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The Participation of the Schengen Associates: Inside or Outside?

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I Introduction

The following contribution deals with the tensions inherent in the simultaneous emergence of an external dimension of the Area of Freedom, Security and Justice (AFSJ) and the internal consolidation of cooperation in this policy field. The argument I seek to advance is that the internal model of cooperation determines the possibilities to include third states irrespective of their form of institutional association with the EU. In this sense the text attempts to show where the limits of the 'Associate status' lie for a non-Member State in terms of participation in the EU's Area of Freedom, Security and Justice. The argument will be illustrated by showing the manner in which the Schengen Associates' privileged access to the EU institutions[1] has been eroded in the domain of judicial cooperation in criminal matters pursuant to the shift towards mutual recognition. The text pursues a double objective: on the one hand, it attempts to shed light on the functioning of judicial cooperation in the European Criminal Area, and on the other hand, it aims to show how the choice of a system of cooperation impacts upon the EU's interaction with third countries. The analysis of the interplay between the internal and external aspects of cooperation will yield insights into some of the inclusionary and exclusionary dynamics unleashed by the creation of the European Criminal Area. The following assumptions underly this contribution, first, the conduct of relations with third states helps us to better understand some of the fundamental principles underlying European integration in a specific policy area. Second, the choice of a mode of cooperation adopted within the EU has a profound influence on the conduct of relations with the rest of the world. It is believed that the reasons for the EU's choice of a model of cooperation can be found in the internal policy arena, such as the institutional governance in a given policy field, and the Member States' preferences.

This text has to be seen in the context of the European Union's efforts to endow itself with the means of becoming an international actor. Beyond doubt

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[1] Privileged status is shown in J. Monar, 'Justice and Home Affairs in a Wider Europe: the dynamics of inclusion and exclusion', ESRC One Europe or Several?, Programme Working Paper 07/00.

the ongoing efforts to strengthen the Common and Foreign Security Policy and the Common Security and Defence Policy most prominently reflect the EU's ambitions in this field. This text on the contrary will focus on an aspect of the EU's external action which is frequently neglected, namely the external dimension of the Area of Freedom, Security and Justice. In this field the EU is increasingly acquiring actorness capacities. By seeking forms of cooperation with the EU, third states have acknowledged the EU's capacities in this field. Moreover, the EU has constantly been developing its profile in this field to engage partners in the fight against common threats arising from organized crime and terrorism. The emergence of an international dimension of the Area of Freedom, Security and Justice is firstly, a response to the challenges arising from Enlargement and the need to transfer the JHA *acquis* to the new Member States; and it secondly, results from the increased internal consolidation of the Area of Freedom, Security and Justice and the EU's desire to promote its 'model' of cooperation.[2]

This article will take a closer look at developments in the European Criminal Area, a field that has been characterized by a lot of dynamism in recent years. The European Criminal Area is being built upon three cornerstones, the approximation of Criminal Law, the introduction of mutual recognition in judicial cooperation and the creation and strengthening of European level actors in the criminal domain, such as Europol or Eurojust. The notion of a European 'area' is of importance, because it implies an erosion of Member State sovereignty in the sensitive field of criminal law and it indicates the emergence of a European dimension to in the penal domain. The geographic borders of this European area are not clearly defined. On the one hand the borders remain fuzzy, provided that the non-EU European neighbours participate in certain aspects of JHA cooperation; on the other hand, the internal consolidation is leading to the 'hardening' of the demarcation between insiders and outsiders. It is the tension between the simultaneous hardening and softening of borders that has motivated me to write this piece.

The field of judicial cooperation was chosen, because, first, progress in this domain has been faster than that achieved in the field of police and customs cooperation[3] and second, cooperation between magistrates predominantly relies on existent legal instruments, whereas police and customs cooperation to a great extent occurs on a less formal level. The contribution is concerned with the Schengen Associates – Switzerland,[4] Norway and Iceland. These

[2] G. de Kerchove and A. Weyembergh (eds), *Sécurité et justice: Enjeu de la politique extérieure de l'Union Européenne* (Editions de l'Université de Bruxelles, Brussels, 2003), pp. 2–3.

[3] COM (2004) 376 Communication from the Commission to the European Parliament and the Council – Enhancing police and customs cooperation in the European Union of 18 May 2004.

[4] At time of writing of this article ratification of the Agreement is still pending.

countries have been selected because they are comparable to the Member States in terms of human rights and rule of law standards. Further, the existence of the Schengen Association Agreements, which represent a close form of association presupposing a high degree of policy convergence with the EU Member States, guided the choice of the countries. As a matter of fact the Schengen Associates are granted direct access to the Union institutions and can exert decision-shaping rights in Schengen-relevant matters. A third reason for this case selection is the contrast between the EU, which is shifting towards mutual recognition, and Switzerland, which remains attached to the traditional intergovernmental mode of judicial cooperation.[5]

The literature that has been published so far on Schengen has focused either on the institutional aspects[6] or the substantive provisions of the Agreement. Other publications have situated the negotiations on Schengen Association in the framework of the general evolution of the relations between the European Union and Switzerland.[7] A further body of literature has dealt with the analysis of the effects of certain provisions on the Swiss legal order.[8] The literature dealing with the European Arrest Warrant and the evolution of the European Criminal Area towards an Area based on mutual recognition (MR) has been useful for understanding the essential changes resulting from a shift in models of cooperation.[9] As regards the external aspects of the AFSJ, the article has drawn on the literature focusing on the external aspects of European integration, and more specifically the European Area of Freedom, Security and Justice.[10]

[5] The principle of mutual recognition was already practiced beforehand among the Nordic states Denmark, Finland, Iceland, Norway and Sweden and therefore the two other Schengen Associates are not reluctant to its introduction.

[6] P. Berthelet, *Le droit institutionnel de la sécurité intérieure* (P.I.E-Peter Lang, Brussels, 2003); N. Bracke, 'An Adventure in JHA' in de Kerchove and Weyembergh, supra note 2, pp. 225–231.

