Decision-making under Pressure: 
The Negotiation of the Biometric Passports Regulation in the Council

Jonathan P. Aus

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Abstract

This paper accounts for the so-called Biometric Passports Regulation of the European Community. Formally adopted by the Council of the European Union (EU) in December of 2004, the Biometric Passports Regulation prescribes the compulsory biometric “enrollment” of all EU citizens applying for a new passport or passport renewal. Member States fully participating in the Schengen regime and Schengen-affiliated third countries like Norway are obliged to include two biometric identifiers into their citizens’ passports by the end of June 2009. Schengen-made “e-Passports” will contain a chip storing a facial scan of the passport holder and two of his or her fingerprints.

The author employs both Rationalist and Institutionalist perspectives in order to explain why the Council of the EU unanimously endorsed a bill which, as far as the mandatory incorporation of fingerprints into EU citizens' passports is concerned, goes beyond what was necessary for meeting U.S. and international requirements. Rationalists may interpret the final legislative outcome as a reflection of the political success of “first mover” strategies on the part of relatively powerful executive actors engaged in a Battle-of-the-Sexes game. From an Institutionalist point of view, on the other hand, the substantive profile of the Biometric Passports Regulation stems from the reproduction of police-specific standard operating procedures, the “consensus reflex” among the members of the Council’s Permanent Representatives Committee (COREPER), and the recognitional character of decision-making processes under time pressure.

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1. Introduction

This article accounts for the adoption of the so-called Biometric Passports Regulation by the Council of the EU.¹ In combination with two follow-up decisions by the European Commission, Regulation (EC) 2252/2004 calls for the compulsory biometric “enrollment” of all EU citizens applying for a new passport or passport renewal by August 28, 2006 (facial images) and June 28, 2009 (fingerprints), respectively. The theoretically informed research question of this study is whether, to what extent, and under which conditions the authors of the Biometric Passports Regulation adhered to a logic of consequentiality or a logic of appropriateness while drafting this supranational legislative act.

The paper is organized as follows. Section 2. introduces two perspectives on decision-making beyond the nation-state, Rationalism and Institutionalism, which focus our attention on two social mechanisms, strategic calculation and rule following, respectively. Section 3. provides background information on the U.S. Visa Waiver Program. Following legislative amendments in 2002, this program required the inclusion of biometric identifiers into selected countries’ passports by October 26, 2004 in order to allow for the continuation of visa-free travel to the United States. Section 4. traces the negotiation of the Biometric Passports Regulation in the Council of the EU. The process under consideration commences with the European Council’s broad policy mandate of June 2003, culminates in the political agreement reached within the Justice and Home Affairs (JHA) Council on October 26, 2004, and terminates with the formal adoption of the Regulation by the General Affairs Council in December of 2004. Section 5. reviews the empirical insights of this case study of decision-making processes in an “Area of Freedom, Security and Justice” in light of the theoretical perspectives presented above.

I close with a discussion of the relative importance of strategic calculation and rule following in the Council.

2. Logics of Action in the Council of the European Union

2.1 Decision-making in the Council: A Rationalist Perspective

Rationalists assume that legislative outcomes like the Biometric Passports Regulation are brought about by strategically calculating actors seeking to maximize given interests. According to Fritz Scharpf, “the ideal individual actor of rational-choice models is assumed to have the capacity for strategic action – which is to say that on the basis of accurate perceptions and adequate information-processing capacity, he or she is able to respond to the risks and opportunities inherent in a given actor constellation by selecting the strategies that will maximize his or her expected total utility.” The theoretical assumptions underlying the instrumentally rational ideal type of social action developed by Max Weber are apparently quite demanding. Herbert Simon thus repeatedly argued that “people are, at best, rational in terms of what they are aware of, and they can be aware of only tiny, disjointed facets of reality.”


In spite of these different ontological starting points, scholars adhering to a logic of consequentiality and devoting their time and attention to analyzing legislative decision-making processes in the framework of the European Union unanimously claim that the collectively binding decisions taken by the members of the Council of the EU, i.e. the principal legislative body of the European Community, may be theorized as processes of purposive-rational choice involving the weighing and selection of alternative courses of action. With a view to integration theory development, Rationalists argue that the dynamics of regional political integration – identified here with the process of laying the legislative cornerstones of the emerging “Area of Freedom, Security and Justice” – can be conceptualized as the consequences of interactions between utility-maximizing national governments. Andrew Moravcsik’s (Liberal) Intergovernmentalist account of the integration process accordingly maintains that “the EC has developed through a series of celebrated intergovernmental bargains, each of which set the agenda for an intervening period of consolidation. The most fundamental task facing a theoretical account of European integration is to explain these bargains.”

Rationalist accounts of decision-making processes both in the European Council and Council of the EU may thus be understood as attempts to develop a theory of strategic integration.

One of the greatest challenges for Rationalist analysts of any given legislative decision-making process in the Council is to provide an empirically informed answer to the following question: “How do member states reach an equilibrium solution?” Balanced and allegedly stable legislative outcomes are associated with a

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concept developed by the economist John Nash in 1951: “[The] single most im-
portant idea that game theory has contributed to the social sciences is the concept
of ‘Nash equilibrium,’ which is defined as a constellation of individual strategies
in which no player could still improve his or her own outcome by unilaterally
switching to another available option.”7 Furthermore, political bargains struck
within the Council are assumed to reflect efficient and functionally adequate
adjustments to exogenous changes, for instance to changes in the EU’s security
environment. We shall see in due course whether the Biometric Passports Regu-
lation of 2004 can be conceptualized as an outcome unanimously endorsed by a
group of utility-maximizing, strategically calculating executive actors realizing
that this bill was the best they could achieve under the given circumstances in the
fight against international terrorism.

2.2 Decision-making in the Council: An Institutionalist
Perspective

According to the Institutionalist approach, political actors allegedly adhere to a
logic of appropriateness.8 Actor orientations are assumed to be informed by a sense of
belonging and duty. Acting out professional roles, in turn, involves the self-
conscious matching of rules to situations. A policewoman, for example, arguably

7 Scharpf (1997): Games Real Actors Play [cf. footnote 2], p. 100. In a similar vain, Douglass
North recalled the behavioral assumptions of neoclassical economic theory as follows: “The
economic world is reasonably viewed as being in equilibrium. … Given repeated exposure,
any individual actor could identify and would seize any available opportunity for improving
outcomes and, in the case of business firms, would do so on the pain of being eliminated by
competition. Hence no equilibrium can arise in which individual actors fail to maximize their
preferences. Because the world is in approximate equilibrium, it exhibits at least approximately
the patterns employed by the assumptions that the actors are maximizing.” North, D. C.
(1990): Institutions, Institutional Change and Economic Performance, Cambridge University Press,
p. 19.

Rein / R. E. Goodin (eds.), The Oxford Handbook of Public Policy, Oxford University Press,
pp. 689-708.
does not spend much time on calculating the consequences of her actions but rather asks: What does a policewoman do in a situation like this? The terminology of a policewoman, so the argument unfolds, “is one of duties and obligations rather than anticipatory, consequential decision-making.” Viewed from the perspective of instrumentally rational choice, a value rational policeman thus appears to be acting irrationally: “[The] more unconditionally the actor devotes himself to [the value to which the action is oriented] for its own sake, to pure sentiment or beauty, to absolute goodness or devotion to duty, the less is he influenced by considerations of the consequences of his action.”

Students of organizational behavior frequently observe routine patterns of action in line with standard operating procedures. Beyond prescribing in more or less great detail how professionals should execute particular programs under certain conditions, organizational routines and ready-made solutions to a given set of societal problems also shed light on standardized codes of meaning and the manner in which resources, including people and money, have been allocated to particular values and worldviews. Morton Halperin, a former member of the National Security Council staff, for example, described the bureaucratic character of U.S. foreign and security policy development during the Cold War as follows: “Participants who look to organizational interests to define national security interests seldom feel the need to engage in a full-scale analysis of a particular issue. Rather,

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their reactions reflect ‘grooved thinking’ – responding to a particular stimulus in a
havior we observe in political institutions reflects the routine way in which
people do what they are supposed to do. Simple stimuli trigger complex,
standardized patterns of action without extensive analysis, problem solving, or use
of discretionary power.”\footnote{March and Olsen (1989): *Rediscovering Institutions* [cf. footnote 9], p. 21.}

In regard to regional integration theory development, political scientists sub-
scribing to a *logic of appropriateness* are particularly interested in the institutionali-
zation, (re-)interpretation, and administrative enforcement of supranational rules
governing politically sensitive issue areas like EU Justice and Home Affairs.\footnote{For further reflections on the concept of political integration as institutionalization, see Stone Sweet, A. / W. Sandholtz (1998): “Integration, Supranational Governance, and the Institutiona-

Furthermore, Institutionalists assume that political processes leading towards the
establishment of an “Area of Freedom, Security and Justice” in the European
Union, for example, may not necessarily be efficient in the functional sense of
matching EU policies to the demands of the environment. Instead, such processes
allegedly tend to display historically inefficient institutional dynamics, competency
traps, and a struggle for legislative expression between different organizational
solutions actively looking for a problem. The following two sections document if
and to what extent the Biometric Passports Regulation reflects the interests,
worldviews, and resources of particular organizations.
3. American Homeland Insecurity after September 11th and the New Requirements of the Visa Waiver Program

One of the Bush administration’s reactions to the terrorist attacks of September 11, 2001 in New York City and Washington, D.C. was the establishment of the Department of Homeland Security (DHS). Since its inception in 2002, the DHS’s principal organizational mission has been to “prevent terrorist attacks within the United States.”14 The new emphasis placed on the prevention of terrorist attacks signaled a departure from the traditional concept of policing based on the presumption of innocence and the logical sequence: “if action A, then reaction B.” U.S. law enforcement operations after September 11th would be informed by the intelligence concept and the presumption of guilt. Intelligence-led policing aimed at preventing possible terrorist attacks or criminal offences in the future requires inter alia the preemptive collection, storage, and comparison of vast amounts of personal data.15

In cooperation with their colleagues from the Department of Defense, some of the internal security experts among the roughly 180,000 DHS staff members singled out biometric identification technology as a potentially useful tool for preventing terrorist attacks in the U.S.16 The DHS’s reliance on biometrics would be-

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15 The “preventive repression” of potentially unlawful or aggressive behavior may, of course, also be achieved by military means. The U.S. National Security Strategy of Sept. 2002 and the subsequent “preemptive strikes” against Iraq are cases in point. The Bush administration’s willingness to “act preemptively in exercising our inherent right of self-defense” vis-à-vis alleged enemies of freedom such as Iran and North Korea was reaffirmed in 2006. See United States of America, The President (2006): The National Security Strategy of the United States of America, Washington, D.C.: The White House, March 2006 [arena-web], p. 18.

come an integral part of the National Strategy for Homeland Security adopted by U.S. President George W. Bush in July of 2002. The President’s homeland security strategy conceived of biometrics as a way “to identify and find individual terrorists.”

