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34

THE EUROPEAN COMMISSION IN JUSTICE AND HOME AFFAIRS

Pushing hard to be a motor of integration

Natascha Zaun

Introduction

The European Commission is often considered the motor of European integration. Ernst B. Haas (1964: 11), most prominently, conceived of the Commission as an institution which aimed at 'upgrading the common interest' and which constantly provided new policy ideas implying further integration. As a non-partisan institution, the Commission is, moreover, perceived as an honest broker providing policy solutions that reconcile the member states, the European Parliament (EP) and civil society (Nugent and Rhinard 2015: 18).

This chapter assesses the Commission's specific role in the area of justice and home affairs (JHA) and compares it to findings from the literature on the European Commission more generally. In doing so, I shed light on a number of pivotal questions on the role of the Commission in JHA. In the second section, I analyze how influential the Commission is in the area of JHA as compared to the other EU institutions and to what extent it was able to leave a mark on European Union (EU) legislation in the field. To this end, I will investigate how the competences of the Commission in this policy area have changed over time and compare competences across the individual subfields of JHA, including cooperation in judicial matters, police cooperation, and immigration and asylum policies. Subsequently, I assess the positions advanced by the Commission in the area of JHA and compare them to those proposed by the other EU institutions. I analyze to what extent the Commission has acted as a supporter of enhanced integration in the area and whether the Commission promotes individual rights or whether it focuses rather on collective security against potential threats.

The role of the Commission in JHA is a heavily under-researched topic. While there is a growing body of literature dealing specifically with the European Parliament in JHA (e.g., Hix and Noury 2007; Lopatin 2013; Ripoll Servent 2014, 2015) or the Council in JHA (e.g., Aus 2006; Maricut 2016; Zaun 2016, 2017), the Commission has rarely been the research focus of a study but has rather been studied *en passant* (with two notable exceptions; see Kaunert 2010a; Uçarer 2001). Research on the role of the Commission in EU policy-making more generally or on the inner functioning of this institution (e.g., Kassim *et al.* 2013; Nugent and Rhinard 2015) has not focused on its role in the area of JHA. Thus, we have little systematic analysis of the Commission's positions and its impact in the field. Given this lacuna,

this chapter collects the existing knowledge on the Commission's role in the field and tries to draw tentative general conclusions. More research will be needed to further substantiate these claims.

Impact of the Commission

Determining the impact of the Commission in JHA is methodologically not an easy task, as the Commission is not – like the EP or the Council – a co-legislator with concrete powers in EU legislative processes. Instead, the Commission submits a legislative proposal which is the basis of discussions in both the Council and the EP. Moreover, it mediates between these institutions should they hold different opinions on a legislative proposal. The Commission's influence is therefore based on its potential to steer debates from early on through setting the agenda and framing policies with its proposals (Héritier 1996: 152–153). Pollack (2000) has argued that the Commission tends to be most influential: (1) if it has a clear treaty mandate; (2) if decisions in the Council are taken under qualified majority voting (qmv), and (3) if member states are unwilling or unable to effectively sanction the Commission in case it embarks on a policy pathway that they do not like. A clear mandate allows the Commission to legitimately submit legislative proposals. Qmv in the Council enables the Commission to push through policies against reluctant minorities among the member states in the Council. Member states are usually unwilling or unable to sanction the Commission if they profit heavily from EU legislation and if they are hence more impatient for it to be in place than the Commission is. Patience is generally considered a key power resource in negotiations (Knight 1992: 135). In addition, the Commission has been demonstrated to use the Court of Justice of the EU (CJEU) strategically in its rhetoric to strengthen its own position. For instance, the Commission has repeatedly threatened the Council to bring an issue to court or has followed up on judgments in its legislative proposals (Schmidt 2000).

In the following, I will analyze to what extent the Commission had these power resources and in how far it was able to use them in JHA. A particular focus will be given to the peculiar institutional design of JHA policies, which evolved from a purely intergovernmental setting into a more communitarized one in most policy areas. Following an overview of the institutional evolution of this policy area, I will draw conclusions on its influence and impact more generally.

