Eurodac: A Solution
Looking for a Problem?

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Abstract

This study accounts for the emergence of a supranational biometric control regime in Europe. The empirical focus lies on the institutionalization of Eurodac, an automated fingerprint identification system covering asylum seekers and “illegal” immigrants. Who promoted the idea of setting up an automated biometric system in the European Community? Which behavioral logics were underlying the negotiation of the Eurodac Regulations in the Justice and Home Affairs Council? And how did the European Commission get involved in policing the so-called “Area of Freedom, Security and Justice”?

Technical Note

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1. Introduction

The Eurodac Regulations adopted by the Council of the European Union on December 11, 2000 and February 28, 2002, respectively, provided the legal basis for the establishment of an automated European dactylographic system (hence the acronym Eurodac) in the European Community. Automated biometric identification systems like Eurodac allow for the instant and exact comparison of unique physiological features such as an individual’s iris, face, or fingerprints for law enforcement purposes.

Eurodac represents the first application of biometric identification technology within a supranational political entity. For the time being, we do not know by which social mechanisms this development was brought about. Nor can we be sure of Eurodac’s impact on the relationship between EU citizens and third country nationals, on the one hand, and supranational political institutions, on the other. In spite of the democratic and human rights relevance of this project, Eurodac has received only scant attention outside practitioners’ circles. In order to ameliorate this situation, this paper addresses the following questions: How can we account for the institutionalization of biometric control procedures in the European Community? Which actors successfully promoted the idea of setting up an automated European dactylographic system? And what were the logics of action

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underlying the negotiation of the Eurodac Regulations both in the Justice and Home Affairs (JHA) Council of the European Union and within the intergovernmental Schengen framework?

I seek answers to these questions in the following manner: Section 2. introduces two theoretical perspectives, Rationalism and Institutionalism, which, by focusing our attention on different logics of action, may serve as ideal-typical representations of the willful political construction of a supranational biometric control regime in Europe. Section 3. provides empirical insights into the stepwise institutionalization of Eurodac, with a particular emphasis being placed on the negotiation of the Eurodac Regulations in the JHA Council and the variable enforcement of Eurodac across the Member States and associated third countries. Section 4. reviews the empirical findings of the case study in light of the crucial theoretical question of how analytically distinct behavioral logics interact with one another in political practice. I shall close with a discussion of the scope conditions of strategic calculation and rule following in EU Justice and Home Affairs.3

2. Rationalist and Institutionalist Perspectives on Intergovernmental Decision-making

2.1 Problems Looking for Solutions

Rationalists adhering to a logic of consequentiality tend to believe that political outcomes, including supranational legislative acts, are brought about by strategically calculating actors seeking to maximize given interests. Within a Rationalist analytic framework, we expect purposive-rational actors to perform means–end and ends–ends calculations culminating in utility–maximizing choices: "Action is instrumentally rational (zweckrational) when the end, the means, and the

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3 For an extensive account of the methodological approach of this study, see Aus, J. P. (2005): Conjunctural Causation in Comparative Case-Oriented Research: Exploring the Scope Conditions of Rationalist and Institutionalist Causal Mechanisms, University of Oslo: ARENA – Centre for European Studies, Working Paper No. 28/2005 [arena-web].
secondary results are all rationally taken into account and weighed. This involves rational consideration of alternative means to the end, of the relations of the end to the secondary consequences, and finally of the relative importance of different possible ends.”

The stylized image of instrumentally rational, strategically calculating actors, formulated in an ideal-typical manner by Max Weber, has been succeeded by formal models of both cooperative and non-cooperative interactions among several “players.” The contemporary policy analyst will thus most likely draw on “the basic [game-theoretic] notions of interdependent strategic action and of equilibrium outcomes.” In line with this interaction-oriented variant of rational-choice theory, Thomas Gehring has argued that the intergovernmental Schengen regime was brought about by a group of Member States’ governments looking for innovative solutions to a set of collective action problems. According to Gehring, the members of the “Schengen club” were aiming at identifying the most efficient and effective means of collectively dealing with the consequences of the elimination of internal border controls in Europe. Schengen’s common provisions concerning external border control, visa, asylum, and police and judicial cooperation, incorporated into the EU in May of 1999, have thus been interpreted as functionally adequate re-regulatory measures willfully designed by strategists of “differentiated integration.”

The Rationalist notion of efficient and effective problem solving may also be applied to Eurodac. The problem that Eurodac is allegedly attempting to resolve is that of “secondary movements” among asylum applicants deliberately concealing

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their identity. A Commission official accordingly recollected that “the main problem we addressed with the Eurodac Regulation was that you simply couldn’t identify persons. At first, people arrived and said that they had lost their identity cards or their travel documents while traveling – that was the case with more than 80% of all asylum applicants. … So although there was a theoretical legal possibility of transferring people back to another country, and, by doing so, to arrive at a certain [level of] burden-sharing [between the Member States], this was made impossible in practice by the asylum seekers themselves, who successfully managed to hide their true identity.”

A viable solution to this problem is arguably the establishment of an automated fingerprint identification system on Community level in combination with the compulsory fingerprinting of certain categories of third country nationals. The effective enforcement of the supranational biometric identification regime, in turn, may require delegating implementing powers to the European Commission. A game-theoretic caveat is in order at this point, however. Fritz Scharpf rightly reminds us that the “‘benevolent-dictator perspective’ of most substantive policy analyses whose job is done when the causes of a problem have been correctly identified and a technically effective and cost-efficient solution proposed” is not satisfactory for the interaction-oriented political scientist. A comprehensive Rationalist account of any given legislative outcome in the field of EU Justice and Home Affairs must also provide empirical insights into actual modes of interaction between executive actors, “each with its own understanding of the nature of the problem and the feasibility of particular solutions…."

We shall see in due course whether the empirical material presented in section 3. below allows for the conceptualization of Eurodac as an equilibrium solution collectively endorsed by the members of the JHA Council.

7 Author’s interview, May 17, 2004.
8 Scharpf (1997): Games Real Actors Play [cf. footnote 5], p. 11.
2.2 Solutions Looking for Problems

Rationalist accounts of intergovernmental decision-making as efficient and effective problem solving may be challenged by a Sociological Institutionalist perspective based on the assumption that institutional actors adhere to a *logic of appropriateness*. The latter involves the self-conscious matching of rules to situations. At first sight, this logic of action appears to explain only the behavior of institutionally embedded actors striving for the “common good.” At closer inspection, however, it becomes readily apparent that this logic also accounts for the political mindset and behavioral traits of members of organizations pursuing “evil” objectives. The *logic of appropriateness*, in other words, is a useful yet normatively colorblind explanatory device.