In line with this counter-terrorist objective, the DHS began implementing a new border control and domestic surveillance program now known under the name of U.S. VISIT (United States Visitor and Immigrant Status Indicator Technology). The program envisioned that every foreign national entering and/or exiting U.S. territory as of January 1, 2004 would systematically be fingerprinted and subjected to a facial scan. These forcibly collected biometric data would then be checked against possible entries in criminal databases and terrorist watch lists. Furthermore, the foreign national’s fingerprints and facial image would be retained for decades by the U.S. government in order to “manage” the alien’s current and future stays in America.

As far as U.S. air and seaports are concerned, these plans were put into practice on January 5, 2004. Since then, millions of travelers have been subjected to biometric “enrollment” procedures and routine “one-to-many” checks against the inter-agency Terrorist Screening Database (TSDB) and the Federal Bureau of Investigation’s Integrated Automated Fingerprint Identification System (IAFIS). By mid-2005, U.S. VISIT had developed into “a database of more than 16 million fingerprint scans” and the DHS’s “primary program for watch list checking.”

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EU citizens and travelers from *visa waiver countries* (see below) were initially not targeted by *U.S. VISIT*. Following a period of transatlantic quarrel over the war in Iraq and a policy shift announced by former Homeland Security Secretary Tom Ridge in April 2004, however, the systematic biometric “enrollment” of all EU nationals visiting the United States was launched on September 30, 2004. Reciprocal measures against U.S. citizens visiting or doing business within the so-called “Area of Freedom, Security and Justice” have not been taken by the EU or its Member States.\(^20\)

Complementing the U.S. VISIT program, both the *USA Patriot Act* and the *Enhanced Border Security and Visa Entry Reform Act* stipulated that visitors from so-called *visa waiver countries* possessing new or newly issued travel documents must be able to present *machine-readable* and, more importantly, *biometric passports* to U.S. border control authorities by October 26, 2004. (This would be the exact date on which the JHA Council would ultimately agree on the Biometric Passports Regulation; see section 4.4.4 below). Non-compliance with these unilaterally determined requirements would be sanctioned by losing all privileges under the *Visa Waiver Program (VWP)*. In this case, the alien in question would need to apply for an ordinary non-immigrant visa at a U.S. consulate abroad (a rather lengthy process involving *inter alia* a personal interview) in order to gain lawful

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\(^20\) For the time being, the only country in the world daring to fingerprint and photograph U.S. citizens at ports of entry has been Brazil. The Brazilian foreign minister, Celso Amorim, reportedly justified these retaliatory measures as follows: “We respect and understand the security problems of the US but we need to find dignified treatment based on reciprocity for citizens of all countries.” *Financial Times Europe* of Jan. 13, 2004: “Brazil Stands Firm on Fingerprinting of US Visitors.” For further reading on the “non-reciprocity problem” in the context of EU enlargement, see European Commission (2006a): “Report from the Commission to the Council on visa waiver reciprocity with certain third countries…,” Commission doc. *COM (2006) 3 final* [arena-web].
temporary access to U.S. territory. Two of the fifteen EU Member States participating in the VWP, namely France and Italy, did not manage to issue biometric passports to their citizens by the prescribed deadline. In effect, French and Italian holders of newly issued passports are currently subject to U.S. visa requirements. The same holds true for Greek citizens and nationals of the ten new Member States except for Slovenia.

The American Enhanced Border Security and Visa Entry Reform Act of 2002 was drafted by F. James Sensenbrenner, a Republican from Wisconsin and Chairman of the House Judiciary Committee. Three years after the bill was signed into law, Sensenbrenner explained the counter-terrorist rationale of his successful legislative initiative in the following manner:

On September 11, 2001, the United States was attacked by 19 terrorists who flew planes into American landmarks, resulting in the largest single terrorist-related loss of American life in our history. The leaders of that terrorist attack either lived in Europe as resident aliens prior to the attack or traveled directly from Europe en route to the execution of this awful assault. Subsequent arrests in Spain, combined with examination of the terrorists' travel, have confirmed that the attacks were planned in Europe, in countries enjoying Visa Waiver Program status. Zacarias Moussaoui, the '20th terrorist' who has just this week announced he wants to plead guilty to the terrorist charges against him, came to the U.S. from France with a French passport.

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under the Visa Waiver Program. These sobering facts are no less relevant today than they were three years ago.²² Sensenbrenner’s straightforward views reflected the so-called 9/11 Commission’s conclusion that “for terrorists, travel documents are as important as weapons.”²³ Equating passports with weapons of mass destruction signaled the opening of a new front in the U.S.-led war on terror. The European Community’s Biometric Passports Regulation of December 2004 analyzed below was drawn up in this spirit.

4. The Negotiation of the Biometric Passports Regulation in the Council

4.1 International Determinants of the European Council’s Biometric Policy Mandate

In June 2003, i.e. about a year after the adoption of the Enhanced Border Security and Visa Entry Reform Act in the United States, the European Council called for “a coherent approach [in the EU] on biometric identifiers or biometric data, which would result in harmonised solutions for documents for third country nationals, EU citizens’ passports and information systems (VIS and SIS II).”²⁴ The European Council’s wish for the equal biometric treatment of EU citizens and third country nationals had emerged in the framework of the Group of Eight (G8). The G8 is an international regime dealing with the global governance of trade, terrorism, and various other issues. In addition to the heads of state or government of Britain, France, Germany, and Italy, the EU is represented in the G8 by the President of the European Council and the President of the European Com-


²⁴ European Council (2003): “Presidency Conclusions – Thessaloniki European Council, 19 and 20 June 2003” [arena-web], no. 11. In regard to the VIS and SIS II, see section 4.2 below.
mission. The *primus inter pares* among the G8 countries, however, is the U.S.A. This section illustrates how the U.S. government managed to influence the policy agenda of the European Council via the G8 and the International Civil Aviation Organization (ICAO).

Responding to U.S. requests acknowledged by the Canadian G8 Presidency, the *G8 Migration Experts* held a series of meetings in 2002 dedicated to facilitating the introduction of biometric passports on a *global scale*. By October 2002, the G8 Migration Experts had agreed upon a number of biometric policy principles, including the *principle of universality*. In splendid isolation from national parliaments or any other kind of democratic scrutiny, the world’s most industrialized nations collectively decided that “a full and complete common interoperable technical standard [shall] be recommended to all nations of the world as the basis for interoperable biometric authentication of machine readable travel documents.”

In order to achieve the ambitious goal of establishing global biometric standards, the G8 Migration Experts organized joint meetings with the relevant working parties of the ICAO, including the *Technical Advisory Group on Machine Readable Travel Documents*. Participation in the latter group was restricted to the G8 states (with the exception of Italy) and six other countries. According to Maura Harty, Assistant Secretary of State for Consular Affairs, the U.S. government “strongly advocated support for ICAO leadership in biometrics [within the framework] of the G8.” Furthermore, the Americans “played a leadership role in ICAO working groups to advocate the successful inclusion of biometrics in travel

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documents.” By March 2003, the ICAO had drawn up a draft report recommending facial recognition as “the globally interoperable biometric for machine-assisted identity confirmation.” Furthermore, the draft ICAO text suggested that “member states may elect to use fingerprint and/or iris recognition as additional biometrics.”

The ICAO’s draft received a warm welcome at the G8 Justice and Home Affairs ministerial summit of May 5, 2003 in Paris. During this meeting, the G8 states reiterated their determination “to work on developing a common framework and standards within the competent international bodies.” Three weeks later, the ICAO formally endorsed facial images as the globally interoperable passport biometric. The Thessaloniki European Council’s policy guidelines of June 2003 were formulated in response to this outcome.

26 Harty, M. (2004): Statement by Assistant Secretary of State for Consular Affairs Maura Harty before the House Select Committee on Homeland Security, Subcommittee on Infrastructure and Border Security, Washington, D.C., Jan. 28, 2004 [arena-web], p. 4. Several Commission officials disapproved of the Bush administration’s seemingly selective engagement in international institutions and regimes like the ICAO and G8. The former head of the Political and Academic Affairs Section of the European Commission’s Delegation to the U.S., for example, openly expressed his discontent with a situation in which “the United States views itself as the key player but is not prepared to seek compromises with other global players, particularly when it considers that important national interests are at stake.” Cameron, F. (2002): “Utilitarian Multilateralism: The Implications of 11 September 2001 for US Foreign Policy,” in: Politics, Vol. 22, No. 2, pp. 68-75, here: p. 68.


