

THE INSTITUTIONAL DEVELOPMENT OF THE EU'S
AREA OF FREEDOM, SECURITY AND JUSTICE:
ROLES, BEHAVIORS, AND THE LOGIC OF JUSTIFICATION

By

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April 21, 2016

ABSTRACT

This thesis explores evolving patterns of European Union (EU) institutional behavior in the Area of Freedom, Security and Justice (AFSJ). The starting point is the puzzling development of the AFSJ on the EU agenda, which cannot be neatly subsumed under any of the existing theoretical conceptualizations of decision-making in the EU. Given the continuous expansion of the AFSJ since the Maastricht Treaty (1993), the roles of the four decision-making institutions in the field—the European Council, the Council, the European Commission, and the European Parliament—have been anything but stable. Over time, institutional behavior in the AFSJ has displayed both continuity and inconsistencies in its patterns. The academic literature can only partly account for these patterns, mainly because the rapid and fragmented development of the field has made scholars focus predominantly on individual institutions, specific time periods, or single AFSJ subfields.

To address this gap, the present thesis introduces an alternative approach to explaining different patterns of institutional behavior in the AFSJ throughout time. Theoretically, the argument draws on insights from organizational theory regarding institutional role expectations combined with the work of political theorist Michael Saward on representative claims-making. It is posited that institutional behavior in the AFSJ cannot be fully understood without examining how each institution seeks to legitimize its role in the EU political system. If treaty rules provide the organizational structure within which institutional roles develop, officials give substance to these roles by constantly justifying policy positions and decisions for the benefit of a constituency they claim to represent. But since the boundaries of constituencies are ambiguous in the EU political system, officials have significant leeway to portray their respective constituency in various ways, providing different lines of justification.

The qualitative longitudinal study of institutional behavior in the AFSJ from the perspective of patterns of justification is divided into three parts. First, the origins of institutional justification in the AFSJ are traced back to the period before the field became a formal area of EU activity (1984-93). Second, the consolidation and diversification of institutional lines of justification are identified during the gradual communitarization of the field from the Maastricht to the Lisbon Treaty (1994-2009). Third, the stabilization in variation of institutional justification in the AFSJ is illustrated in the post-Lisbon context (2010-2014). The analysis reveals that the more competences EU institutions gained in the AFSJ, the broader the universe of constituencies in the name of whom representative claims could be made, and accordingly the higher the possibility for heterogeneous and even contrasting patterns of institutional justification. The focus on justification additionally allows the identification of mechanisms of inter-institutional conflict in the AFSJ, which is shown to occur when institutions defend policy positions by making competitive representative claims. The findings are based on an analysis of institutional discourse present in official documents, media content, and interview material.

The argument finds synergies with new intergovernmentalist expectations regarding institutional roles in new areas of EU activity as well as with constructivist studies underlining the importance of norms in driving institutional behavior. The main contribution lies in providing an explanation of institutional behavior that takes into account the institutional architecture in the AFSJ as a whole and at various moments in time. Simultaneously, the thesis articulates a framework that contributes to the theorization of EU institutional roles as norm-rooted, fluid, and heterogeneous.

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LIST OF ABBREVIATIONS

AFSJ	Area of Freedom, Security and Justice
CIA	Central Intelligence Agency
Coreper	Committee of Permanent Representatives in the European Union
DG	Directorate-General
DG JLS	Directorate-General for Justice, Freedom and Security (1999-2009)
EPP	European People's Party
EMPL	European Parliament's Committee on Employment and Social Affairs
EU	European Union
ICT	Intra-Corporate Transfer
JHA	Justice and Home Affairs
JURY	European Parliament's Committee on Legal Affairs
LIBE	European Parliament's Committee on Civil Liberties, Justice and Home Affairs
MEP	Member of European Parliament
PNR	Passenger Name Records
SCHE-VAL	Schengen evaluation system
SGP	Schengen Governance Package
S&D	Group of the Progressive Alliance of Socialists and Democrats
TCN	Third country national
TEU	Treaty on European Union
TFEU	Treaty on the functioning of the European Union
UK	United Kingdom
US	United States

1 THE CHALLENGE OF STUDYING INSTITUTIONAL BEHAVIOR IN THE AREA OF FREEDOM, SECURITY AND JUSTICE

What explains institutional behavior in the European Union's (EU) Area of Freedom, Security and Justice (AFSJ)? How did institutional behavior impact on the evolution of the AFSJ throughout time? Why is it important to understand past and current dynamics of decision-making over different AFSJ issues? The purpose of this introductory chapter is to situate all these questions in the relevant academic literature, provide an overview of the argument presented, and outline the approach to the empirical evidence used to substantiate the argument. Throughout the text, the AFSJ is treated as a unitary field, although it is a composite domain of EU policy activity—comprising subfields like border management (internal and external), asylum and immigration (legal and illegal), police cooperation (including counter-terrorism policy), judicial cooperation in criminal and civil matters, civil protection, passports and identity cards (Treaty on the Functioning of the European Union [TFEU], Title V). The institutions under focus are those responsible, in various capacities, for decision-making in the field: the European Council, the Council of the European Union ('the Council'), the European Commission ('the Commission'), and the European Parliament ('the Parliament'). The term 'institutional behavior' is used as an umbrella concept denoting both discursive positions (what officials from institutions 'say') and lines of action pursued on policy issues (what they 'do'). The starting point is the puzzling development of the AFSJ at the EU level, which determined particular dynamics of institutional decision-making that are worth further investigation.

1.1 Background: a puzzling area of EU policy activity

The Area of Freedom, Security and Justice does not fit neatly into any of the existing theoretical conceptualizations of decision-making in the European Union. In comparison to other domains

of EU activity, the AFSJ has witnessed an unprecedented institutional and policy development that came to challenge established notions of “intergovernmental” (Hoffmann 1966; Moravcsik 1993; 1998) or “supranational” governance (Haas 1958; Lindberg and Scheingold 1970; Sandholtz and Stone Sweet 1998) at the EU level. Having formally entered the EU policy agenda with the Maastricht Treaty (1993), the field has transformed over the past two decades “from a loosely framed and largely intergovernmental cooperation framework into a fundamental treaty objective” subject to supranational competence (Monar 2012b, 717). The initial intergovernmental framework of cooperation was institutionalized as Maastricht Treaty’s “third pillar” justice and home affairs (JHA), which focused decision-making in the hands of member states in the Council (Peers 2011b, 271). Delegation of competences to supranational institutions—the Commission, the Parliament, and the Court of Justice of the European Union (‘the Court’)—was partially introduced in the Amsterdam Treaty (1999) and became extensive after the Lisbon Treaty (2009) (Ucarer 2013, 283–7). Nevertheless, the field maintained even in the post-Lisbon period a high number of exceptions to decision-making rules that allowed national governments in the European Council and the Council to keep control over agenda-setting and decision-making (Carrera and Geyer 2008, 303). As a result, the AFSJ cannot be currently considered neither intergovernmental nor supranational per se.

Furthermore, the AFSJ does not entirely comply with the theoretical expectations of “new” areas of EU policy activity either. The label “new” is rooted in the new intergovernmentalist literature, which takes the Maastricht Treaty as a threshold in the history of European integration in order to separate between long-standing areas of cooperation in the European Communities and more recent fields, added to the EU mandate during the post-Maastricht period (Bickerton, Hodson, and Puetter 2015b). The resulting distinction between “old” and “new” areas of EU activity is based on both decision-making modes as well as the

political sensitivity of the respective domains. Consequently, the classic community method¹, which entailed an empowerment of supranational institutions, still dominates “old” areas of EU activity, such as the regulation of the single market; conversely, the “new” areas of EU activity—including economic governance, foreign and security policy, or social and employment policy coordination—are dominated by intergovernmental institutions, which have been deliberately positioned at the center of decision-making in order to ensure governments’ control over issues that cut deeply into national sovereignty (Puetter 2014, 18). For a long time during the post-Maastricht era, the AFSJ fit closely the features of “new” areas of EU activity, despite the gradual increase in the role of supranational institutions (Wolff 2015). However, the “reinforcement of supranational governance” in the field in the aftermath the Lisbon Treaty (Kaunert, Occhipinti, and Léonard 2014, 39) makes it a test case for the new intergovernmentalism. Indeed, the AFSJ is nowadays a “new” area of EU activity in which there has been a remarkable degree of supranationalization.

Another attempt at capturing the AFSJ has come under the concept “transgovernmental governance” (Lavenex 2014, 368), which also offers an incomplete account of decision-making in the field. The idea borrows from Helen Wallace’s taxonomy of decision-making modes in the EU, where “intensive transgovernmentalism” denotes a mode in which the overall direction of policy is set by the European Council and consolidated by the Council, while supranational institutions play a marginal role (Wallace 2010, 79–89). In Lavenex’s understanding, the AFSJ remains transgovernmental for two reasons. On the one hand, the field includes politicized issues like migration and asylum, in which member states continue to resist legal harmonization despite the introduction of the community method; on the other hand, there are crucial dimensions of operational cooperation that fall under the AFSJ and require the

¹ The community method refers to the traditional way of legislating at the EU level: the Commission proposes legislation, which is voted upon in the Council [more recently] in conjunction with the Parliament in the co-decision procedure, and enforced by the Court (European Commission 2001, 6).

intergovernmental coordination of border, police, or judicial authorities rather than supranational policy-making² (Lavenex 2014, 368). While both these points may be accurate, they overlook the active role and influence of supranational institutions in the AFSJ, documented time and time again (Ucarer 2001; Kaunert 2010a; Kaunert and Léonard 2012a; Ripoll Servent 2015; Trauner and Ripoll Servent 2015a). At the same time, however, the gradual communitarization of the AFSJ—elsewhere called “normalization” (Ucarer 2013, 282)—has been accompanied by a plethora of safeguard measures designed to limit or postpone the competences of supranational institutions in the field³. Consequently, it can be said the AFSJ is after the Lisbon Treaty more than a transgovernmental policy domain of EU activity, but less than a fully communitarized one. It has been normalized, but it is not ‘normal’ yet.

All the challenges to classify the AFSJ using the terminology available in EU studies stem from the same problem: many of the issues included in the field infringe directly upon national sovereignty and what are traditionally considered “core state powers” (Genschel and Jachtenfuchs 2013). Specifically, border management and its derivatives (visa, migration, and asylum policy), internal security (through law enforcement), and the administration of justice systems (especially in criminal law) are different facets of member states’ “monopoly of the legitimate use of physical force within [their] given territory” (Weber 1946, 78). The expansion

² Indeed, the AFSJ has seen a proliferation of semi-autonomous agencies in the fields of intelligence gathering and police information exchange (Europol), police training (Cepol), operational cooperation at the external borders (Frontex), judicial cooperation (Eurojust and the use of liaison magistrates), the establishment of an EU Counter-terrorism Coordinator (Monar 2010c, 26), as well as agencies designed to monitor developments in member states: the European Union Agency for Fundamental Rights (FRA), the European Monitoring Centre on Drugs and Drug Addiction (EMCDDA), the European Monitoring Centre on Racism and Xenophobia (EUMC) (Lavenex and Wallace 2005, 470). This development seems to support the new intergovernmentalist hypothesis regarding the creation of new (“de novo”) bodies when delegation is necessary instead of empowering traditional supranational institutions (Bickerton, Hodson, and Puetter 2015b, 713). However, taking into consideration that the Commission and the Parliament have been granted legislative competences in the AFSJ, while the Court eventually received jurisdiction, it seems more likely that the proliferation of semi-autonomous agencies is a development additional to—and not replacing—classical delegation.

³ ‘Safeguard measures’ include: 1) the number of transitional periods included in the treaties to delay the Commission’s sole right of initiative (1999-2004) and the jurisdiction of the Court (2009-2014); 2) the exceptions made to the co-decision procedure in order to limit the role of the Parliament, which even after the Lisbon Treaty is only consulted or has to give assent on several issues; and 3) the maintenance of intergovernmental institutions’ oversight of agenda-setting through multi-annual action plans and article 68 TFEU (cf. Monar 2010b, 26).

of EU competence in these domains therefore puts into question basic conditions of state sovereignty while opening new lines of inquiry into the nature of the European Union as an “unidentified political object” (Delors 1985). From the perspective of national governments, the development of the AFSJ was never a political objective in itself—like the establishment of the single market in the 1980s; in contrast, the third pillar JHA originated from the necessity to ensure “compensatory measures” to the abolition of internal border controls entailed in the implementation of the single market (De Lobkowicz 2002, 17). Therefore, member states have been caught from the outset between the requisite to adopt EU-level legislation in the AFSJ in order to complement the internal market and the desire to keep a firm grip over the evolution of a domain in which sovereignty concerns prevailed.

The tension between the functional necessity to integrate in the AFSJ and the national objective to maintain intergovernmental control over the field has resulted in a complex system of “differentiated integration” (Leuffen, Rittberger, and Schimmelfennig 2013). Differentiated integration is a term used to describe varying degrees of vertical integration (centralization) and horizontal integration (territorial participation) across and within EU policy fields (Schimmelfennig, Leuffen, and Rittberger 2015, 765). The AFSJ offers multiple examples of differentiated integration. First, from 1999 to 2009, the AFSJ operated in both the first European Communities pillar and the third intergovernmental cooperation pillar (Monar 2010c, 34). Even after the Lisbon Treaty, criminal law and police cooperation remain areas in which member states have resisted the full application of the community method, making use of their partial right of initiative (Article 76 TFEU, Mitsilegas 2010; Den Boer 2014). Second, the AFSJ has a well-established system of opt-outs from the legal *acquis* adopted, with different rules applicable to the United Kingdom, Ireland, and Denmark (Peers 2008). Third, decision-making over the border-free Schengen Area currently excludes EU member states Ireland, the United Kingdom, Cyprus, Bulgaria, Romania, and Croatia, while including non-member states

Norway, Iceland, Switzerland and Liechtenstein (Vermeulen and Bondt 2015, 19–20). Nevertheless, in terms of dynamics of decision-making, the descriptive label “differentiated integration”⁴ is not very helpful. Empirical research has shown that opting out of the AFSJ does not mean that the United Kingdom or Denmark are not involved in EU decision-making on specific issues—quite the contrary (Adler-Nissen 2009; Adler-Nissen 2014). If anything, differentiated integration implies that decision-making in the AFSJ has always been highly fragmented, without revealing how that fragmentation actually works in practice.

Finally, another descriptive label that has been applied to the AFSJ has been that of “experimentalist governance” (Monar 2010a; Pollak and Slominski 2009; Carrapico and Trauner 2013). The term refers to a particular decision-making architecture found in policy areas in which the EU does not typically have legislative competence, characterized instead by generic goal-setting with contributions from lower levels of governance; very importantly, these “framework goals” are periodically monitored, peer reviewed, and revised (Sabel and Zeitlin 2010, 3). Examples in the AFSJ include the detailed multi-annual programs adopted after the Amsterdam Treaty (Tampere 1999, Hague 2004, Stockholm 2009), but also the wide array of Council recommendations, guidelines, “best practice manuals”, as well as general action plans and strategies (Monar 2010a, 243–4). In terms of roles and impact of lower levels of governance, the agencies Frontex (Pollak and Slominski 2009) and Europol (Carrapico and Trauner 2013) have been researched from the “experimentalist” perspective. Nevertheless, the value of the framework for AFSJ decision-making more broadly is limited. As the field became increasingly supranationalized, some experimentalist tools have been abandoned, e.g. the 2014

⁴ The proponents of the concept do offer explanations for varying degrees of “differentiated integration” across EU policy fields, but their purpose is to depict general patterns of integration rather than dynamics of decision-making (for a summary, see Schimmelfennig, Leuffen, and Rittberger 2015). In respect to the AFSJ, they argue that the initial abolition of internal borders controls created a strong demand for integration in the areas of justice and home affairs (high interdependence), but issues like border management and immigration were too heavily politicized in some member states for integration to be pursued homogenously (Rittberger, Leuffen, and Schimmelfennig 2013, 205). Differentiation thus facilitated “the pursuit of a ‘deepening’ of integration in circumstances in which the full participation of some countries [was] not possible” (Monar 2010b, 289).

follow-up to the Stockholm Program was “a short, vague, and general document” (Léonard and Kaunert 2016, 146). To sum up, on the continuum between experimentalist and non-experimentalist governance, the AFSJ has clearly shifted throughout time towards the latter.

Taking all this into consideration, it appears that decision-making in the AFSJ remains a puzzling phenomenon from a theoretical standpoint. While the initial third pillar inaugurated at Maastricht offered a clear case of (new) intergovernmentalist decision-making, the first wave of supranationalization brought by the Amsterdam Treaty blurred the boundaries of that category. Moreover, the second wave of supranationalization resulted from the Lisbon Treaty changed completely the predominant mode of decision-making in the AFSJ to supranational governance; however, the boundaries of that category were also blurred. The result was a prime example of “differentiated integration” in which some “core state powers” were communitarized while others remained “transgovernmentalized” or more “experimentalist”. In other words, every theoretical conceptualization the academic literature offered so far about the AFSJ has been incomplete or accompanied by caveats. In many ways, the field is a hybrid area of EU policy-making: a supranationalized domain in which member states continue to play a key role (Maricut forthcoming).

Nowhere is the idiosyncratic development of the AFSJ more evident than in the behavior of the four main institutional actors involved in decision-making: the European Council, the Council, the Commission, and the Parliament. Given the increasingly hybrid character of the AFSJ, the roles of the four main institutions in the field have been anything but stable. While the intergovernmental institutions (the European Council and especially the Council) were initially at the center of decision-making in the third pillar, the gradual communitarization of the field empowered first the Commission, then the Parliament, and eventually the Court. The following section briefly problematizes the particularities of

institutional behavior in the AFSJ. Against this background, the central research question of the thesis is introduced.

1.2 Mapping institutional behavior in the AFSJ: a research question

The sinuous development of the AFSJ at the EU level has inevitably translated into fluid institutional roles and behaviors. Several examples are provided here to illustrate this fluidity. To begin with the highest political body in the EU, the European Council contributed substantively to the content of the first multi-annual program in the AFSJ—setting the legislative and operational agenda for a five-year period—but then overlooked its successors. If the inaugural Tampere Program (1999) was actually discussed by heads of state or government during a special meeting of the European Council entirely dedicated to the subject (Werts 2008, 133–5), the Hague Program (2004) was an exclusive project of ministers in the JHA Council and merely “rubber-stamped” by the European Council (Peers 2006, 22). The Stockholm Program (2009) was in a similar vein prepared in the bureaucratic ‘machinery’, but involved more actors other than the Council (Ask 2010, 16–17). In a similar vein, the heads “passed on” the opportunity to debate the 2014 Strategic Guidelines⁵ (Collett 2014), despite the fact that the Lisbon Treaty provided for the first time an explicit mandate to the European Council “to define the strategic guidelines for legislative and operational planning within the Area of Freedom, Security and Justice” (Art. 68). The European Council seems to get rather arbitrarily involved in the AFSJ, but when it does, its input can be decisive (Nilsson and Siegl 2010).

In connection to this, a second example of atypical dynamics of institutional behavior in the AFSJ is provided by the positioning of other institutions to the ad-hoc role of the

⁵ Preoccupied with the nomination of the new Commission President following the European Parliament elections, the European Council framed the new AFSJ guidelines as one priority among many for the next college of commissioners (Carrera and Guild 2014, 5–6). As such, the text rapidly put together by the JHA Council was widely criticized for lacking both substance and vision (De Bruycker 2014; Léonard and Kaunert 2016).

European Council. Specifically, the Commission proved throughout time much more supportive of interventions by heads of state or government than the Council. Rather unusual for other domains of EU activity, the Commission was the one to suggest in the first place the organization of a special European Council on the AFSJ in order to provide both political impetus and policy content to the fresh Title IV of the Amsterdam Treaty (House of Lords 1999, Art 14). In fact, it appears that the Commission strategically made use of the Tampere summit in order to strengthen its own position in the AFSJ (Kaunert 2010b, 59–60) and gain additional prerogatives, such as the scoreboard system monitoring progress in the field (Elsen 2010, 262). Conversely, ministers of justice and home affairs were not even present at the Tampere meeting (reserved for heads of state or government and their foreign affairs ministers)—a move that was not well received at the time in the JHA Council (Bunyan 2003, 4). Accustomed to being the sole decision-makers in the third pillar—the “masters of the game” in effect (De Lobkowicz 2002, 49)—justice and home affairs ministers were careful to assume leadership of the discussions on the subsequent the Hague Program and maintained a close eye on the Commission’s compliance with agreed priorities (Nilsson and Siegl 2010, 70). Their caution anticipated the Commission’s later deviation from multi-annual programs, when the Commission devised a follow-up Action Plan to the Stockholm Program that ‘cherry-picked’ from the instruments signed off by the European Council (European Commission 2010b; Council of the European Union 2010a, 2). In other words, struggles over the content of multi-annual programs portray a complex inter-institutional ‘dance’ in the AFSJ that does not reveal a dominant institutional actor setting the policy agenda.

Moving to fluid or changing institutional roles and behaviors, the case of the Commission in the field of migration policy is instructive. Herein, the Commission acted sometimes as an agent of supranationalization and other times as a direct agent of member states, accommodating the preferences of national governments (Papagianni 2006, 234–45).

Concretely, during the last two decades, the Commission has staunchly supported on some occasions a Community approach to immigration, while on others it remained a compliant participant to intergovernmental methods championed by member states. This inconsistency has manifested itself from the early beginnings of immigration policy at the Community level, in the context of discussions on the completion of the internal market starting the mid-1980s (European Commission 1985b). For example, the Commission was publicly arguing that the abolition of internal frontiers cannot exempt third country nationals (European Commission 1988b, 4) and that member states who persist in preserving checks at internal borders would be sanctioned (European Commission 1993). However, there were no legislative proposals to substantiate such declarations—although they could have been legally justified as part of the classic expansion of competence accompanying the internal market (Timmermans 1993). In fact, the Commission’s acquiescence of member states’ implementation of free movement of persons outside the Community framework—through the Schengen Agreement—was enough to attract the discontent of the European Parliament, which filed a case against the Commission before the Court for failure to implement the Single European Act (case C-445/93).

This ambivalence in the Commission’s behavior did not change after the Maastricht Treaty or even following the Amsterdam Treaty, when the supranational institution initially advanced two ambitious communications containing a list of measures envisaging the harmonization of several aspects of immigration policy (European Commission 1994; 2000). However, given the limited role of the Commission under the third pillar (Maastricht Treaty, Art K4.2), the first communication lacked the necessary legislative follow-up to be translated into concrete policies. Similarly, the legislative effects of the second document were significantly delayed, as the Commission seemed ready to wait for the end of the transitional five-year period after the Amsterdam Treaty during which it had to share its right of initiative with member states (Peers 2011b, 272–7). Moreover, when proposals were finally put forth on

legal migration in the early to mid-2000s, the Commission accepted their significant dilution during Council negotiations without major argument (Brouwer 2007, 69). At the same time, the Commission was very responsive to member states' security concerns in the aftermath of 9/11 and proposed a series of measures linking counter-terrorism particularly to the fight against illegal immigration (Guild 2003, 177). In contrast, the supranational institution has been forceful in praising the benefits of labor migration as a solution to the Union's demographic problems (Boswell 2008)—a position rejected by most member states (Bendel 2007, 36).

On a different note, the Commission avoided to act in its “guardian of the treaties” capacity against member states that maintained visa waiver agreements with the United States (US), despite this being an exclusive community competence (Papagianni 2006, 243). The failure to launch infringement procedures in this case coincided with a legal action brought by the Commission against the Council in 2003 in the field of criminal law, where the supranational institution contested the use of a framework decision instead of a directive in an area that pertained to Community competence (Norman 2015). Under the circumstances, it is generally agreed that the Commission's gradual empowerment in migration has made it prone to a cautious, “pragmatic stance sensitive to the fundamental issues of national sovereignty inherent” in the field (Ucarer 2001, 4).

A final example illustrating the fluidity of institutional behavior in the AFSJ comes from the Parliament. Over time, the Parliament's positions shifted from consistently opposing the Council in the AFSJ to becoming a reliable partner in the co-decision procedure. Some relevant instances can be found in the field of data protection. Indeed, the protection of personal data of EU citizens was one of the most important topics on the agenda of the Committee on Civil Liberties, Justice and Home Affairs (LIBE). In fact, the European Parliament has been the sole EU institution to publicly contest some provisions of the US Patriot Act regarding the mass collection of data in the early days of the fight against terrorism (De Capitani 2010, 133).

What is more, the LIBE Committee expressed a strong position against surveillance programs even before 9/11, e.g. its 2001 report on the global interception program ‘Echelon’ (European Parliament 2001), and became even more articulate on the matter over time, as illustrated during the Snowden revelations⁶ (European Parliament 2014). But however vocal the Parliament had been in its stance on the necessity to protect personal data from law enforcement authorities, its decision-making powers have not always been used to this end. One example is the approval by the Parliament of the controversial Data Retention Directive⁷ once it had been introduced under the co-decision procedure (European Parliament 2005). The Parliament’s support of the act is particularly surprising bearing in mind that a majority of Members had rejected a similar text twice when proposed as a framework decision under consultation (De Hert, Papakonstantinou, and Riehle 2008, 155–6). A comprehensive case study of this dossier showed how Members of Parliament have deliberately abandoned their traditional policy preferences on the matter because they wanted to be perceived in the long run as a responsible partner to the Council under the co-decision procedure (Ripoll Servent 2015, 70).

More recently, the Parliament consented to a bilateral agreement allowing the transfer of Passenger Name Records⁸ (PNR) to the US Department of Homeland Security (BBC News 2012). This was in contrast to its opposition to an analogous agreement on three occasions during 2004-2005, and its contestation before the Court of the Council’s decision to proceed without its consent (Pawlak 2009, 570). But while in the mid-2000s the Parliament was split

⁶ Edward Snowden is a former contractor of the US National Security Agency who in 2013 leaked top-secret documents to the media regarding mass surveillance of ordinary citizens; Members of Parliament took a special interest in his testimony and Snowden replied directly to their inquiries on 7 March 2014 (European Parliament 2014).

⁷ The Data Retention Directive required communication service providers in member states to store all the telecommunication data of their customers for a period of minimum 6 and up to 24 months and make it readily accessible to law enforcement authorities in pursuit of suspected criminals connected to terrorism (Directive 2006/24/EC). The Directive was invalidated by the Court of Justice in 2014 as violating both the right to privacy and the protection of personal data (BBC News 2014).

⁸ The transfer of Passenger Name Records collected by airline carriers during check-in procedures to a third party (the US) is highly problematic from the perspective of the fundamental right to data protection—a position recognized by the European Data Protection Supervisor (2011) and even the Commission’s own Legal Service (The Guardian 2011).

on the matter between its different committees, e.g. the Foreign Affairs Committee supported the agreement with the US while LIBE rejected it (European Parliament 2004), the supranational legislature has witnessed dissenting positions between political groups of the same [LIBE] committee in relation to the 2012 deal (European Parliament News 2012). Moreover, if changes in Members' preferences on the PNR Agreement occurred over several years—and two turnovers of legislature—the Parliament made a U-turn in the case of a similar agreement with the US on SWIFT data⁹, when it went from rejecting the agreement to ratifying it in less than five months (Ripoll Servent 2015, 108–9).

Taking all this into consideration, it is pertinent to argue that there are no clear patterns indicating the position of an EU institution on a given issue in the AFSJ, despite articulating a strong stance in the past on a similar matter. In addition, it is difficult to pinpoint the circumstances under which inter-institutional relations are likely to be cooperative or confrontational; in others words, it is impossible to anticipate which 'battles' institutions choose to fight and which they decide to let go. The following central research question is raised in this context:

What explains different patterns of institutional behavior in the European Union's Area of Freedom, Security and Justice?

An institution is understood in new institutionalist terms as the “structural feature” of a polity or society which “affects individual behavior” and has existed over a continuous period of time in either a formal (e.g. a bureaucracy) or informal way (e.g. network of organizations) (Peters 1999, 18). The focus is on the main formal institutions of the European polity involved in decision-making—the European Council, the Council, the Commission, and the Parliament—referred interchangeably throughout the text as ‘institutional actors’ or simply as

⁹ Also designed in the framework of counter-terrorism cooperation with the US, the SWIFT (Society for Worldwide Interbank Financial Telecommunication) Agreement was meant to offer American authorities access to the financial information of EU citizens, which the Parliament rejected in February 2010 on grounds of proportionality, privacy, and reciprocity (EurActiv 2010).

‘institutions’. Empirically, EU institutional behavior refers to the official stance taken by an EU institution during the policy-making process—be it agenda-setting, decision-making, or implementation. Such stances can be found in the institutional discourse on legislative and non-legislative instruments, inter-institutional agreements, or treaty changes. They include both policy decisions adopted and institutional positions expressed in formal documents and oral/written speeches or statements by officials.

To answer the research question above, it is necessary to first survey the academic literature on institutional decision-making in the AFSJ in order to examine and assess existing explanations. This is the subject of the next section.

1.3 Existing accounts of institutional behavior in the AFSJ¹⁰

From a political science perspective, the dynamics of institutional decision-making in the AFSJ remain an understudied topic. More than twenty years after the establishment of the third pillar by the Maastricht Treaty, there is little theoretical work done in relation to institutional roles and behaviors in the AFSJ *as a whole*. This status quo is not owed to a failure of the academic literature to engage with the AFSJ; on the contrary, there are countless studies conducted from a variety of disciplinary traditions on specific subfields of AFSJ policy (for overviews, see Boswell 2010; Kaunert, Occhipinti, and Léonard 2014). ‘Umbrella’ topics include: a) immigration and asylum¹¹; b) counter-terrorist policy¹²; c) criminal law¹³; d) police cooperation, including the fight against organized crime¹⁴; e) the external dimension of the

¹⁰ A more comprehensive discussion of the AFSJ literature is provided in Chapter 2.

¹¹ Geddes (2003b); Geddes and Boswell (2011); Boswell (2008); Guiraudon (2000); Lavenex (2006); Guild (2006); Baldaccini, Guild, and Toner (2007); Guild, Groenendijk, and Carrera (2009); Bendel (2007); Léonard (2009); Kaunert and Léonard (2012b); Trauner and Wolff (2014); Ripoll Servent and Trauner (2014).

¹² Bures (2006); Zimmermann (2006); Guild (2008); Eckes (2009); Argomaniz (2009; 2011); MacKenzie (2010); Bossong (2008; 2012); Kaunert (2010c); Kaunert, Léonard, and MacKenzie (2012); Kaunert and Léonard (2013).

¹³ Mitsilegas (2009a; 2014); Fletcher, Loof, and Gilmore (2008); Eckes and Konstadinides (2011); Mégie (2013); Fichera (2011); Klip (2012); Thunberg Schunke (2013).

¹⁴ Anderson and Boer (1994); Occhipinti (2003); Mitsilegas, Monar, and Rees (2003); Guild and Geyer (2008); Bergström and Jonsson Cornell (2014); Carrapico (2014).

AFSJ¹⁵; and f) the role and activities of agencies in the AFSJ¹⁶. Taking into consideration the frequent treaty changes that gradually expanded the scope of EU competence in the area and mixed the legal basis of various subfields, the AFSJ developed as a highly fragmented domain—with different rules applicable to different areas of action. In this context, it is no wonder that the few studies that address the AFSJ as a ‘block’ are generally descriptive, focused on legal novelties brought by treaty amendments or secondary legislation and they aim to illustrate the significant expansion of the field throughout the years¹⁷.

Conversely, theoretical contributions that address the AFSJ as a whole are scarce, with one prominent strand coming from the critical security approach in International Relations (Buzan, Wæver, and Wilde 1998). Focusing on the securitization of policy instruments adopted in the AFSJ, scholars like Didier Bigo and Jef Huysmans emphasized the manner in which security-oriented policy goals have taken over most areas of action in the field (like border control, immigration, asylum, or external relations)—especially in the context of the counter-terrorist agenda prioritized after the terrorist attacks in the US on September 11, 2001 (Bigo 2000a; Bigo and Tsoukala 2009; Huysmans 2000; Huysmans 2006). Empirical analyses of EU policies in migration, asylum, and border management have not entirely supported, however, this line of argument (Boswell 2007; Léonard 2007; Neal 2009). In addition, from the perspective of institutional behavior, this body of literature is relevant only to the extent that it underlines an important exogenous factor influencing institutional positions—the terrorist attacks in the US, Madrid (2004), and London (2005)—which prompted a significant

¹⁵ Wolff, Wichmann, and Mounier (2009a); Wolff (2012); Lavenex and Kunz (2008); Balzacq (2009); Monar (2012c); Trauner and Carrapico (2012); Kaunert, Léonard, and MacKenzie (2015).

¹⁶ Kaunert, Léonard, and Occhipinti (2013); Busuioc and Groenleer (2013); Carrapico and Trauner (2013); Wolff and Schout (2013); Monar (2013b); Rozée, Kaunert, and Léonard (2013).

¹⁷ Notable examples include dedicated chapters in EU textbooks (Ucarer 2013; Lavenex 2014; Monar 2012a), legal writings (Walker 2004; Peers 2006; Peers 2011a), the annual reviews by Jörg Monar in the *Journal of Common Market Studies* (Monar 1998; 2011; 2013) and his edited publications (Monar and Morgan 1994; Bieber and Monar 1995; Monar 2010d).

amount of legislative measures motivated by security concerns supported [at least in the initial stages] by all actors.

Furthermore, as in other areas of EU policy activity, political scientists working on the AFSJ have sought to explain why the field has entered the scope of EU competence to begin with. The question why policies of justice and home affairs became ‘integrated’ at the EU level illustrates an old theoretical divide between neo-functionalism and [liberal] intergovernmentalism in integration theory (for a comprehensive discussion about the explanatory utility of each theory in the AFSJ, see Ette, Parkes, and Bendel 2011, 13–26). Within this debate, one camp is supranationalist and stresses the increasing EU competence in migration as a “spillover” from the abolition of internal borders (Koslowski 1998; Ucarer 1999; Niemann 2012), while the other camp is state-centered and re-affirms the central position of governments in the field, especially in the field of migration (Stetter 2000; Guiraudon 2000). A similar interest can be found in studies examining the Europeanization of asylum policy (Guild 2006; Kaunert and Léonard 2012a) or of police cooperation (Occhipinti 2003; Anderson et al. 1995), which can equally be placed on different sides of the supranationalist-intergovernmentalist continuum. The continuum is important because it provides the baseline for ensuing discussions about the role of different institutions in the policy-making process in the AFSJ.

In line with the historical development of the field, the focus of the literature has moved from theorizing decision-making inside the intergovernmental institutions (the Council in particular) to assessing the influence of supranational institutions (mainly the Commission and the Parliament). Virginie Guiraudon’s framework (2000; 2003) of “venue-shopping” in migration policy was the first major theoretical conceptualization of institutional dynamics in the AFSJ. The author examined decision-making by member states because national governments were the relevant players in the field up to the late 1990s (see also Monar and

Morgan 1994; Bieber and Monar 1995; De Lobkowicz 2002). Using the framework of “policy venues” (Baumgartner and Jones 1993), Guiraudon explained the development of EU migration policy as a result of home affairs officials “shopping” for policies in venues other than their national settings, where their control-oriented solutions were constitutionally constrained or simply unpopular (2000, 258–9). Moreover, the orientation towards security and control in decision-making over migration was linked to the professional backgrounds of officials involved, who were policemen rather than diplomats (Guiraudon 2003, 267). Nevertheless, despite being often used to explain the origins of EU policy on migration and asylum, the “venue-shopping” perspective has become less applicable over time; indeed, it has been pertinently argued that subsequent treaty changes have altered the entire system of decision-making venues and that the presence of supranational institutions has made it more difficult for governments to adopt restrictive policies (Kaunert and Léonard 2012a, 1410).

In respect to the theorization of supranational institutions in the AFSJ, two contributions stand out. On the one hand, the work of Christian Kaunert on supranational governance has demonstrated the influential role of the Commission in the AFSJ, despite its limited formal competences. Conceptualizing the institution as a “supranational policy entrepreneur”, he identified multiple instance in which the institution steered the policy-making process in criminal law (Kaunert 2007), asylum policy (Kaunert 2009), counter-terrorism (Kaunert 2010c), and treaty revisions more broadly (Kaunert 2010b). On the other hand, the research of Florian Trauner and Ariadna Ripoll Servent on policy change in the AFSJ has shown that the gradual empowerment of supranational institutions has been accompanied by a change in their policy positions, which have moved closer to the preferences of the Council especially in the area of asylum (Ripoll Servent and Trauner 2014; Trauner and Ripoll Servent 2015a). This change has been particularly visible in the case of the Parliament, which displayed different behavioral patterns under consultation and co-decision respectively (Ripoll Servent 2015).

Moreover, in terms of substantive policy positions, the AFSJ literature has identified an additional line of difference between intergovernmental and supranational institutions, related to normative stances. Particularly in the fields of migration and asylum, the Council has been associated with restrictive, control-oriented policies (Guiraudon 2000), while the Commission and the Parliament have been linked to liberal-oriented ideas (Kaunert and Léonard 2012a)—albeit to a lesser extent in recent years (Ripoll Servent and Trauner 2014). Elsewhere, the institutional positions of the Parliament, the Council, and the Commission have been likened to “the good, the bad, and the ugly”, in line with a 1966 Sergio Leone movie (Acosta 2009). The argument was that the Parliament was “good” because it established a reputation as seeking to protect fundamental rights of EU and third-country citizens alike; next, the Council was “bad” because it constantly aimed to securitize every policy surrounding immigration, asylum or law enforcement cooperation in order to protect the old “fortress Europe” (cf. Geddes 2003; Bendel 2005); finally, the Commission was “ugly” because it was unable to present scientific arguments in an attractive form that could be accepted by the Council. While such depictions were used metaphorically, they concisely summarize the views of an active network of lawyers and political scientists with a clear normative agenda who routinely analyze and offer policy recommendations on various aspects of AFSJ policy¹⁸.

Notwithstanding the richness of all of this specialized literature, two dimensions are currently missing from accounts about institutional behaviors and decision-making in the AFSJ. First, there is still no treatment of the AFSJ institutional architecture as a whole (instead of studies on individual policy subfields), including an analysis of intergovernmental and supranational institutions in parallel (rather than separately). So far, depending on the historical period and the policy area/episode under investigation, scholars made arguments regarding the

¹⁸ Examples of academics who are active in think tanks in the AFSJ are the Centre for European Policy Studies (CEPS), the European Policy Centre (EPC), or the Migration Policy Centre (MPC) at the European University Institute.

dominance of the Council, the relevance of the Commission, or the changing preferences of the Parliament. There are no theorizations of institutional roles in the AFSJ more generally, and how they relate to each other. Second, although the field currently comprises both intergovernmental and supranational modes of decision-making, expectations regarding institutional behavior are no different from those originally formulated about intergovernmental and supranational institutions in classic integration theory (Hosli 1996; Sandholtz and Stone Sweet 1998; Stone Sweet, Sandholtz, and Fligstein 2001). Nevertheless, as emphasized in section 1.2 above, the Commission and the Parliament do not always act as agents of supranationalization in the AFSJ; conversely, they can actively seek to accommodate the preferences of member states—against expectations of classic integration theory. While the work of Trauner and Ripoll Servent (2014; 2015a; Ripoll Servent 2015) has paved the way for investigations of the changing positions of supranational institutions in the AFSJ, the present thesis aims to take that line of inquiry further. The approach followed here is different, however, as shown in the next section.

1.4 The theoretical argument

The central argument of this thesis is that *institutional behavior in the AFSJ cannot be fully understood without examining how each institution seeks to legitimize its role in the EU political system*. The need for justification is considered a driving force of institutional behavior in itself because it impacted directly on the development of the AFSJ at the EU level. The search for legitimation is connected to the premise that the EU suffers from a democratic deficit and a crisis of political representation (Höreth 1999; Eriksen and Fossum 2000; Scharpf 2009; Mair and Thomassen 2010; Kröger 2015; Hooghe and Marks 2009; Bickerton, Hodson, and Puetter 2015b, 709). However, scholars involved in this debate have not yet addressed the implications of the constant need for legitimation and justification on the behavior of

institutions. The logic of justification is empirically manifested in the way in which specific documents or individual officials frame institutional positions and decisions as being for the benefit of someone, made ‘in the name’ of a certain constituency. Given the ambiguity of political representation in the EU, where all EU institutions are ultimately supposed to represent the citizen (TFEU, Art. 10), it is posited that individuals working there at a given moment in time have significant leeway in how they construct and refer to their respective constituencies. To put it differently, the behavior of EU institutions is driven by their wish to be considered legitimate and democratic in the eyes of the constituency they aim to address. Therefore, in order to understand different patterns of institutional behavior, it is necessary to investigate empirically how each institution constructs its ‘target’ constituency on a case-by-case basis, depending on the policy instrument under discussion.

General expectations about lines of justification of institutional behavior can be inferred from treaty provisions. The consolidated version of the Treaty on European Union (TEU) stipulates the following:

1. The functioning of the Union shall be founded on representative democracy.
2. Citizens are directly represented at Union level in the European Parliament. Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens (TEU, art 10).

....

1. The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action. (...)
3. The European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent. (TEU, art 11).

Accordingly, if the European Council and the Council are to represent the interests of member states, which in turn are accountable to national parliaments and citizens, it is expected that Council documents or ministers themselves will constantly make reference to the benefits of a decision adopted in the national context. In a similar vein, if the Parliament is supposed to act on behalf of EU citizens, it is expected that its Members will regularly invoke the value of their

positions and actions for citizens across member states. The same logic applies to the Commission when it consults “representative associations and civil society”, being expected that the institution will frequently underline the merits of supranational cooperation on a given issue. In other words, officials from institutions are constantly making representative claims (Saward 2006; 2010) that influence their behavior in the decision-making process.

Moreover, although the treaty framework and organizational rules provide a set of expectations regarding whom EU institutions are supposed to represent, the specific characteristics of constituencies are neither evident nor natural in the EU political system. For example, if citizens are to be represented by their respective governments in the European Council and the Council and by the European Parliament directly, does this mean that there are differences between what citizens want in their capacity as national citizens and what they want in their capacity as European citizens? Legally speaking, European citizenship is additional to and does not replace national citizenship (TFEU, art 20), a provision which can create a lot of confusion when it comes to political representation. On this point, some scholars pertinently suggested that the EU suffers from a representation surplus rather than a representation deficit, resulted from the creation of multiple avenues of representation: electoral (through the Parliament), territorial (through the Council), functional (through the Commission’s consultation of sectoral organizations) and direct (through the Citizens’ Initiative) (Bellamy and Kröger 2013, 485–6). There is a “struggle for EU legitimacy” (Schrag Sternberg 2013) that is inherent in the ambiguity of political representation in the EU. As a result, individuals inside institutions have significant leeway to pick and choose the interests and values of the constituency they are representing, and motivate their policy and institutional choices accordingly.

For this argument to hold, it is irrelevant whether the constituency is actually ‘out there’ and what specific definitions of the terms ‘legitimacy’ and ‘representative democracy’ are

applied. The point is that legitimacy is considered “essential to the operation of political life” (Coicaud 2002, 1) in the EU political system, which describes itself as a “representative democracy” (TEU, Art 10). As a result, officials from institutions strive to achieve it and justify their policy positions accordingly, impacting on institutional behavior. At the same time, it does not matter whether actors refer to the need for legitimation strategically as rational calculation in order to appear responsive to the demands of their actual constituency, or normatively in relation to how institutions are expected to behave in a representative democracy. The effect on the justification of institutional behavior is the same regardless of the motivation: it influences both what institutions ‘say’, namely policy discourse, and what they ‘do’, namely positions in inter-institutional relations and intra-institutional decisions.

Theoretically, the argument draws on organizational theory insights regarding role expectations (Egeberg and Sætren 1999; Egeberg 2004; Trondal 2001) combined with an adaptation of the political theory work of Michael Saward on representative claims-making (2006; 2010). The former provides the analytical framework regarding how individuals act inside organizations by making sense of the roles assigned to them, in line with the type of organizational structure to which they belong. The latter offers a complementary explanation of the drivers of behavior by recognizing that all EU institutions are ultimately supposed to represent the citizen (TEU, Art. 10), but that the individuals working there at a given moment in time play an active role in defining the characteristics of their respective constituencies.

A subtle dynamic between institutions (as structures) and individual behavior (agency) is entailed in this line of argument. The underlying logic is that structure and agency are mutually constituted, meaning that the actions of agents are constrained and facilitated by existing rules and resources, but at the same time their actions contribute to the redefinition of structure; in other words, “structural properties (...) are both medium and outcome of the practices they recursively organize” (Giddens 1984, 25). Accordingly, it is argued that while

the interests of EU officials are indeed “institutionally constructed” (DiMaggio and Powell 1991, 28), the way in which they portray their respective constituencies contributes to the redefinition of institutional interests, which then provide the parameters for future action. Figure 1.1 offers a summary of the argument. The two distinct bodies of literature that helped in its construction are outlined below.

Borrowing from applications of organizational theory to EU institutions, it is posited that organizational structures possess certain features which create specific role expectations guiding the behavior of actors inside institutions. Role perception is understood here as a cognitive, fluid function of processing information inside the boundaries of an organization (Trondal 2001); very importantly, the cognitive enactment of roles does not imply their *internalization* as norms (Egeberg and Sætren 1999, 95). Three structural features are underlined in the case of EU organizations: 1) the type of horizontal specialization—whether it is territorial (as is the case of the European Council and the Council) or sectoral (in the case of the Commission’s Directorate-Generals or the Parliament’s committees); 2) the primary affiliation of members—whether it is to a national government (the European Council, the Council) or to an EU-level organization where they work full-time (the Commission, the Parliament); and 3) the level of partisanship in the composition—depending on how important the party affiliation is, considered very strong among Members of the Parliament and heads of state or governments in the European Council, moderate in the case of College of Commissioners and the Council of Ministers, and very low in the case of civil servants working in Commission Directorate-Generals (DGs), the Council Secretariat, and the Parliament’s administration. This means, for instance, that the role of an official employed in a Commission DG is determined by the sectoral policy area in which he works and loyalty to the supranational structure where he is present on a full-time basis, with very little or lack of influence from partisan elements. While empirically there is considerable overlap between this argument and

the one portraying the Commission as a pro-integrationist expansionist actor, the two are entirely distinct at the analytical level (Wonka 2015, 98–9)—and only the former can allow for different patterns of institutional behavior.

Indeed, the literature using organizational theory agrees that institutional roles are not automatically acknowledged by a passive, *tabula rasa* individual. In fact, many scholars have conducted extensive research on the national, professional, and social background of people working in EU institutions (Egeberg 1996; Egeberg and Sætren 1999; Hooghe 2001; Kassim et al. 2013). On this point, the present thesis departs from their line of thinking, proposing instead that the answer to the question about different patterns of institutional behavior does not lie one analytical step back (in the background of various EU officials), but one analytical step further (in how individuals make sense of their role after they entered the organization). It is argued that *officials render institutional roles intelligible through an active, self-conscious process of identifying the constituency which they are supposed to be representing on account of their position*. The word ‘official’ is taken to encompass both politically appointed and technocratic officials, in line with the premise that the need to respond to the democratic deficit and legitimize institutional positions and decisions applies indistinguishably to all, regardless of how they entered EU institutions. It remains to be empirically established if the two categories of officials claim to represent the same constituency or different ones, even when they come from the same institution.

The second part of the argument is rooted in the political theory of Michael Saward on representative claims-making (2006; 2010), following a constructivist approach to representation (Disch 2012). Seeking to show that representation is more than the “given, factual product of elections” in the classic interpretation by Hannah Pitkin, Saward advances a conceptualization of representation as a performative act that can be disentangled “in terms of claims to be representative [*made*] by a variety of political actors” (the *subjects*), who purport

to stand for an *object* (the constituency) in front of an *audience* (Saward 2006, 298-302). The point is not that each institution has a clearly identifiable constituency composed of distinct group of states or citizens, which can overlap—for example ‘national governments’, ‘the peoples of Europe’, ‘EU citizens’, ‘free movers’ etc. Instead, the point is that officials *make representative claims* when they portray their institution as the embodiment of a particular set of interests or values held by the selected constituency (Saward 2006, 304–5). Moreover, the act of claims-making has direct consequences on institutional positions and decisions taken. As illustrated in Figure 1.1 below, the act of claims-making is thus considered the mechanism through which officials inside organizational structure can manifest their agency by providing a justification for their positions and actions.

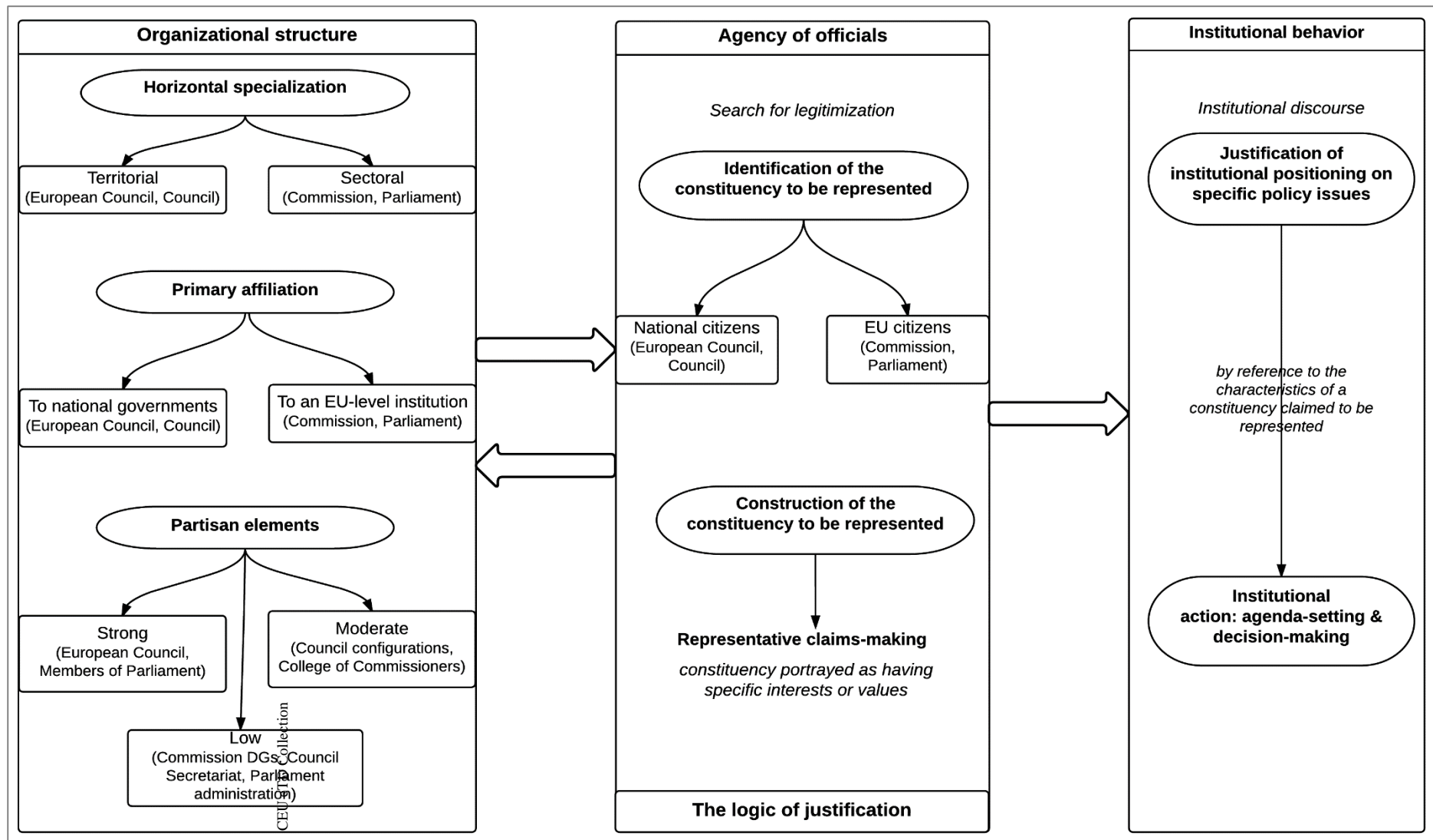


Figure 1.1: Outline of theoretical argument: how EU institutions justify institutional behavior. The form of institutional justification in the AFSJ is illustrated in each empirical chapter.

Consequently, it is posited that the patterns of institutional behavior in the AFSJ cannot be fully understood without examining the constituency claimed to be represented by actors. Specifically, the justification of institutional behavior in the AFSJ is contingent on the way in which officials from different institutions assess the impact of a policy instrument under decision-making on their intended constituencies. Methodologically, this implies looking at how actors constitute themselves as agents by reference to a certain constituency and thus construct their own rationality. The ultimate goal is to demonstrate that the process of role perception inside EU institutions is embedded in a constructed constituency that is manifested when actors claim to be representing something or someone.

To give an example, in the EU discourse on labor migration, there are opposing views from institutional actors on what the best approach is, in line with how they portray their respective objects of representation: the Council invokes national citizens protective of their labor markets, the Parliament speaks of EU citizens supporting liberal, migrant-friendly views, while the Commission focuses on a demographically-declining European economy in need of a strong work force (Papagianni 2006, 221–53). In other words, the constituency is what officials choose to make of it when they claim to ‘stand for’ a particular issue.

Moreover, the more representative claims are made in the public discourse (i.e. through the media), the higher the potential for clashes and hence politicization of issues (De Wilde 2011; de Wilde 2013). In this context, one has to pay attention not only to the constituency claimed to be represented by an official, but also to the audience for which the claims are intended—most visible in the discourse of national representatives in the European Council and the Council towards domestic audiences or vis-à-vis other EU institutions and EU-level organizations. To further demonstrate the labor migration example, it is often the case that some home affairs ministers are supportive of the issue in confidential EU meetings but outwardly reject it during national press conferences (Gsir 2013, 96).

In terms of conditions for variation in the justification of institutional behavior, two elements are identified. The first refers to the scope of EU competence across different policy areas, where it is hypothesized that the more competences EU institutions have in a given field, the broader the universe of constituencies in the name of whom representative claims can be made—and consequently the larger the potential for variation in the justification of institutional positions. The second refers to the circumstances under which officials from various institutions are more prone to make representative claims that stand in opposition to each other, resulting in the politicization of issues. Politicization is understood here as the “increase in salience and diversity of opinions on specific societal topics” which become more contested in the public discourse (De Wilde 2011, 562). It is hypothesized that competitive claims-making is exacerbated by the occurrence of unpredictable crises or disasters that attract media attention and require immediate policy solutions (cf. Zahariadis 2007, 66). While political crises such as the death of immigrants in the Mediterranean can rally EU institutions behind a common goal—for example to prevent the future capsizing of boats—officials are bound to disagree about the means to achieve the goal, in line with the rights and obligations they envisage for themselves by virtue of their would-be object of representation (Lord and Pollak 2013). The two hypotheses are subject to empirical scrutiny with reference to the Area of Freedom, Security and Justice, as shown in the next section.

1.5 The methodological approach

Formulating a research question in terms of explanatory factors for institutional behavior has several implications for the way in which empirical evidence is approached. After all, behavior—understood as the ability to speak and act, articulating positions on given issues—is a feature associated with [human] beings and not institutions. Nevertheless, the academic interest in theorizing the attitudes and actions of institutional actors involved in EU decision-

making is as old as the integration project itself (Haas 1958). The underlying assumption is that officials affiliated with a particular institution have a certain perception of their institution's role in the EU political system, in line with treaty rules and [in this thesis] the constituency they claim to be representing. Furthermore, such perceptions translate into lines of justification associated with consistent patterns of institutional behavior which—crucially—can be not only identified empirically but also anticipated on the basis of theoretically informed expectations. The theoretical framework of this thesis, drawing on the literature on role expectations and representative claims-making, is grounded in a constructivist ontology that does not seek to generate falsifiable hypotheses (Rosamond 2015, 32). As a mode of social inquiry, the present research therefore falls under “analyticism”, meaning that it postulates “an ideal typical account of a process or setting and then [utilizes] that ideal type to organize empirical observations into systematic facts”¹⁹ (Jackson 2011, 151).

In this context, a crucial decision that had to be taken concerned the manner of organizing “empirical observations into systematic facts”. Taking into account the puzzling development of the AFSJ at the EU level (section 1.1) over a period of roughly 30 years—starting the mid-1980s—adopting a chronological approach was considered the most sensible way to demonstrate different patterns of institutional behavior at various points in time. Accordingly, this thesis identifies lines of institutional justification in the AFSJ in three chronological steps, following the historical evolution of the field on the EU agenda: 1) a classic intergovernmental period, outside the Community framework (before the entry into force of the Maastricht Treaty, 1984-93); 2) a gradual communitarization period (from the Maastricht Treaty to the Lisbon Treaty, 1994-2009); and 3) an ordinary community method period (during the first mandate of the Parliament and the Commission after the Lisbon Treaty,

¹⁹ A broader methodological discussion is provided in chapter 2.3.

2010-2014). The separation of these three stages is essential for a better illustration of how institutional positions and decisions have been justified throughout time, as shown below.

Consequently, the first step is to trace back the *origins* of institutional justification in the AFSJ, which are detected in relation to the implementation of free movement of persons entailed in the establishment of the single market by the 1986 Single European Act. The abolition of internal frontiers was the first issue in respect to which the main EU institutions articulated strong positions, essentially creating a baseline for the future development of their respective lines of institutional justification in the AFSJ. The goal is to reveal that before the Maastricht Treaty created the third pillar, there was a lot of uncertainty regarding the potential EU competences required in the fields of justice and home affairs after the creation of the single market, as well as regarding the role of EU institutions thereof. It was against this background that different institutional documents and officials started to refer for the first time to the objectives of the future JHA in relation to specific constituencies they claimed to be representing. Bearing in mind that the implementation of free movement of persons was pursued both within the European Community framework and outside of it through the intergovernmental Schengen system, institutions are considered broadly during the period. For example, the Commission and the Parliament did not have specialized units or committees to cover the free movement issue, whereas the European Council was not the institutionalized summitry venue it is today. As for the Council, the focus lies on intergovernmental working groups from justice and home affairs ministries that were eventually incorporated in the JHA Council structure created in 1994 (Monar 1994a, 80).

In a second step, the *evolution* of institutional justification is observed following the formal establishment of JHA as the third pillar in the Maastricht Treaty and its partial shift to the first pillar after the Amsterdam Treaty. During this period, it is demonstrated how the gradual institutional development and expansion of EU competence in the field went hand in

hand with a diversification in lines of institutional justification—as different units from the same institution started to address different constituencies. This was possible owing to the fragmented structure of the JHA Council in a high number of committees (Nilsson and Siegl 2010), the growth of the Commission in terms of both institutional set-up (from a small Task Force inside the Secretariat General to a fully-fledged Directorate-General in 1999) and competence (from shared right of initiative in 1999 to full right of initiative in 2004) (R. Lewis and Spence 2010), and the inclusion of the Parliament in decision-making first under the consultation procedure and then under co-decision on a number of AFSJ issues (Ripoll Servent 2012).

In a third and final step, institutional justification in the AFSJ is examined in the post-Lisbon context, when it is shown that a form of *stabilization in variation* has occurred. The Lisbon Treaty abolished the pillar structure and brought almost all AFSJ domains under Commission initiative and co-decision—now renamed the ordinary legislative procedure (TFEU, title V)—simultaneously allowing the European Council to set “strategic guidelines” for the area (Art 68). From an institutional perspective, the earlier consolidation of institutional roles became routinized, with “a special Council formation, two Commissioner portfolios, two Commission Directorate-Generals and a European Parliament Committee” working together on a daily basis in order to make legislative and non-legislative decisions (Monar 2012b, 718). This high degree of institutional stability led to a multiplication of the constituencies claimed to be represented by institutional actors in the AFSJ, as it became a question of normality for different units from the same institution to pursue different goals in response to their (claimed) respective constituencies. Indeed, the broader the scope of EU competence in the AFSJ, the higher the number and profile of constituencies in the name of whom representative claims could be made.

