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The origin of EU authority in criminal matters: a sociology of legal experts in European policy-making

Antoine Mégie

ABSTRACT This article aims to show how experts in European law shaped the direction and content of European public policy in the area of criminal justice. Putting policy experts at the core of our analysis allows us to examine the *meso* level of policy-making processes directly, where we can study the actors that played a concrete role in providing political and technical solutions during the drafting and adoption of European decisions. Our research focuses specifically on magistrates and senior civil servants who were actively involved in formulating and adopting the instruments of judicial co-operation (the Eurojust unit and the European Arrest Warrant). Through a sociological analysis of individual and collective actions of these legal professionals, we can explain how this branch of the EU was institutionalized and achieved its current form.

KEY WORDS Criminal matters; Eurojust; European Arrest Warrant; legal experts; judicial co-operation; policy-making.

INTRODUCTION

Since the early 1990s, judicial co-operation has come to represent a distinctive institutional branch of European integration. In 1992, the Maastricht Treaty created the third pillar of the European Union (EU) devoted exclusively to co-operation in the field of 'justice and home affairs', thereby delimiting a new area of intergovernmental European intervention (Walker 2004). Criminal law – by definition one of the fundamental elements of state sovereignty (Kratowich and Rohlich 1985) – was henceforth negotiated among national government authorities within the framework of the EU. The European judicial area was institutionalized primarily through the adoption of criminal procedures, which opened up a broader new vantage point for observing social and institutional dynamics, which radically transformed judicial authority as an object of study (Shapiro and Stone 2002).

Studying the policy-making process that resulted in EU judicial co-operation offers the key to understanding how this new European sector of public action was constructed (Wallace and Wallace 2000). The aim of this article is therefore to examine how the two main mechanisms of mutual legal assistance – Eurojust

and the European Arrest Warrant – came to be formulated and adopted (Mégie 2010).¹

Most analyses and books on European judicial co-operation, which have multiplied since the late 1990s, use a formal approach to describe present and future trends in ‘legal policy’² on criminal matters (Blextoon 2005; De Kerchove and Weyembergh 2000; Delmas-Marty *et al.* 2003; Mitsilegas *et al.* 2003). In the main, these works concentrate on the various legal and policy instruments of European mutual assistance or on the models of transnational co-operation used to reach formal agreement and/or harmonize criminal procedures. The most relevant legal analyses tend to present these issues in terms of their legal framework and normativity (Guild and Geyer 2008). While such analyses are necessary to understand the legal architecture of European judicial co-operation, they need to be supplemented by a study of how doctrine was used to legitimize the system. To grasp the policy dimension of the law (Alter, Dehousse, Vanberg 2001), we must ask questions such as: Why did judicial co-operation become a central topic on the European policy agenda starting in 1990s? How can we explain the form in which European judicial co-operation and its instruments, the Eurojust unit and the European arrest warrant, were institutionalized?

We want to uncover the social and political factors that shaped the way European judicial law was defined as a sector of EU public action (Burley and Mattli 1993). We are therefore seeking to analyse criminal law as a full-fledged policy area in keeping with research already carried out on the role of lawyers in European integration (Cohen and Vauchez 2007). In the case of criminal law, however, legal knowledge was more than a language for defining rules such as EU law. As a pillar of European rule of law, criminal law was also a policy matter.

Our study is based on the hypothesis that European policy-making was produced through the representations, choices and everyday practices of meso-level actors who embodied this sector and entered into intergovernmental negotiations alongside national and European political representatives. In the area of security, the 9/11 attacks in 2001 stepped up political decision-making to strengthen European mutual assistance in criminal matters. But those events should be seen above all as a ‘policy window’ (Kingdon 1984) that prompted national political authorities to agree to negotiate the adoption of new mechanisms of judicial co-operation. This view of the 9/11 terrorist attacks opens up the black box of the meso-level actors who were actively involved in European decision-making. Thanks to their special positioning, they were able – at that critical moment – to sell and impose their public policy solutions and hence influence the content of the decisions (Mérand 2008).