29 Cf. International Civil Aviation Organization (2003b): Biometric Identification to Provide Enhanced Security and Speedier Border Clearance for Travelling Public, Press Release, May 28, 2003 [arena-web]. One may note in this context that the ICAO also recommended the use of so-called contactless integrated circuit chips for storing the biometric data in the passport or travel document. The ICAO’s recommendations were incorporated into the G8 Action Plan to Enhance Transport Security and Control of Man-portable Air Defense Systems (MANPADS) endorsed by the G8 leaders at the Evian Summit of June 1-3, 2003 [arena-web].
4.2 The Commission’s Proposals on Biometric Visa and Residence Permits

By September 2003, the Commission’s services had, as requested by the European Council, drawn up two draft EC Regulations requiring Member States’ authorities to integrate biometric identifiers into visa and residence permits. The European Commission justified its proposal of including both facial images and fingerprints into third country nationals’ travel documents by resorting to the police-specific argument that “the fingerprint [provides] the best solution for so-called ‘background checks’, the identification (one-to-many searches) in databases.” Such checks in Automated Fingerprint Identification Systems (AFIS), in turn, would allegedly “contribute towards internal security and combating terrorism.”

In order to meet the EU’s counter-terrorist policy objectives, both the second generation Schengen Information System (SIS II) and the new Visa Information System (VIS) were equipped with a capacity to process biometric data, i.e. fingerprints and digital photographs. In the end, however, the Commission was forced to withdraw one

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30 European Commission (2003): “[Combined] Proposal for a Council Regulation amending Regulation (EC) 1683/95 laying down a uniform format for visas / Proposal for a Council Regulation amending Regulation (EC) 1030/2002 laying down a uniform format for residence permits for third-country nationals,” Brussels, Sept. 24, 2003, Commission doc. COM (2003) 558 final [arena-web], pp. 3-4. On national level, the fingerprinting of visa applicants had been framed as a measure for fighting illegal immigration. Nicolas Sarkozy, the French Minister of the Interior, for example, reportedly justified closely related legislative initiatives in the French Republic as follows: “Nearly 80% of people without papers came to France on a three-month tourist visa. Once on our territory they tear up their papers, or lose them, and thus become impossible to expel because no one can tell where they are from. … If you have your papers you are welcome in France. If you have false papers, or if you have no papers, you will be accompanied to your country of origin.” BBC News of April 30, 2004: “France to fingerprint tourist visa applicants.”

of its hastily drawn up legislative proposals (namely the one calling for biometric visa) due to the unforeseen and apparently insurmountable technical problem of “interference between several chips in one passport.”

In effect, the biometric data of visa applicants will only be stored in the VIS.

In the eyes of some political actors, the European Commission’s legislative proposal on biometric visa and residence permits served as a blueprint for subsequent legislative action in regard to EU citizens’ passports. After all, the European Council had explicitly called for a coherent approach towards third country nationals and EU citizens (see section 4.1 above). Following a bilateral meeting with U.S. Homeland Security Secretary Tom Ridge on October 29, 2003 in Berlin, the former Federal Minister of the Interior of Germany, Otto Schily, thus announced a transatlantic “consensus” according to which two mandatory biometric identifiers, i.e. facial images and fingerprints, should be included in future European-made passports and travel documents. Secretary Ridge supplemented Schily’s statement by underlining the principle that “transatlantic agreement, U.S.–EU agreement, leads the international discussion.” Shortly before stepping down as Homeland Security Secretary, Tom Ridge explained why he had supported the

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33 The newly installed and hopelessly understaffed European Data Protection Supervisor assumes that “the VIS will contain (and allow exchange of) biometric data on an unprecedented scale (20 million entries on visa applications a year) reaching a potential 100 million entries after the maximum retention period of five years.” European Data Protection Supervisor (2006): Annual Report 2005, Luxembourg: Office for Official Publications of the European Communities [arena-web], p. 38.

German interior minister’s plans for the so-called layered biometric identification of both third country nationals and EU citizens back in 2003:

I, for one, believe if we’re going to ask the rest of the world to put fingerprints on their passports, we ought to put our fingerprints on our passports. I mean you can go out to the rest of the world and say we’d like to engage you in this discussion. We’d like you to consider doing these things. I think you’re in a much better position to discuss issues if you have made the commitment to getting them done yourself. … One of my recommendations to Mike [Chertoff, Ridge’s successor as Homeland Security Secretary,] is be aggressive. Go after 10 fingerprints on the passport. It’s a lot easier to negotiate with your allies if you’ve already done what you’re asking them to do.\(^{35}\)

4.3 The Commission’s Proposal on Biometric Passports

By February 2004, the Commission’s Directorate-General “Justice, Freedom and Security” had produced its legislative proposal for a Biometric Passports Regulation.\(^ {36}\) JHA Commissioner Vitorino personally briefed the members of the Justice and Home Affairs Council about “his” legislative initiative on February 19th.\(^ {37}\)

The EC Treaty as amended by the Treaty of Nice, i.e. the legal foundation of the supranational “First Pillar” of the EU, did not provide a mandate for the

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compulsory biometric “enrollment” of all EU citizens in order to identify terrorist suspects among them. As a matter of fact, the heads of state or government had not even been able to agree upon the introduction of a common European passport during the Nice intergovernmental conference. The Commission had thus decided to frame its draft Biometric Passports Regulation as a legal act developing the Schengen acquis on external border control in general and article 62 par. 2 a) of the EC Treaty in particular. Schengen–related measures create different sets of rights and obligations for the UK, Ireland, Denmark, Norway, and Iceland, respectively. While Norway, a non-EU country, is de facto bound by Schengen–related Community law, for example, the UK, an EU Member State, is frequently not allowed to take part in such schemes. Against this background, the legality of the Biometric Passports Regulation would later be challenged by the UK before the European Court of Justice.

In regard to the choice of biometric identifiers to be included in EU citizens’ future “e-Passports,” the European Commission suggested the mandatory

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39 This treaty provision authorized the Council, i.e. the former Schengen Executive Committee, to adopt “measures on the crossing of the external borders of the Member States which shall establish standards and procedures to be followed by Member States in carrying out checks on persons at such borders.” Large parts of the Schengen acquis as it stood when it was incorporated into the EU on May 1, 1999 were published in the Official Journal. See Council of the EU (2000): “The Schengen acquis as referred to in Article 1 (2) of Council Decision 1999/435/EC of 20 May 1999,” in: Official Journal of the European Communities of Sept. 22, 2000, pp. 1-473 [arena-web]. Detailed rules and standard operating procedures for conducting border checks in the Schengen area are contained in the so-called Common Manual. Parts of this constantly evolving document have also been made publicly available. See initially Council of the EU (2002): “Common Manual,” in: Official Journal of the European Communities of Dec. 16, 2002, Vol. C 313, pp. 97-335 [arena-web].


inclusion of a facial image and, in noteworthy contrast to its legislative proposals on biometric visa and residence permits for third country nationals, the optional incorporation of fingerprints. Logically inconsistent with the latter suggestion, however, the Commission also called for the establishment of a “centralized, biometrics-based ‘EU passport register’ which would contain the fingerprint(s) of passport applicants.” According to the Commission’s services, the political purpose of such a central database of EU citizens’ fingerprint biometrics (presumably managed by the European Commission in the same way as the fingerprint database EURODAC) would be “to enable background searches (one-to-many).”

The Commission’s long-term objective of creating a centralized AFIS covering all EU citizens was apparently inspired by the concept of end-to-end security:

From a security point of view, in order to create the beginning of true ‘end-to-end’ security, a centralised European register of issued passports (and possibly other documents used for travel purposes) could be created in a long term perspective.

The political objective of generating a “true end-to-end capability for analysts and decision-makers” had initially been formulated in the framework of the American Total Information Awareness program. According to Pete Aldridge, U.S. Under-secretary of Defense, the latter initiative aimed at “searching vast quantities of data to determine links and patterns indicative of terrorist activities.” The Total Information Awareness program was terminated in July 2003 after the U.S. Congress decided to cut off funding for the seemingly totalitarian scheme. The concepts of

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43 Commission (2004): Proposal [cf. footnote 36], pp. 4, 7, and 8, respectively.

“end-to-end security” and “total information awareness,” however, would evidently continue to inspire policymakers in the European Union.\textsuperscript{45}

\section*{4.4 Intergovernmental Negotiations in the Justice and Home Affairs Council, March – October 2004 \textsuperscript{46}}

\subsection*{4.4.1 Initial Scrutiny by the Visa Working Party}

As previously mentioned, the draft Biometric Passports Regulation was framed as a Schengen-related measure on external border control. That alone, however, would not yet answer the question of which of the JHA Council’s various working groups should deal with the legislative dossier.\textsuperscript{47} What, then, motivated the decision to assign this delicate task to the \textit{Visa Working Party}? The \textit{administrative expertise} of the members of this particular working group apparently played a decisive role in this context. To borrow the words of an Irish civil servant temporarily presiding over the intergovernmental negotiations in the Council, “the reason why this matter was dealt with in the Visa Working Party was that it could be assumed that this group possessed the necessary experience to


\textsuperscript{46} In this section I draw on a number of previously unreleased or only partially accessible primary sources. I would like to thank the General Secretariat of the Council for granting me full access to documents 10648/04, 11489/04, 11489/1/04 REV 1, 11489/1/04 REV 1 ADD 1, and 12867/04. Except for the opinions of the Council Legal Service, I have also been granted full access to documents 7372/04, 7372/1/04 REV 1, and 10070/04. The documents cited below may therefore deviate from those stored in the Council’s public register (http://register.consilium.eu.int).

deal with this matter as it had dealt with the draft regulations on introducing biometrics into visas and residence permits.”48 As we shall see in due course, the effect of activating the Visa Working Party was that a number of its members would reason by analogy and call for the introduction of both facial images and fingerprints into EU citizens’ passports.