Adopting such a chronological approach is useful not only for the better presentation of the argument but also from the perspective of research methods, as it allows a combination of instruments of data collection and analysis. These become evident in the organization of the thesis, as each of the three stages is elaborated upon in a designated chapter (3, 4, and 5 respectively). While policy documents from the four institutions are extensively used at all stages, the first empirical chapter focusing on the implementation of the free movement of persons relies mostly on historical archives, which are necessary for illustrating the positions of officials inside institutions from the mid- to the late 1980s. The second chapter—covering the diversification in institutional lines of justification in the AFSJ—alternatively draws on media content analysis in order to capture the range of representative claims made publicly by (mostly) politically appointed officials from the four institutions over a 16-year period. Finally, the third empirical chapter, which examines patterns of institutional justification in the AFSJ in the post-Lisbon context, is based on semi-structured interviews with (mostly) technocratic officials who were asked about how they perceive their own role in the field. Overall, it is considered that the mixture of historical archives, media content analysis, and interview material can provide a more comprehensive picture of institutional roles, behaviors, and lines of justification in the AFSJ over time. At the same time, the simultaneous investigation of representative claims made by political officials (in the media) and technocratic officials (in interviews) was intentionally used to probe similarities between the two.

1.6 Contribution

By advancing this line of argument, the present thesis contributes to the literature on institutional decision-making in the AFSJ and the EU more broadly in at least three ways. The first major contribution refers to the investigation of the institutional architecture in the AFSJ as a whole from a longitudinal perspective. No single institutional actor is singled out in the

analysis, as the thesis examines patterns of institutional behavior displayed by the European Council, the Council, the Commission, and the Parliament in parallel with and in relation to each other. Moreover, no emphasis is placed on any historical period, since tracing the institutional development of the AFSJ represents a research objective in itself. Accordingly, the empirical chapters offer a comprehensive analysis on the behavior of the four decision-making institutions that expands three decades—starting from the period before the field was formally included in the Maastricht Treaty until present day. The goal is to illustrate the connection between the expansion of the institutional set-up in the AFSJ and the evolution of justification of institutional behavior by reference to what citizens were thought to expect from an EU-wide Area of Freedom, Security and Justice. As a result, the thesis brings added value to the rapidly-expanding AFSJ literature in EU studies, which has focused so far on individual institutions and on policy developments in subfields like migration or counter-terrorism (Ripoll Servent 2015, 5).

The second contribution concerns the theorization of institutional behavior in the AFSJ as both potentially fluid and heterogeneous. From the perspective of institutional justification through representative claims-making, it is expected that officials justify their institutional positions and decisions in different ways, depending on how they perceive the interests or values of the constituency they claim to be representing. The features of constituencies used to legitimize institutional behavior can expand or change throughout time, according to how they are portrayed by officials inside institutions—in line with their institutional mandates provided by treaty rules. The exponential growth of the AFSJ on the EU agenda has made the field particularly prone to variation or inconsistencies in institutional justification. At the same time, the expansion in the organizational structures of institutions working on the AFSJ has meant that officials from different units inside the same institution could easily adopt varying lines of justification that occasionally stood in contradiction to each other (e.g. DG Justice and DG

Home Affairs after 2009). If institutional behavior is justified through representative claims, there is no reason to expect that institutional positions would be homogenous; instead, officials are expected to offer justifications depending on whom they conceive as their object of representation, delineated by the sectoral area in which they work. This type of argument goes against some of the normative literature in the field that portrays, for example, the institutions in the AFSJ as “the good” (the Parliament), “the bad” (the Council), and “the ugly” (the Commission) owing to their positions on migration and asylum (Acosta, 2009). Conversely, the analysis here shows that it is very difficult to speak of ‘heroes’ and ‘villains’ when it comes to EU institutional behavior in the AFSJ, because in many respects each institution sees itself as the ‘hero’ of its own story, representing a constituency with different interests in the field. The point is that glorifying or, alternatively, vilifying the activity of an institution depends on the researcher’s personal value system and should be acknowledged as such.

The third contribution of the thesis refers to the articulation of a theoretical framework regarding the behavior of EU institutions more generally that supplements insights from the new intergovernmentalism and constructivist applications to decision-making in the EU. As will be shown in chapter 2.1, this thesis acknowledges that there is a difference between areas of EU policy activity contingent on their level of supranationalism or intergovernmentalism in decision-making (Bickerton, Hodson, and Puetter 2015b); furthermore, it argues that the difference lies in the characteristics of constituencies claimed to be represented by officials inside institutions. The reason why supranational institutions are likely to comply with positions of intergovernmental bodies in “new” areas of EU activity is because they perceive the features of their characteristics as overlapping on issues at the heart of national sovereignty. On the other hand, in respect to constructivist insights into EU institutions, this thesis recognizes that justification represents in itself a response to what is considered appropriate institutional behavior. The guiding norm is thus the need to legitimize EU policy activity, and

its impact on institutional behavior can evolve over time depending on how officials justify their positions by reference to the interests, needs, desires, or preferences of the constituency they claim to embody. Contestations over ‘whom or what’ to represent are equally likely once the expanding scope of EU competence in a policy field increases the universe of constituencies in the name of whom representative claims can be made. In the concluding chapter, institutional justification through representative claims-making is shown to capture a growing trend characterizing institutional behavior in the EU political system more generally.

1.7 Roadmap of thesis

The argument of the thesis is presented in five further chapters. Chapter 2 puts forth the theoretical and methodological underpinnings of the study. The first step is to critically review the political science literature covering institutional dynamics in the AFSJ in order to position the argument of the thesis in relation to it. The purpose is to identify gaps in existing studies as well as synergies between the argument presented here and other theoretical approaches on the AFSJ. Having delineated the place of an explanatory framework focused on justification in the broader academic literature on EU institutional behavior, the next step is to expand on the specific propositions of the argument and the theoretical thinking behind them. The third step is to discuss the methodological considerations guiding the analysis as well the specific methods used to capture how the logic of justification looks like in institutional discourse.

Chapters 3 to 5 depict the evolution of institutional justification in the AFSJ for a period of roughly 30 years—from 1984 to 2014. The goal is to demonstrate the chronological development of institutional behavior in the AFSJ in respect to the types of justification offered throughout time by officials from institutions in order to legitimize their policy positions and decisions in a sensitive policy field. As already described in the methodological discussion (section 1.5), chapter 3 focuses on the period before the AFSJ became a formal area of the EU

policy activity (1984-93), emphasizing the origin of institutional justifications in JHA fields in connection to the objective to establish the single market and implement the free movement of persons in the ‘area without internal frontiers’. Chapter 4 explores the evolution of institutional justification in the AFSJ in the period from the institutionalization of Maastricht Treaty’s third pillar up until the entry into force of the Lisbon Treaty (1994-2009). Finally, chapter 5 takes the analysis of institutional justification in the AFSJ to present day by examining the changes brought by the Lisbon Treaty to both intra- and inter-institutional dynamics (2009-2014).

Finally, the concluding chapter summarizes the findings and underlines the theoretical and empirical contributions of the thesis. At the same time, the conclusion identifies the limitations of the study and emphasizes areas of future research. Three limitations are addressed in detail: the absence of the Court from an analysis of institutional behavior of the main EU institutions, the missing normative debate about the quality of democratic representation and the policy process in the AFSJ—which are alluded by an argument focused on representative claims-making—and, lastly, the lack of a more general discussion about the applicability of the argument beyond the AFSJ and the EU more broadly. All of these points are subsequently presented as potential directions for further research. The thesis ends with a brief discussion about the future development of institutional behavior in the AFSJ.

2 THEORETICAL AND METHODOLOGICAL CONSIDERATIONS IN THE STUDY OF INSTITUTIONAL BEHAVIOR IN THE AFSJ

What explains institutional behavior in the EU's Area of Freedom, Security and Justice? So far, this thesis has emphasized that the unique development of the AFSJ over the years cannot be neatly subsumed under any of the existing theoretical conceptualizations of decision-making in the EU political system. At the same time, it was shown that the behavior of EU institutions involved in decision-making over the AFSJ has displayed both continuity and inconsistencies in its patterns. There was continuity in the concerted efforts of intergovernmental institutions to retain AFSJ subfields within the purview of national governments in order to keep control over politically sensitive issues that affected state sovereignty. There were inconsistencies in the empowerment of supranational institutions, which gained competences in the AFSJ in a gradual and fragmented fashion. There were further inconsistencies in the institutional positioning of supranational institutions, whose behavior in the AFSJ has proven unpredictable over the years: at times they complied with their traditionally expected role as "agents of supranationalization", while at other times they readily accommodated intergovernmental modes of decision-making (as illustrated in chapter 1.2). Taking all this into consideration, the purpose of the present chapter is to disentangle from a theoretical standpoint patterns of continuity and inconsistency in the behavior of the main EU institutions—the European Council, the Council, the Commission, and the Parliament—in AFSJ policy-making. The underlying assumption is that institutional positioning over AFSJ issues is not arbitrary, and that inconsistencies relate to broader understandings of institutional roles in a supranationalized domain of EU policy activity in which member states still wish to protect their national sovereignty.

The starting point is provided by existing accounts of institutional behavior from EU studies that have been applied to or have been specifically developed for the AFSJ. The rapid evolution of the field from intergovernmental to more supranational modes of decision-making is reflected in the academic literature, as scholars have formulated different expectations regarding institutional dynamics and behaviors depending on the period on which they focused. Accordingly, early studies offered predominantly government-centered explanations (inevitably looking at the Council), whereas later studies emphasized the influence of supranational institutions, particularly the Commission and the Parliament. What is missing from these contributions is a treatment of the decision-making architecture in the AFSJ as a whole, which additionally accounts for the behavior of (all) institutions at various points in time. Moreover, when considering intergovernmental and supranational actors simultaneously, existing studies do not provide sufficient explanation either for the formal empowerment in the field of the Commission, the Parliament, and the Court or, alternatively, for the continued dominance of governments in the European Council and the Council.

In response to this gap, the present chapter introduces an alternative argument that aims to supplement existing approaches explaining institutional dynamics in the AFSJ. The argument finds synergies with new intergovernmentalist expectations about the behavior of supranational institutions, as well as with constructivist studies underlining the role of norms in driving institutional behavior. It is posited that institutional behavior in the AFSJ cannot be fully understood without examining how each institution seeks to legitimize its role in the EU political system. If treaty rules provide the organizational structure within which institutional roles develop, officials give substance to these roles by constantly justifying policy positions and decisions for the benefit of a constituency they claim to represent. But since the boundaries of constituencies are ambiguous in the EU political system, officials have significant leeway to portray their respective constituency in various ways, in line with their institutional

affiliation. The need for justification in view of legitimization is thus considered a driving force of institutional behavior in itself that requires in-depth investigation. At the theoretical level, this argument draws on organizational theory expectations regarding role perception inside institutions combined with an empirical application of the work of political theorist Michael Saward on representative claims-making.

The chapter is divided into three parts. The first part offers a critical summary of the academic literature covering more generally the topic of institutional behavior in the AFSJ. Its goal is to highlight gaps as well as identify similarities between the argument of this thesis and existing theoretical accounts. The second part introduces the argument and articulates expectations on institutional behavior based on organizational role perceptions and claimed constituencies. The third part outlines the research design, describing the methodological considerations underpinning the empirical study of the argument. A case is made here for the use of qualitative content analysis to engage with the claims of officials inside institutions, using data gathered from interviews with technocratic officials, newspaper articles covering the positions of political officials, and official documents from the institutions.

2.1 State of the art: how institutional behavior in the AFSJ is conceptualized

The subject of institutional behavior is not central to the specialized community of EU scholars writing on AFSJ issues. Similar to other domains of EU activity, their research interests shifted over time from explaining the origins of European integration in the AFSJ to analyzing governance dynamics thereof²⁰. In respect to institutional behavior, applications of integration theories, the new institutionalisms, social constructivism, and policy frameworks are

²⁰ The distinction between “explaining European integration” and “analyzing European governance” was proposed by Antje Wiener and Thomas Diez to distinguish between the first and the second phase of European integration theorizing (2009). In their categorization, federalism, neo-functionalism, and liberal intergovernmentalism are placed under “explaining integration”, while governance approaches, policy network analysis, new institutionalism, and social constructivism belong to “analyzing governance”.

predominant, and together they provide an amalgam of EU-centered theorizing, political science approaches, International Relations scholarship, and public policy literature. The frequent treaty and institutional changes in the AFSJ meant, however, that scholars were at times just keeping up with the latest developments, or simply constructing theoretical arguments on the basis of empirical observations that were no longer valid. If the EU political system is more generally conceptualized as a “moving target” that poses challenges to theorizing (Marks et al. 1996, vii), the AFSJ can be so far considered a ‘running target’ that has long transformed by the time a systematic theory was formulated for its development and functioning.

For a better understanding of the existing literature, this section follows the traditional distinction made in EU studies between intergovernmental institutions (the European Council and the Council) and supranational institutions (the Commission, the Parliament, and the Court). The distinction functions as a heuristic device intended to structure the literature and facilitate theoretical engagement with the main tenets thereof, bearing in mind that the intergovernmental-supranational dichotomy has been present in both classic and modernized integration theorizing (Nugent and Paterson 2010, 62–3). Furthermore, the section focuses on the four main decision-making institutions: alongside the so-called ‘institutional triangle’ responsible for day-to-day policy-making—composed of the Commission, the Council, and the Parliament—the European Council has been included owing to its continuous influence in EU agenda-setting over the past three decades, despite the fact that it only became a formal EU institution after the 2009 Lisbon Treaty (Werts 2008; Puetter 2013). While the selection of these four institutions is consistent with other studies on the topic, the absence of the Court from the analysis might seem puzzling. The reason is related to its functions, as the Court does not participate in decision-making, although its rulings can have important implications for the policy process (Stone Sweet 2011). In addition, other institutions—such as the plethora of

independent agencies in the AFSJ (Kaunert, Léonard, and Occhipinti 2013)—are also deliberately excluded from the discussion because they are only active in specific subfields of the AFSJ and most of their responsibilities are either operational or focused on monitoring developments in member states.

In relation to both types of institutions, three sets of theoretical assumptions have been identified (summarized in Table 2.1). The first refers to the extent to which there is one type of actor driving the process of European integration in the AFSJ. The issue here is whether the development of the AFSJ can be explained in terms of national preferences of member states or as a result of attempts by supranational bodies to expand the scope of EU competence in fields functionally linked to the single market. Applications of classic integration theories—[liberal] intergovernmentalism and neo-functionalism—are consequently reviewed in relation to the evolution of the AFSJ, including when they have been rebranded under a new label (cf. venue-shopping by Guiraudon 2000; 2003). The second assumption identified refers to institutional roles in the new areas of EU activity theorized in the new intergovernmentalism (Bickerton, Hodson, and Puetter 2015b; Bickerton, Hodson, and Puetter 2015a). Here, the European Council and the Council are expected to support further integration in sensitive areas of EU policy activity like the AFSJ, but without a corresponding empowering of supranational institutions; in addition, supranational institutions are expected to be complicit to the institutionalization of “integration without supranationalization” (Bickerton, Hodson, and Puetter 2015b, 712–13).

The third theoretical assumption sees the EU as a “policy-making state” (Richardson 2012) in which institutions trigger policy change in the AFSJ through different mechanisms (Kaunert 2007; 2009; 2010a; Ripoll Servent and Trauner 2014; Trauner and Ripoll Servent 2015b; Ripoll Servent 2015). Within the parameters of specific policy frameworks—namely multiple streams and advocacy coalitions—institutional behavior is conceptualized using

additional insights from the new institutionalisms in political science and constructivism in International Relations, focusing on: a) exogenously-set preferences inside institutional incentive structures (rationalist approaches); and/or b) the [construction of] norms driving or underpinning institutional behavior (constructivist approaches). In International Relations theory, there is a long-standing ontological debate between rationalism and constructivism regarding the nature of human agency and that of social interactions (Müller 2004), which extended to EU studies (Pollack 2001). In short, rationalists operate under the ‘rationality assumption’, claiming that individuals have exogenously-set *preferences* according to the *information* available to them at a certain moment in time, which they use in their interactions with others in order to pursue *strategies* that would allow their preferences to prevail (for applications to EU studies, see Pollack 1997; 2003; 2007; Beach 2005; Hörl, Warntjen, and Wonka 2005; Selck 2006; Selck 2006). Conversely, *constructivists* assume that the behavior of individuals is rooted in the *cultural* context to which they belong; *norms* and *identities* guide social interaction as much as they are reshaped by it (Checkel 1999; Wendt 1999; Risse 2009). Table 2.1 below offers an overview of all these expectations, which are discussed in turn in the next sections.

Table 2.1: Overview of the literature on institutional behavior in the European Union’s Area of Freedom, Security and Justice.

Assumptions	Theoretical background	Expectations about institutional behavior		Missing elements
		Intergovernmental institutions (European Council, Council)	Supranational institutions (Commission, Parliament)	
There is one type of actor driving integration in the AFSJ.	<i>Integration theories</i>	National governments “shop” for venues at the EU level in order to escape domestic constraints on their preferred policies in the AFSJ.	Supranational institutions act as agents of integration, pushing the development of the AFSJ as a spillover from the single market.	Consider the uneven development of the AFSJ and its institutional architecture as a whole.
		<i>Liberal Intergovernmentalism (venue-shopping)</i>	<i>Neo-functionalism</i>	
Institutions behave differently in the new areas of EU activity.	<i>New Intergovernmentalism</i>	Pursue integration in the AFSJ without supranationalization, the European Council and the Council are at the center of decision-making.	Take for granted the lack of supranationalization in the AFSJ, regularly comply with demands of intergovernmental institutions.	Explain the formal empowerment of supranational institutions.
Institutions trigger policy change in the AFSJ through different mechanisms.	<i>Rationalist approaches</i>	<i>Focus on interests within institutional incentive structures</i>		Explain how institutional interests ‘came to be’ and how they changed over time.
		Sideline the empowerment of supranational institutions as competitors, co-opt them once their involvement cannot be avoided.	Use different strategies to maximize institutional power under different decision-making modes.	
	<i>Constructivist approaches</i>	<i>Focus on norms and discursive interactions</i>		Account for different patterns of behavior at different points in time, examining all institutions.
		National preferences in the AFSJ can be shaped by normative arguments of supranational institutions.	Supranational institutions can act as “norm entrepreneurs” and influence the framing of issues in the AFSJ.	
Not applicable		As supranational institutions become empowered in the AFSJ, they can act as “discourse entrepreneurs”, reframing existing beliefs and norms; alternatively, their own norms can change as a result of policy learning.	Consider “discursive practices” by intergovernmental institutions.	

2.1.1 Integration theories and institutional behavior in the AFSJ

The conventional understanding of institutional behavior in EU decision-making more broadly is derived from classic integration theories. Here, the debate circles round the issue of primacy of national governments over supranational institutions and vice versa (Branch and Ohrgaard 1999, 124). Depending on whom scholars place at the center of their explanations, the two competing theories are on the one hand intergovernmentalism (Hoffmann 1966; 1982) and its updated version liberal intergovernmentalism (Moravcsik 1993; 1998; Moravcsik and Nicolaïdis 1999; Moravcsik and Schimmelfennig 2009), and on the other hand neo-functionalism (Haas 1958; Lindberg 1963; Lindberg and Scheingold 1970) and its modernized version supranational governance (Sandholtz and Stone Sweet 1998; Stone Sweet, Sandholtz, and Fligstein 2001). The two differ in the way in which they conceptualize European integration as reproducing features of participating nation states ([liberal] intergovernmentalism) or transforming them altogether (neo-functionalism/ supranational governance), but also in the type of evidence they use to investigate their tenets—concentrating either on “great events” (treaty revisions in [liberal] intergovernmentalism) or on “gradual processes” (day-to-day policy-making in neo-functionalism/ supranational governance) (Schmitter 2004, 47–48). Accordingly, they each underline the centrality of one type of actor driving European integration, namely national governments and supranational institutions respectively.

Applications of integration theory to the AFSJ are rather limited. As discussed in chapter 1.1, scholars have been more concerned to emphasize the distinctiveness of the field as a “system of differentiated integration” (Rittberger, Leuffen, and Schimmelfennig 2013, 205) and as a model of “transgovernmentalism” (Lavenex 2014) or “experimentalist” governance (Monar 2010a) rather than to explain the development of the AFSJ according to classic integration theory. Indeed, the evolution of the field from intergovernmental to more

supranational modes of decision-making raised challenges for both intergovernmentalist and neo-functionalist accounts of European integration. In fact, the AFSJ has its own (liberal) intergovernmentalist approach to explaining integration under the name “venue-shopping” (Guiraudon 2000; 2003). The two share general assumptions about the actors driving the integration process—namely the member states—which are seen to pursue rational goals when choosing to cooperate at the EU level on JHA issues. Conversely, from a neo-functionalist perspective, the creation of the single market and the abolition of internal border controls have rendered cooperation on internal security and border management unavoidable (hence the functional spillover); at the same time, this demand for integration was met by the proactivity of supranational institutions (Ette, Parkes, and Bendel 2011, 13–18).

Andrew Geddes has summarized applications of integration theories to the development of the AFSJ as member states’ “escape to Europe” (the intergovernmentalist hypothesis) or as member states’ “losing control” (the neo-functionalist hypothesis) (Geddes 2003a, 127). The main tenets of each approach are discussed below.

2.1.1.1 Reinforcing the centrality of member states: venue-shopping in the AFSJ

The venue-shopping perspective was developed at a time when the AFSJ was still in its infancy. Virginie Guiraudon—the main proponent of the approach²¹—based her theoretical insights on empirical observations from the period before and after the establishment of the third pillar, as well as in relation to the implementation of free movement of people outside the Community framework through the Schengen Agreement (Guiraudon 2000; 2003). She focused on the wide range of intergovernmental working parties created in the 1980s and the 1990s to cooperate on the areas of border management, asylum, and migration. As a result, the scope of her analysis

²¹ There were other authors who underlined the centrality of national governments in driving European integration in the field of migration, making a similar argument about their attempts to escape legal and political constraints at the domestic level (Freeman 1998; Stetter 2000; Geddes 2003a, 127–8). Among them, Virginie Guiraudon remains the best known, also for having coined the term “venue-shopping” (Guiraudon 2000).

is limited in time; it cannot account for the communitarization of the field in later years (Kaunert and Léonard 2012a).

The venue-shopping perspective is crucial, however, because it represents the baseline for theorizing about the institutional framework of the AFSJ. Borrowing from the public policy literature on multiple “venues” of decision-making (Baumgartner and Jones 1993), Guiraudon conceptualized European policy-making in migration and asylum as a “vertical process” in which actors at lower levels “shopped” for favorable policies at a higher level in order to avoid domestic constraints, exclude possible adversaries, and find new allies (Guiraudon 2000, 261–7). Although the author identified the actors driving this process as representatives of home affairs ministries, she rejected the liberal intergovernmentalist hypothesis according to which national positions were the result of an aggregation of domestic preferences (ibid, 253). In contrast, she contended that the push for integration came from home affairs bureaucrats—for the most part former policemen—who had become aware of their diminishing influence over migration policies owing to the constitutionalization of judicial principles (such as equality before the law, due process, proportionality) and the mushrooming of immigrant-friendly groups (ibid, 258-9). According to Guiraudon, in order to bypass national constraints and pursue their preferred restrictive policies on migration and asylum, home affairs bureaucrats supported the creation of transgovernmental groups—the new venues of policy-making—to work on their issues of interest while using “flexible, informal, and secretive” formats (Guiraudon 2003, 267). The venue-shopping framework thus provides more than a theory about the centrality of national interests in European integration; conversely, it offers insights regarding bureaucratic maximization more generally (cf. Niskanen 1973) and the role of individuals in securitizing immigration policy discourse (Bigo 1998; Huysmans 2000).

From the perspective of institutional behavior in the AFSJ, Guiraudon’s work is valuable for at least two reasons. On the one hand, she aptly pointed out the actors at the center

of decision-making in the initial years of AFSJ cooperation. Her empirical evidence included a) the cooperation of home affairs ministries under the Trevi framework (created in the mid-1970s to facilitate intergovernmental discussions on counter-terrorism, later extended to cover migration and asylum), b) the Schengen working parties (in which home affairs officials gradually took over negotiations from foreign affairs officials), and c) the Ad Hoc Group on Immigration (created in 1986 after the Single European Act set the 1992 deadline for the establishment of the single market) (Guiraudon 2003, 267–8). All of these groups were sooner or later merged into the structure of the JHA Council (see also Niemeier 1995). At the same time, supranational institutions played no role in comparison to justice and home affairs ministers during the period, and the situation did not dramatically shift—according to the author—even after the Amsterdam Treaty (Guiraudon 2003, 278). Nevertheless, the extended communitarization of the AFSJ brought by the Lisbon Treaty has particularly weakened the validity of the venue-shopping perspective. Indeed, it has been pertinently shown that the “system of venues” in the AFSJ has gradually been broadened, as the Commission and the Parliament now participate fully along ministers of justice and home affairs in decision-making over the majority of issues (Kaunert and Léonard 2012a, 1409).

On the other hand, Guiraudon’s framework remains valuable because it provided an innovative explanation of the Council’s institutional positioning on migration and asylum in terms of security concerns. Leaving aside the normative discussion about the internal motivations of home affairs officials, which can never be fully known, there seems to be a clear connection between the professional profiles of decision-makers in the JHA Council and their policy positions on migration and asylum. Although not all national representatives in the JHA Council are former policemen, it is reasonable to expect that the way in which these officials frame policy problems and propose solutions at the EU level depends on whose viewpoint they are expressing (law enforcement or border control authorities, the judiciary etc.). The idea bears

close similarity to the argument presented in this thesis, namely that institutional behavior can be understood by looking at how officials justify policy positions by reference to the constituency they claim to be representing. Guiraudon herself would probably disagree with the analogy because she seems to consider justification as a by-product of self-serving behavior (of home affairs officials) and not an explanation for institutional positions in itself, as argued later in this chapter.

Keeping the venue-shopping framework in mind, the discussion now moves to the other major contribution of integration theories to conceptualizing institutional dynamics in the AFSJ, coming from neo-functionalism.

2.1.1.2 Acknowledging spillovers and the role of supranational institutions in the AFSJ

Applications of neo-functionalism to the AFSJ are better equipped to explain the development of the field as a “spillover” from the single market than to show the role of supranational institutions in driving that spillover process. From this perspective, national governments are seen as reactive rather than proactive actors, and the broader phenomenon they are responding to is economic globalization, discussed in zero-sum terms: the more globalization, the less state sovereignty (Sassen 1998, 52). As the European Community was established in order to cope with economic globalization (among other things), the Treaty of Rome introduced the right to freedom of movement of workers, which the Single European Act extended to ‘persons’ at large—meaning all EU nationals. This is where the “spillover” reasoning comes into play, because “freedom of movement for EU nationals raises the issue of freedom of movement for third-country nationals already legally resident in the European Union” (Kosłowski 1998, 163). In contrary to the venue-shopping framework, national governments are hypothesized to have accepted cooperation over migration and asylum—and JHA more generally—as a matter of “necessity, not political will” (De Lobkowicz 2002, 17).

Two studies emphasizing the importance of spillover in the development of the AFSJ are noteworthy. In a case study discussing the “institutionalization of Europe” in migration and policing, Turnbull and Sandholtz (2001) identified three mechanisms that led to the creation of the third pillar at Maastricht. The first, considered endogenous to the European Community, has already been described above: the decision to create the single market and abolish internal border controls by 1992 had direct implications not only for the control of migration flows but also for the management of transnational crime in the “area without internal frontiers”. Second, national concerns regarding the increase in both immigration and organized crime became prominent following the fall of the Iron Curtain, especially in Germany, which had a long Eastern border to protect. Third, calls by German Chancellor Helmut Kohl to include migration and policing onto the agenda of the 1991 Intergovernmental Conference found echoes in other European governments, albeit to different degrees (Turnbull and Sandholtz 2001, 195). Furthermore, in respect to the Amsterdam Treaty, Niemann convincingly showed that “functional pressures, stemming from the objective of free movement of persons, constitute[d] the most important dynamic for the communitarization of external border control, asylum and immigration policy at the 1996–7 Intergovernmental Conference” (Niemann 2006, 193). Citing implementation deficiencies in the working of the third pillar as well as shortcomings in the functioning of the intergovernmental Schengen system, the author provided details of the spillover logic that prompted the gradual communitarization of the field (ibid, 198-200). At the same time, he demonstrated that there was large consensus among member state regarding the failure of the third pillar and its subsequent need of reform (ibid, 201).

Moving to the role of supranational institutions in driving integration in the AFSJ, findings of neo-functionalist research are less elaborate. The issue was that the Commission, the Parliament, and the Court played either a marginal or no role at all in the development of the third pillar. While the Parliament and the Court had no institutional mandate to participate

in the intergovernmental negotiations that preceded the establishment of the third pillar, the Commission “adopted a pragmatic stance sensitive to the fundamental issues of national sovereignty inherent in questions of JHA matters” (Ucarer 2001, 4). Studies on the position of the Commission suggest that Jacque Delors pushed for the completion of the single market and the abolition of internal frontiers, convinced that this would naturally lead to spillovers in the fields of migration and asylum (Papademetriou 1996, 22). Nevertheless, given the general unwillingness demonstrated by national governments in the pre-Maastricht period to accept supranational competence in JHA, the Commission did not have the realistic option to act “doctrinaire” by supporting the communitarization of the third pillar; conversely, the only choice was to adopt a “gradualist” approach, accommodating intergovernmental decision-making in a sensitive policy area in the hope that this would change in the future (Myers 1995, 282). As a result, the initial strategy of the Commission in the third pillar was to be cautious, taking the time to prove itself to national governments by advancing “well-researched, creative, and balanced proposals” (Niemann 2012, 218).

The result was that in the first years of third pillar cooperation the Commission was seen by member states as a “tolerated partner” (De Lobkowicz 2002, 49), the Parliament was the “ignored partner” (Papagianni 2006, 249), while the Court had a “minuscule and optional role” (Fletcher 2007, 5). In contrast, during the 1996-7 Intergovernmental Conference that led to the partial communitarization of JHA, the Commission and the Parliament were much more involved, advocating a common position—which was also supported by a large number of non-governmental organizations with whom they had “cultivated” relations over the years (Niemann 2006, 227–8). With time, the Commission moved gradually “from the sidelines to the center stage” of policy-making in the AFSJ (Ucarer 2001) and contributed substantially to the expansion of communitarization enforced with the Lisbon Treaty (Kaunert 2010b). It can

thus be said that supranational institutions became little by little “agents of integration” in the AFSJ, but did not assume this function from the beginning.

Particularly because of the belated role of supranational institutions in the AFSJ, some commentators consider neo-functionalist explanations of the field as particularly weak (Ette, Parkes, and Bendel 2011, 17). Nevertheless, the longer one extends the time period under investigation—to include the Amsterdam and the Lisbon Treaty—the more spillover pressures and the “entrepreneurship” of supranational institutions become visible. The present thesis acknowledges the significance of functional spillover pressures in the development of the AFSJ, but without expecting a priori any active role from supranational institutions in the process. The ways in which the Commission and the Parliament positioned themselves in the AFSJ depended on the values and interests of the constituencies they claimed to be representing over time, which were interpreted at times as a mandate to act as “agents of supranationalization” while at other times as an obligation to follow the lead of member states in the Council in sensitive policy areas.

To conclude the discussion on integration theories, it is important to reiterate the point made in chapter 1.1 that rigid distinctions between intergovernmental and supranational modes of decision-making are not very useful for understanding the institutional development of the AFSJ. Specifically, integration theories are bound to focus on one type of institutions at the expense of the other, and thus fail to account for the institutional framework in the AFSJ (and the EU) as a whole. A more convincing line of theorizing comes from the literature that characterizes the AFSJ as a new domain of EU activity, which is discussed in the next section.

2.1.2 The new intergovernmentalism and the institutional development of the AFSJ

In response to limitations of integration theories to account for dynamics of institutional behavior in policy areas added to the EU mandate during the post-Maastricht period (like the AFSJ), a new strand of literature has emerged in recent years. Under the heading “the new

intergovernmentalism”, Bickerton, Hodson, and Puetter propose a distinction between “old” and “new” areas of EU activity²², in which institutional actors play specific roles (Bickerton, Hodson, and Puetter 2015b; Bickerton, Hodson, and Puetter 2015a). Their main argument is that the evolution of the integration process in the period following the Maastricht Treaty has seen a significant expansion of EU activity, without a corresponding delegation of competences to the traditional supranational institutions (the Commission, the Parliament, and the Court). Described as an “integration paradox”, this phenomenon is said to be present in fields like economic governance, foreign and security policy, social and employment policy coordination, and justice and home affairs, where the intergovernmental institutions—the European Council and the Council—have been deliberately positioned at the center of decision-making in order to prevent the classic supranationalization of sensitive policy areas (Puetter 2014, 18).

Furthermore, there are general theoretical expectations formulated about the institutional architecture of the new areas of EU activity. In short, the intergovernmental institutions—the European Council and various Council formations—are expected to act as full-blown policy-making actors, the Commission is given a supporting part, whereas the Parliament and the Court are more of an afterthought (Bickerton, Hodson, and Puetter 2015a, 8–9). Though the situation changed in the AFSJ, where a process of gradual communitarization took place (Lavenex 2010), this has not been the case with economic governance or foreign policy, where informal intergovernmental governance arrangements like the Eurogroup or the Political and Security Committee have been institutionalized (Puetter 2014, 148–225).

²² The analytical distinction between old and new areas of EU policy activity bears strong similarities to the literature on new modes of governance in the EU, contrasting policy coordination instruments such as the open method of co-ordination to traditional EU legislation and their respective methods of decision-making (Borrás and Jacobsson 2004; Schout, Jordan, and Twena 2010; Zeitlin, Pochet, and Magnusson 2005; Trubek and Trubek 2005). However, in the taxonomy of Helen Wallace, new modes of governance denote two different types of decision-making: 1) network-style policy coordination instruments, in which the Commission plays a coordinating role, and 2) “intensive transgovernmentalism”, in which member states play a key role (Wallace 2010, 98–103). The new intergovernmentalist argument is clearly concerned with the latter; accordingly, it aims to move beyond the “experimentalist” nature of network governance (Sabel and Zeitlin 2010) and identify a “powerful institutional trend” manifested in the institutionalization of intergovernmental coordination processes (Puetter 2014, 47).

In terms of institutional behavior, three expectations have been explicitly put forward (Bickerton, Hodson, and Puetter 2015b, 711–14). First, there is the broader claim that within new areas of EU activity, the intergovernmental institutions have been engineered to cater for deliberative decision-making, meaning that there is a clear trend towards informality, flexibility, and consensus-generation present at all levels of government: heads of state or government in the European Council, ministers in the Council, and high-level officials in expert committees (Puetter 2012). The main idea is that even if government representatives cannot agree on a certain policy outcome/position/decision, they would always consent to continue talking until some sort of accommodation is found, as seen for instance during the peak of the economic crisis (Puetter 2014, 105–6). This line of thinking is counter to the hard bargaining described in liberal intergovernmentalism²³, in which powerful member states take decisions on the lowest common denominator (Moravcsik 1998; Schimmelfennig 2015).

Second, it is hypothesized that supranational institutions (the Commission, the Parliament, and the Court) deviate from their default position to seek “ever-closer union” in the new areas of EU activity, as the Commission in particular understands very well the futility of pursuing communitarization in areas in which member states would not accept it (Hodson 2013). As a result, the Commission is expected to follow the lead of the European Council and the Council in these field, without challenging member states or seeking to expand its competences (Bickerton, Hodson, and Puetter 2015a, 31). In addition, the Commission would not even consider this development an erosion of its right of initiative (Ponzano, Hermanin, and Corona 2012, 14), as Commission officials are less inclined nowadays to think in terms of the intergovernmental-supranational dichotomy, not least because post-Maastricht presidents

²³ While it is evident that the involvement of intergovernmental institutions in day-to-day decision-making requires different dynamics than those present at “grand bargains” during intergovernmental conferences, the emphasis on deliberation faces, however, other conceptual and empirical struggles. Even if one were to clearly specify the conditions for deliberative interactions at the theoretical level—as attempted by Habermas (1989)—it is still difficult to pinpoint when such conditions have been met in practice.

of the Commission are former heads of state or government themselves (Kassim et al. 2013). Moreover the Court is expected to carefully stay away from the areas in which it has not been attributed formal competence, while the Parliament is expected to direct its energy towards community method policy fields in which its powers have been extended significantly (Bickerton, Hodson, and Puetter 2015a, 32). The balance of power between institutions is thus fundamentally changed, as illustrated by the strengthened position of the European Council as the “new center of EU politics”—with key functions in setting the agenda and instructing the Council and the Commission on various courses of action (Puetter 2013).

Third, in those cases when a necessary expansion in competences requires delegation to supranational institutions, there is a tendency to create so-called “de novo” bodies rather than assigning new functions to the Commission. This phenomenon is visible in the exponential increase in the number of agencies since the 1990s (Busuioc 2013), reinforced during the financial crisis by the establishment of the European Financial Stability Facility and the European Stability Mechanism (Hodson and Puetter 2013). The point here is that member states actively seek to avoid the further empowerment of the Commission in policy domains close to national sovereignty. While acknowledging the benefits of ‘more integration’, member states pursue a different path to achieve this objective and thus opt for flexible policy coordination based on discussions within intergovernmental institutions.

The AFSJ represents a test case for the new intergovernmentalism because it is a new area of EU activity in which old modes of decision-making have been gradually introduced (in the Amsterdam Treaty) until they became the mainstream (after the Lisbon Treaty). Indeed, in the first years of third pillar activity, all hypotheses of the new intergovernmentalism found widespread evidence. The centrality of the European Council and the Council in decision-making was self-evident from the architecture of the first pillar, where their preferred policy instruments were non-legislative while working modes were both informal and secretive.

Moreover, informality was the principal mode of interaction between national governments in the JHA Council, which had incorporated the large number of pre-Maastricht working parties into its institutional framework and thus created a four-layer structure of decision-making (Nilsson and Siegl 2010, 54–5). Moreover, the European Council “established” a “pattern” in the AFSJ “to ask the Commission to submit reviews or reports on the implementation of programs [Tampere, Hague, Stockholm], action plans, and strategies in order to identify strengths and weaknesses and revise priorities or take supplementary action where needed” (Monar 2010a, 252). The Commission, the Parliament, and the Court played a marginal role (if at all), as governments were by all standards “the masters of the game” (De Lobkowicz 2002, 49).

Despite the gradual communitarization of the AFSJ and the empowerment of supranational institutions, the new intergovernmentalism still offers valuable insights regarding institutional dynamics of decision-making. In an analysis of the post-Lisbon period, Sarah Wolff identified as features of the new intergovernmentalism the continuous leadership role of the European Council in agenda-setting, the informality of decision-making in legislative procedures, as well as the creation of numerous “de novo” bodies focused on operational coordination between governmental networks (Wolff 2015, 130). At the same time, she argued that the numerous exceptions to the traditional community method of decision-making included in the Lisbon Treaty has inevitably weakened the influence of supranational institutions in the AFSJ (ibid, 133-4). Elsewhere, it was shown that the post-Lisbon institutional framework of the AFSJ maintains a strong new intergovernmentalist character owing specifically to the permanent presence of the European Council in agenda-setting during crisis situations and the informality of working methods in the Council, characterized by: the continuous search for consensus among member states on ‘big’ decisions (despite the introduction of qualified majority voting), the concentration of legislative decision-making in the hands of the loosely

institutionalized meetings of JHA Counsellors, the large number of working parties, and the continued use of senior expert committees (Maricut forthcoming). The positions of supranational institutions towards intergovernmental bodies have been under-researched from a new intergovernmentalist perspective, but initial findings suggest that they tend to comply, on average, with guidelines and requests from national governments in the European Council and the Council (Wolff 2015; Maricut forthcoming).

Overall, the new intergovernmentalist literature offers important clues about general trends of institutional behavior in the AFSJ. There is wide evidence to support the claim that national governments wanted to remain at the heart of decision-making in the AFSJ and consequently organized decision-making in flexible and informal ways, focused on coordination of national resources based on consensus among members. The empowerment of supranational institutions has been done “with hesitation” (Lavenex 2010), as the Commission and the Parliament “took a back seat in JHA cooperation—or more precisely, [were] carefully escorted to this seat by member states” (Ette, Parkes, and Bendel 2011, 18). There are, however, several exceptions to the compliant behavior of supranational institutions to the wishes of intergovernmental bodies. As illustrated in chapters 1.2 and 1.3, the Commission and the Parliament attempted at times to increase supranational competences in the AFSJ, acting as “supranational policy entrepreneurs” (Kaunert 2007; 2010a) and having centrifugal policy positions from the Council (Ripoll Servent 2012, 58). Blurring the distinctions between old and new areas of EU activity, the AFSJ demonstrates an important blend of the community method in the new intergovernmentalism, or depending on one’s starting point, of the new intergovernmentalism in the community method (Maricut forthcoming).

Consequently, the task of the present thesis is to supplement expectations of the new intergovernmentalism regarding institutional behavior and specify the reasons behind the particular trends identified by its authors. Accepting the premise that national governments

want to protect their national sovereignty in ‘high’ politics areas like the AFSJ, the question remains under which circumstances supranational institutions comply, or alternatively, deviate from their wishes. As the focus of this thesis lies on patterns of justification of institutional behavior, the interest is to assess in how far institutional behavior is determined by the need of officials from institutions to justify their role in the AFSJ and the EU political system more broadly. Before the argument is presented in section 2.2, it is necessary to also review the literature concerned with competing drivers of institutional behavior and their impact on policy change. This is covered in the next pages.

2.1.3 Policy frameworks and the rationalist-constructivist divide in the AFSJ

Despite having different theoretical origins and assumptions, strands of new institutionalism, constructivism, and policy approaches have been used together to analyze institutional behavior in the AFSJ. The reason for this relates to their complementarity: while new institutionalism and constructivism provides answers regarding different drivers or logics of institutional behavior (March and Olsen 2008; Müller 2004), the public policy literature offers descriptive frameworks in respect to how institutional behavior leads to policy change (Richardson 2006). Grounded in the rationalist-constructivist divide, research on institutional behavior in the AFSJ typically combines the two either directly, in order to show their complementarity in practice (Ripoll Servent and Trauner 2014; Trauner and Ripoll Servent 2015b; Ripoll Servent 2015); or indirectly, focusing on the construction of norms and the ways in which actors behave strategically to advance their preferred norms (Kaunert 2007; 2010a; 2010b; 2010c). Chronologically, the most significant contributions come from the work of Christian Kaunert on the one hand (Kaunert 2007; 2010a; 2010b; 2010c), and Florian Trauner and Ariadna Ripoll Servent on the other hand (Ripoll Servent 2012; 2013; Ripoll Servent and Trauner 2014; Trauner and Ripoll Servent 2015b; Ripoll Servent 2015). Both conceptualize interest-driven behavior or norm-driven behavior in conjunction with different policy

frameworks that allow them to link the actions and positions of institutions to actual policy change. On the one hand, Kaunert connects norm-driven behavior to policy change according to the multiple streams framework²⁴ developed by John Kingdon (Kingdon 1995). He advances a conceptualization of the Commission and the Council Secretariat as “supranational policy entrepreneurs” which are “gaining in importance politically” because they can push for and accomplish policy change (Kaunert 2010a, 13). The purpose is to show that the two institutions can contribute actively to the “construction and reconstruction of norms” that guide decision-making by national governments in the AFSJ (Kaunert 2010c, 13).

On the other hand, Trauner and Ripoll Servent (2014) consider both interest-driven and norm-driven behavior as triggering policy change, in line with tenets of the advocacy coalition framework²⁵ developed by Paul Sabatier (Sabatier and Weible 2007). Consequently, they seek to explain institutional and policy change in the AFSJ rather than institutional behavior as such. They are particularly interested in supranational institutions and the question why their positions on substantive AFSJ issues seems to have altered following their empowerment in the field, coming closer to the preferences of national governments in the Council. Both rational

²⁴ The multiple streams framework views policy change as the “collective output formulated by the push and pull of several factors” (Zahariadis 2007, 66). These factors refer, firstly, to the way in which policy problems are identified—being highlighted by statistical indicators, “focusing events” like disasters, crises etc., or negative feedback from existing programs. Secondly, such factors include the policy alternatives (“solutions”) available in a particular field, assessed according to their technical feasibility, compatibility with existing values, and perceptions of future constraints. Thirdly, the “push and pull” of these factors is dependent upon the existence of political will—determined by election turnovers, the advocacy of organized political forces, or the existence of a favorable “national mood”. The three are brought together by the opening of “small and scarce” windows of opportunity in either the problem or the political stream, and with the contribution of “people willing to invest their resources in return for future policies they favor”, a.k.a. policy entrepreneurs (Kingdon 1995, 197–205).

²⁵ The advocacy coalition framework starts from the assumption that policy stability is rooted in the existence of change-resistant normative beliefs, meaning that actors perceive the world through “pre-existing beliefs that are difficult to alter” (Sabatier and Weible 2007, 194). However, some beliefs are more susceptible to change than others. Sabatier and associates rank beliefs according to their “depth” and “scope” in the perception of participants, and accordingly hypothesize their respective likelihood to (be) change(d). As such, deep core beliefs [broad normative values/positions about the world, such as liberalism or conservatism] are the least likely to change, because they are strongly embedded in the environments in which actors have been socialized. Next, policy core beliefs [applications of deep core beliefs on specific policy issues] could change sometimes, given ongoing empirical evidence regarding their effectiveness in practice. Finally, secondary beliefs [narrow in scope, geographically-bound, and data-based] are more likely to change frequently, since they are not directly linked to deep core beliefs (Weible, Sabatier, and McQueen 2009, 122–123). Indeed, policy core and especially secondary beliefs are subject to change through the four “paths”.

choice and constructivist mechanisms are considered to have generated this shift in institutional positions. The change in decision-making rules altered on the one hand the opportunity structure of actors, fostering coalition-building across institutions, while the new decision-making mode facilitated on the other hand the development of new institutional beliefs and norms that focused on consensus-seeking in legislative decision-making (ibid, 1151).

Each of the two frameworks is discussed below, splitting their expectations in two separate sections in order to illustrate the distinction between rationalist and constructivist perspectives regarding institutional behavior in the AFSJ.

2.1.3.1 Rationalist approaches to institutional behavior in the AFSJ

From a rationalist perspective, both intergovernmentalist and supranational institutions are expected to seek the realization of their preferred outcomes in decision-making over the AFSJ (North 1990; Trauner and Ripoll Servent 2015b, 21). Moreover, their preferences are assumed to be exogenously set (Aspinwall and Schneider 2000, 7), usually in the sense that national governments want to limit delegation of competences to supranational institutions whereas supranational institutions seek to maximize that delegation and influence the decision-making process (Pollack 2003, 35–41). In respect to intergovernmental institutions, the “safeguard measures” introduced in the Amsterdam and the Lisbon Treaties to limit or delay the empowerment of supranational institutions in the AFSJ are considered evidence that most national governments only half-heartedly supported delegation of powers in a field at the heart of national sovereignty (Monar 2010c; Wolff 2015). Examples include the “transitional periods” entailed in the Amsterdam Treaty to delay for a period of five years the involvement of the Commission and the Parliament in the fields that had been “uneasily communitarized” (Lavenex and Wallace 2005, 463), as well as the large number of exceptions to the ordinary legislative procedure listed in the Lisbon Treaty to exclude the Parliament as a co-decider or limit the Commission’s right of initiative (Peers and Bunyan 2010). In turn, the Commission

and the Parliament are expected to seek the maximization of those competences—although, as discussed in chapter 1.2 and section 2.1.1, this has been more the case in recent years rather than in the early years of third pillar cooperation (Ette, Parkes, and Bendel 2011, 18).

Moving from the broader discussion about treaty changes to day-to-day policy-making, rationalist perspectives put emphasis on bargaining, and more precisely on the way in which changes in the structural environment—namely treaty modifications—impact on the bargaining strategies of all institutions (Trauner and Ripoll Servent 2015b, 21–2). Two strategies are identified in particular: coalition-building, defined as “the capacity to build winning coalitions inside and across EU institutions”; and issue-linkages, understood as the situation “when actors give up their particular policy preferences in a particular policy instruments for guarantees that (...) losses will be compensated in future [negotiations]” (ibid, 23-25). Both intergovernmental and supranational institutions can make use of these strategies, and the extent of their success depends on the context and the configuration of actors. Analyzing the case of asylum legislation before and after communitarization, Trauner and Ripoll Servent show how the supranational institutions—the Commission and the Parliament—have significantly changed their policy positions in the field (Ripoll Servent and Trauner 2014). Specifically, they moved from liberal to more restrictive views on substantive policy issues under different decision-making procedures, namely from consultation to co-decision. The reason for this alteration of positions is identified in the formation of a successful advocacy coalition led by home affairs ministers in the Council, which managed to co-opt influential members of the Parliament and the Commission on their side and thus impose an agreement close to their own preferences (ibid, 1142). This co-option was possible owing to changes in the membership of the Parliament, where the European People's Party (EPP)—dominant after the 2009 elections—found common ground with the ideological preferences of most home affairs ministers, who were conservatives themselves. Next, the

Council-EPP coalition had the “bargaining strength” to corner the Commission into dropping some its liberal positions because of the need to accept a ‘realistic’ compromise that could be reached expediently (ibid, 1151-2).

Furthermore, this rationalist model also provides insights into the reasons why the Parliament altered its policy positions in the AFSJ from consultation to co-decision (Ripoll Servent 2012; Ripoll Servent 2015). The answer is found in the formal rules of procedure, which under co-decision require higher majorities in the second reading that neither left nor right-wing party groups have (Ripoll Servent 2015, 155). In this context, MEPs have the incentive to look from the first reading for “winning coalitions” both among different political groups and separately with the Council (ibid, 45). Under limited time constraints (in which there is pressure to find agreement quickly) and conditions of reiterated interactions (failure in current negotiations is considered costly because it undermines future negotiations), the “bargaining strength” of the Parliament decreases (ibid, 46-7; based on Farrell and Héritier 2007). In addition, the author acknowledges that an explanation of institutional behavior limited to changes in decision-making rules is incomplete because it misses the norm-based reasoning of some MEPs (reflected in her interviews). Accordingly, MEPs in the LIBE Committee were reported to have sought to alter the Parliament’s reputation as a confrontational actor in the AFSJ, gained under the consultation procedure; in contrast, they wanted the Parliament to be perceived as a “responsible legislator” under co-decision (Ripoll Servent 2012; 2013). This argument can still be twisted in rationalist terms by saying that the underlying reason why the Parliament changed its attitude under co-decision was its “institutional patriotism”: MEPs thought of the long-term benefits of being viewed as a mature partner in legislative decision-making in the AFSJ, as this would allow the maximization of

their influence²⁶ over policy-making in the future (Ripoll Servent 2015, 166–7).

In respect to the Commission, rationalist expectations also revolve around attempts to maximize supranational competences in the AFSJ. In criminal law for example, the Commission found a coalition partner in the Parliament in the post-Lisbon period and together they pushed the Council to adopt more harmonized rules of criminal procedures (Mitsilegas and Vavoula 2015, 140). Conversely, attempts of the Commission to be more influential in areas like police cooperation have been less successful, as the institution's right of initiative has been deliberately limited by member states in the Council even after the Lisbon Treaty (Den Boer 2015, 125). Moreover, in Kaunert's work, the Commission is seen as a successful "supranational policy entrepreneur" when it manages to take advantage of an open "window of opportunity" and trigger policy change (Kaunert 2007; 2009; 2010b; 2010a). It is argued that the capacity of the Commission to influence the design of policy instruments in the AFSJ depends on the speed of its proposals (taking advantage of being the "first mover" owing to its right of initiative), the extent to which it can convince other actors of the merits of its reasoning (persuasion), and the ability to form alliances with powerful actors that support its views (Kaunert 2007, 392). While the notion of "persuasion" is rooted in constructivist thinking, the first-mover advantage and alliance-building can be construed as rationalist strategies through which the Commission seeks to maximize its influence in the policy-making process. Empirically, Kaunert substantiates how the Commission managed to achieve this in different fields: asylum policy (Kaunert 2009), counter-terrorism (Kaunert 2007; 2010c), and treaty revisions more broadly (Kaunert 2010b).

²⁶ Other empirical studies have also documented how the Parliament repeatedly attempted to increase its role in the AFSJ over time (De Capitani 2010). Institutional strategies included: 1) efforts to lobby the Commission to cast proposals according to a legal basis that would allow the involvement of the Parliament; 2) introducing a 'double vote' in the plenary for each proposal that would potentially force the Commission to accept more substantial amendments; 3) attempting to preempt the formulation of legislative programs through their own resolutions; 4) attracting media attention through lively plenary debates on specific AFSJ issues, focused on the promotion and protection of fundamental rights (ibid, 120-8). While the first three strategies were used in all areas of EU activity, the last one is specific to the AFSJ.

In the present thesis, rationalist approaches are considered to remain at the surface of explanations regarding institutional behavior in the AFSJ. What is contested in particular is the assumption that preferences are exogenously set and that institutions always want to expand the scope of their own competences and ‘turf’. Conversely, it is considered that interests and preferences are grounded in particular normative frameworks, and it is essential for researchers to understand how they ‘came to be’ (Kaunert 2007, 391). There is ample evidence in the AFSJ that institutions do not always seek to maximize their competences (see chapter 1.2); in addition, even when this is the case, rationalist approaches are insufficient to explain alterations over time in institutional behavior. Owing to their emphasis on causal models and the requirement of parsimony, rationalist analyses are limited to providing linkages between actors’ preferences and their available strategies under different rules of decision-making. Conversely, the present thesis aims to go one analytical step back and understand how institutions construct their rationality to begin with, how this changes over time, and how it differs within the same institution. Constructivist perspectives are better suited to this end, and they are discussed in the next pages.

2.1.3.2 Constructivist approaches to institutional behavior in the AFSJ

Applications of constructivism to EU studies are not so much a category as they are a continuum, moving from more ‘radical’ views focused on the contested discursive construction of reality (Diez 2001; Wiener 2008) to more ‘moderate’ versions that acknowledge that reality is socially constructed, but consider it possible to demonstrate the impact of socially constructed reality on (individual/institutional/state) behavior (Checkel 1999; Jupille, Caporaso, and Checkel 2003; Checkel and Katzenstein 2009). The latter are considered the “mainstream” in EU theorizing²⁷, following the tradition of Alexander Wendt (Wendt 1999).

²⁷ ‘Moderate’ constructivist views have become mainstream in EU studies because they subsumed their research questions under widely accepted positivist epistemologies, while ‘radical’ constructivists have come to be perceived as “dissident voices” owing to their reliance on interpretivist (or reflectivist) epistemologies (Manners and Whitman 2016, 7). Rosamond commented on this development by explaining that “the credibility of

At the heart of constructivist thinking is the notion of the “constitutive effect of norms” (Kratochwil 1989), meaning an understanding of individual behavior as not only guided by social norms but also defined by them at the level of identity(-ies) (Risse 2009, 148). In respect to EU institutional behavior more broadly, constructivist scholars sought to explain the role of institutional norms in guiding behavior in decision-making (J. Lewis 2005; 2010) or alternatively to assess, through large-scale surveys, the impact of officials’ identities on their behavior (Hooghe 2001; 2005; Egeberg 1996; 1999; Egeberg 2004; Egeberg, Gornitzka, and Trondal 2014; Kassim et al. 2013).

In the AFSJ in particular, the work of Christian Kaunert is instructive. His starting point is a critique of Moravcsik (1998) and the inability of liberal intergovernmentalism to explain where “national interests and preferences come from” in third pillar areas (Kaunert 2007, 391). Instead, he proposes to examine the formation of national interests within the policy-making process, conceptualized at the intersection of a problem, a policy (solution), and a political (preferences) stream (based on Kingdon 1995). Kaunert’s argument is that the three streams are underpinned by a fourth one, namely the norm stream, which is responsible for the way in which problems are defined, solutions identified, and political preferences formed (Kaunert 2009, 156). In terms of institutional behavior, Kaunert expects the Commission to act as a “supranational norm entrepreneur” able to introduce ideas at opportune moments, when they are likely to persuade national governments and thus alter national preferences (drawing on Payne 2001). His empirical research shows the Commission’s success as a supranational policy entrepreneur in the case of the adoption of the European Arrest Warrant (Kaunert 2007), the Common European Asylum System (Kaunert 2009), counter-terrorism policy more generally (Kaunert 2010c), and the treaty reform process (Kaunert 2010b). The challenge remains,

constructivist approaches to the EU relie[d] upon their ability to conform to the methodological postulates of neopositivism” (Rosamond 2015, 32). In this thesis, no epistemological position is considered superior; what matters is the compatibility between the researcher’s goals and the epistemological approach used to reach those goals. Section 2.3 discussed methodological considerations in detail.

however, to explain the circumstances under which the Commission does not act as a supranational policy entrepreneur, as the supranational institution “can (though not always does) play” this role (Kaunert 2009, 148). Indeed, depending on the historical period and the policy area/episode under consideration, empirical research yields different findings regarding the norm entrepreneurship of the Commission.

Another major contribution of the author is his “norm matrix” for the development of the AFSJ. Two relevant dimensions are identified here: on the one hand, the scope of the AFSJ at the EU level, oscillating between the maintenance of national sovereignty and the pooling of sovereignty through supranationalization; on the other hand, the purpose of the AFSJ at the EU level, namely whether it should be a single market flanking measure or a policy domain in its own right (Kaunert 2010a, 61). The preferences of supranational institutions have shifted, historically, along these dimensions: in the mid-1980s, the Commission advocated the establishment of the third pillar as a flanking measure to the single market, while in the 2000s the Commission was in favor of pooling sovereignty and creating the AFSJ as a field in its own right (Kaunert 2010a, 71). Member states in the Council were assumed to opt traditionally for the preservation of national sovereignty; however, their preferences could change if the Commission persuaded enough member states of the benefits of a supranational approach, as was the case of the European Arrest Warrant (Kaunert 2007). Persuasion is, in fact, the constructivist mechanism through which norm entrepreneurs frame issues in a way in which they resonate with intended audiences (Payne 2001). Hypothetically, persuasion could work in both directions, meaning that the Commission (and the Parliament for that matter) could be convinced by arguments of national arguments to the same extent that the reverse is possible. The option has not yet been investigated empirically, as it falls outside the scope of Kaunert’s research on the Commission (and the Council Secretariat) as supranational policy entrepreneurs.

The notion of persuasion by norm entrepreneurs shares common ground to Trauner and Ripoll Servent's conceptualization of "discursive entrepreneurship" and "policy learning" as mechanisms through which institutional change in the AFSJ can trigger the redefinition of actors' systems of beliefs and norms (Trauner and Ripoll Servent 2015b, 25). Under the heading "constructivist institutionalism", the authors theorize the possibility of a normative shift in institutional positions when: 1) discourse is actively used by new actors "to reframe policy alternatives and norms perceived as legitimate in a given institutional context", or alternatively when 2) existing norms and ideas of the institutional environment are passively adopted by the new actors (*idem*). Accordingly, the gradual empowerment of supranational institutions in the AFSJ is expected to bring new discursive entrepreneurs in decision-making—namely the Commission, the Parliament, and the Court—which were so far considered illegitimate to have a say over politically sensitive issues. Conversely, the reverse happened was equally seen as possible, namely that the new discursive entrepreneurs engaged in a passive process of learning from the established actor—the Council—and thus come closer to member states' policy positions in the AFSJ rather than enforcing their own.

Most of the empirical research on these hypotheses revolves around the Parliament and its shift in institutional positions from consultation to co-decision. The main finding is that the Parliament appears to have adopted the "consensus norm" under co-decision, which entailed an active search for effective and non-confrontational decision-making (Shackleton 2000, 326). Specifically, after receiving concrete decision-making powers in the AFSJ, the Parliament wanted to be perceived as a "responsible legislator" that member states in the Council could take seriously and treat as a credible partner (Ripoll Servent 2012; Ripoll Servent and Trauner 2014). The closeness between the Parliament and the Council is empirically substantiated in case studies on civil justice (Storskrubb 2015), data protection (de Hert and Papanikolaou 2015; Ripoll Servent 2013), and asylum policy (Ripoll Servent and Trauner 2014).