[7] L. Goetschel, 'Switzerland and European integration: Change through Distance' (2003) 8 EFA Rev, pp. 313–330; F. Filliez, 'Le rapprochement de la Suisse à l'Espace penal européen à l'exemple des négociations bilatérales en cours avec l'Union européenne' in de Kerchove and Weyembergh, supra note 2, pp. 231–246.

[8] A. Epiney, 'Schengen, Dublin und die Schweiz' (2002) 3 *Aktuelle Juristische Praxis/ Pratique Juridique Actuelle*, pp. 300–310; M. Jametti-Greiner and H. Pfenninger, 'Der Schutz des schweizerischen Bankgeheimnisses im Abkommen zur Assoziierung der Schweiz an Schengen' (2005) 2 *Aktuelle Juristische Praxis/Pratique Juridique Actuelle*, pp. 159–171.

[9] S. Alegre and M. Leaf, 'Mutual Recognition in European Judicial Cooperation: A step too far too soon? Case Study – the European Arrest Warrant' (2004) 10 ELJ, pp. 200–217; E. Guild, 'Crime and the EU's Constitutional Future in an Area of Freedom, Security and Justice' (2004) 10 ELJ, pp. 218–234; W. Wagner, 'Building an Internal Security Community: The Democratic Peace and the Politics of Extradition in Western Europe', ECPR 2nd General Conference, Marburg, 18–21 September 2003.

[10] S. Lavenex, 'EU External Governance in 'Wider Europe'' (2004) 11 *Journal of European Public Policy*, pp. 688–708; T. Müller, 'Eine Aussenpolitik für den Raum der Freiheit, der

The first part of the paper will present two alternative models of judicial cooperation, namely 'intergovernmental cooperation' and 'mutual recognition'. In the second section, the status of third states with respect to the intergovernmental model and the MR model will be compared and the consequences of the EU's shift towards MR will be analysed. Pursuant to the presentation of the two alternative modes of governance and the implications that the mode of cooperation has on the relations with third states, some reflections on the inclusion/exclusion effects that third states are experiencing with respect to the European Criminal Area will be presented.

II The Cooperation Principle

Mutual assistance in criminal matters is a well-established principle in international judicial cooperation. Mutual assistance is relied on when a state is unable to continue with an investigation or procedure on its own and requires another state's help, such as to hear witnesses or carry out surveillance on persons located on the other state's territory. The fulfilment of 'dual criminality', i.e. the requirement that an offence is criminalized in both states, is the cornerstone principle for the granting of mutual legal assistance. The traditional 'cooperation principle' incorporates the idea that one state requests another to assist it with some aspect of the operation of its criminal justice system, and the requested state then takes a decision to cooperate based on the respect of its internal legal order. It is thus the penal code of the requested state that is decisive for determining whether the commitment of a certain offence gives rise to the execution of measures of search and seizure and what legal guarantees an individual subject to these measures enjoys. International agreements, amongst them the two conventions signed within the Council of Europe,[11] on judicial cooperation codify the procedures, the delays, the form and the type of evidence that can be granted to another state. Traditional intergovernmental cooperation is also characterized by the existence of a multitude of grounds on which cooperation can be refused, most prominently the fiscal and the political exception. A further feature of traditional intergovernmental cooperation is that the demand is formulated by the judiciary authority in one state but it is addressed to a political (administrative) office, frequently located in the Ministry of Justice.

The defenders of the traditional cooperation approach reason that the need for upholding dual criminality derives from the fact that the national penal law system reflects the value of a given society at a given time. For example,

Sicherheit und des Rechts' in P.-C. Müller-Graff (Hrsg.), *Der Europäische Raum der Freiheit, der Sicherheit und des Rechts* (Nomos, Baden-Baden, 2005).

[11] *Infra* note 12.

the main reason for the Swiss attachment to the principle of intergovernmental cooperation in fiscal matters is the existence of the legal distinction between fiscal fraud and fiscal evasion. This distinction was established because every resident files an income tax declaration and submits it directly to the tax authorities. As there is no communication of financial data between banks, employers, social security and the fiscal authority, the relationship between the state and the individual is based on trust. The infraction of fiscal evasion was introduced to protect the resident who does not submit the declaration on time or provides incomplete information to the authorities from criminal pursuit. Tax fraud on the contrary is committed when falsified or non-genuine records such as accounts, balance sheets or income statements and other statements of third parties are used to deceive the authorities.

Many criticisms have been voiced with respect to traditional intergovernmental cooperation. The object of these criticisms is the efficiency, speed and the ultimately political nature of the decision whether to grant the assistance or not. It will thus come as no surprise that in the course of time many agreements have been signed to speed up the procedure, to limit the grounds for refusal and to enhance the efficiency of judicial cooperation. The development of more adequate instruments in the domain of judicial cooperation in criminal matters in the EU was a response to the challenges posed by cross-border phenomena, such as international crime and terrorism to nationally-bounded police systems and jurisdictions and the existence of an area of free movement of persons in which citizens could circulate freely. The majority of the instruments governing judicial cooperation in the EU, to which we will now pass, incorporate the principle of traditional intergovernmental cooperation.

III Mutual Legal Assistance Instruments in the EU

The EU regime for granting mutual legal assistance is based on a jigsaw of instruments. The common heritage that all Member States adhere to is the Council of Europe Convention of 1959 on judicial cooperation and its two additional protocols.[12] In the context of subregional cooperation frameworks, instruments on cooperation in criminal matters have been concluded between the Benelux states and the Nordic states. Further rules on mutual legal assistance are contained in the Articles 48–53 of the Schengen

[12] ETS no. 30 European Convention on Mutual Assistance in Criminal Matters of 20 April 1959; ETS no. 99 Additional Protocol to the European Convention on Mutual Assistance in Criminal Matter; ETS no. 182 Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters.

