member states' national interests and preferences come from? Moravcsik (1998) assumes national interests to be exogenous from the EU process. The interests of the member states are stable before they come to the bargaining table. However, it does not seem reasonable to assert that preferences are exogenous. The EU has created a system whereby member states continuously interact at different levels. The claim that this would not alter preferences over time appears doubtful. Even within the context of the international system with less social interaction amongst states, Katzenstein (1996) has convincingly demonstrated how norms and values shape national interests. Constructivist literature clearly shows how these norms change over time (Finnemore, 1996a, b; Finnemore and Sikkink, 1998).

Yet, if national interests and preferences are shaped by different norms and values, as argued later in this book, this implies that a fourth stream – the norm stream – is underpinning the three other streams. Norms consequently influence the definition of political problems, the search for policy alternatives and finally the national preferences in the politics stream where decisions are taken. How can norms be constructed and how can they be observed? Firstly, actors provide reasons for action. The SPE constantly pushes for his reasons for action to become accepted as a norm, albeit in competition with other actors. This is the first stage of norm creation in the norm life cycle as described by Finnemore and Sikkink (1998), and is followed by the norm socialisation stage. Eventually a norm becomes the dominant norm. Consequently, SPEs are important in the social construction and reconstruction of norms that steer the political movement of the other streams.

This book suggests different ways in which political entrepreneurs can achieve this:

- *First-mover advantage.* SPEs need to come in faster with their proposals than their rivals.
- *Persuasion strategy.* As suggested above, in order to achieve acceptance, the SPE need to convince other actors of the reasons for the action suggested.

- *Alliances.* It is vital for the SPE to form initial alliances with other powerful actors to create a bandwagon effect, whereby more actors will want to join the 'winning team'.

Furthermore, this book argues that it is important to conceptualise the EU institutions' political role in the integration process on two levels: (1) the constitutional level of the Treaties of the EU (the Lisbon Treaty), and (2) on the policy-making level (AFSJ). In agreement with Christiansen (2002), treaty-making in the EU is a process dependent on the policy level, and not separate from it. The treaty level provides the legal tools required at the policy level. Yet, without policy change, there is no need to alter the existing tools or to provide new ones. Thus, given that one level depends on the other, it is crucial to analyse and evaluate the role of the European institutions on both levels.

This book connects with the broader literature, where a number of scholars have identified a prominent role for the European Commission (Haas, 1958, 1964, 1967; Lindberg, 1963; Lindberg and Scheingold, 1970, 1971; Puchala, 1971, 1984; Stone Sweet and Sandholtz, 1997, 1998; Stone Sweet et al., 2001; Pollack, 1997a, b, 2003; Hix, 1994, 1998; Tallberg, 2002, 2003, 2006, 2008; Beach, 2004a, 2005a; Kaunert, 2005, 2007, 2009), and increasingly the Council Secretariat, in a number of policy areas, such as telecommunications (Fuchs, 1994, 1995), equal opportunities (Mazey, 1995) and research (Peterson, 1995b).

This book focuses on the Area of Freedom, Security and Justice (AFSJ) at the policy and treaty levels; primarily on four grounds. Firstly, the academic literature has virtually neglected the topic, with the notable exception of Uçarer (2001a), who provided a formal analysis of the institutional powers of the Commission in the Area of Freedom, Security and Justice, but not of its political role. Areas of 'high politics', or 'security', are generally perceived to be the prerogative of the nation-state. The theoretical assumptions regarding the primacy of states therefore blind the academic examination of the question of the importance of the Commission.

Secondly, it is amongst the most extreme, historically deviant and hardest cases for examining SPE behaviour. It represents an area of 'high politics' and security concerns, as well as providing the weakest institutional arrangements, both in the policy area and in the treaty negotiations. Hence, this selection of a 'hard case' ensures that it is possible to generalise the conclusions of the present study to the widest possible range of EU policy-making areas. Thirdly, the AFSJ has experienced significant policy developments since the late 1990s. Jörg Monar (1999b) emphasises the fact that there has been no other example of a policy-making area which made its way so quickly and comprehensively to the centre of the treaties and to the top of the EU's policy-making agenda. After major treaty revisions in Amsterdam (1997), Nice (2001) and an increased political impetus at Tampere (1999) and the Hague

(2004), the area appears as one of the most promising policy fields for integration in the EU in the foreseeable future. This process has deepened even more significantly after the terrorist attacks in the US on 11 September 2001, in Madrid on 11 March 2004 and in London on 7 July 2005.

Fourthly, there are also important reasons to examine the interplay between treaty negotiations and policy-making. Moravcsik (1999a) attempts to disprove the concept of supranational policy entrepreneurship (SPE) mainly by focusing on the 'five major decisions' – the grand bargains – and therefore the process of treaty reform. Wincott (1995, p. 602) rightly criticised him for making a one-sided analysis. A concern with negotiations between states over major constitutional innovations is too narrow a focus to yield conclusive results. Wincott finds it hardly surprising that Moravcsik came to the view that the European Community is primarily motivated by the aggregation and conciliation of national interest, given his research attention. It is difficult to separate the policy-making from the architecture that creates the policy-making structures in the first place. Christiansen (2002, p. 5) suggests that the significance of the European Commission in the EU's policy process is well documented and widely recognised, which is rather different from treaty reform, with some exceptions (Ross, 1995; Dinan, 2000; Christiansen and Jorgensen, 1998; Gray, 2001; Budden, 2002; Falkner, 2002). Therefore, in order to analyse the role of the European institutions, this book combines an analysis of the Lisbon Treaty in relation to the Area of Freedom, Security and Justice with an analysis of the policy-making in the same area.

Why is this book relevant?
The growth of the Area of Freedom, Security and Justice

Since the events of 9/11 it has been argued by some scholars that security has become the dominant force in the Area of Freedom, Security and Justice (Huysmans, 2000, 2004; Bigo, 1996, 1998a, b, c, d, 2001, 2002; Guild, 1999, 2002, 2003a, b, c, 2004, 2006; Guiraudon, 2000, 2003). In this context, 'securitisation' refers to the theoretical suggestion that policy objects are presented as security threats, based on the framework by the so-called 'Copenhagen school' (Buzan, 1991; Buzan et al., 1998; Waever et al., 1993, 1995). Levy (2005: 35) suggests that 9/11 represents a turning point because 'the trend towards liberalisation seemed to be stopped dead in its tracks by the events of 9/11'. Some non-governmental organisations (Human Rights Watch, Amnesty International and Statewatch) have also expressed their fear that security concerns could affect the EU policy.

However, this fear should be counter-intuitive. Especially the EU is well known for its legalistic approach to policy problems, which aims to appear to always follow the letter of the law; in fact the Commission is often derided for being technocratic. It seems thus counter-intuitive that the EU would 'securitise'.

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