The Commission in early cooperation on JHA

Early European cooperation on JHA was characterized through a purely intergovernmental mode of decision-making outside of the European architecture. Points in case are fora such as TREVI (short for *Terrorisme, Radicalisme et Violence Internationale;* translation: Terrorism, Radicalism and International Violence), created in 1975, and STAR (short for *Ständige Arbeitsgemeinschaft Rauschgift,* translation: Permanent Working Group on Drugs), created in preparation of the Schengen Agreement. Both were composed of senior officials from national JHA ministries, and they aimed at combatting either terrorism or drug trafficking respectively.

With the Maastricht Treaty in 1992, JHA made it into the so-called third pillar of the EU. Although issues such as immigration and the combat against organized crime and drug trafficking had now made it into EU primary law, decisions were still made in an intergovernmental mode and did not lead to directives or regulations but to less binding instruments such as common positions or joint actions. This implied that the Commission shared the right to

initiative with the member states that were the only ones entitled to submit proposals in areas such as police cooperation and judicial cooperation in criminal matters. Since JHA deal with sensitive issues, decisions in the Council were taken unanimously, and only implementing measures could be passed by qmv, provided there was a previous unanimous agreement among the member states. The EP was not part of this decision-making process in any way. Given these circumstances, the Commission remained 'a potentially awkward actor' with extremely limited possibilities to take influence (Uçarer 2001: 1).

Newly gained competences with the Amsterdam Treaty

Since the mid-1990s the Commission had pleaded for an enhanced integration of all issues that were part of the third pillar, proposing in particular the Commission's right to initiative in all areas and qualified majority voting (Uçarer 2001: 9). Indeed, the lack of integration in the field had produced unsatisfying results, as policies were barely enforceable. This became particularly obvious for the area of immigration and asylum policies which had been in the spotlight ever since large numbers of immigrants had come to Europe subsequent to the disintegration of the Soviet Union and Yugoslavia in the early 1990s. The Amsterdam Treaty therefore introduced immigration and asylum policies into the first pillar of the EU (Stetter 2000).

Yet, policy-making in this field was still not fully communitarized. For an interim period of five years, the Commission continued to share its right to initiative with the member states, decisions in the Council were taken under unanimity, the EP was only consulted and the CJEU had only very limited jurisdiction. Still, this implied a strengthening of the Commission, which was now able to initiate binding legislation. In the remaining areas of JHA the Commission did not receive any additional rights. With the Tampere summit, the Commission received the sole right to initiative in the area of asylum policies, an area in which member states wanted to see quick results following the mass influx of refugees from former Yugoslavia since the mid-1990s, while competences in other areas of immigration policies remained mixed (Uçarer 2001: 14). Overall, the Commission's potential impact was enhanced significantly with the Amsterdam Treaty and the Tampere summit – at least in the area of asylum (and to some extent immigration) policies. In this area the Commission had a clear treaty mandate to initiate secondary legislation and in the case of asylum policies was even the sole actor possessing this competence. Thus, the Commission was able to frame debates from early on.

Yet, as studies of the decision-making processes after Amsterdam have shown for the area of asylum policies, the Commission did not leave a strong mark on EU legislation. Instead, the suggestions in its proposals were significantly watered down (Zaun 2017: 176–183). With unanimity vote in the Council, the Commission had to accommodate every member state that voiced a concern. Where it did not take into account all of these concerns, it received substantial criticism from the member states and even had to redraft its legislative proposal, as the cases of the Asylum Procedures Directive (see European Commission 2002), the recast Asylum Procedures (see European Commission 2011a) and the recast Reception Conditions Directive (see European Commission 2011b) demonstrate. While some member states in Northwestern Europe had initially wanted enhanced cooperation to ensure a more even distribution of asylum-seekers across Europe, this was no longer a priority when negotiations on EU legislation took place, as the numbers of asylum applications were decreasing in Europe at that time. Thus, member states were rather reluctant to change tried-and-tested national policies for the sake of EU harmonization and did not accept any Commission proposals that they would deem too ambitious (Zaun 2017: 176–183, 190–200). This heavily constrained the Commission's possibility for action.