Implementation Convention (SIC).[13] Except for the Council of Europe Conventions aforementioned instruments are not binding upon all Member States. Nevertheless, since 1990, the EU Member States, except for the United Kingdom and Ireland, have become Schengen members. Provided that the United Kingdom and Ireland have opted-in to the Schengen framework as regards the measures under Title VI TEU in the area of police and judicial cooperation, the compensatory rules can be considered applicable to the Schengen states, including the Associates, and all EU Member States.[14]

To replace this multitude of measures by one instrument, the Council adopted the Act of 29 May 2000[15] establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the EU[16] (henceforth the 2000 Convention) and the Act of 16 October 2001 establishing in accordance with Article 34 of the Treaty on European Union the Protocol to the Convention on Mutual Assistance in Criminal Matters between the Member States of the protocol of 2001 (the 2001 Protocol).[17] Nevertheless, these two EU instruments have not yet entered into force due to an insufficient number of Member State ratifications. When these two EU instruments enter into force according to Article 2(1) of the 2000 Convention and Article 15 of the 2001 Protocol, they will develop and replace certain provisions of the Schengen Implementation Convention. Given that some of the provisions of the 2000 Convention and the 2001 Protocol are a further development of the Schengen *acquis* they will be extended to the Schengen Associates.[18]

[13] Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, OJ 2000, L 239/19.

[14] Decision 2000/365/EC Council Decision of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen acquis, OJ 2000, L 131/43; Decision 2002/192/EC Council Decision of 28 February 2002 concerning Ireland's request to take part in some of the provisions of the Schengen acquis, OJ 2002, L 64/20.

[15] In the third Pillar the legal instruments are not the same as in the first. The Third Pillar Convention requires the ratification by half of the Member States before it can enter into force. By an Act the Council adopts the instrument and it is then submitted to national ratification procedures. The framework decisions are similar to directives, but they do not have direct effect.

[16] Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, OJ 2000, C197/1.

[17] Council Act of 16 October 2001 establishing, in accordance with Article 34 of the Treaty on European Union, the Protocol to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, OJ 2001, C326/1.

[18] Annexe B referred to in Art. 2 para. 2 of the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's Association

Most of the aforementioned instruments belong to the first generation of mutual legal assistance instruments. During this first phase of internal security cooperation (i.e. before Maastricht), the Member States insisted that cooperation between the law enforcement authorities be intensified, but that the underlying principles of sovereignty and territoriality remain untouched. Therefore the legal instruments developed by the Council of Europe and the Schengen framework reflected the traditional 'cooperation' logic, which codifies the respect of sovereignty and territoriality. Nevertheless, with respect to police cooperation, the Schengen Implementation Cooperation already allowed for the first encroachments upon sovereignty and territoriality, most prominently the provisions on hot pursuit and surveillance (Articles 39–40). In the aftermath of Maastricht, the Member States realized that the framework and the instruments that they had given themselves to combat crime were insufficient and that to become more efficient they needed to allow for more important encroachments upon territoriality and sovereignty.[19]

The 2000 Convention reflects a change in philosophy in two regards. First, it foresees that the requested Member State must comply with the formalities and procedures indicated by the requesting Member State and second, it provides for direct contact between the judiciary authorities in the requesting and the requested state. It is thus no longer the criminal law in the requested state that is decisive for determining the rules according to which a request is carried out. The sovereign decision of the requested state is to a certain extent limited. The provision on the conduct of Joint Investigation Teams (Article 12) is a further indicator for the change that is currently taking place. It provides for the secondment of officers to assist in the conduct of an investigation in another Member State and on the instruction of the team leader, a national of the requested state, the 'foreign' officers can carry out investigative authorities.[20] Furthermore the 2000 Convention codifies the use of modern instruments, such as video-conference, to pay due account to the increased resort to new technologies in the conduct of mutual legal assistance.

Notwithstanding these important novelties, the 2000 Convention does not reflect a complete departure from the logic of intergovernmental cooperation. With respect to the conduct of measures of search and seizure, the provisions of Article 51 of the Schengen Implementation Convention will remain in force. Article 51 of the SIC codifies the principle of intergovernmental cooperation

with the Implementation, Application and Development of the Schengen Acquis of 25 October 2004, Document number 13054/04.

[19] A. Weyembergh, 'L'Espace Pénal Européen: coopération judiciaire et territoire pénal européen' in P. Magnette (ed.), *La Grande Europe* (Publication de l'Université Libre de Bruxelles, Bruxelles, 2004), pp. 247–262.

[20] T. Schalken and M. Pronk, 'On Joint Investigation Teams, Europol and Supervision of their Joint Actions', (2002) 10 *European Journal of Crime, Criminal Law and Criminal Justice*, at pp. 71–72.

by stipulating the requirement of dual criminality. An explicit reference to the upholding of the rules contained in Article 51 of the SIC is also made in the 2001 Protocol.[21] For the moment we can assert that instruments relying on traditional intergovernmental cooperation remain dominant in the area of judicial cooperation, but that they increasingly co-exist with instruments that foresee at least a partial departure. To sum up, the existent instruments seem to live uneasily with the challenges that are imposed on law enforcement officials today and therefore their replacement in the near future is predetermined. Indeed in November 2003 the European Commission presented a proposal for a framework decision on the establishment of a European Evidence Warrant (EEW).[22] When the European Evidence Warrant enters in to force, this one instrument based on mutual recognition will replace the currently existing jigsaw of mutual legal assistance instruments. For the conduct of relations with the European neighbour states, the introduction of this instrument has had far-reaching consequences, as the following section will show.

IV Mutual Recognition

The British proposed the introduction of mutual recognition as a fundamental principle of the EU's Area of Criminal Justice at the Cardiff European Council in 1998. They suggested replacing the traditional European approach of harmonization of substantive and procedural criminal law by a regime of mutual recognition. They anticipated that mutual recognition would boost cooperation between law enforcement agents in a similar manner as mutual recognition had led to a relaunch of the Internal Market following the *Cassis de Dijon* ruling and the Single Market Programme. Positive experiences with mutual recognition in the area of cooperation in civil matters reinforced the opinion that such an approach would be desirable.