Our analysis will concentrate on some 20 French, British, Belgian, Dutch, Spanish and Italian legal professionals who held positions in national administrations or departments of the Council of the EU and the European Commission.³ Through their acquired special status as experts, these professionals participated directly, notably through *ad hoc* European groups (De Maillard *et al.* 2005), in managing the policy agenda and formulating

proposals for public action together with national authorities. In this instance, we are presenting a sociological study of the way European criminal law was produced during the 1990s, in line with the effort to promote a sociological approach to the definition of European law as a field of its own (Jettinghoff and Schepel 2005; Vauchez 2008). We interviewed these actors, some of them several times, between March 2001 and early 2006. While most of the actors were magistrates, the specificity of each national institution in charge of legal questions implies the presence of other types of actors that we have described as senior civil servants. In this way, we propose to round out the study of the members of the General Secretariat of the Council of the European Union (GSCEU) (Mangenot 2009) and the legal experts who took part in institutionalizing European judicial co-operation. By including the representatives of the GSCEU in our analysis, we will also be looking at other jurists working at the national or European level.

The article, which is divided into three parts, examines the content of the actors' expertise and the way in which they constructed and succeeded in legitimizing their solutions for public action. In the first part, we will demonstrate how an analysis of the social dynamics that structured the group of legal experts on European judicial co-operation can help to explain the timing and content of European policy-making. In the second part, we will take a closer look at who the professionals working in this field actually were and the resources that enabled them to take part in the decision-making processes of the Council of the European Union, national governments and EU bodies. In the third part, we will study that expertise itself. We will see how it determined the dominant approach used in the problem and policy streams during the policy-making process resulting in Eurojust and the European Arrest Warrant.

A POLITICAL SOCIOLOGY OF EUROPEAN RULE OF LAW

In his description of the various streams related to policy-making, John Kingdon defines three types of complementary streams: problem streams; policy streams; and political streams (Kingdon 1984). This breakdown is useful because it allows us to examine, through a close look at the actors, the political and social dynamics that determine which public problems are put on the agenda and how the proposed solutions are formulated. From this point of view, the actors play a fundamental role as 'policy entrepreneurs'. Their long-term investment in a particular policy sector allows them to define a set of solutions (policy stream) even before a political window of opportunity opens up. While these solutions may not necessarily be the best response to the problems raised by political events, the fact that they are technically feasible and correspond to the dominant standards of the policy community allows their promoters to impose them on the decision-making agenda. In the case of European judicial co-operation, as we will see specifically later on, a genuine narrative of public policy developed during the 1990s (Radaelli 2000), correlating the

dominant representations of 'organized transnational crime' with a political and judicial interpretation in favour of European co-operation.

At the heart of the mechanisms for making policy changes (Radaelli and Schmidt 2004), the discursive representations and norms promoted by 'policy entrepreneurs' took on a life of their own and became the dominant representations because their promoters had succeeded in acquiring the status of 'European experts'. To understand this process, we must undertake a specific analysis of the 'policy entrepreneurs' and their ability, as European sector actors, to determine which representations and solutions would define the content of the problem stream and the policy stream.

In approaching this topic from the standpoint of a political sociology of the European process (Saurruger and Mérand 2010), we propose to put sector actors at the core of our study in order to understand how these legal experts turned themselves into 'policy entrepreneurs' capable of influencing the content of European policies. This approach brings us back to some of the issues surrounding the constitution of European élites and their role in the Europeanization process (Fligstein 2008). The particular feature of our contribution, however, lies in considering actors that are all too often left aside in favour of analyses centred on the most visible actors at the European level. Pursuing the line of inquiry opened up by Adrian Favell and Virginie Guiraudon (2009), our methodological approach offers the advantage of being able to study the collective as well as individual participation of meso-level actors in European political processes (Georgakakis and Weisbein 2010).

These sector actors were real intermediaries, serving as brokers between different fields (Dezalay and Garth 2002). A similar approach to legal experts and their role in internationalization and Europeanization processes can also be found in research on the sources of the international and European political order (Alter 2009; Cohen and Vauchez 2010; Schepel 2005). Through their ability to introduce legal know-how into the policy sphere, these actors were able to build up and legitimize their own positions as European experts at the intersection of national and transnational dynamics. The meso-level actors effectively became translators of sector problems, capable of providing a set of analyses and solutions to meet the multiple national interests of the member states. Understanding the social processes that turned these actors first into experts and then into 'policy entrepreneurs' explains the content of the public policies that were adopted. To do this, we have to grasp the problems that arose and the orientations of public action imposed as solutions during the decision-making processes (Nay and Smith 2002).