Full communitarization of most policies with the Lisbon Treaty

After the first round of asylum directives had been passed in 2005, decision-making in the Council moved to qualified majority voting. This also applied to the areas of judicial cooperation in civil matters (excluding family law) and irregular immigration. With the Lisbon Treaty, the decision-making in legal immigration policies, judicial cooperation in criminal matters, Europol, visa policies and residence permits, civil protection and non-operational police cooperation also became fully communitarized. In these areas the EP is a co-legislator and the CJEU has full jurisdiction (Council of the European Union 2009). While the Commission has the sole right to initiative in immigration and asylum policies, a quarter of the member states may also initiate legislative proposals in criminal matters and police cooperation (Art. 76 TFEU). In areas like family law and operational police cooperation, consultation procedure and unanimity voting in the Council still apply (Council of the European Union 2009).

This may be assumed to have substantially strengthened the role of the Commission, at least in most areas of JHA. Indeed, the following example from the area of asylum policies shows that the Commission has been more effective in promoting its own policy suggestions than before the Lisbon Treaty. Both in its proposals on the Reception Conditions Directive (post-Amsterdam) and the Recast Reception Conditions Directive, the Commission suggested labor market access for asylum-seekers within six months after their application. In the negotiations on the original Directive this suggestion was entirely undermined by two restrictive outliers, Germany and France, which could only agree to labor market access after one year. In the negotiations on the Recast Directive, these two restrictive outliers no longer had a veto and thus, with the backing of the EP and the remaining member states in the Council, a compromise was found proposing labor market access after nine months which is much closer to the initial Commission proposal. This is a case in point for the enhanced agenda-setting powers the Commission has gained through full communitarization in the area (Thielemann and Zaun 2013: 11–12).

Evaluating the influence of the Commission

While the Commission has been able to draw legislative output closer to its proposal on a number of issues in the area of asylum policies since their full communitarization, this does not imply that the Commission is no longer heavily dependent on close cooperation with the member states and the EP to get its proposals accepted. The fact that two of the Commission's proposals on recast asylum directives had to be amended shows that the Commission has little leverage when proposing policies that are incompatible with (at least the majority of) member states' interests. In this regard the situation has barely changed from the pre-Lisbon context. In 2005 the introduction of European Border Guards had also failed due to ideological tensions between member states and eventually resulted in a less integrated agency, known under the name of Frontex (Parkes 2015: 64).

Situations of crisis, however, are windows of opportunity for successful policy activism by the Commission. According to MacKenzie *et al.* (2015), the Commission needs to 'seize [...] windows of opportunities' to be influential in JHA (MacKenzie *et al.* 2015: 93). A case in point for a demand of member states strengthening the Commission's ability to shape EU law according to its preferences is the European Arrest Warrant (EAW). The Commission had been working on a proposal for a EAW as an instrument of police cooperation since 2000, and some member states had opposed the idea of a EAW altogether. Yet, following 9/11 the Commission

was able to frame the EAW as an instrument of counter-terrorism which was welcomed by many member states, as it allowed them to demonstrate to the USA that they were supporting them in the 'War on Terror'. Italy was even pressured by member states and the Commission to revise its law so that it would be able to agree to the EAW. Moreover, the adoption of the EAW implied more significant transfers of sovereignty than initially foreseen (Kaunert 2007: 396; MacKenzie *et al.* 2015: 102). Overall, this demonstrates that the Commission had strong leverage in this situation of crisis. Another recent example for the Commission seizing a window of opportunity is related to the European Boarder and Coast Guards Agency which was launched on October 6, 2016 (European Commission 2016a). The Commission 'recycled' this idea from the early 2000s and presented it as a response to the so-called EU refugee crisis. It succeeded in doing so due to the urgent need to address the influx of refugees (Interview Commission 1) and because it was successfully linked to EU counter-terrorism. While this shows that crisis situations are windows of opportunity for policy activism by the Commission, its success still strongly depends on the willingness of member states. The idea of a refugee quota system which was also meant to address the refugee crisis, for example, failed due to lack of support from the Visegrad countries and the high degree of politicization of the proposal, particularly in Central and Eastern Europe (Zalan 2016).