Institutionalist analysts of organizational decision-making and administrative reform processes have come to observe that “changes often seem to be driven less by problems than by solutions.” The dynamics of solution-driven problem solving can be studied in a variety of policy areas, including policing and criminal justice. “A law enforcement agency, [for example], may regard criminalizing an activity as the obvious way of eliminating it.” Policemen and women devoting

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10 Cf. Arendt, H. (1994): Eichmann in Jerusalem: A Report on the Banality of Evil, London: Penguin. Standing accused of carrying out the so-called “Final Solution of the Jewish Question,” Adolf Eichmann stated that “I consider oath-breaking to be the worst possible crime and offence a person can be guilty of.” The man who had thoroughly internalized the motto of the SS, “My honor is called loyalty!”, was sentenced to death by an Israeli court.


their time and energy to the maintenance of law and order are doing what they are supposed to do. The value-rational social action of a policeman, to borrow once more the words of Max Weber, is ideal-typically motivated by “‘commands’ or ‘demands’ which, in the actor’s opinion, are binding on him.” The matching of rules and roles to situations is a fairly complex cognitive process. By actively searching for the most efficient and effective means of preventing and combating crime, law enforcement officials and their political representatives are fulfilling a professional duty.

Institutional actors like the police have every reason to believe that the efficiency and effectiveness of their operations can be improved by making use of cutting-edge technologies of political control. The potential “added value” of biometric identification technology for “securing the homeland” from perceived threats such as bogus asylum seekers, illegal immigrants, and foreign-born terrorists is a case in point. And yet it would be foolish to think that political problems can be solved by technological means alone. This especially holds true if the political question to which a given technology is seemingly the answer is notoriously hard to determine, not least for its corporate suppliers solely interested in profit maximization. The Steria Group, for example, promotes its fingerprint

image transmission (FIT) devices as follows: “The FIT solution, which is part of Steria’s global ‘biometrics’ offer, can also be applied in fields such as electronic voting, authentication and verification in sensitive areas such as airports (passengers and personnel), nuclear power stations, research laboratories or e-commerce, internet kiosks, etc.”

Interestingly, the Steria Group perceives Eurodac, whose Central Processing Unit (CPU) it developed itself, as being concerned with “immigration applicants.” Aware of the lucrative prospect of selling Eurodac technology to customers other than asylum and immigration authorities, Steria representatives have (evidently quite successfully) suggested that “this solution may prove useful in combating organised crime and terrorist networks.”

Commercially distributed automated fingerprint identification technology is a textbook example of a solution looking for a problem.

An organization’s stance or “solution” towards a given problem at time $t_0$ may be approximated by identifying its position at $t - 1$. While such an exercise might prove useful for heuristic purposes, it is conceptually misleading to equate the social mechanism of rule following with unconscious repetition. Traditional behavior, as Max Weber reminds us, is qualitatively distinct from value-rational social action. The Sociological Institutionalist task rather consists of empirically

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20 This would constitute a shift towards Historical Institutionalism. The latter perspective’s emphasis on dynamics of lock-in and increasing returns is undoubtedly of vital importance for understanding path-dependent developments. However, the micro-foundations of this approach are ambiguous and arguably do not depart from the logic of consequentiality. Cf. Pierson, P. (2000): “Increasing Returns, Path Dependence, and the Study of Politics,” in: American Political Science Review, Vol. 94, No. 2, pp. 251-267.
illustrating “the [social] process by which routines come to encode the novelties they encounter into new routines.”  

Actors whose interests and perceptions are institutionally shaped arguably live up to the challenge of novelty by searching for a set of standard operating procedures that they can creatively “upgrade” and apply to a new set of problems. Fingerprinting as a police-specific standard operating procedure and its application to the refugee problem is a case in point.

The Institutionalist concept of solution-driven problem solving sketched out above fits well with Virginie Guiraudon’s account of decision-making processes in the field of EU migration policy. As commonly known, Community legislation relating to asylum, immigration, and external border control has mainly been drawn up by national executives, i.e. by the members of the Justice and Home Affairs Council and the civil servants assisting them. Guiraudon accordingly observed that “interior, justice and police personnel ensured that they were the most well equipped to provide solutions to the problems that they themselves had identified.”  

Furthermore, she found that “they emphasized technical solutions that required their expertise,” and, most notably from a theoretical point of view, that “solutions’ had been devised before ‘problems’ had been identified.”  

Empirical observations of this kind should not come as a surprise to the organizational theorist trying to make sense of decision-making processes in an “Area of Freedom, Security and Justice.” We shall see in due course whether similar patterns can be identified with a view to the negotiation of the Eurodac Regulations in the JHA Council.

21 March and Olsen (1989): Rediscovering Institutions [cf. footnote 11], p. 34.


3. Eurodac and the Emergence of a Supranational Biometric Control Regime, 1990–2005

3.1 Predecessors of Eurodac on National Level: Police Demand and Corporate Supply

One of the principal tasks of members of police records departments is to collect fingerprints. The latter can be achieved by investigating crime scenes and via fingerprinting actual or potential offenders. Fingerprint data can assist the police in identifying probable perpetrators. Forensic evidence and corresponding fingerprint matches of accused individuals may also be admissible in court. No wonder, therefore, that the manual collection and storage of fingerprints for police and criminal justice purposes was already in use by the late 19th century.24

Automated Fingerprint Identification Systems (AFIS), on the other hand, only began to spread across the Western world a century later. Thanks to new technological devices such as fingerprint scanners and computer hard drives, it became administratively feasible to retrieve and store vast amounts of digitalized biometric data. By 1983, automated searches in dactylographic databases had become commonplace among employees of the U.S. “Federal Bureau of Investigation” (FBI).25 Today’s largest biometric database in the world, the “Integrated Automated Fingerprint Identification System” (IAFIS) maintained by the FBI, contains the fingerprint templates of more than 47 million individuals.26

The “added value” of such systems for the police stems from three features: AFIS operate with unprecedented speed, deliver scientifically exact comparative results, and offer the possibility of producing “cold hits” via random searches or automated “one-to-many checks.” The latter do not require the physical presence

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of the victim or criminal suspect in question, but merely their virtual digital representation. It is important to note, however, that the chance of obtaining a “hit” positively correlates with the number of entries stored in the database. The more crime scene evidence and biometric data of criminal suspects and convicted criminals can be collected, stored, and continuously compared with each other, the better for the police. In the best of all police worlds, everyone’s fingerprints would be stored in a central database accessible to law enforcement officials “24/7.”