The Visa Working Party initially scrutinized the draft Biometric Passports Regulation on March 11, 2004. The first reading of the European Commission’s proposal in the Council thus fatefully coincided with the train bombings in Madrid. The latter terrorist attack, evidently carried out by Islamist jihadists rather than Basque separatists, left nearly two hundred citizens dead and more than two thousand wounded.

Two weeks after the Madrid bombings, a tragic event frequently referred to as “3/11” or “Europe’s 9/11,” the European Council adopted a Declaration on Combating Terrorism which, beyond expressing the European heads of state or governments’ solidarity with the victims of the terrorist attacks, contained the following passages:

[The] Member States and the acceding States shall … mobilise all the instruments at their disposal, including military resources, to prevent the terrorist threat in the territory of one of them…. Improved border controls and document security play an important role in combating terrorism. … The European Council instructs the Council to adopt by the end of 2004 the Commission’s proposals for the incorporation of biometric features into passports and visas…..”

In effect, Europe’s political leaders had reaffirmed the counter-terrorist nature of the draft Biometric Passports Regulation. How precisely the biometric “enrollment” of all EU citizens would contribute to preventing future terrorist attacks by

49 European Council (2004): Declaration on Combating Terrorism of March 25, 2004 [arena-web], pp. 7-8 and 18, respectively.
third country nationals on European soil, however, had not been laid out by the heads of state or government.\textsuperscript{50} At any rate, the European Council’s Declaration on Combating Terrorism reinforced the sense of urgency with which this legislative dossier was supposed to be dealt with by the JHA Council. As I will document in section 4.5 below, the European Council’s deadline for the adoption of the Biometric Passports Regulation by the Council of Ministers would barely be met.

Let me return to the very first reading of the draft Regulation in the Visa Working Party. Only a few hours after the Madrid bombings, the German delegation, supported by France and Italy, expressed its discontent with the Commission’s seemingly too modest proposal. Acting upon instructions from Berlin, the German Visa Working Party representative was “of the opinion that fingerprints should be mandatory.” This “hawkish” stance was justified by recognition of legal precedence rather than comprehensive analysis. Germany, France, and Italy thus openly questioned “[why] the draft proposal did not follow the two recently adopted texts, integrating both [a] facial image and fingerprints into the uniform formats for visa and residence permits.” Sweden and Finland, on the other hand, expressed that they “would have difficulty in accepting a possible centralised [fingerprint] register [of EU citizens] as mentioned in the [Commission’s] explanatory memorandum.” Furthermore, the Finnish delegation drew attention to the fact that it would be “inconsistent to suggest the storage of fingerprints in the register, when fingerprints were not contained [on an] obligatory [basis] in the passport.” Responding to these critical remarks by the Nordic countries, the Commission representative noted that “the idea [of a central fingerprint register] had been launched as a long-term perspective” and that there was arguably “no

need to discuss it in detail at this stage.” The latter subject was never brought up again in the working group.

During the Visa Working Party’s second reading of the draft bill on April 7, 2004, “France reiterated its request for the fingerprints being a mandatory biometric identifier. Italy, Spain, the UK, and Germany supported this point of view.” This would be the first empirical manifestation of a coordinated policy stance by the members of the Group of Five (G5), the informal group of interior ministers and government officials of France, Germany, Italy, Spain, and the UK (see section 4.4.4 below). It would also be the first time that one of the political heavyweights participating in the G5, namely Germany, would, “in the interest of a timely adoption of the measure,” suggest that “fingerprints could become mandatory only at a later stage.” The Irish Presidency, on the other hand, was fully aware of the political sensitivity of amending the draft Regulation in such a manner. It therefore “concluded that, as suggested by the Commission, the question of whether the second biometric identifier being mandatory or not should be decided upon by Ministers.” The civil servants’ need for “urgent political guidance” was reiterated during the Visa Working Party’s third meeting on May 11th.

Meanwhile, the French, German, Italian, and British interior ministry representatives were negotiating directly with their American counterparts in the framework of the G8. Even though little is publicly known about decision-making processes at the G8 Sea Island summit of May 2004, we do know that these inter-executive exchanges led to the following policy statement by the G8 Justice and Home Affairs Ministers: “Work towards introducing passports with biometric identifiers will be accelerated. States will take the necessary steps to intro-

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51 Council of the EU (2004f): Council doc. 7372/04 VISA 46 COMIX 183 [arena-web], pp. 2 and 4, respectively.
52 Council of the EU (2004g): Council doc. 7372/1/04 REV 1 VISA 46 COMIX 183 [arena-web], p. 6.
53 Council (2004e): doc. 10070/04 [cf. footnote 48], p. 3.
duce such documents on the basis of global interoperability.”

At the press conference succeeding the G8 JHA summit, the acting G8 President, U.S. Homeland Security Secretary Tom Ridge, underlined the G8’s leadership role in establishing globally interoperable biometric standards:

[It] is generally agreed that as we reach for biometric standards, as we look for ways to authenticate the identity of people, or to verify the authenticity of documents, that the G-8 take a leadership role in identifying what those biometric parameters would be and the technology that we would ... encourage our colleagues from around the world to use.

4.4.2 Towards a Political Agreement under the Irish Presidency

Back in Brussels and Dublin, the civil servants of a “medium-sized” Member State kept busy with preparing the JHA Council in June, i.e. the last meeting of the Justice and Home Affairs ministers under the Irish Presidency. Since intergovernmental negotiations on Visa Working Party level had effectively stalled, the outgoing Presidency activated the Strategic Committee on Immigration, Frontiers and Asylum / Mixed Committee (SCIFA/COMIX) in order to move the biometric passports agenda forward. SCIFA/COMIX was charged with answering two politically decisive questions, namely “1) Should the passport contain one or two mandatory biometric identifiers?” and “2) Should the second biometric identifier,


56 The designation Mixed Committee (COMIX) indicates the formal involvement of third countries associated with the Schengen regime. While the representatives of Norway, Iceland, and now also Switzerland may use the Mixed Committee procedure for discussing particular problems with their EU counterparts, formal decisions on Schengen-related legislative measures have to be taken by the JHA Council as such (cf. section 4.3 above).
either mandatory or optional, be fingerprints or iris recognition?” 57 Having met twice on May 19th and June 1st, SCIFA/COMIX concluded that “most delegations were in favour of having fingerprints as the second biometric identifier, but were divided on whether the identifier should be mandatory or optional.” 58 Except for definitely ruling out iris recognition, SCIFA/COMIX had not been able to solve the political problem at hand.

In light of this deadlocked situation, the Presidency placed the draft Biometric Passports Regulation as a so-called “B” item, i.e. as an issue requiring further political discussion, on the agenda of the Mixed Committee on Ministerial level. 59 Ironically, this Schengen-related meeting of the EU plus Norway and Iceland would be chaired by Minister McDowell of Ireland, i.e. by the political representative of a Member State not fully participating in the Schengen scheme. 60 During its working session on June 8, 2004, the Mixed Committee on Ministerial level “broadly agreed that the EU citizens’ passports should contain a first mandatory biometric identifier, a facial image, and an optional one, in principle fingerprints.” 61 At last, a political agreement had been reached. Against this background, “the Mixed Committee [on Ministerial level] instructed the competent bodies to continue their examination of the proposal in the light of these guidelines.” 62

57 Council of the EU (2004h): Council doc. 9510/04 VISA 91 COMIX 336 [arena-web], pp. 1-2. The use of iris recognition instead of fingerprints had initially been promoted by the UK and Finland, with Germany suggesting the iris as yet another optional biometric identifier. In light of the overall lack of intergovernmental support for iris recognition and the Council’s ultimate choice of fingerprints, I shall spare the reader with further details on these largely technical discussions.


60 During the first six months of the year, Mixed Committee meetings are chaired by the rotating Council Presidency. During the second half of the year, the chair is occupied by a Schengen-affiliated third country.


During the press conference after the Council meeting, former JHA Commissioner Vitorino praised the ministers’ collective decision which, it may be recalled, was fully in line with the Commission’s proposal. The Commissioner also underlined the close link between reaching an early agreement on the biometric passports issue in the JHA Council, on the one hand, and the possible extension of the U.S. deadline for the Visa Waiver Program, on the other:

[We] will [now] be in a condition to do our best to guarantee that the new model of European passports will start being issued by the end of 2005. As you know, this is relevant to guarantee the Visa Waiver Program, especially with the United States of America, and I hope that today, at the precise hour I am talking to you now, the Congress of the United States of America will be adopting a bill that will postpone the requirement of biometric features in the passports for those countries who benefit from the Visa Waiver Program for an extra year, this means until October of 2005. So, I hope that the decisions taken today here in Luxembourg and the decisions that are being taken in Washington, D.C. will converge in order to keep a free area of travel in the transatlantic relationship.  

Supplementing the Commissioner’s statement, Minister McDowell, acting President of the JHA Council, justified the ministers’ collective political decision by emphasizing the practical hazard of going beyond internationally agreed upon technical standards for biometric passports:

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[We] have to realize that we live in an international world, that we have bilateral relations on these matters with countries such as Australia, Canada, New Zealand, United States, and other countries, and you can’t simply live in a vacuum. And, you know, what becomes standard internationally is likely to be the norm in Europe as well. But we don’t want to be in a position that we are ahead of the world, and then be in a position that our technology and our passports are effectively not useable by other countries, or not recognizable by their machines and all the rest of it.  

Such practical concerns had also been raised in the framework of the G8 and ICAO (cf. section 4.1 above). The following statement by Joel F. Shaw, a former U.S. liaison officer with the ICAO, may illustrate this line of reasoning. Asked about “what can go wrong if visa waiver countries are rushed to meet the deadline?”, Mr. Shaw responded verbatim:

Well, I think the biggest problem will be they’ll all show up with a passport that won’t work…. You’ll have chaos at Homeland Security because they’ll show up, and it says I can’t read the data from the chip, I can’t identify the person, then immediately the person is suspect.  