In the absence of an urgent demand for common EU policies, member states will usually prioritize their national sovereignty and draw upon unilateral action in the highly sensitive policy field of JHA. This weakens the position of the Commission substantially. For instance, following the Arab Spring, France and Denmark resorted to unilateral border closings and blocked an initiative of the Commission which wanted to be asked for its consent before any border closings. Subsequently, the Commission only needed to be notified in case a state suspended Schengen (Parkes 2015: 66). This, of course, also had important repercussions in the so-called refugee crisis, where member states lost their confidence in their neighbors' adherence to the Dublin Regulation and many of them, including Sweden, Germany, Austria and Denmark, closed their borders unilaterally (Taynor 2016). The fact that member states can do so without having to consult the Commission sets a low threshold for Schengen suspensions and severely weakens the European integration project in one of its key areas, namely internal freedom of movement.

Apart from seizing crisis situations, the Commission has used other strategies to pursue its aims in JHA. Roos (2013) has demonstrated in the area of labor migration policies that the Commission has partitioned its proposals so they would only focus on aspects that member states could agree on. While this, of course, led to less ambitious policies, it helped the Commission to safeguard policy ideas that would not have made it into EU legislation otherwise. In addition to that, the Commission has also strategically used the Court to constrain the Council, as described by Schmidt (2000) in the area of competition law. For instance, the Commission has drawn extensively upon case law by the CJEU (and the European Court of Human Rights) when drafting the recast asylum directives and initiated more than forty infringement procedures at the height of the 'refugee crisis' in 2015 when it became obvious that many member states, including those whose asylum systems had proven particularly poor at this time, had not implemented the Common European Asylum System (CEAS) (Carrera *et al.* 2015: 14). Arguably, the crisis situation provided the Commission with the necessary political backing for doing so, as it had previously shied away from initiating such a large amount of infringement procedures, although widespread non-implementation was identified as a key problem lying at the heart of the malfunctioning of the CEAS (Interview PermRep Germany).

After I have demonstrated that the Commission has assumed a relatively stronger role with each step of further integration while still depending widely on the consent of the member states and the EP, I will now assess the content of positions advanced by the Commission.

Positions of the Commission in JHA

Usually, the Commission is assumed to have a strong pro-integrationist stance, as this is its mandate and as more integration strengthens its own role (Kassim *et al.* 2013: 19). However, as it has always to take into consideration member states' concerns, it tends to water down its own proposals in anticipation of potential reservations of the member states. Regarding the content of its positions, the Commission is often described as a neutral and technocratic actor. At the same time, it has been both described as promoting 'neoliberal' policies undermining the welfare state or – more closely related to the policy area under investigation here – as a fervent supporter of minority rights (Hartlapp *et al.* 2014: 1). This section will assess to what extent these expectations can be confirmed in the area of JHA.

The Commission as a promoter of enhanced integration

While the Council has been quite cautious in accepting a deeper integration of policies in the area of JHA, the Commission has generally proposed policies that would ensure more competences for the EU. This is as true for data protection and police cooperation as it is in the areas of immigration policies and border control. In the area of border control, the Commission twice proposed the highly integrated concept of European Border Guards, which implies that European officials protect the EU's external borders. Its first attempt was only partly successful and the proposal was later watered down in the Council, resulting in the adoption of Frontex, which is much less integrated, as it is an agency coordinating national border guards (Parkes 2015: 64). The same may be said about the EAW where the Commission went for a much more integrated version that virtually abolished all political decisions in extraditions, when it had the opportunity to do so following 9/11 (Kaunert 2010b: 75; MacKenzie *et al.* 2015: 106–107). As mentioned earlier, the Commission had proposed full communitarization of JHA since the mid-1990s (Uçarer 2001: 9). This all supports the expectation that the Commission has a strong interest in a high degree of integration of JHA.

The Commission as a promoter of individual freedoms or security?