Mutual recognition serves the purpose of managing diversity within the Union. It ensures the respect of the legal and judicial traditions of the Member States. They can continue adopting domestic laws defining the nature of crimes, their commission, and how individuals will be punished as regards transgression. The only requirement imposed upon the other states is that the judgement of one Member State will be given effect within the territory of all of the others. The application of the mutual recognition principle implies that the decision reached in the first state (the issuing state) takes effect *as such*

[21] G. Vermeulen, 'The European Convention on mutual assistance in criminal matters' in G. de Kerchove and A. Weyembergh (eds), *Vers un Espace Pénal Européen* (Editions de l'Université de Bruxelles, Bruxelles, 2000), p. 81.

[22] COM (2003) 688 Proposal for a Council Framework Decision on the European Evidence Warrant for obtaining objects, documents and data for use in proceedings in criminal matters of 14 November 2003.

within the legal system of the second state (now the executing state), although depending on the instruments involved, the latter still retains some power to refuse to implement or to convert the issuing state's decision into an act within its own legal system.[23] The revolution entailed by mutual recognition is that Member States have to execute – quasi-automatically – decisions adopted under the legal system of another state without being able to ensure that the same result would have been reached under their own national law.

One of the consequences of this new quasi-automatic regime is that the requirement of double criminality can no longer be upheld. This rule is comparable to the country of origin rule in the internal market. In order for mutual recognition to work the competent authorities must have a high level of mutual confidence in each other's legal systems. They need to be convinced that the other Member States' methods of prosecuting crimes are equivalent to their own, meaning that they obtain evidence in a correct manner and that they treat prisoners decently. In a recent judgment, the first one on an aspect of the third Pillar, the ECJ underlined the pivotal role that mutual trust and confidence have to play for JHA cooperation in general and mutual recognition in particular to be successful:

> There is a necessary implication that the Member States have mutual trust in their criminal justice systems and that each of them recognizes the criminal law in force in the other Member States even if the outcome would be different if its own national law were applied.[24]

The elaboration of proposals for the realization of mutual recognition began after the Tampere European Council reiterated that mutual recognition should become one of the cornerstones of judicial cooperation in both civil and criminal matters. The Nice Treaty and the Constitutional Treaty have confirmed this choice. To bring forward the implementation of mutual recognition, the Commission tabled a work programme, which the Council adopted in 2000.[25] It foresees the introduction of mutual recognition in the form of 24 instruments, which encompass all stages of the criminal procedure (pre-sentence, sentence and enforcement of sanctions). The Council has adopted certain of these instruments (for example, the European Arrest Warrant), whereas others are still under discussion or in the preparatory phase (for example, the European Evidence Warrant).

These recent development towards a system of mutual recognition is not uncontroversial. It has been severely criticized by both human rights activists

[23] Guild, *supra* note 9, p. 219.

[24] Case C-187/01 (and C-385/01), *Hüseyin Gözütok & (Klaus Brügge),* Judgment of 11 February 2003, para. 33.

[25] Programme of measures to implement the principle of mutual recognition of decisions in criminal matters in OJ 2001, C 12/10.

(Amnesty International, Statewatch) and certain academics. From a human rights law perspective, for instance, Guild laments that only judgements circulate freely in the European area of criminal justice, whereas the individual's rights in respect of charge, trial and sentence remain nationally bounded.[26] It is a fact that with respect to international human rights law, mutual recognition without the parallel harmonization of procedural standards bears risks for the protection of individuals. The application of mutual recognition could lead to a situation in which the executing state would have granted the individual a higher degree of protection than the laws of the issuing state. The situation of unequal protection for the individual derives from the fact that state responsibility for human rights violations is determined by whether the act was committed under the domestic legal order or on the territory of another state. Procedural guarantees are not granted to the same extent in the Member States, because certain states have not ratified the 7th additional Protocol to the European Convention on Human Rights.[27] To avoid the occurrence of such differences and to enhance mutual confidence between the Member States, the Commission has tabled a Green Paper on common standards for procedural safeguards in February 2003.[28] The adoption of this proposal is pending in the Council. Its adoption would constitute a first step towards approximation of procedural guarantees, but the Commission will need to table further proposals regarding the admissibility of evidence in criminal proceedings or the protection of witnesses to ensure that mutual recognition really works.

Scholars also voice concern about the parallel which is established between the internal market and cooperation in criminal matters. They argue that the situation in the two areas is fundamentally different because the introduction of mutual recognition in the area of free movement of goods could, first, build upon a comparable level of standards all over Europe and second, harmonization of minimum requirements in the area of consumer protection, health and environment were explicitly foreseen. In the sensitive area of criminal law and individual rights protection, standards are far from comparable and approximation is merely to occur if mutual recognition fails. Therefore, Weyembergh forcefully argues that prior harmonization is a prerequisite for mutual recognition to work because it is the only way for enhancing mutual trust and confidence between the judicial authorities.[29]

[26] Guild, *supra* note 9, p. 220.

[27] Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11, ETS no. 117.

[28] COM (2003) 75 Green Paper from the Commission, Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union of 19 February 2003.

[29] A. Weyembergh, *L' harmonisation des législations: condition de l'espace pénal européen et révélateur de ses* (Eds. de l'Univ. de Bruxelles, Bruxelles, 2004); S. Peers, 'Mutual Recognition and Criminal Law in the European Union: Has the Council got it wrong ?' (2004) 41 CML Rev, pp. 5–36.

Concerns were not merely voiced by academics and human rights activists: mutual recognition has also been criticized by European institutions, e.g. the European Parliament's Committee on Legal Affairs and the Internal Market,[30] and the German Constitutional Court. The latter has ruled that the German legislature 'has not exhausted the margins afforded to it by the Framework Decision on the EAW in such a way that the implementation of the Framework Decision for incorporation into national law shows the highest possible consideration in respect of the fundamental rights concerned'.[31] On the whole the critics believe that the introduction of the mutual recognition principle was a step 'too far too soon', i.e. before the necessary conditions were in place. What the mutual recognition principle implies for the granting of mutual legal assistance in Europe will be illustrated with a brief presentation of the EEW.