While acknowledging these practical difficulties, both the DHS and State Department continued exerting massive political pressure on VWP countries’ governments. A testimony by Catherine Barry, Managing Director of the Office of Visa Services at the U.S. State Department, sheds light on these diplomatic efforts:

On the diplomatic front, we will continue to pursue vigorous efforts at the highest levels to ensure that the VWP countries remain committed to introducing biometric passports as quickly as possible. Senior [State] Department officials have and will continue to use every opportunity in regularly scheduled meetings with officials from the European Union, the G-8 and the Asia-Pacific Economic Commission to challenge other governments to act

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64 Council (2004m): 2588th Council meeting, audio record [cf. footnote 63], at 18:15 min.; transcription JPA.  
aggressively. This issue will be a top priority at all VWP Embassy sections, not just the consular section."

The political agreement reached within the *JHA Council of the EU* in June 2004 was administratively acknowledged during a subsequent meeting of the *Visa Working Party*. In effect, article 1 par. 2 of the draft Biometric Passports Regulation took the following shape at the end of the Irish Presidency:

The passport and travel documents shall include a storage medium with sufficient capacity, which shall be highly secured and shall contain a facial image. Member States may also include fingerprints in interoperable formats.67

### 4.4.3 Re-opening the Negotiations under the Dutch Presidency

The incoming Dutch Presidency of the Council focused its attention on resolving the remaining *technical* problems connected with the draft Biometric Passports Regulation. Some of these problems stemmed from the challenge of meeting the technical requirements for globally interoperable contactless chips and passport readers laid down by the ICAO in May 2004.68 After three consecutive meetings presided over by the Netherlands, the *Visa Working Party* had completed the "technical examination" of the draft bill.69


69 Cf. *inter alia* Council of the EU (2004o): Council doc. 11489/04 VISA 140 COMIX 474 [arena-web]; and Council of the EU (2004p): Council doc. 11489/1/04 REV 1 VISA 140 COMIX 474 [arena-web]. Inter-administrative coordination processes of this kind illustrate the well-known fact that the Justice and Home Affairs Council of the EU is not an ordinary legislative organ but rather a *hybrid* between legislative and executive body. The latter, of course, also holds true for the European Commission’s DG “Justice, Freedom and Security” and the legislative and executive functions assigned to it.
Much to the chagrin of the Commission’s political leadership, several governments now suddenly declared that they wished to re-open the negotiations on ministerial level in regard to the future legal status of fingerprint biometrics. These demands were voiced during the Visa Working Party’s meeting on September 28, 2004. On this occasion, the German, French, Italian, and Greek delegations stated “that they were still of the opinion that the second identifier should become mandatory … and wished to address this question again at political level.”

Four weeks later, the JHA Council formally reversed its initial political decision and called for the mandatory inclusion of fingerprints into EU citizens’ passports. How did this remarkable policy shift come about?

Responding to the requests inter alia of Germany, France, and Italy, the Dutch Presidency, assisted by the Council Secretariat, arranged for yet another meeting of SCIFA/COMIX on October 6th. Even though the Council Presidency had “[invited] the Strategic Committee on Immigration, Frontiers and Asylum [to] address [the] outstanding questions in order for the text to be submitted to Coreper as soon as possible,” the meeting did not yield any concrete results. SCIFA/COMIX simply could not agree on a new wording of article 1 par. 2 of the draft Regulation. However, the meeting of the Strategic Committee revealed that the German, French, Italian, and Greek demands for the mandatory inclusion of fingerprints would be supported by the governments of Spain, Slovenia, Malta, and Lithuania. Poland and Slovakia, on the other hand, responded by formally entering scrutiny reservations, while Estonia argued that “changing the draft proposal at this stage would compromise the timetable for applying the measure.”

The Estonian position was representative of the stance of several other new Member States who had indicated that they would not manage to produce technologically

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highly demanding “e-Passports” within a timeframe of less than two years. The final round of intergovernmental negotiations in the Justice and Home Affairs Council was about to commence.

4.4.4 Rushing Towards a “General Approach”

With only twelve working days left before the JHA Council meeting scheduled for October 26, 2004, i.e. the initial date of expiry of the U.S. deadline for legislative action concerning biometric passports, the unfinished dossier now moved up from SCIFA to COREPER (Part Two). In order to accommodate the views of the Norwegian and Icelandic ambassadors, the issue was dealt with “in the margins of COREPER” by the Mixed Committee at Senior Officials level on October 14th. Before discussing the biometric passports dossier at around 3 pm that Thursday afternoon in Brussels, COREPER had worked through an impressive agenda of 43 other items. Among the numerous policy issues scrutinized more or less thoroughly that day by the Permanent Representatives were the possible provision of macro-financial assistance to Serbia and Montenegro and the administration of Community tariff quotas for Icelandic fishery products.74

The Permanent Representatives’ meeting resulted in a so-called general approach which would be formally endorsed by the politically responsible ministers on October 26th. The ambiguous aspect of this general approach was that the ambassadors of Sweden, Finland, Estonia, and Latvia had clearly stated that “they could not accept this re-opening of discussions on the second biometric identifier to become mandatory.” Given the unanimity requirement in the Council, deliberate non-acceptance on the part of a single delegation, let alone numerous delegations, would have resulted in legislative deadlock. In the end, however, none of the national representatives mentioned above nor any other EU government explicitly

73 Council of the EU (2004s): Council doc. 13186/04 VISA 181 COMIX 599 [arena-web], p. 3.
“vetoed” the compulsory fingerprinting of the entire EU population of approximately 450 million people.

The general approach hammered out by COREPER consisted of connecting two analytically separate issues with one another, namely the question of whether EU citizens should be fingerprinted on a mandatory basis, on the one hand, and the timeframe for the enforcement of the Regulation in administrative practice, on the other. COREPER, in other words, addressed the politically salient issue of EU citizens’ possible multiple biometric “enrollment” by scrutinizing the administrative feasibility of such a procedure. A Council Secretariat official recalled the emergence of the general approach within COREPER as follows:

[The] discussions showed that the two outstanding issues are closely linked, as delegations indicated that the introduction of even one biometric identifier could not be accomplished within the timeframe of 12 months set out in the original Commission proposal.

Against this background, the Permanent Representatives settled for the following package deal:

On the basis of the above, there seemed to be a basis for an agreement among delegations to the following solution:

- the first mandatory biometric identifier, i.e. facial image, should apply at the latest 18 months after the adoption of the technical specifications,
- the second mandatory biometric identifier, i.e. fingerprints, should apply at the latest 36 months after the adoption of the technical specifications.

This timeframe would be in line with the one set for the visa stickers and residence permits.

Having found an apparently feasible administrative solution to the political problem of EU citizens’ compulsory and multiple biometric “enrollment,” i.e. a solution which would meet the European Council’s request for “harmonized solutions for documents for third country nationals [and] EU citizens’ passports” (cf. section 4.1 above), COREPER suggested the following course of action to the members of the Justice and Home Affairs Council:
The Permanent Representatives’ Committee / Mixed Committee at the level of Senior Officials invites the Justice and Home Affairs Council / Mixed Committee at Ministerial Level to endorse the general approach set out above at its session on 26 October 2004, pending the opinion of the European Parliament.\footnote{Council of the EU (2004u): Council doc. 13490/04 VISA 188 COMIX 613 [arena-web], pp. 2-3.}

The JHA Council, in other words, was “asked to confirm the agreement already reached at technical level.”\footnote{Council of the EU (2004v): Background Note: Justice and Home Affairs Council, Luxembourg, 25-26 October 2004, General Secretariat of the Council: Press Service, Oct. 20, 2004 [arena-web], p. 5.} The justice and interior ministers of the EU would indeed approve of the general approach developed by COREPER. The Justice and Home Affairs Council’s decision, in turn, was formally endorsed by the Mixed Committee (EU + Norway and Iceland).\footnote{Cf. Council of the EU (2004w): Council doc. 13991/04 JAI 407 COMIX 647 [arena-web], p. 2.}

The consent of the Council had been “nailed down,” so to speak, by the Group of Five (G5), i.e. by the interior ministers of France, Germany, Italy, Spain, and the UK, during their meeting of October 18\textsuperscript{th} in Florence. In a blunt display of political power, the privileged members of this European “homeland security directorate” and self-declared “policy laboratory” announced that they had collectively agreed upon the mandatory inclusion of fingerprint biometrics into EU citizens’ passports.\footnote{Cf. Corriere Della Sera of Oct. 18, 2004: “Impronte digitali sul passaporto Ue”; eGovernment News of Oct. 19, 2004: “G5 Countries Agree to Include Fingerprint Scans in Passports”; and European Voice of Oct. 21, 2004: “Biometric ID set for backing from ministers.” The G5 meeting in Florence brought together Dominique de Villepin (Minister for the Interior, France), Otto Schily (Federal Minister for the Interior, Germany), Giuseppe Pisanu (Minister for the Interior, Italy), José Antonio Alonso Suárez (Minister for the Interior, Spain), and David Blunkett (Secretary of State for the Home Department and Home Secretary, United Kingdom). Poland joined this group in March 2006, transforming the former G5 into the G6. The first meeting of the G6 in Heiligendamm, Germany, \textit{inter alia} resulted in calls for “police access to EURODAC and full access of authorities responsible for internal security to the VIS” and for the intergovernmental exchange of DNA and fingerprint biometrics according to the “principle of availability.” The latter had already been agreed upon by Austria, Belgium,
bers to give their blessing to these proposals on October 26th, i.e. to formally confirm a policy position lending support to the general approach hammered out by COREPER on October 14th.