There is extensive overlap between the constructivist argument of Trauner and Ripoll Servent and the one elaborated in this thesis. The common ground comes from their conceptualization of discursive entrepreneurs as actors who “use discursive practices to enhance the legitimacy of their preferred policy outcomes” (Trauner and Ripoll Servent 2015b, 24). In her research alone, Ripoll Servent discusses further the importance of “legitimizing meta-norms” that provide the normative reference points for discursive entrepreneurs (Ripoll Servent 2015, 50). Meta-norms function as “legitimizing tools—yardsticks that help actors evaluate whether a particular discourse of action is perceived as an acceptable and legitimate course of action” (ibid, 52; cf. Béland 2009). Furthermore, meta-norms can refer to the substantive content of a policy, e.g. liberal or restrictive migration policy, or to procedural aspects, e.g. the norm of consensus under co-decision (Ripoll Servent 2015, 53). In the present thesis, it is argued that the guiding norm for EU institutions is exactly the ‘legitimizing norm’, manifested in the need of all institutions to be perceived as legitimate in the EU political system (see section 2.2.1). Moreover, discursive practices of this meta-norm are instantiated through the act of making representative claims, when actors justify the appropriateness of their policy positions and decisions by reference to the interests or values of a constituency they claim to be representing.

Simultaneously, the line of argument pursued in this thesis—centered on the importance of justification—finds further overlap with early constructivist research on competing discourses about what it means to have legitimate governance in the EU’s decentralized political system (Jachtenfuchs, Diez, and Jung 1998; Diez 1999; 2001). There are also synergies with Vivien A. Schmidt’s work on discursive institutionalism, given by the similar emphasis on actors as propagators of ideas enacted through discursive argumentation embedded in the institutional environment (V. A. Schmidt 2008; V. A. Schmidt 2010). The approach pursued here is different, however, from Risse’s logic of arguing (Risse 2000), as

justification is not about seeking to persuade by “the force of the better argument” entailed in deliberative interactions (Habermas 1989). Conversely, justification is about how arguments are communicated to an audience by taking into account the audience’s characteristics and then seeking to appeal to them (Fischer and Gottweis 2012, 15). The repositioning of the argument in the constructivist literature, by reference to all of these different strands, is revisited in the concluding chapter, following the presentation of the empirical evidence.

For the time being, it suffices to say that the political science / International Relations literature in the AFSJ offers a helpful starting point for the conceptualization of institutional behavior. Although integration theories cannot account for the uneven development of the AFSJ and its institutional architecture as a whole, they provide important insight into the initial drivers of AFSJ cooperation—namely home affairs bureaucrats—who set in motion the development of an EU field that gradually ‘spilled over’ and became supranationalized. In a similar vein, while rationalist approaches cannot account for the origin of institutional interests, they identify different strategies that connect those interests to institutional behavior. Conversely, two bodies of literature have been found particularly relevant for the AFSJ and the argument of this thesis. On the one hand, the new intergovernmentalism offers general theoretical expectations about institutional dynamics in the AFSJ that remain to a large extent valid despite the formal empowerment of supranational institutions. On the other hand, constructivist approaches provide the framework for thinking about institutional behavior in terms of norms of what is considered appropriate, desirable, and crucially, legitimate institutional action. Having established the main commonalities between the argument of this thesis and the existing literature, the next step is to spell out its main theoretical expectations. This is the purpose of the following section.

2.2 *Constructing the argument*

This section presents and expands upon the central theoretical claims of the present thesis. On the basis of the literature review provided so far, it is possible to derive criteria for what a general theory about institutional behavior in the AFSJ should include. First, it should include an explanation of the institutional architecture of the AFSJ as a whole, taking into consideration institutional positions at various points in time. Second, it should account for the (norm-rooted) construction of institutional interests, as well as their fluctuation throughout time. Accordingly, a general theory about institutional behavior in the AFSJ should be able to explain why the Commission and the Parliament are sometimes “hard-wired to seek ever-closer union” (Bickerton, Hodson, and Puetter 2015b, 712) but sometimes they are not.

To achieve these goals, the present thesis posits that a general theory about institutional behavior in the AFSJ needs to take seriously discursive interactions between actors inside institutions and their intended audiences. At the heart of these interactions lies the inherent need of the former to justify and legitimize their policy positions to the latter. It is hence argued that EU institutional behavior cannot be fully understood without examining how officials inside institutions seek to legitimize their institutional positions, in line with how they perceive their organizational roles. In order to make the argument, this section is divided into three parts. The first part puts forward a series of theoretically informed propositions that summarize the argument. The second and the third parts elaborate on the theoretical framework behind the propositions, borrowing from 1) applications of organizational theory to role expectations inside EU institutions, and 2) a constructivist approach to political representation grounded in the work of political theorist Michael Saward.

Before moving to the discussion of theoretical propositions, a few ontological remarks are in order to complement the review of constructivist approaches presented in subsection 2.1.3.2. Therefore, the argument described next is grounded in a constructivist ontology,

meaning that reality is understood as relative to the observer: facts and features become meaningful through the conscious and purposeful attribution of functions to objects and actions by individuals (Searle 1995, 12–13). The moment these become established, or are “institutionalized”, they can be considered “real” (Berger and Luckmann 1966, 74). This view implies that individual actors have conceptions of themselves, of the world, and of the others which impact on their behavior. Inside institutions, they make sense of the role attributed to them and act accordingly²⁸. The process of sense-making is not without contestation, and meanings ascribed are not stable (Wiener 2008). Officials can disagree with the policies promoted by their institution, or they can alter the scope of the institution’s activity during implementation (e.g. Lipsky 1980). The idea is that at one specific moment in time, in relation to a particular policy issue, officials are bearers of a singular institutional role—which they enact by prioritizing some goals over others and portraying them in the institution’s best interest.

Furthermore, in line with constructivist thinking, the relationship between institutions (as structures) and individual behavior (agency) is assumed to be mutually constituted (Christiansen, Jørgensen, and Wiener 1999). This relationship implies that the actions of agents are constrained and facilitated by existing rules and resources, but at the same time their actions contribute to the redefinition of structure; in other words, “structural properties (...) are both medium and outcome of the practices they recursively organize” (Giddens 1984, 25). Accordingly, it is assumed that while the behavior of officials inside institutions is constrained by the organizational structure to which they belong (determined in the case of the EU by treaty rules), these individuals are neither passive nor tabula rasa. Conversely, they are thinking,

²⁸ The focus on sense-making and interactions is consistent with symbolic interactionist orientations (Mead 1967). Symbolic interactionism is a social theory perspective that explains human action in terms of the meanings agents attribute to the things and people around them; while meanings are the product of the interactions the agents have and the social structures they belong to, they are simultaneously generated through a process of interpretation by the agents, who are capable of creativity and purposefulness (Blumer 1969).

sentient agents who make their own decisions and influence the structure, thus (re-)constructing the parameters for future action. This interpretation presupposes a particular theoretical apparatus discussed later in the section: one which conceptualizes the impact of institutional structures on individual behavior (drawing on organizational theory), and another that defines the scope of agency in terms of representative claims made (based on the work of Saward).

The understanding of structure and agency as mutually constituted offers the framework in which the argument of the thesis is constructed. Its main theoretical expectations are presented below.

2.2.1 Theoretical propositions about institutional behavior in the AFSJ

The central claim of the thesis is that *EU institutional behavior cannot be fully understood without examining how each institution seeks to legitimize its role in the EU political system.*

The need for legitimation is grounded in the prevailing idea that the EU polity suffers from a democratic deficit in the eyes of its citizens. The nature and implications of the democratic deficit have attracted heated debate in the academic literature over the past two decades (Höreth 1999; Eriksen and Fossum 2000; Moravcsik 2002; Scharpf 2009; Mair and Thomassen 2010; V. A. Schmidt 2013; Kröger 2015). Especially in the post-Maastricht period, scholars agreed on the emergence of a new empirical development in the EU polity—namely the increased interest of public opinion in European integration issues—which had constraining effects on decision-making in Brussels (Hooghe and Marks 2009, 5). The new status quo was contrasted with the early years of the European Community, when national governments could take integration decisions without being challenged by voters domestically—in line with a so-called “permissive consensus” (Lindberg and Scheingold 1970). In the context of the expansion of supranational competences in policy areas at the heart of national sovereignty (for example, through the creation of the economic and monetary union), some authors declared the end of the permissive consensus and the existence of a crisis of political representation across the EU

(Bickerton, Hodson, and Puetter 2015a, 25). Accordingly, the politics of organized interests in the member states were acknowledged to have substantively changed, as political parties and interests associations such as trade unions lost support and trust from citizens while social movements became increasingly popular (Schmitter 2008, 199–201). It was inevitable that such a crisis of political representation would have an impact on the behavior of EU institutions. The present thesis aims to theorize the consequences of this crisis.

The underlying argument behind the central claim is that in response to the democratic deficit of the Union, *institutions constantly seek to legitimize their policy positions and decisions by reference to a certain constituency—portrayed as having a specific set of interests or values*. This continuous need for legitimation becomes a driving force of institutional behavior in itself and is manifested when political and technocratic officials justify their choices by claiming to act for the benefit of someone, ‘in the name of’ their constituency. For elected representatives in a local or national setting, this logic is self-evident. However, the point is far from obvious in the EU political system, where the link between representatives and the represented are vague even in the absence of the crisis of political representation described above. For example, according to the treaty framework, the Council and the European Council are to represent citizens on a territorial basis through national governments; the Parliament is to represent citizens directly in keeping with the results of elections; finally, the Commission is to represent citizens indirectly through the consultation of sectoral organizations (TFEU, Art 10-11; Bellamy and Kröger 2013, 485–6). Consequently, officials from every institution can claim to speak “on Europe’s behalf”—which, very importantly, does not mean that their claims are accepted as such (Van Middelaar 2013, 25–6). In other words, EU institutions are engaged in a “struggle for legitimacy” (Schrage Sternberg 2013) that is inherent in the ambiguity of political representation in the EU political system.

In terms of institutional behavior, the immediate consequence of this constant search for legitimation is variation or inconsistency in institutional positions. Indeed, while all EU institutions are ultimately supposed to represent the citizen, the particular characteristics of the generic citizen are to be identified and formulated by the officials working there at a given moment in time. When a policy field emerges on the EU agenda, there is a lot of uncertainty regarding the scope and form of its development. A domain that started under intergovernmental decision-making can evolve over time to include supranational institutions—such as the former third pillar JHA—or it can continue to rely on national governments in intergovernmental forums for day-to-day decision-making (Puetter 2014, 19). As a result of this uncertainty, *individuals inside institutions have significant leeway to pick and choose the interests and values of the constituency they are representing and justify their policy and institutional choices accordingly.* Intra-institutional heterogeneity becomes possible from this perspective, as different units from the same institution can hold different views about whom the constituency is—depending on the policy area in which they work and the extent of EU competence thereof. Consequently, variation in institutional positions is not only conceivable but in fact very likely. Nevertheless, the direction of this variation cannot be established a priori; conversely, empirical work is necessary to determine how every institution constructs its ‘target’ constituency on a case-by-case basis, depending on the policy instrument under consideration.

In terms of conditions for variation, two elements are identified. The first refers to the scope of EU competence across different policy areas, where it is argued that *the more competences EU institutions have in a given field, the broader the universe of constituencies in the name of whom representative claims can be made—and consequently the larger the potential for variation in institutional positions.* Indeed, when a policy field emerges at the EU level, it initially revolves around single issues. For example, when the Maastricht Treaty

created the third pillar JHA, the chief objective was to ensure that policy areas directly related to free movement of persons were regarded by member states as “matters of common interest” (art. K.1). Nevertheless, JHA has evolved over time into one of the key EU priorities, aiming to “offer citizens an Area of Freedom, Security and Justice” (TEU, art 3[2]). It is thus reasonable to expect that the increase in EU competences in the AFSJ went hand in hand with an expansion of the constituencies claimed to be represented by EU institutions in the field.

The second condition for variation refers to the circumstances under which officials from various institutions are prone to make representative claims that stand in opposition to each other, resulting in the politicization of issues (De Wilde 2011, 562). It is thus posited that *competitive claims-making is exacerbated by the occurrence of unpredictable crises or disasters that attract media attention and require immediate policy solutions* (cf. Zahariadis 2007, 66). While political crises such as the death of immigrants in the Mediterranean can rally EU institutions behind a common goal (e.g. prevent the future capsizing of boats), officials are bound to disagree about the means to achieve the goal, in line with the rights and obligations they envisage for themselves by virtue of their would-be object of representation (Lord and Pollak 2013).

Several concepts are used in the formulation of this argument. First, individuals inside EU institutions are consistently referred to as ‘officials’. The word is taken to encompass both politically appointed and technocratic officials, in line with the premise that the need to respond to the democratic deficit and legitimize institutional positions and decisions applies indistinguishably to all, regardless of how they entered EU institutions. It remains to be empirically established if the two categories of officials claim to represent the same constituency or different ones, even when they come from the same institution. At the same time, it is irrelevant which definitions of the terms ‘legitimacy’ and ‘representative democracy’ are applied. The point is that legitimacy is considered “essential to the operation of political

life” (Coicaud 2002, 1) in the EU political system, which describes itself as a “representative democracy” (TFEU, Art 10). Regardless whether officials from institutions strive to achieve legitimacy following a rational calculation of their interests or because they consider it a norm, there is an impact on both what they say (discourse) and what they do (actions).

There are important theoretical assumptions behind the claim that EU institutional behavior cannot be understood without examining how officials inside institutions legitimize their role in the EU political system by reference to their respective constituencies. The claim implies that behavior is determined on the one hand by the institutional structure to which individuals belong and on the other hand by the agency of those individuals to render the structure intelligible, depending on how they portray their intended constituency. The theoretical tenets behind each assumption are discussed next.

2.2.2 The structure behind institutional behavior

The view that institutional behavior is constrained by organizational structures shares important premises with the conceptualization of institutional roles in organizational theory—also to be found in a less explicit form under social constructivism²⁹ (Trondal 2001, 17–18). In its new institutionalist version, organizational theory posits among others that different organizational environments will create some specific roles rather than others. Simply put, “it is not the person that creates the institution, but the institution that creates the person” (Kauppi 2011, 155). Roles emerge spontaneously at the same time as institutionalization, and the performance of roles on behalf of an institution implies typical behaviors (Berger and Luckmann 1966, 74). In other

²⁹ For their part, social constructivists use the more encompassing term ‘identity’ rather than ‘roles’, stressing an orientation towards the internalization of values, norms and goals entailed in roles (Christiansen, Jørgensen, and Wiener 1999; Checkel 1999; 1999; Risse 2000; Checkel and Katzenstein 2009; Risse 2009). Broadly defined, identity is the conception of oneself as member of a social community (Risse 2009, 148). In the EU context, studies in this tradition focus on identity formation as a consequence of socialization at the EU level (Checkel 2005). The goals here were to examine (a) the emergence of European identity, (b) the transformation of national identity, and (c) the coexistence of the two in the context of a plurality of national identities (Christiansen, Jørgensen, and Wiener 1999, 540).

words, roles contain “a set of expectations (norms or rules) that more or less specify the desired behavior of the role incumbent” (Egeberg and Sætren 1999, 94).

Moreover, *role*-following behavior can be distinguished from *norm*-following behavior, i.e. the logic of appropriateness, along a cognitive-integrative continuum (Trondal 2001). At one end, role perception is a function of serial information processing inside the boundaries of the organization, meaning that organizational sub-units allow people to pay attention to one issue at a time, thus taking “cognitive shortcuts” (Johnson 1987). In this cognitive view, roles are fluid—they can shift swiftly in the face of new information. At the other end, role perception is rooted in old identities that can be replaced gradually the more time somebody spends in the organization and is socialized into new roles, identities and belief systems (Trondal 2001, 7). The second interpretation of institutional role perception assumes a norm-following behavior according to the logic of appropriateness (March and Olsen 2008). The distinction is important because it yields different empirical findings, as cognitive transformation is more often validated by evidence than integrative transformation³⁰ (2001). In other words, cognitive enactment of roles does not imply their internalization as norms (Egeberg and Sætren 1999, 95). This is not to say that compliance with roles is void of norms, but that such compliance takes place in a non-reflective manner (Checkel 2005, 811).

In the case of EU institutions, three features of organizational structures are expected to impact on role perceptions (Egeberg 2004, 202–3; Egeberg, Gornitzka, and Trondal 2014, 5–6). The first refers to the type of horizontal specialization inside organizations, which can be territorial (member states in the European and the Council) or sectoral (the Commission’s Directorate-Generals or the Parliament’s committees). This implies that agents think about their institutional role in terms of what is desirable for their member state, or what is preferable

³⁰ Further applications of organizational theory to EU institutions can be found in the research agenda of Morten Egeberg and Jarle Trondal from the Oslo-based Arena Centre for European Studies, following in the footsteps of Johan P. Olsen (Egeberg and Trondal 1999; Trondal 2007; Egeberg 1996; 1999; 2006; Egeberg, Gornitzka, and Trondal 2014).

in terms of the policy area itself. The second feature refers to the primary affiliation of members, which can lie with a national government—as national representatives in the European Council and the Council only work in Brussels part-time—or alternatively with an EU-level organization where officials in the Parliament and the Commission work full-time. The expectation here is that officials are more devoted to the organization/decision-making venue where they spend more time. Finally, the third feature of the organizational structure refers to the level of partisanship among members of an institution. Interpretations vary here, but one could reasonably assume that party affiliation is the strongest among members of the Parliament and heads of state or governments in the European Council (who are directly elected); next, party affiliation can be considered moderate in the case of College of Commissioners and the Council of Ministers, and very low in the case of civil servants working in Commission DGs, the Council Secretariat, and the Parliament’s administration.

According to this perspective, the role of EU officials employed in a Commission DG is determined by the sectoral policy area in which they work and loyalty to the supranational structure where they are present on a full-time basis, with very little or lack of influence from partisan elements. Similarly, the role of MEPs is not so much embedded in the member state in which they were elected but in the supranational sectoral committee in which they devote most hours of their work; contrary to Commission officials, party affiliation is very important for them (Egeberg, Gornitzka, and Trondal 2014). While empirically there is considerable overlap between this approach and the conventional view portraying the Commission and the Parliament as pro-integrationist, expansionist actors, the two are entirely distinct at the analytical level (Wonka 2015, 98–9). The organizational approach provides a theory of social action rather than assuming the existence of exogenously-given, stable, and unitary preferences; as a result, it theoretically allows for the possibility of variation in institutional positions.

Indeed, there is considerable explanatory utility to the formulation of expectations about institutional behavior in line with features of the organizational structure under consideration. The account is, however, incomplete because it cannot explain the mechanisms through which agents render those structures intelligible and enact their institutional roles. In the language of the structure-agency debate, this strand of organizational theory is too “structural” or “determinist”; in other words; it prioritizes structure over agency and thus overlooks an essential aspect of the relationship between the two (Reed 2005, 290). In order to bring agency back into the equation, insights from organizational theory are supplemented with the representative claims framework—detailed in the following section.

2.2.3 The agency within institutional behavior

The discussion above emphasized how organizational structures provide officials inside EU institutions a platform of roles that draw the boundaries of the general behavior expected from them as role incumbents. In the next pages, it is shown that officials use their judgement to pick and choose from that platform of roles the specifics of their expected behavior as role incumbents. Moreover, in line with the argument presented at the outset of the section, it is posited that the process of picking and choosing those roles is driven by the need of officials to legitimize their institutions in the EU political system. In other words, officials inside institutions make sense of their roles by identifying and describing the features of the constituency which their institutional structure claims to be representing. This line of argument borrows from the work of Michael Saward on the representative claim (2006; 2009; 2010), which is introduced below.

Michael Saward is a political theorist working on contemporary democratic theory and leading recent debates on the theory of representation that are increasingly refined for the purposes of empirical application (de Wilde 2013; de Wilde, Koopmans, and Zürn 2014). Starting from the premise that representation is more than the “given, factual product of

elections” in the classic interpretation by Hannah Pitkin (1972), Saward puts forth an understanding of the concept “in terms of claims to be representative by a variety of political actors” (2006, 298). The purpose is to overcome the rigidity and conservativeness of the term in contemporary political thought, keeping in mind that being a representative is not necessarily the result of an electoral process; in this respect, Saward is often cited for giving the example of U2 singer Bono claiming that “I represent a lot of people [in Africa] who have no voice at all...” (cited in Saward 2009, 1). From this perspective, representation is first and foremost seen as a performative act in which political actors construct representative links between themselves and their constituency and thus *make* them real, not least in order to address their “sense of remoteness and inadequacy” (Saward 2006, 299–301; emphasis in original). Such insights are particularly pertinent at the EU level, where channels of representation are not immediately visible outside the direct election of the European Parliament, which even nowadays remains of “second-order: importance for national citizens (Reif and Schmitt 1980).

Furthermore, a number of elements compose the representative claim framework, outlined in Figure 2.1 below. The starting point is the *maker* of representative claims, who says something about a *subject* (the representative) which claims to represent an *object* (the constituency) (Saward 2006, 301–2). In order to be politically acceptable, representative claims draw on familiar terms and understandings (the *referent*), ‘ready-mades’ which potential *audiences* can first recognize and then accept or reject (ibid, 303). The division into five components does not imply that there is no overlap; on the contrary, it is often the case that the maker of such claims offers him- or herself as the representative of a certain constituency, which can be the same as the intended audience. In this context, Saward contends that political representatives pick their constituents “just as much as” the electorate chooses their representatives—by referring to some groups rather than others, depicting them as “this or that, as requiring this or that, as having, this or that set of interests” (ibid, 301). In Saward’s words:

Makers of representative claims suggest to the potential audience: (1) you are/are part of this audience, (2) you should accept this view, this construction—this representation—of yourself, and (3) you should accept me as speaking and acting for you. (2006, 303).

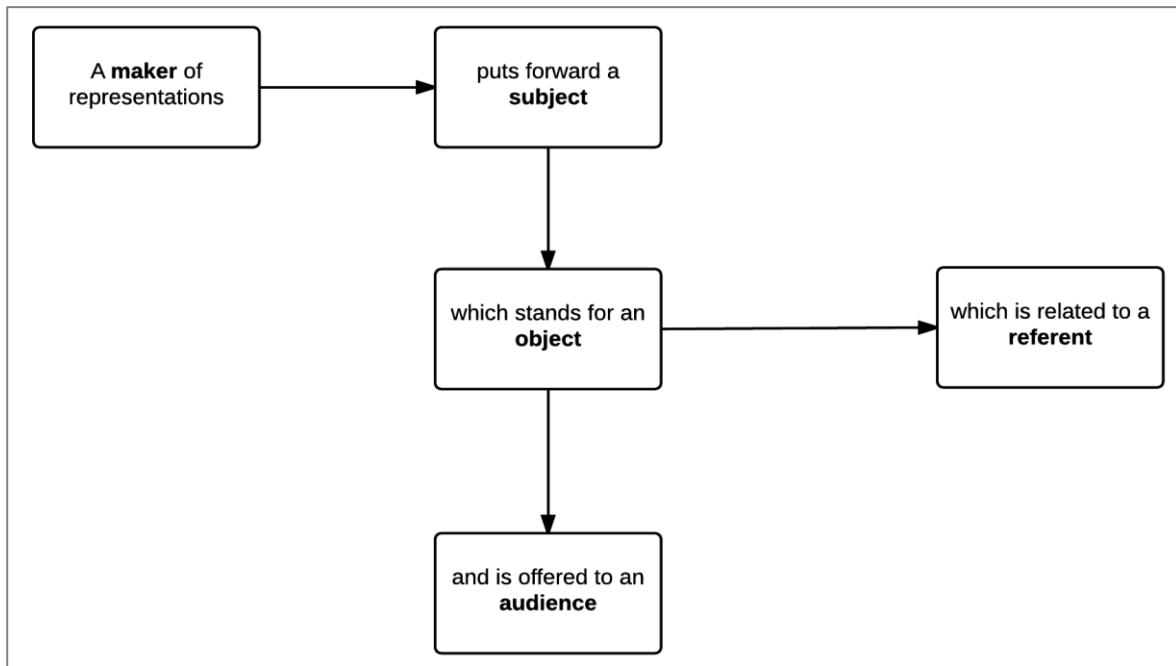


Figure 2.1: The elements of the representative claims framework. Based on Saward (2010, 36).

In the case of the AFSJ, we can think of officials in the Council (makers) who offer themselves (subjects) as representatives of the best interests of member states (objects) by adopting, for example, data retention instruments meant to support the fight against terrorism (Data Retention Directive, 2005). In doing so, these officials essentially prioritize the objective of one type of national authorities—namely the goal of police forces to ensure public order by monitoring possible criminals—and present it as a common good beneficial to all national citizens. In turn, Members of Parliament (makers) offer themselves (subjects) as defenders of the rights of EU citizens (object) to data protection, which in their view should not be infringed upon in the name of pursuing criminal activities. In this case, the intended constituencies are essentially the same—as EU citizens are first and foremost national citizens—and they additionally overlap with the audience. However, in the process of claims-making, officials emphasize different characteristics of their respective constituencies by employing specific referents: the value of security (which the Council claims to stand for) as opposed to the value

of the fundamental rights to privacy (which the Parliament claims to stand for). This example underlines an essential component of the representative claims framework, namely the dimension of rights and obligations which claimants assume to have been entrusted upon them by virtue of their envisaged constituency (Lord and Pollak 2013, 523).

While Saward was primarily interested in opening up the black box of representation by shifting the focus from elected representatives to constructed images of the represented (2010, 9), his line of thinking is very fruitful for the conceptualization of roles inside EU institutions. Indeed, if we conceive of representation as “a process of making and receiving, accepting and rejecting claims” (ibid, 36), then the whole idea of roles performed by representatives becomes a platform of *resources* actively used in the making of representative claims (ibid, 71). For instance, given the formal role of ministerial officials in the Council to cast a vote on behalf of their member state in EU legislative decision-making (TEU, Art 10), we can expect them to claim to embody a wide variety of ‘true’ preferences of their nations. Manipulation of such resources is always possible, as there is no inherent normative quality in representative claims-making; for example, Council representatives from Germany can claim to defend the interests of all member states—beyond their designated constituency—in an instrumental way to gather support for a proposal. Consequently, making claims says nothing about the democratic legitimacy of representation, which is determined by the extent to which such claims are accepted as such by the intended constituency (ibid, 84).

To sum up, applying the representative claim framework to the issue of role perception entails an argument that officials inside institutions engage cognitively with the tasks and functions assigned to them (in their job description), and constantly take decisions in relation to the particular interests of the constituency that they think they are expected to represent. Following this line of thought, it is possible to identify for every policy episode at the EU level the constructed constituency which officials had in mind when they advocated one course of

action or another. Moreover, it is considered that the process of “constituting the represented” can account for variation and inconsistencies in institutional positions—unlike other theoretical approaches (see section 2.1). Therefore, if we accept the premise that organizational environments delimit the main roles that officials are supposed to fulfill in line with their institutional affiliation, then the framework of representative claims allows us to understand puzzling instances of decision-making in the AFSJ—as illustrated in the three legislative case studies of the post-Lisbon period discussed in chapter 5.2.1.

Before concluding the theoretical discussion, it is necessary to address an important implication of the act of making representative claims, namely the possibility that at some point in time such claims will stand in contradiction with each other, resulting in inter-institutional clashes. Indeed, EU institutions are bound to engage in competitive representative claims-making, meaning that every claimant will offer his/her institution as the ‘true’ representative of a particular set of interests or values presumably held by constituency. This idea is closely connected to the concept of politicization, understood as “an increase in polarization of opinions, interests or values and the extent to which they are publicly advanced towards policy formulation within the EU” (De Wilde 2011, 559). In other words, the more public competitive claims for representation are, the higher the propensity for inter-institutional clashes³¹. The media plays a crucial role herein—offering the environment in which competitive claims for representation are made and brought to the citizen. It is against this background that the second condition for variation in institutional behavior was formulated; to reiterate, competitive claims-making is exacerbated by the occurrence of unpredictable crises or disasters that attract media attention and require immediate policy solutions (cf. Kingdon 1995).

³¹ While inter-institutional clashes are not the main focus of this thesis, they represent one outcome of the variation in institutional justifications in the AFSJ.

Having established the main tenets of the argument presented in the thesis and its theoretical underpinnings, the next step is to specify the methodological approach through which institutional behavior in the AFSJ can be best studied empirically from this perspective. The topic is covered in the remainder of the chapter.

2.3 *Research design*

Launching an empirical investigation into different patterns of institutional behavior in the AFSJ requires the clarification of two aspects in advance: 1) the general epistemological and methodological considerations that will underpin the empirical analysis, and 2) the sources of data collection and research methods that will structure the analysis. Each element is discussed in the following pages.

2.3.1 *Methodological considerations*

The formulation of a research question in terms of explanations for institutional behavior might seem at first sight problematic. Indeed, behavior—understood as the ability to speak and act, articulating positions on given issues—is a feature associated with [human] beings and not institutions. Nevertheless, the academic interest in theorizing the attitudes and actions of institutional actors involved in EU decision-making is as old as the integration project itself (Haas 1958). The underlying assumption is that officials affiliated with a particular institution have a certain perception of their institution's role in the EU political system, in line with treaty rules and institutionalized practices. Moreover, it is assumed that such perceptions translate into lines of justification that correspond to consistent patterns of behavior—which can be identified empirically and anticipated on the basis of theoretically-informed expectations.

Several methodological decisions had to be taken in view of the research question. The first was epistemological: how was the answer to the research question going to be 'known'? (Schwartz-Shea and Yanow 2012, 24). Starting from the premise that institutional behavior is

closely connected with the process of role perception by officials, the challenge was to determine how to empirically investigate perceptions and their consequences on institutional positioning. The interest in role perception is grounded in a constructivist ontology that inevitably orients the researcher towards direct engagement with the subjects under investigation—in this case, people affiliated with EU institutions in different capacities, whose views can be found in official policy documents, media coverage, and interviews or survey material. In EU studies, most of the research on role perception relies on large-scale survey analysis (Hooghe 2001; Kassim et al. 2013) or on qualitative interviews with targeted employees (Egeberg 1999; J. Lewis 2003). Their purpose is to establish how officials from institutions describe the roles of their respective organizations, and how they correspondingly motivate institutional action. Although not following the epistemology of argumentative policy analysis (Fischer and Forester 1993), such studies are effectively looking at forms of argumentation that seek to justify institutional behavior.

In contrast, the present thesis is explicit in taking the “the practical argument as the unit of analysis” (Fischer and Gottweis 2012, 2). The basic assumption is that “argument is central in all stages of the policy process” and that “public policy is made of language” (Majone 1989, 1). The process of argumentation is made of claims through which people involved in public policy “construct working accounts” of existing problems and offer possible solutions based on limited data, often under political pressure and faced with time constraints (Fischer and Forester 1993, 2–3). From this perspective, institutional behavior can only be evaluated on the basis of what officials say, when and where they say it, as well as to whom they say it (V. A. Schmidt 2008, 306). In the EU context, argumentation is essential at the agenda-setting and decision-making stage, when officials motivate in either written or oral form their choices for one course of policy action or another. According to the central theoretical propositions of this thesis, the process of argumentation is manifested in the representative claims put forth by

political and technocratic officials or present in institutional documents. In other words, institutional behavior can be empirically traced by looking at how agents inside institutions discursively construct their institutional roles by reference to the features of a particular constituency which their institutional structure is believed to be representing.

The focus on claims-making does not automatically imply, however, adopting an interpretive research design (Yanow 2000; Schwartz-Shea and Yanow 2012). In line with the typology proposed by Patrick Jackson regarding “the conduct of inquiry” in social science research, one can have a constructivist ontology (according to which the social world is inseparable from the social mind) without being interpretivist and seeking to establish how language constructs reality. The epistemological difference lies in thinking “whether knowledge is purely related to things that can be experienced and empirically observed, or whether it is possible to generate knowledge of in-principle unobservable objects” (Jackson 2011, 36). The research conducted in this thesis falls under the first category—labelled “analyticism” in Jackson’s typology—meaning that it postulates “an ideal typical account of a process or setting and then [utilizes] that ideal type to organize empirical observations into systematic facts” (ibid, 151). The second category—labelled reflexivity in Jackson’s typology but essentially capturing interpretive research methods—aims to generate knowledge about the “self-understandings of situated actors”, or in other words, the “relationship [between] everyday practical knowledge and the social group that holds it” (ibid, 178).

An example is needed to illustrate the distinction. For instance, one of the central theoretical propositions of this thesis is that the behavior of EU institutions is primarily driven by the need to legitimize their role in the EU political system. Accordingly, the argument developed in section 2.2 is rooted in the assumption that discourse has consequences, or—to be more specific—the act of representative claims-making by officials has consequences on institutional positions and EU policy-making more broadly. Moreover, such consequences are

empirically observable and expected to allow variation in institutional positioning. This entire line of inquiry is illustrative of Jackson's analyticism. Conversely, if the research question would seek to unpack what officials from different institutions understand by EU legitimacy in their everyday interactions—as done by Claudia Schrag Sternberg in a recent monograph (2013)—then the line of inquiry would fall under reflexivity and employ interpretive methods.

Furthermore, a second methodological decision taken was related to the analytical apparatus guiding the research. The initial intention was to draw on existing literature and simply test conventional expectations regarding institutional behavior (see section 2.1). The literature review provided the basis for the construction of the interview guide that was administered during fieldwork. Following the work of Milliken (1999), the interview guide was organized in three parts, dealing with practices, productivities, and meanings of institutional roles associated with various AFSJ activities. However, while being in the field, the researcher admits to being “abducted” (Schwartz-Shea and Yanow 2012, 26) by the frequent references of interviewees to their target constituencies envisaged according to their [employment] positions. It was in this context that theoretical attention was redirected towards the concept of representation, where Michael Saward's framework was found to appropriately convey the argument inductively inferred from the data.

A third methodological decision referred to how the empirical evidence was going to be presented. Given the general focus of the thesis on the institutional development of the AFSJ, it was considered sensible to adopt a chronological approach to the AFSJ, going through: 1) a classic intergovernmental period, outside the Community framework (before the entry into force of the Maastricht Treaty, 1993); 2) a gradual communitarization period (from the Maastricht Treaty to the Lisbon Treaty, 1994-2009); and 3) an ordinary community method period (during the first mandate of the Parliament and the Commission after the Lisbon Treaty, 2010-2014). The separation of these three stages was necessary for a better illustration of

evolution of institutional justification in the AFSJ, allowing the identification of: 1) its origins, 2) its consolidation and diversification over time, and 3) its stabilization (in variation) in the post-Lisbon period. The specific features of each period were already described in chapter 1.5, so they will not be repeated here.

A fourth methodological decision concerned the possible data sources that were going to be used in the examination of the empirical material. The most viable option was to rely on a triangulation of sources (Jick 1979), building the analysis on the basis of a) policy documents, b) media coverage, and c) interview material. The purpose of these sources, as well as the methods used in their investigation, are described below.

2.3.2 Data collection and analysis

In approaching the sources of data collection, it was vital to consider the different points of the argument to which they could potentially contribute. First, policy documents were crucial for establishing the broad lines of institutional positioning in the AFSJ, as well as the official institutional justification on specific issues. Next, media content analysis offered the possibility to capture representative claims by politically appointed officials, as they were the ones who regularly spoke on behalf of their institutions for the general public. Finally, interview material provided the possibility to engage with institutional role perception by technocratic officials, who were very little covered by the media. Together, the three sources of data collection were considered to allow the construction of a fuller picture about institutional lines of justification in the AFSJ and their variation thereof.

Accordingly, policy documents consulted included primary legislation (the treaties) and official documents of the Commission (communications, reports, press releases, proposals for legislation), the Council (conclusions, decisions, action plans), the Parliament (opinions, resolutions), and the European Council (multi-annual programs, conclusions, statements). The public databases PRE-LEX and EUR-LEX were used to gain access to these documents in a

systematic manner, as they allowed the identification of specific documents coming from each institution. The electronic Archive of European Integration (AEI) from the University of Pittsburgh and the website of the Centre Virtuel de la Connaissance sur l'Europe (CVCE) provided additional documentation from the institutions, especially for the 1980s period. Moreover, the Historical Archives of the European Union (HAEU) held at the European University Institute in Florence, Italy, were consulted during a research visit in September–November 2015. Although the HAEU makes documents available after a 30-year period and thus did not provide access to recent documents in the AFSJ, several dossiers were found on the Schengen Agreement and the implementation of the third pillar—which proved useful in the development of chapter 3.

Next, the exploration of media coverage relied on the content analysis of articles reporting on the AFSJ, retrieved from the independent press agency specialized in EU news *Agence Europe* and its ‘Europe Daily Bulletin’. Created in 1953, *Agence Europe* is available as an electronic resource that allows key word search from 1 January 1995—the date which served as starting point for examining articles covering issues related to the third pillar³². Despite the change in name introduced by the Amsterdam Treaty from JHA to the AFSJ, *Agence Europe* continued to use ‘JHA’ as one of the sectoral policies they reported on regularly. A total number of 1560 articles published during the period 1 January 1995 to 1 December 2009 were examined for the purposes of identifying representative claims by [mostly] politically appointed officials about the AFSJ in-between the Maastricht and the Lisbon Treaties. The method of content analysis employed was an adapted version of claims analysis—originally developed by Ruud Koopmans and Paul Statham in the context of the

³² This means that the period immediately following the entry into force of the Maastricht Treaty—from 1 November 1993 to 1 January 1995—could not be covered. Taking into consideration the time needed to formally establish institutional structures working on JHA, this is not considered a problem. For example, the Council Secretariat established a Directorate-General Justice and Home Affairs in March 1994 (Monar 1994a, 80), while the Commission Task Force was created in 1995 (De Lobkowicz 2002, 49).

social movements literature (1999; 2010). As a variant of media content analysis which connects “makers” to policy positions, claims analysis was considered the most appropriate method to investigate representative claims because it allowed the identification of all elements in Saward’s framework, including the audience (de Wilde 2013; de Wilde, Koopmans, and Zürn 2014). Thus, Saward’s idea of “maker” was understood as the “claimant” in Koopmans and Statham’s model, i.e. the person/entity doing the talking in the public sphere. The “subject” preserved its meaning as the “representative” of a given constituency, presented as such by the claimant. The “object” was the intended “constituency” in the name of whom representative claims were being made, while the “audience” was made of the “addresses” who not only witnessed but in some cases were expected to act upon the claim (de Wilde 2013, 286). Next, Saward’s concept of “referent” (the familiar terms and understandings offered to the audience) can be construed as the “issue” and the “position” in claims analysis (de Wilde, Koopmans, and Zürn 2014, 29). Finally, the element of framing—namely the “organizing idea that suggests what is at stake” (de Wilde 2013, 286)—is included to identify the type of justification used in the representative claim. The results of the media content analysis are presented in section 4.2.

Moving to the third source of data collection, semi-structured interviews were conducted with current and past EU officials working on AFSJ issues in the four institutions under investigation. During the period April—December 2014, a total number of *49 interviews* were completed (see Appendix 1): two at the Cabinet of the President of the European Council, nine at the Council Secretariat, twelve at different Permanent Representations of Member States, sixteen at the European Commission (twelve in DG Home, two in DG Justice, one at the General Secretariat, one at the Cabinet of the Home Affairs Commissioner), and ten at the European Parliament (five at the LIBE Committee Secretariat, one MEP, four assistants of MEPs). Since most interviewees work on specific issues of current AFSJ affairs, it was decided to organize interviews around individual policy instruments in which they were involved. As a

result, three legislative dossiers from the post-Lisbon period were selected for in-depth investigation, which allowed a better engagement of the interviewees with questions about institutional roles and positions by reference to concrete cases. A total number of 26 out of the 49 interviews were conducted with officials working on the three cases.

The selection of the three legislative instruments was done according to their manifestation of variation in institutional positions and their representativeness of the AFSJ in general. Specifically, the post-Lisbon dossiers analyzed were the Schengen Governance Package (2011-2013), the Intra-Corporate Transferees Directive (2010-2014), and the Confiscation Directive (2012-2014). Not only do these cases illustrate varying degrees of competitive claims-making between the Council, the Commission, and the Parliament (with a one-time intervention by the European Council), but they are also representative across AFSJ policy subfields—capturing border management, legal migration, and criminal law policy. The three domains have been brought gradually under community method decision-making, meaning that the relevant units from EU institutions have different levels of experience in collaborating over legislation (see chapter 5.2 for an in-depth discussion of the cases).

Moreover, the issues at stake in the three dossiers were all potentially controversial: the Schengen Governance Package was effectively about who controls [the lack of] internal borders in the Schengen Area, the Intra-Corporate Transferees Directive was about the rights of [highly skilled] third country nationals in EU member states, while the Confiscation Directive was about the extent to which competent authorities should be able to freeze assets [suspected of being] derived from criminal activities. Only the former resulted in a media-publicized polarization of representative claims coming from the four institutional actors, while the second and the third were barely mentioned in the news. The Intra-Corporate Transferees Directive was far less [publicly] conflictual, although it illustrated much deeper misunderstandings between institutional actors than the Schengen Governance

Package—immediately evident from the duration of legislative negotiations (four years). Last, but not least, the discussions on the Confiscation Directive went surprisingly smooth (lasting less than two years), despite the fact that the file could have attracted intense public debate and competitive representative claims-making owing to the controversy it raised regarding the trade-off between effective crime-fighting and constitutionally-protected rights to private property.

2.4 Outlook

Based on the theoretical and methodological considerations presented in this chapter, the qualitative longitudinal study on institutional behavior in the AFSJ is presented in the remainder of the thesis. The starting point was provided by the identification of gaps in the academic literature on institutional dynamics in the AFSJ, which could not account for different patterns of institutional behavior at various moments in time. Owing to the rapid and fragmented development of the field, scholars predominantly focused on individual institutions, specific time periods, or single AFSJ subfields. To address this shortcoming, the chapter introduced an alternative approach to explaining institutional behavior in the AFSJ from the perspective of lines of justification given by institutions in order to legitimize their policy positions. It was argued that the patterns of institutional behavior in the AFSJ cannot be fully understood without examining the constituency claimed to be represented by actors. Accordingly, the justification of institutional behavior in the AFSJ was hypothesized to be contingent on how officials from different institutions assess the impact of a policy instrument under decision-making on their intended constituencies. Methodologically, this presupposed looking at how actors constitute themselves as agents by reference to a certain constituency and thus construct their own rationality. This is empirically manifested when officials from

institutions claim—in formal documents, media coverage, or interview material—to be representing something or someone.

The following chapters put forth the empirical material against which the argument of the thesis is analyzed. Following the chronological approach adopted, chapter 3 traces back the *origin* of institutional justification in the field—detected in relation to the implementation of free movement of people as entailed in the establishment of the single market by the 1986 Single European Act. Chapter 4 explores the diversification of institutional justification in the AFSJ in the period following the formal incorporation of JHA as the third pillar in the Maastricht Treaty up until the abolition of the pillar structure with the Lisbon Treaty (1994-2009). Finally, chapter 5 takes the analysis of institutional justification in the AFSJ to present day by examining the changes brought by the Lisbon Treaty to both intra- and inter-institutional dynamics (2009-2014).

3 THE ORIGIN OF INSTITUTIONAL BEHAVIOR IN THE AFSJ (1984-93)

This chapter seeks to identify the *origin* of institutional behavior in the European Union's Area of Freedom, Security and Justice. The purpose is to show that in the AFSJ—like in any other area of EU policy activity for the matter—there is a discernible point of departure when it is possible to detect one principal pattern of justification for the positions of each institutional actor, in relation to which variation will later emerge. It is argued that in the early stages of development of the AFSJ at the EU level, officials sought to legitimize their institutional positions by reference to a specific constituency that they claimed to be representing. Their initial positioning became the baseline for how patterns of institutional justification and legitimation evolved in the AFSJ, creating general and policy area-specific expectations regarding institutional behavior in decision-making. The general expectations correspond to a large extent to new intergovernmentalist hypotheses concerning the behavior of institutions in “new” areas of EU activity (chapter 2.1.2). However, as EU competences expanded over time in the AFSJ, institutions started to diverge from their original lines of justification. The diversification of activities in the AFSJ was accompanied by variation or inconsistencies in the justification of institutional behavior. The next chapters will explore the nature and extent of this variation; for the time being, the goal is to put forth the main features of the ‘baseline’—i.e. the origin of institutional justification—in order to understand the point of departure from which variation started to take shape.

Accordingly, the present chapter looks at the early beginnings of the AFSJ as a policy domain of interest for member states of the European Community, before the third pillar JHA had been officially introduced by the Maastricht Treaty (1 November 1993). The focus is on the implementation of the free movement of persons objective agreed in the 1986 Single European Act as part of the broader goal to create the single market. It is argued that the main

EU institutions—the European Council, the Council, the Commission, and the Parliament—have used the creation of the border-free regime to position themselves in the field, articulating for the first time ever not only the nature and scope of EU action in the future AFSJ, but more importantly their own role thereof. By relating their institutional mandates and tasks to the very purpose of the new “area without internal frontiers”, officials from the four institutions had essentially set a precedent that would prove to have long-lasting consequences for the justification of their behavior in the AFSJ. The empirical analysis takes into account that the free movement of persons was an objective pursued both within the European Community framework and outside of it through the intergovernmental Schengen system—inaugurated by the Schengen Agreement (1985) and its implementing Convention (1990). Their timing overlaps: the Schengen Agreement was signed on 14 June 1985, in the same month when the Commission forwarded to the European Council its soon-to-be-famous White Paper on Completing the Internal Market (European Commission 1985b). The two initiatives on the abolition of internal frontiers developed in parallel, although their respective documents rarely acknowledged the other; in many ways, it was considered that “their ‘survival’ depended on how well they performed, not in trying to suppress their competitor” (Zaiotti 2011, 88). As a result, it is important to capture the justification of institutional positioning of each institutional actor in both arrangements.

Following this line of thought, it is shown that the European Council, ministry officials associated with the Council, the Commission, and the Parliament saw different things when they examined the implementation of free movement of persons; specifically, their justifications for the necessity of EU involvement in JHA polices depended on whom and how they conceived of the constituencies they were supposed to represent at the EU level. Therefore, from the perspective of heads of state or government in the European Council, free movement of persons was part of their efforts at the time to bring Europe closer to its citizens, who would

benefit directly from the establishment of the single market (European Council 1984). Having envisaged the ‘big picture’, the specifics of implementing the free movement were subsequently delegated to the other institutions. Conversely, from the point of view of foreign affairs, justice, and especially home affairs officials operating in intergovernmental working groups, the abolition of [internal] frontiers was a clear threat to the security of the Community. Acting on behalf of national law enforcement and border control authorities, home affairs officials sought to ensure security in the absence of internal frontiers by setting a coherent agenda of “flanking measures” (De Lobkowicz 2002, 17). For the Commission, implementing the free movement of persons was in itself an ambition comparable to “that which propelled the single market” (Lavenex and Wallace 2005, 458), having the potential to provide a tangible benefit to all Community citizens willing to exercise the new right. Last but not least, while the Parliament initially sought the implementation of free movement of persons inside the Community framework and rejected Schengen, it soon found its vocation in the context of the “area without internal frontiers” as the chief advocate of fundamental rights—to be equally ensured for all EU citizens (De Capitani 2010).

Under the circumstances, the implementation of free movement of persons was critical in the initial process of rendering EU institutional roles intelligible in the AFSJ and justifying institutional behavior. The present chapter expands on this argument, starting with a historical overview of the issue and then moving to the reactions and positioning of each institution to the implementation of free movement of people by reference to the constituency they claimed to represent. The conclusion summarizes the findings and sets the scene for the evolution of institutional roles in the AFSJ.

3.1 Historical context: implementing the free movement of persons

The mid-1980s witnessed a revival of the European Community project through the political commitment to finalize the single market, motivated primarily on economic grounds as necessary to ensure the competitiveness of European states at the global level (Dedman 2010, 114). In 1986, member states signed the first major treaty revision in two decades, the Single European Act, which established a concrete deadline for the completion of the internal market (1992). The implementation of this objective, set out in a Commission White Paper (European Commission 1985b) and endorsed by the European Council (European Council 1985b), dominated Community affairs for the next years, marking the transition towards the European Union (McAllister 1997).

But while the Single European Act promised to deliver on the ‘four freedoms’ entailed in the single market (of goods, capital, persons, and services), the main focus initially was on accomplishing the first two, considered more technical and hence less contentious (R. Lewis and Spence 2006, 294). In respect to the free movement of persons, even if heads of state or government specifically requested during a summit meeting in Fontainebleau “the abolition of all police and customs formalities for people crossing intra-Community frontiers” (European Council 1984), the measure could not be achieved through a Community instrument. The reason was the United Kingdom’s (UK) well-known opposition to any form of removal of internal Community border controls, a stance more silently supported by Ireland and Denmark (Whitaker 1992, 201). Apart from arguing that frontier checks allowed national border guards to better detect drug trafficking and other criminal activities, the UK was unyielding on the immigration issue, considered a core sovereignty aspect related to internal security (Papagianni 2006, 10–11). According to the UK government, it was impossible to distinguish Community from non-Community citizens without stopping them at the frontier, which meant that free movement of persons had to be rejected altogether (Nanz 1995, 31).

Under the circumstances, the other member states sought to provide an alternative. The first solution came from French President François Mitterrand and German Chancellor Helmut Kohl, who decided to make a “symbolic” gesture and “relax the checks at the common Franco-German border, in particular for car drivers who show by a green sticker on their windshield that they are citizens of member states of the EC” (Schutte 1991, 549). The bilateral agreement—known as the Saarbrücken Accord of 1984—immediately attracted the interest of Belgium, the Netherlands, and Luxembourg, which had already abolished their internal border controls in the context of the Benelux Economic Union (entered into force in 1960). The five countries thus started negotiations and in July 1985 signed an agreement in the small village of Schengen, Luxembourg—considered the birth place of the Schengen Area (Bunyan 1997, 107).

It is important to note that the Schengen Agreement was not a political objective in itself, but played merely a supporting role in the removal of barriers to the “four freedoms” (Morgan 1994, 13–14). The intergovernmental option clearly indicated that participating member states were not particularly keen on relinquishing internal border controls without at least ensuring control over the process. While governments had long agreed on the broad concept of a “passport union” that would allow their national citizens to move freely across borders (European Council 1974, para. 10), the practical implications of this decision were rife with problems. The thorny questions were not only limited to the removal of frontier checks and their administrative consequences, but also revolved around their symbolic significance: since borders set the limits of the modern Westphalian state (Zaiotti 2011, 45–48) in which territoriality is related—among others—to the capacity to ensure public order (Weber 1946; Agnew 1994; Albert, Jacobson, and Lapid 2001), the act of abolishing border controls threatened the very existence of the state (cf. Weber 1946, 78).

As a result, the decision to proceed with cooperation outside the Community framework (the future Schengen system) aimed at more than circumventing the UK’s veto; conversely, it

was a deliberate “political choice of the intergovernmental over the community method in order to avoid difficult questions of competence” (De Lobkowicz 2002, 33). Even so, the difficulties surrounding the implementation of the Schengen Agreement are illustrative of member states’ reluctance to give up controlling their borders, as it took another decade—until March 1995—for the Schengen Area to become reality in a “brave new world of a Europe without frontiers” (Bellos and Carvel 1995). The agreement expanded over time to 26 European countries, including non-member states Norway, Iceland, Switzerland and Liechtenstein, but currently excluding EU member states Ireland, the UK, Cyprus, Bulgaria, Romania, and Croatia (Vermeulen and Bondt 2015, 19–20).

Crucial for the argument of this chapter, the official discourse on the free movement of persons developed around the sterile language of “compensatory measures” to the internal market, where the abolition of internal border controls was *by necessity* coupled with various forms of police and judicial cooperation meant to ensure national citizens the same level of internal security in the absence of internal borders (Adonnino 1985, para. 7.2). This focus found echoes in the Schengen Convention in the distinction made between internal and external borders, accompanied by a list of measures to be taken on “police and security” that ranged from police cooperation to mutual assistance in criminal matters (Convention implementing the Schengen Agreement 1990, Title III). The policy areas listed in the Schengen Convention overlapped with the future third pillar JHA (Maastricht Treaty, Title VI)—later renamed the Area of Freedom, Security and Justice (Amsterdam Treaty, Title IV; Lisbon Treaty, Title V). Bearing all this in mind, the implementation of free movement of persons can plausibly be regarded as the ‘zero hour’ of AFSJ cooperation—the small snowball that built upon itself and moved an entire policy field “from a peripheral aspect to a focal point of European integration” (Lavenex and Wallace 2005, 457).

It was in this context that the institutional actors involved in decision-making at the Community level came to interpret the significance of the border-free regime in different ways and established patterns of institutional justification in the field. The next section discusses the positions of each institution in turn, in line with the institutional roles they identified for themselves.

3.2 Institutional positioning over the free movement of persons

The free movement of persons was an objective in relation to which all the main institutional actors at the Community level held a firm position. Not all of them expressed it in a systematic manner, however. One should keep in mind that at the time, the European Council was not the institutionalized summitry venue that it is today; in fact, heads of state or government saw their own meetings as a form of “fireside chat” attracting little public scrutiny (European Council 1986a, 7). Furthermore, the Council did not have a formal say in areas associated with free movement of persons until the introduction of the third pillar by the Maastricht Treaty (1993); in addition, its formal legislative competences on the border-free regime entered into force only after the incorporation of the Schengen acquis into the EU legal framework with the Amsterdam Treaty (1999).

The Justice and Home Affairs Council was established in March 1994 (Monar 1994b, 80). Nevertheless, the points of view of officials from justice and especially home affairs ministries were articulated well before the date. Over time, home affairs officials came to dominate the Schengen governance arrangement as well as the working parties associated with the European Council (e.g. the Coordinators’ Group ‘Free movement of persons’), gradually “ousting” officials foreign affairs ministers from negotiations (Guiraudon 2003, 267). In turn, the Commission and the Parliament can be examined in their respective institutional capacities from the start, albeit they had little competence over the implementation of free movement of

persons. Predictably, the two supranational institutions established specific structures to deal with the issue after the entry into force of the Maastricht Treaty, when there was legal basis for such a move.

The discussion here starts with the highest political level—the European Council, continues with the main decision-making forum (ministerial talks associated with the Council), and finally moves to the Commission (accepted as an observer) and the Parliament (the clear outsider of the decision-making system).

3.2.1 The European Council: knowing what Europe’s people want

While the general re-launch of the European Community in the 1980s does not have a single author, the European Council—as the reunion of heads of state or government from member states of the European Community—has been the key institution where “decisions on systemic change were taken” (Bulmer 1998, 378). In this respect, the meeting in Fontainebleau in June 1984 is considered a watershed (Bache, George, and Bulmer 2011, 148). On the one hand, the Fontainebleau European Council established the Ad Hoc Committee ‘On a people’s Europe’ responsible for proposing measures on the abolition of intra-Community frontiers in view of completing the internal market; on the other hand, the summit appointed another committee on institutional affairs—the so-called Dooge Committee—to put forth suggestions for institutional reform (European Council 1984, sec. 6–7). The Fontainebleau meeting of the European Council thus paved the way for the 1985 Commission White Paper on the internal market and the signing of the Single European Act a year later, when “European leaders committed themselves to addressing issues never successfully tackled in a multinational forum” (Moravcsik 1991, 20). Throughout the period, heads of state or government played a crucial role in directing the European integration policy agenda (Ludlow 1991, xiv).

One should note that the whole idea of “a people’s Europe” was designed to respond to “concerns” of ordinary citizens regarding the utility and symbolism of European integration,

starting from the abolition of customs formalities and the establishment of a system for the equivalence of university diplomas, and going into more sensitive issues such as the selection of a flag and an anthem for the Community (European Council 1984, 229). The summit of heads of state or government was the only body which held the authority to address such concerns; after all, the necessity for an “ultimate source of authority” was the main reason why the European Council was first introduced in 1974 (De Schoutete 2012a, 46). Given its composition from political chiefs of member states, the European Council considered that it had both the competence and the legitimacy “to set the overall framework of European integration” (Bulmer 1985, 99). In the mid-1980s, heads of state or government proceeded to exercise these powers strategically by appointing the committee ‘On a people’s Europe’ (also known as the Adonnino Committee) to do the groundwork on their behalf. The initiative was framed as a response to demands of Community citizens, implicitly claimed to be represented:

The European Council considers it essential that the Community should respond to the expectations of the people of Europe by adopting measures to strengthen and promote its identity and its image both for its citizens and for the rest of the world. (European Council 1984, 229).

Among such measures, the priority to ensure the elimination of internal border checks was at the top, as articulated by some members of the European Council. Given that the Fontainebleau summit took place under the French Presidency in the first half of 1984, many of François Mitterrand’s ideas shaped the mandate for creating “a people’s Europe”. In a speech delivered before the European Parliament in May, Mitterrand deplored the bureaucratic procedures experienced by citizens at the customs: “How many controls and formalities there are to try the patience of those who are subjected to them and baffle the understanding of public opinion!” (Mitterrand 1984). At this point, the French President claimed not only to be well-acquainted with the hurdles of free movers across the Community, but also to sympathize with the broader ‘public opinion’ (i.e. the audience) on the matter, displaying outrage at the Kafkaesque nature of border checks.

The free movement of persons was nevertheless not the only idea of Mitterrand for Europe. In addition, he raised fundamental questions about the future of the European political and economic construction:

...we must look further than the common market. What is Europe for? This is a question we have to answer if we are not ultimately to lose our identity, our *raison d'être* and our reasons for action. (Mitterrand 1984).

The creation of “a people’s Europe” was thus a direct response provided by the political elites of the 1980s in an effort to rebrand the Community project and transform it into the European Union. The context was important, as according to an Eurobarometer survey the Community had registered in the early 1980s the lowest support rates (until that point) from citizens (Eichenberg and Dalton 2007, 134). In itself, the concept of “a people’s Europe” was not new; actually, Belgian Prime Minister Leo Tindemans had introduced the idea of the necessity to respond to citizens’ needs as early as 1976, in the midst of the crisis-struck ‘Eurosclerosis’ years. In a report submitted to the European Council, he had called for heads of state or government to “listen” to their people and find out “what Europeans want” and “what they expect from a united Europe” (Tindemans 1976, 11). It took another decade and a more Euro-friendly political elites for the “people’s Europe” discourse to be formally taken on board by the European Council through the appointment of the Adonnino Committee (Adonnino 1985). The focus on the rights of European citizens, coupled with an emphasis on issues such as education, sports, health, or culture, soon became the official legitimization rhetoric of the Community—intended to alter the image of national citizens from employers and consumers in the single market to “culturally embedded human beings endowed with political and civil rights specific to the European Community” (Schrag Sternberg 2013, 78).

In the language of the representative claims framework, it can be argued that the European Council (the maker/claimant) offered itself as the representative of all of Europe’s people (the object of representation), whose “wants” they claimed to have listened. Given the

public character of European Council conclusions (the venue where these claims were made), one can safely assume that the audience was intended to be as broad as possible, including other EU institutions, national representatives from ministries, the media, commentators, and very importantly, the citizens themselves. The European Council thought of itself as the institutional embodiment of the people of Europe, which they presented as seeking—among other things—free movement inside the Community’s borders. Having established this goal, heads of state or government then delegated implementation to the other institutions, which were instructed in March 1985 to follow up on the conclusions of the Adonnino Committee in respect to the abolition of internal border controls:

[the European Council] requests the Council of Ministers to take those decisions which are within its sphere of competence as quickly as possible. It also requests the Commission to take the necessary steps for putting the report’s proposals into practice. Lastly, it invites the Member States to implement those decisions which are within their field of competence. (European Council 1985a, 13).

But while heads of state or government claimed to speak for the people of Europe and tasked the Community ‘machinery’ with the practical implementation of free movement of persons, officials from other institutions also reacted to the 1992 target. The Commission was unsurprisingly the first to jump on the idea of “a people’s Europe”, initiating a large-scale public communication campaign to explain the benefits of a “Europe without frontiers” (Bee 2008, 441). There was a clear overlap between the characteristics of the constituency identified by the European Council and that articulated by the Commission, whose officials immediately seized the opportunity to (claim to) address citizens’ concerns as a legitimation tool for its own existence (section 3.2.3). For the Parliament, citizens had been at the center of their activity since the first direct elections in 1979, but bearing in mind the institution’s limited decision-making powers during the period, there was little its members could have done in reaction to European Council conclusions (section 3.2.4).