V The European Evidence Warrant

In November 2003, the European Commission presented its proposal for a European Evidence Warrant.[32] The EEW applies to the gathering and transferring of evidence in cross-border cases. It does not apply to the taking of 'real time evidence', i.e. the taking of evidence in the form of interviews or hearings, the taking of evidence of any person (e.g. DNA), the interception of communications or the taking of evidence that would require further inquiries. Therefore the EEW only applies to evidence that has been gathered 'prior to the issuing of the warrant'. It is expected that it will be used most frequently when one Member State requests another to search premises or to seize property. The requested state would have to comply with the request of the issuing state if it cannot invoke grounds for non-execution according to Article 15. The EEW proposal limits the list of the grounds for non-execution to an absolute minimum and it has therefore come under serious attack by human rights organizations. The revolution introduced by the EEW is the complete abolition of dual criminality after the lapse of a transitional period. This suggestion has however not been followed by the Council, it has opted for a list of 32 offences for which the dual criminality requirement would be abolished.[33] This decision mirrors the approach the Council chose with respect to dual criminality under the European Arrest Warrant.

[30] Opinion of the Committee on legal Affairs and the Internal Market of 23 February 2004 in A5-0214/2004, Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, Report on the proposal for a Council framework decision on the European Evidence Warrant for obtaining objects, documents and data for use in proceedings in criminal matters, p. 11.

[31] Federal Constitutional Court, Press release no. 64/2005 of 18 July 2005 on the judgment of 18 July 2005 (2 BvR 2236/04).

[32] *Supra* note 22.

[33] Doc. 6228/05, Press Release, 2642nd Council Meeting Justice and Home Affairs

From a procedural point of view, the proposal was debated by the European Parliament on 22 March 2004 and the Council on 25 February 2005 and 2 June 2005. The adoption is expected by the end of 2005. The European Parliament Committee on Citizen's Freedoms and Rights, Justice and Home Affairs suggested introducing an amendment that would stress the need for adopting the framework decision on procedural safeguards for defendants. The Plenary adopted the report of the Committee on Civil Liberties and JHA. It is, however, interesting to note that the Committee on Legal Affairs and the Internal Market, consulted for opinion, called for a rejection of the proposal. It demanded the prior adoption of the Constitutional Treaty, which contains provisions on the fundamental rights protection of individuals (the Fundamental Rights Charter) and the participation of the EP in the decision-making procedure in the field of JHA.[34]

The preceding sections have shown us that currently two models of cooperation in criminal matters, traditional intergovernmental cooperation and mutual recognition, co-exist in Europe. To illustrate how the change in the EU internal mode of governance has influenced the position of the third states, we need to show, first, the relatively strong position of the Associate states under the institutional structure of the Schengen Association Agreement (traditional cooperation framework) and second, the changes to this status that result from the shift towards mutual recognition.

VI Schengen Association

Schengen Association was conceived to allow for the partial participation of Norway and Iceland in the formulation of Schengen-relevant internal-security legislation. For this purpose, a separate institutional construct, the Mixed Committee Procedure, was established. The Nordic states received preferential treatment allowing for participation in the policy process because of their status as members of the Nordic Passport Union. (Since the 1950s, the 'Nordics' – Denmark, Sweden, Norway, Finland and Iceland – had enjoyed a passport union where nationals of these countries could circulate freely in the entire area.) When Denmark applied for observer status in Schengen in 1994, it was not willing to give up the Nordic Passport Union in exchange for taking down the borders with Germany. In addition the Swedish and Finnish entries into the EU increased the pressure to find an innovative solution for including Norway and Iceland in the Schengen area.

Brussels, 24 February 2005 President Mr Luc Frieden Minister for Justice, Minister for the Treasury and the Budget, Minister for Defence Mr Nicolas Schmit, p. 8.

[34] *Supra* note 30.

A further reason for the EU acquiescing to the Nordic pressure was that the EU acknowledged the difficulties involved in establishing an external Schengen border on the long, inhospitable border between Sweden and Norway. The Luxemburg Agreement of 18 December 1996 grants Norway and Iceland observer status without voting rights in the Schengen Group. The incorporation of the Schengen *acquis* into the European Union had the consequence of requiring the Luxemburg Agreement to be transformed into an agreement signed between the EU and Norway and Iceland. The need to define the Schengen *acquis* once it was incorporated in EU law was also a consequence of the particular position of the United Kingdom and Ireland as EU (but non-Schengen) members and Denmark's status as a Schengen member with an opt-out with respect to Title IV TEC. The negotiations conducted with Switzerland were based on the Norway–Iceland Agreement of 18 May 1999, which granted the two non-Member States decision-shaping rather than decision-taking rights in Schengen-relevant policies.[35]

Decision-shaping occurs both on the EU level in the framework of the Mixed Committee Procedure and at the national level according to the constitutional requirements. In legal terms, the Association Agreement provides that the Mixed Committee is a body which meets outside the EU's institutional structure. In practice, however, the Mixed Committee is convened as a Working Party, Article 36 Committee/CATS, Coreper or Ministerial meeting, to which a representative of the Associate states is also invited when Schengen-relevant matters[36] are being discussed (e.g. the Common Border Manual, Schengen Information System, Visa Information System). In this sense, the Associates are granted direct access to the policy-making rather than decision-taking stages of the discussions in the Council, when Schengen-relevant matters are on the agenda. It is important to underline this particularity of Schengen Association in terms of access to the EU's institutions because it contrasts with other forms of committee in the external relations field.[37] As has been mentioned above, the Association Agreement also foresees the involvement of the national institutions in bringing the Schengen-related measures into force in the non-Member States.[38]

[35] Agreement of 18 May 1999 concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the latters' association with the implementation, application and development of the Schengen acquis – Final Act, OJ 1999, L 176/36.

[36] On this term more details will be provided in section VII on Schengen Relevancy and Mutual Recognition.

[37] In a presentation on the institutional aspects of the Schengen Association Agreement (2 March 2005 in Berne) it was made clear that the name 'Mixed Committee' was chosen to clearly distinguish it from the 'Joint Committee' that was set up to oversee the implementation of the EEA Agreement with Norway and Iceland.