The political demonstration of the G5 had the desired effect. The Justice and Home Affairs ministers of the EU basically “waved through” the legislative item. This course of action was only reasonable considering the impressive agenda of the Justice and Home Affairs Council meeting of October 26th in Luxembourg. At the press conference after the actual Council meeting, the head of the European Commission’s Directorate-General “Justice, Freedom and Security,” Jonathan Faull, accordingly underlined

[the] extraordinary range of importance of the subjects that we are dealing with here, which shows how important the work of the Justice and Home Affairs Council is. We’ve talked about biometrics in passports, we’ve talked about terrorism, we’ve talked about drugs, we’ve talked about pollution disasters, we’ve talked about police records for pedophiles and other criminals, we’ve talked about durable solutions for refugee crises, we’ve talked about re-admission agreements this afternoon, we will see the adoption, the creation of the European Borders Agency … This is a remarkable agenda, and I thank very much the Dutch Presidency for having shepparded our work to this stage on these important topics in such a smooth and consensual way. … The agenda for Justice and Home Affairs is frankly a dizzying one, it’s enormous!


79 Council of the EU (2004x): 2613rd Council meeting – Justice and Home Affairs, Press Conference, audio record [arena-web], at 13:45 min.; transcription JPA. Jonathan Faull was substituting for António Vitorino who had given his last press conference as JHA Commissioner one day earlier. In his last oral statement to the press, Vitorino tried to strike a balance between European engagement in the U.S.-led war on terror, on the one hand, and upholding basic democratic freedoms and fundamental rights, on the other: “[The] events that might occur, especially in the fight against terrorism, will require from us ambition, determination, and politi-
Director-General Faull was apparently not the only one feeling a bit “dizzy” after having worked his way through the “Multi-annual Programme for the Area of Freedom, Security and Justice” (the so-called “Hague Programme” succeeding the “Tampere Programme”), four Commission Communications on “Prevention, Preparedness and Response to Terrorist Attacks,” an “orientation debate” on the integration of third country nationals, and numerous other items. In light of this “dizzying” policy agenda, the Minister of the Interior and Kingdom Relations of the Netherlands and acting President of the JHA Council, Johan Remkes, could not even recall what the Council had actually agreed upon a few hours earlier in regard to the Biometric Passports Regulation. The Dutch Minister of the Interior thus told the journalists that

[it] has been decided in principle to include one mandatory identifier [into the passport], namely the facial scan, and one optional identifier which the Member States would be free to include. And that would be the iris scan – eh, sorry, it has to be the fingerprint.\(^80\)

The Council’s official press release was a bit clearer than Minister Remkes in this respect. However, the document fell short of explaining why the Justice and Home Affairs ministers had ultimately decided to include fingerprints into EU citizens’ passports on a mandatory basis. The press release merely informed the interested public that “the integration of biometric identifiers is an important step towards the use of new elements in the perspective of future developments at Eu-
ropean level.” As documented in section 4.3 above, the “long-term perspective” envisioned by the European Commission in this context was the establishment of a “centralized, biometrics-based ‘EU passports register’ which would contain the fingerprint(s) of passport applicants [and would] enable background searches (one-to-many).” With the JHA Council’s political decision of October 26, 2004, the European Community had moved a decisive step closer to realizing the Commission’s long-term biometric control objectives.

4.5 Supranational Parliamentary Critique and Formal Adoption by the Council

By November 23, 2004, the Council Secretariat, drawing on its professional expertise in redrafting legal texts, had produced a revised and consolidated version of the Biometric Passports Regulation. Article 1 par. 2 of the draft Regulation now read as follows:

The passports and travel documents shall include a storage medium which shall contain a facial image. The Member States shall also include fingerprints in interoperable formats.

One day later, the head of the Council Legal Service forwarded the draft legislative act as endorsed by the JHA Council to the President of the European Parliament (EP). The Council Secretariat used this opportunity to remind the EP of the European Council’s deadline for the adoption of the Biometric Passports Regulation by the end of 2004.

The EP met the (European) Council’s request for immediate parliamentary endorsement. In spite of the Council’s latest amendments to the Commission’s proposal, however, the EP decided to base its legislative resolution of December

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exclusively on the Commission’s politically outdated draft. Symptomatic of the EP’s political marginalization under the consultation procedure, the Euro-parliamentarians’ legislative resolution therefore suggested amendments to a draft bill calling for the optional inclusion of fingerprint biometrics.

In regard to article 1 par. 2 of the draft Regulation as proposed by the Commission in February 2004 (cf. section 4.3 above), the EP wished to add the following sentence to this decisive passage of the legal act: “No central database of European Union passports and travel documents containing all EU passport holders’ biometric and other data shall be set up.” The EP’s disapproval of the Commission’s long-term objective of establishing a central biometric register had initially been voiced by the EP’s Committee on Civil Liberties, Justice and Home Affairs. In fact, the Committee’s report of October 25, 2004 had concluded that

[the] setting up of a centralised database would violate the purpose [of the Biometric Passports Regulation] and the principle of proportionality. It would also increase the risk of abuse and function creep. Finally, it would increase the risk of using biometric identifiers as ‘access keys’ to various databases, thereby interconnecting data sets.

The committee’s report largely reflected the views of Carlos Coelho, the EP’s rapporteur on the dossier. Coelho, a Portuguese MEP affiliated with the European People’s Party (Christian Democrats) and European Democrats, the EP’s largest political group at the time, had demanded that “it has to be made absolutely clear that the

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84 In an open letter to the EP of Nov. 30th, an alliance of non-governmental organizations (NGOs) fiercely criticized the EP’s acceptance of the Council’s claim that “the change was not sufficient grounds for the report to be sent back to the Committee [on Civil Liberties, Justice and Home Affairs] for further consideration.” Among other things, the NGOs were “[urging] the Parliament to oppose mandatory fingerprinting as an unnecessary and disproportionate act.” Privacy International / Statewatch / European Digital Rights (2004): An Open Letter to the European Parliament on Biometric Registration of All EU Citizens and Residents, Nov. 30, 2004 [arena-web], p. 1.

data can only be used for verification and under no circumstances for other purposes, in particular hidden surveillance.” An ultimately outvoted minority of left-leaning parliamentarians even went beyond the rapporteur’s critique. Several members of the Committee on Civil Liberties, Justice and Home Affairs thus rejected the Commission’s idea of introducing biometric passports altogether:

[The] proposal violates all common standards of appropriateness and subsidiarity. Until now, neither the Commission nor the Council have adequately explained the necessity, functionality, efficiency and probable side-effects of including biometric identifiers in identity documents. They have not even provided detailed figures of the expected costs nor proposed a clear budget! 

Regardless of their political party origin, all amendments suggested by the EP were completely ignored by the Council since intergovernmental negotiations had already been concluded.

A few days after the European Parliament had passed its resolution of December 2\textsuperscript{nd}, the Council Secretariat paved the way for formally adopting the Biometric Passports Regulation as a so-called “A” item, i.e. as an issue requiring no further discussion." The final version of the bill, cleared by the Council Legal Service and the linguistic experts," was formally adopted by the General Affairs and External Relations Council on December 13, 2004." Most likely not aware of what they were agreeing to, the foreign ministers unanimously endorsed the legislative act.

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\textsuperscript{86} European Parliament (2004a): “Report on the Commission proposal” [cf. footnote 50], pp. 8, 16, and 19, respectively. The Committee’s report was adopted with 26 votes in favor, 9 votes against, and no abstentions.

\textsuperscript{87} Council of the EU (2004γ): Council doc. 15918/04 VISA 223 COMIX 753 [arena-web].

\textsuperscript{88} Cf. Council of the EU (2004δ): Council doc. 15152/04 VISA 209 COMIX 716 [arena-web].

\textsuperscript{89} Cf. Council of the EU (2004ε): 2630\textsuperscript{th} Council meeting – General Affairs and External Relations, Press Release, Council doc. 15460/04 (Presse 343) [arena-web].
The British government’s frustration with not being allowed to participate in the European Community’s new Schengen-related biometric passports regime was dealt with by attaching a “unilateral United Kingdom statement” to the Council minutes.\textsuperscript{90} This statement read as follows:

The United Kingdom recalls that, under the Protocols on the position of the United Kingdom and Ireland and on integrating the Schengen acquis into the framework of the European Union, it has the right to take part in the adoption of this measure. It regrets that it has been denied that right.

The adoption of this measure is without prejudice to the United Kingdom’s legal position, and its right to take such legal steps in accordance with that position as it considers necessary.\textsuperscript{91}

In March 2005, the Blair government brought a case before the European Court of Justice (ECJ), suing the Council of the EU as such for adopting the Biometric Passports Regulation as a Schengen-related measure.\textsuperscript{92} These ongoing legal proceedings could result in the annulment of the Regulation if the ECJ should find that article 62 par. 2 a) of the EC Treaty does not provide an adequate legal basis for excluding Ireland and the UK while including Iceland, Norway, and Switzerland.

In this case, the Biometric Passports Regulation would suffer the same fate as the so-called Passenger Name Records (PNR) Agreement of May 2004. The latter accord between the European Community and the United States, retroactively annulled by the ECJ in May 2006, required European airlines operating flights to, from, or across U.S. territory to provide the Department of Homeland Security

\textsuperscript{90} Council of the EU (2004\textsuperscript{Q}): Council doc. 15918/04 ADD 1 VISA 223 COMIX 753 [arena-web].

\textsuperscript{91} Council of the EU (2004\textsuperscript{η}): Council doc. 16273/04 ADD 1 REV 1 PV/CONS 79 [arena-web], p. 3. The UK Permanent Representative to the EU, ambassador John Grant, had formally notified the Council Secretariat on May 19, 2004 of the UK’s intention to participate in the adoption of the Biometric Passports Regulation; see Council of the EU (2004\textsuperscript{θ}): Council doc. 10649/04 VISA 118 COMIX 407 [arena-web].

with advanced access to passenger name records. The DHS systematically checks airlines’ passenger records against terrorist watch lists. In fact, U.S. government officials regard such private-sector databases as “extremely useful to a government’s effort to locate and eliminate terrorist threats.” EU officials, on the other hand, had framed the PNR Agreement as an internal market-related measure based on article 95 of the EC Treaty. This line of reasoning did not hold water in the eyes of the Court.