By design, the Area of Freedom, Security and Justice, as JHA were previously called, tries to balance two public goods, namely freedom and security, using law (justice) as a mediator. Since its early beginnings, scholars were therefore highly interested in whether JHA tilted towards individual freedoms or collective security. Some scholars came to the conclusion that this policy area was highly securitized (Bigo 2001), while others did not share this perspective (see, e.g., Boswell (2007) for the absence of securitization after 9/11).

This section addresses the question whether the Commission advances more security-oriented positions or whether the Commission is an advocate of freedom rights. In contrast to the question whether the Commission is a promoter of more integration, there is no straightforward answer to the question of the political leaning of the Commission. While the Commission has proposed comparatively liberal policies in the areas of immigration and asylum which had the potential to enhance individual rights of migrants (Thielemann and Zaun 2013), it also advanced relatively security-oriented policies in the area of border policies or counter-terrorism

(Parkes 2015). This leads to the conclusion that the Commission is an 'opportunistic' actor when it comes to the normative underpinnings of its proposals and corresponds well with the concept of the Commission as an unideological, technocratic actor. The Commission proposes policies which are generally in line with its core policy aim and mandate, namely to strengthen EU integration, as I will show in the following. I will now assess how the Commission's content-related positions vary both between policy areas and over time.

Variance between policy areas

Whereas the Commission proposes policies oriented towards individual freedoms in some policy areas, it suggests security-oriented policies in others.

In the area of asylum policies, the Commission has usually submitted legislative proposals which were much too liberal in the eyes of the Council. Thus, the Commission gradually watered down these proposals to ensure member states' consent and the passage of the Directive. Cases in point are the already mentioned original and recast asylum directives. There are three reasons why the Commission is a relatively liberal actor in the area of asylum policies. First, when minimum standards or even common standards are negotiated, agreeing on a high level of protection immediately implies agreeing on a high level of harmonization. Policies on a low level of protection that allow for more liberal policies (as is the case in the asylum area) means de facto little harmonization. If the EU agrees on a high level of protection member states falling below this protection standard need to adjust their policies to be compliant. Agreeing on a high level of protection thus ensures a high degree of harmonization and implies deeper integration. While the Commission is usually described as a neutral technocrat, it does see itself as a visionary and therefore not only tries to fulfill its duties but also proposes policy solutions that provide an added value for states and refugees (Interview Commission 3; Interview Commission 2). Second, besides the member states, NGOs and UNHCR are important contacts for the Commission that provide it with the expertise to write legislative proposals. This expertise is essential for the Commission, as expertise usually lies with the operating institutions in the member states (Interview Consultant). These, however, do not provide information as openly as do UNHCR and NGOs. In comparison to member states, NGOs and UNHCR are considered less biased towards a specific system, but oriented towards best practices. Third, the Commission is a non-elected or non-majoritarian institution which does not consider itself responsible to any specific electorate. Instead its positions are based on technocratic expertise (Thielemann and Zaun 2013). In addition, research has repeatedly shown that Commission officials belong to an elite which is arguably much more open to universalist ideas of human rights than to particularistic interests and national immigration laws (see Kassim *et al.* 2013: 31–54). While, of course, it is questionable to what extent Commission officials can follow their own preferences and ignore member states' concerns, their training may prejudice the arguments they find convincing.

In other policy areas, however, the Commission has put forward policies that are likely to sacrifice individual freedoms for the sake of security. One example is that of the European Border and Coast Guards (EBCG), mentioned previously, which should ensure a more effective border protection. Its predecessor, Frontex, has already been heavily criticized for human rights violations (Fischer-Lescano *et al.* 2009). In a similar vein the EAW is controversial, among others, given the highly diverse legal practices and detention conditions across Europe (Chakrabarti 2014). Subsequent to the terrorist attacks in Paris on November 13/14, 2015 and in Brussels on March 22, 2016, the Commission has launched a number of highly security-oriented projects, including the Security Union. The EBCG Agency was introduced as a measure of the Security

Union and thus clearly links irregular border crossings to issues such as terrorism (European Commission 2016a). In addition, the Security Union envisages the introduction of European Travel Information and Authorisation System (ETIAS), comparable to the US Electronic System for Travel Authorization (ESTA) (European Commission 2016b).

