

Federalism, Intergovernmentalism, and Intelligence: The Future of Cooperation in the European Union

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Abstract

Core differences in governance systems of European Union member-states have spawned information-sharing policy disputes in joint intelligence. These disputes yield shortcomings in the depth and breadth of fusion analysis, stifling interagency sharing and limiting collection. A nation supporting intergovernmentalism likely will favor a decentralized information-sharing solution in international intelligence processing; however, federalists likely will demand a centralized institution (such as Europol) as a single point, information collection repository for joint and fused analysis. Therefore, in a confederation such as the EU with both federal and intergovernmental supporters, governance differences yield inefficient sharing, untenable interagency policies, and institutional diversion from EU law.

This work examines the consequences of differences in governance systems on international intelligence policies. Additionally, it examines how political conflict impedes interagency cooperation and information-sharing policy coordination at the intelligence executive level. Finally, it proposes how these conflicts may be addressed to improve joint and fused intelligence products.

Introduction

In development of a joint (multinational) and fused (combined) cross-border intelligence product among national institutions, what role does the governance system of government play in establishing cooperative regimes in a large scale information-sharing venture? Specifically, how do prevailing political philosophies of federalism and intergovernmentalism impact EU criminal intelligence agencies and their ability to share information in fusion analysis? Armed with this understanding, intelligence agency executives will be well-prepared to perceive others' early bargaining positions when these are made more predictable. Examining relationships between intelligence agencies and host governments will reveal a better understanding of how cooperative relationships may evolve with intelligence agencies of other governments.

Additionally, the relationships among EU member-states will be examined to determine if a relationship exists between intergovernmental (confederal) and supranational (federal) philosophies and the sharing capabilities of the respective criminal intelligence agencies. The recent popular trend toward intergovernmentalism will be examined, as well as implications for the future of EU intelligence.

Economics and Nascent Federalization

William Riker (1964) suggested that decisions in governance are perceived in cost-benefit terms; therefore, federations emerge when the benefits of federalism exceed the costs.

He adds that nascent federations are in danger of failing (or breaking up) when the costs borne by the component states are perceived to be greater than the benefits derived from remaining in the federation (Riker 1964, Chapter 3). Over the past decade this has not been the case in the European Union. Neither has a hegemonic power risen to the fore, nor has the economic burden of operating the EU fallen to just one or several major players (e.g., the Big 3/Big 5). Therefore, over time the EU has achieved a significant degree of stability politically and economically as a result of prudent cost-benefit decisionmaking at federal (i.e., *supranational*) levels. This otherwise humble observation has a dynamic effect on the criticism of supranationalism, since it blunts the intergovernmentalist argument that assembling a number of diverse states in a common economic or political cause would be inherently unstable (Riker 1964). Not only is there substantive proof to the contrary, but also the onus of proving intergovernmental primacy shifts to its supporters.

To best understand EU federalism versus intergovernmentalism, first the concept of European *integration* must be examined. According to Wayne Sandholtz and John Zysman (1998), integration, “begins when governments perceive certain economic policy problems cannot be solved by national means alone and agree to joint policymaking in supranational institutions” (pp. 198-199). This view is of particular note since the root of European integration is, therefore, economics, *not conflict*. This is noteworthy because dealing with conflict was among the purposes in establishing early cooperation in post-World War II Europe, particularly in neutralizing any future threat of German militarism (Nelson and Stubb 1998, 16). However, when Germany no longer was perceived as a regional threat, the swelling economic framework that bound Germany to its neighbors became the single-most reason for European integration (McKay 1996, 5).

Prevailing political theory in post-World War II Europe posited that if former antagonists cooperated economically it would diminish the chance of future war. Hence, formation of the European Coal and Steel Community economically tied France and Germany and later others as well. Once the notion of uniting Europe politically met with the notion of uniting Europe economically, a common European direction was forged, i.e., political unification based on establishing a unified European economic presence in the world market. Therefore, preserving peace was an *intended residual* of economic growth, rather than a purpose of design.