This sociological approach reveals that there were different types of intermediaries (Georgakakis 2010) within different spaces (Kauppi 2013). This community of specialists was in fact fragmented into a multitude of positions of expertise (Robert 2010).

BECOMING 'POLICY ENTREPRENEURS': THE PATHS TO SPECIALIZATION IN EUROPEAN CRIMINAL LAW

The institutionalization of the European area of criminal law during the 1990s resulted in a sharp increase in the number of posts in charge of these issues at the national and European levels. The aim of this section is to understand the trajectories and resources used by national experts on criminal matters to build up transnational policy capital and thereby develop their knowledge and win recognition as European policy-makers. From this point of view, the ability of certain actors to circulate between the various national and European judicial and political areas proved to be a path of specialization, socialization, and above all, indispensable legitimation.

Specialization resulting from institutional or judicial experience

When we compare the career paths of the various interviewees, there appear to have been two main avenues to becoming a specialist in European judicial matters and later on to being appointed to a post of responsibility in the field. Jurists entered the area of judicial co-operation either by occupying a post in an institution with national jurisdiction over these issues or through experience in the field. Typical trajectories took shape, leading civil servants and magistrates to invest in European criminal matters.

In the case of specialization via the institutional route, the actors began building their expertise within various central political institutions with jurisdiction over criminal matters by helping to formulate criminal justice rules for transnational co-operation and ensuring their legal implementation. In some member states, these legal experts were not necessarily magistrates. One example was the person in charge of judicial co-operation issues at the Belgian Ministry of Justice, who played an active role in formulating the Eurojust project and the framework decision that created the European Arrest Warrant. The work of these actors in chancelleries or ministries in charge of European issues focused primarily on the technical and diplomatic dimensions of mutual assistance.

The other main avenue to specialization, which could be described as access via the uses of criminal matters, also deserves some discussion. Indeed, many judges in member states had no exposure to the area of European judicial co-operation, despite the growing number of offences qualified as transnational. In practice, these cases represented a minority of the caseload handled by national judicial authorities. The possibility of specializing in the area of mutual assistance in criminal matters depended on the judges' ability to acquire further experience in this type of litigation and build a track record in the field based on the number of cases they handled. Experience in combating 'transnational organized crime' (TOC) phenomena was one of the main common denominators of a large percentage of magistrates who became involved in European cases during the 1990s. The fact that judicial co-operation was defined as a European political challenge through the fight against TOC

(Mitsilegas 2001) is certainly linked to this process of redeployment. Finally, the institutionalization of systems of co-operation such as the Schengen magistrates or the European Judicial Network (EJN) in the early 1990s meant that certain magistrates were constantly working on European mutual assistance procedures.

Trajectories of specialization

The various types of entry points to European judicial co-operation influenced the way these professionals defined themselves individually and collectively later on. These career development opportunities explain how some of the experts accumulated practical and/or diplomatic experience that allowed them to build up their expertise and legitimacy. To make their trajectories easier to follow, we will present them here based on three levels of observation: the Council of the European Union; national authorities; and EU bodies.

The Council of the European Union level

The persons recruited in 1994, when the 'Justice and Home Affairs' (JHA) department was set up in the General Secretariat of the Council of the European Union, are exemplary in this regard. As Michel Mangenot (2009) has shown, the career paths of these individuals, mainly senior civil servants, are of particular interest because they were to become central actors in formulating the legal and policy aspects of Eurojust and the European Arrest Warrant:

- The person in charge of criminal co-operation issues at the Luxembourg ministry for 30 years and co-founder of the TREVI group was named director general.
- The post of senior legal officer was occupied by a civil servant with 20 years of experience on these issues at the Dutch Ministry of Justice. With close ties to political authorities, this Dutch senior civil servant was also among the drafters of the Schengen Agreement.
- Within this department, a 'Judicial and Police Co-operation' section was set up, headed by the former chief of staff of the Belgian Ministry of Justice since 1989. Like his Dutch colleague, this senior official also took part in drafting the Schengen Agreement. In 2007, he was appointed European co-ordinator of the fight against terrorism.
- Finally, the head of the 'Judicial Co-operation' division is a Swedish magistrate who worked on these issues for 10 years at the Council of Europe.