Variance of positions in comparison to other EU institutions and over time

Whereas the Commission was usually considered less liberal than the EP in the first phase of the CEAS, it was probably the most liberal actor compared to the other two institutions (Council and EP) in its second phase (Ripoll Servent and Trauner 2014; Zaun 2017: 179–180). This was for various reasons. First, the EP had become notably more restrictive. One reason for the EP becoming more restrictive was that the EP was an elected body and, with enhanced powers, considered itself more strongly as representer of the interests of its national electorate and ideological gaps among parties became more visible. During the first phase this had played a much smaller role, since the EP had little influence as an institution and so concentrated more on giving a single message to be heard at all (Interview Caritas Europa). Interestingly, this finding seems to be consistent across policy areas. For instance, Ripoll Servent and MacKenzie (2009) demonstrate for the case of the EU–US SWIFT agreement, that with increasing powers following the Lisbon Treaty the EP had to take into account security concerns of member states, whereas previously it had been free to advocate strong data protection. The Commission, as a fully non-majoritarian institution, was not subject to the aforementioned political pressures. Neither did it face the constraints that the EP was confronted with resulting from becoming a co-legislator and suddenly being in the spotlight. This leads to the conclusion that the Commission's positions were probably indeed more stable over time. Yet, more systematic research (across JHA policy areas) is needed to provide evidence for this conjecture.

With the EP becoming more restrictive and the Commission maintaining a stable (non)-ideology, the Commission has now turned into the most liberal among the EU institutions in the legislative process, at least in the area of asylum policies where high standards are closely related to its key interest of enhanced integration. But even in asylum policies, the Commission did not depart from the restrictive policy core that is underlying asylum policies in all European member states (Ripoll Servent and Trauner 2014: 1142). The focus of these policies still lies in the control and management of asylum, and the Commission rather proposes best practices from member states than radical innovations. It has often been questioned whether even these best practices are always in line with international law (e.g., Peers 2011; Trauner and Ripoll Servent 2015). The reason for adopting such a conservative approach is, again, that the Commission needs the support of the member states for any policy proposal it submits. Nevertheless, the Commission became more self-confident with its newly acquired powers in the second phase of the CEAS and at times adopted a more confrontational style, trying to link up with the EP against the Council. For instance, the Commission warned the Council not to resume negotiations on the Dublin III Regulation before the revised Eurodac Regulation was finalized. The Commission was aware that Northwestern European member states were not ready to accept the suspension of transfers it had proposed in the Dublin III Regulation and therefore tried to use Dublin as leverage for negotiations on the Eurodac Regulation, which member states had dropped (Interview Council). However, member states later turned the tables on the Commission, saying they would not discuss Eurodac until Dublin was passed (Interview PermRep Germany) and were more successful than the Commission had been.

Conclusion

This chapter has demonstrated that the Commission has always tried to deepen integration in all areas of JHA. This is a general feature of the Commission and is not related to any policy area. However, member states have been extremely reluctant to transfer competences to the EU in this field and only did so in times of crisis when they felt that enhanced cooperation was the only way to ensure effective policies that can be enforced. Cases in point are the partial communitarization of asylum policies with the Amsterdam Treaty, which was prompted by the high refugee influx from the former Soviet states and Yugoslavia in the early 1990s, the introduction of the EAW as a tool of counter-terrorism shortly after 9/11, and the recent introduction of the EBCG Guards as a response both to the 'refugee crisis' and recent terrorist attacks in Europe.

While most policy areas of JHA have been fully communitarized with the Lisbon Treaty, member states are still very reluctant to agree on policies which could potentially interfere with their national sovereignty and do not accept proposals by the Commission which they deem 'too ambitious'. Unless there is a real situation of crisis, the Commission has little to offer member states and has a stronger interest in EU policies than the member states, as this is its mandate. In situations of crisis, however, the Commission can act as a provider of policy solutions to predefined problems.

While the Commission has continuously been a fervent supporter of stronger European integration, the leaning of its normative underpinnings is more mixed. On the one hand, the Commission has promoted rights-enhancing policies in the area of immigration and asylum policies; on the other hand, it has also fostered securitarian policies, potentially reducing individual rights in the areas of police cooperation or border policies. The core focus of the Commission still seems to lie in strengthening integration and the Commission does not follow a clear ideological line in its proposals. Overall, this fits very well with its mandate and its role as a technocratic actor.