Following the U.S. lead, the majority of Western European countries had, by the early 1990’s, installed AFIS targeted not only at ordinary criminals, but also at asylum seekers and “illegal” immigrants. The German AFIS, for example, began its highly efficient operations in December of 1992. In addition to the system’s principal use for police and criminal justice purposes, federal German asylum authorities like the former “Bundesamt für die Anerkennung ausländischer Flüchtlinge” could now quickly determine whether or not a would-be refugee had filed asylum applications in more than one of the Federal Republic’s partially autonomous states, the “Länder.” A similar political objective, namely the detection and suppression of “asylum shopping” across national jurisdictions, would be stated by politicians and civil servants promoting the establishment of Eurodac in the European Community.

Governments and administrations interested in setting up large-scale biometric identification systems operating on a national or even supranational scale were, and still are, chiefly dependent on the resources and expertise of private corporations. The dependence of public administrations on corporate capabilities

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and know-how in the biometric realm can be illustrated by highlighting the comparatively vast resources at the disposal of Sagem Morpho, the corporation which in practice established the AFIS’s *inter alia* of Austria, France, and Germany. Sagem Morpho’s parent company, Sagem Défense Sécurité, belongs to the Safran Group. The latter employs approximately 55,000 people.\(^{39}\) Sagem is an arms producer which, faced with reduced public defense expenditures after the end of the “Cold War,” diversified into the law enforcement market.\(^{30}\) With a global market share of nearly 50%, Sagem is currently the world’s leader in the AFIS business.\(^{31}\)

The multi-national corporation which rightly claims to be a “major player in the Eurodac system”\(^{32}\) has managed to expand its profitable biometrics business *inter alia* into the emerging African market for *election and population control*. Possibly the world’s first biometrically secured election was held in Mauritania between October 19–26, 2001. Every Mauritanian citizen had to submit his or her fingerprints to authorized business representatives and was later provided with a biometric *smart card* – allegedly in order to prevent “voter fraud” and thus to guarantee for fair and equal elections. Indicating that this large-scale operation not only served the purpose of strengthening democracy in Mauritania, a spokesperson of Sagem concluded that “Mauritania now has two advantages. First,


\(^{30}\) The so-called “Sagem Mistral Seeker,” currently employed *inter alia* by the French army, provides an illustrative example of Sagem’s military production line [arena-web]. In regard to the involvement of Thales, the French defense and electronics group, in issuing genetically enhanced identity cards to all Chinese citizens, see Amnesty International (2004): *Undermining Global Security: The European Union’s Arms Exports* [arena-web], p. 58.


it has a complete and coherent national database of the population. Second, all the adult citizens now have an ID card secured via a fingerprint.” At the time of writing, Mauritania’s AFIS is under the control of a military junta which took over power in August of 2005. With the signing of a contract with Colombian authorities in February of 2006, Sagem enlarged its pool of biometric customers to a total of 56 countries. AFIS of the French, Mauritian and Colombian type have few corporate parents but many brothers and sisters all around the world.

3.2 Intergovernmental Negotiations within Maastricht’s “Third Pillar”

Inter-executive deliberations on the technical feasibility of establishing an automated fingerprint identification system for asylum applicants in the EU range back as far as December of 1991. By November of 1992, the Council’s Ad Hoc Group on Immigration had drawn up a confidential Eurodac progress report according to which a group of independent technical experts was supposed to elaborate the “user requirements” of such a system. Following the short-term engagement of a consultancy firm, the JHA Council, now formally established under Maastricht’s “Third Pillar,” expectedly declared that “it is technically feasible to install a system for exchanging asylum seeker’s fingerprints at European level” at its meeting on November 23, 1995.

This course of events suggests that the evaluation of the technical feasibility of Eurodac preceded a political assessment of the project’s desirability and appropriateness. In fact, intergovernmental discussions concerning the political objec-

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atives of Eurodac only began in 1996. At that time, it was still an open question whose fingerprint templates should be included in the database, which authorities should be granted access to the data, and whether the Central Unit should be managed by the Commission or a Member State. As we shall see in due course, some of these politically sensitive issues were still not resolved by the year 2000.

3.2.1 The Impact of Schengen on Intergovernmental Negotiations under the UK Presidency

In line with the political rationale of the Dublin Convention on asylum of 1990, the personal scope of Eurodac was initially conceived to be limited to potential refugees in the meaning of the Geneva Refugee Convention. In the end, however, Eurodac would also cover "illegal" immigrants, i.e. every third country national apprehended while trying to cross the external borders in an irregular fashion, and third country nationals residing in the territory of a Member State without proper authorization. How did this development come about?

The extension of the scope ratione personae of Eurodac cannot be understood without taking Member States governments’ reactions to the refugee crisis of mid-1997 into account. The latter originated in war-torn Northern Iraq and quickly spread to Europe via Turkey. At the height of the crisis on November 2, 1997, a rusty ship with 769 would-be refugees of predominantly Kurdish ethnic origin on board stranded at the Southern coast of Italy. Most of the "boat people" were evidently heading for Germany, France, the Netherlands, and Scandinavia, and the Italian authorities initially did not prevent these people from traveling further to Central, Western and Northern Europe.

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In light of these irregular international migratory movements which seemed to undermine the effective application of the Dublin Convention from the very outset, the Schengen Executive Committee decided to create a Task Force responsible for coordinating practical measures for curbing “illegal immigration” in December of 1997. The first meeting of the Schengen Task Force was held on January 13–14, 1998, involving officials from France, Germany, the Netherlands, and Sweden, on the one hand, and Italy and Greece, on the other. Both transit and destination countries, in other words, were represented in the Schengen Task Force. According to Kurt Schelter, a former “Staatssekretär” in the German Ministry of the Interior, the German government exerted “massive pressure on Greece and Italy” during these meetings. What was interpreted as an asylum and refugee protection issue by the Italians and the Greek was read as a problem of “illegal immigration” and human trafficking connected with organized crime syndicates by the Germans, the French, and the Dutch.

It did not take long before the Council of the EU, now presided over by the British, decided to take collective action along the lines discussed within the Schengen Group. By January 26, 1998, the General Affairs Council had formally adopted a cross-pillar action plan concerning the “influx of migrants from Iraq and the neighboring region.” The plan had been drawn up by an Ad Hoc Working


Cf. Council of the EU (1998a): “2066th Council meeting – General Affairs,” Press Release No. 5271/98 [arena-web]. The action plan as such was never published. Neither did the Council consult the European Parliament before adopting the measure. Against this background, the European Parliament, in a resolution passed more than a year after the action plan had been adopted by the Council, held that “the action plan was not established lawfully [and that] the Member States may not base any legislative action on it…..” European
Group comprised of national asylum and migration experts, Europol personnel, and “Second Pillar” officials. In spite of this cross-pillar EU initiative, the Schengen Task Force continued to convene parallel meetings on this subject matter.