4.6 Commission Follow-up and Administrative Enforcement in the Member States

Additional supranational measures were needed in order to guarantee a full-fledged harmonization of security standards throughout the so-called “Area of Freedom, Security and Justice.” On February 28, 2005, the European Commission, following consultations with national experts, adopted the first set of technical specifications for the Biometric Passports Regulation. The Commission Decision entailed precise technical instructions on how to incorporate facial images into EU citizens’ passports.” Sixteen months later, the Commission also adopted the technical specifications for fingerprint biometrics, i.e. for storing the plain impressions

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of the left and right index finger of individual EU citizens in the passport." In combination with article 6 of the Regulation, the two Commission Decisions mentioned above triggered specific deadlines for introducing biometric passports on national level. These deadlines apply to all twenty-five EU Member States except for Ireland and the UK, plus the acceding states (Bulgaria and Romania), plus Norway, Iceland and Switzerland. Administrative authorities of the thirty European countries listed above are obliged to start issuing biometric passports containing a digital photograph by August 28, 2006 and passports incorporating both a facial scan and fingerprint biometrics by June 28, 2009 at the latest.

Following in the footsteps of Belgium, the first European country to begin issuing biometric passports to its own citizens, Sweden began to roll out its national “e-Passports” program on October 1, 2005. Newly issued Swedish passports contain a facial scan of the Swedish national in question performed in the secure environment of a Swedish police office. Ironically, “the facial expression [of the Swedish citizen] must be neutral, no smiling.” In order to compensate for the additional administrative costs of mass biometric enrollment, the price for a Swedish passport has increased from approximately 29 to 43 Euros. Norway and Germany followed in third and fourth place, respectively.

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throughout Europe are continuing to enforce the directly applicable Biometric Passports Regulation of the European Community in spite of the so-called Article 29 Data Protection Working Party's opinion that "before implementing biometric features in passports, other travel documents or ID-cards, there must be an exhaustive discussion in society." The chairman of the latter working party, Peter Schaar, qualified his remarks by stating that "collecting biometric features means collecting data of the body of a person" and that "up to now biometric features, like fingerprints, have mostly been collected in criminal cases." Such privacy issues will probably be raised again once Member States' authorities start to fingerprint their citizens in a systematic fashion.

5. Interpretation and Conclusions

5.1 Biometric Passports and the Logic of Consequentiality

Member States governments' behavior during the negotiation of the Biometric Passports Regulation in the JHA Council from March through October 2004 may be interpreted as reflecting the strategic "moves" of utility-maximizing "players" engaged in a so-called Battle-of-the-Sexes game.

From an analytical point of view, Battle-of-the-Sexes is a "positive-sum" game with both cooperative and conflictual elements. Applied to decision-making processes in the Council, the game abstracts from a situation in which Member States' governments disagree over the substance of a given legislative proposal and yet prefer a common solution over the status quo. The structure of the latter situation may be illustrated by a well-known narrative according to which both members of a couple prefer to do something together, but they disagree on their preferred outcome, vacationing in the mountains or at the ocean. ... Both parties are averse to an absence of coordination in which they take different vacations, but the payoff matrix itself provides no in-
formation about which of the two equilibrium points will be chosen. The
problem is not how to get to the Pareto frontier but which point along the
frontier will be chosen.¹⁰⁰

The ideal-typical situation sketched out above differs from a pure coordination
game, i.e. from a situation in which motorists have to agree on driving either on
the left or right side of the road, for example. In contrast to a pure coordination
game, the game Battle-of-the-Sexes also entails a conflict over distribution. After all,
climbing in the mountains is the collective outcome favored by party A, whereas
lying on the beach is the preferred joint solution of party B. This game, in other
words, has two mutually exclusive Nash equilibria. Failure to agree on one of
them is clearly the worst outcome for all parties involved. Utility-maximizing
“players” will thus ultimately endorse a collectively binding solution. But which
one should they select?

Even though game theory can not predict which of the two equilibria will be
chosen without introducing auxiliary assumptions (see below), we do know that
an outcome blatantly favoring one side over another is likely to stir up heated
controversy. If both parties insist that solution A or B is simply “not fair” and
therefore “unacceptable,” a negotiated settlement may not be reached. A possible
way for homo oeconomicus to avoid the complete breakdown of negotiations and
mutually ensured “low payoffs” in a situation like this is to move first. The stra-
tegic calculation of the player who moves first is that the second player is going to
adjust his or her move to the previous one:

Whichever player moves first is able to select its most preferred solution,
while later players (assuming perfect information on others’ past moves)
will find it in their interest to converge on the coordinated solution so
defined, even though it is by no means their most preferred outcome.

Given the fact that they still prefer coordination to noncoordination, they have no rational alternative.\textsuperscript{101}

In regard to the “vacation” example mentioned above, a reasonable “first move” would be to restrict the other player’s alternatives via unilaterally purchasing two non-refundable airline tickets to destination A. Under these circumstances, the couple in question is most likely going to spend its vacation in A. Exploiting the first-mover advantage, in other words, is crucial for winning a Battle-of-the-Sexes game. “First mover” strategies and “bandwagon” effects of this kind have been empirically observed in numerous policy areas, including the international standardization of telecommunication technologies.\textsuperscript{102} Intergovernmental negotiations in the JHA Council concerning the development of common European standards for interoperable biometric passports evidently displayed similar dynamics.

In the case at hand, the G5 countries (led by Germany, France, and Italy) demanded the mandatory inclusion of both facial scans and fingerprint biometrics in EU citizens’ passports. Several of the newly acceded and Nordic governments, on the other hand, preferred to avoid the compulsory fingerprinting of all EU citizens via Community Regulation. Even the latter group of countries, however, favored Community legislation on biometric passports over legislative deadlock. After all, the continuation of the status quo, i.e. the absence of directly applicable and unambiguous common European rules for biometric passports, might have resulted in the introduction of technically incompatible travel documents within the

\textsuperscript{101} Scharpf (1997): Games Real Actors Play [cf. footnote 2], p. 250. One may note in passing that the two players could, of course, also flip a coin or draw straws in order to coordinate their actions. I intentionally refrain from elaborating further on this theoretically viable option in light of the practical irrelevance of using randomizing devices for deciding politically salient issues in the context of the EU.

“Area of Freedom, Security and Justice” and a disruption of transatlantic travel – the worst-case scenario for every government involved. During the final phase of intergovernmental negotiations and under strong political pressure emanating from the Bush administration in the U.S., the G8, and the European Council, the interior ministers of the G5 regime managed to break the emerging deadlock in the JHA Council’s working groups. By prematurely “deciding upon” the mandatory fingerprinting of all EU citizens on October 18, 2004 in Florence, the G5 effectively “moved first.” The twenty other participants of the ordinary Justice and Home Affairs Council meeting of October 26\textsuperscript{th} in Luxembourg, in turn, now found it in their own interest to settle for the version of the Biometric Passports Regulation favored by the “big five.”

The course of events summarized above sheds light on the practical difficulties that utility-maximizing actors may have in choosing among multiple equilibria in the framework of the Council. In a situation resembling a Battle-of-the-Sexes game, the “first mover” advantage of strategically calculating executive actors participating in “policy laboratories” like today’s G6 can evidently make a decisive political difference. This finding not only illustrates that the “Schengen spirit” is still alive in the field of EU Justice and Home Affairs cooperation.\textsuperscript{103} It also points to the relevance of variables that play a less prominent role in game-theoretical models, namely to the impact of unequally distributed material resources and relative power on Council-based decision-making processes.\textsuperscript{104}


\textsuperscript{104} In a similar vain, Andrew Moravcsik has argued that “coalitional bargaining power may result either from the threat to cooperate with non-EC countries or, more common today, from cooperation among subgroups – a ‘multi-speed’ or ‘variable geometry’ Europe. Such coalitional dynamics tend to favor large states, whose participation is necessary to more viable coalitions….” Moravcsik (1998): The Choice for Europe [cf. footnote 4], p. 64 (emphasis added). For further reading on the impact of relative state power on intergovernmental decision-making processes resembling a Battle-of-the-Sexes game, see Krasner (1991): “Global Communications and National Power” [cf. footnote 100], p. 363.
5.2 Biometric Passports and the Logic of Appropriateness

From an Institutionalist point of view, the substantive profile of the Biometric Passports Regulation, i.e. the "dependent variable" of this study, reflects the cumulative impact of three "independent variables," namely the professional interest of the police in strengthening their informational resource base in the fight against terrorism, the recognitional rather than analytical nature of decision-making processes under time pressure, and the informal "culture of consensus" in COREPER. These three causal factors were, methodologically speaking, jointly sufficient to trigger the social mechanism of rule following in the JHA Council.

The professional interest of law enforcement officials and their political representatives in national ministries of the interior and the European Commission’s Directorate-General “Justice, Freedom and Security” in gaining access not only to the digital photographs, but also to the fingerprint biometrics of all EU citizens, stems from the prospect of being able to conduct both “one-to-one” checks for verification purposes and “one-to-many” checks in criminal databases and terrorist watch lists. The technique employed by police and border control authorities in this context is, as John Torpey rightly observed, “roughly the same that underlies ju-jitsu: the person’s body is used against him or her, in this case as evidence of identity.”

Since the first “live” application of the fingerprinting technique in colonial India around one hundred and fifty years ago, the police as an institution have learned to master the “martial art” of criminal identification to a state of near perfection. The effectiveness of biometric solutions to societal problems like politically motivated violence, organized crime, and asylum abuse,

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however, crucially depends on national and supranational legislation authorizing the informational "embrace" of particular social groups or populations. By lending professional support to such legislative efforts, the police are not attempting to "normalize the exceptional," as Janne Flyghed has convincingly argued. Viewed from an organizational perspective, they merely try to apply their standard operating procedures and the technology they are most familiar with to a new set of problems.