[38] P. Cullen, 'The Schengen Agreement with Iceland and Norway: its main features' (2001) 4 *ERA Forum.*

The Mixed Committee mainly meets at the level of Working Parties as well as in the framework of the Article 36 Committee. Occasionally it is also convened on the level of Coreper and the JHA Council. During the first half of the year, the Council Presidency chairs the meetings, whereas during the second six months a representative of the associate states takes over this function. Article 4 foresees that the Mixed Committee's main function is the discussion of Schengen-relevant measures contemplated for adoption by the competent Union bodies. The Agreement foresees that the Mixed Committee shall be informed when Schengen relevant EU legislation is being prepared (Article 5). In addition, in the preparatory stage of drafting new legislative proposals, the Commission shall informally seek input from the Associate state experts (Article 6). The Associates can also participate in the meetings of the Comitology Committees, which assist the Commission when it exercises its implementing powers. In the framework of the third Pillar there are only few Comitology Committees; they play a far more important role in the area of the First Pillar.[39] Regarding the position of the Associates in the framework of decision-shaping, it is important to note that they do not possess any formal rights for exerting influence. They have neither been granted a right of initiative, nor has an obligation been imposed on the Commission to seek input from their experts. Provided that the Member States already have a network in place for accessing the respective Commission services, we can presume that they have more possibilities for influencing the law-making process in the early stages. Yet the representatives of the Associate states are not completely excluded as they can make suggestions, which will then be discussed in the Mixed Committee according to Article 4 al. 4.

How large the influence of the Associates' experts really is remains subject to controversy. On the one hand, it has been claimed that on the expert level the expertise of a person is more important than nationality.[40] On the other hand, from a strictly formal point of view, one can conclude that while the Associates' experts can participate in the discussions, there are no mechanisms to ensure that they can 'really influence the decision-shaping process'.[41] On the level of decision-taking, the asymmetric nature of the Agreement reveals itself most clearly, as it is in this stage that the Associates are formally excluded. As soon as a consensus amongst the Schengen members has been reached, the Council, without the participation of the Associates, adopts the measure. On the whole, the question of influence will depend crucially on the resources that the third states invest in the following-up of the developments of the Schengen *acquis* and the thorough preparation of the expert meetings.

[39] Conference in Bern, 2 March 2005.

[40] Interview conducted in February 2004 at the Norwegian Permanent Representation in Brussels

[41] A. Epiney, 'Schengen, Dublin und die Schweiz' (2002) 3 *Aktuelle Juristische Praxis/ Pratique Juridique Actuelle*, pp. 300–310.

Provided that there are approximately 12 expert groups that are exclusively concerned with Schengen-relevant matters, and a certain number of expert groups that convene to discuss issues that fall in the scope of the Schengen agreement, the requirements concerning the level of expertise and the resources that are needed to effectively exert decision-shaping rights are high.[42] When the Associates consolidate their positions in advance, they can also increase the importance of the decision-shaping rights; in this respect it will be interesting to observe how the more 'reluctant' Swiss cooperate with the more 'expansionist' Norwegians.[43]

After adoption of a measure by the Council, the Associate states decide whether they will accept the content of the measures and implement them in their domestic order. The need for a domestic decision whether or not to implement a Schengen disposition reflects the continued respect of sovereignty of the Associates under the Agreement. The Associate states must, after notification by the Council, inform the Council whether they will implement the measure in their domestic order. They are granted six months for deciding whether the measure will be taken over. Norway can extend this deadline by six months to allow for the fulfilment of the constitutional requirements. During the six-month period, Norway must provide for the provisional application of the measures, whenever possible. In the case of Switzerland, the EU extended the deadline to two years for ensuring the completion of the internal procedures. Such a long deadline was needed to ensure that a referendum could be held in case a further development of the Schengen *acquis* is subject to a referendum. If one of the Associates fails to agree or to notify a particular measure, the Agreement can be terminated with respect to that state (Article 8 al. 4). The existence of a 'dispute about the application of a measure', which could not be resolved by the Mixed Committee (Article 11), can also trigger the non-consensual termination clause. In addition, when substantial differences between Norway/Iceland and the Member States occur in either the application of the laws or the administrative practices (Article 10 al. 2), then the Agreement is considered terminated with respect to the 'non-complying' state. If the non-consensual termination clause (or guillotine clause) is activated, then the Mixed Committee disposes of a 90-day time limit for resolving the differences.

Provided that the guillotine clause exists, the question of the legal effects of the Agreement with respect to the non-members arises. One can argue that,

[42] Conference in Bern, *supra* note 39.

[43] The reluctance of the Swiss as to their willingness to accept further developments of the Schengen *acquis* and the position of the Norwegians that would like to participate in the entire European Criminal Area might give rise to an interesting dynamic (information received during interviews with Swiss and Norwegian representatives in February/March 2005 in Bern and Brussels).

although there is no legal obligation imposed on Norway and Iceland to comply with the Schengen *acquis*, the case law of the ECJ[44] and the administrative practices in the Member States, the adaptational pressure which arises from the potential activation of the guillotine clause is very strong. Therefore Schengen association squares the circle of participating in a part of the Union's activities without becoming a member, yet it is questionable whether the loss of sovereignty is compensated for by sufficient venues for influencing the decision-making process.[45] On the practical level, the Associates seem to have been rather satisfied with the functioning of the Mixed Committee Procedure. In interviews, the consensual nature of the decision-making in the Council was mentioned as contributing to the low level of divergence existing in this area. On two occasions, however, a divergence of interests between the Associates and the Member States did occur: first, when the Council declared the European Arrest Warrant non-Schengen relevant and second, when the Kaliningrad issue was transferred from the visa group to a Relex body.[46] In both instances the Associate states wanted to be able to exert their decision-shaping rights.