In contrast, officials from home affairs ministries did not particularly welcome the free movement goal set by their heads of state or government, as they were conscious of the enormous list of administrative problems they had to solve in order to complete [their part of] the single market. In the end, for the European Council, the abolition of internal frontiers was a rather modest objective in comparison to the more political goal of institutional reforms that dominated the late 1980s. Conversely, for home affairs ministries, the abolition of internal border checks was the main priority of their European agenda. This is not to say that home affairs officials purposefully deviated from the objective of free movement set by the European Council, just that they were the level responsible for dealing with all coordination issues and institutional changes entailed in the elimination of frontier controls—for instance, in the functioning of national border guards structures. The tension between the ‘big picture’ drawn by heads of state or government and the details of implementation entrusted to lower-level national representatives dominated the next decade of the European integration process (1985-1995). For example, the lack of progress in the abolition of frontier checks was often deplored by the European Council, who urged national administrations to keep a tight schedule on the removal of physical barriers:

With regard to the measures contained in the initial [Adonnino] report and approved by the European Council in March 1985, the European Council expressed its concern at the delay in implementing them and asked the Council, the Member States and the Commission, each acting within its own powers to take the necessary decisions to remedy this situation as soon as possible. (European Council 1985b, 14).

In addition, heads of state or government provided priority areas for the Council to focus on, such as “easing of restrictions on border area passenger traffic” (European Council 1986a, 9); “pool(ing) resources to maximize their ability to prevent terrorist acts and to bring those responsible to justice”; “concert action with a view to ensuring that the right of asylum is not abused”; coordination over extradition, removing illegal immigrants, visa and passports of EC citizens; strengthening of external borders etc. (European Council 1986b, 10–11). Overall, it

was clear that the “compensatory measures” to the internal market were a subject which heads of state or government wanted to supervise directly in order to provide impetus to their own state administrations if necessary (Monar 1994b, 81).

Consequently, in the view of the European Council, the free movement of persons was an “area which ha[d] fallen behind” and where progress was urgent (European Council 1988). As a result, at the summit in Rhodes in December 1988, the European Council decided that a Coordinators’ Group ‘Free movement of persons’ should be created in order to expedite the abolition of internal border controls; the group was a gathering of high-level officials from home ministries of member states (Zaiotti 2011, 80). The Coordinators submitted their work to the Madrid European Council of June 1989—a report which became known as the ‘Palma Document’ and provided the main reference framework for the next years (European Council 1989). The European Council continued to keep track of the timetable set in the Palma Document, being regularly informed of developments or the lack of progress thereof. The Coordinators’ Group on Drugs (CELAD) and parts of TREVI (see section 3.2.2) also submitted reports of their activity to the European Council, although they were not officially part of the Community institutional framework.

Furthermore, in the context of the preparations for the new Treaty on the European Union, the discussions of heads of state or government on the “complementary measures” to the internal market—including justice and home affairs—became more intense. Taking “even the Commission” by surprise, German Chancellor Helmut Kohl proposed during the Luxembourg European Council of June 1991 to communitarize migration and asylum while simultaneously advancing the creation of a European Police Force named Europol (Moravcsik 1998, 452). On the one hand, the German position on migration and asylum can be understood in the context of the wave of refugees flowing from Yugoslavia/Eastern Europe and burdening the Länder, which represented the administrative level bearing the maintenance costs during

the lengthy processing of asylum applications (De Lobkowicz 2002, 37). On the other hand, the idea of a European Police Force was Chancellor Kohl's 'pet project', grounded not only in the geopolitical position of Germany in Central Europe (where frontiers with nine other states made it particularly vulnerable to cross-border crime³³), but also in the post-Second World War tradition of a federally organized police force—the Bundeskriminalamt (Verbruggen 2013, 463–64). While Kohl was already prepared to offer Great Britain an opt-out on migration and asylum, the 1991 Luxembourg Presidency decided to adopt a less radical approach and advanced the pillar structure model—with JHA as the third intergovernmental pillar—a proposal which remained “virtually intact for the remainder of the intergovernmental conference” (Corbett 1993, 49).

In the end, bringing JHA into the treaty framework as the intergovernmental third pillar was the only “politically feasible option at the time” given the diverging positions of member states—from ‘maximalists’ advocating the full communitarization of JHA (Benelux countries, Italy and Spain) to ‘minimalists’ in favor of a passing reference to JHA intergovernmental cooperation in the treaty (the UK, Ireland, Denmark and Greece), and the middle ground occupied by France and Germany which envisaged the possibility of communitarization in the future, but were content with an intergovernmental solution for the time being (Monar 2012b, 721). For the European Council, the Maastricht meeting of December 1991 (when the new treaty was drafted), marked also the beginning of a more systematic attention devoted to issues under the newly-created third pillar (Puetter 2014, 94–8). Interestingly enough, European Council conclusions never mention the Schengen Agreement per se. In their language, the end game was always the completion of the single market, in which the free movement of persons— together with its “flanking measures”—were merely a piece of the puzzle.

³³ The timing is also important here: the German reunification and the prospective enlargement brought urgency to the need to tackle organized crime and drug trafficking in a more efficient manner (Geddes 2007, 453).

To summarize, the European Council was the one institutional actor which set in motion the establishment of the single market and, through it, the abolition of internal border controls that prompted the creation of the third pillar and eventually the emergence of the AFSJ. The leadership position taken by heads of state or government on the matter was justified in terms of ‘knowing what Europe’s people want’ owing to their status as the highest directly elected officials in member states. While the objective of the “area without internal frontiers” was only one component of the single market for the European Council, it was seen as the most tangible way in which heads of state or government could legitimize at the time their political decisions on European integration in the eyes of their citizens. The pattern of justification identified in the institutional discourse of the European Council revealed their frequently invoked claim to act on behalf and for the benefit of the people of Europe. From this perspective, the European Council presented the free movement of persons to be in the public interest of all Europe’s citizens.

Heads of state or government were not concerned, however, with the means through which this public interest was to be met. Seeing itself as the body with the most legitimacy and authority in the European Community, the European Council dictated to the other institutions to carry out the abolition of internal border controls, and then periodically complained about delays in implementation. On account of ‘knowing what Europe’s people want’, heads of state or government also considered themselves responsible for overseeing the creation of the “area without internal frontiers”—and thus routinely included in their conclusions guidelines to this end. The other institutions, particularly the Council, did not rejoice at the complexity of the task, for which they were directly responsible. The Commission, in contrast, planned to seize the window of opportunity opened by the European Council in order to legitimize its own political agenda. These two institutions, together with the Parliament, are discussed in the next pages.

3.2.2 The Council: representing the internal security interest

It is important to reiterate that institutionally speaking, the Council had very little official standing on the issue of free movement of persons. The Internal Market Council received a directive from the Commission in 1985 proposing the “easing of border controls” through an extension of the Saarbrücken Accord (European Commission 1988b, 5); however, ministers decided first to water down the initiative and later delay it by sending it to a smaller configuration of ministers in charge of immigration (Zaiotti 2011, 120). This is not to say that ministry officials were not active on the issue. On the contrary, experts from home affairs ministries had been meeting informally to exchange information on terrorist threats and police cooperation ever since 1975 within the so-called Trevi framework³⁴ (Peek 1994, 202). At the same time, the Schengen negotiations were originally in the hands of undersecretaries of state for foreign affairs (Schutte 1991, 551), but were gradual taken over by home affairs officials (Guiraudon 2003, 267–8). In light of the Schengen Agreement and the 1992 deadline for the completion of the internal market, the work of relevant ministries across member states intensified exponentially. Apart from the working parties established under the Schengen Secretariat³⁵, a Coordinators’ Group ‘Free movement of persons’ was created at the request of the 1988 European Council in Rhodes—as mentioned in the previous section—and tasked with conducting the necessary preparations for the abolition of internal borders (Niemeier 1995, 322–5). In both venues, home affairs officials were at the forefront, as they saw the free movement of persons and its accompanying measures to fall primarily under their jurisdiction. Their influence over the process of abolishing internal border controls had long-lasting

³⁴ Over time, Trevi’s scope of activity expanded from counter-terrorism (Trevi I) to police cooperation (Trevi II), to the fight against organized crime (Trevi III), and the abolition of borders (Trevi 92) (Council of the European Union 2005, 7). The latter groups were established in 1985 and 1988 respectively in view of the necessity to devise measures to protect the [future] internal market, with human trafficking cited as a major threat (Trevi Group 1989).

³⁵ The working parties were divided on specific topics: police and security, free movement of persons, transport, and checks on goods (Schutte 1991, 549).

consequences for the development of institutional roles in the [JHA] Council, which are explained below.

It is no secret that home affairs practitioners are typically oriented towards security; after all, their job is to ensure public order within the borders of their states (Anderson and Boer 1994; Anderson et al. 1995; Bigo 1998; 2000b; Bigo and Guild 2005). The abolition of internal frontiers fundamentally challenged this view. If the free movement of goods, capital, services and people was an economic and politically-desirable goal rallying strong support from heads of state or government, national law enforcement and border authorities saw the “free movements” as a safe haven for criminals in several respects. First, the free movement of goods was associated with smuggling, especially of products subject to different tax levels across member states, like cigarettes and alcohol; second, the free movement of capital was linked to financial crimes, such as money laundering; third, the free movement of persons in itself was expected to foster cross-border crimes, allowing perpetrators to move from one country to another in order to avoid arrest and prosecution (Bache, George, and Bulmer 2011, 469). Moreover, the end of the Cold War and the German reunification added significantly to this feeling of ‘insecurity’ in home affairs units—with large-scale migration and organized crime from the east often cited as major causes for concern (Geddes 2007, 453). All these problems were acknowledged by ministry officials involved in European cooperation, whose top priority became how to “compensate the loss of border controls which have traditionally been relied upon as ‘crime-filters’” (Den Boer 1994, 174).

In the language of the representative claims framework, it can be said that home affairs officials (makers/claimants) offered themselves (subjects/representatives) as the embodiment of the internal security interest of their respective countries (the object of representation). For them, the people of Europe were the constituency to be represented in more abstract terms—to the extent that the provision of security was ultimately for the benefit of the citizen. The

immediate logic seemed to revolve around the national institutional structures directly under their supervision: police forces, border guards, customs authorities, or immigration and asylum bodies (some member states even had separate ministries to deal with immigration or asylum). Their focus was first and foremost on the operational implications of the abolition of frontier controls; for example, the driving question behind the negotiations of the Schengen Agreement was “how to reduce the potential for crime which is encouraged by open borders?” (Kapteyn 1991, 366). In other words, without explicitly seeking to do so, the single market project—in conjunction with the internationalization of criminal activities expanding in the 1980s—had prompted home affairs officials to question whether security could be ensured at the national level in the absence of internal borders controls (De Lobkowicz 2002, 17). In this context, their role in European cooperation became evident: to represent the national security interest by protecting the internal market within its external borders, as marked by ‘Schengenland’ (Bigo 2000b). The common purpose was stated clearly in the Schengen Agreement³⁶:

In regard to the movement of persons, the Parties shall endeavor to abolish the controls at the common frontiers and transfer them to their external frontiers. To that end, they shall endeavor to harmonize in advance, where necessary, the laws and administrative provisions concerning the prohibitions and restrictions which form the basis for the controls and to take complementary measures to safeguard security and combat illegal immigration by nationals of States that are not members of the European Communities. (Schengen Agreement 1985, Art 17).

³⁶ The five states which originally signed the Schengen Agreement had different views on the implications of the abolition of internal border controls for internal security. Already a federal state, Germany was not as sensitive as others to the loss of sovereignty entailed in the supranationalization of internal security; for example, chancellor Kohl supported the creation of a European police force during the 1991 Luxembourg European Council (section 3.2.1). In addition, the country’s geographic vulnerability to cross-border crime made it the strongest advocate of the agreement (Verbruggen 2013, 463–4). Furthermore, the Netherlands was equally interested in finalizing a deal, seeking to protect the tolerance of its judicial system while at the same time ensuring that the expected increase in crime was met with proportional sanctions (Kapteyn 1991, 368). For their part, France and Belgium were rather reluctant at the start of negotiations: on the one hand, France was at the time victim of a wave of terrorist attacks which shut down any discussions on the possibility for visa liberalization; on the other hand, Belgium saw the common good in tackling potential crime resulted from the abolition of border controls, but its state apparatus was too fragmented between the Flemish and the Walloons to allow the articulation of a coherent national negotiating position (Ibid, 369-70). The text of the 1985 Agreement illustrated the uncertainty of the form of cooperation, which is why it meant to serve “more as a letter of intent than an instrument with operational content” (Nilsson 2006, 116).

In this context, a German high-ranking official present in his Permanent Representation at the time compared the Schengen Agreement to a wheel—“a range of compensatory measures as spokes held together by the hub of the wheel”, namely the provision regarding the elimination of internal frontier checks (Nanz 1995, 32). The work of the Coordinators’ Group, conducted in parallel within the Community framework, echoed this line of thinking. Composed of senior experts from home affairs ministries reporting directly to their heads of state or governments, the Coordinators’ Group sought to put together a “catalogue of measures” to be adopted in view of the 1992 deadline (European Council 1988). Their most important output was the so-called ‘Palma document’, submitted to the 1989 reunion of the European Council in Madrid (European Council 1989). The document identified a series of steps that had to be taken in view of the 1992 target for the abolition of internal frontiers, making a distinction between “essential” and “desirable” measures (Bunyan 1997, 12–16). The distinction is important, because it shows the lack of political agreement among high-level home affairs officials on the implementation of the free movement of persons:

In the course of the Group's discussions it was recognized that differing views were held on their legal and political framework (...) It was agreed to set those differences on one side (...) Accordingly, the report in general, and the recommendations for measures to be taken, represent practical steps upon which all could agree and do not prejudice the legal and political questions. In many instances the measures proposed, for example those regarding provisions on immigration, mutual legal assistance and greater cooperation between law enforcement agencies, are ones which are desirable in their own right, though equally their implementation assumes greater urgency and importance in the light of objective of free movement. (Group of Coordinators 'Free Movement of people' 1989).

Herein, the emphasis placed by the Coordinators on the unanimity criterion is evident: while the goal of the internal market was “essential” for all, it was equally essential that *each* national delegation approved of the means to achieve this goal. Overall, regardless of the political choice to adopt a gradual approach (from issues that were of immediate necessity to those seen as

desirable in the long-term), there was one thing the Coordinators' Group unanimously agreed upon—and that was the need to protect the internal market by ensuring that:

...guarantees measures are adopted in order to avoid the elimination of controls at borders between Member States being a source of abuse, facilitating crime, terrorism or drug trafficking, or increasing illegal immigration. (Group of Coordinators 'Free movement of persons' 1993).

The justification was that if national border authorities could not control what crossed across their frontiers, additional action needed to be taken to ensure indirect control (Morgan 1994, 13). It is in this sense that the creation of the third pillar JHA can be considered a “spillover” from the abolition of internal frontiers (Niemann 2012, 217), in line with the neo-functionalist argument (Boswell 2010, 281). Nevertheless, it was obvious that home affairs officials were unwilling to allow the full communitarization of the domain and delegate competences to the supranational institutions in a field so close to the heart of national sovereignty. For this reason, the inclusion of JHA in the Maastricht Treaty as the intergovernmental third pillar fits perfectly the features of “new” areas of EU activity identified in new intergovernmentalism (Bickerton, Hodson, and Puetter 2015b; Bickerton, Hodson, and Puetter 2015a). At the same time, while Schengen might have initially emerged “from the failure of the [Community] to make progress on the free movement of persons” (Nilsson 2006, 116), it was clear that ministry officials were comfortable with the solution. For them, Schengen was the logical response to a difficult situation (Zaiotti 2011, 8). Given their claim to represent the national security interest at the European level, home affairs officials tried to make the most of the situation by enforcing their own ideas about the perils of free movement and transnational crime (Guiraudon 2003).

In any case, such ideas laid the foundation for the justification of institutional behavior later provided by the JHA Council. By offering themselves as the guardian of the national security interest, officials from home affairs ministries defined their role as protecting:

The attraction represented by the freedom and prosperity of our societies [...] becoming a source of profit and exploitation of misery for networks of illegal

immigration, taking advantage of our wish not to impose over-rigorous controls at frontiers on the vast majority of travelers (Trevi Group 1989, para. 3).

In conclusion, the gradual abolition of internal borders placed the issue of internal security firmly on the agenda of the European Community, despite never having been mentioned in the founding treaties. In response, home affairs officials reacted in self-defense (of their national sovereignty and security), emphasizing the dangers posed by the lack of internal borders to their capacity as states to ensure public order within their territories (De Lobkowitz 2002, 12–13). Claiming to represent the internal security interest of member states was a move that came naturally to home affairs officials, who portrayed the concerns of national law enforcement and border control authorities. Accordingly, they constructed the borderless Schengen regime as something in need of protection both from internal (cross-border crime) and external threats (terrorism, illegal immigration).

This line of justification set the tone for the subsequent understanding of AFSJ cooperation by national governments in the JHA Council. While in later years the institution gained a reputation as being oriented towards security to the extreme (Acosta 2009), home affairs officials always saw their role in the field not only as positive but also as indispensable for the protection of citizens and the national security interest. A different position was adopted by the supranational institutions, which are discussed in the next pages.

3.2.3 The European Commission: safeguarding the free movement of persons

Under the powerful presidency of Jacques Delors (1985-95), the European Commission had been very proactive in advocating the removal of physical barriers inside the Community, prominently articulating its vision in the White Paper on Completing the Internal Market (European Commission 1985, Art 47-56). A staunch supporter of the “area without internal frontiers”, the Commission first sought to achieve the gradual elimination of frontier checks through a community instrument (the Border Control Directive, initiated in 1985); however,

the negotiations for the directive got blocked in the Council despite urges for progress by the European Council (European Commission 1988b, 5). Under the circumstances, the Commission dedicated its full energy to completing the single market for goods and capital, postponing the free movement of persons and services for a later, more politically-favorable date (R. Lewis and Spence 2006, 294). This is not to say the abolition of internal border controls was not high of the agenda on the Delors Commission. In the words of Lord Cockfield, the Internal Market Commissioner and one of the main architects of the 1985 White Paper, the underlying philosophy of the Commission was that:

The frontiers and the frontier controls have become the most blatant manifestation of a Europe which remains divided. If the Community was to become a United Europe, however one defined 'united', the frontiers and the controls associated with them would have to go. It is useless simplifying the controls and leaving the frontiers in place. (Cockfield 1994, 41).

This idea of a "United Europe" differed significantly, however, from that envisaged by Jean Monnet in the age of the High Authority (Yondorf 1965). Taking shape in the 1970s, the new vision of a united continent centered on concepts such as the "People's Europe" or the "Citizens' Europe" (Shore and Black 1994, 275). While the authorship of the terms is formally attributed to members of the European Council (Tindemans 1976; European Council 1984), the Commission had undoubtedly contributed to rebranding the Community project. The move is not surprising, bearing in mind the growing criticisms to the Community's democratic deficit at the time and the difficulties to defend a Brussels-based bureaucracy unaffected by electoral cycles (Habermas 1999, 49). If the political and economic circumstances of the 1980s had allowed the re-launch of the European integration project, Commission officials like Jacques Delors understood very well that their institution required an effective legitimating strategy in order to ensure its survival (Schrag Sternberg 2013, 76). The solution found was to bring "Europe closer to its citizens" through the discursive construction of a European identity; in

this respect, a wide range of initiatives in the areas of culture, education, and youth policy were introduced for the benefit of the omnipresent citizen (Bee 2008, 441).

The efforts to “invent the people’s Europe” included but were not limited to the elimination of barriers to the free movement of persons (Shore 1993, 787). At the Milan European Council in 1985—where the White Paper was presented—Jacque Delors officially made the link between the abolition of border controls and tangible benefits for the citizen:

The objective is total removal of barriers—not just their reduction. The Commission's intention is that the internal frontier posts will disappear completely. It is not enough to reduce the number of controls currently carried out at frontiers. So long as there remains any reason whatever for requiring people and goods to stop and be checked, the main objective will not have been reached: goods and citizens will not have been relieved of the costly delays and irritations of being held up at frontiers, and there will still be no real Community. (cited in European Commission 1985a, 18).

By claiming to understand the hassles of intra-Community movers and the symbolic barrier of the border to the forging of a “real Community”, President Jacque Delors offered his institution (the subject/representative) as the one body seeking to pursue to the full extent the implementation of the border-free regime for the benefit of Community citizens (the object of representation). At this point, the constituency portrayed by the Commission went beyond traders profiting from economic integration or technocrats employed in the European bureaucracy; conversely, the Commission was seeking to reach all citizens willing to engage in border-crossing in the absence of controls, in the hope that they would—as a result—start to feel ownership over the integration project (Schrag Sternberg 2013, 78). The move was in line with the Commission’s expanding discourse on the limitations of understanding the Community in purely economic terms and its articulation of a more normative perspective (Wiener 1998, 307). Through the “Europe 1992” campaign on an “area without internal frontiers”, Commission officials envisaged a symbiosis between the elimination of borders and the emergence of European citizens, called on to become involved in Community affairs:

The removal of physical, technical, and fiscal barriers is bound to improve the Community's image in the eyes of its citizens. (...) The broadening of horizons strengthens the sense of a common identity, the feeling of belonging to the same Community. (...) Community activities will have a far more direct impact than in the past on all European citizens. The citizens themselves must be aware of this. Not only will this enable them to benefit from the European dimension, but it is also essential if they are to defend their interests... (European Commission 1988a, 2).

There were many overlaps between the constituency claimed to be represented by the European Council and that of the European Commission. But while heads of state or government purported to have listened to what the “peoples of Europe wanted” owing to their position as the highest-level elected representatives, the Commission could not pretend to have such legitimacy. Consequently, the supranational institution focused instead on how to make Community citizens want the European Union (Schrag Sternberg 2013, 81). It was in this context that borders became framed as “antonym to ‘freedom’” (Zaiotti 2011, 81). Indirectly, the Commission was targeting those citizens who were [potentially] willing to exercise the right of free movement in the first place. Notwithstanding these differences, the ties with the European Council remained strong throughout the period, as expected by the new intergovernmentalism in “new” areas of EU activity. As their President outspokenly supported integration “from the top” (Delors 1989, 2–3), Commission officials often invoked European Council conclusions to provide political impetus to their own initiatives (Drake 2000, 93–4).

The Commission was very cautious, however, with regard to the “compensatory measures” accompanying the abolition of internal frontiers. The 1985 White Paper acknowledged that the elimination of border checks created an urgent necessity to deal with visa policy at the Community level, as well as to coordinate the treatment of non-Community citizens in accessing employment or seeking asylum (European Commission 1985b, Art 55). At the same time, the Commission recognized that the two issues which concerned national law enforcement authorities the most—terrorism and drug trafficking—did not fall under the scope of the founding treaties (European Commission 1985b, Art. 29). Of course, the institution

continued to argue that the benefits of the internal market would outweigh its potential costs, and that “alternatives means of protections” had to be found:

The Commission is not trying to evade the logical consequences of dismantling frontiers, even where this involves straying into sensitive areas such (...) the fight against drugs and terrorism. It recognizes frankly that these are difficult areas, which will pose real problems, but maintains its conviction that the target justifies the effort that will be required to solve them... (European Commission 1985a, 19).

After its failed attempt to translate the Saarbrücken Accord into a directive, the Commission became acutely aware of its dependence on the benevolence of the Council for Community decision-making. There was no point to propose legislative packages that would never pass, and having the support of the European Council was proving insufficient (see quote below). The unanimity requirement on free movement legislation meant that the UK veto was insurmountable, while the signing of the Schengen Agreement made it clear “which way the wind was blowing” (Peers 2011a, 139). Lacking in this domain its regular standing from other Community policy areas, the Commission had to play by the Council’s rules:

There is, however a need for acceleration and a new political impulse which only the Council can provide. (...) the Commission would ask the Council to display the political will to attain the 1992 objective by working, with the Commission, both to adopt the measures required where Community legislation is necessary, and also to ensure the setting in hand of the essential cooperation between the Member States, and between the latter and the Commission. This would be in line with the conclusions of the Rhodes European Council of 2-3 December 1988, which invited Member States to designate a single person to be responsible for the necessary co-ordination. (European Commission 1988b, 3).

Given the progress of intergovernmental negotiations in the Schengen working groups, the choice for the supranational institution was between being completely excluded and participating in whatever capacity to ongoing discussions, which would have proceeded regardless of the Commission’s approval (Zaiotti 2011, 77). According to a prominent Commission official working at the time on the issue, his institution decided not to “push its luck in competence terms”, to the “understandable exasperation” of the Parliament—who had

hoped the free movement of persons would be a Community instead of an intergovernmental project (Fortescue 1995, 20–21). In the words of Martin Bangemann, Vice-President of the Commission:

The Commission's general approach is pragmatic rather than doctrinaire, particularly where questions of competence are concerned. Thus, where the best prospects for progress lie in going down the road of intergovernmental conventions rather than Community legal instruments, the Commission has opted for making progress rather than fighting time-consuming battles for competence. This pragmatic policy has led to the modification of the approach originally set out in the 1985 White Paper. (cited in European Parliament Resolution, 14 October 1991).

The approach of the Commission fits closely the new intergovernmentalist expectation regarding the behavior of supranational institutions in the “new” areas of EU activity. In the context of a policy process centered on intergovernmental decision-making, the Commission focused on maximizing its “observer” status to the Schengen process, a move facilitated by the active presence of Adrian Fortescue—who had been Lord’s Cockfield’s chef de cabinet when drafting the 1985 White Paper, and who became the first Director General of DG JLS in 1999 (R. Lewis and Spence 2010, 85). In 1989, Fortescue explained that:

We are a long way from the point where any member state is prepared to entrust its security to another member state because it believes the other state can do the job just as well. It would be a major psychological and political change. (cited in James 1989).

Under the circumstances, the Commission sought to “prove its [expert] worth” at the intergovernmental negotiating table (Myers 1995, 277–8), which is how it became “fully associated” to the workings of the third pillar instead of being entirely excluded (Maastricht Treaty, Art. K4). But even after a designated Task Force was created inside the Secretariat General to deal with JHA issues (1995), the Commission remained acutely aware of its position as a “tolerated partner” in the arrangement (De Lobkowitz 2002, 49). The sensitive nature entailed in the compensatory measures to the internal market—closely linked to member states’ sovereignty—made the Commission a restrained actor, far from its powerful position in the

first pillar where it enjoyed exclusive right of initiative (Monar 2012b, 729). In addition, the Commission's orientation towards the Council burned an important bridge in its relation with the Parliament, as the latter brought legal action against the Commission for failure to implement the provisions of the Single European Act on the free movement of persons (Case C-445/93). The Commission's pragmatic position was perceived as complacency by the Parliament, and often attracted the wrath of its members (Zaiotti 2011, 77).

Nevertheless, at the declarative level, the Commission continued to defend the abolition of internal border controls throughout the period. For example, in an article published in The Daily Telegraph in May 1992, the Commission was cited as claiming that:

Failure to do away with border controls would be seen, both by public opinion in the Community and by the world outside, as a failure of the Community itself. (...) We don't want [Community] passengers even to have to wave their passports. You shouldn't have to carry any documents at all. (cited in Johnson 1992).

All things considered, the Commission's initial justification of institutional behavior in the future AFSJ perfectly fits the profile of supranational institutions in "new" areas of EU activity expected by the new intergovernmentalism (Bickerton, Hodson, and Puetter 2015a, 30–2). In fact, the tension between the self-proclaimed goal to ensure the abolition of internal frontiers and the careful attempt not to infringe on member states' sovereignty in the process would characterize the Commission's institutional positioning in the AFSJ for years to come. Claiming to act on behalf of Community citizens willing to exercise the right to free movement, the Commission defined its institutional role in the future AFSJ in terms of the imperative to safeguard the free movement of persons—even at the expense of its own influence in the process. In this context, it can be said that the Schengen Agreement provided what would later become one of the Commission's major *raison d'être*—protecting the free movement of persons as a tangible accomplishment of the European integration project. As emphasized by

the Home Affairs Commissioner decades later: “Schengen exists to defend freedom of movement” (cited in Vandystadt 2012a).

The other intriguing aspect about the Commission’s original justification of institutional behavior in the AFSJ referred to its often implied ‘wait-and-see’ policy regarding the development of the field. Lacking both the institutional standing and the personnel capacity to take on board the new JHA issues, the Commission was content to allow the area to develop organically, convinced that any intergovernmental governance arrangement would only be temporary (Zaiotti 2011, 77). Indeed, Schengen officials often claimed that their work should be perceived as a “laboratory” and precursor to Community-level policy-making—a promise on which they delivered taking into account the 1999 incorporation of the Schengen acquis into the EU legal framework and the empowerment of the Commission in the field (Monar 2001, 750–1). Under the circumstances, Commission officials justified their compliance with intergovernmental decision-making on the implementation of free movement of persons as pragmatism in anticipation of the spillover logic, expected to lead from cooperation on the abolition of internal frontiers to the supranationalization of internal security policies. This pragmatic standpoint was quite far from the position of the Parliament, presented in the next section.

3.2.4 The European Parliament: the defender of fundamental rights

For its part, the European Parliament had supported the implementation of free movement of persons years before the issue was formally placed on the agenda of the other institutions. A famous example is the 1982 campaign of German MEP Dieter Rogalla, who initiated a bike tour from Bochum (Germany) to Strasbourg (France) as a sign of protest against the existence of border controls inside the European Community. His controversial campaign attracted a lot of media attention, as cyclists refused to present their passports at frontier check-points or tore down border fences in their passing (Financial Times 2005). The idea was simple: given the

provisions of the 1957 Treaty of Rome establishing the European Economic Community, MEPs argued that border controls among member states were an illegal and outdated practice that should have been abolished (Pearce 2013, 106).

In fact, the removal of barriers to the internal market was the driving force behind the work of the ‘Kangaroo Group’—composed of MEPs who advocated the realization of “projects which the vast majority of its citizens would consider advantageous” (The Kangaroo Group n.d.). This initiative ran in parallel to the more encompassing constitutional reforms proposed by the ‘Crocodile Club’ of Altiero Spinelli, who envisaged a “constituent role” for the Parliament in line with ideals of the federalist movement (Corbett 1998, 144). The fact that the Parliament claimed to speak on behalf of Community citizens was hardly surprising; after all, it was the only “representative institution with democratic credentials based on direct elections”, held for the first time in 1979 (Shackleton 2012, 126). But given competitive claims from the European Council to represent “the peoples of Europe” (European Council 1985b) and the Commission’s commitment to “relieve” European citizens from the hurdles of frontier checks (European Commission 1985a, 18), the Parliament was forced to find a different niche to make its voice heard.

In this context, the Parliament welcomed the determination of the European Council and the Commission to finally implement the free movement of persons in the mid-1980s, but strongly criticized the intergovernmental means to achieve it “outside the democratic control of the Parliament” through the Schengen Agreement (European Parliament Resolution, 14 October 1991). Calling for the lawful adoption of Community instruments to regulate the abolition of internal frontiers and their ensuing consequences, the Parliament was enraged by the Commission’s collaboration with member states in the development of the Schengen system, perceived as “capitulation” to national governments (Monar 1994b, 76). The main

positions of the Parliament can be summarized in a set of oral questions addressed by five MEPs on behalf of the Green Group to the Council:

- (1) How can the accession of six of the twelve Member States of the [Community] to Schengen Agreement be reconciled with the Commission's statements on free movement of persons?
- (2) How does the Council consider the Schengen Investigatory System (SIS) can be reconciled with respect for individual freedoms? Does it not consider that the SIS has the features of a 'police service' removed from any democratic control?
- (3) Does the Council not consider that the European Parliament should be more closely associated with the drawing up of decisions regarding the free movement of persons within the Community?
- (4) In view also of the intergovernmental nature of the Schengen Agreement, does the Council not consider that a Community policy should be drawn up with the aid of the European Parliament on the fight against drug trafficking? (European Parliament 1990).

Not only was the Parliament against the idea of “a Europe of different speeds or variable geometry” proposed by Mitterrand (Mitterrand 1984), but it also deplored the lack of parliamentary or judicial control over the Schengen governance arrangement (O’Keeffe 1991, 212). Of course, the main complaint remained the exclusion of the Parliament from decision-making on areas associated with the free movement, which developed outside the purview of Community institutions. Nevertheless, there was not much the Parliament could do to prevent the evolution of the Schengen regime. As mentioned earlier, the Parliament challenged the Commission before the Court of Justice for failure to uphold the Single European Act regarding the free movement of persons (Case C-445/93), but their case was dismissed when the Commission put forth three proposals for directives to this effect in 1995, which again reached a deadlock in the Council (Zaiotti 2011, 122). Otherwise, MEPs often voiced their opposition openly, not missing any chance to condemn the slow progress in the achievement of freedom of movement within Schengen:

This agreement [Schengen], which was signed ten years ago, has primarily been used to hide the total lack of political will on the part of the Council and the Commission to institute full freedom of movement for persons. (European Parliament 1995).

In the face of this *fait accompli*, MEPs decided to change strategies and profit from the Parliament's internal reorganization in anticipation of the Maastricht Treaty—which considerably strengthened the institution through the introduction of the co-decision procedure (Shackleton 2012, 129). Accordingly, on 16 January 1992, a new standing committee with 30 members and substitutes was established: the Committee on Civil Liberties and Internal Affairs (Esders 1995, 260). The already established Committee on Legal Affairs and Citizens Rights (JURY) was not thrilled about the new structure, which was seen as “stripping off some of its powers” (Minutes of JURY Committee meeting, 11 December 1991). However, the Parliament decided that a different committee was necessary to mirror the creation of a new Council formation (the future JHA Council) by addressing issues “directly or indirectly linked to the abolition of internal frontiers in the Community by 1993” (Letter from LIBE Committee Chairman to the Vice-President of the Commission, 21 January 1992).

The mandate of the committee was clear from the start, covering first and foremost matters relating to “human rights problems in the Community, [and second] civil liberties in the Communities and the security and the free movement of persons” (European Parliament Decision, 16 January 1992). But while the Parliament's focus on human rights was not in itself a novelty—as the External Affairs Committee held a debate every year on the state of human rights outside the Community—the explicit agenda of LIBE to protect fundamental rights inside the newly-founded European Union was both unprecedented and a provocation to member states, which considered themselves to have an outstanding human rights record (De Capitani 2010, 125–6). This nuance must be read in the context of the Maastricht Treaty, which gave no legislative competence to the Parliament in the third pillar but only provided that the institution was to be “informed” of ongoing discussions and its opinions “duly taken into consideration” (Art K.6). Under the circumstances, the Parliament sought for alternative avenues to have its voice heard—an obvious intention from the very choice of title for its

committee ('Civil Liberties' as opposed to plainly 'Justice and Home Affairs' as selected by the Council). In a move consistent with the Parliament's tendency to exploit existing powers (Corbett 1998, 92), the LIBE Committee based its fundamental rights mandate on a different Maastricht Treaty provision, which clearly specified that the policy areas accompanying the free movement of persons were to comply with "the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and the Convention relating to the Status of Refugees of 28 July 1951" (Art K.2[1]). For the first years of LIBE activity, most members focused on the annual political debates in JHA, which attracted a lot of media attention and became increasingly lively (De Capitani 2010, 125). The committee would often antagonize the Council openly because of its tight confidentiality policy, which excluded the Parliament even from being properly informed about JHA developments (Esders 1995).

To conclude, the implementation of free movement of persons had important consequences for the European Parliament in terms of both internal organization and taking a substantive policy stance. Since the European Council and the Commission had already framed the "area without internal frontiers" for the benefit of the European people—the 'usual' constituency of the Parliament (Wessels 1999, 209)—members needed something else to gain a legitimate say in the border-free regime. Excluded from decision-making in the intergovernmental Schengen 'club', the Parliament found an alternative way to get involved in the third pillar as the "champion of the citizen" and defender of European values (European Parliament 2008). Playing the human rights card was clever not only because it was ethically problematic to argue against such a position in the EU, but also because it attracted support from a lot of non-governmental organizations, think tanks, and civil rights activists—transforming LIBE over time into "one of the most important and paradigmatic Standing Committees in Parliament" (Carrera, Hernanz, and Parkin 2013, 6). In the end, the creation of the "area without internal frontiers" was presented as an opportunity to safeguard the freedoms

and rights of EU citizens—a position that has become so ingrained that it is now taken for granted by members of the LIBE Committee (European Parliament n.d.).

Consequently, in the language of the representative claims framework, it can be said that the Parliament (the maker/claimant) offered itself (the subject/representative) as the embodiment of European human rights values (the object of representation) which should be accepted as such by the general public (the audience/the addressees). Despite belonging to a partisan institution composed of different political groups, MEPs found themselves generally united on this front. In the end, it was exactly the Parliament's exclusion from decision-making in the third pillar that forced it to seek a different pattern of justification in order to legitimize its institutional position. This was found in the defense of fundamental rights of EU citizens inside the Community, which in later years proved incredibly inconvenient for the Council, as shown in the next chapters. For the time being, the Parliament had defined its institutional role according to the values of the constituency they claimed to defend—EU citizens—who were portrayed through frequent representative claims as wanting the protection of their fundamental rights and values in the “area without internal frontiers”. This original institutional positioning of the Parliament soon transformed into a mission for some MEPs active in the third pillar, who presented their institution as the human rights watchdog in the EU. This line of justification was maintained, albeit with variation, throughout the evolution of the AFSJ.

3.3 Conclusion: default positions and expectations of institutional behavior

Figure 3.1 below illustrates the initial patterns of policy justification given by the European Community's institutional actors on the issue of free movement of persons. The third row of the figure reveals an important overlap between the objects of representation for which the European Council, the Parliament, and the Commission claimed to stand; indeed, officials from the three institutions essentially placed citizens at the center of their activity, but emphasized

different aspects as being important for their intended constituencies. The European Council claimed that “what Europe’s people wanted” was the completion of the single market, the Parliament claimed that EU citizens cherished the respect of their human rights and fundamental freedoms, while the Commission pledged to safeguard an essential right of Community citizens open to exercise free movement. The Council alone claimed to stand for the national security interest, aiming in this respect to ensure the same level of security in the absence of internal frontiers. From this perspective, ministry officials clearly distinguished themselves from positions of heads of state or government, Commission employees, and MEPs. The types of justification used to legitimize these institutional positions—illustrated in the fifth row of Figure 3.1—aim to show that officials used for the most part instrumental arguments to defend their positions. Such arguments included emphasizing the benefits of the single market (highlighted by the European Council), the merits of EU-level approaches to implementing the abolition of internal border controls (underlined by the Commission), or the necessity to protect the internal security of member states (stressed by the Council). The Parliament alone used moral and ethical types of justification, emphasizing the importance of protecting human rights and fundamental freedoms in the European Community.

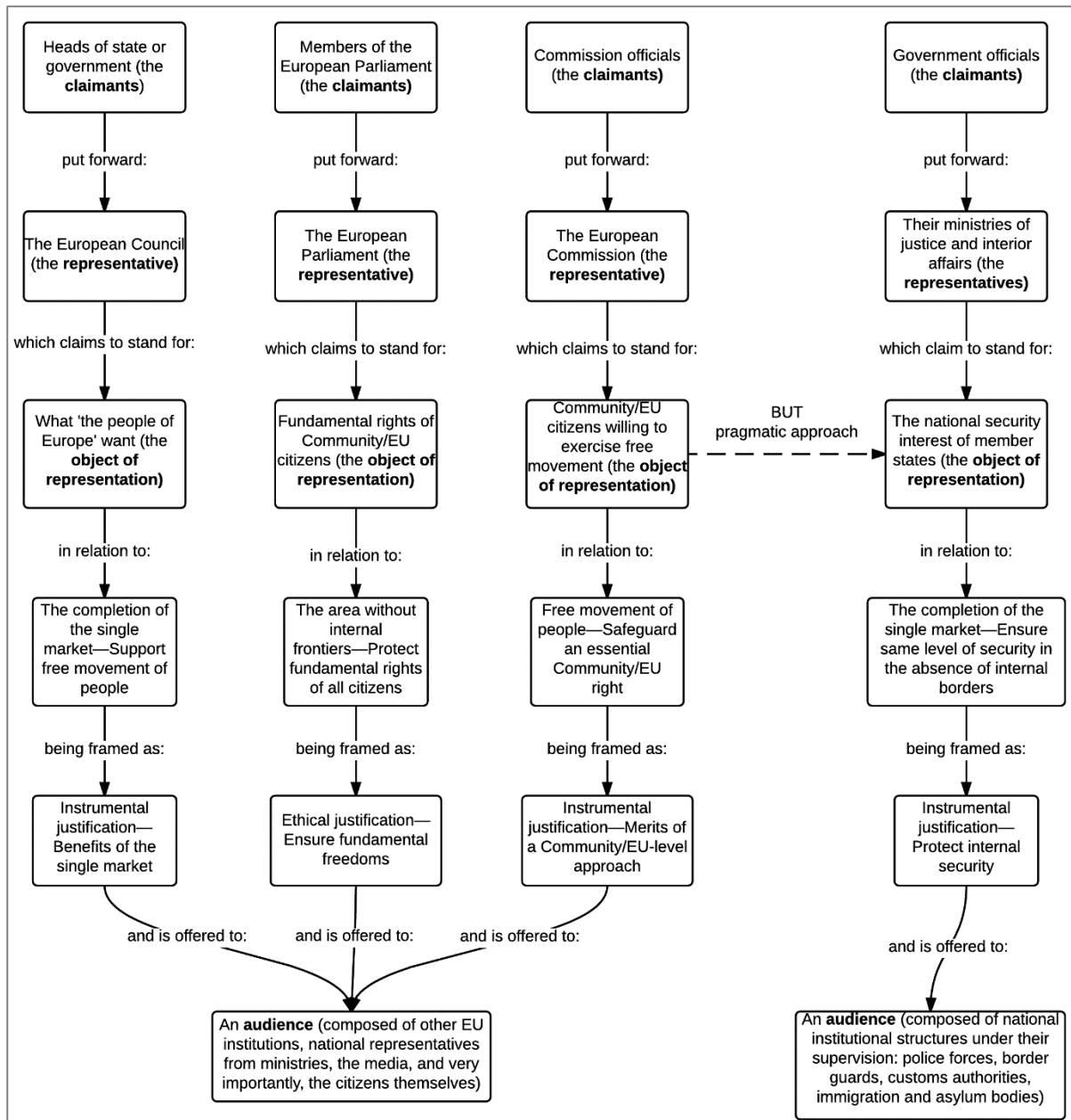


Figure 3.1: Matrix of representative claims framework for Community institutions vis-à-vis the implementation of free movement of persons. Own account.

Nevertheless, given the centrality assumed by intergovernmental working parties in the Community framework and in the Schengen system, the Commission was quick to understand that its representative role to serve Community citizens willing to exercise free movement rights could best be accomplished by working *with* rather than *against* ministry officials. Efforts to formally demand communitarization at this point in time would have been futile. Although realizing that its compliant behavior would antagonize the Parliament, the Commission decided to collaborate closely with the Council and wait for future developments

in order to consolidate its position. At the same time, the Commission recognized the benefits of invoking European Council conclusions to legitimize its own activities and advance the implementation of measures.

In a similar vein, the Parliament acknowledged that the only way it could become a legitimate actor in decision-making was to appeal to European-wide values that would attract public attention. The infringement of individual freedoms (such as privacy) was one of the first issues addressed by MEPs in relation to the creation of the Schengen Information System. This position implied directly challenging government officials, who commonly placed security concerns ahead of individual freedoms. As shown in the next chapters, the divergences between the Council and the Parliament on the issue of data protection only became deeper over time. Conversely, MEPs might have perceived the growing influence and representative claims of the European Council as hijacking their role as the only EU institution directly elected (Bulmer and Wessels 1989, 114); nonetheless, they were not too vocal about it during this initial period.

In contrast, there was a much more hierarchical relation between the European Council and the Council, as heads of state or government often gave ministry officials various tasks which they had to “duly obey” (Werts 2008, 195). The differences between the constituencies which the two actors claimed to represent were, however, too significant for the hierarchical chain to work smoothly. The delays in the implementation of free movement provide evidence of the difficult negotiations of home affairs officials in the attempt to find common ground, despite repeated urges from their respective heads of governments. Indeed, the tension between the objectives of the European Council and those of the Council would continue throughout time.

In conclusion, the original behavior of EU institutions in policy areas related to justice and home affairs depended on the patterns of justification offered by relevant officials to legitimize their policy positions and decisions. This chapter illustrated the mechanisms through

which this logic of justification unfolded, as officials rendered their inspective institutional roles intelligible in line with whom/what they identified as the constituency to be represented in the process of implementing the free movement of persons. Whether they claimed to stand for the “people’s Europe” who wanted the single market (the European Council), the internal security interest of member states (ministry officials), Community citizens willing to exercise the right to free movement (the Commission), or fundamental rights within the “area without internal frontiers” (the Parliament)—EU institutions engaged for the first time in making representative claims about issues that would form the basis of the AFSJ. This had an important impact on the development of institutional lines of justification in the field, as the original institutional positions on the topic of free movement of persons created the baseline in respect to what became expected from the European Council, the JHA Council, DG JLS, and the LIBE Committee in the AFSJ. The next chapter explores how the justification and legitimation of institutional behavior evolved from the Maastricht to the Lisbon Treaty, as the constituencies claimed to be represented by the four institutions multiplied in parallel with the expansion of EU competence in the field.

4 THE EVOLUTION OF INSTITUTIONAL BEHAVIOR IN THE AFSJ (1994-2009)

The European Union's Area of Freedom, Security and Justice has witnessed from 1994 to 2009 a substantial expansion of competences as well as a period of strong institutional consolidation. Over the course of 16 years, the policy area added to the EU mandate at Maastricht as the third pillar JHA evolved from a small-scale, entirely intergovernmental arrangement to a far-reaching, partially communitarized policy domain. From the perspective of institutional competences, this rapid growth meant that the scope of EU decision-making went far beyond the original purpose of JHA, namely to complement the implementation of free movement of persons in the Schengen Area (see chapter 3). Indeed, it was during this period that fields like migration and asylum, civil and criminal justice, counter-terrorism and police cooperation became established areas of EU policy activity. The expansion of EU competence in the AFSJ was mirrored in the institutional infrastructure, as the Council, the Commission, and the Parliament created or consolidated organizational units to work on the new issues. Heads of state or government in the European Council also started to meet more frequently during the period and discuss AFSJ policy.

This chapter argues that the increase in institutional mandates in the AFSJ triggered a diversification in the range of justifications available to EU officials in order to legitimize institutional behavior. Specifically, the rise in tasks and functions fulfilled by each institution in the decision-making process meant that people from new units could easily perceive their institutional roles as different—i.e. addressing different constituencies—from those originally held by their organization. To put it differently, the more competence the EU accumulated in the AFSJ, the broader the universe of competences in the name of whom representative claims could be made by officials from institutions—and consequently the higher the possibility for variation or inconsistency in institutional positions. Depending on treaty provisions, this

diversification in patterns of justification used to legitimize institutional behavior was more visible for the Commission's and to some extent the Council, and less noticeable for the Parliament's and the European Council.

The main changes in institutional mandates were introduced by the Amsterdam Treaty (entered into force 1 May 1999), which brought under community method decision-making several domains from the third pillar—namely the Schengen acquis, migration, asylum, and civil law policy (Title IV). In terms of institutional engineering, the most important development referred to the creation in 1995 of a Commission Task Force dedicated to JHA issues inside the Secretariat-General, which evolved into a fully-fledged Directorate-General in 1999: DG Justice, Freedom, and Security (JLS after its French abbreviation) (R. Lewis and Spence 2010, 106). In addition, the Parliament's LIBE Committee expanded its institutional structure to participate in consultation and even co-decision on some dossiers after the end of the five-year “transitional period” envisaged in the Amsterdam Treaty (De Capitani 2010, 128).

For its part, the JHA Council remained the key decision-making actor in the field throughout the period, broadening its institutional structure to accommodate multiple developments. These included: a) the 1999 incorporation of the Schengen Agreement into the EU treaty framework, b) the growing EU competences in the AFSJ granted by the Amsterdam Treaty, and c) the progressive enlargement from 12 to 27 member states following three rounds of enlargement (1995, 2004, and 2007). At the same time, the JHA Council had to operate from 1999 to 2009 in an environment of differentiated integration—given the opt-outs of the United Kingdom, Ireland, and Denmark from the JHA acquis and the participation to the Schengen Area of non-member countries Norway, Iceland, Switzerland, and Liechtenstein)—with different decision-making rules applying in the first and the third pillars (Nilsson and Siegl 2010, 74–5). Finally, the European Council was involved in the AFSJ beyond the regular ‘ad-

hoc' basis, as heads of state or governments were the level adopting multi-annual programs setting the policy agenda in the field (Tampere 1999; The Hague 2005; Stockholm 2009)³⁷.

“External shocks” (Mahoney and Thelen 2010, 4) also played a role in the evolution of the AFSJ during the period. The 2001 terrorist attacks in the US marked the prioritization of counter-terrorism policy at the EU level, materialized in a wide range of third pillar actions adopted in order to facilitate police and judicial cooperation in criminal matters (Argomaniz 2009). Most of this activity—not foreseen by the Amsterdam Treaty and the subsequent Tampere Program—became the focus of the JHA Council especially after the terrorist attacks in Madrid (2004) and London (2005). Furthermore, the recurrent waves of immigrants coming into the EU during the period shifted the focus to cooperation with third countries (the so-called ‘Global Approach to Migration’)—which prompted institutions to develop units or committees covering the external dimension of the AFSJ (Lavenex and Kunz 2008).

Consequently, the 16 years between the Maastricht Treaty and the Lisbon Treaty were characterized not only by a steady increase in the scope of EU competence in the AFSJ, but also by an exponential growth of the activity of EU institutions working in the field. In fact, the AFSJ was often cited as the fastest-growing EU policy area at the time (Monar 2005, 111). This frenzy of decision-making implied that officials inside institutions had significant leeway to decide on the purpose of EU activity in the AFSJ and their own role thereof. The future of the AFSJ was uncertain, as it was unclear in which direction this bundle of policy domains was heading and what effects it would have on member states and citizens. Under the circumstances, officials from each institution attempted to legitimize their role in the AFSJ by making frequent reference to the interests or values of the constituencies [they believed] they were expected to represent.

³⁷ Apart from changes in the main EU institutions, the period 1994 to 2009 has also seen a proliferation of semi-autonomous agencies in the AFSJ, already listed in chapter 1.1 (cf. Lavenex and Wallace 2005, 470).

The present chapter provides an overview of this process of justifying institutional behavior through representative claims-making. The bulk of the chapter draws on an analysis of claims by high-level political officials from each institution cited in *Agence Europe*—the independent press agency specialized in EU news—during the period 1 January 1995 to 30 November 2009³⁸. This was essential to observe the evolution of representative claims associated with each institution, as well as to follow their diversification. Before moving to a more detailed account of each institution in turn, the chapter starts with a historical overview of the period that encompasses general institutional positions to main developments. The discussion is based on primary documents, interview material, and secondary literature.

4.1 *Institutional consolidation in the historical context*

There are two types of factors that contributed to the evolution of the AFSJ from 1994 to 2009. The first set of factors can be categorized as ‘internal’ to the European Union and refers to the constitutional and institutional changes implemented during the 16-year period. Chronologically, these included a) the negotiation and adoption of a new treaty that reformed the third pillar and communitarized some AFSJ subfields (1995-9), b) the decision to adopt multi-annual programs in the AFSJ at the European Council level in order to develop the domain more rapidly (1998-9), c) the Eastern Enlargement negotiations, which required a clarification of the AFSJ *acquis* following the adoption of the Amsterdam Treaty (1997-2004/7), and finally, d) the debates on the European Constitution, which entailed the creation of a Working Group on ‘Freedom, Security, and Justice’ whose proposed reforms were codified in the Lisbon Treaty (2002-2009).

³⁸ 1 January 1995 represents the date when *Agence Europe* started to make its articles available online, while 1 December 2009 is the date of entry into force of the Lisbon Treaty.

At the external level, two developments were important. On the one hand, the terrorist attacks in the US on 11 September 2001 (henceforth 9/11) placed counter-terrorism policy firmly on the EU agenda. On the other hand, the frequent immigrant deaths occurring at EU borders (Bendel 2005) led to a refocus of EU migration policy towards cooperation with third countries. Each of these “external shocks”, as well as the reaction of different institutions to them, are discussed below.

4.1.1 Internal developments

4.1.1.1 The 1996-7 Intergovernmental Conference and the Amsterdam Treaty

To begin with, the entry into force of the Maastricht Treaty and the formalization of the third pillar was full of complications. Within EU institutions, officials were trying to make sense of the concrete implications of the pillar structure in terms of decision-making and policy measures. Most practitioners and observers of JHA policies agreed that the legal and institutional set-up of the third pillar was ineffective and in urgent need of reform (Den Boer 1998). This consensus paved the way for including a reform of the third pillar on the agenda of the 1996 Intergovernmental Conference, which led to the signing of the Amsterdam Treaty.

The Commission, the JHA Council, and the Parliament all supported the reform. In a report taking stock of the functioning of the Maastricht Treaty, the Commission emphasized the lack of results in JHA, showing that by 1995 the Council had only adopted two common actions, one convention, no common position—but around 50 recommendations, resolutions and conclusions, which were part of the traditional way of cooperation available before Maastricht (European Commission 1995, 199). In similar fashion, JHA Council officials acknowledged the deficiencies of the third pillar:

too dense decision-making process, legal content in line with the preferences of the least ambitious member state owing to the requirement of unanimity, too small role for the Commission, the absence of clear objectives applying the same security logic to the management of migration and the fight against crime, rendering Europe too inhospitable [for skilled migrants], insufficient participation of the Parliament, community judicial review practically

inexistent, use of international conventions as legal instruments that only enter into force after all the 15 states have ratified them ... (de Kerchove³⁹ 1997, 105).

The Parliament had already affirmed on multiple occasions that the functioning of the third pillar was faulty⁴⁰; however, its President Klaus Hänsch was concerned that member states would not support a sweeping reform of JHA decision-making only two years after the Maastricht Treaty entered into force (Hänsch 1995). Indeed, given the short time period since the implementation of the third pillar, member states agreed during the Intergovernmental Conference that it was better to pursue a gradual approach in the field by moving only some issues to the first pillar, namely border management, migration, asylum, and civil justice; conversely, the remaining issues—police cooperation and criminal justice most importantly—were left under the third pillar, thus creating the “(in-)famous ‘pillar divide’” (Monar 2010c, 34).

Very significant for the argument of this thesis, the Reflection Group on JHA present at the Intergovernmental Conference framed the necessity of third pillar reforms as part of the necessity to address the Union’s democratic deficit—especially evident after the difficult ratification of the Maastricht Treaty. Accordingly, the Group proposed a link “between ‘serving the citizens’ interest’ and the claimed ‘demand on the part of the public for greater security’, extending to ‘the citizens calling for better handling of the challenge posed to the Union by the growing migratory pressures’” (Reflection Group, cited in Den Boer and Wallace 2000, 513). The Reflection Group was thus making a general representative claim on behalf of citizens, portrayed as wanting protection from the security-threatening immigration waves.

The text of the Amsterdam Treaty became very ambitious in the end, setting the goal for the EU to progressively establish an Area of Freedom, Security and Justice (TEU, art 61).

³⁹ Gilles de Kerchove was Director for Justice and Home Affairs in the Council Secretariat from 1995 to 2007. In 2007, he became the first EU Counter-Terrorism Coordinator.

⁴⁰ The main problems identified by the Parliament referred to the lack of democratic and judicial control in the third pillar, caused by the absence of the Parliament from decision-making on the one hand and of the Court of Justice from judicial review on the other (European Parliament 1996, 3).

The details of this objective were listed in the first multi-annual program in the AFSJ, discussed in the next subsection.

4.1.1.2 The Tampere Program

The ‘window of opportunity’ (Kingdon 1995) opened by the Amsterdam Treaty to transform JHA into the AFSJ was immediately explored by the Commission. Indeed, on 21 October 1998, Commission President Jacques Santer used his annual speech on the legislative program before the European Parliament to put forward the idea of a special European Council summit on the AFSJ (Bunyan 2003). A few days later, the idea was officially tabled by the Spanish government and resulted in the adoption of the Tampere Program (House of Lords Select Committee 1999). An official working at the time in the Commission’s Task Force on JHA describes the preparations vividly:

The idea of having Tampere was inspired by people in the internal market: we [in the Commission] understood that in order to develop something in the EU, you need to have: 1) political commitment, and 2) a plan. (...) If you are in the Commission and see so many different member states and their citizens, you have the overview [picture], and it’s the EU citizen you target. You then realize that it’s useful to have a new concept: a listing of what things you need to develop. (AM0306, 17 September 2014).

The quotation above illustrates a representative claim made by a technocratic official of the European Commission on behalf of his/her institution, portrayed as working for the benefit of “the EU citizen”. Moreover, the Commission’s plan to develop “a listing” of measures needed in the AFSJ was more than declarative. For example, the newly appointed Commissioner for Justice, Freedom, and Security Antonio Vitorino actively lobbied national capitals in anticipation of the Tampere meeting of the European Council (Occhipinti 2003, 80; Kaunert 2010b, 179). His proactivity—as well as the contribution to the discussions of the Director of DG JLS, Adrian Fortescue—allowed the Commission to gain an important role in setting the Tampere agenda and receiving additional prerogatives in the AFSJ (Elsen 2010, 262). One example is the introduction of the Scoreboard system monitoring progress in the field, which

was to be the responsibility of the Commission (European Council 1999, 1). The Commission's maneuvering of the Tampere meeting was a clear example of officials' agency making a difference in decision-making outcomes, despite organizational structures not specifying their institutional role thereof.

Of course, the willingness of the European Council to provide substantive content to the new Title IV of the Amsterdam Treaty was crucial in the process of adopting the Tampere conclusions. According to an official involved in the process:

It was much easier for heads of state or government to meet and agree on strong deadlines than to let ministers take decisions, because they [ministers] are bound by the wording of the treaty, e.g. the Common European Asylum System was absolutely not in line with the treaty. Some delegations explained to us that it was very easy to agree on general principles that are not legally binding, whereas ministers of large administrations would always ask the practical questions regarding implementation: Is this feasible? How? Who will pay for it? (AM0305, 8 May 2014).

In fact, JHA ministers were not even present at the Tampere European Council—a venue reserved for heads of state or government and their foreign affairs ministers. Some commentators reported that the JHA Council was very unhappy about its exclusion from the Tampere summit (Bunyan 2003, 4), and that some ministers even refused to take part in the their own meeting following the summit in order “to take revenge for the fact that they, the politicians most involved, had not been welcome in Tampere” (Werts 2008, 134). Nevertheless, since there were no formal complaints by the JHA Council on the matter, it is difficult to assess the degree of competitiveness between ministers and their heads of state or government in setting the agenda on the AFSJ.

For its part, the European Parliament used the Tampere Program to articulate its own position in the AFSJ. In a report written for the LIBE Committee by civil liberties activist Tony Bunyan and a group of like-minded legal scholars (Heiner Busch, Elspeth Guild, and Steve Peers), the role of the Parliament was defined as follows:

While the Parliament is one of the main EU institutions, its role is quite different from those of the Council and Commission. (...)

The Parliament is directly elected by EU citizens and is accountable to them. It therefore has the unique role of scrutinizing new policies and the consequent practices and, above all, of representing and protecting the interests of all the people in the EU.

Nowhere is the EP's role more important than in the field of justice and home affairs, which so critically effects civil liberties. (European Parliament 2000, iii).

In addition to formulating direct links between the Parliament and its constituency—composed of “all the people of the EU”—the claims above identify distinct characteristics of the AFSJ. Specifically, the role of the Parliament is seen to “to scrutinize new policies” and their consequences on the civil liberties of EU citizens. In other words, the Parliament is claimed to embody one value of its constituency, namely the protection of civil liberties. Indeed, according to an administrator present in the LIBE Committee starting 1998, officials were very excited about the new powers granted to them by the Amsterdam Treaty; consequently, they wanted to help the committee “make a name for itself.” (AM0405, 5 November 2014). One way to achieve this ‘name’ was to pursue a strong and vocal fundamental rights agenda, which became most articulate in respect to data protection in the EU fight against terrorism (De Capitani 2010, 135).