Epitomizing the intra-European political tensions prevailing at the time, the Austrian government unilaterally decided to reinforce its border controls vis-à-vis Italy. From a strictly legal point of view, the government in Vienna was entitled to do so since the Schengen Executive Committee had not yet declared that the conditions for the lifting of internal border controls vis-à-vis Italy, envisioned for April 1, 1998, had been met. Politically, however, the strengthening of Austrian border controls vis-à-vis Italy was linked to (for the time being unfulfilled) Franco-German demands for extending the scope ratione personae of Eurodac to “illegal immigrants.” This political rationale manifested itself at the meeting of the JHA Council on March 19, 1998. During this meeting, the German delegation formally entered a “general reservation on the Eurodac Convention, pending concrete progress on [the] issue [of] fingerprinting illegal immigrants.” In other words, Germany was threatening to veto Eurodac unless German demands for extending the system to “illegal immigrants” would be met.

The Schengen Group, rather than the JHA Council as such presided over by a non-Schengen Member State, the United Kingdom, shaped the EU policy agenda during this phase of intergovernmental consultations. On April 21, 1998, the Schengen Executive Committee formally agreed upon inter alia the “fingerprinting of every foreign national entering the Schengen area illegally whose identity cannot


be established with certainty on the basis of valid documents.” In line with the ongoing technical preparations for launching the Eurodac database, the Schengen Group also called for the “retention of fingerprints for the purpose of informing the authorities in other Schengen States.” The principal decision-making body of the Schengen Group justified these permanent measures as a collective response to “the increase in the number of foreign nationals immigrating into the Schengen States, in particular nationals of Iraq and other States.”

In effect, the Schengen Group had presented the UK Presidency with a fait accompli against which, in light of the forthcoming incorporation of the evolving Schengen acquis into the EU, no unilateral British remedies could be found.

At the last Council meeting under the UK Presidency in May of 1998, the JHA Council thus formally decided that “it will draw up a Protocol to the Eurodac Convention extending the Eurodac system to include the fingerprints of ‘illegal immigrants’ for adoption by the end of 1998.” In Bonn, this development was celebrated as a political victory for the German federal government under chancellor Kohl.


48 In regard to the politics of incorporating Schengen into the EU, agreed upon during the 1996/97 Intergovernmental Conference, see McDonagh, B. (1998): An Account of the Negotiation of the Treaty of Amsterdam, Dublin: Institute of European Affairs, pp. 165-182; and den Boer, M. / L. Corrado (1999): “For the Record or Off the Record: Comments About the Incorporation of Schengen into the EU,” in: European Journal of Migration and Law, Vol. 1, No. 4, pp. 397-418.


3.2.2 “Freezing” the Eurodac Convention under the Austrian Presidency

During the second half of 1998, the policy agenda concerning Eurodac was not only de facto, but also de jure shaped by the Austrian Presidency of the Council and the German Presidency of the Schengen Group. High-ranking German officials now made it publicly known that “Germany has demanded not only collecting the fingerprints of asylum seekers, but also those of aliens who have entered illegally.” The German delegation would maintain this position throughout 1998 in spite of a change in federal government from the “center-right” towards the “center-left.”

Intergovernmental discussions would now revolve around the question of how one could possibly define an “illegal immigrant.” While the majority of national government representatives were apparently willing to accept that the category of “illegal immigrants” should cover third country nationals apprehended while attempting to cross the external borders in an irregular fashion, the German delegation wanted to go further than that. It therefore suggested to “include all persons who had crossed the borders illegally and were caught in a Member State.” The problem with such a wide definition was that a connection with irregular border-crossing was, for all practical purposes, very hard to establish for national police forces dealing with so-called sans-papiers or illegally resident third country nationals lacking any sort of documentation. Beyond that, extending the personal scope of Eurodac in such a manner might have signaled a departure from


52 See Bundesministerium des Innern (1998c): “Ratstreffen der EU-Innen- und Justizminister in Brüssel,” Press Release of December 4, 1998 [arena-web]. To be sure, this stance also reflected the domestic constraints placed upon the new “Red-Green” coalition government in Bonn by a Conservative majority in the “Länder” chamber, the Bundesrat. For a typical example of political pressure exerted upon an otherwise “center-left” federal government by the CDU/CSU-dominated “Länder” chamber, see Deutscher Bundesrat (2000): Bundesrat doc. 471/00 [arena-web].

article 63 (1) (a) of the forthcoming EC Treaty, Eurodac’s envisioned legal basis. The Austrian Presidency could not resolve this intricate problem during its tenure.

What the Austrian Presidency did achieve, however, was to identify a means of taking collective action before the partial “Communitization” of Justice and Home Affairs cooperation could manifest itself in procedural terms. The Austrian Presidency thus decided to “freeze” those asylum-related parts of Eurodac which had already found intergovernmental approval. The “frozen” Eurodac Convention could then, according to the Austrian Presidency’s plan, reappear on the Council’s agenda in the form of a draft Community Regulation presented by the Commission immediately after the entry into force of the Treaty of Amsterdam. This technique allowed the JHA ministers to partially “lock in” their policy agenda while de facto stripping the European Commission of its (shared) right of legislative initiative under the “First Pillar.” In December of 1998, the Council thus formally decided, subject to parliamentary scrutiny reservations entered by Denmark, Italy, and the UK, that “the draft Eurodac Regulation … will be ‘frozen’ until the entry into force of the Amsterdam Treaty.”

3.2.3 “Freezing” the Eurodac Protocol under the German Presidency

The incoming German Presidency of the Council devoted a considerable amount of time and energy to drawing up a “Protocol extending the scope ratione personae of [Eurodac].” By February 17, 1999, the Eurodac Working Party had reached “broad agreement” on the draft Protocol. About a week later, the K4 Committee, the “Third Pillar” predecessor of the Strategic Committee on Immigration, Frontiers


and Asylum (SCIFA), confirmed the “broad agreement” reached on working group level. The basic consensus among national civil servants paved the way for COREPER’s politically decisive involvement. The Member States’ ambassadors settled the remaining intergovernmental differences by drawing up a Statement for the Council Minutes on March 4, 1999. This legally non-binding yet politically important statement underlined Member States authorities’ obligation under Community law to systematically fingerprint not only every “alien [who] is apprehended at or close to the external border itself,” but also every “alien [who] is apprehended beyond the external border, where he/she is still on route.”