In conclusion, the position one adopts on the importance of exerting decision-shaping rights depends on the angle from which one looks at the question. If one compares the status of the Associates with that of the Member States, one could argue that they are rather weak considering that, after adoption, these policies are also binding for the Associates and given that non-compliance can lead to a termination of the Agreement. In reality, one can argue that their rights are restricted to explaining the problems they may encounter and expressing themselves on any question of concern to them.[47] If one, however, compares the status of the Associate states with that of third states in all other areas, one could claim that the rights are rather far-reaching as the Associates have direct access to the EU institutions involved in the making of Schengen law. Moreover, the scope of the rights is rather far reaching as it enables them to influence the policies that are implemented in the Member States.

It was argued above that the principle underlying 'Schengen judicial cooperation' is that of intergovernmental cooperation. It was also shown that the Schengen framework grants third states rather far-reaching participation

[44] Articles 9 and 10 of the Association Agreement stipulate that the case law of the ECJ and of the Norwegian and Icelandic courts must be kept under constant review to achieve an uniform application and interpretation of the Agreement. Norway and Iceland must submit annual reports on how their courts have applied and interpreted the provisions, as interpreted by the ECJ.

[45] Cullen, *supra* note 38.

[46] Interview conducted in February 2004 at the Norwegian Permanent Representation in Brussels.

[47] Monar, *supra* note 1.

rights in the shaping of Schengen-relevant decisions. Therefore the argument can be made that, as long as mutual legal assistance is based on intergovernmental cooperation, its further development will be discussed in the framework of the Mixed Committee Procedure. The issue on which to focus now is how the introduction of mutual recognition will influence the framework in which judicial cooperation matters are debated. In this context, an analysis of the concept of Schengen relevancy needs to follow. An analysis of Schengen relevancy is crucial for understanding whether a measure is debated under the Mixed Committee Procedure (i.e. participation of the third state), or whether they are excluded from the discussions.

VII Schengen Relevancy and Mutual Recognition

The incorporation of the Schengen *acquis* in EU law was one of the main results of the Amsterdam Treaty Revision. A protocol attached to the Treaty of Amsterdam incorporates the developments brought about by the Schengen agreement within the European Union framework. Before the entry into force of Amsterdam, the Schengen Group existed as a separate framework of intergovernmental cooperation outside of the Union. Since Amsterdam, the Schengen *acquis* is a part of the *acquis communautaire*, but given the fact that the EU and Schengen membership do not coincide, it institutionalizes a form of flexibility within the Union.

For the purpose of defining the content of the Schengen *acquis*, a Protocol was annexed to the Treaty of Amsterdam. The Council adopted a Decision on 20 May 1999 which indicates the list of the elements which make up the *acquis communautaire*. It assigns the corresponding legal basis to each disposition of the Schengen *acquis*.[48] In essence, the provisions concerning the abolition of internal frontier controls and the free movement of persons were integrated in Title IV TEC and the provisions on police and security cooperation were incorporated in to Title VI TEU. Schengen cooperation covers the abolition of frontiers and the setting up of compensatory measures related to the abolition of frontiers.[49] The need to define the content of the Schengen was not only a result of the particular position of Norway and Iceland, it was also required

[48] 1999/435/EC Council Decision of 20 May 1999 concerning the definition of the Schengen *acquis* for the purpose of determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the *acquis* in OJ 1999 L176/1; Corrigendum to 1999/436/EC: Council Decision of 20 May 1999 determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the Schengen *acquis,* OJ 2000, L 9/31.

[49] Berthelet, *supra* note 6, pp. 231–236.

to accommodate the particular status of the Member States United Kingdon, Ireland and Denmark.

Provided that the Schengen *acquis* has been undergoing developments since 1999, the question of the Schengen relevancy of a measure is of importance. There is a controversy surrounding the question as to which measures in the third Pillar are Schengen relevant and which are not. Indeed, there exists both a political and a legal definition of the Schengen *acquis*. The political definition extends the term Schengen *acquis* to encompass the whole range of compensatory measures, even those the Union adopts outside of the Schengen framework. In contrast the legal definition, practiced by the Council Secretariat, excludes the latter instruments; it rather adopts a literary interpretation of the original text: 'only measures directly building upon the Schengen Implementation Convention are considered part of the Schengen Acquis'.[50] In the initial proposal the European Commission indicates whether or in which respect it considers a proposal to build upon the Schengen *acquis*.[51] The Council, mostly on the level of Coreper, then decides whether it agrees with the Commission's suggestion as regards Schengen relevancy or whether it does not. If the latter is the case, the Associate states are excluded from the further discussions on a proposal. In the process of deciding whether a measure is Schengen relevant or is political in nature, the Council ultimately determines whether it wants a measure to be applicable to Ireland and the United Kingdom or whether it should be extended to the Associate states.

In some instances a measure is clearly outside the scope of Schengen, for example when legal acts are adopted which aim at the establishment of a common immigration policy or the adoption of minimum procedural guarantees. On other occasions, a measure is clearly Schengen relevant, for example the two Spanish initiatives foreseeing the expansion of the functions of SIS to terrorism.[52] Problems with the application of the concept of Schengen relevancy occur in cases in which a partial link between a new instrument and a SIC provision exists. For this purpose, the Legal Service of the Council Secretariat has defined a criterion for determining whether a measure is to be considered Schengen relevant or not. In fact it has adopted that stance that a measure is considered Schengen relevant if

[50] Berthelet, *supra* note 6, p. 238.

[51] In practice the Proposal will contain an article stating how the provision of the new instrument relates to the relevant articles of the Schengen *acquis*.

[52] Initiative of the Kingdom of Spain with a view to adopting the Council Regulation (EC) No /2002 concerning the introduction of some new functions for the Schengen Information system, in particular in the fight against terrorism in OJ 2002, C 160/5; Initiative of the Kingdom of Spain with a view to adopting the Council Decision 2002/JHA concerning the introduction of some new functions for the Schengen Information system, in particular in the fight against terrorism in OJ 2002, C 160/7.

> it is *strictly necessary* for the abolition of internal borders and as flanking measure to realization of the free movement of persons. The measure needs to be *inevitable and essential* for the purpose of immigration control, public order and internal security. On the contrary, the simple fact that it would be *desirable* or *practical* to associate the two non-Member States in the framework of the decision-shaping procedure is not sufficient for including them in the adoption of a measure.[53]

On the whole it seems as if the Council is reluctant to define a new measure as Schengen relevant. It prefers adopting measures in the framework of the AFSJ to ensure that a maximal number of EU Member States are on board.