Other internal developments important for the evolution of institutional behavior in the AFSJ were the Eastern Enlargement and the Commission's administrative reform, discussed in the next pages.

4.1.1.3 The Eastern Enlargement and the Commission's internal administrative reform

The organizational structures of the European Council, the JHA Council, and the Parliament were immediately affected by the EU enlargement to the East—which increased the number of member states from 15 to 27 by 2007. According to a Commission official involved in the negotiations, the enlargement forced national governments “to move beyond the confrontational approach between opposing blocs which had long divided Europe [in the AFSJ]

to define key objectives and give the new member states the financial resources and legal means to achieve them” (de Lobkowitz 2009, 99). In fact, member states and EU institutions alike needed to overcome differences of opinion regarding the future of the AFSJ and present a unified front in their negotiations with Central and Eastern European applicants—for which “being part of the Schengen zone was the real symbol of EU membership” (AM0305, 8 May 2014). In fact, the Council and the Commission had to engage in an active exercise of defining the JHA acquis, which needed to be adopted by candidate countries in its entirety (Grabbe 2000, 13). Taking into consideration the changes brought by the Amsterdam Treaty in 1999 and the subsequent legal instruments adopted, member states decided to additionally create within the JHA Council a Collective Evaluation Group in order to keep track of both legislative and operational aspects (Günter Krenzler and Wolczuk 2001, 11).

For its part, the administrative structure of the Commission in the AFSJ was not impacted by the Eastern Enlargement beyond the intake of new officials who were recruited from the new member states. Instead, the Commission’s internal organization was shaken up by the corruption scandal and ensuing resignation of the Santer Commission in 1999 (Höreth 2001, 1). The White Paper on European Governance that followed marked a turning point in the functioning of the Commission owing to its focus on the participation of and accountability to EU citizens (European Commission 2001). According to the text, the “legitimacy [of the Union] today depends on involvement and participation” instead of “its ability to remove barriers to trade or to complete an internal market” (ibid, 9). This change of focus in the Commission’s discourse rapidly translated into practices, as the institution introduced in 2003 the compulsory procedure of impact assessments to prepare its major legislative proposals (European Commission 2006, 7). By expanding the space allocated to ‘explanatory memorandums’ within Commission proposals, impact assessments offered essential material for the argumentation and justification of new initiatives (see chapter 2.3.2). In other words,

the Commission's internal administrative reform only exacerbated the need for justification and thus the inclination to make representative claims on behalf of EU citizens and the EU interest more generally.

4.1.1.4 The Constitutional Convention

Finally, the last major internal EU development that shaped the development of the AFSJ in the early 2000s consisted of the constitutional debates held at the Convention on the Future of Europe (2002-3). They resulted in the rejection of the ensuing Constitutional Treaty in Dutch and French referendums (2005), followed by a “reflection period” in which the European Council decided that it can maintain the provisions adopted (2005-7) by revamping the Constitutional Treaty into the Lisbon Treaty. After a difficult ratification process, the Lisbon Treaty entered into force on 1 December 2009 (Beach 2012, 217). This chain of events is important because the Convention included discussions regarding a far-reaching constitutional reform of the AFSJ (Monar 2005). Headed by former Irish Prime-Minister John Bruton, the Convention working group dedicated to AFSJ issues was quick to acknowledge the necessity of a radical reform, particularly in respect to abolishing the pillar structure and communitarizing police cooperation and criminal justice (Barbe 2007, 43). Composed of representatives of national governments, a large number of Parliament members, and several Commission officials, Working Group X emphasized the importance to “streamline the decision-making process whilst preserving a diminished capacity for member states to block decisions”, by replacing for example the unanimity requirement with qualified majority voting (Ucarer 2007, 315). Again, the role of the Commission during the negotiations was considered to have been pivotal, not least owing to the presence of Commissioner Antonio Vitorino making the case for further integration in the AFSJ (Kaunert 2010a, 193–5). In the end, although the project for a European Constitution failed, the AFSJ provisions were preserved in the new Lisbon Treaty and implemented starting 2010 (see chapter 5).

In addition to the series of internal developments presented above as having affected the constitutional and institutional set-up of the AFSJ, the field was also impacted during the period by several external events which played a role on the evolution of institutional behavior.

4.1.2 External developments

4.1.2.1 9/11 and the EU counter-terrorist agenda

The most significant external event of the period occurred in the US on 11 September 2001, commonly referred to as 9/11. The gravity of terrorist attacks on US soil triggered an unprecedented number of counter-terrorist measures adopted by the JHA Council—for the most part as third pillar instruments (Bures 2006; Guild 2008; Bossong 2012). For instance, the second multi-annual program in the AFSJ, drafted by the JHA Council, was much more oriented towards security—cited as “the central concern of the peoples of the States”—than its predecessor (Balzacq and Carrera 2006b, 5). Moreover, the objective to combat terrorism soon became coupled with other policy subfields in the AFSJ, most notably migration (Bigo 2002; Huysmans 2000; 2006). As explained by an official from the Council Secretariat:

[From the perspective of member states] 9/11 changed everything because it brought irregular migration as a criminal activity at the forefront. Even if from the beginning [of JHA cooperation] they decided to have compensatory measures from the abolition of internal borders (e.g. to deal with third country nationals), the focus was always on internal security—and the border is the place where a country deals with internal security. 9/11 changed the discourse because people working in counter-terrorism turned to the border out of reflex. (AM0205, 16 September 2014).

9/11 had thus a lasting impact on the objectives of national governments in the JHA Council towards security. As it is demonstrated in section 4.2.3, home affairs ministers in particular made frequent representative claims about their national citizens—portrayed as valuing internal public order above everything else; furthermore, they implied that this highly valued public order can be disrupted by ‘foreign’ terrorist elements.

For its part, the Commission was also closely involved in promoting counter-terrorist measures, treating 9/11 as another “window of opportunity” that could be seized in order to harmonize certain elements of criminal law—such as the European Arrest Warrant (Kaunert 2007). In addition, 9/11 had a strong impact on the Commission’s agenda on the development of a Community immigration policy; for example, an official working at the time in the newly established DG JLS recounts that their efforts were concentrated on proposing the legislation inscribed in the Tampere Program; however:

Our 2001 Communication on immigration fell on deaf years [in the Council], it was too soon after 9/11. (...) The inclination of the Commission was to be liberal in terms of migration, but there is a difference between the real world and the ideal world—what is realistic and what is a dream. (AM0304, 8 May 2014).

In this context, the Commission started to deviate from its original positions on migration, as officials came to realize that there was no point to advance legislation that had little chances of passing (Papagianni 2006, 234). However, there were considerable differences of opinion between units of the newly-created DG JLS regarding the Commission’s approach to migration. Owing to the rapid growth of the DG—from a permanent staff of 46.5 in 1998 to 180 employees in late 2000 (Ucarer 2001, 12)—the new units were very heterogeneous. An interviewee who worked at the time in DG JLS reported that part of the staff came from the Secretariat’s General Task Force, another part were relocated from DG Employment (having previously worked on issues like migrant integration), and the last part were newly hired from member states (AM0301, 3 April 2014). They each correspondingly brought quite different visions about the Commission’s ‘constituency’ in migration policy. In relation to the staff expansion, the interviewee further explained that the management’s approach towards the new people could be summarized as “if you cannot fight them, absorb them” (*idem*). This ‘absorption’ referred to the strategy to coordinate the DG’s various units and present a unified position to the outside world. In practice, the coordination proved challenging, as some units

worked on fighting against illegal migration, while others advocated the benefits of legal migration. The two dimensions were not treated as facets of the same phenomenon until the launch of the 2005 Global Approach to Migration (Papagianni 2014, 385).

As for the Parliament, the LIBE Committee took pride in being one of the first parliamentary committees in the world to issue an opinion against the data protection infringements inherent in the US-led war on terror (AM0405, 5 November 2014). In fact, the investigation into the global interception program Echelon was a main concern of LIBE even before 9/11 (European Parliament 2001). Data protection became with time a huge point of contention between the Council and the Parliament, as the latter made a point of opposing the exchange of sensitive information with the US. Responding to German Home Affairs Minister Wolfgang Schäuble in a parliamentary hearing on 14 May 2007, the Vice-President of the LIBE Committee summarized the positions of the two institutions:

I do get frustrated sometimes because I get the sense that we act in the Parliament like Robin Hood, running around protecting data and we tend to treat [in the Council] you like the Sheriff of Nottingham as you were the only people who care about police measures and all that stuff (Stavros Lambrinidis, cited in De Capitani 2010, 135).

To put it differently, while all institutions acknowledged the Council's lead role in the fight against terrorism, they also understood the high stakes of the matter. For instance, in the discussions on the Convention on the Future of Europe (2002-3), the members of Working Group X 'Freedom, Security and Justice' claimed to represent a major concern of [all] citizens related to effective crime fighting, which featured as the third "most important issue" in recent Eurobarometer surveys (Lavenex and Wallace 2005, 477). The Final Report of Working Group X made explicit reference to this:

The battle against crime is an area in which the European Union can demonstrate its relevance to its citizens in the most visible way. [...] Public concern has considerably heightened following the events of 11 September 2001 and the emergence of more recent threats arising from international terrorism. (Working Group X "Freedom, Security and Justice" 2002, 1).

Indeed, the EU fight against terrorism managed to rally support from all institutions, which claimed to act on behalf of the security interests of their claimed constituencies.

4.1.2.2 Immigrant deaths and the Global Approach to Migration

Apart from 9/11, the other major “external shock” that shaped the development of the AFSJ in the 2000s were the migrant deaths in Ceuta and Melilla in 2005. The tragic events brought a refocus of EU migration policy towards cooperation with third countries (Bendel 2007, 32). Indeed, the fatal shootings of immigrants trying to cross into ‘Fortress Europe’ demonstrated the dangers of pursuing a repressive, security-oriented immigration policy (Lavenex and Kunz 2008, 449). Although efforts to create an external dimension to the AFSJ were present in the three institutions—the Council, the Commission, and the Parliament—since the early 2000s, such attempts were considered “paper tigers” with little effect on institutional practices (Wolff, Wichmann, and Mounier 2009b, 13). Discussing the recent events in Ceuta and Melilla, the informal European Council in Hampton Court gave an important impetus to the issue of cooperation with third countries, which was followed up with a Commission Communication on the Global Approach to Migration (European Commission 2005b).

The migration literature considers the Global Approach to Migration to represent “beyond doubt a turning point” in the way in which this policy area was seen inside EU institutions, as it became formally acknowledged that legal and illegal migration should not be treated separately in the relations with third countries (Papagianni 2014, 385). The view was much different from that of the JHA Council immediately after the Tampere summit, when a report explicitly mentioned that the goal in this field was “certainly not to develop a ‘foreign policy’ specific to JHA” (Coreper 2000). Once again, the urgency of a tragic external event brought a refocus of institutional roles especially in the Council and the Commission, which allocated new personnel to work on the novel policy priority. Moreover, the Global Approach to Migration came at a time when EU legislative decision-making in the area of migration

reached a deadlock, as member states rejected or watered down any proposal aimed at the harmonization of legislation (Collett 2007). As explained by a JHA Counsellor from the Permanent Representation of an old, medium-sized member state: most governments believed that legal migration “was not the best place to harmonize” because it involved “matters for states to decide on internally” (AM0218, 7 November 2014). Under the circumstances, the Commission embraced the flexibility entailed in the Global Approach to Migration. An official who worked for many years in DG JLS described the mindset inside the institution at the time:

We were too optimistic in the early 2000s, we were going too fast; we put forward a wide-ranging view on migration [the 2001 Communication], and so a number of proposals were shut down...member states didn't like them, they said they were exaggerated...Over the years, we have become much more modest in our proposals. (AM0306, 17 September 2014).

To put it differently, the Global Approach to Migration was a way for the Commission to pursue its objectives on legal and illegal migration without the pressure of harmonizing member states' legislation. This flexible attitude of the Commission confirms another expectation of the new intergovernmentalism regarding the openness of supranational institutions to comply with wishes of national governments in the Council and the European Council rather than challenge their competences (Bickerton, Hodson, and Puetter 2015b, 712).

To conclude, institutional behavior in the AFSJ proved over time very sensitive to changes happening outside EU borders. Catalyzing events—such as 9/11 or immigrant tragedies—shifted the attention of policy-makers (Jones and Baumgartner 2005, 334) and impacted their claims about whom and what they are supposed to represent in the EU policy-making. Indeed, justification of institutional behavior was bound to be influenced by what happened globally in terms of security (wars), immigration waves, economic crises, natural disasters, accidents, and so on. Nevertheless, as historical institutionalists acknowledge (Mahoney and Thelen 2010, 4), there is no way of anticipating when “external shocks” would occur and what consequences they would have on institutions and decision-making. Post-hoc

empirical analyses are needed in order to assess alterations, which is why the focus now shifts towards the positioning of EU institutions towards such triggers.

4.2 The justification of institutional positions in the AFSJ: making representative claims

So far, this chapter has offered an overview of the internal and the external developments that influenced the evolution of institutional behavior in the AFSJ during the period 1994 to 2009. To summarize, the treaty status of this policy area was under debate twice in just 16 years, every time rendering the future of the field uncertain; in addition, the expansion of the Union to the East and the internal administrative reforms put additional pressure on the institutions involved in decision-making. Moreover, the terrorist attacks in the US and the increasing waves of immigration to Europe changed significantly the direction of AFSJ policy throughout the 2000s. The organizational units of EU institutions working on AFSJ issues were forced to position themselves in relation to these developments and at the same time navigate the regular decision-making process in the field.

The remainder of the chapter presents the results of a media content analysis of representative claims made throughout the period by officials from each institution. Its purpose is to illustrate the way in which the four institutions under consideration justified to the public their role in the AFSJ by reference to the constituency they claimed to represent. The analysis is important for at least two reasons. On the one hand, the results demonstrate how politically appointed officials construct their institutionally-bound constituencies in respect to some interests or values that are translated into policy positions. On the other hand, the longitudinal nature of the analysis confirms the diversification in the justification of institutional behavior throughout time—as captured in representative claims put forth in the media. To illustrate these points, the evidence gathered on the JHA Council, the Commission, and the Parliament—on which more data was available—was split to show i) the diversity of constituencies claimed to

be represented by each institution in the AFSJ, and ii) their evolution over the period under consideration.

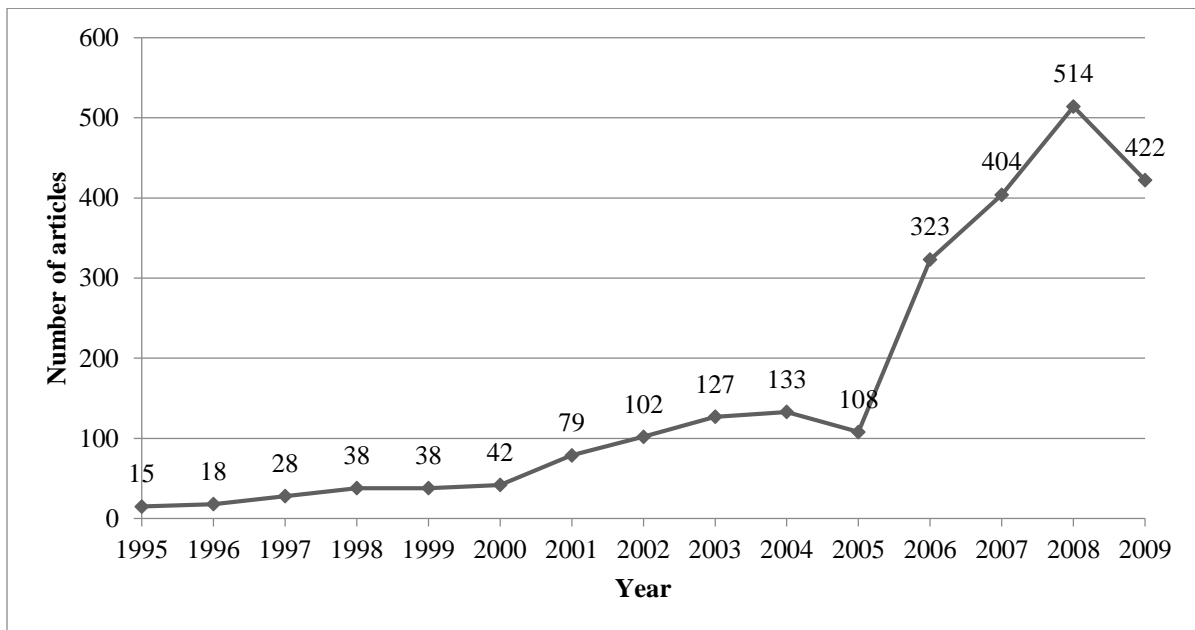
The section is structured as follows. The first part provides an overview of the number of articles and representative claims identified in *Agence Europe*'s articles on the AFSJ during the period 1995 to 2009⁴¹. The next four parts illustrate the findings of the analysis for each institution in turn, starting from the European Council and going through the JHA Council, the Commission, and the Parliament.

4.2.1 Analyzing representative claims in the media

The following analysis represents a summary of the representative claims made [for the most part] by politically appointed officials from the main EU institutions in the period 1995 to 2009. Graph 4.1 below gives a snapshot of the total number of AFSJ-related articles retrieved from *Agence Europe* in the 15 years until the entry into force of the Lisbon Treaty on 1 December 2009. Overall, there was a steady increase in the number of articles reporting on AFSJ developments at the EU level; however, the years registering growth were not necessarily those in which new treaty provisions were implemented (1999, 2001 or 2005—the end of the transitional period after Amsterdam). In contrast, there was modest coverage of third pillar issues throughout the 1990s (under 50 articles per year), an almost doubling of articles starting 2001 (an evolution related to the terrorist attacks in the US and the general increase in the profile of the policy area after the Amsterdam Treaty and the Tampere Program), and a real explosion of articles on the AFSJ starting 2006. According to the editorial staff of *Agence Europe*, their coverage followed the gradual communitarization of the field; specifically, after the community method of decision-making became operational in several AFSJ domains in

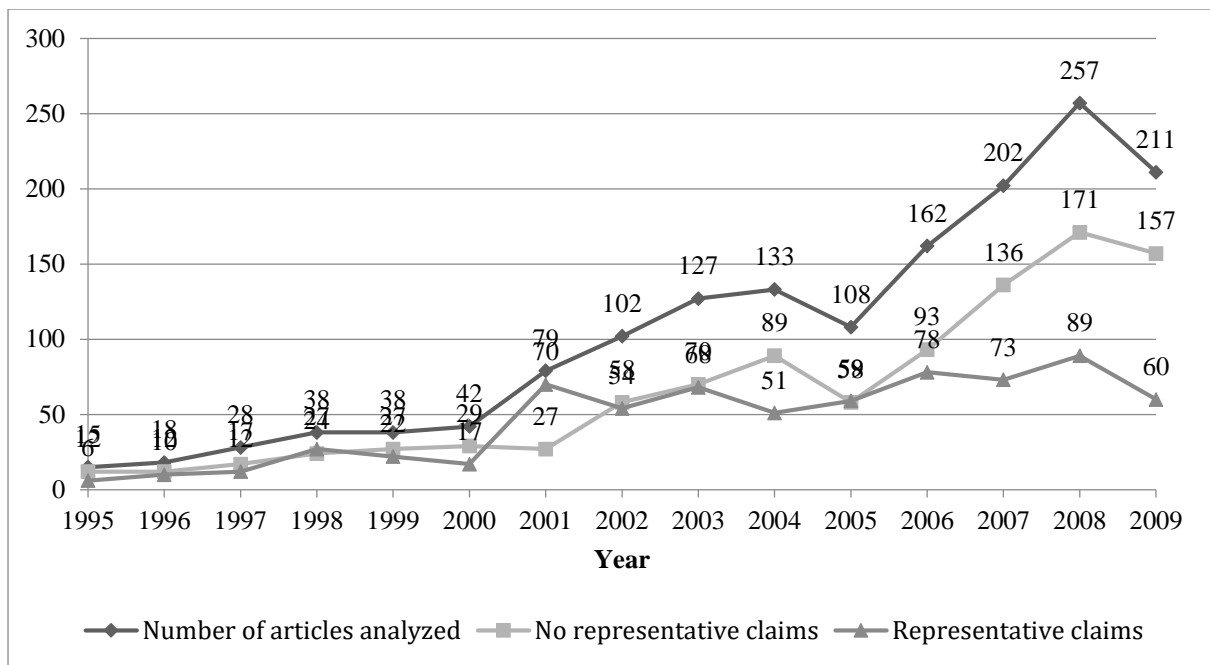
⁴¹ The methodological considerations underpinning the analysis are outlined in chapter 2.3.2. The goal here is to present the findings in the form of narratives told about each institution, according to their logic of justifying behavior through representative claims.

2005, the editorial staff decided to report on the topic regularly (Bion 2015, personal communication).



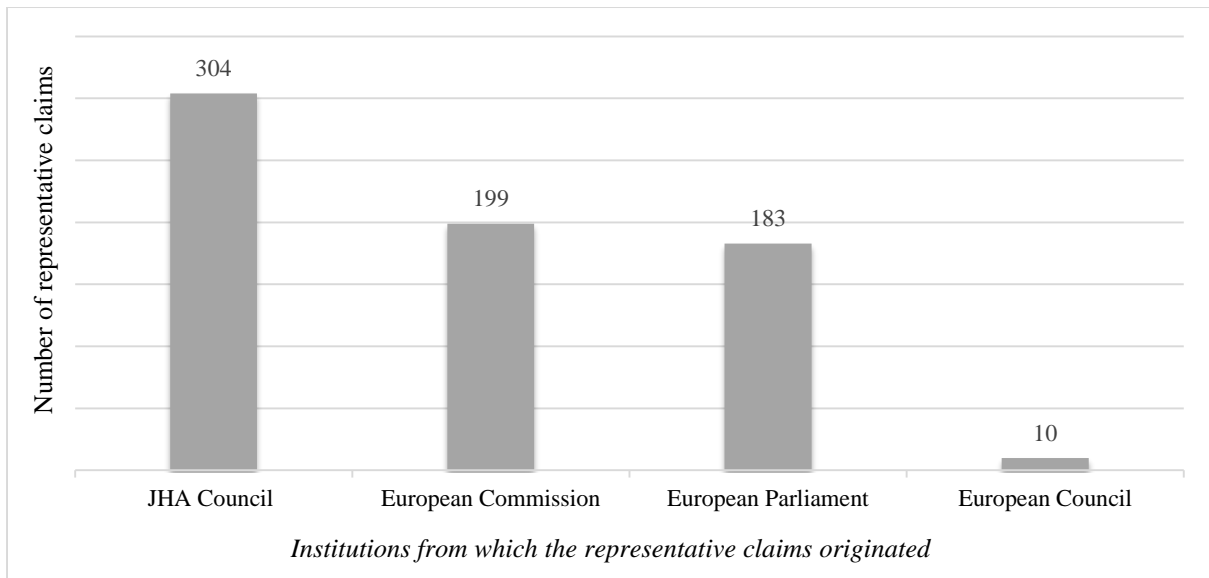
Graph 4.1: Total number of articles published yearly on the AFSJ in Agence Europe’s ‘Europe Daily Bulletin’ (1 January 1995—30 November 2009).

Consequently, starting 2006, there was a surge of articles on the AFSJ in the agency’s ‘Europe Daily Bulletin’. Many of them were however very brief (approx. 5 lines) and entirely descriptive, reporting on the calendar of different institutions and their agendas of meetings rather than including institutional positions about issues. Keeping this in mind, a random sampling of the articles during the period 2006-9 was introduced, excluding half of them in order to ensure a manageable number of articles surveyed for representative claims. Graph 4.2 offers an overview of the number of articles analyzed and the corresponding numbers of representative claims identified. The graph confirms that the extension in coverage of JHA policies starting 2006 was the result of an internal *Agence Europe* decision which does not reveal any information about the intensification of claims-making by officials involved in decision-making.



Graph 4.2: Evolution of the number of representative claims identified in articles on the AFSJ from Agence Europe's 'Europe Daily Bulletin' (1 January 1995—30 November 2009).

What can be clearly observed from the graph is a steady increase in the number of representative claims identified every year, with peaks in 2001 and 2004 following the terrorist attacks in the US and Madrid and the subsequent development of an EU counter-terrorism strategy. Again, starting 2006 there is a slight increase in the number of representative claims, but in relative terms this is actually smaller—that is, considering the total number of articles from the period. In respect to the officials from institutions putting forth the claims (summarized in Graph 4.3), the highest number of claims comes unsurprisingly from officials associated with the JHA Council, which had been the principal decision-maker in the field during the period.



Graph 4.3: Number of claimants per institution identified in articles on the AFSJ from *Agence Europe*'s 'Europe Daily Bulletin' (1 January 1995—30 November 2009).

Graph 4.3 shows an underrepresentation of the European Council when it comes to the number of representative claims identified from *Agence Europe*'s articles on the AFSJ for each institution. There are two reasons for this. First, the European Council was not involved in day-to-day decision-making on the AFSJ or on any other domain of EU activity for that matter. Unlike the Council, the Commission, or the Parliament, the European Council did not have a specialized institutional unit to deal with AFSJ issues. Consequently, there were considerably fewer instances in which the media could have reported on positions of heads of state or governments on AFSJ topics. The second reason for the lack of representative claims associated with the European Council refers to the informality and secrecy of its meetings (Werts 2008; Puetter 2014). Indeed, the European Council only became a formal EU institution after the entry into force of the Lisbon Treaty (2009), and even then, discussions among heads of state were not made public. The conclusions released after every European Council meetings were often reported by media outlets like *Agence Europe* word by word, with little or no input whatsoever from individual heads of state or government. For these reasons, representative claims of the European Council cannot be discussed as comprehensively as for the other institutions.

4.2.2 The European Council

The absence of representative claims made by European Council members in *Agence Europe* articles on the AFSJ during the period 1995 to 2009 is a finding in itself. This is not to say that heads of state or government failed to play an important role in the evolution of the AFSJ, but that the informality of their interventions made it challenging to empirically identify their role as illustrated in the media. Nevertheless, according to data on the content of European Council conclusions from 1992 to 2013, heads of state or government kept regular oversight over developments in the third pillar and the newly created AFSJ; in fact, policy areas under ‘justice and home affairs’ are the fourth most mentioned topic in European Council conclusions after economic governance, foreign policy, and employment and social affairs (Puetter 2014, 94–8). Moreover, the AFSJ received special attention on four occasions: in 1995 (after the implementation of the Schengen acquis), in 1997 and 1999 (in the context of the signing of the Amsterdam Treaty and the organization of a special European Council meeting in Tampere on the future of the AFSJ), in 2001-2 (after the terrorist attacks in the US and the subsequent measures introduced to counter terrorist threats), and in 2004-5 (following the Madrid and London bombings on the one hand and the immigrant deaths in Ceuta and Melilla on the other). Overall, two dimensions in the institutional role perception of the European Council are illustrated by the representative claims identified in *Agence Europe* articles. The first refers to the self-appointed responsibility of the European Council to provide general political impetus to the development of the AFSJ by establishing priorities for the other institutions. The second concerns the crisis manager role of the European Council and its intervention in the adoption of specific instruments considered necessary to respond to security or immigration crises. Both dimensions are rooted in the assumption that the European Council is the legitimate institution to provide political direction and solve sensitive crises owing to the status of its members as the highest directly elected officials in the EU political system.

In respect to providing political impetus for the development of the AFSJ, the European Council explicitly justified its interest in the field on the occasion of the signing of the Amsterdam Treaty. At the time, French President Jacques Chirac was cited for underlining the “strong decisions taken in the field of freedom, security and justice; the fact that, for the first time, the Treaty contains provisions relating to the fundamental rights of the human being; the strengthening of measures relating to the environment and human health, which will bring Europe closer to the citizens” (cited in Europe Daily Bulletin, 18 June 1997). This is a reiteration of an older theme of European Council representative claims—namely that the AFSJ will bring Europe closer to its citizens—discussed in chapter 3.2.1. The claim here suggests the French President’s implicit view that adopting treaty provisions related to fundamental rights is what citizens need in order to feel ‘closer’ to the European political construction. Furthermore, in anticipation of the 1999 Tampere summit—organized to give political direction to the new treaty provisions on the AFSJ—Finnish Prime Minister Paavo Lipponen explained the role of the European Council in launching the Tampere Program as follows:

...discussions [with other heads of state or government] convinced me further that we share equal ambitions: the meeting should provide guidelines for future action and, at the same time, directly address the people. We have a unique opportunity to develop the Union as an area of freedom, security and justice in the next millennium, acting in a responsible and influential manner at the global level. (cited in Europe Daily Bulletin, 14 October 1999).

There is a crucial representative claim made here on behalf of the European Council by one of its members, who identified the institution as the one forum responsible for developing the AFSJ by being ambitious and oriented towards people. In a similar vein to the launch of the single market project in the 1980s, heads of state or government empowered themselves to define priorities in the AFSJ because they agreed on the field’s “importance”. After the Tampere meeting, Spanish Prime Minister José Maria Aznar confirmed that “the Area of Freedom, Security and Justice has now moved forward irreversibly”, and that the heads have

sought to “defend the citizens' interests and to give citizens more guarantees and security, while maintaining solidarity with immigrants” (cited in Europe Daily Bulletin, 18 October 1999).

The other major involvement of the European Council in the AFSJ during the period referred to its leadership role in the security and immigration crises of the early and mid-2000s. While the European Council was quick to express its institutional solidarity with the US following 9/11, member states disagreed on the desirability and implications of a military intervention in Afghanistan. Some heads of state or government expressed humanitarian concerns regarding the potential operation; for instance, if the General Affairs Council had previously “affirmed that the Union was totally behind the United States”, the European Council was more careful in the wording of its conclusions, calling the military intervention “legitimate” because it was “targeted” (Europe Daily Bulletin, 19 October 2001). The issue was solved a few months later at the European Council summit in Laeken, where all heads approved the United Nations-led military operation in Afghanistan; in this respect, Guy Verhofstad, the Belgium Prime Minister holding the Presidency at the time, pointed out that “the great difference with other crises is that, for the first time, there was unanimity in saying that we must play a role in a force which will of course be wider than the EU alone” (Europe Daily Bulletin, 16 December 2001). The European Council was at the center of those intergovernmental negotiations as the forum responsible for defining the EU position on the matter.

In addition to shaping the external direction of EU policy on counter-terrorism, heads of state or government also took leadership of the development of internal measures aimed at tackling terrorism. For example, the European Council got directly involved in the negotiations over the European Arrest Warrant, which reached a deadlock in the JHA Council because ministers could not agree on the harmonization of national extradition rules. Under the circumstances, the heads decided at their October 2001 Ghent summit to be “much clearer and

firmer than on 21 September [during an Extraordinary informal meeting of the European Council after 9/11]” and make “concrete recommendations”, such as “the request made of the JHA Council of ridding, in the definition of the European Arrest Warrant, the principle of double incrimination, which will disappear for the majority of major crimes, and notably terrorism” (Europe Daily Bulletin, 20 October 2001). After the attacks in Madrid in 2004, the European Council released a ‘Declaration on Combating Terrorism’ which emphasized the need of intelligence services and police forces to exchange more information. In fact, several heads of state or government admitted to the reluctance of their national secret services to share information, with immediate consequences for the prevention of terrorist acts (Europe Daily Bulletin, 26 March 2004). Similarly, the European Council intervened after the 2005 terrorist attacks in London and formally adopted, at the proposal of the British Presidency, an EU strategy to combat terrorism (Europe Daily Bulletin, 16 December 2005). In other words, in the event of terrorist crises, the European Council was the one body which claimed to act on behalf of the EU as a whole both externally and internally.

The other AFSJ subfield on which the European Council got involved during the early to mid-2000s was migration. Two years after the launch of the Tampere Program, the heads discussed progress on its various parts and concluded that the “balance sheet was rather flimsy on immigration and asylum issues”, urging the Commission and the JHA Council to move faster on passing the necessary legislation (Europe Daily Bulletin, 17 December 2001). At their 2002 meeting in Seville, the European Council launched an action plan on immigration and asylum whose main objective was to fight against illegal immigration by cooperating with third countries; on this matter, Spanish Prime Minister José Maria Aznar explained that “this problem [i.e. irregular migration] is a great source of concern for our citizens speaking without demagogy and with serenity” (cited in Europe Daily Bulletin, 23 June 2002). Finally, in 2005, after the tragic immigrant deaths in Ceuta and Melilla (section 4.1.2.2), the European Council

was the forum in which the decision to adopt a Global Approach to Migration was sanctioned. Heads of state or government emphasized “the need to set up a policy in this field based on a balanced, global and coherent approach”, taking into account “the upsurge in problems relating to migration within the EU and the growing concern of the public in certain member states” (Europe Daily Bulletin, 16 December 2005). Again, the European Council claimed to know what “Europe’s people want” and to this end decided to allocate more financial resources allowing individual countries to “step up controls on borders, to support readmission operations, improve and assist development in the countries of origin and have transit” (Spanish Prime Minister José Luis Rodríguez Zapatero, cited in Europe Daily Bulletin, 21 December 2005). Afterwards, the European Council periodically renewed its political commitment towards “the establishment of an over-arching EU immigration policy” (Europe Daily Bulletin, 14 December 2007) by adopting, for example, a European Pact on Migration and Asylum (Council of the European Union 2008).

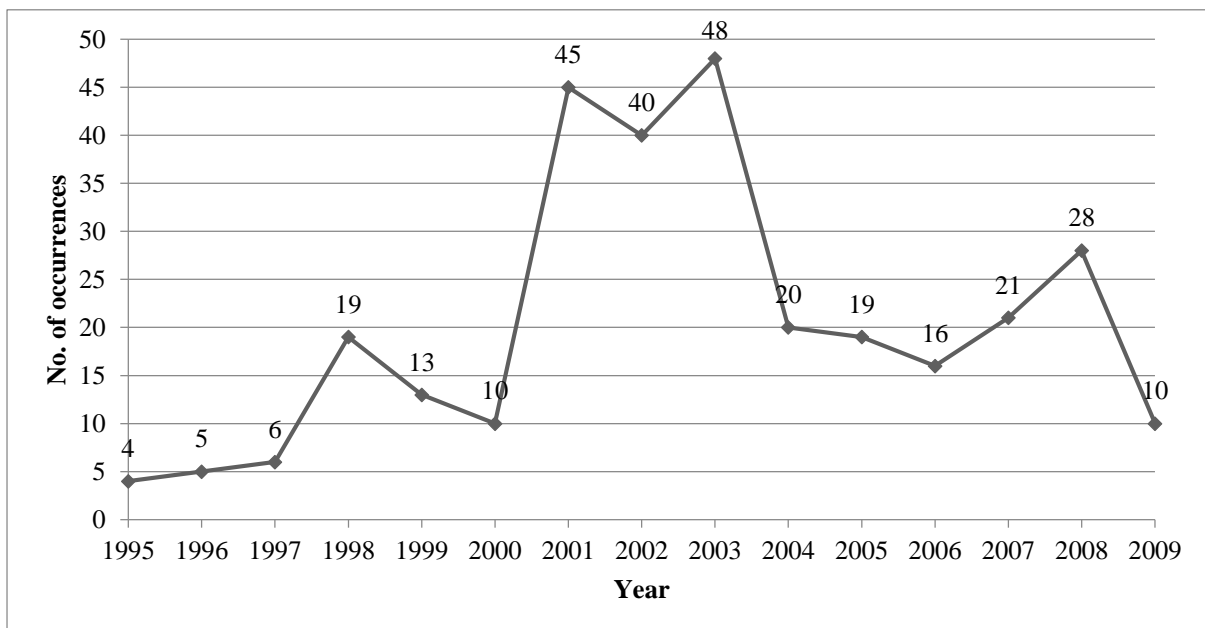
To summarize, the European Council was conspicuously absent from making representative claims in *Agence Europe* articles on the AFSJ during the period 1995 to 2009. The absence reflected, however, a lack of appropriate media coverage of the institution on the topic rather than a lack of interest by the European Council on AFSJ issues. Conversely, the frequent inclusion of issues falling under JHA policies in the conclusions of the European Council during the post-Maastricht period demonstrates the focus of heads of state or government on this “new” area of EU activity (Puetter 2014, 94–8). Therefore, in terms of the patterns of institutional justification found in conclusions and reported in the media, they were often (re-)affirming the political commitment of heads of state or government to the AFSJ as a priority of the European Union. Moreover, the European Council’s default presence in decision-making during crisis situations signaled an implicit claim at representation: given that members of the European Council were the highest officials directly elected by citizens, they

were the only level legitimate enough to take decisions during uncertainty-ridden crisis moments. This finding confirms new intergovernmentalist expectations regarding the “intensive involvement of the European Council in the post-Maastricht period in the minutia of justice and home affairs policy” (Bickerton, Hodson, and Puetter 2015b, 712).

In summary, the behavior of the European Council in the AFSJ during the period 1994 to 2009 was justified by the need to provide political direction and solve crisis situations. In contrast to this leadership role, the other institutions—the JHA Council, the Commission, and the Parliament—were responsible for all the details of the policy process in the AFSJ. An analysis of the representative claims identified for each institution is presented next.

4.2.3 The JHA Council

Given the centrality of the Council in JHA decision-making in the period 1995 to 2009, members of the institution were found to ‘generate’ the highest number of representative claims on the AFSJ, namely 304. Their evolution throughout time varied, as shown in the graph below:



Graph 4.4: The evolution of representative claims made by officials from the JHA Council, identified in articles on the AFSJ from Agence Europe’s ‘Europe Daily Bulletin’ (1 January 1995—30 November 2009).

The peak in claims-making on behalf of the Council was during the period 2001-3, following the terrorist attacks in the US and the high activity of home affairs ministers in devising EU-level instruments to fight terrorism. All member states agreed at the time on the paramount importance of the terrorist threat, its transboundary nature (affecting more than one member state), and the necessity to work together in the areas of police cooperation, intelligence gathering, and harmonization of criminal law elements. In this context, it is no wonder that home affairs ministers are more frequently cited in the articles analyzed (180 representative claims) than ministers of justice (113 representative claims), while other members of the JHA Council feature much less: the Council-based Counter-Terrorism Coordinator was identified with 6 claims, while only 5 claims were attributed to ministers of foreign affairs ministers and ambassadors of the Committee of Permanent Representatives in the European Union (Coreper).

The patterns of justification used by members of the JHA Council to legitimize institutional behavior are illustrated in Figure 4.1. The figure is based on Saward's representative claims framework (cf. Saward 2006, 5) and its empirical application as provided by de Wilde and associates (de Wilde, Koopmans, and Zürn 2014). The figure must be read from the upper-left corner and has the following logic: a maker of representations (the claimant) puts forward a subject (the representative—in this case, the JHA Council), which claims to stand for an object (of representation) in relation to a referent (the position taken on an issue) that is offered to an audience (the addressee), being framed using different types of justification (instrumental, ethical, moral⁴² etc.). While the paragraph above already mentioned the different claimants identified in *Agence Europe* articles from the JHA Council, it makes sense to first

⁴² The distinction between ethical and moral justification follows the work of De Wilde and associates, who consider moral values as universal and ethical values as group-specific; conversely, instrumental justifications invoke material benefits rather than systems of values (de Wilde, Koopmans, and Zürn 2014, 41; based on Habermas 1993). In the analysis on the AFSJ, respect for human rights is regarded as a universal moral values, whereas personal freedoms—such as privacy for example—are seen as ethical values specific to EU member states.

report on the positions they took on various issues before mentioning whom they claimed to stand for. In this respect, the box in the upper right corner of Figure 4.1 shows that the fight against terrorism was definitely the frontrunner in relation to issues on which the JHA Council took a position, as this stance was found in 72 representative claims—counting both the preoccupation with terrorism inside the EU (mentioned 53 times) as well as cooperation with third countries on data and information exchange (mentioned 19 times). Indeed, the necessity to protect and ensure the security of the Union was the second most frequent position taken by members of the JHA Council in relation to their activity throughout the years (present on 89 occasions). Security was not only relevant in respect to the fight against terrorism, but also with regard to the fight against organized crime (mentioned 20 times). Nonetheless, the preoccupation for security was secondary to the argument about the need to protect the sovereignty of member states (encountered in 98 representative claims) and identified in relation to: a) the responsibility of government representatives in the Council to protect their national legal systems when it came to the harmonization of civil or criminal law (46 occasions), b) their responsibility to protect national labor markets by limiting legal migration (14 occasions) or opposing it altogether (11 occasions), and c) their responsibility to make sure that national asylum systems are not abused through the implementation of an EU-level approach (13 occasions) or by refugees ready to engage in ‘asylum-shopping’ (9 occasions).

What is essential for the argument of this thesis is that the priorities listed above were always related to certain objects of representation identified by JHA Council members. The central box in Figure 4.1 lists the constituencies for whom the JHA Council claimed to stand. Specifically, when it came to the necessity to fight against terrorism, the views of national law enforcement and border control authorities were taken into account 81 times. Moreover, the objections raised to the harmonization of criminal and civil law instruments were always associated with the good functioning of national legal system and the obligation to respect legal

traditions (76 times), while at the same time other claim-makers invoked as objects of representation the prospective benefits of harmonization for the effectiveness of legal systems on cross-border cases (on 16 occasions) or the advantages of strengthening judicial cooperation (mentioned 11 times). As it is more conventionally expected, Council members also presented themselves as the protectors of national budgets (on 36 occasions) and of national economies or labor markets (on 27 occasions), which were under debate in relation to the principle of burden-sharing in asylum policy (13 times), fighting illegal migration (18+11 times), and limiting legal migration (14+11 times).

While many of the policy positions of the JHA Council in the AFSJ were framed in negative terms—fighting terrorism, tackling organized crime, combating illegal migration, deterring asylum-shoppers etc.—the institution also had more ‘positive’ concerns. The third element listed in the box in the upper right corner of Figure 4.1 demonstrates that ministers claimed to stand for the importance of fundamental rights of EU citizens and third country nationals, mentioned 21 times. The types of argumentation used to defend this position, illustrated in the box in the lower right corner of Figure 4.1, were moral and ethical, such as the general goal to fight security while respecting human rights (invoked 37 times) and fundamental freedoms (invoked 26 times). In the end, ministers of both justice and home affairs claimed that national citizens represented their indirect constituency on 65 occasions. Consequently, the way in which they sought to cater to their citizens was from the perspective of different professions—the police, border guards, legal practitioners—which prompted a description of their constituency as wanting public order, secure borders, and an effective judicial system. JHA Council members made far less reference to EU citizens (on 14 occasions) or EU fundamental values like tolerance or freedom of speech (12 occasions).

In terms of the audiences identified, the box in the lower left corner of Figure 4.1 shows an amalgam of potential addresses of ministers in the JHA Council. During press conferences

after Council meetings, national representatives sought to inform the general ‘public’, but often addressed directly other EU institutions (202 times), their own national authorities (84 times), and their citizens (81 times). But taking into consideration the large number of roundtable debates in which government representatives were in dialogue with other delegations, the articles covered in *Agence Europe* on the AFSJ illustrate that ministers were mostly concerned to signal to each other their policy positions on an issue (252 times).

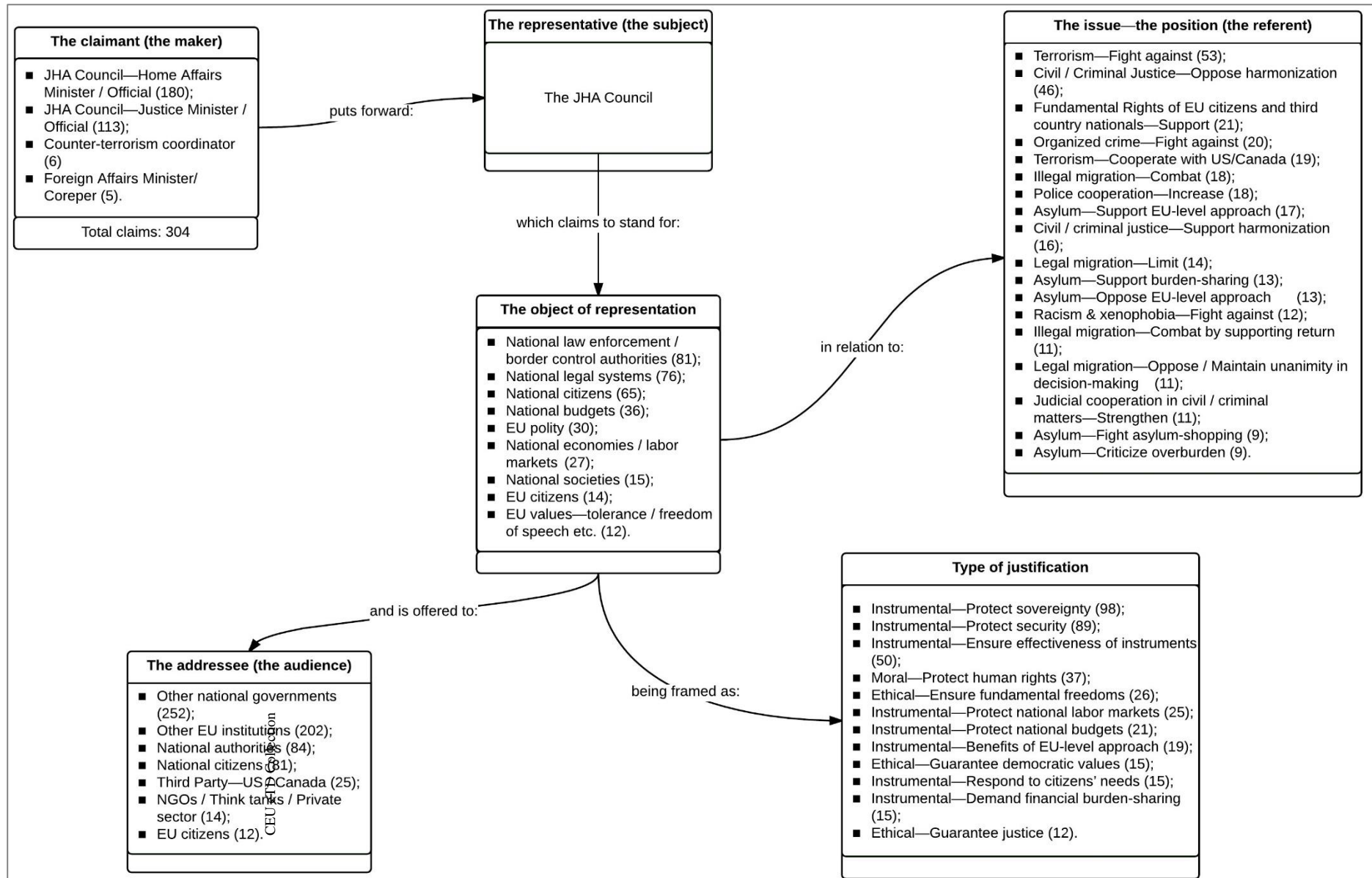


Figure 4.1: Matrix of representative claims framework for the JHA Council, based on analysis of articles on the AFSJ retrieved from Agence Europe's 'Europe Daily Bulletin' (1 January 1995—30 November 2009). The number between brackets represents the total number of claims identified for the respective code.

Having outlined the diversity in the patterns of justification offered by the JHA Council, the discussion now shifts towards a chronological review of how Council members justified their institutional positions in the period under investigation. To begin with, the first years of third pillar cooperation were marked by different proposals put forward by individual member states in the field, bearing in mind their national priorities. Depending on the degree to which there was convergence on the applicability of such priorities in other domestic contexts, the proposals would be adopted unanimously in the Council. For example, a Belgium proposal on a joint action targeting organized crime networks specialized in human trafficking of children was immediately agreed upon by the fifteen member states:

Based on the feeling that the trade in human beings and the sexual exploitation of children constitutes serious infringement of the fundamental rights of a person and of human dignity especially, and that the recent developments show such facts constitute a major form of organized crime which is growing within the European Union at an increasingly alarming rate... (cited in Europe Daily Bulletin, 10 October 1996).

Indeed, the unanimity rule implied that the Council could only decide on instruments which were agreed upon by all, such as protecting children from sexual exploitation. Other issues of common interest were the fight against drugs, organized crime, and human trafficking more generally, which attracted support from all national representations, at least at the declarative level (cited in Europe Daily Bulletin, 2 December 1996). Under attack from the Parliament's LIBE Committee for the "soft measures" adopted and the lack of progress on the JHA acquis, the Irish Minister of Justice at the time characterized the criticisms concerning the third pillar as "unrealistic" given the "particularly sensitive nature of the issues it covers, which were at the heart of states' sovereignty" (cited in Europe Daily Bulletin, 16 December 1996).

The lack of transparency in the JHA Council's decision-making was however acknowledged by ministers themselves. Regarding some of the conventions adopted in the area of civil law, French Justice Minister Elisabeth Guigou recognized "the inability of the JHA Council and its structures in communicating properly and of ensuring that the results reached

were properly understood” and how they need to improve their “public relations exercise” (cited in Europe Daily Bulletin, 29 January 1998). She was also later cited as saying that “within the EU, the JHA Council has not yet found its feet, falling either into too technical considerations, or simply into general considerations” (cited in Europe Daily Bulletin, 30 January 1998). This was an indirect reference to citizens, as the French official seemed frustrated that there was no proper connection with the general public—meaning an opportunity for ministers of justice and home affairs to show that they matter in EU politics. At the same time, the claim above suggests that national officials working for the JHA Council were still undecided about whom they were supposed to represent at the EU level. The diversity of member states’ interests in the third pillar was crucial in this context. For instance, under the Austrian Presidency of 1998, Denmark “urged the Union to tackle the ‘real problems’ that concern citizens, i.e. in particular ‘crime against the environment’” (cited in Europe Daily Bulletin, 28 May 1998). This concern for the environment was not articulated by any other member state at the time—at least not in the *Agence Europe*’s articles on the AFSJ. Indeed, it was very difficult for the Council to find its own institutional standing in a field as broad as the AFSJ, where the concerns of the citizens were expressed through the eyes of many different professions: the police, border guards, lawyers, judges, and prosecutors.

Under the circumstances, ministers in the Council could only offer their own perspectives about what the EU should be doing in the AFSJ. Soon after the adoption of the Amsterdam Treaty, Spanish Home Affairs Minister Jaime Mayor Oreja highlighted the “unprecedented challenge” posed by organized crime to “the structures of our societies and even the State”, which is why he proposed that “the EU must translate into facts the ‘new security culture’ that came with the European Amsterdam Council, through cooperation and specialization of the police” (cited in Europe Daily Bulletin, 28 May 1998). In contrast, German Justice Minister Däubler-Gmelin considered that “it is important to make citizens understand

that the Union is not just an economic area. Rights and liberties must become common and binding parameters, especially with a view to the forthcoming enlargement” (cited in Europe Daily Bulletin, 12 February 1999).

The other major subject preoccupying the JHA Council at the time was the refugee inflows triggered by the Kosovo conflict. On this matter, one position advocated was the necessity to create a European system for processing refugees because of the danger of asylum-shopping, described by Luxembourg’s Minister of Justice Luc Frieden as “refugees going from country to country, looking for the one with the least strict legislation or the longest procedures” (cited in Europe Daily Bulletin, 17 September 1999). Another difficult issue debated was the question of burden-sharing in relation to solidarity principles, on which there was no consensus in the Council—as some countries were inevitably going to be affected more than others. German Home Affairs Minister Otto Schily explained that burden-sharing was seen by some member states as “likely to encourage refugees” and that it would make “flows of displaced persons even larger” (cited in Europe Daily Bulletin, 11 February 1999).

After 9/11, the focus of the JHA Council shifted visibly towards the protection of internal security and the fight against terrorism. In the week following the attacks, the ministers held an extraordinary meeting which exclusively covered the fight against terrorism and “reiterated the European Union's commitment to do all in its power to help the United States arrest and judge those responsible” (cited in Europe Daily Bulletin, 18 September 2001). There were limits, however, to the form counter-terrorism measures could take. The Austrian Home affairs Minister Ernst Strasser made it explicit that “a European police force is of no interest” and that what was required was “strengthening national police forces, information exchange between police forces or common police training”; moreover, in his view “the EU's action must be geared to two key principles: the protection of citizens' rights, and the protection of citizens themselves.” (cited in Europe Daily Bulletin, 20 September 2001).

In the context of the fight against terrorism, the most contentious issue soon became the cooperation with the US over information exchange, made worse by criticism from the Parliament and civil liberties organizations on data protection infringements and death penalty provisions for extradited suspects. In 2002, the Danish Justice Minister Lene Espersen, who at the time held the Presidency of the Council, expressed support for the American position claiming that “the aim is not to exchange freedom for security but to make our freedom secure” and that she did “not understand why the European press gives the impression that the United States and Europe are on two different planets” (cited in Europe Daily Bulletin, 16 September 2002). Indeed, the Council always portrayed itself as doing what was needed under the circumstances, even to the detriment of civil liberties. As put by a former Home Affairs Minister from Germany: “the fight against terrorism has always been at the expense of human rights.” (cited in Europe Daily Bulletin, 16 February 2006).

Moreover, the concern for internal security in general was directly justified in terms of ‘what citizens wanted’. For example, on the subject of strengthening operational police cooperation to deal with terrorism and organized crime, the French Home Affairs Minister Michèle Alliot-Marie declared that “we agreed on developing extremely concrete measures to help respond to citizens' expectations. (...) citizens do not have a positive vision of European construction and we have to show [them] that the European Union brings them something in their daily lives” (cited in Europe Daily Bulletin, 7 July 2008). Claiming to act on behalf of national citizens, the JHA Council thus frequently used its increased powers in the AFSJ to adopt numerous legislative and non-legislative instruments in counter-terrorism. For example, between September 2001 and March 2007, the EU Action Plan to Combat Terrorism grew to a record number of 140 measures (Hayes and Jones 2013, 24). Both home affairs ministries (working on police cooperation) and justice ministries (working on the legal framework in criminal law) were involved in decision-making over the measures.

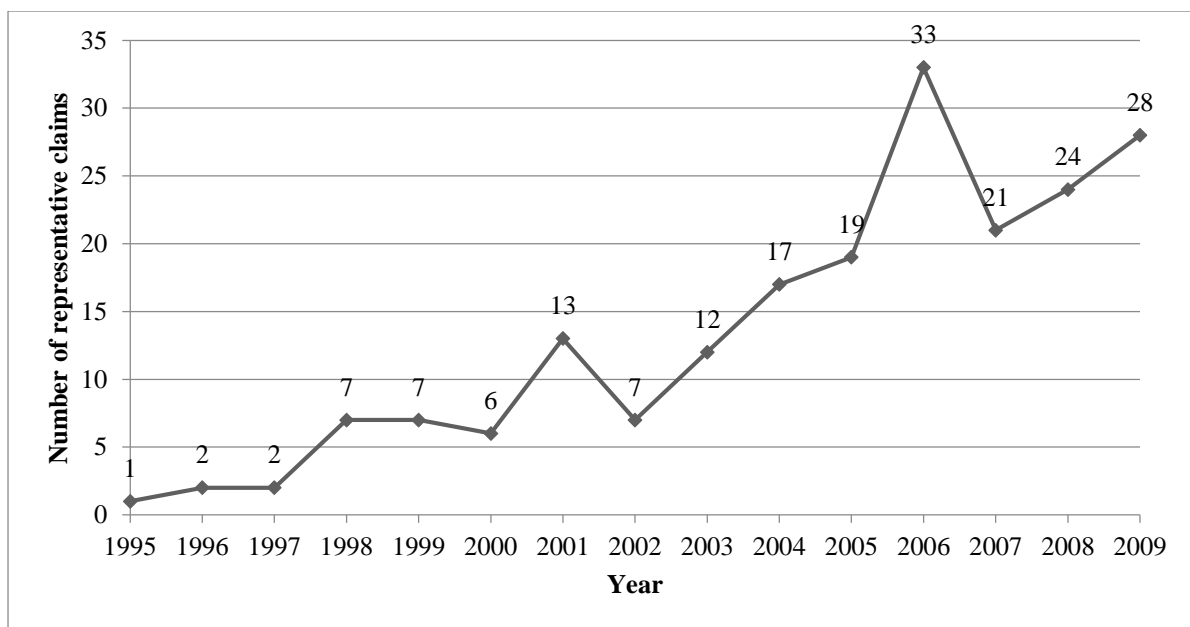
But despite the overemphasis on security and the fight against terrorism, the JHA Council offered other types of justification for its institutional positions throughout the 2000s. One example is given by the Council's stance in relation to racism and xenophobia, in relation to which they claimed to speak on the EU's behalf when saying that: "The EU strongly condemns all forms of racism, racial discrimination, intolerance and discrimination and urges states to adopt effective measures to combat the symptoms and causes of racism and discrimination." (cited in Europe Daily Bulletin, 23 March 2007). In other words, although the JHA Council prioritized internal security at the expense of fundamental freedoms (like data protection) throughout the 2000s, this did not mean that the institution failed to support fundamental freedoms altogether. On the contrary, the position of member states in the Council varied from issue to issue, depending on the constituency they claimed to represent in that particular case. In the examples above, Council members portrayed the preference of citizens as being in favor of more security, while at the same time expecting not to be discriminated against within national and EU borders. The catalogue of values and interests was wide-ranging, and the JHA Council could pick and choose what they wanted to stand for every time a new policy instrument was discussed.

Overall, the period from 1995 to 2009 saw a simultaneous diversification and clarification of the Council's institutional role in the AFSJ. In the first years of third pillar activity, the range of representative claims made by JHA Council officials was very broad. Claiming to embody the interests and values of several constituencies from the national level—law enforcement and border authorities, prosecutors and judges, as well as citizens more generally—the JHA Council had a wide platform of representative claims at its disposal. But although the Council's range of justifications for institutional behavior expanded during the period, the main concern of national officials remained the protection of national sovereignty in a delicate domain in which the specificities of national legal systems and jurisdictions had

to be defended. The ‘focusing events’ brought by the terrorist attacks in the US, Madrid, and London in the 2000s placed security at the top of the JHA Council’s agenda. Under difficult circumstances, the JHA Council saw itself as the only EU institution equipped to make tough decisions on extremely sensitive issues. And since the position of the Council in AFSJ decision-making weighed the most during the period 1994 to 2009, it provided the baseline in relation to which the other institutions had to define their own role and justify their behaviors. The analysis of the representative claims of the Commission and the Parliament is discussed in the next pages.

4.2.4 The European Commission

Taken into account its gradual institutional consolidation in the AFSJ, the Commission became an increasingly vocal actor throughout the period, with small contributions in the first years of third pillar cooperation (under 10 claims per year) that became more frequent after 9/11 and the end of the transitional period in 2005. Graph 4.5 below shows the growing confidence of Commission officials to make public claims about the role of their institution on various aspects in the AFSJ. There is a peak in the number of representative claims associated with Commission members in the context of the terrorist attacks in the US (2001) and the debates on the Central Intelligence Agency’s (CIA) secret detention centers in Europe (2006).



Graph 4.5: The evolution of representative claims made by officials from the European Commission, identified in articles on the AFSJ from Agence Europe’s ‘Europe Daily Bulletin’ (1 January 1995—30 November 2009).

Figure 4.2 below offers a similar analysis to the one conducted for the JHA Council regarding the patterns of justification of institutional behavior offered by Commission officials. Accordingly, the figure identifies makers of representations (claimants) putting forward a subject (the representative—in this case the Commission), which claims to stand for an object (of representation) in relation to a referent (the position taken on an issue) that is offered to an audience (the addressee), being framed using different types of justification (instrumental, ethical, moral etc.). To begin with, the box in the upper left corner of Figure 4.2 reveals the highest number of claims as coming from Commissioners Franco Frattini and Jacques Barrot during the period 2004-9 (93 times). Commissioner Vitorino comes next with 43 claims made during 1999-2004, and Commissioner Gradin with 13 claims in the interval 1995-9. The Commission services or heads of DG JLS were also cited on 43 occasions throughout the period 1995 to 2009.

In comparison to the JHA Council, we can observe a higher diversity of issues on which high-level officials from the Commission take a position. As illustrated in the box in the upper right corner of Figure 4.2, there is not one subject that dominates the priorities of the JHA Task

Force (1995-1999) and DG JLS (1999-2009) during the period. Specifically, officials from the two organizational units showed support for a variety of aspects such as the fundamental rights of EU citizens and third country nationals (31 times), the adoption of an EU-level approach to asylum (23 times) and of a harmonized legal migration policy (23 times), fighting against terrorism (17 times), and cooperating with the US/Canada on information exchange (11 times). Other objectives included the harmonization of criminal or civil law instruments (17 times), developing the AFSJ in general (14 times), fighting against human trafficking (14 times), combating illegal migration (13 times)—also by supporting return of illegal immigrants (10 times)—or fighting against organized crime (10 times).