In regard to the introduction of biometric passports and travel documents in the EU, the professional interest of the police in mandatory fingerprinting via directly applicable Community Regulation initially manifested itself in the design of the new Visa Information System – a Schengen-related legislative initiative of the German Federal Ministry of the Interior developed in close cooperation with the U.S. Department of Homeland Security (cf. section 4.2 above). The same rationale informed the European Commission's suggestion of February 2004 of establishing a central biometric database storing the fingerprint data of all passport holders in the EU (cf. section 4.3). Last but not least, this line of reasoning evidently influenced the way in which the G5 delegations to the JHA Council's Visa Working Party, i.e. the same working group that had already dealt with the draft Community Regulations on biometric visa and residence permits, handled the biometric passports dossier in the Council (cf. section 4.4). Practical considerations relating to the administrative enforcement of biometric verification and identification procedures modeled after the U.S. VISIT program in America were more important in this intergovernmental context than the careful weighing of policy alternatives.

The second causal factor lending empirical support to an interpretation of the Biometric Passports Regulation as a supranational legislative outcome re-

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108 For a more thorough discussion of fingerprinting as a police-specific standard operating procedure, see Aus (2006a): "Eurodac" [cf. footnote 42].
flecting the self-conscious matching of rules to situations is intrinsically linked to the recognitional nature of decision-making processes under time pressure. As sketched out above, the ideal-typical *homo sociologicus* responds to any given political challenge by searching for a satisfactory answer to the following question: What is the appropriate course of action for me in a situation like this? Organizational theorists are currently trying to specify the conditions under which policymakers adhere to a logic of appropriateness. A viable way of moving this research frontier forward arguably lies in fostering an interdisciplinary dialogue with cognitive psychologists like Gary Klein.109 His research focuses on the decision-making behavior *inter alia* of firefighters, soldiers and nurses, i.e. on professionally trained civil servants frequently making important decisions under extreme *time pressure*. Klein’s *recognition-primed decision model* postulates that experienced firefighters, for example, heavily rely on their ability to recognize and classify a given situation. “Naturalistic decision-making in field settings,” as Klein describes his empirical research focus, seems to have very little to do with the weighing of policy alternatives and “rational political choice.” Instead, decision-makers under time pressure try to recognize *familiar patterns* in a given operational environment in order to carry out a “doable” course of action.110 Decision-making

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under pressure, in short, can best be understood as a non-analytic pattern-matching process.

In the case at hand, the members of the JHA Council not only had to meet the U.S. deadline for the introduction of biometric passports in conformity with the new requirements of the Visa Waiver Program (cf. section 3. above). The justice and interior ministers of “Schengenland” also had to act more or less immediately upon the European Council’s political request of March 25, 2004 to formally endorse Community legislation on biometric visa and passports before the end of 2004 at the latest. The tight deadline determined by the heads of state or government did not necessitate a particular choice of biometric identifiers. However, the European Council had also asked the Commission and the Council to adopt a “coherent approach” towards third country nationals and EU citizens (cf. section 4.1). What did this additional request for “coherence” imply in regard to the mandatory or optional fingerprinting of EU citizens? The Community institutions’ policy towards visa applicants had been modeled after the U.S. VISIT system. It thus prescribed the mandatory collection, central storage, and automated comparison of visa applicants’ fingerprints. The supranational fingerprint database EURODAC for asylum applicants and “illegal” immigrants operated in a similar fashion. Recognizing the “added value” of these automated fingerprint identification systems for “homeland security” purposes and inspired by the Commission’s idea of establishing a common European fingerprint register of passport applicants, several delegations to the JHA Council’s Visa Working Party and SCIFA simply reasoned by analogy and called for the mandatory rather than optional inclusion of fingerprint biometrics into EU citizens’ passports (cf. section 4.4). In the eyes of the German, French, Italian, and Spanish delegations, the reproduction of operational blueprints and identification of legal precedents was the most viable course of supranational legislative action given the extraordinary time pressure under which they had to find an inter-administrative agreement on the Biometric Passports Regulation.

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The third explanatory factor worth mentioning from an Institutionalist point of view in regard to the negotiation of the Biometric Passports Regulation is the “consensus reflex” among the members of the Council’s Permanent Representatives Committee (COREPER). A growing body of empirically informed literature sheds light on the distinct and highly institutionalized character of this committee. Jeffrey Lewis, for example, observed that “the standards of appropriateness found in COREPER include norms ruling out certain instrumental behavior (such as ‘pushing for a vote’ under conditions of qualified majority voting) … and a duty to ‘find solutions’ and keep the legislative agenda of the Council moving forward.”\footnote{Lewis, J. (2005): “The Janus Face of Brussels: Socialization and Everyday Decision Making in the European Union,” in: International Organization, Vol. 59, pp. 937-71, here: p. 939.} Supplementing Lewis’s qualitative studies, Helen Wallace and her collaborators concluded a recently published quantitative analysis of decision-making behavior in the Council as follows: “[Irrespective] of the rules that govern any decision, the predominant patterns of bargaining are aimed either at building consensus as far as possible in eventual decisions or else at preventing measures from getting to the ministerial level of negotiation until and unless there is more or less a consensus.”\footnote{Hayes-Renshaw, F. \textit{et al.} (2006): “When and Why the EU Council of Ministers Votes Explicitly,” in: Journal of Common Market Studies, Vol. 44, No. 1, pp. 161-94, here: p. 183. The aggregate data presented by Hayes-Renshaw, Van Aken, and Wallace \textit{inter alia} show that the Council Secretariat did not record a single negative vote in connection with the legislative proceedings of the Justice and Home Affairs Council during the period of 1998–2004 (p. 170). The JHA Council, in other words, simply does not vote. For further comments on the JHA Council’s “consensus reflex” from both Rationalist and Institutionalist perspectives, see Aus (2006b): \textit{Logics of Decision-making on Community Asylum Policy} [cf. footnote 47].} Against this background, Dorothee Heisenberg suggested that “a greater understanding of consensus and its implications in the EU decision-making process should serve to underpin any analysis of the EU.”\footnote{Heisenberg, D. (2005): “The Institution of ‘Consensus’ in the European Union: Formal versus Informal Decision-making in the Council,” in: European Journal of Political Research, Vol. 44, pp. 65-90, here: p. 66.}

The “general approach” of October 14, 2004 analyzed in section 4.4.4 above may be interpreted as a typical product of the Permanent Representatives Com-
mittee. Again, this “general approach” basically consisted of agreeing upon the mandatory fingerprinting of EU citizens while showing some degree of flexibility in regard to the timeframe for the administrative enforcement of this requirement. COREPER’s “compromise solution” that the compulsory fingerprinting of passport applicants in the EU should commence “at the latest 36 months after the adoption of the technical specifications” may not have been elegantly put. This was also not deemed necessary given the secretive character of negotiations. Nor were the ambassadors inter alia of Sweden and Estonia very happy with the way in which the legislative agenda of the JHA Council was moving forward. In the end, however, no one “rocked the boat” – which would have been considered to be totally inappropriate. COREPER’s “general approach” was more or less consciously endorsed by the members of the Justice and Home Affairs Council. This, in turn, paved the way for the formal adoption of the Biometric Passports Regulation as an “A” item by the General Affairs Council. With the decisive help of COREPER, the Council of the EU had managed to do what it was supposed to do.

5.3 Strategic Calculation and Rule Following in the Council of Ministers

Neither Rationalists nor Institutionalists can reasonably claim to hold a monopoly on accounting for the legislative output of the Council of the EU. The real challenge therefore lies in specifying the conditions under which decision-making processes in the Council are driven by strategic calculation, rule following, or both. ¹¹⁴

The empirical evidence presented in this paper strongly suggests that tight deadlines and extreme time pressure lend support to political behavior motivated by

a logic of appropriateness. Community Regulations “rushed through” the legislative pipeline in order to meet the deadlines determined by the European Council are likely to reflect the worldviews and standard operating procedures of particular organizations rather than the careful weighing of policy alternatives in light of given preferences. The empirical findings of this case study thus confirm Alfred Marcus and Philip Bromiley’s theoretically informed hypothesis that “the tighter the deadline, the less analysis is feasible.”\textsuperscript{115} The rule-driven and recognitional character of decision-making processes under time pressure is arguably not confined to the field of EU Justice and Home Affairs. It can reasonably be expected to apply across policy areas and levels of governance.\textsuperscript{116}

This study has also shown that the willingness and ability of COREPER to work out “compromise solutions” like the “general approach” of October 14, 2004 ahead of ordinary Council meetings may leave a lasting imprint on the substantive profile of EU policies in an “Area of Freedom, Security and Justice.” Even though it is impossible to reconstruct or predict in advance the impact of COREPER involvement on the precise content of EU policies without contextualizing the political issue at hand, one may reasonably assume that the absence of COREPER involvement would lead to the frequent breakdown of intergovernmental negotiations. As long as COREPER remains the “hub” of decision-making in the JHA Council and regards it as its professional duty to keep the EU’s legislative agenda moving forward, we will continue to see the unanimous adoption of politically divisive Community Regulations, Directives, and Decisions in the field of EU Justice and Home Affairs.


Last but not least, this paper has demonstrated that “first mover” strategies of relatively powerful executive actors participating in international regimes like the G6 can “pay off” if a collective choice between multiple equilibria has to be made. For the time being, the domain of application of this game-theoretical insight seems to be confined to the supranational standardization of biometric identification technology. Further empirical studies on the practices of the G6 and so-called “Schengen III” signatories are needed in order to move this research frontier forward.