National government level

In the 1990s and at the beginning of the 2000s, several magistrates were employed at the level of national central government, where they played an important role in the policy-making and legal processes that resulted in the creation of Eurojust and the European Arrest Warrant:

- This was the case of a magistrate who, after working for the European Affairs

Department of the French Ministry of Justice (SAEI) setting up the first systems of mutual assistance (Schengen magistrates, liaison magistrates), became a liaison magistrate abroad. It is noteworthy that the same route was taken a few years later by her successor in the SAEI. The latter was head of the 'Justice and Home Affairs' Department of the French Permanent Representation (PR) in Brussels, following posts as director of continuing judicial education at the *École de la magistrature*, head of the SAEI and then deputy secretary general at the General Secretariat of European Affairs (SGAE);

- The magistrate who inaugurated the post of 'Justice and Home Affairs' advisor at the French PR in Brussels in 1997 became a liaison magistrate after heading the 'Criminal Judicial Co-operation' group of the Council of European Ministers during the French Presidency of the European Union in 2000, at the time the Eurojust project was negotiated.
- Another path of specialization that also included a period of work at the SAEI is interesting, both as an example and for the role played by this magistrate in the different systems, particularly as a Schengen magistrate. After starting his career in national jurisdictions, in the early 1990s he became head of the Justice Mission of the Department of European and International Affairs at the Central Division of the Criminal Investigation. The magistrate was then seconded from the Ministry of Justice to head the Office of European Law. In the late 1990s and the early 2000s, this French magistrate has been seconded as an 'expert' to the European Commission.

These trajectories show how a 'stream of specialization' developed in France. This type of circulation was not specific to France. Other similar trajectories could be mentioned: the Dutch liaison magistrate, present in France until 2006, formerly worked on these issues in his chancellery, followed by two years at the SGCE in the late 1990s, where he took part in drafting the Eurojust project.

The level of EU bodies

Finally, circulation among various posts in charge of European issues also led some magistrates or senior civil servants to pursue careers outside their national administration (within DG JLS of the European Commission or the European Anti-Fraud Office (OLAF)):

- Thus, a French magistrate who, after working on international and European issues at the *École de la magistrature française*, took part in drafting the European Arrest Warrant project in his capacity as a French expert seconded to the European Commission, and was ultimately hired by the 'Criminal Co-operation' department of the JHA.
- Another example is a Dutch prosecutor who, after assuming a post in Rotterdam, was appointed as a national expert to various European groups in charge of fighting financial crime. As he himself points out, it was thanks to his

experience at the national and European levels that he succeeded in being recruited by the criminal investigative services at OLAF in the early 2000s.

For some professionals, owing to the way recruitment took place, obtaining a post in an EU institution was a way of circumventing the obstacles they encountered at the national administrative level. A typical example of such a configuration is the case of a magistrate who helped to draft the Eurojust project and later joined OLAF services after being rejected for the post of national representative.

Asserting expertise: resources

Certain types of experience enabled these actors to stake out positions for themselves in European law and turn the field into a full-fledged specialty, but not all of them participated to the same extent in developing systems of co-operation. Their diverse national origins and career paths made them a heterogeneous group. Understanding this dimension brings us directly back to the problem of legitimacy and the reasons why some of them succeeded in establishing their authority as 'policy entrepreneurs' in a rapidly evolving area of European policy. The organizational changes that took place in national and European administrations beginning in the mid-1990s enhanced the institutional and symbolic value of a European specialization in the area of criminal justice (Roussel 2003). To assert their authority on European issues, experts in judicial co-operation had to marshal certain resources specific to this area that would give weight later on to their proposals during negotiations. The variety of these resources, owing to their individual career paths and the national frameworks in which they developed, appears to have been an important factor.

Experts who failed to demonstrate good language skills were soon relegated to the rank of 'amateurs' by the other actors. Fluency in a particular language was the main reason for being appointed to certain positions in certain countries.

Another resource, closely connected to issuing statements and making speeches, was decisive in the case of European co-operation: the chance for experts to publish texts on EU issues. The exponential multiplication of institutional literature on European security during the decade was crucial in giving legitimacy to experts on criminal co-operation. Virtually all the actors that contributed to the construction of Eurojust and the European Arrest Warrant published works during this period. The most emblematic examples were unquestionably the members of the General Secretariat of the Council of the EU. Publishing texts gave the authors an opportunity to propose and promote their own ideas about the rules of co-operation to be introduced. Official reports and books were the preferred vehicles for expressing the opposing views of the advocates of the *Corpus Juris* project to harmonize national criminal laws, the magistrates behind the Geneva Appeal who wanted to strengthen legal co-operation and the independence of the courts (Paris 2008), and the magistrates and senior civil servants promoting the introduction of minimum rules

of co-operation for reasons of concrete, practical efficiency. The ability to produce and circulate multiple publications in national chancelleries was a clear advantage in this context.