This single-mindedness of economic purpose would be reflected in European integration agreements and treaties over the next sixty years; however, the perspective of integration based on economics also would prove causal in future interstate political conflict. Because the economic-centered ideology that drove integration was a constant, this penchant ultimately was reflected in EU institutions, whether the econo-centric focus was appropriate or not. Conflict surfaced between econo-centric policymakers and those who facilitate *justice* policy in contexts (such as crime) not normally associated with economic policy. This shortcoming did not go unnoticed by member-states' police agencies that continued to negotiate *case-by-case* agency cooperation when investigating transnational crimes and pursuing criminal court remedies within their own jurisdictions.

According to David McKay (1996), when the original twelve nations signed the 1992 Treaty for European Union (TEU) in Maastricht, macroeconomic policy of the member-states became a federalized function. He wrote, "Macroeconomic policy is one of the most vital functions of the modern state (possibly *the* most vital function) so potentially Maastricht involved the creation of a genuine political union or federation" (McKay 1996, 3). However, the TEU was so laden with macroeconomic policy that it neither made provisions for a mutual defense (Pinder 1994, 46) nor dealt with interstate (transnational or cross-border) crime, both hallmarks of a strong federation. Whereas, this may have been adequate by some definitions to form a true federation, by other definitions it lacked important federal characteristics.

K. C. Wheare (1956) and R. L. Watts (1966) both wrote on integration and federalism several decades before Maastricht, and each enumerated fundamental criteria to create a successful federation. Wheare (1956) wrote that the commonsensical criteria for a federation to exhibit from the time of its inception was:

- “1. A sense of military insecurity and the need for a common defence ...
2. A desire to be independent of foreign powers ...
3. A hope of economic advantage ... ” (Wheare 1956, 37-38)

Wheare's (1956) first two criteria address international security and national sovereignty; but the third merely cites a *hope* for economic advantage, falling far short of assigning "economic advantage" the same priority as national security. Considering that in 1956 World War II was in recent memory and the ECSC had not yet met in Rome to form the Common Market, this perspective should not be surprising. A decade later Watts (1966) added to

Wheare's (1956) criteria, "a need for efficiency" (p. 42). Indeed, the 1992 TEU offers federal solutions for streamlining matters between and among member-state governments by a federal authority, which according to Riker (1964) is necessary for states to support a federation. Therefore, although early purposes of integration were economic to achieve *peace* goals, later second-stage (post-1980s) integration motives can be characterized as economic to achieve *efficiency* goals.

Assuming for a moment that, based on Wheare (1956) and Watts (1966), these assertions are valid, post-1990 econo-centric federalists, *except to affect a higher level of international efficiency*, of need would not address security concerns in defense and transnational crime. Metaphorically speaking, security matters fell off the planning table after the 1980s. This suggests TEU framers never intended the European Union would provide any form of federal, executive empowered, transnational police authority, but instead would serve to improve the efficiency of member-states' agency interaction. In other words, it would make the intergovernmental function of transnational criminal intelligence more efficient, but *not* replace it with a federal institution. Evidence this is indeed the case is Europol itself. According to the Europol Convention, Europol is meant to facilitate the process of multinational criminal justice information sharing as a single-source, centralized intelligence brokerage (Council of Europe 1995); however, the institution always has lacked executive authority, cannot conduct inquiries on its own (as can member-state agencies), and is wholly dependent on the member-states for the information it processes into intelligence.

This evidence leads to the conclusions that: 1) the EU designed Europol as an institution to enhance the efficiency of intergovernmental information-sharing by serving as a multinational locus (rather than to resolve conflict); 2) panlateral (universal) sharing is the least efficient of the available options to member-state intelligence executives; and, 3) there is no substantive evidence that the federal institution of Europol can consistently outperform the member-states' own intergovernmental fusion analysis capabilities. Therefore, in its present institutional form Europol cannot succeed in its mission to improve or enhance information-sharing efficiency over and above what the member-states already enjoy. Instead, it only can serve to facilitate lower-order sharing and generate intelligence at a level generally less efficient than fusion analysis at member-state level engaging in bilateral and multilateral sharing. Additionally, it can provide information-sharing where before none had existed such as in Sweden.