The only common theme that unites these diverse priorities is the instrumental justification for the benefits of an EU-level approach, which the Commission invoked on 76 occasions, as shown in the box in the lower right corner of Figure 4.2. If the JHA Council had used arguments framing EU action in terms of the need to protect national sovereignty and ensure higher security, the Commission relied on the traditional supranational argument about the advantages of solving issues at the EU level from the perspective of effectiveness (47 times). In addition, the Commission also used other types of justification for their positions: the importance of protecting human rights, especially with regard to the treatment of refugees (44 times), the value of security in the fight against terrorism (24 times), the necessity to respect fundamental freedoms (16 times) like data protection, or the imperative for justice when it came to tackling human trafficking and the sexual exploitation of children (16 times). A unique type of argument is that labelled ‘Commission pragmatic approach’ (identified on 17 occasions), which appeared when Commissioners or other officials explained that that they were going to follow the Council’s wishes on a matter despite expressing divergent views on the issue earlier because that was the only feasible option at that point.

Furthermore, in respect to the objects of representation invoked to legitimize policy positions, the box at the center of Figure 4.2 lists the findings for the Commission in order of their frequency. Accordingly, Commission officials claimed to act most often on behalf of the EU polity by protecting the interests of the European political construction as a whole (on 73 occasions), on behalf of EU citizens in general (on 49 occasions), and on behalf of people using the right to free movement in particular (on 11 occasions). The rights of non-EU citizens are also claimed to be represented by the Commission, which defends asylum-seekers (on 20 occasions) and legal migrants alike (13 occasions). Values such as tolerance and freedom of speech—claimed to stand at the basis of the EU project—are also invoked by Commission officials in the AFSJ (on 17 occasions). In contrast, the representative claims identified appeal far less to the Commission’s role as ‘guardian of the treaties’ (7 times), common in other policy areas⁴³.

Last, but not least, the audiences to whom Commission officials ‘offered’ their representative claims are illustrated in the box in the lower left corner of figure 4.2. The main finding is that in addition to ‘speaking to’ other institutions (169 times) and hoping to reach EU citizens more broadly (90 times), Commission officials address their consultation partners, namely NGOs, think tanks, or business groups (41 times). On few occasions, the Commission speaks directly to specific national governments (35 times) or to third parties such the US or Canada (16 times).

⁴³ This is not surprising given the limited community competence in the AFSJ and the fact that binding legislation was only adopted starting the early 2000s onwards, which meant that the possibilities for the Commission to revise implementation only became concrete after 2005.

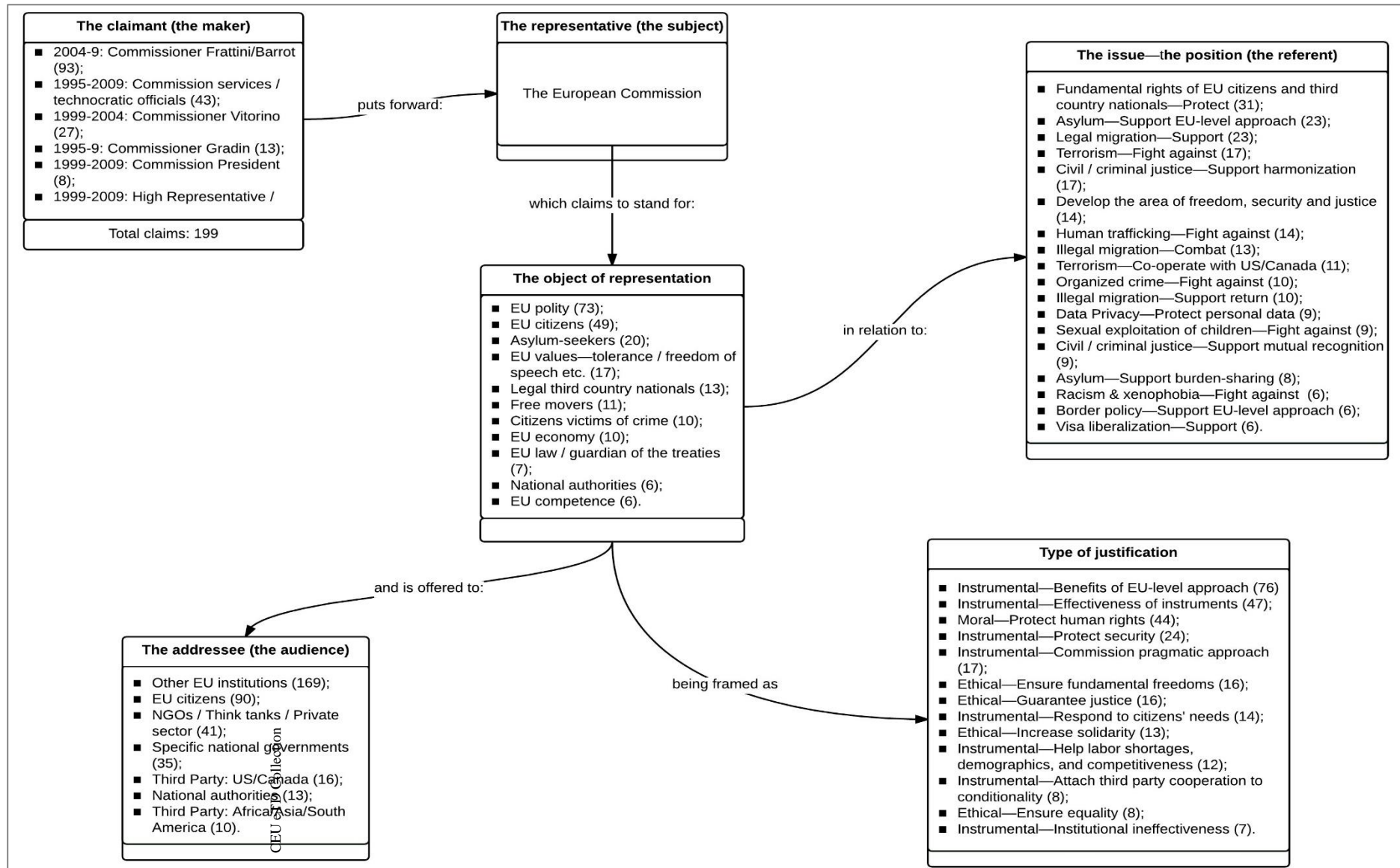


Figure 4.2: Matrix of representative claims framework for the European Commission (JHA Task Force, DG JLS), based on an analysis of articles on the AFSJ retrieved from Agence Europe's 'Europe Daily Bulletin' (1 January 1995—30 November 2009). The number between brackets represents the total number of claims identified for the respective code.

Moving to specific claims identified in the repertoire of European Commissioners, it is interesting to note initial quotes from Anita Gradin—whose portfolio included the third pillar among others responsibilities. Describing the mindset of justice ministers in the 1990s, Commissioner Gradin declared that she “would have preferred to have proceeded through an alignment of legislation” but that was not feasible given how protective national representatives were of their respective legal systems and traditions:

When I met the Ministers of Justice of Member States at the beginning of my mandate, each told me that they had a perfect legal system! In that frame of mind, it is difficult to go for legislation alignment (...) for the moment. (cited in Europe Daily Bulletin, 1 July 1998).

Indeed, there was little the Commission could have done in the first years of third pillar cooperation, but the situation changed after the entry into force of the Amsterdam Treaty. Expressing satisfaction at the new EU instruments made possible by the new treaty, Commissioner Gradin took up an older theme of the Commission (see chapter 3) and underlined the benefits of the AFSJ for the proper functioning of the internal market:

European action in the area of legal measures would contribute to the proper functioning of the internal market, for both persons and businesses. Citizens must be in a position to exercise their rights in the European Area of Freedom, Security and Justice with the same guarantees they enjoy before the courts of their country (cited in Europe Daily Bulletin, 5 May 1999).

Furthermore, the Tampere summit represented a milestone in the Commission’s involvement in the newly created AFSJ. In relation to the special meeting of the European Council in 1999, Commission officials were quick to emphasize the centrality of the citizen in setting the five-year policy agenda on the topic. For example, the recently appointed President of the European Commission, Romano Prodi, declared that:

The subject matter of Tampere is close to the citizens' preoccupations, much closer than many subjects discussed by Heads of State and Government; the message from the European Council must reach public opinion in language which it can identify itself (...) I believe that we have to avoid any danger that Tampere might come to be viewed as a “repressive” Summit: the security aspect of the triptych (freedom, security and justice) is certainly important and may indeed reflect citizens' main preoccupations, but the other aspects—especially

access to justice—cannot be neglected. Citizens must find in Tampere the guarantees they are looking for in terms of fundamental rights, where the future Charter will be of great importance, and in terms of transparency and data protection. (cited in Europe Daily Bulletin, 30 September 1999).

At the same time, the new Commissioner for JLS Antonio Vitorino formulated the priorities of the Commission for the Tampere meeting in the form of a question: “Which are the sectors in which the EU can provide added value to tackle the daily concerns of European citizens?” (cited in Europe Daily Bulletin, 13 October 1999). These were clear claims by Commission officials that EU action in the AFSJ should be in the interest of EU citizens, for which fundamental rights and daily concerns were seen as most relevant.

Moreover, from the early days of his mandate, Vitorino underlined the “positive economic and social effects” of immigration, claiming that diversity “will only be a source of wealth” as long as the “fundamental principles of the host country” were respected (cited in Europe Daily Bulletin, 31 July 2000); on a different occasion, he stated that while “Europe needs immigration”, it must however be “legal” (11 September 2002). Faced with the Council’s stiff opposition on the matter—manifested in the regular watering down of Commission proposals—Commissioner Vitorino voiced his discontent by denouncing the “continued resistance of Member States and the risk of seeing the degree of harmonization (...) reduced to the level of the smallest common denominator, to the detriment of the added value that it gives common action at European level.” (cited in Europe Daily Bulletin, 22 May 2003). There was not much the Commission could do, however, as the Council still used unanimity voting in legal migration and member states refused to remove national quotas. In later years, the Commission weakened its stance and limited itself to underlining the merits of research in the formulation of migration policy. For example, Commissioner Fratinni was quoted in 2008 for saying that “although well-managed migration is beneficial for the European Union, it can also be a major challenge. Europe must, therefore, be able to count on research in this field.” (cited in Europe Daily Bulletin, 14 March 2008).

In contrast, the Commission came very close to the position of member states on matters related to illegal migration, and supported fully the collaboration with third countries in order to prevent the phenomenon and ensure return and readmission to origin countries. In 2006, Commissioner Frattini decided to rely on Libya and the “very pan-African leadership attitude” of its leader Muammar Ghaddafi in order to counter illegal migration (cited in Europe Daily Bulletin, 21 November 2006). Given later developments during the Arab Spring (2011), this attitude shows the Commission’s flexibility regarding the protection of fundamental rights inside the EU as opposed to outside of it.

In relation to the treatment of refugees on European soil, Vitorino frequently highlighted the fundamental rights component, but was cautious in making sweeping declarations about the necessity for European action. Signaling the role of the media in the debate, he argued that this was “a debate for the citizens, and its result will depend upon the way in which they perceive the future society” (cited in Europe Daily Bulletin, 9 February 2001). In other words, Vitorino was saying that the Commission still represented the opinion of EU citizens on the matter, whatever that might be, but for the time being there was no dominant trend in public opinion polls as to what kind of policy should be enacted towards refugees. Given this ambiguity, the Commission could oscillate between protecting human rights for refugees and supporting the Council’s position regarding the necessity to prevent “asylum-shopping, the movement of asylum-seekers to the most welcoming countries” (cited in Europe Daily Bulletin, 15 October 2002). The two were not mutually exclusive, but they indicated the expanding range of Commission policy priorities in the AFSJ and offered a broader scope for the justification of institutional positions in the field.

In later years, the Commission was involved in the scandal regarding the hosting of CIA secret detention centers on the territory of member states (2006). Unlike their unfaltering position on the issue of freedom of speech, Commission officials preferred to be more cautious

in this case by underlining their lack of competence on the matter. For example, during a Parliament hearing on the topic, the High Representative for the Common Foreign and Security Policy, Javier Solana, told Members of Parliament:

Professionally, in the role I have now, I have no competence to question EU Member State on allegations of illegal CIA flights and detention centers operating in Europe. Our stance against torture and other cruel treatment is clear. It is always wrong and illegal. There are no ifs or buts (...) As for secret centers, if these exist or have existed in Europe or elsewhere, they would violate international human rights and humanitarian law. (cited in Europe Daily Bulletins, 3 May 2006).

Simultaneously, the Commission started to become more assertive on the issue of free movement in the Schengen Area, by asking for example clarifications from Belgium and Spain for “not observing rules on the free movement of persons” (cited in Europe Daily Bulletin, 10 April 2002). The Commission also spoke in favor of the Eastern Enlargement and constantly attempted to alleviate fears of a massive immigration wave from the East that would destabilize the security of the border-free Schengen Area. At a European Parliament debate on the subject, Commissioner Vitorino brought data from a Commission study showing that “only around 1% of the new EU citizens would, in the next five years, use the possibility of going to work in one of the older Member States, i.e. less than 220,000 persons in a Union of 450 million inhabitants.” (cited in Europe Daily Bulletin, 5 May 2004).

Indeed, starting 2005—after the end of the transitional period and the appointment of a new Commissioner for JLS in the person of Franco Frattini, who was also Vice-President of the Commission—the supranational institution saw its position strengthened. One visible aspect of this strength was the budget for the AFSJ, which increased significantly, with the largest amount going to immigration and asylum. Frattini explained that his institution’s proposal for budget extension confirmed “the priority nature of the Europe of freedom, security and justice for the European Commission” (cited in Europe Daily Bulletin, 6 April 2005). From then onwards, the Commission became a full-blown actor in the AFSJ, getting monopoly over

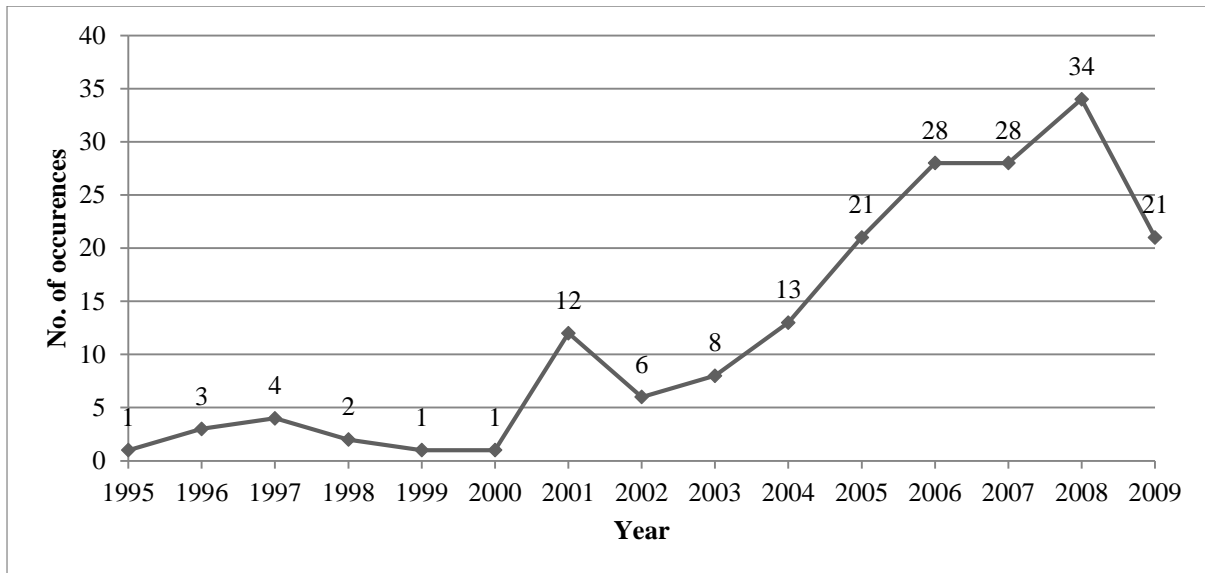
legislative proposals in several policy fields.

On the whole, the period 1995 to 2009 was crucial for European Commission officials to identify and affirm the role of their institution in the AFSJ. Indeed, the Commission was the one institution which saw its organizational structure significantly expanded as a result of the increase in EU competence in the third pillar during the period. The Commission started to follow several AFSJ dossiers at a time, quadrupling the number of staff working in the field once DG JLS was established (Ucarer 2001, 12). The expansion of competences and staff fostered the diversification in the range of justification patterns available to the Commission, as newly-created units made representative claims on behalf of constituencies different from those previously invoked by the institution—namely EU citizens making use of the right to free movement (see chapter 3). Consequently, from the point of view of DG JLS, it was not considered inconsistent to simultaneously stand for increasing rights of legal immigrants and limiting those of illegal immigrants. In this case, two different units inside the DG were claiming to act on behalf of different constituencies, in line with the purpose of their organizational structure and institutional mandate. This diversification of institutional roles was to a lesser extent visible in the Parliament, which is discussed in the next section.

4.2.5 The European Parliament

The *Agence Europe* analysis on representative claims by Members of European Parliament on AFSJ issues revealed the institution's increasing role in the field during the period under consideration, as shown in Graph 4.6. Having started with a minimal role in the third pillar, the Parliament's contribution to the AFSJ grew gradually over time, and became routinized with the introduction of co-decision after 2004 in the areas of free movement, migration, asylum, and civil justice. As the Parliament's influence in policy-making expanded, so did its outspokenness on AFSJ issues. The 2001 terrorist attacks in the US and the beginning of the

EU fight against terrorism marked a spike in the number of claims identified from MEPs, as was the case with the other institutions. In contrast, 2009 saw a drop in the number of total claims associated with the Parliament because most of the articles from that year reported on the Parliament's waiting for the Lisbon Treaty to enter into force and see its powers extended. The total number of claims identified throughout the period is 183.



Graph 4.6: The evolution of representative claims made by officials from the European Parliament, identified in articles on the AFSJ retrieved from Agence Europe's 'Europe Daily Bulletin' (1 January 1995—30 November 2009).

Figure 4.3 below illustrates the patterns of justification adopted by officials from the Parliament to legitimize institutional behavior in the period under consideration. In terms of the type of claimants identified, listed in the box in the upper left corner of the figure, the highest number of claims came from individual MEPs across political groups (139 times), active in the LIBE Committee or as President(s) of the Parliament. In addition, Parliament general resolutions including representative claims were directly cited in *Agence Europe* articles 34 times, while LIBE reports 10 times. Furthermore, figure 4.3 shows that the issues in relation to which MEPs adopted a position were the least diverse from the three institutions, as they argued mostly in favor of protecting the fundamental rights of all citizens—be they from member states or from a third country (on 84 occasions)—as well as in favor of protecting data

privacy in the context of the EU fight against terrorism (on 31 occasions). In fact, MEPs got involved in the cooperation with the US and Canada on counter-terrorism on 27 occasions only to manifest concern at infringements of human rights (on 20 occasions, as was the case regarding the existence of CIA secret prisons on member states' territory) and of data privacy (on 7 occasions, for example in relation to airlines' Passenger Name Records transfers).

The box in the lower right corner of figure 4.3 further illustrates that the Parliament's positions were most often framed using moral types of justification (on 86 occasions) or ethical ones, such as ensuring fundamental freedoms (mentioned 57 times) and respect for democratic values (mentioned 29 times). Moreover, in the period 2001 to 2009, the LIBE Committee claimed to stand—rather regardless of political groups—for the protection of basic human rights of people suspected of terrorism and against the access of law enforcement authorities to citizens' personal data in the name of the so-called 'war on terror'. No other EU institution invested so much energy and political capital as the Parliament in the two issues, portrayed as being in the interest of all EU citizens. The box at the center of Figure 4.3 confirms that the Parliament typically claimed to act on behalf of EU citizens (93 occasions). Indeed, taking into account that the Parliament is the only body directly elected in the EU political system, it is not surprising that EU citizens represent the constituency most frequently invoked by MEPs.

Broad EU values such as tolerance or freedom of speech came in second (mentioned 37 times) and were presented as a matter of principle given the historical origins of the EU polity. In contrast, the protection of security was far less supported by MEPs (featuring 14 times), not least because this dimension was seen as being already sufficiently covered by the Council. In fact, the Parliament's radically different position placed it throughout time in heated debates with the JHA Council, which refused to acknowledge the trade-off between security and fundamental rights in the fight against terrorism. Other issues of importance for the Parliament during the period were the creation of a common EU asylum policy (13 identified

claims) in which the principle of solidarity through burden-sharing was implemented (6 claims), while legal migration was also supported (10 claims). Indeed, the Parliament found itself on several occasions speaking on behalf of asylum-seekers (22 times), legal migrants (11 times), and even illegal immigrants (6 times)—whose human rights and dignity were according to some MEPs to be equally protected.

Finally, in terms of audiences, the box in the lower left corner of figure 4.3 demonstrates the multiplicity of addressees identified by the Parliament in the AFSJ. Accordingly, MEPs are trying to cast a wide net in the audience by offering their representative claims to other EU institutions (165), EU citizens (135), as well as to groups of NGOs, think tanks, and business groups that surround its activity (64). Sometimes, MEPs use the media to send messages to other political groups in the Parliament (42), to specific national governments (27), and even to third countries such as the US (21) in the context of cooperation on counter-terrorism.

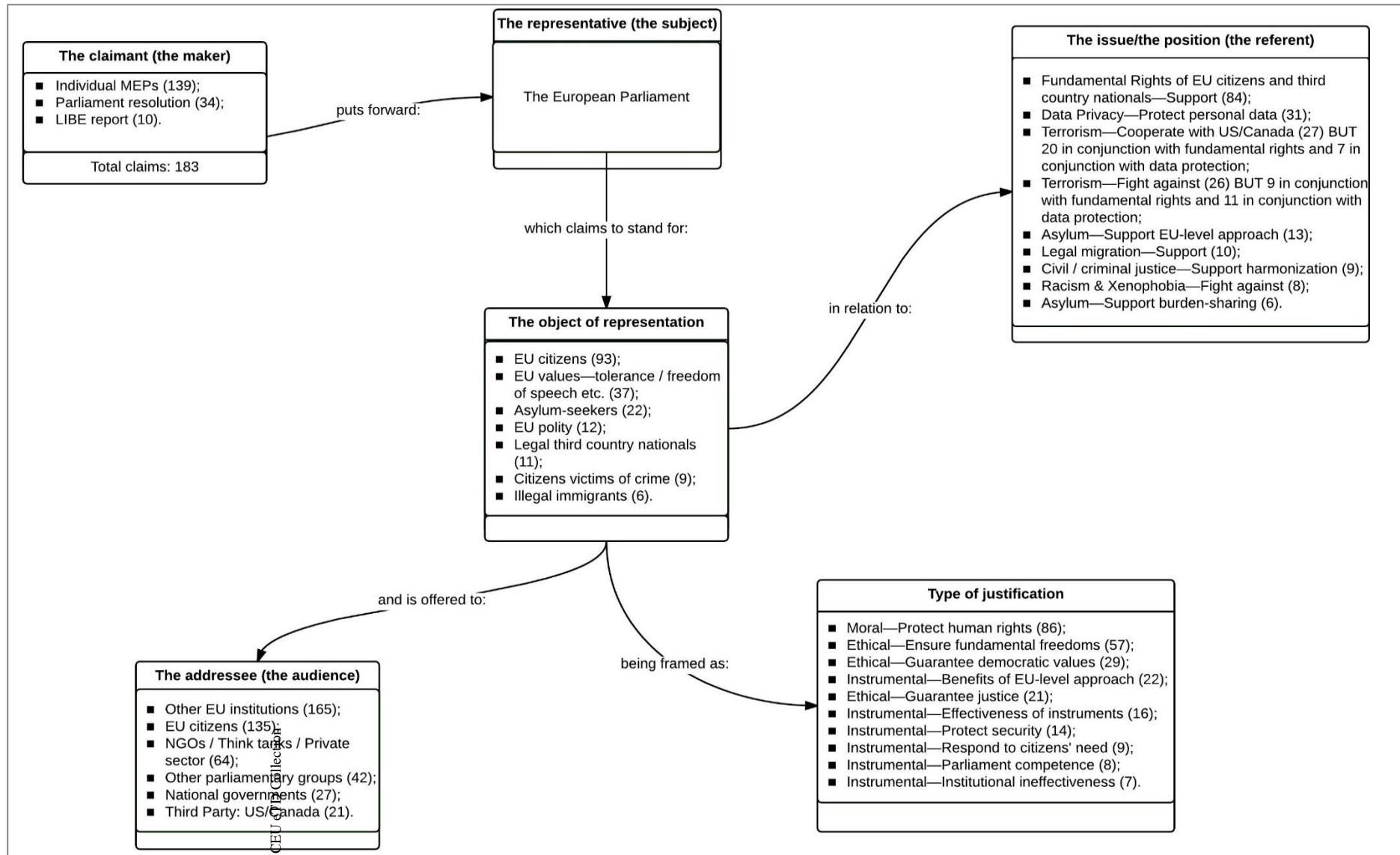


Figure 4.3: Matrix of representative claims framework for the European Parliament (LIBE Committee), based on an analysis of articles on the AFSJ retrieved from Agence Europe's 'Europe Daily Bulletin' (1 January 1995—30 November 2009). The number between brackets represents the total number of claims identified for the respective code.

Having outlined the general overview of the Parliament's patterns of justification between the Maastricht and the Lisbon Treaties, it is important to examine some of the specific claims put forth by MEPs over time. As described earlier in the paper, the first years of third pillar cooperation came under strong criticisms by the Parliament in terms of both institutional ineffectiveness and lack of democratic accountability for the measures adopted. At the 1996 annual debate on JHA, Michèle Lindeperg (Socialist Party, France) criticized on behalf of the LIBE Committee the slow pace of developments in the area of JHA, which could "no longer be attributed to a breaking-in period"; at the same time, she suggested that "without substantial progress, the annual debate could turn into a ritual of lamentation without any real benefit for citizens" (cited in Europe Daily Bulletin, 16 December 1996). There was a certain feeling of impotence on the side of the LIBE Committee, which had no competence in the third pillar besides making political declarations. From this perspective, the MEP quoted here was essentially saying that the Parliament could not serve its constituency, namely the EU citizens.

During the 1996-7 Intergovernmental Conference, MEPs got the opportunity to be heard on the matter, which is why their claims became very colorful: "There is a European union of crime but not a European Union to fight crime. This is the responsibility of governments, which consider sovereignty a sacred cow" (Martin Schulz, Socialist Party, Germany). Nevertheless, if the majority of MEPs expressed firm support for the extension of Community competences to asylum and migration in the future Amsterdam Treaty, there were a few reticent voices coming especially from Scandinavian members like Georges Berthu (Non-Attached, Finland) and Ole Krarup (Non-Attached, Denmark), who "affirmed for their part that they do not want 'everything to come under Community competence' and that the knot of the matter is the States' right to 'democratic self-determination'" (cited in Europe Daily Bulletin, 31 January 1997).

But if there was no consensus inside the Parliament regarding the division of powers between member states and the supranational level in the AFSJ, the institution showed more consistency in its substantive policy positions, as illustrated in the following resolution:

As far as migratory pressure and internal security is concerned, the Parliament reaffirms that the challenges facing the Union must be dealt with by the Council in a way that preserves the fundamental rights of those living in the Union and without limiting individual guarantees. The Parliament refuses to accept that ‘joint action’ against racism and xenophobia has not been adopted and that the notion of refugee has received restrictive application. (cited in Europe Daily Bulletin, 15 December 1995).

The protection of human rights was not the only issue on which the LIBE Committee took a strong stance at the time. In addition to promoting asylum rights for refugees, a majority of MEPs claimed to stand throughout the 2000s for the social rights of legal migrants, because they “contributed to the EU member states’ prosperity and to their economic, cultural and social development. The Socialists and the Greens in particular supported a more social approach when it comes to the integration of immigrants. Martine Roure (Socialist Party, France) was of the view that “we must make legal openings for immigration in full and entire respect of the right to live as a family group, and make integration policies an integral part of such measures.” (Europe Daily Bulletin, 27 October 2005). It is important to mention, however, that not all MEPs spoke in favor of economic migration. In fact, a report on the matter was adopted in 2005 with 259 votes for, 85 against and 176 abstentions (ibid.). But if many MEPs were against the issue, they were by far not as vocal about it as the ones in favor—as suggested by the high number of abstentions casted on this report. Indeed, the Parliament built a reputation as being liberal-oriented on migration and asylum by virtue of a group of MEPs mostly from the Socialists and the Greens, but also the European People’s Party, who made a career by speaking on behalf of the two issues.

Another topic that came to dominate LIBE’s agenda throughout the 2000s was the protection of citizens’ personal data from access by law enforcement authorities from both

inside and outside the EU, which escalated against the backdrop of 9/11 and the JHA Council's involvement in the 'war on terror' alongside the United States. As early as 2001, the ramifications of the collaboration with the US came under close scrutiny in the Parliament, as illustrated by Graham Watson's (Liberal Democrats, UK) claims:

after the 11 September attacks, some people (including the President of the European People's Party group, Hans-Gert Pöttering) has announced 'We are all American', but the tragic events have taught us that 'we must first be Europeans'. Europe is capable of 'putting its house in order' by striking a balance between security and rights and freedoms. The difference in legal culture between the United States and Europe is a problem, as the US Patriot Act that appears to discriminate against non-US citizens, [an issue] that has to be raised by EU representatives with the Attorney General John Ashcroft when he visits Europe later this week. (cited in Europe Daily Bulletin, 12 December 2001).

In this statement, we have a clear claim of representativeness by a member of the Parliament, who portrays the priorities of Europeans as opposed to those of Americans when it comes to the trade-off between security and fundamental freedoms. With time, this view from the Parliament had only become more articulate. By 2007, some MEPs openly questioned the effectiveness of US counter-terrorism measures that relied on passenger data transfers from the EU, suggesting that such data could be used instead "for the private use of employers or insurance companies" since "EU citizens were not protected by the US Privacy Act, other than as an administrative favor which [could] be removed at will, and not within a legislative framework" (Sophia In't Veld, Liberal Democrats, the Netherlands, cited in Europe Daily Bulletin, 15 May 2007).

Moreover, data protection infringements were not the only aspect criticized by the European Parliament in relation to the Council's approach to the 'war on terror'. For example, on the subject of the EU-US agreements on criminal legal cooperation and extradition, the rapporteur Jorge Salvador Hernandez Mollar (European People's Party, Spain) strongly complained about the lack of legal and constitutional guarantees for EU citizens, and his report was adopted in the plenary by a landslide (356 in favor, 63 against and 35 abstentions); in his

words: “how can we explain to the citizens of Europe that agreements affecting their rights are being concluded without the European Parliament having any say?” (cited in Europe Daily Bulletin, 4 June 2003). In addition, the Parliament got involved in the scandal regarding the existence of secret CIA detention centers on EU territory by organizing a temporary committee to investigate the allegations. The rapporteur of the committee, Claudio Fava (Socialist Party, Italy), declared that he is certain that “some of these flights were involved in the illegal practice of extraordinary rendition” because “fundamental rights are much less respected since 9/11” and that it is the responsibility of the Parliament “to ensure that in future terrorism is faced up to without abusing human rights” (cited in Europe Daily Bulletin, 6 April 2006).

In addition, in terms of inter-institutional relations, one of the Parliament’s victories during the period was the rejection of Rocco Buttigione as Commissioner for Justice, Freedom, and Security in the first Barosso Commission. The problem was a series of remarks made by Buttigione at his parliamentary hearing and considered by some members of the LIBE Committee as discriminatory against women and homosexuality—which they perceived as unacceptable to come from an EU Commissioner. According to a press release following the parliamentary hearing, the LIBE Committee rendered “Buttigione's vision of immigration, asylum and sexual preferences [as] incompatible with the European treaties and secular and egalitarian values of Europe” (Europe Daily Bulletin, 7 October 2004). In the end, Buttigione was replaced, which strengthened the Parliament’s stance on the existence of common EU values such as tolerance and freedom of speech.

Overall, the Parliament’s evolution of institutional roles throughout the period has been the most internally consistent from all of the three institutions. Having started on the fringes of JHA decision-making, the LIBE Committee made a concerted effort to gain a say in the field, aiming one day to stand on equal footing with the Council. Given their institutional profile as a parliament, the choice for fundamental rights of EU citizens as the main object of

representation is not exactly surprising; nevertheless, the priority given to data protection and rights of immigrants was contingent upon developments at the EU level and the focus of the JHA Council. Indeed, in many instances, the Parliament has defined its institutional role in direct opposition to that of the JHA Council, its main competitor. This feature bears a close resemblance to the idea of ‘ressentiment’ proposed by Liah Greenfield in relation to national identity narratives, according to which countries often develop identity narratives that deliberately contrast their national characteristics with those of their chief national ‘Others’ (Greenfeld 1992, 16). Especially in these first years of Parliament involvement in the JHA, the Parliament has found itself in opposite camps from the Council—a situation which changed, however, after the Lisbon Treaty and the expansion of Parliament competences in the AFSJ (see chapter 5).

4.3 Conclusion: consolidating and diversifying institutional roles in the AFSJ

This chapter discussed the evolution of institutional behavior in the AFSJ in the period after the implementation of Maastricht Treaty’s third pillar (1994-5) up until the almost complete communitarization of the field with the entry into force of the Lisbon Treaty (1 December 2009). Institutional behavior was considered in terms of patterns of justification offered by the four main institutions—the European Council, the JHA Council, the Commission, and the Parliament—in order to legitimize their respective policy positions and decisions. The purpose was to illustrate how officials from each institution substantiated the role of their organization by making representative claims on behalf of certain constituencies, portrayed as having specific interests or values. Moreover, patterns of justification were shown to have been neither constant nor one-dimensional throughout the period; conversely, depending on the issue under consideration, constituencies were claimed to want security, fundamental rights (for EU citizens or all human beings, regardless of citizenship), the protection of national sovereignty

or labor markets, the tackling of the Union's demographic problems, etc. While some institutions (such as the Parliament's LIBE Committee) were more consistent in portraying the characteristics of their constituency than others (like the Commission's DG JLS), the diversification of justification patterns for institutional behavior proved inherent in the nature of the AFSJ—which covered so many different and sensitive issues under one EU policy field. The more competences an EU institution accumulated in the AFSJ, the larger the universe of constituencies in the name of whom representative claims could be made, and by implication, the higher the likelihood for variation or inconsistency in the justification of institutional behavior.

To reiterate the argument of this thesis, EU institutional behavior in the AFSJ was driven during the period 1994 to 2009 by the need of officials to legitimize the policy positions and decisions of their respective institution by reference to a constituency whose interests or values they claimed to be representing. Internal constitutional and administrative developments in the EU as well as external events during the period under consideration altered the scope of institutional roles and thus the boundaries of the universe of constituencies to be represented—as shown in the first part of this chapter. Under the circumstances, officials inside each institution had significant leeway to articulate their positions and decisions as being for the benefit of different constituencies. As illustrated in the second part of this chapter through the *Agence Europe* content analysis, politically appointed officials in particular engaged, on behalf of their institution, in the practice of representative claims-making in the media. The analysis revealed a multiplicity of constituencies claimed to be represented by each institution.

Specifically, the European Commission focused its role in the AFSJ as the one institution responsible for providing political impetus to the field and engaging in ad-hoc crisis management. Next, the JHA Council was shown to have been much more multi-dimensional in terms of policy priorities in the first years of third pillar cooperation, when the institution

was searching for its own standing in a new field of EU action. While security was a chief concern of ministers of home affairs since the Schengen Agreement, the terrorist attacks in the US, Madrid, and London gave a clear institutional purpose to the JHA Council in the fight against terrorism from abroad. In contrast, the Commission was the one institution which saw its role both consolidated and diversified during the 16-year period. As the institutional structure of the Commission grew to exercise new competences in the AFSJ, so did the constituencies in the name of whom DG JLS claimed to be acting. As for the Parliament, the LIBE Committee was caught in the period under investigation in a constant struggle to increase its institutional role and visibility in the third pillar and the AFSJ. Stuck in a position of inferiority in the decision-making process vis-à-vis the JHA Council, MEPs working on AFSJ issues dedicated a lot of energy into making public statements that would attract media attention and raise the profile of their institution. The protection of fundamental rights in the name of EU citizens, immigrants, and asylum-seekers proved to fit their institutional portfolio quite well. However, after the institutional landscape in the AFSJ was again altered by the Lisbon Treaty, the Parliament also started to diversify the constituencies claimed to be represented—in a move similar to that of the Commission after the Amsterdam Treaty. The institutional changes introduced by the Lisbon Treaty are discussed in the next chapter.

5 THE STABILIZATION OF INSTITUTIONAL BEHAVIOR IN THE AFSJ (2009-14)

This chapter explores institutional behavior in the European Union Area of Freedom, Security and Justice during the first mandates of the European Commission and the European Parliament in the aftermath of the Lisbon Treaty (2009-14). The period is crucial because it reveals how EU institutions sought to legitimize their policy positions and decisions following the extensive introduction of community method decision-making across AFSJ subfields (TFEU, Title V, Art 67-89). Not only did the new treaty bring an empowerment of supranational institutions through a so-called “normalization” of the former third pillar JHA, but it also changed the patterns of interaction between member states in the Council—where unanimity rules have been for the most part replaced by qualified majority voting (Ucarer 2013, 286). Some issues, however, remained subject to intergovernmental policy coordination or special legislative procedures, which is why it is often argued that the AFSJ has been communitarized “with hesitation” (Lavenex 2010). In this context, the present chapter examines patterns of institutional justification of the European Council, the Council, the Commission, and the Parliament which reflect the process of role perception by officials inside institutions in the context of legislative negotiations within co-decision—now renamed the ‘ordinary legislative procedure’ (TFEU, Art 294).

The purpose is to show that the post-Lisbon period has brought a stabilization of institutional behavior in the AFSJ, with the consolidation of “a special Council formation, two Commissioner portfolios, two Commission Directorate-Generals and a European Parliament Committee dedicated to it”, which work together on a daily basis to produce legislation (Monar 2012b, 718). In respect to specific patterns of institutional behavior, it is argued that the initial post-Lisbon years can be described as ‘stabilization in variation’, meaning that variation in the justification of institutional positions and decisions has become the norm rather than the

exception. In other words, officials from the same institution can adopt different positions on similar issues at given periods in time, leaving the impression of inconsistency or at the very least a departure from their original or typical arguments used to legitimize institutional action. The reason for this is found in the diversification of constituencies claimed to be represented by each institutional actor—or, to be more precise—the diversification of the characteristics identified as relevant for those particular constituencies. The development is closely connected with the increase in scope of EU activity in the AFSJ. To put it differently, the more competences the EU accumulated in the AFSJ, the broader the universe of constituencies in the name of whom representative claims could be made. Such a perspective explains, for example, why officials from DG Justice and DG Home Affairs found themselves sometimes in opposite camps on common issues (Vermeulen and Bondt 2015, 78), or why the LIBE Committee in the Parliament—which receives the majority of AFSJ legislative proposals⁴⁴—maintains its fundamental rights discourse while simultaneously attempting to show a tougher stance on organized crime (Carrera, Hernanz, and Parkin 2013, 2).

At the same time, the variation in the justification of institutional behavior can account for different patterns of inter-institutional interactions, where seemingly erratic patterns of cooperation and conflict can be observed. Inter-institutional conflict is understood in terms of competitive claims-making by institutions, i.e. institutional actors claiming to speak on behalf of constituencies that are portrayed as having opposing interests, values, or beliefs. The point here is that the more the intended constituencies of institutional actors are overlapping, the less likely clashes between institutions are. This can explain, for instance, why officials from different institutions fight over issues like immigration or criminal policy, but collaborate more smoothly on civil justice. Last, but not least, it is argued that the polarization of institutional positions, i.e. the politicization of issues through competitive representative claims-making, is

⁴⁴ The exception is the area of civil justice, which falls under the jurisdiction of the JURI Committee.

exacerbated by the occurrence of unpredictable crises or disasters that attract media attention and require immediate policy solutions (cf. Zahariadis 2007, 66). While political crises such as the death of immigrants in the Mediterranean can rally EU institutions behind a common goal, e.g. prevent the future capsizing of boats, officials can disagree about the means to achieve the goal—in line with the rights and obligations they envisage for themselves on account of their would-be objects of representation (Lord and Pollak 2013).

To illustrate these points, the chapter proceeds in three steps. The first part explains the framework of institutional behavior in the AFSJ following the entry into force of the Lisbon Treaty, describing the main institutional features of a field that has been communitarized but in which member states continue to play a key role. The second part follows the institutional justifications of the European Council, the Council, the Commission, and the Parliament in three legislative packages selected for in-depth investigation: the Schengen Governance Package (2011-13), the Intra-Corporate Transferees Directive (2010-14), and the Confiscation Directive (2012-14) (described in section 5.2). The goal is to show the extent of variation in institutional justification in line with the features of the constituencies claimed to be represented by actors—which can vary even within the same institution on the same case. The last part takes stock of the empirical material presented, and puts forth an analysis of post-Lisbon patterns of institutional justification in the AFSJ and their implications. In contrast to chapter 4, the empirical evidence presented here draws mostly on interview material with technocratic officials from the four institutions, seeking to illustrate similarities and differences with the constituencies claimed to be represented by politically appointed officials.

5.1 Context: Post-Lisbon institutional dynamics in the AFSJ

The impact of the Lisbon Treaty on the AFSJ has been extensive. Among the chief objectives of the architects of the treaty—and its predecessor the Constitution for Europe—was that:

The Union shall offer its citizens an Area of Freedom, Security and Justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime. (TFEU, Art 3[2]).

This generic treaty goal was translated differently by the main EU institutions, with specific emphasis according to the constituencies they claimed to represent. Thus, heads of state or government were quick to reaffirm their commitment to Europe's citizens in the context of the third multi-annual program in the AFSJ—the Stockholm Program—adopted by the European Council in December 2009 (simultaneously with the entry into force of the Lisbon Treaty):

The European Council considers that the priority for the coming years will be to focus on the interests and needs of citizens. The challenge will be to ensure respect for fundamental rights and freedoms and integrity of the person while guaranteeing security in Europe. It is of paramount importance that law enforcement measures, on the one hand, and measures to safeguard individual rights, the rule of law and international protection rules, on the other, go hand in hand in the same direction and are mutually reinforced. (European Council 2009, 9).

The focus on citizens and fundamental rights came in response to the harsh criticism leveled against the previous multi-annual program (Council of the European Union 2004). Formulated in the aftermath of the terrorist attacks in the US (2001) and Madrid (2004), the Hague Program was widely regarded as downplaying the importance of individual liberties in favor of security considerations—viewed at the time as “the central concern of the peoples of the States” (Balzacq and Carrera 2006b, 5). Although heads of state or government maintained the objective of “a Europe that protects” among the AFSJ priorities in the Stockholm Program, there was an obvious emphasis on “promoting citizenship and fundamental rights” and ensuring “a Europe of law and justice” as well as “a Europe of responsibility, solidarity, and partnership in migration and asylum matters” (European Council 2009, 10–11).

One should note, however, that the actual list of measures proposed in the Stockholm Program was devised within JHA Council structures (Council of the European Union 2009), and therefore the signature and commitment of the European Council was a symbolic rather

than a substantive gesture (Bunyan 2009). Indeed, it was the 2009 Swedish Presidency of the Council which took the lead in the preparations for the Stockholm Program, conducting comprehensive discussions with member states' governments and the Commission, but also with the European Parliament and major European and national-level stakeholders (Ask 2010, 16–17). The main ambition of the Swedish Presidency was to shift the focus of EU activity in the AFSJ onto individual procedural rights, a domain for which Sweden was internationally renowned (Swedish Government 2010, 28). According to opinions from civil rights groups, the extent to which this ambition was actually achieved in the Stockholm Program is debatable⁴⁵ (Amnesty International 2009). Notwithstanding this criticism, the active role of the Swedish Presidency in shaping the agenda had important implications for the constituency traditionally claimed to be represented by the JHA Council. While continuing to claim the importance of security in the life of national citizens, the Presidency sought to find a balance with fundamental rights issues:

One of the first duties of the State is to protect its citizens. Without security there can be no freedom for European citizens. But neither can there be security for citizens if protection is provided while disregarding certain individual rights, such as the rights of suspected and accused persons in criminal proceedings. Striking the right balance between law enforcement measures and measures to safeguard individual rights and the rule of law is of paramount importance. (Swedish Presidency of the European Union 2009).

The European Commission also expressed its understanding of the provisions of the Lisbon Treaty in terms of the constituency they claimed to represent:

A European Area of Freedom, Security and Justice must be an area where all people, including third country nationals, benefit from the effective respect of the fundamental rights enshrined in the Charter of Fundamental Rights of the European Union. (European Commission 2010b, 2).

The key words here were “including for third country nationals”, a clear signal of the Commission’s commitment towards a constituency that went beyond EU citizens to third party

⁴⁵ The main criticism was that the Stockholm Program included too many details, which made the text bulky and unreadable. For this reason, it was considered that the program “resembles more a ‘Christmas tree’ than a political document of orientation” (Pascouau 2014, 8–9).

nationals legally residing in any of the member states. In a similar vein, one of the Parliament's main priorities in the post-Lisbon period was to ensure “respect [for] the principle of equal rights for all people” (European Parliament 2009)—another allusion to the treatment of third country nationals and asylum-seekers. At the same time, the Parliament maintained some of its older commitments to the protection of personal privacy, by demanding that:

Citizens' rights and rights of protection, especially data protection, must be preserved, and whereas the common justice and home affairs policy must remain subject to parliamentary supervision. (ibid.).

Apart from such declarative goals made by all institutions, the real stakes of the new treaty were the changes brought to the institutional and policy framework of the AFSJ. Most significantly, the treaty eliminated the pillar structure established at Maastricht and thus “put an end to the separate life of the third pillar, which had caused a range of legal and decision-making complications for the construction of the AFSJ” (Monar 2012a, 616). Indeed, the remainder of the third pillar, consisting of police and judicial cooperation in criminal matters (Amsterdam Treaty, Title IV), became part of the AFSJ and subject to community method legislation⁴⁶. For insiders of the AFSJ, the move towards the community method was bound to happen eventually, keeping in mind that the former third pillar—unlike the second pillar Common Foreign and Security Policy—had always been directly related to the internal market in the form of “compensatory measures”, which logically required the same legal foundations for decision-making (Donnelly 2008, 1).

In this context, the institutional framework of the AFSJ has undergone important changes during the period 2010 to 2014, especially in regard to the activity of institutions. The implications for each actor are discussed below, by illustrating how technocratic officials from

⁴⁶ Other general provisions of the Lisbon Treaty referred to an extension of the jurisdiction of the Court of Justice (taking full effect after a transitional five-year period), the legally binding nature of the EU Charter for Fundamental Rights, and the consolidation of the opt-out system for the United Kingdom, Ireland, and Denmark (Bache, George, and Bulmer 2011, 473).

the four institutions described in interviews the roles of their institutions in the post-Lisbon context.

5.1.1 The European Council

When it comes to the role of the European Council in the AFSJ, the most significant novelty introduced by the Lisbon Treaty referred to the formalization of its agenda-setting powers, as heads of state or government were empowered to “define strategic guidelines for legislative and operational planning within the Area of Freedom, Security and Justice” (TFEU, Art 68). The provision was a translation of the practice already in place to adopt multi-annual programs at the highest political level (Tampere 1999; Hague 2004; Stockholm 2009), which did not imply that heads of state or government actually discussed the content of these documents (Peers 2006, 22). In fact, the first Strategic Guidelines adopted after the entry into force of the Lisbon Treaty (European Council 2014) are widely viewed as a “missed opportunity” to provide a clear political vision to the AFSJ (Carrera and Guild 2014; De Bruycker 2014)—not least because the text had [again] been prepared in Council structures and discussed only by Coreper ambassadors (AM0202, 3 April 2014). In the opinion of AFSJ officials from the cabinet of Herman Van Rompuy—the first permanent President of the European Council (2009-14)—this development was perfectly normal, as they expected that “not every issue arrives there [on the table of heads of state or government], because if it did—it would be a sign that the ‘machinery’ is not working” (AM0101, 1 April 2014). Conversely, issues that reached the agenda spontaneously—like migrant deaths, or the surveillance crisis—were discussed in the actual meeting of the heads, who then wrote down the conclusions “in the room”. In fact, at the Council Secretariat (which also serves as the Secretariat of the European Council President), it is taken for granted that substantive contributions from the European Council only come in times of crisis, as heads of state or government have developed a sort of

philosophy of “managing by emergency, as was the case of the Lampedusa shipwreck, or 9/11 as the paradigmatic example.” (AM0202, 3 April 2014).

In fact, during the period 1 December 2009 to 1 July⁴⁷ 2014, only three AFSJ issues featured on the European Council agenda: a) the accession of Romanian and Bulgaria to Schengen, placed on the agenda by the two delegations themselves; b) the refugee crisis in the Mediterranean following the Arab Spring, placed on the oral agenda and leading to the creation of the so-called Task Force Mediterranean; and c) the post-Stockholm process—the strategic guidelines on the AFSJ, discussed at the June 2014 meeting, taking into consideration that the five-year Stockholm Program was nearing completion (AM0102, 5 November 2014). In other words, “without having a crisis, [the AFSJ] comes to European Council meetings only when you plan it” (AM0101, 1 April 2014)—as was the case of the Strategic Guidelines. According to Peter Van Kemseke, former Deputy Head of Cabinet for Herman Van Rompuy, the European Council sees itself nowadays as a ‘crisis manager’ who can have “enormous impact on legislation” (by inviting the Commission to submit proposals, and solving legislative deadlocks)⁴⁸, but “its role is to give political impetus, it doesn’t have the expertise [for details]”(Van Kemseke 2014). Other officials associated with the European Council and working on the AFSJ support the view:

In general, European Council input creates tremendous political pressure [on the other institutions]; for example, with the Common European Asylum System, it didn’t matter that we needed a few months longer to finalize it, I’m sure that without the deadline from heads of state or government it would have lasted much longer. (AM0102, 5 November 2014).

⁴⁷ The 2014 European Parliament elections took place during 22-25 May; however, this analysis includes the June 2014 meeting of the European Council because that is when heads of state or government decided on the results of the elections and appointed Jean Claude Juncker as the next Commission President (European Council 2014).

⁴⁸ Apparently, even the threat of bringing an issue before the European Council is enough to solve legislative deadlock in the Council (Van Kemseke 2014).

This feature is consistent with portrayals of the European Council in recent years, against the backdrop of the global economic and financial crisis (Puetter 2011; 2013). Van Rompuy himself describes the role of the European Council:

The institution's vocation [...] is to be ready to spring into action when special cases arise—changing the treaty, letting new members into the club, setting the budget, dealing with crises. In all these cases, it draws upon the collective legitimacy of its members. (Van Rompuy 2014, 114).

In times of crisis the limitations built on attributed competences are quickly reached. The European Union can only act in fields where governments have jointly given it a mandate to so. But when we enter uncharted territory and new rules have to be set, the European Council, with the Union's twenty-eight most senior executive leaders around the table, is well placed to play its part. (ibid, 124).

The self-appointed role of the European Council as 'crisis manager' has quickly expanded across policy fields, including the AFSJ—which contains heavily politicized issues such as immigration, asylum, and internal security more broadly. In the language of the representative claims framework, it can be said that the European Council (the maker/claimant) offered itself (the subject/representative) as the one institution capable to engage in effective problem-solving in the name of all Europe's citizens (the object of representation). As the political leaders of their respective countries, heads of state or government in the European Council considered that only they have the legitimacy to pursue crisis management in the EU political system.

Taking all this into consideration, it can be said that the institutional behavior of the European Council in the AFSJ has changed to a certain extent in the aftermath of the Lisbon Treaty. While the constituency remained virtually the same as in the 1980s—the peoples of Europe—what has transformed is the way in which the European Council seeks to serve them 'best'. Since the AFSJ is already a full-blown policy field at the EU level, the political commitment of heads of state or government is no longer considered as vital as it was in Tampere (1999). On single issues, the European Council can still use its political weight to provide deadlines for legislation, but the other institutions are generally left to solve matters by

themselves. Instead, the European Council has taken on a ‘crisis manager’ role in the AFSJ, similar to its functions in the field of economic governance, meaning that heads of state or government engage in problem-solving in the AFSJ only when crises are pressing and require urgent action at the EU level. The line of justification offered by technocratic officials regarding this new role of the European Council is the same as in the 1980s: since the institution brings together the highest directly elected officials in member states, it is best placed to “know what Europe’s people want” (chapter 3.2.1). If heads of state or government originally saw themselves responsible for the ‘big decisions’ of European integration, they are now routinely involved in managing crisis situations, providing at times very specific policy guidelines on what the other institutions are to do. This trend is further illustrated in the legislative packages examined in the second half of this chapter, when the European Council chose to intervene only in the case when there was a crisis to be tackled.

5.1.2 The JHA Council

Formerly the linchpin of the AFSJ governance arrangement, the Council has seen its role diminished in the post-Lisbon years, being now placed on equal footing with the Parliament on a majority of AFSJ issues (Ucarer 2013, 288). Most officials from the JHA Council are not happy about the development, explaining the differences in vision between them and the LIBE Committee, their main counterpart in the Parliament, in relation to the constituencies they claim to represent:

My opinion is that the Council is the most democratic institution of the Union because it brings together the justice and interior ministers of members states, who are actually in touch with what is happening in their countries (more so than the MEPs, who get elected every 5 years and are Brussels-based) and are familiar with the sensitivities of the issues. If you listen to the LIBE Committee, their position on the fundamental rights of citizens is nice, my heart goes to them, but the reality in the member states—which ministers know—is that citizens want to fight crime more effectively. (AM0202, 3 April 2014).

Here we have a clear portrayal of the interests of the constituency which the JHA Council claims to represent—the citizens of member states—whose desires are registered by

government representatives as wishing to live in a ‘crime-free’ environment. A novelty of the post-Lisbon period is that JHA Council officials now feel the need to articulate the legitimacy of their institution in contrast to that of the Parliament, which was not a concern before:

The LIBE Committee is not very well connected with member states’ interests on security because they do not consider that security could be an essential fundamental right. As policemen, our first goal is to protect people, and for us this is the fundamental right... (AM0212, 23 October 2014).

This position is shared in particular by Council representatives working on migration, asylum, border management, counter-terrorism, and police cooperation more generally—whose primary affiliation is with national home affairs ministries. Since most of these people have started their career as police officers, they are prone to think in terms of crime-fighting and security-provision, now at a European scale:

The task of my administration is to ensure the security not only of [my national] citizens, but of all European citizens. We can consider that all of us are in the same boat because of the absence of borders, and we work together for the security of our citizens... (AM0213, 28 October 2014).

At the same time, the Council views Members of Parliament as far less legitimate to participate in decision-making, owing to their distance from the implementation of EU legislation:

We are prone to be in conflict with the [Parliament], they make a huge deal out of small things. The Council feels more important, because we represent the member states. We feel the consequences of the decisions made, they don’t. (AM0216, 4 November 2014).

In other words, the Council currently legitimizes its positions in the AFSJ by reference to national administrations, which are considered better suited to participate in decision-making in the field because they have to deal with the implications of the measures adopted. Accordingly, when asked directly about whom they see as the beneficiary of their work, officials from Permanent Representations are prone to cite the “national interest” (AM0214, 29 October 2014) or the “national administration” (AM0220, 17 December 2014). On account of their job—which requires them to act in line with the national ‘mandate’ for negotiations in every legislative initiative—Council officials operate under the general assumption that their

role “is to make the proposal as easy as possible to integrate in national legislation” (AM0217, 7 November 2014). The Commission, for example, sees both merits and shortcomings in this approach of the Council:

The Council is a body characterized by expertise and a thorough understanding of issues, but it is also ideologically-driven; if for some reason they don’t want to change something, they won’t—and sometimes the reason is that they don’t want to change a coma in their national legislation. (AM0311, 31 October 2014).

However, Commission officials who participate in Council meetings agree that it was very difficult for people from ministries of justice and home affairs to accept the empowerment of supranational institutions:

There is ‘deep conservatism’ on the Council’s side as regards the role of the other institutions: the intergovernmental approach is the way they think about it, keeping things within the purview of member states. Having to deal with the Parliament on an equal footing was sort of a cultural shock. (AM0303, 4 April 2014).

In addition, the other major change brought to Council structures by the Lisbon Treaty was the shift from unanimity to qualified majority voting (with a few exceptions). Nevertheless, the consensus culture of making decisions has been preserved to a large extent during the 2009-14 period, as ministers did not want to be perceived as voting against a ‘deal’ reached (AM0205, 16 September 2014). But while formal voting patterns by ministers seemed to display continuity in the Council, officials at lower level confessed that negotiations dynamics have changed significantly since the introduction of qualified majority voting. One consequence was the intensification in the activity of JHA Counselors from Permanent Representations⁴⁹, whose work was organized in informal meetings in order to facilitate the reaching of decisions outside the public eye (AM0214, 29 October 2014). JHA Counselors typically identified their role in

⁴⁹ Each member state has a number of JHA Counselors from justice and home affairs ministries ‘posted’ to Brussels to oversee negotiations on EU-level instruments. Interviewees generally agree that their role has intensified exponentially since the introduction of the ordinary legislative procedure, owing to their availability to meet in person after each triologue and reach compromises (AM0203, 7 May 2014; AM0208, 30 October 2014; AM0210, 15 September 2014; AM0213, 29 October 2014).

terms of the constituency they claimed to represent—“to act in conformity with the national interest”—which was defined on a case-by-case basis by their respective ministries (AM0218, 7 November 2014). Another consequence of the change in voting rules was that presidencies could no longer be blackmailed by unanimity requirements, and decisions could be taken despite the formal opposition of up to three member states (or even more, depending on their size and populations). This particular development was not always visible to the public because the real voting takes place in Coreper⁵⁰, while the ministers just sanction the result (AM0209, 12 November 2014). In this configuration, even large member states could be outvoted, and their awareness of the possibility has apparently made them more flexible in negotiations (AM0210, 15 September 2014).

This is not to say, however, that officials from national governments have lost control over decision-making in the AFSJ; on the contrary, the Lisbon Treaty offered member states several mechanisms to continue exercising their influence. For example, the treaty included an “emergency brake” mechanism which allowed one member state to block any proposal that was considered contradictory to the fundamentals of its justice system; in case no agreement was reached, a minimum of nine member states could proceed in the respective domain through “enhanced cooperation” (Nilsson and Siegl 2010, 79). In the area of civil justice, this provision was used in order to adopt a regulation on the law applicable to divorce and legal separation, which had been deadlocked in the Council for years (Regulation 1259/2010). Moreover, in the field of police cooperation, where most instruments have an operational dimension, the JHA Council remained at the center of decision-making—in contrast to the limited roles of the Parliament and the Commission⁵¹ (AM0208, 30 October 2014).

⁵⁰ It can happen that delegations vote ‘no’ at Coreper level and ‘yes’ in the Council, since they already know that their opposition will not prevent the legislation from being adopted. However, “nobody does the following: vote ‘yes’ in Coreper and ‘no’ in the Council, but the other way around is quite possible” (AM0207, 18 September 2014).

⁵¹ For example, when the Commission attempted to table a legislative proposal merging Europol with Cepol for efficiency considerations (since they both work in the area of police cooperation), the JHA Council refused to

Taking all this into consideration, it can be said that the institutional behavior of the JHA Council has indeed altered in the post-Lisbon period. In the area of civil and criminal justice, the JHA Council maintained “the last word on most issues” (AM0313, 7 November 2014); nonetheless, the new decision-making rules have forced ministry officials to become more flexible in negotiations both inside their institution (due to qualified majority voting) and outside of it vis-à-vis other institutions. Faced with the need to accept the Parliament’s position as second chamber and the Commission’s extensive right of initiative in the field (AM0203, 7 May 2014), national officials from justice ministries could no longer ignore representative claims other than their own in decision-making. Moreover, in respect to the home affairs branch of the JHA Council, the characteristics of the constituency claimed to be represented—namely national law enforcement authorities seeking to ensure internal security—remained stable. What changed, however, was the JHA Council’s willingness to justify and stand by its positions in relation to the Parliament, with whom collaboration could no longer be avoided. The JHA Council engaged in competitive claims of representation with the Parliament and the Commission on issues like counter-terrorism, migration, asylum, and border management more generally. The content of these representative claims is discussed in the second half of this chapter in relation to three cases of legislative decision-making selected from the period.