Jurists often combined publications with other resources to reinforce their expert status, particularly teaching and lecturing in universities or specialized schools (European institutes or magistrate training schools). These activities enabled professionals to develop academic programmes on European expertise that were financed by national or EU authorities. As we shall see, the very fact of participating in these activities allowed the legal professionals to recognize each other and confirm their legitimacy as experts.

Owing to the importance of the national frameworks in individual career paths, other resources also played a central role. In some cases, belonging to a political party and/or a trade union seems to have been an essential factor in receiving a European-level appointment. The time spent by GSCEU members in ministerial cabinets is a good example. Similarly, one of the first French liaison magistrates who actively participated in creating Eurojust was closely associated with the Socialist party and an adviser at the Ministry of Justice during the French Presidency of the EU in 2000. In Italy, trade union and political party connections also appear to have been indispensable, given the importance of this dimension in the country's judicial system (Vauchez 2004). An Italian magistrate who became one of the country's first and principal representatives in the area of European judicial co-operation had previously earned considerable recognition for his actions in combating the mafia and terrorism, together with substantial political and trade union experience as a former trade union leader and political activist.

Nevertheless, in the case of a group as disparate and heterogeneous as the one we are studying, it is difficult to establish a clear-cut typology of the attributes these individuals acquired in order to be appointed and speak with an authoritative voice in the field of European judicial co-operation. It is therefore relevant to look at the question of resources more specifically by examining why certain actors succeeded in the task of formulating and implementing European criminal policies.

Legitimizing the position of policy entrepreneur

In addition to their personal investment in European legal affairs, the actors needed to develop further professional expertise and significantly transform the know-how they had previously acquired. The jurists who were most successful in making these adjustments were those who had accumulated the widest range of resources to become multi-positioned actors. The hypothesis of multiple positioning, which places these individuals at the intersection of the various fields of national authority through their involvement in different networks, is particularly instructive (Georgakakis 2002). In an area at the crossroads of politics, law and academia, the actors' ability to move easily among various circles allowed them to establish themselves as experts and above all ensure their long-term involvement in the European security field.

Most of the professionals who became key experts on European judicial co-operation in the mid-1990s found ways of combining institutional posts with publishing and/or teaching activities, as well as trade union or political party involvement at the European or national level. This created a closed circle, limiting even further the number of specialists assigned important roles during the process of adopting and implementing the policies behind Eurojust and the European Arrest Warrant. Those who failed to position themselves as multiple actors were eliminated from the game and kept from formulating the rules of co-operation over the long-term.

There were pronounced cleavages along national lines. Belonging to a Common Law system was often considered a 'deviation' from the idea of European integration in legal matters. The national dimension no doubt represented the primary dividing line between members of the group. The actors' legal training and culture affected the way they defined themselves.

Another distinction was also promoted by the actors to confirm their own legitimacy. Initial learning experiences influenced the way these professionals defined themselves and validated their approach to judicial co-operation by determining the resources they could engage and, later on, some of their empirical training. Being able to highlight institutional or operational knowledge lent legitimacy to the actions and position of the individuals we encountered.

Legal professionals who began their specialization by handling Europe-wide judicial cases claimed their knowledge of the field as a fundamental component of their expertise. From this perspective, they defined their added value as the ability to combine practical experience with technical knowledge. In seeking legitimacy, the actors therefore called attention to their 'practical' and/or 'policy' skills, depending on their position and work.

Thus, the community of legal professionals involved in European judicial co-operation starting in the mid-1990s defined and positioned themselves on the basis of numerous dividing lines concerning nationality, socio-professional position, path to specialization and level of intervention in public action. At the same time, despite their heterogeneity, the group was shaped by a certain number of shared representations and perceptions, particularly with regard to the issue of the legal and political form of European judicial co-operation. The social dynamics that traditionally irrigate the European process (Guiraudon and Favell 2010) help to explain the homogeneity of their categories of perceptions and representations, despite numerous divisions and the singularity of their personal trajectories.