While the analysis has shown certain trends, the Commission in JHA still remains a highly under-researched topic. To date, there is no systematic research comparing the role of the Commission in the different subfields of JHA or research that focuses on the Commission as an actor in one of them, linking its findings to the general discussions on the role of the Commission in EU policy-making. Interesting avenues for further research include the systematic assessment of whether the liberal policy ideas promoted by the Commission in areas such as asylum policies are really a result of its focus on enhanced integration, or whether the Commission does follow normative or ideological considerations under specific circumstances. Further research should consider how institutional developments within the Commission, such as the separation of DG Justice, Freedom and Security into two DGs, one for Justice and Consumers and one for Migration and Home Affairs, as well as different Commissioners, have influenced policy-making processes and policy output. In addition, research in the field should address the question how the introduction of comitology into JHA with the Lisbon Treaty has changed the Commission's impact in its implementation and whether this has provided more leverage to the Commission, as has been demonstrated in other areas (Ballmann et al. 2003).

Table 34.1 List of interviewees

Cited as	Institutional affiliation of interviewee	Date of interview
Interview Caritas Europa	Caritas Europa	November 21, 2012
Interview Commission 1	European Commission, DG Migration and Home Affairs, Asylum Unit	October 5, 2016
Interview Commission 2	European Commission, DG Migration and Home Affairs, Asylum Unit	November 21, 2012
Interview Commission 3	European Commission, formerly DG Migration and Home Affairs, Asylum Unit	November 20, 2012
Interview Consultant	Freelance consultant on asylum refugee policies	March 24, 2013
Interview Council	Secretariat of the Council of the EU	April 10, 2012
Interview PermRep Germany	Permanent Representation of Germany to the EU	November 22, 2012

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THE COUNCIL AND EUROPEAN COUNCIL IN EU JUSTICE AND HOME AFFAIRS POLITICS

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Introduction

Research on the EU policy area of justice and home affairs (JHA) almost inevitably touches upon the 'Council'. The Council is the most influential EU institution and is the gatekeeper for member state interests (Lewis 2015: 221), particularly with regard to JHA issues and their sovereignty relevance. Therefore, almost any study on legislative politics in the EU policy area of JHA includes an analysis of one or more governing bodies that comprise the Council. The bodies are the European Council and its permanent president in which heads of state or government decide and define the JHA agenda, the JHA Council headed by the respective member state holding the rotating six-month Council presidency as part of the Council of the European Union where the home affairs ministers negotiate and make the decisions, the Committee of Permanent Representatives (COREPER) where ambassadors (COREPER II for JHA) from member states take preparatory decisions for the ministers, and, at the lowest level, the eighteen working parties consisting of national experts and JHA counselors that channel Commission proposals into the Council bodies for a decision (A-point) or further discussion (B-point) to the higher levels (de Schoutheete 2006; Puetter 2012; Maricut 2016).

This review of scholarly work on the Council in JHA departs from a counter-intuitive observation. Despite the Council's key position in the policy area, it has largely remained a 'black box' in the academic literature concerned with JHA. A few notable exceptions to this general claim are the works of Maricut (2016), Smeets (2013) and Aus (2008). Compared to the broader political science debates on the Council, the JHA Council is under-researched with regard to themes such as the voting behavior of member states or alliances among member states, as well as on questions regarding possible shifts of power within the Council, from lower to higher levels of decision-making. The reasons for these research gaps relate to the fact that the member states and the Council are often not considered as analytically distinct units. This has the effect of obscuring dynamics within the EU institution that can originate from specific procedures at play within the body. In addition, research on the JHA policy area is dominated by issue-specific case studies that aim at understanding policy output in the respective policy subfields of police cooperation, asylum, immigration and justice matters, rather than identifying general patterns in policy-making.

One more reason for these research gaps may also be the methodological choices of scholars and the challenge of data access that working on the Council poses. Scholars have shown a