5.1.3 The European Commission

The most visible change brought by the Lisbon Treaty to the European Commission refers to the organizational split of the former DG Justice, Freedom, and Security. Two portfolios—on Justice and Home Affairs respectively—were thus created in order to raise the institution’s profile in the AFSJ by mirroring ministry structures in member states (Peers 2011c, 680–1).

reduce the number of agencies in the AFSJ—as it was considered a matter of prestige to host or head an EU agency (AM0312, 5 November 2014). In fact, member states put forth an initiative of their own seeking to move the seat of Cefpol to Budapest, a proposal supported by a group of eight Eastern member states forming the so-called Salzburg Forum (AM0211, 19 September 2014). In other words, the strong intergovernmental character of the former third pillar has survived in the field of police cooperation, despite the introduction of communitarization.

From the perspective of rank-and-file officials, this growth shows the emphasis placed on AFSJ issues inside the Commission:

In my opinion, there has been a parallel growth of administrative structures with the legal framework: before Maastricht, JHA was under the Internal Market portfolio, after Maastricht it became the secondary dimension of the portfolio of Pádraig Flynn and Anita Gradin. Then there was the standalone DG JLS and finally the split between DG Home and DG Just. Meanwhile, analyze the profile of these commissioners: Anita Gradin was not a major player in the Commission, Vitorino was, Redding is now a key player since she is Vice-President. More and more importance is placed on JHA. (AM0305, 8 May 2014).

At the substantive level, the Commission had been “armed” with its traditional exclusive right of initiative across AFSJ subfields, and thus consolidated its position within the institutional framework⁵² (R. Lewis and Spence 2010, 110). This development is not surprising, as the Commission had contributed actively to the communitarization of the AFSJ during the negotiations for the Constitutional Treaty and later the Lisbon Treaty (Kaunert 2010b).

Officials recognize that:

With the ordinary legislative procedure, it has become much easier to put forward proposals; now the usual institutional game is at play—through the Parliament you have all lobby groups, through the Council you have member states. (AM0307, 17 September 2014).

While the other institutions formally recognize the Commission’s role as the formal initiator in the AFSJ (AM0310, 20 October 2014), this does not imply that there is an actual monopoly over the casting of new proposals. For example, the Commission generally welcomes input from the European Council to the legislative process, as heads of state or government are considered better placed than sectoral ministers to give a “helicopter view” on the AFSJ (AM0309, 27 October 2014). Moreover, like in other fields, the Commission makes extensive use of the impact assessment procedure in order to evaluate the feasibility of its planned proposals (ibid). In fact, in the opinion of officials from DG Justice, the preparatory stage of

⁵² The exception remains the area of police and judicial cooperation in criminal matters, where the Commission can be replaced by a quarter of member states in the casting of proposals (Bache, George, and Bulmer 2011, 473).

proposals is vital because it allows them to get familiar with institutional positions of the Council and the Parliament and propose texts that reflect everybody's concerns: "the less time we have to prepare, the longer the negotiations will be" (AM0313, 7 November 2014). But while Commission employees are growing increasingly comfortable with having exclusive right of initiative in the AFSJ (AM0303, 4 April 2014), it remains intriguing to examine whom they claim to represent in the field:

The Commission acts upon the EU interest, taken collectively rather than sectoral or national; because of its position, the Commission has a better overview of what is happening. (AM0312, 5 November 2014).

The "EU interest" is an abstract concept which can mean different things to different people; in most instances, Commission officials rely on the treaty framework to explain it. Someone who has worked for both the Commission and the Council Presidency made a comparison between the constituencies of the two institutions:

There are a lot of multilateral negotiations behind closed doors when you have the Presidency; in the Commission things are more streamlined, we have in mind the European interest; we don't have to respond to anybody like the member states, so we have a straightforward preparation of proposals. (...) The EU interest is in the treaty, in all articles referring to JHA. (AM0307, 17 September 2014).

Indeed, the view that the Commission should act as a "motor of integration" is still present among officials (AM0314, 13 November 2014); nevertheless, the fulfillment of the European interest does not necessarily imply the transfer of competences to the supranational level. Instead, the Commission's philosophy in the AFSJ is better captured in the slogan "strong rules, common rules" (AM0301, 3 April 2014)—a position which may or may not entail communitarization. As underlined by other researchers of the supranational institution (Kassim et al. 2013), most Commission personnel understand very well that there is no point in going against the express wishes of member states, especially in fields as sensitive as the AFSJ. In respect to the right of initiative, one official explicitly made the point that:

We are much more relaxed about it than portrayed in the academia...for the Commission, EU policy-making is ‘the art of the feasible’—we can exercise our right of initiative, but we need to reach an agreement with the Parliament and the Council in order for our proposals to pass... We also have to bear in mind that the EU did not create member states but the other way around. If the European Council discusses something at the highest political level, it is important to take it into account; in the end, the President of the Commission is also there [in European Council meetings] and reflects on what member states want. (AM0316, 5 November 2014).

Furthermore, while the Commission would like to present itself as the bridge between the Council and Parliament in legislative negotiations (an ‘honest broker’), employees find it difficult to maintain the balance in their daily lives. In their words:

We follow shifting currents: there are issues on which we objectively are with the Council (quality of legislation) and on others with the Parliament (ambition to develop EU-level instruments). (AM0311, 31 October 2014).

In the end, it appears that there is no such as thing as ‘one institutional position’ characterizing the Commission during the 2009-14 period. Regarding the cleavage between security and fundamental rights often invoked in the AFSJ, employees believe there is no driving ideational force behind their work:

I would argue that within each institution there is a constantly-changing balance between fundamental rights and security. You have this in the Council, in the Parliament, and in the Commission. For example, before DG JLS was split, it was easier to arbitrate between the two, now the dialectics between security and data protection [for example] are more leaning towards the latter; this is fair enough, but sometimes frustrating for those working on security because we don’t have the moral upper-hand. (AM0310, 29 October 2014).

In other words, the Commission’s scope of activity in the AFSJ has grown to such an extent that it has become increasingly difficult to act with one voice. When asked about the Parliament’s relations with the Commission in the post-Lisbon period, a former administrator of the LIBE Committee replied back “which Commission?”, pointing out the differences in approaches between DG Justice and DG Home Affairs (AM0405, 5 November 2014). Indeed, having a separate DG to work on criminal and civil justice as well as fundamental rights issues—alongside another DG with a mandate on internal security and immigration—makes

coordination very difficult. By virtue of their dissimilar sectoral lines of work, Commission officials can find themselves closer to positions of the Council (e.g. on organized crime) or closer to the Parliament (e.g. on data protection). This is one aspect on which the horizontal specialization of the Commission's organizational structure into sectoral areas (chapter 2.2.1) has a tangible impact for the constituencies identified by officials working in different units.

In the language of the representative claims framework, it can be said that the Commission (maker/claimant) offers itself nowadays as the representative (the subject) of multiple, often diverging interests (the object of representation), and all this can be done in the name of the treaty framework or for the benefit of the integration project more broadly. In the end, the position of the Commission depends a lot on the policy field under consideration. In areas like asylum, where the Amsterdam Treaty granted exclusive right of initiative since 2004, the supranational institution has proved quite successful in acting as a normative “policy entrepreneur”, pushing for a more refugee-friendly agenda (Kaunert and Léonard 2012a, 1405). In contrast, in fields like police cooperation, where there is a strong operational dimension to policy, the remnants of the third pillar are more resilient⁵³: the Commission is not so much a policy-maker as it is “broker, facilitator, coordinator, evaluator and exchequer of integrated EU policing” (Den Boer 2014, 61). In this domain, Commission officials find their work very frustrating, as they feel they are not taken seriously by member states: “this is all a cultural phenomenon, they still have third pillar attitudes and the dynamics haven't really changed” (AM0312, 5 November 2014). Overall, one can observe a general empowerment of the Commission following the entry into force of the Lisbon Treaty, although some notable

⁵³ One example of the legacy of the third pillar in police cooperation is the Salzburg Group, a forum of home affairs ministries from eight EU member states who collaborate on internal security issues in order to influence policy agendas and voting in the JHA Council (AM0211, 19 September 2014). Established in 2000 by Austria, the group currently includes Austria, Bulgaria, Croatia, the Czech Republic, Hungary, Poland, Romania, Slovakia and Slovenia (Salzburg Forum n.d.).

intergovernmental residues remain in the decision-making process (Lavenex 2010, 466–7). A similar situation characterizes the European Parliament, which is discussed next.

5.1.4 The European Parliament

The Lisbon Treaty provided a much larger role for the European Parliament as co-legislator in the AFSJ; in fact, the ordinary legislative procedure applies now to most issues, with a few exceptions when the Parliament is only consulted or its consent is required (Peers and Bunyan 2010, 6). This increase in functions was inevitably accompanied by closer cooperation with other institutions, especially the Council, which was not exactly an ally of the Parliament before 2009 (De Capitani 2010, 133–8). The problems did not disappear completely in the post-Lisbon period; as explained by an EU official from the LIBE Committee:

The adversity between the Parliament and the Council is only related to institutional positions, it's not a matter of general adversity; the two institutions have different mandates: the Council to represent member states' governments, the Parliament is elected directly and democratically—they are two different animals. (AM0401, 2 April 2014).

Indeed, the justification of institutional behavior is formulated by participants in the legislative process depending on the constituencies they claim to represent:

It is true that the Parliament is more attentive to fundamental rights while the Council is more attentive to judicial / law enforcement authorities. Sometimes the Council is not so willing to make concessions, because they see the problems in implementation; they want to be sure that what is adopted is detailed and it fits. At the same time, if they already have legislation in place, they are concerned that the EU does not impose them something that cannot be adapted to their current system. From a structural point of view, the Council has to be cautious. On the other hand, the Parliament—representing citizens—has to be innovative and think of ways to change the life of citizens. (AM0406, 10 November 2014).

Notwithstanding these differences, it appears that the distance between the Parliament and the Council in the AFSJ has somehow become smaller during the 2009-14 period. In fact, since 2009, the number of early agreements and informal dialogues with the Council and the Commission has grown at a steady pace, attracting criticism regarding the democratic accountability of the supposedly most democratic EU institution (Carrera, Hernanz, and Parkin

2013, 5). One reason posited for this rise in inter-institutional cooperation is the Parliament's desire to be perceived as a "responsible legislator" vis-à-vis the Council, even at the expense of some of its traditional standpoints as defender of fundamental rights (Ripoll Servent 2013; Ripoll Servent and Trauner 2014). The shift in rules from consultation to co-decision in the AFSJ is said to have altered the Parliament's behavior in the direction of the Council, as normative compromises had to be made in the search for consensus with security-oriented ministry officials (Ripoll Servent 2012, 68).

The interviews held at the Parliament portrayed a slightly different picture than the one described above. Indeed, there is no doubt that LIBE tries hard to find agreements at the first reading—when only a simple majority is required—rather than allowing legislation to reach the conciliation committee, where decision-making would be complicated by absolute majority rules (AM0401, 2 April 2014). However, perhaps more important than the desire to be perceived as a responsible legislator, the composition of the LIBE Committee has changed in recent years to reflect the expansion in competences brought by the Lisbon Treaty. A few officials explain:

There is a silent majority in LIBE who works on security which until now has been a no-go for the Parliament. (AM0310, 29 October 2014).

The Parliament is not always coherent, there is a circle of people interested in criminal law, and they are different from those working on fundamental rights issues. (AM0408, 13 November 2014).

To put it differently, the characteristics of the constituencies identified by MEPs have broadened significantly since the Lisbon Treaty. Following its historical evolution (see chapters 3 and 4), part of the LIBE Committee continues to speak on behalf of EU citizens, claimed to want the protection of their fundamental rights. In fact, the official web page of the committee describes the LIBE mandate as:

...responsible for the democratic oversight of Justice and Home Affairs policies. Whilst doing so, it ensures the full respect of the Charter of Fundamental Rights within the EU, the European Convention on Human Rights and the strengthening of European citizenship. (European Parliament n.d.).

For long-standing members of LIBE, the commitment to fundamental rights is seen to be dictated by the directly-elected character of the institution (AM0403, 24 October 2014). Indeed, when asked why LIBE is so active on fundamental rights, one administrator laughed and called it a “trivial question”, insinuating this is something everybody takes for granted (AM0405, 5 November 2014). However, at the same time, newer administrators of the committee explained that they wish to escape the one-dimensional portrayal LIBE has created for itself in the first years of activity:

There is still a big focus on fundamental rights on behalf of LIBE [...] it is not the member states who [usually] have the idea to introduce things related to human rights. Nonetheless, LIBE does not want to be seen just as a fundamental rights activist. (AM0402, 14 November 2014).

In other words, while the fight for individual liberties is still considered central to the mandate of the committee, the new generation of MEPs has a variety of other interests for which they want to be recognized. Evidently, their interests could not have been manifested in the absence of treaty provisions empowering the Parliament in former third pillar areas. For example, the shift in attitudes is particularly visible in the field of criminal law:

This orientation [towards fundamental rights] remains very strong in files on procedural rights (e.g. the European Investigation Order was much improved in the fundamental rights direction following the Parliament’s intervention). However, in the area of organized crime, the Parliament seeks to take a tough stance on fighting crime. When it comes to criminal law, the Parliament is much stricter than the Council; except on procedures where it much more lenient. (AM0409, 13 November 2014).

It appears that during the first mandate of the European Parliament following the entry into force of the Lisbon Treaty, a certain division of labor took place between MEPs following AFSJ dossiers. On the one hand, the strong nucleus advocating fundamental rights issues has been preserved—as shown by data privacy conflicts with the Council on the SWIFT Agreement with the US, the Snowden revelations, or the reform of the data protection regulation (see section on the Parliament in chapter 1.2). On the other hand, another nucleus has started to take shape on issues related to criminal justice and the fight against organized crime, as illustrated by the

proceedings of the Special Committee on Organized Crime, Corruption and Money Laundering (EPP Group in the European Parliament n.d.). In other words, MEPs in the LIBE Committee claim nowadays to represent diverse constituencies, with different interests and values. The cliché often invoked in this case is that European citizens “want not only their freedoms protected, but also their security ensured”. Taking this into consideration, it is not surprising that on some issues the Parliament currently finds itself closer to positions of the Council.

To further illustrate these arguments, it is necessary to follow the institutional behavior of the European Council, the Council, the Commission, and the Parliament in concrete legislative dossiers of the post-Lisbon period in the AFSJ, which are discussed in the remainder of this chapter.

5.2 Three cases of legislative decision-making

Three cases have been selected for further investigation of institutional lines of justification in the AFSJ during the post-Lisbon period: the Schengen Governance Package (2011-13), the Intra-Corporate Transferees Directive (2010-14), and the Confiscation Directive (2012-14). On the one hand, these cases are relevant because they illustrate varying degrees of inter-institutional conflict in legislative negotiations between the Council, the Commission, and the Parliament (with a one-time intervention by the European Council). Inter-institutional conflict is classified as high, medium, and low respectively, depending on the degree of media attention given to clashes between institutions over each dossier, as well as according to the length of negotiations—following the logic that the longer a file remains in the legislative process, the more difficult the negotiations were. Accordingly, the issues at stake in the three dossiers were all potentially conflictual: first, the Schengen Governance Package (SGP) was effectively about the reintroduction of internal borders in the border-free Schengen Area; second, the Intra-Corporate Transferees (ICT) Directive was about granting social and mobility rights to [skilled]

third country nationals through a unified EU scheme; third, the Confiscation Directive was about the extent to which competent authorities were able to freeze assets derived from criminal activities, even if there had been no permanent conviction on the name of the accused. However, only the first dossier resulted in a media-publicized inter-institutional battle (on multiple fronts), while the second and the third were barely mentioned in the news. The ICT Directive was far less publicly conflictual, although it illustrated deeper misunderstandings between institutions than the SGP—evident from the duration of legislative negotiations (four years). Lastly, the discussions on the Confiscation Directive went surprisingly smooth (lasting less than two years), despite the fact that the file could have attracted intense debate and inter-institutional clashes owing to the trade-off proposed between effective crime-fighting and constitutionally protected rights to property.

On the other hand, the three cases are representative across subfields of the AFSJ—capturing border management, legal migration, and criminal justice. These domains have been brought gradually under the community method (Peers 2011b), meaning that the relevant institutional units involved in decision-making had different levels of experience in collaborating over legislation. Border management has been subject to co-decision and qualified majority voting in the Council since 2004, and was thus not considered (at the time) a field prone to inter-institutional skirmishes in the AFSJ (AM0402, 14 November 2014). Conversely, legal migration functioned according to the consultation procedure and unanimity rules in the Council prior to the Lisbon Treaty (2005-9), while co-decision and qualified majority voting were introduced afterwards (Peers 2011b, 289–90). In addition, government representatives in the Council had always rejected the competence of the Commission over labor migration, framed as a matter of national sovereignty to be decided upon domestically on the basis of economic, political, and social criteria (Papagianni 2006, 199–203). Finally, community method decision-making had only been used in criminal justice since the Lisbon

Treaty; until then, the field functioned according to third pillar rules and saw the adoption of numerous ‘soft’ instruments (namely framework decisions decided solely by the Council). Even after 2009, member states could put forth initiatives of their own in the field, sidelining the Commission if they wanted (AM0203, 7 May 2014). To summarize, officials from the three institutions were most used to co-legislating in border management and least accustomed in criminal justice, with legal migration somewhere in-between. The next sections discuss each dossier in turn.

5.2.1 The Schengen Governance Package

It is generally agreed that the Schengen Area represents one of the most tangible achievements of the European integration project (together with the single currency)—“widely heralded as both a symbol and a major institutional advancement” (Davis and Gift 2014). In this context, the perspective of allowing the temporary reintroduction of internal border controls—envisaged in the legislative proposals known as the ‘Schengen Governance Package’ (2011-13)—became a highly contentious issue in European border management during the 2009-14 period. Initiated against the backdrop of a Franco-Italian clash over the administration of refugees fleeing from the Arab Spring, the legislative dossier revealed a series of underlying conflicts: 1) between member states in the European Council and the Council—in particular Italy and France, whose relevant authorities were throwing the burden of refugees from one to another; (2) between the Commission and the Council, who had different visions of whom should decide on the temporary reintroduction of border controls, and (3) between the Council and the Parliament, who disagreed on the decision-making mode through which such legislation should be enacted.

This section aims to explain the sources of disagreement among the main institutions involved in the episode (the European Council, the Council, the European Commission, and the European Parliament) as a function of different patterns of justification followed by each

in respect to the very scope of the European border regime. Seeing the interests of the constituencies they claimed to represent under threat, officials from all institutions demonstrated their willingness to publicly antagonize each other and engage in inter-institutional conflicts. Concretely, the Commission and the Parliament took a stance on behalf of EU citizens, and in particular those EU citizens exercising their treaty right to freedom of movement. At the political level, member states in the JHA Council and the European Council were concerned to respond to their domestic electorates—who were portrayed as rejecting further immigration. At the technical level, the Council referred to national law enforcement and border control authorities, whose interests were depicted as the most significant on the issue because they bore the consequences of EU-adopted instruments. The discussion starts with a narrative of the events surrounding the file.

On Sunday 17 April 2011, in the small Italian city of Ventimiglia, close to the border with France, the European border regime was being put to the test. In the context of the Arab Spring and the ensuing migratory pressures in the Mediterranean, an influx of Tunisian refugees reached the shores of Italy (Pascouau 2011). Overwhelmed by the inflow and denied help from other member states—despite repeated solidarity pleas—Italian authorities unilaterally decided to grant residence permits to those refugees seeking to cross the border to France (Der Spiegel 2011). Since French and other national authorities did not recognize the legality of the documents, human rights activists got involved in the dispute, offering to accompany the Tunisians to France in a so-called ‘Dignity Train’ that ran from Genoa to Marseille via Ventimiglia. On the grounds that their demonstration was unauthorized and posed threats to ‘public order’, the French administrative authorities decided to stop the trains in Ventimiglia and conduct temporary border controls in order to return the unwanted immigrants (Europe Daily Bulletin 18 April 2011). The episode led to a huge clash between France and Italy that soon snowballed at the EU level and became a bone of contention between EU

institutions involved in decision-making over the Schengen Area. Indeed, this ‘focusing event’ can be credited for the ensuing polarization of institutional positions that surrounded the SGP. But while the immediate discussion referred to the reintroduction of frontier checks in the border-free Schengen regime, the stakes were much higher and revealed diverging interpretations of the very purpose of the Schengen space.

From beginning to end, the SGP was deeply politicized and full of events. Its substance was not entirely new, as the Commission had tried to reform the Schengen evaluation system⁵⁴(SCHE-VAL) years before, putting forward a proposal under the consultation procedure in 2009 (rejected by the Parliament as obsolete under the new provisions of the Lisbon Treaty), and then again in 2010 under co-decision (Carrera 2012, 6–7). While that initiative was still under consideration in the Parliament and the Council, the Franco-Italian dispute of April 2011 brought about a recast of the proposal. Heads of state or government got involved in the bilateral conflict, as French President Nicolas Sarkozy and Italian Prime Minister Silvio Berlusconi sent an official letter to the Commission demanding the initiation of a reform of the Schengen Borders Code that would permit the temporary reintroduction of internal border controls in the Schengen Area (Pascouau 2011). The suggestion was taken up by the European Council in June—which set the deadline of September for the tabling of the revised proposal (Berthelet 2012, 658–661).

The Commission complied with the deadline, but produced a surprise by interpreting the European Council conclusions to its own advantage and shifting the responsibility for the reintroduction of border controls from member states to itself, which infuriated the Council (Bocquillon and Dobbels 2014, 33). To enact this clever move, the Commission needed to

⁵⁴ The Schengen evaluation system was an intergovernmental mechanism of peer-review in which member states of the Schengen Area assessed each other’s implementation of Schengen rules (Peers 2013, 30). The Commission viewed the system as ineffective and lacking transparency owing to the collegiality and reciprocity between evaluators, who were unwilling to report and sanction each other’s deficiencies in implementation (European Commission 2010c, 4–5).

choose a specific legal basis, which incidentally involved the Parliament in full capacity as co-legislator; consequently, when the Council unilaterally decided to change the legal basis in June 2012, they effectively excluded the Parliament from the decision-making process, which in turn infuriated MEPs (Pascouau 2012). In retaliation, they [also] unilaterally decided to freeze negotiations with the Danish Presidency of 2012 on five legislative files considered important by the Council, in the hope that such “show of force” would make ministers reconsider their decision on the legal basis (EurActiv 2012b). After a few months of uncertainty, the Council proposed the Parliament to continue negotiations as if they were debating a co-decision file in which the rapporteur’s opinions were duly taken into consideration, but without actually changing the legal basis. Once dialogues started, discussions advanced quickly and the file was concluded in May 2013, with formal adoption in October of the same year (Peers 2013, 30).

Overall, the events of the SGP offered EU institutions ample opportunity to articulate the characteristics of their targeted constituency. First, the Commission reacted “with unusual speed” to the Franco-Italian request from 26 April 2011 regarding the introduction of a legislative package allowing the temporary reintroduction of border controls, by means of a letter sent by Barroso to Sarkozy and Berlusconi three days later (Pascouau 2013, 2). Although accepting the reintroduction of internal border controls as “one possibility among others”, the Commission President signaled an important nuance:

This [Schengen] management should not lead us to lean toward a vision overly focused on security, which might appear to deny the very values that underpin the European project, or to an overly lax immigration policy, which would raise fears in our publics about their safety. (Barroso 2011).

Barroso’s diplomatic answer did not give clear indication of the Commission’s later actions, but his willingness to even consider the temporary reintroduction of internal border controls was heavily criticized in the Parliament as “blindly” obeying France and Italy (Bocquillon and Dobbels 2014, 32–3). Conversely, a Commission official overseeing the file considered that:

“we had already mentioned in a communication before the letter from Berlusconi and Sarkozy that we plan to re-launch the SCHE-VAL proposal; the crisis only made it urgent to respond” (AM0314, 13 November 2014). Consequently, the Commission attempted from the very beginning to frame the whole debate as a matter of improving rather than weakening the governance of the Schengen Area, to which it was gladly ready to contribute. Cecilia Malmström, the Commissioner for Home Affairs, made clear the position of her institution clear some months later: “Schengen exists to defend freedom of movement. It is not an instrument to control migratory flows.” (cited in Vandystadt 2012a).

At the same time, the European Council was equally quick to respond to the Franco-Italian crisis, not least because the Berlusconi-Sarkozy request was also sent to the President of the European Council, Herman Van Rompuy. In May, Van Rompuy decided to place the debate on the temporary reintroduction of internal border controls on the agenda of the annual June meeting of heads of state and governments. According to an official working at the time in the cabinet of the European Council President, there was a sense of urgency to settle the crisis because:

...the well-functioning of Schengen was in danger (...) 25 years ago we took the decision to abolish border controls; the most successful policy of the EU also led to the fact that every area related to cross-border issues needed to be controlled. (AM0102, 5 November 2014).

But while Van Rompuy ascertained the necessity to safeguard the free movement acquis, he was ready to facilitate agreement on its temporary suspension “in exceptional and strictly delimited situations” (Europe Daily Bulletin 2011b). According to Polish Prime Minister at the time Donald Tusk, debates in the European Council were “fierce”, with some member states advocating the priority of combating illegal immigration by allowing internal border controls, while others—Poland included—defending the right of EU citizens to free movement (Europe Daily Bulletin 24 June 2011). As a result, the European Council conclusions called on the Commission to propose a legislative package by September that “would allow the exceptional

reintroduction of internal border controls in a truly critical situation”, “without jeopardizing the principle of free movement of persons” (European Council 2011). In other words, the European Council immediately stepped into its ‘crisis manager’ role, attempting to reconcile the diverging interests of its members in order to settle the Franco-Italian dispute and move on to other pressing issues. As usual, heads of state or government instructed the Commission to initiate a proposal following its guidelines.

The other EU institution involved from the very beginning in the SGP debate was the JHA Council. But while home affairs ministers (especially from France and Italy, but also others) were making political declarations throughout the spring of 2011 on the question of the temporary reintroduction of internal border controls, the official reaction from the institution came only in September, when the Commission tabled the two legislative proposals under the ‘Schengen Governance Package’. Basically, the JHA Council felt cheated, considering that the Commission misrepresented the mandate of the European Council from June by attempting to empower itself to decide on the reintroduction of border controls (see European Commission 2011). The trick was in the legal basis, selected by the Commission as article 77(e) TFEU, related to “the absence of any controls on persons, whatever their nationality, when crossing internal borders”. To put it simply, the Commission framed the reintroduction of border controls as an aspect of the free-movement acquis, to be decided upon by the Council and Parliament in line with the ordinary legislative procedure (Pascouau 2012). The Council was far from agreeing with this assessment. As put by an official from a Permanent Representation:

The legal basis issue was considered a provocation from the Commission, especially since we had had a strong call from heads of state and governments in the European Council of June 2011 to find a solution for reintroducing border controls under extraordinary circumstances; the Commission decided to take that mandate and expand its own power. (AM0218, 7 November 2014).

Conversely, the Council believed this to be an issue relating to peer evaluations among member states and thus advocated article 70 TFEU as the appropriate legal basis, according to which

the Council was responsible for—“laying down the arrangements whereby member states, in collaboration with the Commission, conduct objective and impartial evaluation of the implementation of the Union policies (...) by member states' authorities”. The problem of the legal basis was as much administrative as it was political: ever since the 1999 incorporation of the Schengen acquis into the Amsterdam Treaty, the implementation of the Schengen rules was evaluated in a peer-review process conducted by relevant national authorities (Berthelet 2012, 657) under the coordination of a designated group in the Council—the SCHE-VAL Working Party (Nilsson 2006, 132). It was not just that the Council wanted to protect its ‘turf’, but national officials considered that their respective constituencies, namely border authorities present in SCHE-VAL, were in a much better position than the Commission to evaluate the effectiveness of border controls—since they had the expertise to do so. At the same time, for ministers in the JHA Council, evaluating the effectiveness of national borders was a matter of internal security: “Schengen is not just a treaty on the free movement of persons, it is also a treaty on the protection of external borders.” (French Minister of Interior Claude Guéant, cited in Vandystadt 2012b)

Nevertheless, the Commission persisted in defending its approach despite public opposition from the Council. As explained by an official from DG Home Affairs: “For the Commission it was very important to link this proposal to SCHE-VAL; the idea was to keep them together in order to make sure they are considered as a whole, i.e. only after failures in SCHE-VAL could borders be reinstated, with approval from the Commission” (AM0314, 13 November 2014). In addition, since the Parliament had already rejected the 2009 proposal on the grounds that it was cast under the consultation procedure, it was rendered as a matter of course not to repeat the scenario. In this context, Cecilia Malmström, the Home Affairs Commissioner, specifically referenced the “common interest” as the constituency represented by her institution:

Free movement is in the common interest and it is felt that the decision to reintroduce border controls should therefore be taken at the European level. The Commission proposes a mechanism for a coordinated EU response to protect the functioning and the integrity of the Schengen Area. (Europe Daily Bulletin 16 September 2011).

For its part, the European Parliament responded positively to the Commission proposals, not least because of what they perceived as the ‘correct’ legal basis. In addition, MEPs in the LIBE Committee attached a vital importance to the SGP for one crucial reason:

Schengen has a positive impact on the lives of hundreds of thousands of EU citizens (...) freedom of movement is a fundamental right and a pillar of EU citizenship. (European Parliament 2011a).

Accordingly, MEPs started work immediately on their reports on the legislative package, assigning Carlos Coelho from the European People’s Party (EPP) as rapporteur on the proposal on the Schengen evaluation mechanism and Renate Weber from the Alliance of Liberals and Democrats for Europe (ALDE) as rapporteur for the amendment to the Schengen Border Code that would allow the temporary reintroduction of internal border controls. On the second proposal, there was consensus among political groups on how to proceed: “the opinion of the Parliament was that the entire [initiative] was problematic; we did not see the necessity for a system for the reintroduction of border controls. Our suggestion was from the very beginning not to agree” (AM0404, 24 October 2014). In addition, an MEP involved in the file explained why the issue was so important:

First because in this area, we are looking at decisions taken under the umbrella of intergovernmentalism, legislation only made so far between member states, without the involvement of EU institutions. We had to make sure that there was going to be a European dimension to the SCHE-VAL (...). Second, we wanted to fight against double standards: when we consider a country for membership in the EU during the enlargement process, we have very tough criteria in assessing border control capacities. However, after member states have joined the club, there is no more proper checking. (...) Third, we wanted a more efficient mechanism, which would render better results. (...) The purpose was to find out if Schengen rules were well applied, and give credibility and consistency to the evaluation. (AM0407, 13 November 2014).

From September 2011 to June 2012, while the Parliament completed its report and the relevant Council working party adopted a position on the substance of the proposals, member states in the Council repeatedly sought to find the necessary unanimity in order to change the legal basis—which they finally succeeded after convincing Romania, Luxembourg, and Belgium⁵⁵ (AM0211, 19 September 2014). However, in the meantime, the Danish Presidency of 2012 had started informal trialogues with the Parliament on the two files; as a result, the moment when the Council changed the legal basis for the regulation regarding the Schengen evaluation mechanism, it effectively limited the Parliament to a consultative role (Pascouau 2013). The Council justified its move:

...the change in legal basis was not about taking them [the Parliament] out, it was a question of principle to maintain SCHE-VAL as a peer-review system and not communitarize it (which the Commission wanted) [...] We felt that the Schengen Agreement has always been an intergovernmental project—these are matters for states to decide on internally. (AM0218, 7 November 2014).

In retaliation, the Parliament froze negotiations on five co-decision dossiers considered priorities by the Council, including the proposal for the creation of a European Passenger Name Record. As explained by an MEP working on the file: “I was quite surprised when the Council proposed the change in legal basis, taking out the Parliament from co-decision. We felt betrayed; the President of the Parliament wrote a letter to the European Council explaining we could no longer work with the Danes. The move showed the lack of trust between institutions, usually visible in disputes over budget” (AM0407, 13 November 2014). Negotiations restarted under the Cypriot Presidency in the second half of 2012 on the substance of the SGP, with a compromise suggested by the Council to continue discussing the file as if it were a co-decision file and address the legal basis problem later; according to Parliament officials, the rapporteurs accepted out of consideration for ensuring the free movement of persons in a very difficult

⁵⁵ These three countries were originally siding with the Commission for different reasons: interviewees report that Belgium and Luxembourg thought the Commission would run a more efficient evaluation process, while Romania is reported to have attempted to trade its vote for a promise of support for its accession to the Schengen Area (AM0207, 18 September 2014; AM0211, 19 September 2014).

political context (AM0404, 24 October 2014). As posited by MEP Claude Moraes in a press release of the Social Democrats (S&D):

Freedom of movement across EU countries is not a national right. It is a fundamental right guaranteed to EU citizens by the Treaties, which prevails over temporary national interests. Accordingly, no national government alone can take decisions affecting that right without them first being agreed at EU level. (Europe Daily Bulletin 19 September 2011).

A few months after trialogues started, the dossier was finalized (in May 2013), with formal adoption in October of the same year (Peers 2013, 30).

There are several conclusions one can draw on the basis of the three conflicts unfolding in the Schengen Governance Package. First, it is not clear whether the Franco-Italian dispute was even related in the initial stages to the EU level; conversely, it was mostly a show of force by national authorities (border control and police) for the benefit of their own national audiences, which they perceived as rejecting illegal immigration. Following the same logic as their [claimed] national constituencies, Sarkozy and Berlusconi transformed it into a European issue by requesting permission to arbitrarily reintroduce border controls; in fact, this was not so much a bilateral solution as a blame-shifting instrument to the EU level—again intended for their respective domestic audiences. However, the immediate consequence was the snowballing of the dispute at the supranational level, where two inter-institutional conflicts emerged (Council vs. Commission and Council vs. Parliament).

In both cases, the heart of the matter was the debate over the legal basis. Apparently dry in scope owing to its legal jargon, this discussion was substantively a debate over what type of political construction the Schengen Area is—a supranational project where the free movement of persons is guaranteed for all EU citizens (a position held by the Commission and the Parliament), or an intergovernmental project in which member states are responsible to ensure the security of their national citizens (a position shared by most member states in the Council). It was interesting to find out that the absence of borders is still perceived by [member]

states as a challenge to their capacity to provide security to national citizens (AM0213, 28 October 2014), which is why they used the opportunity of the SGP to seek—by means of the Council—to reestablish control over the reintroduction of border controls. One official from a Permanent Representation explained the underlying justification for this position⁵⁶:

We are unable to protect national borders as in the past, it would be wrong to say it's the fault of Schengen, but that doesn't make it less true. [...] We see what happens with public opinion: more and more people don't think the EU can protect them; that is a strange feeling because we are working to build a safer EU and the feeling of our citizens is much different. (AM0212, 23 October 2014).

In this respect, it is important to reiterate that officials in the JHA Council working on border management are seconded to Brussels from ministries of home affairs⁵⁷ (see chapter 3.2.2), which has [unintended] consequences because the point of view of national police forces is most often claimed to be represented by the JHA Council. To put it differently, the home affairs configuration of the JHA Council is inclined to decide on its institutional role by rapport to law enforcement authorities, which interview material indicates they regard as their target 'constituency' (interviews AM0211 to AM0218). In addition, French Interior Minister Claude Guéant was known at the time as a firm supporter of the reintroduction of border controls as a security measure, an opinion shared by his German and Austrian counterparts (EurActiv 2012a). The widespread politicization of the matter helped this line of discourse significantly, as some member states like France and Italy were openly trying to use migratory pressures to reintroduce internal border controls (AM0207, 18 September 2014).

To conclude, what can be learned from the Schengen Governance Package about post-Lisbon patterns of institutional justification in the AFSJ? First and foremost, EU institutions still have different ideas about what the Schengen Area is and how it should consequently be

⁵⁶ Other interviews in Permanent Representations corroborated this line of justification.

⁵⁷ The 'mother' institution of JHA Counselors from Permanent Representations is visible when consulting the official directory of the European Union (EU WhoIsWho). The generic name 'JHA Counselor' includes different hierarchical titles in line with the bureaucratic tradition of each country; as such, the category includes 'Counselors' (France, Denmark, Romania), 'attachés' (Italy, Austria), or 'secretaries' (Netherlands, Poland).

protected or enabled—in line with the constituencies they claim to be representing. More specifically, ideas that the Schengen Area is a security problem that needs to be fixed by reintroducing border controls or an opportunity to be enjoyed [mainly] by EU citizens are the result of competitive representative claims by officials from different institutions. Accordingly, the Commission and the Parliament claimed to act on behalf of EU citizens, and in particular EU citizens who exercised their freedom of movement right in the Schengen Area—subsequently portrayed as a tangible benefit of the European political construction. At the political level, member states in the JHA Council and the European Council claimed to respond to the wishes of their domestic electorates, who were depicted as rejecting immigration. At the technical level, the JHA Council claimed to embody the interests of national law enforcement and border control authorities, described as the experts in the field who actually bore the consequences of EU-adopted instruments.

Different dynamics were found in the legislative negotiations of the ICT Directive, discussed in the next section.

5.2.2 The Intra-Corporate Transferees Directive

The Intra-Corporate Transferees Directive is a remarkable case of legislative decision-making in the AFSJ during the post-Lisbon because it proved to be nothing of what the people involved originally expected. Initially considered a low-key instrument on which the three actors of the institutional triangle should have easily agreed upon, the ICT Directive revealed instead important areas of contention between the Commission, the Council, and the Parliament regarding the treatment of third country nationals (TCNs). Unlike the Schengen Governance Package, the negotiations for this directive were not publicly conflictual, but their significant length (4 years from the casting of the proposal in 2010) and the high number of political dialogues organized to facilitate agreement (eight) are indicative of underlying disputes between institutions and an overall difficulty to reach consensus. Despite its lengthy process of

negotiation, the directive was not so divisive to attract the attention of heads of state or government in the European Council, which gave no input on the matter.

The proposal was initially considered uncontroversial because it targeted a small category of legal immigrants—intra-corporate transferees—who were TCNs working for a multinational corporation in their country of origin who got temporarily seconded to an EU member state as employees of the same corporation (European Commission 2010e). While legal migration is usually a hugely politicized topic across member states of the European Union, the admission of highly skilled professionals is more welcome as part of efforts to increase the competitiveness of the EU economy (European Commission 2005a, 5). Nevertheless, despite general agreement among institutions regarding the potential economic benefits brought by intra-corporate transferees, negotiations ended in stalemate over matters of principle such as the maintenance of national schemes in parallel to the EU scheme or aspects of social and mobility rights of the transferees (Lazarowicz 2013). Although the Council and the Parliament informally agreed on the proposal in March 2014, the Parliament’s Employment Committee (EMPL) rejected the compromise reached by LIBE, while the plenary vote passed by a narrow margin on 13 May (Ghimis, Pascouau, and Lazarowicz 2014a; Ghimis, Pascouau, and Lazarowicz 2014b).

The proposal for the ICT Directive—formally titled “proposal for a directive on conditions of entry and residence of third country nationals in the framework of an intra-corporate transfer”—was put forth by the Commission in July 2010 (European Commission 2010e). The instrument had already been announced in 2005 as part of a broader legislative package on economic migration, according to which several initiatives were to be cast on various categories of labor immigrants (European Commission 2005a). The scope of the directive was thus quite limited, in line with the Commission’s gradual, sectoral approach to legal migration (AM0308, 21 October 2014). Indeed, since the Commission’s early plans on

economic migration—following a 2001 Communication—had largely been rejected by the Council, the supranational institution decided to adopt a “pragmatic” approach, only putting forth proposals which they believed to have chances of passing (Papagianni 2006, 240–2). The ICT Directive was one of them. The Commission pleaded its case on economic grounds:

We need a European approach on labor migration that allows our economies to receive the migrants they need (...) Multinational companies operating in Europe need access to the right people, with the right skills, at the right time, but such key personnel are not always available locally. The need for these companies to be able to temporarily transfer workers to and within the EU has become more crucial in recent years. These intra-corporate transferees bring with them specialist knowledge and skills to Europe, which in turn contributes to strengthening the European economy and attracting further investments in Member States. (Cecilia Malmström, cited in European Commission 2010d).

The Commissioner for Home Affairs is hereby offering her institution as the representative of multinational companies in Europe, perceived to be requiring high-skilled workers for the larger benefit of European economies. In addition, the Commission invokes the data gathered through the impact assessment procedure to underline the degree of uncertainty facing large corporations, which cannot explore to the full extent the benefits of mobile personnel, because they are confronted “with a lack of clear specific schemes in most EU member states, complex requirements, costs, delays in granting visas or work permits and uncertainty about the rules and procedures” (European Commission 2010a, 5). Consequently, the Commission speaks very little in its explanatory memorandum of the people actually targeted by the directive—namely the TCNs who would immigrate to EU member states for employment purposes for a short time period; instead, by presenting the measure as strictly demand-driven by the economy, the Commission demonstrates a clear intention to appear ‘business-friendly’ rather than ‘immigrant-friendly’.

Despite these efforts, however, the Commission’s proposal was not received too well in the JHA Council. Officials from Permanent Representations continued to consider labor migration as a prerogative of nation-states, bluntly declaring that:

There is a lot of reluctance among member states with regard to legal migration; they don't like Europe to impose rules, so there is a big struggle to find the right compromise—there is a natural reflex from member states not to give competence to the EU. This reluctance is both political (as a choice) and administrative (resistance to change), in particular with regard to legal migration. When they see another directive on the subject, they say 'oh, no' and the same goes with implementation. (AM0216, 4 November 2014).

In the first orientation debate held on the proposal (7-8 October 2010), ministers were quick to point out that it was within the competence of nation-states to decide the number of TCNs admitted yearly on their territories; at the same time, ministers emphasized the practical problems entailed in the provisions:

Another issue highlighted by several ministers was the question whether the rights accorded to third country nationals should be equivalent to those enjoyed by nationals of the host member states, in particular with regard to social security benefits. (Council of the European Union 2010b, 8).

The issue of social rights remained contentious throughout the negotiations of the dossier, and especially once dialogues with Parliament began after the Council received its mandate from Coreper at the end of May 2012 (Council of the European Union 2012). It is important to mention that the ICT Directive had been cast at the same with the Seasonal Workers Directive, which targeted low-skilled immigrants coming to Europe for seasonal employment, typically in agriculture. In this respect, the second proposal was considered much more controversial by the Council, whose officials expected that they could reach a deal on conditions of entry for high-skilled rather than for low-skilled immigrants (Lazarowicz 2013). Conversely, the Parliament wanted to connect the two initiatives as a package in the hope that they could find agreement on both (AM0209, 12 November 2014).

In fact, within the Parliament, the dossier was split between LIBE and the EMPL Committee (according to Art 54 of the Rules of Procedure); specifically, LIBE received competence on most of the content while EMPL was assigned exclusive responsibility on the provisions regarding rights (AM0403, 24 October 2014). Salvatore Iacolino (EPP) was appointed rapporteur on behalf of LIBE, while Liisa Jaakonsaari (S&D) was selected

rapporteur for opinion on behalf of the EMPL Committee. The initial discussions in LIBE revolved around the period of employment before coming to the EU (in months), as MEPs wanted to make the scheme more accessible than proposed by the Commission while at the same time ensuring that the system would not be abused—by having, for example, people who get hired for 3 weeks in order to take advantage of the instrument and come to the EU (LIBE Committee 2011).

Once the two institutions had their mandates, it was obvious that their positions were so far apart on the ‘big questions’ that officials following the file feared they “might not have an agreement at all” (AM0308, 21 October 2014). Three points were most heatedly debated: 1) the prospect of maintaining national schemes in parallel to the EU scheme, which the Council wanted in order to ensure flexibility for their national administrations but the Parliament rejected on the grounds that it was rendering useless the entire existence of an EU scheme; 2) the equal treatment regime—on which the Council wanted to ensure equal treatment of employment conditions to posted workers⁵⁸ in order to avoid legal hurdles related to pension and health benefits, whereas the Parliament wanted equal treatment to member states’ nationals in the name of non-discrimination; and 3) the aspect of intra-EU mobility—i.e. the possibility to move to another member state inside the same corporation once the first work permit was granted—which the Council argued it required a new application procedure to the member state of destination, while the Parliament claimed that would make the process too bureaucratic (AM0403, 24 October 2014; AM0209, 12 November 2014; AM0308, 21 October 2014; see also Lazarowicz 2013). The first two were ‘yes’ or ‘no’ questions, so it was very difficult to

⁵⁸ Under EU law, “posted workers” are a category of employees who are citizens of a member state and move temporarily to another member state to work for their original employer. Specified in Directive 96/71/EC, the working conditions of posted workers are meant to protect against “social dumping” and ensure similar labor standards across the EU (European Commission n.d.). However, the implementation of this Directive is known to be lacking, as there were several instance of “wage dumping”, i.e. citizens from lower-income member states working in higher-income member states would be paid at the level of their country of origin (Lazarowicz 2013, 3). The EMPL Committee has fought fiercely on this matter for years (AM0403, 24 October 2014).

find a compromise. The Commission sided with the Parliament on the first issue: they wanted the EU scheme to replace national schemes (as they had previously witnessed the ineffectiveness of the Blue Card Directive); on the second issue the supranational institution was more in line with the Council, because they agreed that it was legally more complicated to offer equal rights to nationals; finally, on the third issue, they were open to finding the best solution to allow the flexibility of TCNs and employers (AM0308, 21 October 2014).

These points of contention illustrate very well the characteristics of the constituencies described by different institutions. Seeing itself as the representative of national administrations, the JHA Council sought to ensure a maximum level of flexibility and straightforwardness for immigration authorities in the application of rules:

We wanted a flexible scheme that would allow us to attract high qualified workers as a matter of principle; we thought we shouldn't have things made more difficult for us (...) our opinion is that legal migration is not the best place to harmonize, and that is why it's impossible to find an agreement with the Parliament and the Commission—we [the member states] are too different. [...] and of course we as the Council always think we are right... (AM0218, 7 November 2014).

At the same time, in relation to intra-EU mobility rules, some member states like Austria, Belgium, Cyprus, and Malta did not trust national authorities from other member states to process applications correctly, which is why they opposed the relaxed scheme proposed by the Parliament: “we were afraid that people would enter through Bulgaria and Romania and then move to Western Europe, this had to be controlled.” (AM0216, 4 November 2014).

For their part, officials from DG Home Affairs—acting in the name of the economic European interest—claimed the necessity to have one common, EU-level scheme that would simplify the procedures for employers wishing to ensure the mobility of their personnel. In addition, for the benefit of the same employers, the Commission invoked the need to maintain the provisions for rights as they were for posted workers, in order to ensure the simplicity of legal provisions. Officials thought that “the Council’s objections were quite practical, because

they actually use the rules in their everyday jobs. They are not always the bad guys they are portrayed to be, while the Parliament is always the political player...” (AM0308, 21 October 2014).

Indeed, the Parliament was clearly trying to make it easier for TCNs themselves to access the scheme and move relatively freely within the EU, by being subject to one common set of rules rather than 28 different jurisdictions. However, the Parliament was not an internally coherent actor, as shown by the growing divergences between LIBE and the EMPL Committee, which became more visible as negotiations progressed. During trialogues, LIBE was very active, while EMPL did not get directly involved because the issue on equal treatment on terms and conditions of employment was in their opinion a question of principle; moreover, any form of compromise was rejected because they had on the table the Implementation Directive (related to posted workers) and they feared that an agreement on ICTs could be used against them in the other file, much more important for their portfolio (AM0403, 24 October 2014). Conversely, LIBE prioritized the adoption of the instrument even in a weakened form—because it provided an EU-level scheme in which intra-EU mobility rules were for the first time regulated (AM0308, 21 October 2014).

A lot of progress in negotiations was achieved during the Lithuanian Presidency of the Council in the second half of 2013. Representing a small country with no real stakes when it came to legal migration, the Lithuanian chair overseeing the ICT Directive was mostly concerned with ‘delivering’ on the file, i.e. brokering an agreement during their Presidency (AM0215, 30 October 2014). Since the Seasonal Workers Directive was in the final stages of negotiations in the autumn of 2013 and was actually closed down in December (AM0201, 1 April 2014), the Lithuanians hoped to use all the applicable provisions agreed for the Seasonal Workers and transfer them to the ICT (AM0308, 21 October 2014). However, this was not so easy in practice, as shown by the huge number of technical meetings that followed between

representatives of the Presidency, the Council Secretariat, the Commission, and the LIBE Secretariat—in parallel to meetings of JHA Counselors where the Presidency would report to other member states about the progress of negotiations (AM0215, 30 October 2014). On the whole, there were eight official dialogues (three in 2012, two in 2013, and three in 2014), nineteen JHA Counselors’ meetings (thirteen in 2013, six in 2014), and six discussions at Coreper level (five in 2013, one in 2014) (AM0403, 24 October 2014; AM0218, 7 November 2014).

The equal treatment regime remained an outstanding issue until the late stages of the negotiation process, and it was solved during the Greek Presidency of the Council in early 2014. From the perspective of the Council, although general negotiations were already at an advanced stage:

Labor-related issues had not been approached to a satisfactory degree due to a lack of flexibility from the side of the EMPL Committee, who insisted on providing equal treatment with regard to pay and working conditions. A breaking point was the suggestion of the Commission and the Presidency to provide for equal treatment with nationals as a condition of admission without intervening to the article on equal treatment. (AM0220, 17 December 2014).

Indeed, as negotiations drew to an end, the clashes between the LIBE and EMPL committees reached climax. An official from LIBE explained that a decision had to be made in Parliament as regards the rights issue, so LIBE shadows decided to go against the EMPL Committee by accepting that remuneration would be equal to nationals whereas other employment conditions would be equal to posted workers:

This created a lot of trouble with EMPL, as it basically went against the article which gave exclusive competence to EMPL on the question of rights. While there were two rapporteurs on the file (one from LIBE, one from EMPL), it was up to the LIBE rapporteur (the main committee in charge of the file) to decide on the matter. LIBE felt that it was more important to have the directive than to have the equal treatment issue, which is why they voted in favor of the report. Nobody was thrilled about this compromise even in LIBE, but it was the only way they could reach an agreement, as the Council didn’t budge on the matter and the Commission was on their side. The equal treatment question was the last tricky thing to be settled, and the compromise infuriated the EMPL Committee (which voted against the report). The report was however supported

by LIBE and passed the plenary vote with a small majority, which was uncertain until the morning of the vote, as the Left voted against... (AM0403, 24 October 2014).

But while the Council managed to impose its position on the equal treatment regime, it failed to do so in respect to national schemes and the intra-EU mobility question (AM0209, 12 November 2014). Within the Council, such agreements were ultimately political: “The decision on national schemes was taken at Coreper level, we received guidance from our minister and he agreed to let it go” (AM0218, 7 November 2014). However, at the final vote on the proposal, three countries abstained—Spain, Hungary, and Austria (Council of the European Union 2014a), showing a clear lack of consensus on the matter between member states⁵⁹.

On the whole, the ICT Directive illustrated the paramount importance of justifying policy positions by invoking constituencies in the dynamics of inter-institutional interactions in the AFSJ. Specifically, when officials perceived the interests of their respective constituencies to overlap (e.g. the Parliament and the Commission on the EU-level scheme, the Council and the Commission on equal rights issues), it was much easier to facilitate inter-institutional agreement. At the same time, institutional actors were not homogenous in the portrayal of their constituencies; as shown by the different approaches adopted by the LIBE and EMPL Committees in the Parliament, different institutional units saw their mandates as designed to defend constituencies with different characteristics, depending on their sectoral portfolios. In this case, party lines did not matter so much: for instance, the S&D political group voted in favor of the compromise in LIBE but against it in the EMPL committee (AM0308, 21 October 2014). Consequently, the differences between LIBE and EMPL support the idea of the

⁵⁹ According to an official in the Council Secretariat, there were different reasons why Spain, Austria, and Hungary abstained. Spain wanted to maintain its own national scheme because the EU proposal was considered more restrictive; Austria was skeptical on intra-EU mobility (similar concerns were voiced by Germany, Cyprus, and Malta), Hungary had doubts about many issues; while Poland and the Czech Republic introduced reservations about the relationship of intra-EU mobility to Schengen (AM0209, 12 November 2014).

dimension of sectoral specialization in the Parliament's organizational structure (chapter 2.2.1). In other words, the policy areas in which committees worked proved to be—in this particular case—more relevant than party affiliation for the construction of the constituencies claimed to be represented. When it came to justifying institutional positions in the AFSJ, the Parliament demonstrated it can also be heterogeneous internally (like the other institutions), in line with expectations regarding the increase in competence in the field. This heterogeneity can be further illustrated in the field of criminal justice, which is discussed next.

5.2.3 The Confiscation Directive

Unlike the other two cases discussed above, the Confiscation Directive was for the most part a conflict-free legislative dossier of the post-Lisbon period in the AFSJ. This feature is even more interesting if we consider that the file touched directly upon the criminal justice system of member states—a domain perceived to lie at the heart of national sovereignty. Indeed, the ability to catch criminals is directly related to the capacity of states to ensure public order and thus to be recognized as legitimate in the eyes of their citizens (Mitsilegas 2009b, 321–2). Nevertheless, the Confiscation Directive was adopted quite rapidly (after less than two years of negotiations, 2012–14), without creating much controversy between the three legislative institutions or prompting an intervention by heads of state or government in the European Council. The proposal was put forth in March 2012 (European Commission 2012b), the Council adopted its mandate in December 2012, and an informal agreement with the Parliament was reached within the year under the Lithuanian Presidency (Council of the European Union 2013). The LIBE Committee voted in favor of the compromise with an overwhelming majority—forty-four votes in favor, one against, and one abstention (European Parliament 2013), and a similar endorsement was found in the plenary—631 votes in favor, nineteen votes against and nineteen abstentions (AM0408, 13 November 2014).

The rapid process of negotiations was in contrast to proceedings on most instruments regarding criminal law cooperation, where there was typically a lot of disagreement about the very scope of EU-level action—see for example the attempts at creating a European Public Prosecutor Office (AM0307, 17 September 2014). In itself, the outcome of the Confiscation Directive is not surprising if we take into account that the forfeiture of assets resulted from criminal activities is generally perceived as a ‘good’ and ‘fair’ measure in criminal law. Nevertheless, the proposal also envisaged the inclusion of unprecedented elements of non-conviction based confiscation in the EU acquis, which could potentially be used in a non-proportional manner or even in breach of fundamental rights of citizens to private property (European Criminal Bar Association 2012). Interestingly enough, it was the Parliament and the Commission who supported non-conviction based confiscation, while most member states in the Council opposed it (Arcifa 2014). This positioning of institutions is rather unexpected bearing in mind most conventional conceptualizations of the Council as the one institution always oriented towards security (Acosta 2009). Under the circumstances, the Confiscation Directive offers an intriguing case of legislative decision-making in the AFSJ, in which we find an almost full overlap between the constituencies claimed to be represented by the three institutional actors. As explained by an official from the Commission: “the subject-matter of the Confiscation Directive was conducive for having larger support, because everyone agreed that taking assets from criminals was a desirable goal” (AM0311, 31 October 2014).

Accordingly, the Confiscation Directive was framed as part of efforts to combat organized crime, an issue which increasingly gained salience on the EU agenda in the context of the single market and the necessity to protect citizens from the perils of transnational criminal activities (Carrapico 2010). Drawing on its evidence-based impact assessment, the Commission provided hard data to illustrate the difficulties of competent authorities to recover

assets of organized criminal groups (European Commission 2012a, 12–13). The dangers of the phenomenon were made clear in the explanatory memorandum of the Commission proposal:

[Organized crime] affects the functioning of the Internal Market by distorting competition with legitimate businesses and undermining trust in the financial system. [It also] deprives national governments and the EU budget of tax revenues. (European Commission 2012b, 2).

Commission officials explained that the proposal resulted from consultations with practitioners and experts in the field, and that the content was not too far-reaching—reiterating previous commitments made by member states in the form of third pillar instruments (AM0315, 14 November 2014).

Indeed, representatives of national governments had already welcomed the proposal years before, when they published Council Conclusions on Confiscation and Asset Recovery (Council of the European Union 2010c). The focus on effectively fighting organized crime had been for many years a priority of home affairs ministries, who widely supported the adoption of EU-level instruments that could potentially allow them to tackle the 3,600 organized crime organizations estimated at the time to be active on EU territory (AM0212, 23 October 2014). The Confiscation Directive was in their view one step in that direction. Officials from Permanent Representations explained their position:

All our [law enforcement] agencies have asked for stronger cooperation in the pursuit of criminal activities [...] Member states realized they cannot rely only on their own capacities to respond to these cross-border threats. When I look at specific criminal activities, they still ask for even stronger cooperation. It is not enough to say that we (country X) have a good police, because the combating of crimes goes beyond our borders... (AM0210, 15 September 2014).

In a similar vein, the Parliament had issued a resolution in 2011 calling on the Commission to cast a directive on confiscation, among others, emphasizing that:

Organized crime has a substantial social cost, in that it violates human rights, undermines democratic principles, diverts and wastes financial, human and other resources, distorting the free internal market, contaminating businesses and legitimate economic activities, encouraging corruption and polluting and destroying the environment. (European Parliament 2011b).

Thus, when the initiative was finally cast in March 2012, the Parliament appointed a group of rapporteurs with direct experience on the issue: Monica Macovei (EPP), a former ministry of justice in Romania, and Rita Borsellino (S&D) as shadow, a known anti-Mafia activist with a personal history of fighting against Italian Mafia. They “understood very well how important it was ‘to go after the money’. There are many limits to confiscation, and it’s legally very difficult to show that a crime has been committed” (AM0408, 13 November 2014).

But while there was political consensus among the three legislative institutions that confiscation was an effective way to respond to organized crime, there were several legal considerations that factored in during the decision-making process. Previous research has shown that criminal justice at the EU level is a field dominated by officials with long-standing experience on European issues as magistrates or lawyers, who provide on account of their expertise a source of authority in criminal matters (Mégie 2013). Accordingly, the opinion of Council officials from working parties and the Secretariat weighed as much in the progress of negotiations on the Confiscation Directive as political considerations. The reasoning of national legal experts in response to the new EU instrument went as follows:

The idea is to subscribe first and foremost to constitutional provisions (if there is any conflict between the new proposal and our constitution, the proposal will be rejected). Next there is a wide consideration of the legal system and the legal tradition; if a proposal demands an entire reform of the current system, it cannot be accepted. The purpose is to make the proposal as easy as possible to integrate in the national [judicial] system. (AM0217, 7 November 2014).

The relevance of judicial considerations manifested prominently on the issue of non-conviction based confiscation—“the big elephant in the room” of the dossier (AM0315, 14 November 2014). As its name suggests, non-conviction based confiscation refers to those cases in which asset forfeiture is possible in the absence of a criminal sentence, which can happen in the event of “illness, death, or flight” by the defendant or “if a (civil) court is satisfied or convinced that the money or assets derive from activities of a criminal nature” (Arcifa 2014). On this issue, the Commission wanted to adopt a mid-way approach that allowed confiscation “without a

criminal conviction” but only “following proceedings which could, if the suspected or accused person had been able to stand trial, have led to a criminal conviction” (Rui 2012, 353).

For their part, the rapporteurs from the Parliament wanted to go further than the Commission’s proposal by recommending an adaptation of the controversial US model of civil asset forfeiture⁶⁰ (AM0408, 13 November 2014). While abiding by the right to a fair trial, the Parliament wanted to introduce confiscation based on “an eased burden of proof, where there is no conviction, if the illicit origin of the assets concerned is demonstrated” as having originated from criminal activities (Alagna 2014, 12). The soundness of non-conviction based confiscation remains extremely contentious among legal scholars, as there are several considerations of rights at stake; for example, the European Criminal Bar Association issued a statement condemning the Commission proposal and even more so the Parliament report for showing “a disregard for the principle of proportionality and the fundamental rights of citizens including breaches in the rule of law” in their approach to confiscation (European Criminal Bar Association 2012).