EXPERTISE AT THE CORE OF POLICY-MAKING CONTENT

Although the national framework had a significant influence in shaping their course of action, a certain degree of social unity existed among the actors, which led them to produce and share a set of beliefs, practices and know-how regarding judicial co-operation. This cognitive approach dominated in the problem stream owing to the position of the actors as legitimate experts.

Later on, it was because these same actors also played a central role in the policy stream that their solutions prevailed during intergovernmental negotiations. In other words, the actors' ability to shape the negotiation agenda and take advantage of policy windows had a concrete affect on the content of the decisions on which Eurojust and the European Arrest Warrant were based.

Defining and sharing 'pragmatic', operational expertise on judicial co-operation

The first type of shared representation was the jointly held conviction that European co-operation is a political and institutional solution essential to European integration. All the actors we interviewed expressed a variation of this idea, including the belief that co-operation among member states is the most effective way to combat transnational organized crime. Social representations identifying organized crime and terrorism as transnational threats lie at the core of their discursive logic (Den Boer 2002). Thus, the actors played an essential role in disseminating genuine public policy discourse presenting European judicial co-operation as a full-fledged political and judicial solution to the problem of transnational organized crime.

These perceptions and beliefs embodied the dominant, legitimate representations to such an extent that they achieved a sort of autonomy and gained a solid foothold at the centre of the problem stream and the policy stream. The principle of trans-governmental co-operation did not gain general acceptance in the security field until the early 1980s, notably as a result of the first institutional experiments in police co-operation (Bigo 1996). The European criminal law-enforcement area was thus developed through a discourse of legitimation that, starting in 2001, made the prevention of 'transnational organized crime' and of 'international terrorism' the principal political and judicial challenge of the EU. Imposing this narrative of public policy fundamentally altered the configuration and balance of the European penal system (Guild and Geyer 2008). Intergovernmental negotiations were henceforth oriented towards introducing systems that emphasized arrest and punishment, at the expense of the legal aspects of stable criminal procedures. At the same time, the actors we are studying also view stronger judicial co-operation as vital to the legitimacy of the European security sector and to supervise police force action.⁴

In another register, these legal professionals all have what they describe as shared experience. Seeing themselves as 'inventors' of European co-operation in the 1990s is essential to the way the magistrates and senior civil servants define their approach to European co-operation, both individually and collectively. In their view, they built up a set of specific skills at the European level by learning different rules from the ones inculcated during their initial training. They all claimed to value 'interpersonal skills', 'diplomatic imperatives' and the ability to 'go beyond national practices'. In their opinion, this shared

‘technocratic mentality’ (Radaelli and O’Connor 2009) enabled them to stand out clearly from the actors who remained at the national level.

Finally, the members of this group define themselves collectively as intermediaries, at the intersection of national legal interaction and transnational processes. Closely linked to this common definition of their role, the magistrates and senior civil servants share and advocate a method that they themselves describe as ‘pragmatic’. This approach, which they present as the ‘European method’, nevertheless differs from a European Union method because it does not require prior integration of judicial authorities at the EU level. In this type of configuration, national authorities remain the principal decision-makers. As a result, diplomatic and political experience is viewed as a fundamental asset. The example of Schengen is regularly invoked as a reference to support this view. It is therefore no coincidence that some of the senior civil servants and magistrates who contributed to the Schengen accords also intervened in the cognitive and legal construction of instruments of judicial co-operation such as Eurojust and the European Arrest Warrant. Thus, the social dynamics underlying the Schengen accords, analysed by Virginie Guiraudon (2003), also influenced the way the European judicial system was set up. The rejection of recommendations in favour of a European prosecutor formulated by the *Corpus Juris* movement and the Geneva Appeal reflects the same thinking.

This tendency to encourage a pragmatic, operational view of judicial co-operation was at the heart of European policy-making. It had a concrete effect on how the two main instruments of mutual assistance – Eurojust and the European Arrest Warrant – were formulated.

Actors at the juncture of the problem stream and the policy stream

Here, we will attempt to determine the extent to which the representations of these actors and the solutions they proposed concretely influenced the content of the decisions. From this standpoint, if the solutions formulated by the actors under study prevailed at the policy stream level, it was because those same actors participated directly in the negotiations.⁵ In the case of institutionalizing judicial co-operation as a European political area, the strength of policy entrepreneurs lay, as one might expect, in their ability to take advantage of various ‘policy windows’. Indeed, they seized these ‘windows of opportunity’ to put instruments of judicial co-operation on the decision-making agenda, at a time when the projects were still in progress and/or held up for legal and political reasons.