The JHA Council would rubberstamp this inter-administrative settlement a few days later.

In the end, the German Presidency had not only achieved that every Member State must systematically fingerprint irregular border-crossers (in addition to asylum applicants). It had also accomplished that national authorities may take the fingerprints of illegally resident third country nationals in order to check whether the templates of this person might match with an entry in the Eurodac database. Mimicking its Austrian predecessor, the German Presidency, headed by Otto Schily, the newly appointed Minister of the Interior, decided to “freeze” the Eurodac Protocol in March of 1999. Having found a common position on the entire Eurodac agenda in due time, i.e. just weeks before the fundamental restructuring of both the “First” and “Third Pillar” of the EU, the Council asked the Commission to present an agreeable proposal for a Community Regulation immediately after the entry into force of the Treaty of Amsterdam. The European


Parliament’s outright rejection of the Protocol, on the other hand, came far too late to affect the decision-making process in the Council.\textsuperscript{59}

\section*{3.3 Incorporating Eurodac into Amsterdam’s “First Pillar”}

\subsection*{3.3.1 The Inter-institutional Struggle over Implementing Power}

In the following weeks, legally trained Commission officials like Jean-Louis De Brouwer, at the time head of the “immigration and asylum unit” in the newly established Directorate-General “Justice and Home Affairs,” managed to merge the two “frozen” texts into a single document.\textsuperscript{60} On the basis of this preparatory work, JHA Commissioner Anita Gradin was able to present a \textit{Commission proposal} for the establishment of Eurodac via EC Regulation to the members of the JHA Council on May 27, 1999.\textsuperscript{61}

Having participated in all “Third Pillar” meetings of the Council, the Commission obviously knew what the Member States’ governments were expecting from its first legislative proposal in the domain of Community asylum policy, namely to “ensure continuity in the results of the negotiations” on Council level.\textsuperscript{62} In spite of some bickering about “[the unorthodox] technique of negotiating a draft Convention and a draft Protocol in parallel,”\textsuperscript{63} the Commission’s services loyally adhered to the “frozen” Eurodac Convention and its equally “frozen” Protocol on irregular border-crossing and illegal residence, respectively. In one important respect, however, the Commission deviated


\textsuperscript{60} The organizational structure of the Commission’s DG “Justice and Home Affairs” as it stood in late 1999 can be viewed on the [arena-web]. The new DG succeeded the Commission’s “JHA Task Force” and was later renamed into the DG “Justice, Freedom and Security.” A more recent organigram of the DG, referred to by its civil libertarian critics as the DG “Law, Order and Security,” is also stored on the [arena-web].


significantly from the “frozen” texts. Whereas the Council had unambiguously expressed its intention of reserving implementing powers to itself, the Commission had drawn up a draft Regulation which “confers on the Commission powers of implementation to adopt provisions to give effect to it…."

The reluctance of Member States’ governments to accept the power-sharing arrangement envisioned by the Commission already surfaced at the very first meeting of the Council’s Working Party on Asylum (Eurodac) under the “First Pillar” in July of 1999. During this meeting, numerous delegations formally entered “scrutiny reservations” in regard to the proposed “comitology” procedure. A few weeks later, an apparently irritated French delegation submitted in writing that “there is no reason to think that the authors [of the Eurodac Convention] wished to limit the power of the Council to adopt implementing rules…,” while an equally concerned German delegation expressed the opinion that “the Council should … reserve the right to exercise the implementing powers for EURODAC [to] itself.”

In spite of the Commission’s warnings that “the type of changes being envisaged by the French and German delegations would require the reconsultation of the European Parliament,” the JHA Council stuck to its line of reserving the main implementing powers concerning Eurodac to itself. Being confronted with unexpectedly fierce intergovernmental resistance, the

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The Commission backed off from its first legislative draft and grudgingly drew up an amended and considerably “watered down” proposal.69

The revised Commission proposal was presented to the Council in March of 2000. COREPER quickly cleared the Commission’s amended legislative draft.70 In line with established legislative practice, the Council now had to re-consult the European Parliament. It would be the fourth and last time that the European Parliament would be dealing with the Eurodac dossier. As had happened before, however, the European Parliament’s formal involvement in legislative proceedings had little impact on Eurodac’s substantive profile. The latter may be illustrated by recalling the Council’s response to the European Parliament’s proposal to raise the age limit for the compulsory collection of fingerprints from 14 to 18. The Euro-parliamentarians justified their position by arguing that “the threshold of 14 is contrary to the existing international instruments on children’s rights,” including the United Nations Convention on the Rights of the Child, and that “it would be excessive to take fingerprint data as a routine practice from the age of 14.”71 The Council, however, simply rejected the European Parliament’s amendment.72

69 European Commission (2000): Commission doc. COM (2000) 100 [arena-web]. The Commission’s services could not resist, however, from stating that “the Commission considers that the justification given by the Council [for reserving the main implementing powers under the Eurodac Regulation to itself] is totally inadequate” (p. 8). This normative assessment is at least debatable considering the circumstances. After all, the French government had justified its position by resorting to the argument that “it is not compatible with the rules of proper administrative management for an administration which applies legislation to determine its own operational rules where they go beyond the framework of strict internal management.” The German government, for its part, had justified its stance by arguing that Eurodac “touches on a very sensitive area of state activity, which in Germany, for example, is covered … by the constitutionally protected right of an individual in respect of personal data.” Council (1999j): doc. 12582/99 [cf. footnote 67], p. 5; and Council (1999i): doc. 13018/99 [cf. footnote 66], p. 2, respectively.

70 Cf. Council of the EU (2000b): Council doc. 8417/00 EURODAC 2 [arena-web].


72 The Commission’s reluctance to spare children from compulsory fingerprinting was apparently motivated by the consideration that “within the Council, the pressure has been for a lower rather than a higher minimum age limit.” Commission (2000): doc. COM (2000) 100 [cf. footnote 69], p. 2. This may very well hold true. According to Evelien Brouwer, the
The obligatory re-consultation of the European Parliament, at any rate, paved the way for the formal adoption of the Eurodac Regulation by the Council in December of 2000. There would be no ceremony on this occasion. Instead, the Regulation was adopted by means of the *written procedure* by the Health Council. In a similarly routine fashion, specific rules for the implementation of Eurodac were laid down via Council Regulation in February of 2002.