The application of such a restrictive decision has led to difficulties in the Mixed Committee, taking into account that Norway and Iceland would prefer a more dynamic conception of Schengen cooperation. The two states would like to participate in as many areas of JHA cooperation as possible. The controversy surrounding Schengen relevancy is there in the context of the adoption of the European Arrest Warrant. The initial Commission proposal had declared the European Arrest Warrant as being a Schengen-relevant measure.[54] The Legal Service of the Council Secretariat did not follow the opinion of the Commission Legal Services on this issue and declared the EAW non-Schengen relevant. A similar controversy has arisen in the debates surrounding the European Evidence Warrant, as once again the Commission declared the proposal partially Schengen relevant. It seems that, by the time of writing (September 2005), the decision that the issue is not Schengen relevant has been adopted.[55]

According to an official of the Council Secretariat, the reason for this restrictive application is that mutual recognition is not part of the Schengen *acquis* and that instruments incorporating this new principle are by definition not Schengen relevant.[56] For third states this decision implies that potentially they will not be able to participate in the decision-shaping process of any new instruments in the area of judicial cooperation. The relations between the EU and the third states will continue to be based on the Schengen Implementation Convention and the relevant provisions in the 2000 Convention, i.e. it will continue to be based on intergovernmental cooperation as long as no supplementary agreements are concluded. The Council's position seems to

[53] Berthelet, *supra* note 6, p. 242. (My translation from French.)

[54] Ibid.

[55] The non-Schengen relevancy can be deduced from the agenda of the JHA Council 25 February 2005: the proposal on the EEW figures under Points B to be discussed by the Council and not on the agenda of the parallel session of the Mixed Committee Meeting on Ministerial Level.

[56] Information received during a presentation of a Council Official in Brussels in September 2004.

reflect the belief that instruments incorporating mutual recognition, such as the European Arrest Warrant or the Evidence Warrant, are conceived within the logic of creating a European Area of Criminal Justice and not with the traditional cooperation principle in mind. From what has been said, one could deduce that the exclusion of third states from mutual recognition results from the realization that extending mutual recognition to third states would entail declaring basically the entire AFSJ *acquis* in the area of criminal law binding on third states. Therefore, to be able to participate in the mutual recognition system, the Associates would have to become bound by the minimal standards[57] which make mutual recognition work. One could also speculate that the Council's reasoning is based on the first experiences which have been made with the implementation of the EAW. The first experiences with the EAW have revealed that in reality the relations between the Member States are still characterized by a relatively high degree of 'mistrust'.[58] Given the existence of mistrust, it is probable that there is no great interest on the part of the EU to increase heterogeneity. For the third states, these developments entail questions concerning the inclusionary/exclusionary dynamics of the AFSJ and the limits of Association. We now turn to these effects.

VIII Inclusion/Exclusion of Third States

This paper has showed that the intergovernmental system of cooperation that Schengen and many other instruments in the area of judicial cooperation build upon offered possibilities for associating third states and for granting them rather far-reaching decision-shaping rights. Intergovernmental cooperation does not call for any fundamental changes in the domestic system: the only requirement is to enable the interconnection of the various 'sovereignties'. Being an observer or an Associate in such a system is not a great disadvangtage as the consequences of the issues at stake remain manageable.

The shift from intergovernmental cooperation to the creation of a European area based on the cornerstone principle of mutual recognition has however implied that the penal systems of the Member States are moving closer together in their fight against crime. For mutual recognition to be implemented successfully, further approximation and harmonization measures will be adopted. By staying outside the EU, the Associate states have decided not to participate in this system of trust and confidence-building in Europe and they

[57] Efforts are underway in the AFSJ to Approximate procedural and substantive criminal law provisions.

[58] Term used by a Council official at the ERA Conference in Trier on Trust in the AFSJ, 4 March 2005.

are therefore not able to participate in the adoption of instruments that aim at combating crime more efficiently.

Schengen Association offers possibilities for the third states to respond to the most immediate needs for cooperation in law-enforcement matters, but the framework seems static when it is compared to the developments that are currently underway in Europe. In terms of sovereignty it seems questionable if third states could decide to become associated with the EAW or the EEW as the adoption of these instruments would entail far-reaching changes in their penal/procedural law that they have not been able to influence on the supranational level. For that matter, only membership in the EU would give them a certain guarantee as to the legitimacy of the decisions that are taken. One could hardly imagine a third state adopting the EU's Fundamental Rights Charter or the framework decision on procedural safeguards just to be able to implement the EAW and the EEW. Partial membership in the AFSJ thus seems difficult to justify from both the perspective of the EU and that of the Associates. The decision on EU membership needs to be taken after having examined the advantages and disadvantages for all policy areas.

It remains to be seen if the Associates will remain completely aloof from the further developments in European criminal law, or if they will begin a slow process of approximation towards the EU minimal standards to remain 'euro-compatible'. Such a process would probably not require any major changes, provided that they are also members of the ECHR (i.e. the provisions on a due process), but it might mean abandoning certain national specificities. National specificities do not constitute a problem in the Area of Freedom, Security and Justice as long as they are not an obstacle in the process of building 'trust'. The removal of obstacles to trust is of primordial importance provided that the latter constitutes the fundament for the functioning of the system of mutual recognition in particular and of the European Criminal Area in general.

In conclusion, this contribution has aimed at showing that a shift in the internal mode of governance in the domain of judicial cooperation has had an influence of the position of third states. It seems as if they have experienced an exclusionary effect that may also be in their interest. On the substantive level, further research could be conducted on whether the shift in mode of governance contributes to further approximation of the non-Member States with the EU standards or whether their penal systems will remain untouched by European developments. On the institutional level, the relationship between the unsettled internal governance and that with third states seems an interesting phenomenon to analyse and to compare across policy fields.