The policy entrepreneurs were involved in the same political and social area as members of the Council of European Ministers, particularly the Permanent Representations to the EU in Brussels. Their various professional and political interests at the time tended to converge in the Eurojust project. In the mid-1990s, the members of the GSCEU were seeking to establish their legitimacy within the third pillar, notably in relation to the European Commission departments. As for the national representatives, newly appointed to Brussels, they

were eager 'to enter the European arena as quickly as possible. In other words, they wanted to engage in negotiations and tackle concrete projects'.⁶ In the ensuing discussions, the GSCEU was to receive considerable support from certain national delegations, particularly from the Germans and the French. Following the murder of an Irish journalist by drug traffickers shortly before the Dublin Summit in 1997, the General Secretariat of the Council of the EU, with Irish government support, proposed to set up a European judicial unit to combat 'organized crime'. Though the draught proposal was rejected, the members of the GSCEU continued developing the initial project to put it on the agenda of the Tampere summit.

At the meetings to prepare the first European summit on internal security issues, the GSCEU was involved in organizing the agenda, together with the staff of the Finnish Presidency. The GSCEU sought to represent the judicial unit project with the help of French and German advisors who were present. Their task was to define the issues that would be discussed during the two-day European Council meeting in Tampere. As one of the GSCEU members explained:

We had to prepare the points that would help to generate a consensus on the Eurojust co-ordination unit project. However, none of the ministers mentioned the topic. So we decided to mobilise the German and French ministers of justice who, as we had learned from talking with their advisors, were in favour of the idea. They confirmed their interest in the course of the meeting, which led the rest of the ministers to approve the project.⁷

The preparatory meeting convinced the increasingly reluctant Finnish Presidency to include the creation of the Eurojust unit in the future conclusions of the Tampere summit. Once the project was adopted as a policy at the summit, the pragmatic approach favoured by the policy entrepreneurs prevailed. Following the conclusions of Tampere, a small number of national chancelleries decided to participate in the Eurojust project to define the future orientation of the new system of co-operation. The delegations of the next four EU Presidencies, Portugal, France, Sweden and Belgium, agreed to collaborate on producing what was called the project of the 'four Presidencies'. The fact that the French and Belgian authorities, some of whose representatives were close to the GSCEU, were part of this coalition had a decided effect on the final form of the Eurojust project. Though the process was brought back under the control of the member states, the GSCEU remained present as a mediator between the various authorities thanks to its role in managing some of the negotiations and helping to draft the text.

There were competing implementation plans, with a German proposal on one side and the proposal of the four Presidencies on the other.⁸ A consensus was reached between the members of the French delegation in charge of the negotiations on behalf of the Presidency and the GSCEU members to speed up the implementation process before the German proposal could gain support. With this in mind, a provisional judicial co-operation unit called

Pro-Eurojust was set up in 2000, i.e., a year before the final adoption of the European framework decision stipulating the creation of a judicial unit (Mangenot 2009). This approach was backed by the actors from the GSCEU as well as by the French delegation (one of whose members was to become the French representative in Eurojust). In their thinking, the legal foundations of the unit, i.e., the general principles of law and judicial procedures governing Eurojust, would be defined *a posteriori* to justify and legitimize what already existed. This dynamic of production clearly affected the way Eurojust and its activity were to develop later on amidst a constant search for legitimacy *vis-à-vis* other European and national authorities (Mégie 2007).

The ability of our actors to take advantage of policy windows was even more crucial in the case of the European Arrest Warrant. The arrest of the leader of the Kurdistan worker's party (PKK) in Italy and the German authorities' refusal to extradite him was the underlying reason for including a project for a new European extradition procedure in the final conclusions of the Tampere summit. This decision met with considerable opposition on the part of numerous national authorities, who ultimately refused to ratify the 2000 convention on mutual judicial assistance.⁹ Finally, the 9/11 terrorist attacks triggered the sudden acceleration of the process of negotiating and adopting the European arrest warrant, which came into a being only a few months later.