### 3.3.2 Geographical “Spill-over” to Britain, Ireland, and European Third Countries

Eurodac was a test case for how national governments would be dealing with the peculiar “opt in” and “opt out” arrangements under Title IV of the EC Treaty agreed upon during the 1996/97 Intergovernmental Conference.

Both the *Irish* and *UK governments* notified their intention of “opting in” to the Eurodac Regulation in October of 1999. The geographic extension of Eurodac to Ireland and the UK is politically remarkable insofar as both countries uphold strict border controls vis-à-vis other Member States. This does not fit well with Eurodac’s official justification as a “directly related flanking measure” (article 61 EC) to the elimination of internal border checks within an “Area of Freedom.”

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Dutch delegation suggested an age limit of only 12 years; Brouwer (2002): “Eurodac” [cf. footnote 2], p. 237.


The relationship between the European Community and Denmark is more complex due to Denmark’s unconditional participation in Schengen, on the one hand, and Denmark’s categorical “opt out” of Title IV of the EC Treaty, on the other. Since Denmark’s rights of influencing Community measures in the fields of asylum and immigration entirely depend on whether a given legislative dossier is deemed to be “Schengen-relevant” or not, the Danish delegation requested a written opinion from the Council Legal Service on the possible Schengen-relevance of Eurolac. The Council Legal Service apparently followed the Commission’s official line according to which Eurolac could not be considered to build on the Schengen acquis. In response to this politically ambiguous assessment, the Danish government announced its intention of taking part in the Eurolac project on an intergovernmental basis.

The EU institutions now had to find ways and means to associate Denmark with Eurolac. The organizational solution to this problem was to treat Denmark in the same way as Norway and Iceland, the two Nordic countries participating in Schengen but falling short of membership in the European Union. Against this background, the Council began to hammer out a legal arrangement which would create reciprocal obligations under international law between the European Community, Denmark, Iceland, and Norway. Both Ireland and the UK would need to “opt-in” to this regime, of course. In May of 2003, the Council provided the Commission with a mandate for parallel negotiations with Denmark, Norway, and Iceland on extending the geographical scope of the Eurolac and Dublin II
Regulations. The association agreement with Denmark and a protocol to the existing agreements with Norway and Iceland were formally endorsed by the JHA Council in February of 2006.

At the time of writing, Eurodac spans 27 European countries, with implementing measures in the acceding states (Bulgaria and Romania) under way and association agreements with additional European third countries (Switzerland and Liechtenstein) in the making. In geographical terms, Eurodac has developed into a truly pan-European biometric identification regime.

3.3.3 The Central Unit in Operation

The Eurodac database went “live” on January 15, 2003. From this date onwards, designated Member States’ authorities and those of associated third countries have been transmitting the fingerprint templates of asylum seekers, irregular border-crossers, and “illegal” residents as of the age of fourteen to the Eurodac Central Unit managed by the European Commission.

During the first year of operations, the Eurodac Central Unit received a total of around 272,000 fingerprint data sets. Reflecting the start of Eurodac activities in the ten new Member States in mid-2004, the volume of biometric data sent to Luxembourg slightly increased during the second year of operations, with a total

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86 In regard to Switzerland and Liechtenstein, see Council of the EU (2004): “Signature of a Number of Agreements with the Swiss Confederation,” Press Release No. 12896/04 [arena-web], p. 3. Official records relating to this ongoing negotiation are classified. Information concerning the design of a Eurodac-related “twinning project” with Bulgaria, on the other hand, can be found on the [arena-web].
of about 288,000 digitalized fingerprint sets being transmitted to the Central Unit.\textsuperscript{89} The “top five” countries “feeding” the Central Unit in 2003 and 2004 were, in declining order of magnitude, Germany, France, the UK, Sweden, and Austria. These five Member States combined contributed more than two thirds (68%) of the biometric data transmitted to the Central Unit. The states listed above are currently the Union’s principal asylum destination countries.\textsuperscript{90}

Eurodac has been performing as efficiently as expected in regard to asylum applicants, i.e. the category of third country nationals covered by the former Eurodac Convention. The number of “hits” registered by the Central Unit relating to “asylum shoppers,” i.e. people who have evidently lodged asylum applications in more than one Member State, increased in a more or less linear fashion from 0 in January of 2003 to around 3,100 in December of 2004. Unsurprisingly, the greatest number of foreign “hits” were recorded in Germany, Sweden, France, the UK, and Austria. We will continue to see “hit” growth rates of around 4% per month on European level unless Eurodac has a deterring effect on potential “asylum shoppers” or Member States’ asylum authorities stop “feeding” Eurodac with new data. (As previously mentioned, the number of “hits” generated by AFIS like Eurodac tends to increase in proportion to the size of the database.)

Eurodac’s performance in regard to irregular border-crossers, on the other hand, i.e. the category of people covered by the former Eurodac Protocol, is a near complete failure. At closer inspection of the data released to the public by the European Commission, one is struck by the very small amount of Eurodac entries


\textsuperscript{90} Cf. UNHCR (2005): Asylum Levels and Trends in Industrialized Countries, 2004, Geneva: UNHCR, Population Data Unit, March 1, 2005 [arena-web], p. 5. The composition of this list may change in the long run as a result of EU enlargement. One may note in this context that the 15 “old” Member States experienced a 21% drop in asylum requests in 2004 compared to 2003, while the 10 “new” Member States simultaneously recorded a 4% increase.
relating to irregular border-crossers. The Commission had estimated to receive approximately 400,000 fingerprint templates of apprehended irregular border-crossers per year from the Member States. In actual fact, however, it merely received an average of about 12,000 fingerprint sets per annum. The overwhelming majority (82%) of fingerprint data in this category were transmitted by Greece, Italy, and Spain. What is interesting about these figures is not the relatively high share, but the very low volume of data transmitted to the Central Unit by Greece, Italy, and Spain. The patterns of intergovernmental conflict highlighted in section 3.2 above have evidently been resurfacing in the form of deliberate non-compliance with Community law.  

Underpinning the sense of premeditated non-compliance with EC law on the part of external border countries in Southern Europe, both the Greek and Italian authorities made sure that the few data they did transmit to the Central Unit were sent so late that other Member States’ queries in the database would yield negative results. In 2004, for example, the Greek authorities waited on average more than 29 days before actually transmitting the fingerprints of an apprehended irregular border-croesser to the Central Unit. This gave the would-be refugee in question approximately four weeks to lodge a potentially successful application for asylum in another Member State – after having been fingerprinted for illegal border-crossing in Greece. On the basis of the available data, we may infer that a large proportion of third country nationals illegally entering EU territory in Greece and Italy subsequently lodge asylum applications in the UK.