In contrast, most officials in the Council—with the exception of those from Ireland, Italy and the UK (whose systems already applied non-conviction based confiscation)—were opposed to the provisions, citing as grounds the respect of national legal traditions (AM0315, 14 November 2014). Moreover, some member states like Poland, Romania, and Luxembourg argued that non-conviction based confiscation was against their constitutional provisions regarding the violation of the right to property, and moreover proposed that even extended confiscation should only be limited to serious crimes (AM0219, 12 November 2014). In the case of Poland, the communist legacy directly impacted on the outward rejection of non-conviction based confiscation, and it remained the reason why Poland was the only country to

⁶⁰ In the U.S., the implementation of Civil Asset Forfeiture has led to widespread abuses by police forces confiscating the private property of many American citizens without proper cause; as such, the procedure has caused a public outcry against infringements of civil liberties (Williams et al. 2010).

vote against the proposal, thus breaking the consensus rule of decision-making in the Council (Council of the European Union 2014b). On a different note, since a majority of member states had a roman law system, it was seen as completely unproductive to adopt common law provisions (namely civil asset forfeiture) on top of them (AM0212, 23 October 2014). In other words, in the opinion of most legal experts from the Council, non-conviction based confiscation was incompatible with their national judicial traditions, which they regarded as the constituency that had to be defended in this case.

In the end, the proposal passed with a very limited form of non-conviction based confiscation—in the event of illness, death, or flight—and a request from the Parliament and the Council to the Commission to conduct a feasibility study on the possibility of introducing the principle at a later date (European Parliament 2013). Conversely, the Parliament succeeded in incorporating an innovation: the use of confiscated funds or property for social purposes, as there were no regulations on how the proceeds of confiscation should be employed (AM0315, 14 November 2014). The Commission was quite content with the outcome:

The result was not as ambitious as Ms. Macovei wanted, but still is a very useful tool to go after the money: organized crime is about profit-making, we still have problems of capacity, re-use of assets.... (AM0310, 29 October 2014).

For their part, the rapporteurs remained convinced that non-conviction based confiscation will be the future in the EU and asked the Commission to provide reports on the results of the directive (AM0408, 13 November 2014). It was very curious, however, that the group of MEPs working on the file were entirely ready to forego the fundamental rights dimension in the name of fighting effectively against organized crime. According to an official from the LIBE Committee:

The perception of the public in criminal law changed from the 70s and 80s onwards, there is a demand to be ‘tough on crime’—this came later to Europe and is reflected by MEPs. (AM0409, 13 November 2014).

To summarize, the Confiscation Directive demonstrated a few important things about institutional lines of justification in AFSJ legislative negotiations during the post-Lisbon period. First, files are solved far more smoothly when there is consensus between institutions on the interests of their respective constituencies, or—in this case—on what the EU should be fighting against: “the main motive for cross-border organized crime, including mafia-type criminal organization, is financial gain. As a consequence, competent authorities should be given the means to trace, freeze, manage and confiscate the proceeds of crime” (Directive 2014/42/EU, Preamble). Indeed, it appears that when officials of the three legislative institutions agree at the political level on objectives to be followed (in this case, freezing proceeds of crime), it is much easier to overcome differences over means (i.e. non-conviction based confiscation). Most fascinating, however, was to find the Council and the Parliament in reversed roles in the debate between security and fundamental rights, with MEPs pushing national representatives to increase the discretion of law enforcement and judicial authorities in the pursuit of criminal organizations. For observers following developments in counter-terrorisms and the clashes over data protection (see Statewatch n.d.), this case would appear ironic. However, from the perspective of the constituencies which the two institutions claimed to represent, the seemingly unusual polarization of institutional positions on non-conviction based confiscation makes perfect sense.

5.3 Conclusion: the logic of justification and inter-institutional conflict in the AFSJ

The post-Lisbon period has brought important changes to the institutional framework of the AFSJ. The empowerment of supranational institutions has naturally altered the dynamics of inter-institutional interactions, and the trend is only likely to be consolidated in future years—assuming there will be no ‘spillback’ (Schmitter 2004) in the scope of EU activity in the field. The most important changes underlined in this chapter were: the informal institutionalization

of the European Council as the ‘crisis manager’ in the AFSJ; the Council’s difficulties of accepting the Parliament’s greater role in the field and its increased reliance on the activity of JHA Counsellors from Permanent Representative to reach qualified majorities in legislative negotiations; the Commission’s consolidated position as agenda-setter in the AFSJ owing to the extension of its right of initiative and its corresponding administrative expansion (two DGs, double the personnel); and, finally, the Parliament’s strengthened role in decision-making and the external dimension of the AFSJ—which overall brought it closer to the positions of the Council than ever before.

In terms of patterns of institutional justification identified in the AFSJ during the post-Lisbon period, the chapter demonstrated the centrality of claims at representation—this time put forth by technocratic officials—present in institutional discourse in order to legitimize policy positions and decisions. This, however, is not a specific feature of the post-Lisbon period, having served as the principle for institutional positioning from the very beginnings of policy-making in the AFSJ (see chapter 3). The Lisbon Treaty increased the competences of the EU in the AFSJ, thus broadening the universe of potential constituencies claimed to be represented by institutional actors. Indeed, the expansion of classic community method decision-making in areas like criminal justice has provided the opportunity for freshly-empowered actors—like the Commission and especially the Parliament—to position themselves in the new field, by invoking the needs of some constituencies they had not really considered before.

Furthermore, the mushrooming of representative claims revealed in this chapter alludes to a fragmentation of institutional roles in the AFSJ. This idea is very similar to what Richard Bellamy and Sandra Kröger called the “representation surplus” of the EU polity, according to which “multitude avenues of representation”—of states, national parliaments, citizens, civil society organizations, experts etc.—have been inserted in EU decision-making particularly in

order to overcome formal representation deficits (Bellamy and Kröger 2013). In terms of patterns of institutional justification, this meant that officials within the same institution could easily find themselves at odds with each other, because they each perceived their work for the benefit of some constituency considered central to the activity of their particular unit, committee, or working group. ‘Focusing events’ such as refugee or security crises polarized institutional positions even more, forcing into the public sphere competitive claims at representation by various political actors. Conversely, to the extent that constituencies were perceived as overlapping, decision-making between institutions worked much smoother.

The case studies presented here illustrated this line of argument very well. The contentiousness of the Schengen Governance Package brought forth the influence of ‘crises’ in the decision-making process, as the politicization around the reintroduction of internal border controls was effectively a situation of competitive claims-making by the institutions involved—the Council and partially the European Council on the one side, and the Commission and the Parliament on the other. In contrast, the ICT Directive and the Confiscation Directive did not attract public attention through the media, which was also the reason why the European Council did not intervene to advance or guide the negotiations as it did on the SGP. In addition, these dossiers demonstrated the importance of overlapping constituencies in the name of whom institutions claim to act: 1) in the case of the SGP, there was very little convergence between the objectives deemed important by the Council as opposed to those of the Commission and the Parliament; 2) in the ICT Directive, there was some convergence on specific issues across institutions—the Commission and the Council on the aspect of rights, the Commission and the Parliament on the maintenance of parallel national schemes; 3) in the Confiscation Directive, there was broad convergence between officials from all institutions on the priority to freeze assets of organized crime groups. Last, but not least, the ICT Directive and the Confiscation Directive have revealed the scope of variation in institutional justifications formulated within

the Parliament: one the one hand between different committees—LIBE and EMPL—regarding the constituencies they claim to represent, and on the other between competing values portrayed as being held by the constituency—effective crime-fighting vs. the right to privacy—within the same LIBE Committee.

As a result, several conclusions can be drawn about institutional behavior in the AFSJ in the initial post-Lisbon years. First, officials from EU institutions offer nowadays multiple, at times diverging justifications for their policy positions and decisions in the AFSJ, depending on the characteristics of the constituency they claim to represent. Indeed, the gradual diversification in institutional justification in the AFSJ has transformed with the Lisbon Treaty into full-blown diversity, meaning that officials from individual organizational units now take it for granted that they have different patterns of justification at their disposal to legitimize institutional action. In this respect, it has been argued that a level of stabilization in variation of institutional justification has occurred. This is particularly visible with regard to the Parliament and the Commission, which can find themselves closer or farther from the positions of the Council depending on the committee/unit responsible for an issue. The Council remained the most internally coherent actor, although at times it can also surprise through a prioritization of one constituency value (e.g. the national legal tradition) over another (e.g. effective crime-fighting by law enforcement). Second, external crises generally exacerbate the polarization of institutional positions, as officials typically respond by offering competing representative claims in the media which are prone to create inter-institutional conflicts. The less publicized an issue, the more likely it is to be solved through inter-institutional cooperation. Variation or inconsistency in the justification of institutional positions in the AFSJ is thus dependent on the constituency claimed to be represented by the actors involved in a given instance of decision-making, and the extent to which such claims are made in the public sphere.

6 CONCLUSION: THE CENTRALITY OF JUSTIFICATION IN EXPLAINING INSTITUTIONAL BEHAVIOR IN THE AFSJ

This thesis has examined the behavior of the main EU institutions in decision-making over the Area of Freedom, Security and Justice for a period of roughly 30 years (1984-2014). It showed that the institutional positioning of the European Council, the Council, the Commission, and the Parliament towards governance arrangements as well as their individual policy positions varied considerably depending on the period and the issue under investigation. This variation was only partially explained by existing literature, as most studies on EU institutional behavior in the AFSJ assumed fixed, stable, and exogenously-set preferences from institutions—in line with their intergovernmental or supranational character (chapter 2.1). In contrast, the present thesis argued that EU institutional behavior could not be fully understood without looking at how officials justified the decisions and actions of their respective institutions as being for the benefit of someone, ‘in the name of’ a constituency they claimed to be representing (chapter 2.2). The argument was embedded in the AFSJ as a hybrid area of EU activity that encompassed different decision-making modes and dynamics between institutions developing throughout time (chapters 3 to 5).

The guiding research question was ‘*what explains different patterns of institutional behavior in the European Union’s Area of Freedom, Security and Justice?*’. The answer was found in the continuous tendency manifested in institutional discourse and speeches/statements of individual EU officials to legitimize institutional decisions by justifying policy positions and choices in reference to their respective constituency, portrayed as having specific interests or values. Taking into account that the boundaries of political representation in the EU political system are blurred, officials from institutions were theorized to have an active role in constructing the wishes of their respective constituencies. In this thesis, the process of constructing ‘images of the represented’ has been dubbed representative claims-making—

following the work of Michael Saward (Saward 2006; 2010) and its empirical applications to EU studies (De Wilde 2011; De Wilde, Koopmans, and Zürn 2014). Moreover, the process of making representative claims was seen as embedded in the organizational structure to which officials belonged, as their constituencies were delimited—albeit in general terms—by how their work was structured. Drawing on organizational theory, the crucial elements of the organizational structure identified were the type of specialization (territorial or sectoral), the primary affiliation of officials (to an EU-level institution or to a national government), and the extent of their party membership (which could be strong, moderate, or low). Accordingly, institutions with territorial specialization and primary affiliation of officials to national governments were expected to claim to represent national citizens, while institutions with sectoral specialization and primary affiliation of officials to permanent EU organizations were anticipated to claim to act on behalf of EU citizens. But since national citizens and EU citizens were essentially the same people, what mattered was how constituencies were portrayed in institutional discourse. The result was a multiplicity of claims at representation that led to different patterns of institutional behavior.

To put it differently, the thesis argued that the tendency present in institutional discourse to constantly justify and legitimize policy positions became a driving force of institutional behavior in itself. The reason for this permanent search of legitimacy was found in the nature of the EU political system, where links between the representatives and the represented remained far from straightforward. The point here was that the democratic deficit of the Union and the crisis of political representation in member states had important consequences on the behavior of EU institutions—beyond discussions about the quality of democratic representation (Höreth 1999; Eriksen and Fossum 2000; Scharpf 2009; Mair and Thomassen 2010; Kröger 2015; Hooghe and Marks 2009; Bickerton, Hodson, and Puetter 2015b, 709). In this thesis, the empirical manifestation of the constant struggle for EU

legitimacy (cf. Schrag Sternberg 2013) were explored in respect to justificatory claims at representation made by institutional actors throughout time. Moreover, when justification was taken as a driving logic of institution behavior, variation in policy positions—as opposed to consistency (fixed, stable, homogeneous positions)—became not only possible but in fact very likely. The evolution of institutional behavior in the AFSJ demonstrated that the more competences EU institutions gained in the field, the broader the universe of constituencies in the name of whom representative claims could be made, and accordingly the higher the possibility for heterogeneous and even contrasting positions.

In fact, representative claims made by different institutions were expected to come sooner or later in competition with each other, resulting in inter-institutional clashes. This understanding of inter-institutional clashes differed, however, from the typical rationalist conceptualization of EU inter-institutional relations as a zero-sum game in which some institutions hold more power than others (see chapter 2.1). In this thesis, the identification of competitive claims at representation did not aim to provide answers about the outcome of inter-institutional relations in terms of which institution succeeded in getting its preferences across in decision-making. At the same time, the type of investigation conducted here did not seek to assess inter-institutional relations in respect to bargaining dynamics (who exchanged what for which goal) or deliberative interactions (who convinced whom of the better course of action). Conversely, the purpose was to illustrate inter-institutional clashes as the result of a process of argumentation and justification in which contradictory institutional positions were formulated on given issues—depending on the values or interests of the constituencies claimed to be represented.

Furthermore, the interest in competitive claims-making was related to the empirical observation of instances of EU politicization in the AFSJ. However, the hypothesis that competitive claims-making was exacerbated by the occurrence of unpredictable crises or

disasters that attracted media attention and required immediate policy solutions was only partly confirmed. While immigrant or refugee crises had an immediate impact on the polarization of positions and thus the politicization of issues, this was not the case, for example, with terrorist attacks. On the contrary, the terrorist attacks in the United States (2001), Madrid (2004), and London (2005) had the reverse effect of getting different institutional positions to coalesce into one representative claim about the security of citizens, which became prioritized over other interests or values, e.g. data protection. The other hypothesis, regarding the scope of EU competences across different policy areas, was widely supported by empirical evidence. Indeed, the case of the AFSJ has demonstrated that the more competences EU institutions have in a given field, the broader the universe of constituencies in the name of whom representative claims can be made—and consequently the larger the potential for variation in institutional positions.

The remaining of the conclusion is organized as follows. Section one elaborates on the findings, briefly discussing each chapter in turn. Section two reiterates the contributions of this study to the existing literature on institutional dynamics of decision-making in the AFSJ. Section three identifies limitations while simultaneously identifying directions for future research. Section four provides the concluding remarks and an outlook on the most recent developments in the field that fell outside the scope of this thesis.

6.1 Findings: the evolution of institutional behavior in the AFSJ

The Area of Freedom, Security and Justice offered excellent material for the investigation of EU institutional behavior in terms of representative claims made by officials or included in formal documents in order to justify and legitimate policy positions and decisions. Indeed, the development of the field at the EU level—from the fringes to the center stage of EU policy activity—allowed the tracing of institutional consolidation and the subsequent diversification

of institutional positions that accompanied the increase in competences. Few commentators would dispute the fact that the group of policies falling under justice and home affairs (and sometimes immigration) ministries from member states had a unique path of getting onto the EU agenda—starting as a completely intergovernmental arrangement outside the EU framework (1984-93), then entering the EU mandate as the intergovernmental third pillar (1993-9), continuing as a first pillar/third pillar domain for a decade (1999-2009), until finally becoming an almost fully communitarized area of policy EU activity (2009-present day). The three empirical chapters of the thesis have been organized around these developments, attempting to identify different stages in the evolution of institutional behavior as illustrated by the justification of policy positions and decisions.

Figure 6.1 below provides a summary of the findings of the empirical analysis. Chapter 3, which depicted the origin of institutional behavior in the AFSJ, covered the historical period before justice and home affairs policies were included in the EU treaty framework (1984-1993). The point of the chapter was to show that initially there was a lot of uncertainty among relevant decision-makers regarding the type of cooperation member states could develop in the future AFSJ, or whether there should be any cooperation at all. The issue at the time was whether JHA should be a policy area complementing the creation of the single market or a field in its own right. It was argued that the main EU institutions—the European Council, the Council, the Commission, and the Parliament—reacted to the implementation of free movement of people by positioning themselves in relation to a constituency they identified and claimed to represent for the first time, in line with their institutional mandates. This initial positioning became the baseline for the evolution of institutional justification in the AFSJ, creating general and policy area-specific expectations about institutional behavior in decision-making. The analysis revealed how each institution articulated during the period not only the nature and scope of EU action in the future AFSJ (in their view), but also their own role thereof. It was in

this context that the European Council claimed to know “what Europe’s people want”, the Council affirmed itself as the guardian of internal security, the Commission committed to safeguarding the right to free movement for EU citizens, while the Parliament portrayed itself as the defender of fundamental rights within the newly-established “area without internal frontiers”.

Furthermore, chapter 4 investigated the period after the creation of the third pillar by the Maastricht Treaty up until the abolition of the pillar structure by the Lisbon Treaty (1994-2009). The purpose here was to show the diversification in the justification of policy positions and decisions resulted from the process of institutional consolidation and the gradual expansion of EU competences in the field. Specifically, the rise in tasks and functions fulfilled by each institution in the decision-making process meant that new units could easily perceive their institutional roles as different—i.e. addressing different constituencies—from those originally held by their organization. This was obvious from the multiplicity of constituencies addressed in the early years of third pillar cooperation by the JHA Council, as well as from the pursuit of diverging priorities by different units in the Commission’s DG JLS. At the same time, the representation of constituencies was neither constant nor one-dimensional throughout the period. In fact, depending on the issue under consideration, constituencies were claimed to want security, fundamental rights (for EU citizens or all human beings regardless of citizenship), the protection of national sovereignty or labor markets, the tackling of the Union’s demographic problems, and so on. The contentious nature of AFSJ issues came to the fore during the period, as there was no universally accepted way to deal at the EU level with illegal immigrants, refugees, terrorist organizations, or different fundamental rights.

Finally, chapter 5 presented a so-called ‘stabilization in variation’ in patterns of institutional justification during a period when the institutional environment in the AFSJ became “normalized”. In the EU setting, normalization of decision-making implied the

expansion of the traditional community method of legislating as opposed to policy coordination and the adoption non-binding measures. The Lisbon Treaty empowered the Commission and the Parliament in legislative decision-making in the AFSJ, brought changes to voting rules inside the Council, and streamlined the influence of the European Council in agenda-setting. All these elements impacted the perception of institutional roles by officials, who were found to adopt different positions on similar issues at given periods in time—leaving the impression of inconsistency or at the very least a departure from the stances they held previously in the AFSJ. The reason for this variation in the justification of institutional positions and decisions was identified in the multiplication of constituencies claimed to be addressed by each institutional actor as a result of the expansion of EU competence in the AFSJ. In other words, the more competences the EU accumulated in the AFSJ, the broader the universe of constituencies in the name of whom representative claims could be made by different institutions. Under the circumstances, variation in the justification of institutional positions became the norm rather than the exception in decision-making across AFSJ subfields.

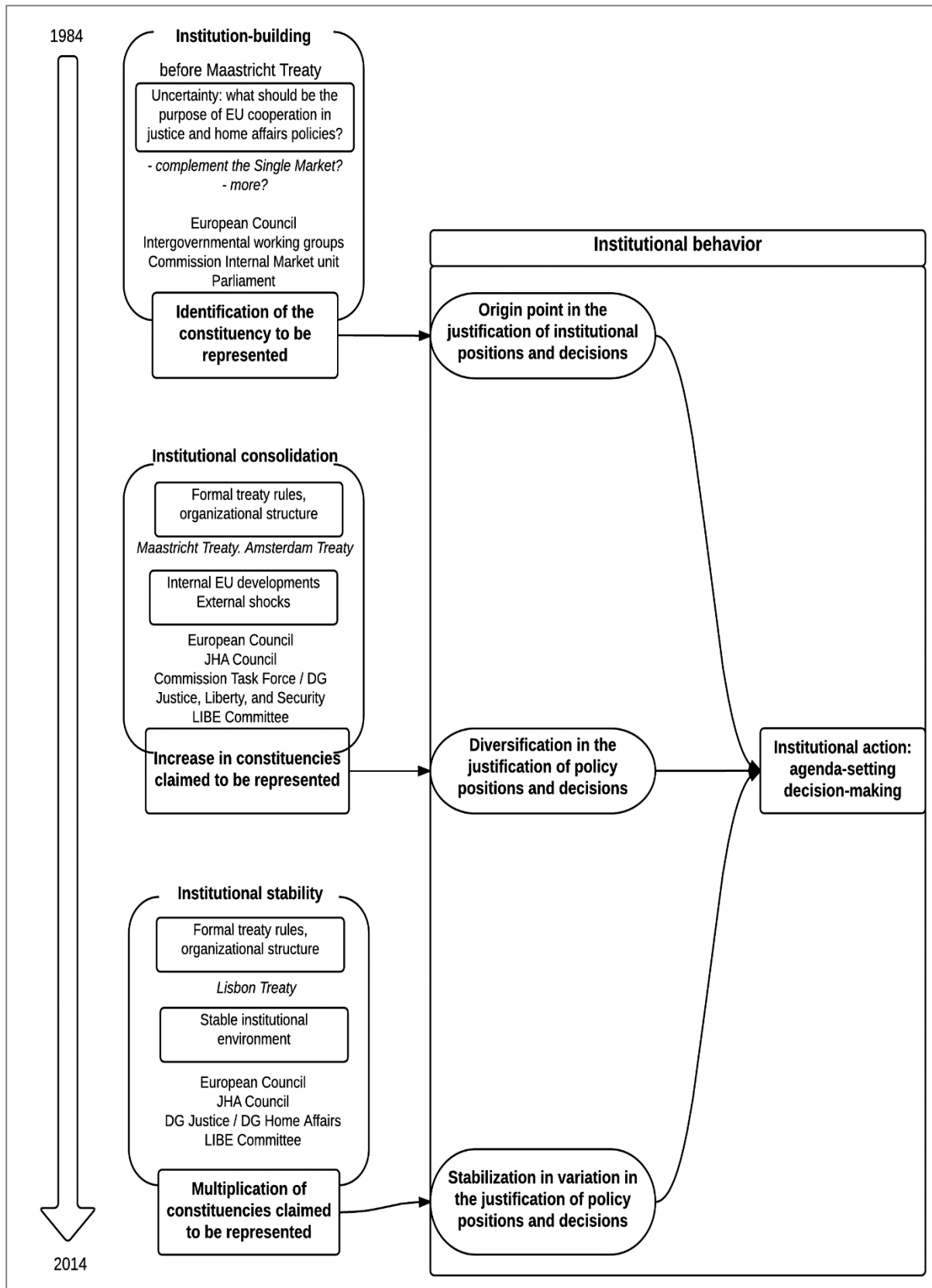


Figure 6.1: The evolution of institutional justification in the European Union's Area of Freedom, Security and Justice (1984-2014).

The data sources used to arrive at these findings allowed a comprehensive analysis of representative claims as reflected in official institutional documents and in statements of politically appointed officials (from the media), or technocratic officials (from interviews). In fact, it is a finding in itself that the representative claims present in official institutional discourse and those attributed to politically appointed and technocratic officials are for the most part consistent with each other. More contradictions in the justification of policy positions—or competitive claims at representation—were found in the internal process of decision-making in the Parliament (among Members) and in the Council (among ministers), most often depending illustrating party lines. However, once an institutional position was formally adopted, this was consistently reflected in the views of technocratic officials who participated in decision-making. In other words, there was more variation in the characteristics of the constituencies claimed to be represented by different politically appointed officials rather than between the constituencies constructed in institutional documents and by technocratic officials. Crucially for the argument of this thesis, all officials—regardless of how they came to be part of the EU decision-making process—justified their policy positions and choices in terms of the constituency they claimed to be representing.

Overall, examining the justification of institutional behavior in the AFSJ as manifested in the discursive practice of representative claims-making by different institutional actors allowed a better understanding of the particular institutional development of the AFSJ and of different positions adopted in the decision-making. The details of this contribution are outlined in the next section.

6.2 *Contribution: institutional behavior and the logic of justification in the AFSJ*

The study of institutional behavior as conducted in the present thesis makes at least three significant contributions to the current understanding of institutional dynamics of decision-

making in the AFSJ. The first refers to the investigation of the institutional architecture in the AFSJ as a whole from a longitudinal perspective. Indeed, one of the major gaps identified in the existing political science literature on the AFSJ referred to a focus on the behavior of one or two institutions at specific moments in time rather than a consideration of all the main institutions throughout time (chapter 2.1). This thesis has shown that the only way to fully grasp the behavior of EU institutions in the AFSJ is by placing their positioning in the context of the unique development of the AFSJ at the EU level—from an intergovernmental project outside the framework of the European Community to a supranationalized area and a standalone objective of the EU political system. The continuous expansion of the AFSJ on the EU agenda has translated into a lot of uncertainty for the institutions involved in decision-making, whose institutional roles were far from defined. As a result, the positioning of the different institutions throughout time depended on how officials working there at various points in time justified their policy decisions by reference to a constituency they claimed to be representing, portrayed as having specific interests or values.

The second major contribution of the thesis refers to the conceptualization of institutional positions in the AFSJ as fluid and heterogeneous. From the theoretical standpoint of justification through representative claims-making, there is no reason to expect that an institution will remain stable on an issue and not respond to endogenous and exogenous changes to the EU that impact on the AFSJ. Instead, shifts in the positions of the Commission and the Parliament under different decision-making procedures are not only possible but in fact very likely. At the same time, the perspective taken here does not see any reason why institutional positions should be homogenous. Conversely, it expects that increases in the organizational structure of an institution (by the creation of new units) consequently expands the universe of constituencies in the name of whom representative claims can be made, thus increasing the likelihood for heterogeneous justifications of institutional behavior. Moreover,

an understanding of institutional behavior from the standpoint of claims aimed at legitimization does not presuppose a priori choices in the normative debate between security and fundamental rights in counter-terrorism or asylum policy, or between security and liberal views in respect to migration. Conversely, the reason why institutions choose to focus on one dimension or another depends on how they construct the interests or values of the constituency they claim to be representing. For example, the JHA Council illustrates the orientation of police forces or border authorities towards security because this is what they claim to be representing. The same applies for the Parliament and the representation of its constituency as wanting for instance a higher consideration for privacy concerns of EU nationals.

The third major contribution of the thesis refers to the articulation of a theoretical framework regarding the behavior of EU institutions that supplements insights from the new intergovernmentalism and constructivist applications to decision-making in the EU. Indeed, the findings here support the new intergovernmentalist hypothesis that supranational institutions deviate from their roles as “agents of supranationalization” in the new areas of EU activity. According to the argument described in chapter 2.2, the reason why they do so is because the constituencies of supranational and intergovernmental institutions—as portrayed in their justification of policy positions through representative claims-makings—overlap to a large extent in the new areas of EU activity. Supranational institutions do not see any reason to provoke member states’ governments on issues that cut deeply into national sovereignty because they see the interests of their respective constituency (EU citizens broadly construed) as aligned with the interests of the constituency of intergovernmental institutional (namely national citizens). In respect to constructivist approaches, the present thesis formulated the mechanisms through which institutional behavior could be explained in terms of norms of what is considered appropriate institutional action. Crucially, appropriate institutional action was substantiated as legitimate institutional action, as institutional actors were shown to follow the

norm of legitimization by justifying their policy positions and decisions in reference to the constituency they claimed to be representing.

On the whole, the merit of the constructivist approach to institutional behavior adopted in this thesis lay in demonstrating 1) where institutional norms come from; 2) how institutional behavior guided by norms can evolve over time; and 3) why internal divisions over the interpretation of norms are possible inside the same institution (cf Jachtenfuchs 1997, 47). In a nutshell, the thesis argued 1) that institutional norms come from the need to legitimize EU policy activity, 2) that justification of institutional behavior can evolve over time depending on how officials construct the values and interests of their respective constituencies in the historical context; and 3) that internal divisions over ‘whom and what’ to represent become very likely once the expanding scope of EU competence in a policy field increases the universe of constituencies in the name of whom representative claims can be made.

Despite these important contributions, the study of institutional behavior in the AFSJ as presented in the thesis is not without limitations. They are problematized in the next section in conjunction with directions for future research.

6.3 *Limitations and avenues for future research*

There are at least three dimensions that fall outside the scope of the thesis but which potentially form an intriguing agenda for future research. The first limitation refers to the one actor unaddressed in the analysis on the AFSJ, namely the Court, whose rulings in the field make for a fascinating object of study in themselves. The second limitation concerns the missing normative debate from the thesis regarding the implications of representative claims by EU officials and institutions on the quality of both democratic representation and the policy process in the EU political system. The third limitation centers on discussing the generalizability of the theoretical argument outside the AFSJ—excluded from the thesis—and its applicability to

other policy fields of the EU, as well as to local, national, and international settings. Each subsection illustrates how each of these limitations can be turned into a direction for future research.

6.3.1 The unaddressed actor: the Court of Justice of the EU

The Court of Justice of the European Union has been deliberately excluded from the treatment of institutional behavior in the AFSJ provided in this thesis. The introduction to chapter 2.1 explained the absence of the Court from the empirical investigation in relation to its functions, as the Court is not directly involved in decision-making over AFSJ issues. The operative word here is ‘directly’, meaning that judges of the Court are not physically present at intergovernmental talks in the European Council and the Council or in tripartite negotiations between the Council, the Commission, and the Parliament. Admittedly, this is a procedural and not a substantive ground for excluding the Court from an analysis of institutional behavior in the AFSJ. The other major reason for not examining the behavior of the Court in the field refers to its constrained jurisdiction—which has been delayed, fragmented, and remains subject to exceptions even after the Lisbon Treaty (Mitsilegas 2010; Peers 2011c). This is not to say that the influence of the Court in the AFSJ was so far negligible; conversely, the point is that a comprehensive assessment of its behavior in the field can only be made after its full jurisdiction has taken effect for several years after 1 December 2014⁶¹. Bearing this in mind, the present section aims to provide an overview of the general development of the Court in the AFSJ, as well as to probe into the possibilities of conducting a study on institutional role perception and representative claims-making based on the Court’s rulings.

⁶¹ This is the date when the last transitional period limiting the jurisdiction of the Court in the former third pillar expired (Protocol 36 of the Lisbon Treaty).

The impact of the Court on the policy-making process in the EU at large cannot be underestimated. In line with the development of its competences over decades of European integration, the Court has come to play a crucial role owing to “its inherent capacity to alter the constitutional ‘rules of the game’ under which all other organs of governance (...) interact” (Stone Sweet 2011, 131). Even more remarkable, the Court constitutionalized its own judgements by establishing in the 1960s the supremacy and direct effect of the treaties vis-à-vis member states’ national law (Weiler 1981). The judicial activism of the Court has been described throughout the years as a “catalyst of integration through law” (Dehousse 1998, 177) and more generally as an “engine of European integration” (Pollack 2003, chap. 3). Indeed, legislative decision-making in particular came to “take place in the shadow of judicial politics”, meaning that the Court’s activism to interpret treaty rules and secondary legislation translated into case law which simultaneously added to and limited decision-making inside the institutional triangle; at the same time, institutional actors themselves strategically invoked and appealed to the Court in specific instances of decision-making in order to tip the balance in their favor (S. K. Schmidt 2011, 43–4).

In respect to the AFSJ, the intention of member states to contain or postpone the role of the Court on issues that cut deeply into their national sovereignty was clear from the start. In fact, title VI of the Maastricht Treaty provided no mandatory jurisdiction for the Court in the third pillar justice and home affairs. Instead, article K.3(c) allowed member states to decide on a case-by-case basis if the conventions adopted as third pillar instruments should be subject to judicial interpretation and review by the Court. Under the circumstances, it is no wonder that the role of the Court in the first years of the post-Maastricht period has been described as “minuscule and optional”, demonstrating “the continued reluctance on the part of some national governments to subject this highly sensitive policy field to any comprehensive, overarching judicial control” (Fletcher 2007, 4). The communitarization of migration, asylum, and civil

justice in the Amsterdam Treaty empowered the Court only partly because its jurisdiction on these issues was placed in a “ghetto” inside the first pillar, meaning that judges could only use their regular powers under restricted conditions (Peers 1998, 351). Moreover, the Court’s competence to provide preliminary rulings on decisions and framework decisions adopted under the remaining third pillar—police and judicial cooperation in criminal matters—had to explicitly recognized by member states before it was considered valid (Sanfrutos Cano 2008, 51–2). Such limitations on the role of the Court were heavily criticized at the time by legal commentators, who were concerned about the fragmentation of the Court’s jurisdiction in the AFSJ (Guild and Peers 2001).

Nevertheless, despite all these restrictions, rulings of the Court from the early and mid-2000s “‘provoked’, or even ‘anticipated’, the depolarization of its own jurisdictional role” (Hatzopoulos 2010, 146). Specifically, through its judgements on cases pertaining to both the first and the third pillars, the Court sought to expand its jurisdiction to all types of secondary legislation while at the same providing interpretation of treaty provisions per se (Hatzopoulos 2008, 56). With the Lisbon Treaty, the Court “gained its normal jurisdiction” over AFSJ issues, albeit with regard to third pillar instruments adopted in the pre-Lisbon period there was another five-year transitional period (Peers 2011c, 666). During the post-Amsterdam period, the basic principle upheld by the Court revolved around the mutual recognition of national decisions in the fields of asylum, criminal law, and civil law; however, with time the Court started to pay attention to the ways in which automatic inter-state cooperation infringed upon the fundamental rights of affected individuals (Mitsilegas 2012). The legally binding character of the EU charter on fundamental rights, enshrined in the Lisbon Treaty, has formalized the Court’s role on the matter and confronted its judges with difficult decisions regarding the respect of fundamental rights of immigrants and asylum-seekers (Carrera et al. 2012, 7–8). Nonetheless, despite these advancements in the post-Lisbon period, the Court continues to have no say on the validity and

proportionality of operational activities by law enforcement authorities, as well as on the protection of natural and legal persons in implementing measures⁶² adopted by the Council (Mitsilegas 2010, 476).

In addition to the non-decision-making functions and the delayed and fragmented jurisdiction of the Court in the AFSJ, the analysis of its behavior from the perspective of the logic of justification would have faced additional challenges owing to the overlap with the concept of legal reasoning in legal scholarship. There is no shortage of legal studies analyzing the reasoning of the Court in case law across different areas of EU policy activity (Joxerramón Bengoetxea 1993; Joxerramon Bengoetxea, MacCormick, and Moral Soriano 2001; Conway 2012; Beck 2012). In fact, the argumentation of judicial decisions represents an object of study in itself for legal scholars (Feteris 2013; Levi 2013; MacCormick 2005). A distinction they generally make is between the context in which judicial decisions are reached or “discovered” (depending on the role of courts in different legal systems, the consensus around sources of law, or the motivation of judges) and the actual process of justification through which judges deductively link case-specific facts to universal norms in the legal system under consideration (Joxerramon Bengoetxea, MacCormick, and Moral Soriano 2001, 49). In respect to the Court of Justice of the EU, legal scholars further distinguish between the pro-integrationist logic driving the institutional behavior of the Court and the post-hoc justification of its decisions, which effectively disguises judicial activism as legal interpretation of European law (Rasmussen 1986). From this perspective, the Court is regarded as just another political actor driven by self-serving goals in the EU political system, while justification is seen a rationalist strategy intentionally pursued to expand European integration through law (Garrett 1995). This line of argument is contrary to the one presented in this thesis, where justification is taken as a

⁶² The implementing powers of the JHA Council in the area of counter-terrorism are so extensive that they have been labeled as “executive”; for example, the JHA Council compiles “EU-level lists of suspected terrorists whose assets [are] then frozen by national authorities as a direct consequence of EU-level lists” (Curtin 2009, 5).

driving force of institutional behavior in itself. The logic of justification as manifested through the process of representative claims-making is thus different from the mainstream understanding of justification in legal studies on the Court's decisions.

The question that raises under the circumstances is whether an argument focused on institutional role perceptions and representative claims-making could fit at all the institutional behavior of the Court in the AFSJ. Here, the challenge is to determine whether the reasoning of the Court includes references to a specific constituency and, if so, what the characteristics of the identified constituency would be. To pursue this line of argument, it is necessary to borrow an assumption from a different strand of legal scholarship that conceptualizes the operation of the Court within the “self-contained context of reasoning and action” provided by the body EU law (Grimmel 2012, 534). From this perspective, EU law could abstractly be perceived as the general constituency which the Court claims to represent; at the same time, EU law is underpinned by particular norms and values constructed by the Court in different ways. For example, it has been argued that for the first decades of European integration, the Court projected “an idea of Europe based on market integration and supranational and federal solutions”, while during the post-Maastricht and post-Lisbon period more specifically “judicial opinions [were] infused with notions of human rights, social justice, citizenship, democracy, and pluralism as core elements of European integration” (Granger 2015, 226). To put it differently, in their justification of case law, judges of the Court engage in the active interpretation of the general norms and objectives of the European Union.

To further illustrate the interpretative role of the Court and its compatibility with the representative claims framework, the work of Beck (2012) on the notion of “heuristic legal reasoning” is instructive. According to the author, the Court always had to take decisions in an environment characterized by a high degree of (legal) uncertainty, as treaties adopted by member states were the result of political compromises between different actors that failed to

specify the values, principles, and objectives applicable to particular instances of policy-making. Therefore, the Court had a lot of discretion in interpreting these norms as it saw fit (Beck 2012, 2–3). The implications of this discretion became evident with the expansion of EU competence during the post-Maastricht period, when rulings of the Court proved “more uneven and unpredictable”, not necessarily reflecting a pro-integrationist logic (Dawson, de Witte, and Muir 2013, 2–4). Beck explains this variation as a result of the Court’s cumulative approach to interpreting EU law—following context-specific wording, historically embedded legal precedents, and teleological (purposive) criteria derived from the treaties and existing secondary legislation (Beck 2012, 281–3). He further explains that the Court has a heterogeneous repertoire of argumentation schemes—called legal *topoi*—which include “unresolved tensions between expansive and/or integrationist concepts and aims like the internal market or the goals of mutual recognition, non-discrimination and equal treatment irrespective of national origin, and member state prerogatives and sovereign rights in many overlapping national policy areas” (Beck 2012, 332; emphasis from author). Indeed, his empirical study on the legal reasoning of the Court overlaps closely with the logic of justification presented in this thesis as driving institutional behavior.

Consequently, a political science study focused on justification and (representative) claims-making by the Court in the AFSJ could well be imagined as an avenue for future research. Such an investigation would focus on the multiple constituencies the Court claimed to be representing in the AFSJ throughout the years, including among others the coherence of EU law, the supremacy of the Court’s interpretations over national law, but also general norms underpinning the treaty—ranging from mutual trust in inter-state cooperation on asylum or criminal law to the protection of fundamental rights of individuals affected by this cooperation (Mitsilegas 2012). The purpose of this empirical study would be to show that the Court of Justice of the EU has “multiple rationalities” depending on the specific context of the decision

it has to take (Grimmel 2012, 519). What is more, the Court's rationalities are manifested in the wide array of representative claims found in the legal reasoning of its decisions.

Having noted the role of the Court in the AFSJ, the thinking behind its exclusion from the analysis of the present thesis, and the possibility to apply in future studies the same theoretical framework in order to investigate its behavior, the next pages move to another limitation and possible direction for future research. This refers to the normative implications of making representative claims, which were deliberately excluded from the argument.

6.3.2 The missing normative debate: the value of making representative claims

This thesis aimed to provide an analytical, non-normative discussion of the drivers of institutional behavior in the AFSJ. The explanation found—rooted in officials' logic of justification through representative claims-making—has, however, important normative implications that need to be considered carefully. Two dimensions are salient and debated in the next pages. On the one hand, the argument that institutional roles are rendered intelligible through an active process of constructing the constituency to be represented raises questions about the democratic quality of the EU political system more generally. On the other hand, there is the practitioner expectation that if officials are acting on behalf of their claimed constituencies, their decisions and actions provide 'the best' policy outcomes. The first dimension speaks to the broader normative debate in EU studies regarding the existence of a democratic deficit and subsequent ways to improve it, while the second dimension demands an assessment of the 'real-life' impact on policy practices of a framework centered on representative claims by elected and unelected officials in the EU political system.

To begin with, in the constructivist approach to representation theorized by Saward and applied in this thesis, concerns about the democratic legitimacy of making representative claims were secondary. Saward's primary interest was to unpack the process of representation

into “claims to be representative by a variety of political actors” (Saward 2006, 298); at the same time, this thesis aimed at theorizing the agency of officials inside EU institutions from the perspective of how they justified their positions and actions by making representative claims (chapter 2.2.3). Moreover, Saward specifically explained that according to his reasoning, whether representative claims were regarded as legitimate was determined by the extent to which the intended constituency—on behalf of whom the claims were made—perceived them as such (Saward 2010, 144). Acts of accepting representative claims needed not be verbal (open dissent to political action); conversely, they could be expressed through silence (tacit consent) or low turnout in elections (ibid, 151-3). From a methodological standpoint, the assumption that legitimacy lies ‘in the eyes of the beholder’ presupposes an interpretive orientation towards the perceptions and opinions of the constituents identified by the researcher. This entire line of investigation was outside the scope of the present thesis, which treated representative claims-making as the empirical manifestation of the logic of justification driving the behavior of officials from EU institutions.

It is possible, however, to imagine a study that uses the representative claims framework in order to investigate the notion of democratic legitimacy in the EU political system. Such a study would differ notably from the mainstream approach in the literature focused on the factual existence and nature of the EU’s democratic deficit (Kröger 2015, 474–85). In this debate, one camp points to the lack of clear-cut “chains of accountability” between the representatives and the electorate in the EU institutional set-up that contribute to the perpetuation of the democratic deficit, despite the direct election of the Parliament (Weiler, Haltern, and Mayer 1995; Follesdal and Hix 2006; Rittberger 2010). Another camp contests that such a deficit exists in the first place given the democratic character of the EU’s constituent members (directly elected national governments), its institutionalized system of checks and balances and the increased role of the directly elected Parliament (Moravcsik 2002). Whether

they emphasize or deny the existence of the democratic deficit, both these strands of the literature address the question of democratic legitimacy as an objective consideration of the EU system: it is either there or it is not. Following the constructivist approach to representation adopted in this thesis, such a perspective is misguided because it imposes particular standards of legitimacy—established by philosophers, political scientists, or legal theorists—which are developed “independent of the context” of their emergence (Saward 2010, 144).

Furthermore, a study investigating the perceived legitimacy of representative claims by EU institutional actors would also deviate from notions of “output” and “throughput” legitimacy popular in the literature. “Output legitimacy” presupposes the evaluation of EU policy-making on the basis of the effectiveness of the decisions adopted (Scharpf 1999), while “throughout legitimacy” focuses on the involvement of multiple actors in the process of decision-making (V. A. Schmidt 2013). The idea of “throughput legitimacy” is embedded in the broader procedural discussion about deliberative democracy (Habermas 1989) applied to the EU context (Eriksen and Fossum 2000). One focus of scholars writing in this tradition was whether [and how] civil society contributed to enhancing the democratic character of the EU policy process through the consultation procedure (Smismans 2004; 2006; Kohler-Koch and Finke 2007; Saurugger 2008; Kröger 2013). Another interest of scholars drawing on Habermasian thinking concerns a functional understanding of deliberation aimed at identifying the advantages (“functions”) of deliberative interactions among unelected expert officials in a supranational setting (Joerges and Neyer 1997a; 1997b; Neyer 2006). Conversely, a study seeking to assess the normative legitimacy of representative claims by institutional actors in the AFSJ would need to focus on perceptions regarding the legitimacy of AFSJ policies among the professionals implementing them (police forces, border authorities, judges, prosecutors, lawyers etc.) and the citizens of member states affected by these policies.

The other normative dimension that remained unaddressed in the present thesis refers to the impact of adopting a constructivist approach to representation on policy practices. From this standpoint, the question whether specific AFSJ policy instruments are ‘good’ or ‘bad’, ‘effective’ or ‘problematic’ depends on the perception of the people who make that evaluation, in line with their pre-existing normative beliefs. In order to engage with how ‘people on the ground’ actually understand the effectiveness or rightfulness of AFSJ decisions, interpretive research is again the appropriate methodology to adopt. A quick survey of the academic literature written under the securitization framework (Bigo 2000b; Balzacq 2010) would suggest that some scholars indeed think that the AFSJ has been developing in the wrong direction because of its emphasis on security instruments that treat immigrants and asylum seekers as threats (Bigo 2000a; 2002; Huysmans 2000; 2006) and tend to invade the privacy of EU nationals under the guise of security-oriented goals against terrorism (Guild 2008; Bigo and Tsoukala 2009; Balzacq and Carrera 2006a). In this respect, ethnographic studies or large-scale survey analyses are the appropriate research methods to study how professionals and citizens understand the direction of specific AFSJ policies. Moreover, such studies would assume no normative hierarchy between liberal-oriented and security-oriented policies in the AFSJ, as this would depend on the underlying values of the community under investigation.

To sum up, the normative debate is missing from the present thesis because it would open up controversies about the EU’s democratic legitimacy and the meaningfulness of AFSJ policies that are deserving in-depth research in themselves, pursued from an interpretivist angle. Keeping this in mind, the discussion shifts to the other major limitation identified, referring to the extent to which the theoretical argument presented in the thesis ‘travels’ to other contexts outside the AFSJ.

6.3.3 Generalizability in the EU and beyond: the logic of justification outside the AFSJ

The theoretical framework of this thesis has been developed to account for the specific behavior of EU institutions in decision-making in the AFSJ. Nevertheless, the argument that officials from institutions act more generally according to the need for legitimization—as manifested in the justification of their policy positions through representative claims-making—could easily be extended to institutional settings beyond the AFSJ. The present section seeks to discuss the potential generalizability of the theoretical framework of the thesis to other sectors of EU activity, as well as to national and international settings.

In respect to the EU context, the question is whether the logic of justification through representative claims-making could be used to investigate institutional behavior in fields other than the AFSJ. To begin with established areas of EU activity subject to community method decision-making, a study similar to the one conducted in this thesis could supplement existing explanations of inter-institutional conflict and cooperation in legislative negotiations. In particular, an examination of how institutions portray the interests and values of their constituencies by adopting certain policy positions could potentially report important findings about the conditions under which actors are likely to start to inter-institutional ‘battles’. Such an approach could complement studies aiming to explain inter-institutional conflict from a rationalist, interest-centered perspective (Farrell and Héritier 2007; Héritier and Reh 2012). Moreover, an analysis focused on representative claims-making of institutional discourse could also assess the extent to which ideas of lobby groups, trade unions, or civil society organizations are reflected in the representative claims of different EU institutions and officials. The aim would be to expand the focus of studies investigating the role of non-governmental actors in the EU policy process (Mazey and Richardson 1993; Kohler-Koch and Finke 2007; Saurugger 2008; Smismans 2006).

Moving to “new” areas of EU activity, it is interesting to imagine how a study similar to the one conducted in this thesis could look like in the field of economic governance. Here, the European Council and the Eurogroup formation of the Council dominate decision-making, the European Commission plays a supporting role, while the Parliament is limitedly involved (Puetter 2012). The relationship between the European Council and the Commission has received the most attention from scholars, who argued that the permanent presence of the European Council in agenda-setting, especially since the start of the 2010 economic crisis, has led to an erosion of the Commission’s right of initiative (Ponzano, Hermanin, and Corona 2012). Some authors also posited a transformation of the Commission into a sort of secretariat of the European Council in the field of economic governance, with little or no input of its own (Höing and Wessels 2013; De Schoutheete 2012b, 13). While the new intergovernmentalism already has an explanation for this compliant behavior of the Commission based on the sensitivity of economic governance aspects (Bickerton, Hodson, and Puetter 2015b, 712), the argument of this thesis could shed further light on the reasons why the Commission does not challenge member states on economic issues. Specifically, if the Commission’s behavior in economic governance is examined from the perspective of the constituency which officials claim to be representing, the expectation is that their representative claims would overlap with those of the European Council and the Eurogroup. In other words, the Commission does not deviate from the guidelines of intergovernmental institutions because they see their constituency as having similar characteristics in terms of what they want from the EU economic governance⁶³. Conversely, when the Commission sees the interests of its constituency as diverging from those of the member states, it can become very vocal⁶⁴. In other words, an

⁶³ This is a discussion that refers to the decisions of the European Council and the Council as a whole rather than positions of individual member states, e.g. Greece.

⁶⁴ For example, when Greece organized a referendum in the summer of 2015 regarding the approval of a new bailout package, Commission President Jean-Claude Juncker addressed the Greek people directly and asked them to vote ‘yes’ in the referendum because their place is in Europe (EurActiv 2015).

argument based on the logic of justification combined with an examination of claims-making in institutional discourse can contribute to a comprehensive explanation of institutional positioning in the EU more broadly.

Moreover, if the representative claims framework can be applied to study behavioral patterns of EU institutions in general, it is pertinent to ask whether an argument focused on the logic of justification is also applicable to national and international contexts outside the EU. In Saward's constructivist approach to representation, all elected and unelected officials from different levels of government engage in the practice of making representative claims. In this thesis, it has been shown that the investigation of such claims improves our understanding of how institutional positions 'come to be'. Following this line of thought, it can be expected that mayors, members of national governments or national parliaments, bureaucrats from ministries, as well as officials from international organizations—they all justify their work in reference to the constituency they see as appropriate given their organizational role. For example, at the local level, mayors can justify the building of a shopping mall in a park by reference to the economic interests and convenience of his/her constituents. If there are no environmental protests against the decision, the mayor maintains his/her position and goes through with approving the building of the shopping mall. While it is entirely possible that the mayor simply responded to lobbying pressure from business interests, this did not preclude the justification of the need to open a new shopping mall as being for the benefit of the entire community. Furthermore, taking the example of specialized international organizations like the United Nations Refugee Agency, their constituency is constructed by internal law statutes regarding the protection of refugees, which they pursue actively in their institutional positioning. For example, in respect to EU asylum policy, the United Nations Refugee Agency will always seek to ensure the protection of human rights of asylum-seekers, according to internal standards (The United Nations Refugee Agency n.d.). Representative claims-making

occurs at all levels of governance and provides the basis for officials justifying their institutional positions and decisions.

These were some very preliminary examples that probed into the possibility of generalizing the argument of this thesis beyond the AFSJ. Systematic research is necessary in order to assess the explanatory value of such an argument in other sectors of EU activity or at the national and international levels.

6.4 Concluding remarks: the future of the AFSJ

In order to focus on a clearly delineated time period under investigation, the analysis provided in this thesis has not taken into account developments in the AFSJ since mid-2014, after the end of the first mandates of the Commission and the Parliament in the post-Lisbon context. Important events occurred since then, most notably the refugee crisis which dominated the second half of 2015 and continued into 2016. Watching the refugee crisis unfold, numerous commentators have argued that the Schengen system is failing and EU institutions are incapable of finding a coordinated response (The Economist 2015). Indeed, if the creation of “the area without internal frontiers” stood at the origin of the establishment of the AFSJ on the EU agenda, it is daunting to imagine what would happen with the field if the Schengen system collapsed.

The institutional responses to the refugee crisis did not diverge, however, from the patterns of institutional justification through representative claims-making depicted in this thesis. In fact, what we witnessed was an updating of the Council’s security-centered line of justification, as some member states invoked a provision of the Schengen Borders Code in order to frame refugee inflows as “serious threats to public policy or internal security” (art 25) and thus justify the [temporary] reintroduction of border controls (Ghimis 2015). For example, during the period November 2015 to March 2016, five Schengen member states—Austria,

Denmark, Germany, Norway, and Sweden—notified the Commission of “the temporary reintroduction of border control at internal borders” on account of a “continuous big influx of persons seeking international protection” (European Commission 2016). Under the circumstances, one could expect that the same justification that accompanied governments’ creation of Schengen in the 1980s, namely the necessity to ensure the same level of security in the absence of internal borders, will be the central reason given to justify its dissolution, i.e. the necessity to maintain the same level of security when the absence of internal borders becomes unsustainable in the face of refugee inflows. In contrast, the Commission preserved its old line of justification on the topic, namely the objective to ensure the free movement of persons in the Schengen Area. The supranational institution even consolidated the position by forcefully arguing that this right of EU citizens enshrined in the treaties is non-negotiable, regardless of the pressures put on it (Palmeri 2015). In a similar vein, the Parliament continued to defend its traditional ethically-grounded type of justification, arguing that Europe is not at fault for the current refugee crisis but that it is necessary to respond in line with European values that dictate a humanitarian approach to people who have fled war zones⁶⁵ (Schulz 2015). In other words, institutional lines of justification can constantly be updated on the basis of current events, making reference to the preferences and values which constituencies are thought to hold under the new circumstances. While it is impossible to predict the future of the AFSJ,

⁶⁵ For its part, the European Council has been more ambivalent in its institutional positioning on the refugee crisis, mainly because heads of state or government were split on the topic. Disagreements emerged between German Chancellor Angela Merkel and European Council President Donald Tusk on the issue of mandatory relocation schemes, which the latter—together with several Eastern European member states—did not support. At the European Council meeting in June 2015, Tusk advocated the organization of relocation on a voluntary basis, declaring that: “We have no consensus among member states on mandatory quotas for migrants. It will take much time to build a new European consensus on migration” (Traynor 2015). After the summer and the exponential increase in the number of refugees particularly in Germany, Merkel decided to take the lead in creating a so-called “coalition of the willing” composed of eight member states that would work together with Turkey on relocation (Rettman 2015). At the same time, another coalition of ten states—this time led by Austria—organized their own intergovernmental response to the crisis by closing down the Balkan route and effectively blocking refugees in Greece (Smale 2016). As of March 2016, the direction of the refugee crisis remains unclear, and the European Council has for the most part been characterized by lack of consensus and (temporary) decision-making paralysis during this crisis (Maricut forthcoming).

one thing is certain: the field remains surrounded by uncertainty, prompting institutions to engage in (competitive) claims-making on behalf of their constituencies and justify their policy positions and actions.

Jean Monnet, one of the founding fathers of the European Union, once noted that “Europe has never existed; one has genuinely to create Europe” (cited in Davies 1996, 10). Following the same logic—which continues to be valid today—constituencies of the EU political system have never existed. They had to be genuinely and continuously constructed. This thesis has aimed to show that the institutional development of the Area of Freedom, Security and Justice has been significantly impacted by how officials from different institutions constructed their institutional roles by reference to the interests and values of the constituencies they claimed to be representing. Their need to legitimize institutional behavior in terms of policy positions and decisions adopted implied that justification was essential to the ways in which they understood their institutional role. This perspective could be the beginning of a comprehensive theory of social action applicable to EU institutions and beyond that is worth further exploration.

7 APPENDIX – LIST OF INTERVIEWS⁶⁶

#	EUROPEAN COUNCIL (AM01)	Coding	Day of interview
	<i>Cabinet of European Council President</i>		
1	EU official, member of Cabinet of Herman Van Rompuy.	AM0101	1 April 2014
2	EU official, Member of Cabinet of Herman Van Rompuy.	AM0102	5 November 2014
	THE COUNCIL (AM02)		
	<i>General Secretariat</i>		
3	EU official, DG Justice and Home Affairs, Council Secretariat	AM0201	1 April 2014
4	EU official, DG Justice and Home Affairs, Council Secretariat	AM0202	3 April 2014
5	EU official, DG Justice and Home Affairs, Council Secretariat	AM0203	7 May 2014
6	EU official, DG Justice and Home Affairs, Council Secretariat.	AM0204	7 May 2014
7	EU official, DG Justice and Home Affairs, Council Secretariat.	AM0205	16 September 2014
8	EU official, DG Justice and Home Affairs, Council Secretariat.	AM0206	16 September 2014
9	EU official, Legal Service, Council Secretariat.	AM0207	18 September 2014
10	EU official, DG Justice and Home Affairs, Council Secretariat.	AM0208	30 October 2014
11	EU official, DG Justice and Home Affairs, Council Secretariat.	AM0209	12 November 2014
	<i>Permanent Representations</i>		
12	National official, JHA Counselor, from large ⁶⁷ , old ⁶⁸ member state.	AM0210	15 September 2014
13	National official, JHA Counselor, from medium-sized, new member state.	AM0211	19 September 2014
14	National official, JHA Counselor, from large, old member state.	AM0212	23 October 2014
15	National official, JHA Counselor, from large, old member state.	AM0213	28 October 2014
16	National official, JHA Counselor, from small, old member state.	AM0214	29 October 2014

⁶⁶ Dates of employment are mentioned only when the person interviewed no longer works at the institution in question.

⁶⁷ According to population, large member states are considered Germany, United Kingdom, France, Italy, Spain, and Poland. Medium-sized member states are Romania, the Netherlands, Belgium, Greece, the Czech Republic, Portugal, Hungary, Sweden, Austria, and Bulgaria. Small member states are categorized Denmark, Finland, Slovakia, Ireland, Croatia, Lithuania, Slovenia, Latvia, Estonia, Cyprus, Luxembourg and Malta.

⁶⁸ The distinction between ‘old’ and ‘new’ member states is drawn on the basis of the Eastern Enlargement (2004, 2007, 2013), where all member states part of the European Community / European Union before the 2000s are considered ‘old’, while all others are seen as ‘new’.

17	National official, JHA Counselor, from large, new member state.	AM0215	30 October 2014
18	National official, JHA Counselor, from medium-sized, old member state.	AM0216	4 November 2014
19	National official, JHA Counselor, from medium-sized, new member state	AM0217	7 November 2014
20	National official, JHA Counselor, from medium-sized, old member state.	AM0218	7 November 2014
21	National official, JHA Counselor, from large, new member state.	AM0219	12 November 2014
22	National official, JHA Counselor, from medium-sized, old member state.	AM0220	17 December 2014
23	National official, JHA Counselor, from medium-sized, new member state.	AM0221	17 September 2014
	EUROPEAN COMMISSION (AM03)		
	<i>Secretariat General</i>		
24	EU official, Home Affairs Coordinator.	AM0301	3 April 2014
	<i>DG Home Affairs</i>		
25	EU official, Policy Officer.	AM0302	4 April 2014
26	EU official, Head of Sector.	AM0303	4 April 2014
27	EU official, Head of Unit (1999-2003).	AM0304	8 May 2014
28	EU official, Head of Unit (1996-1998; 1999-2001).	AM0305	8 May 2014
29	EU official, Policy Officer.	AM0308	21 October 2014
30	EU official, Head of Unit.	AM0309	27 October 2014
31	EU official, Deputy Head of Unit.	AM0310	29 October 2014
32	EU official, Head of Unit.	AM0311	31 October 2014
33	EU official, Head of Unit.	AM0312	5 November 2014
34	EU official, Head of Unit.	AM0314	13 November 2014
35	EU official, Policy Officer.	AM0315	14 November 2014
35	EU official, Head of Unit.	AM0316	5 November 2014
	<i>Home Affairs Commissioner</i>		
37	Member of Cabinet, Commissioner Cecilia Malmström	AM0306	17 September 2014
	<i>DG Justice</i>		
38	EU Official, Adviser DG Justice.	AM0307	17 September 2014
39	EU official, Policy Officer.	AM0313	7 November 2014
	EUROPEAN PARLIAMENT (AM04)		
	<i>LIBE Committee Secretariat</i>		
40	EU official, Administrator.	AM0401	2 April 2014
41	EU official, Administrator.	AM0402	2 April 2014 14 November 2014
42	EU official, Administrator.	AM0403	24 October 2014
43	EU official, Administrator (1998-2011).	AM0405	5 November 2014
44	EU official, Administrator.	AM0409	13 November 2014
	<i>Members of the European Parliament (MEPs)</i>		

45	Member of European Parliament, European People's Party (EPP)	AM0407	13 November 2014
	<i>Assistants to MEPs</i>		
46	National official, Assistant to MEP from the Social Democrats (S&D)	AM0404	24 October 2014
47	National official, assistant of MEP from EPP.	AM0406	10 November 2014
48	National official, assistant to MEP from EPP.	AM0408	13 November 2014
49	National official, assistant to MEP from S&D (1999-2004).	AM0410	16 September 2014

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