In the name of swiftness and 'political expediency',¹⁰ the final framework decision was drastically reformulated. After the extraordinary summit meeting of the European Council on 12 September 2001 and the adoption of a European Arrest Warrant policy, the framework decision was rewritten by a small committee of three or four people from the GSCEU and the Belgian Chancery in a diplomatic strategy aimed above all at promoting its rapid adoption by the member states. The desire to move quickly, in keeping with the pragmatic approach advocated by the magistrates and senior civil servants involved, resulted in setting aside whole sections of the project proposed by the European Commission, notably concerning rights of defence.

For some SGCEU members and national authorities that favoured the idea of pragmatic development, the main advantage of the Laeken decision was that it went beyond the lowest common denominator. The swift negotiations and the positioning of the actors involved in the legal formulation of the framework decision were nevertheless to have direct repercussions on the final form of the extradition system when it was implemented. Indeed, after the new European extradition procedure was transposed into national law, a number of national constitutional courts criticized their executive authorities for introducing rules contrary to domestic law (Guild 2006).

CONCLUSION

The adoption of an operational view of European judicial co-operation must therefore be understood partly as the product of the European specialization

of certain legal professionals who became acknowledged policy experts through multiple institutional positions. Their shared culture of compromise oriented towards a pragmatic approach explains how and why, in a context dominated by security issues, European policy-making in judicial matters adhered to a vision focused exclusively on procedural co-operation rather than on harmonizing criminal law at the European level. These policy experts played an important role at the heart of the European institutional game, managing the policy agenda as well as writing about and promoting solutions for public action. Their impact symbolizes moreover the centrality of executive authorities in producing European criminal standards as opposed to legislative and judicial authorities.

Finally, the advantage of analysing meso-level actors to grasp the content of European policy-making also lies in the possibility of defining the main mechanisms of co-operation that structured the European process. We have seen that vertical co-operation among national governments through the Council of European Ministers was not the only mechanism supporting the institutionalization of the European judicial sector. While the member states, by definition, are not homogeneous actors, the European Union seems to have accentuated this fragmentation. As other authors have already pointed out (Dehousse 2002), the EU has brought about the decomposition of member states, resulting in horizontal mechanisms of co-operation among the various national sector authorities (Smith and De Maillard 2007). This horizontal co-operative interaction, combined with the vertical dynamics, determined the many normative, strategic and institutional adjustments that produced the European judicial sector.

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NOTES

- 1 Eurojust, the first European unit devoted exclusively to judicial co-operation, was a multilateral office with a prosecutor from the legal system of each EU member state. Council of the European Union, Decision 187/JAI setting up Eurojust to reinforce the fight against serious organised crime, OJEC C 063, 6 March 2002. The European Arrest Warrant (EAW) is a specific procedure for extradition between EU member states. The EAW marked the implementation of the European principle of mutual recognition of legal decisions in a new field of law. Council of the European Union, 'Framework decision of the European Council 13 June 2002 on the European arrest warrant and the surrender procedures between member states', OJEC L 190, 18 July 2002.
- 2 By the term 'legal policy' we mean how the member states and legal doctrine shape and view trends in court decisions.

- 3 To respect the anonymity frequently requested by our interviewees, we will specify only their nationality and/or function. Furthermore, while French actors make up the largest contingent, the information they provided is representative of the data gathered on the actors from other member states.
- 4 Article 30 of the Treaty of Amsterdam Treaty of Amsterdam modifying the treaties of the European Union, OJEC C 340, 10 November 1997.
- 5 For a detailed account of the intergovernmental negotiations that culminated in the adoption of the Eurojust unit and the European arrest warrant, cf. Bigo *et al.* (2008) and Mégie (2010).
- 6 Interview conducted with a French liaison magistrate, a former member of the French PR in Brussels in February 2003. Similar testimonials were obtained from other civil servants and magistrates who were present in Brussels at the time.
- 7 Interview with a member of the GSCEU, April 2004.
- 8 In total secrecy, including from the GSCEU members in charge of the negotiation schedule, the Berlin authorities filed a project in 2000, one day before the project prepared by the GSCEU and the 'four Presidencies'. In taking this position, the German authorities sought to intervene directly in a process from which they felt excluded, even though the idea of Eurojust had originally been supported by some of their representatives. In this case, the German chancellery wanted to participate concretely in defining the working framework of Eurojust to avoid having to cope later on with orientations it opposed.
- 9 European Convention on Mutual Assistance in Criminal Matters, OJEC C 197, 12 July 2000.
- 10 European Convention on Mutual Assistance in Criminal Matters, OJEC C 197, 12 July 2000.

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