91 In the near future, we are probably going to witness similar tensions between selected “old” and “new” Member States. A first account of the impact of Dublin II and Eurodac on German-Polish relations was given by a group of German non-governmental actors visiting Poland in November of 2004. According to their report, Polish asylum authorities are already calling for a new “burden-sharing” mechanism taking some of the Eurodac-related pressure off of Poland [arena-web].

Sweden, Norway, and Germany, whereas third country nationals transiting Spain typically request political asylum in France.

Optional searches in Eurodac based on fingerprint data collected from illegally resident third country nationals have mainly been carried out by Germany, the UK, the Czech Republic, Norway, and the Netherlands. The relatively strong and partially successful use of this facility by the Czech Republic, a Central European country entirely surrounded by other Member States, illustrates the political and administrative rationale behind such queries. As one may have expected, Czech “hits” in this category paved the way for “removing” illegally resident third country nationals to Poland and Slovakia. Likewise, the majority of “hits” recorded by Germany pointed to Austria, while the greatest number of “hits” registered in Norway related back to Sweden.

Last but not least, one may inquire into the reaction of would-be refugees to the European Community’s newly established biometric identification regime. The immediate reaction to Eurodac on the part of an apparently increasing number of asylum applicants seeking protection in the Nordic countries has been to deliberately cut or burn their fingertips. This has evidently been practiced by several hundreds of asylum seekers in Sweden during the first year of Eurodac operations. A member of the Swedish Migration Board reported “scars from knives and razors, or entire [fingerprint] patterns that are entirely destroyed because they’ve used acid or some other kind of product to destroy their hands.” 93 Norwegian law enforcement authorities have tried to contain the problem by resorting to a strategy of deterrence, including outright imprisonment. 94 While we lack systematic cross-


country evidence of such practices, they do suggest a new quality of Eurodac-related social interaction.

4. Conclusions

4.1 Eurodac and the Logic of Consequentiality

The past and present actor constellation and mode of executive interaction concerning Eurodac represent, game-theoretically speaking, a Rambo-situation. The political dynamics of such a situation may best be illustrated by shedding light on the patterns of inter-state conflict over the river Rhine.

By the mid-1970’s, the river Rhine was so polluted that it was commonly referred to as “the sewage of Europe.” The Rhine’s water quality had progressively deteriorated due to its utilization inter alia by chemical producers such as Sandoz, Ciba-Geigy, and BASF. After having passed through Switzerland, France, and Germany, the water ending up in the Netherlands had to be qualified as toxic waste.95

The water conflict between upper- and lower-lying riparian states of the river Rhine is a textbook example of an asymmetrical Rambo game. Cooperative solutions are very hard to achieve under such circumstances. After all, “Rambo” (in this case an upper-lying riparian state) benefits most from maintaining the status quo. The “underdog” (in this case the lower-lying riparian state), on the other hand, has a hard time convincing “Rambo” of the need to participate in a cooperative regime. Against this background, the disadvantaged country’s government will try to improve its lot by making “threats (decreasing for the other the utility of defection) or promises (increasing for the other the utility of


The empirical material presented in section 3.2 above suggests that the Member States’ governments were engaged in a similar “game” while dealing with the problem of “secondary movements” among third country nationals in the EU. During the Iraqi refugee crisis of 1997-98, transit countries such as Italy and Greece found themselves in the position of the “Rambo” vis-à-vis destination countries like Germany and the Netherlands. As one may have expected, the “Rambos” at first showed no interest in a solution like Eurodac and were subsequently subjected to a strategy of Schengen-related “carrots” and “sticks.” The latter involved the temporary reinforcement of internal border controls, while the former entailed the prospect of their complete removal – provided that the entire Schengen acquis, including the systematic fingerprinting of irregular border-crossers, had been fully complied with. The success of this strategy allowed the Austrian and German Presidencies of the JHA Council to “freeze in” the draft Eurodac Regulation shortly before the entry into force of the Treaty of Amsterdam.

From the point of view of the JHA Council, the process of incorporating Eurodac into the “First Pillar” involved an unexpectedly fierce yet ultimately victorious power struggle with the Commission over implementing rules. In spite of the Council’s success in retaining maximum control over the Eurodac project, the effective enforcement of the Regulation would continue to pose practical problems for its political masters. Eurodac’s ongoing operational problems stem from the fact that cross-national compliance with new rules and procedures is very unlikely in Rambo-situations. This game-theoretic insight explains why Eurodac is
a near complete failure in regard to irregular border-crossers (see section 3.3 above). The unilateral political and administrative benefits of not being held responsible for processing the asylum requests of tens or even hundreds of thousands of irregular border-crossers each year are apparently valued higher than the costs of sustained non-compliance with Community law.

We have also learned that Eurodac is performing as efficiently as promised by its corporate suppliers in regard to ordinary asylum applicants. The Rationalist explanation for Eurodac's partial success is that all Member States and associated third countries potentially benefit from conducting "one-to-many checks" in this category. What is at stake here is not the redistribution of asylum applicants from north to south or west to east, but rather the combating of "asylum abuse" in an integrating Europe striving for a full-fledged harmonization of substantive and procedural refugee law. Diverse national reactions to asylum applicants' attempts to circumvent the system inter alia via deliberate self-mutilation may, however, create new interstate tensions. As recent practices in the Nordic countries have amply demonstrated, one would be mistaken to believe that Member States' governments and administrations are the only "players" in the Eurodac game.

4.2 Eurodac and the Logic of Appropriateness

For the Institutionalist observer, organizations like the police are resourceful "carriers" of certain principles and worldviews. Police-specific worldviews stem from the internalization of a particular organizational mission, namely the prevention and combating of crime. How, then, does the police pursue its mission? How does the police know which practices are more suitable than others for the maintenance and enforcement of law and order?

The police knows because it is experienced. Its organizational memory is able to recall standard solutions to repeatedly encountered problems.\textsuperscript{98} The police routine of collecting, storing, and comparing fingerprints for identification purposes is a case

in point. Fingerprint experts doing what they are supposed to do adhere to a *logic of appropriateness* and “[deal] with calculation mainly as a means of retrieving experience preserved in the organization’s files or individual memories.”

Dactyloscopy is the science of fingerprinting. Automated fingerprint identification systems like Eurodac are technologically advanced law enforcement tools. In contrast to human beings, these machines are able to compare hundreds of thousands of biometric datasets in a matter of seconds and achieve conviction rates of nearly 100%. But what, one may ask, does all of this have to do with the European Union in general and Community asylum policy in particular? The empirical answer to this question is that the operational success of automated fingerprint identification systems in the Member States motivated their establishment on European level. As documented in section 3. above, national governments and administrations experienced in operating large-scale biometric databases successfully managed to “upload” domestic standard operating procedures to the supranational level. The “bottom-up” process of applying ready-made national solutions to a new set of European problems involved a particular “framing” of the political challenge at hand. The empirical evidence accordingly suggests that resourceful actors like the German *Ministry of the Interior* perceived the refugee crisis of 1997–98 as a *problem of organized crime*. The appropriate thing to do in a situation like this was to call for the compulsory fingerprinting of “illegal” immigrants and for the storage of their biometric data.

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in a central European database. Against this empirical background, one may conclude that Eurodac is first and foremost an expression of a police-specific behavioral logic.\textsuperscript{101}

What is surprising about Eurodac from an Institutionalist perspective is not its particular conception of appropriateness, but rather the remarkable absence of empirically observable collisions with competing and contradictory sets of institutionalized rules. After all, "major political conflicts are focused on which set of rules should prevail when and where."\textsuperscript{102} The only political conflicts we have witnessed in the context of the negotiation of the Eurodac Regulations, namely the intergovernmental conflict over the redistribution of asylum applicants "through the backdoor," on the one hand, and the power struggle between the Council and the Commission over implementing rules, on the other, did not fundamentally challenge Eurodac's police-specific rationale. The apparent lack of concern \textit{inter alia} for the privacy rights of third country nationals may be accounted for, however, by the particular institutional design of the intergovernmental Schengen regime, the so-called "Third Pillar" of the European Union during the "Maastricht" era, and the Community governance of external borders, asylum, and international migration following the entry into force of the Treaty of Amsterdam.

The Institutionalist explanation for Eurodac's weak performance in southern Europe is that law enforcement agencies tend to execute \textit{selective enforcement programs} if inadequate resources do not allow otherwise.\textsuperscript{103} Members of the Greek, Italian, and Spanish border police are responsible for controlling thousands of kilometers of sea and mountainous land borders, crossed, in a more or less regular


fashion, by several hundred million people a year. Greek, Italian, and Spanish officials know that “the [available] resources in men and equipment cannot keep up with the rhetoric of systematic control.” Frontier security professionals need to set enforcement priorities under such circumstances. Carrying out stringent measures against illicit arms trade, human trafficking, and other forms of organized cross-border crime may then become prioritized courses of action. Subjecting irregular border-crossers and potential victims of political persecution to biometric identification procedures in conformity with Community law, however, may not.

It is important to note in this context that the governments of Greece, Italy, Portugal, and Spain have repeatedly tried to close the gap between immigration control objectives and actual immigration outcomes by retroactively pardoning hundreds of thousands of “illegal” immigrants in the course of so-called regularization programs. Such programs not only reflect the porous nature of selected external Schengen borders resembling anything but an “iron curtain.” They also indicate that irregular border-crossers are frequently not “deportable” even if detected by the police. Time and again, labor-intensive administrative efforts in

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105 Enforcement priorities of this kind are particularly likely to emerge if irregular entry as such is not regarded as a crime, but merely as an administrative infringement. The latter is evidently the case in Italy. Cf. McCreight, M. V. (2006): “Smuggling of Migrants, Trafficking in Human Beings and Irregular Migration from a Comparative Perspective,” in: *European Law Journal*, Vol. 12, No. 1, pp. 106-129, here: p. 122.


107 Official figures analyzed by Stefan Alscher, for example, show that Spanish authorities ordered around 23,500 *expulsiones incoadas* in 2001 but executed less than 4,000 *expulsiones materializadas*. Alscher, S. (2005): *Knocking at the Doors of “Fortress Europe”: Migration and Border*
detaining apprehended *sans-papiers* and identifying their nationality for the purpose of removal have been frustrated by the unwillingness of countries of origin and transit to cooperate in issuing the necessary documents. The standard operating procedure in cases like these is to eventually release the “illegal” immigrant in question into the so-called “Area of Freedom, Security and Justice.”

### 4.3 The Politics of Supranational Biometric Control Revisited

James G. March and Johan P. Olsen hold that “[political] action generally cannot be explained exclusively in terms of a logic of either consequences or appropriateness. Any particular action probably involves elements of each.”

How, then, did analytically distinct behavioral logics interact with one another in the specific case of Eurodac? When and under which conditions were the Eurodac–related politics of biometric control driven by strategic calculation, rule following, or both?

The empirical material presented above strongly suggests that accumulated organizational experience with operating automated fingerprint identification systems lends support to social action based on a logic of appropriateness. If standard biometric control procedures are already in place, the matching of established rules to new situations tends to take precedence over comprehensive analyses of the expected consequences of alternative courses of action. The notion of self-referential organizational memories allows us to conceptualize an organization’s typical response to changes in its environment, namely by applying ready-made solutions to any given societal problem. Experience-based processes of solution-driven problem solving are characterized by cognitive recognition of precedents rather than calculation of costs and benefits. Lawyers, judges, and other members of the legal profession are more familiar with this line of reasoning than businesspeople and economists.

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*Control in Southern Spain and Eastern Poland*, University of California, San Diego: Center for Comparative Immigration Studies, Working Paper No. 126, p. 17.

The matching of rules to situations may give way to strategic calculation if particular organizational objectives cannot be achieved satisfactorily without obtaining the explicit consent or cooperation of other actors. Even the most resourceful executive actors in the Council are dependent on the support of other Member States for reaching intergovernmental agreement, especially if the supranational legislative act at hand needs to be endorsed unanimously. In the event of deviating or contradictory organizational experiences and standard operating procedures, inter-executive decision-making processes in the EU tend to reflect the self-interested “moves” of instrumentally rational “players.” Accordingly, selected national governments and administrations’ strategic use of Schengen-related “carrots and sticks” during the negotiation phase of Eurodac may best be accounted for from a game-theoretic perspective.

In conjunction with Eurodac’s “hard” Community law characteristics (direct applicability without “transposition,” precedence over national law), the system’s formal incorporation into the “First Pillar” of the EU could have signaled a renewed shift toward rule-based action. This transition has been constrained, however, both by a lack of political will and a lack of administrative capacity in southern Europe to enforce the Eurodac acquis in its entirety. These tensions could theoretically be resolved by dedicating a greater share of the EU budget to border control and refugee protection in southern Europe. Alternatively, the members of the JHA Council may decide to abandon Eurodac in light of its unsatisfactory performance. The most likely outcome, however, is an enduring tension between the two logics of action.