Sweden is a standout success story in the effectiveness of Europol as an international intelligence institution. Not long after signing the Europol Convention and initiating information exchange with Sweden's Federal Criminal Investigation Department, Europol identified a serious and apparently longstanding penetration of international organized crime. However, because there had been no fusion analysis at the federal level beforehand, it is possible that analysis at any level (i.e., local, national or international) may have exposed Sweden's organized crime problem, even before Europol's discovery. Nevertheless, the lesson taken from Sweden is clear: cross-border fusion analysis is requisite in effectively and *efficiently* combating serious and organized crime at the national level. Although Europol has exhibited competency in multinational information-sharing and intelligence generation, because of institutional (i.e., *not* operational) shortcomings the purpose of improving EU member-state information-sharing efficiency is hobbled.

Recalling that a stated purpose within the Europol Convention is to facilitate information sharing among the member-states (Council of Europe 1995) the Convention tacitly and errantly presumes that Europol can facilitate information sharing more efficiently than can member-state agencies. It is in this fallacious supposition of the Convention that the dilemma of Europol's role in the EU is founded. Whereas, by its inception the Convention supposes to facilitate information-sharing at the most efficient level, instead Europol shares at the least efficient level. The Europol dilemma is not a matter that can be resolved by in-house planning or executive decisionmaking at the institution, but rather must be resolved by powers even beyond those of Justice and Home Affairs.

Federalism versus Intergovernmentalism

Ernst Haas (1958) wrote there are three levels of the *supranational* process. First is the ability of a central institution "to assert itself in such a way as to cause strong positive or negative expectations." Second is the tendency of "business and labor ... to unite beyond their former national confines in an effort to make common policy." And third, "the demonstration by a resourceful supranational executive that ends already agreed to cannot be attained without further united steps" (Haas 1958, 222). In this manner, the supranational body develops its own identity and direction, a direction obtained from *within* its centralized governing body.

On the other hand, *intergovernmentalism* is decentralized by comparison and relies on the participation of member-state executives and policy inputs. According to Andrew Moravcsik (1998, 223), *intergovernmental institutionalism* is, “based on three principles: intergovernmentalism, lowest-common denominator bargaining, and strict limits on future transfers of sovereignty.”

The European Community was an intergovernmental body from its inception, even though governments on the Continent preferred a supranational (federal) solution to integration. In the absence of a hegemonic power, bargains were struck and alliances built among the member-states, and the only true power in the EC was the threat of expulsion. Moravcsik (1998) wrote:

“Once an international institution has been created, exclusion can be expensive both because the nonmember forfeits input into further decisionmaking and because it forgoes whatever benefits result. If two major states can isolate the third and credibly threaten it with exclusion and if such exclusion undermines the substantive interest of the excluded state the coercive threat may bring about an agreement at a level of integration above the lowest common denominator.”
(Moravcsik 1998, 223-224)

The third element is perhaps the most normative in protecting national government interests. Protection against erosion of national sovereignty is each national policymaker’s role in intergovernmentalism, and so typically shall oppose centralization of institutions that concentrate multinational power. Moravcsik (1998, 224) adds, the policymakers “also avoid granting open ended authority to central institutions that might infringe on their sovereignty, preferring instead to working through intergovernmental institutions.”

Therefore, institutions of these two forms of governance are focused more clearly. Whereas, supranational institutions are subject to a centralized federal authority, intergovernmental institutions are decentralized functions of combined national authorities. A historical comparison might be drawn between the Trevi Council, a decentralized intergovernmental institution of the Treaty of Rome, and its latter day successor, the Office of Justice and Home Affairs, a centralized supranational institution of the European Union.

Post-Maastricht Federalism, Idealism and Compromise

According to David McKay (1996), most literature on the European Union errantly suggests that common interest always “leads to cooperation and improved welfare for all the participating countries” (p. 7). He adds, “Early literature on the federal states is *ipso facto* a good thing and federal-like arrangements are the optimal institutional structures for the governance of culturally diverse states which share some common interest” (McKay 1996, 7). Although McKay (1996) calls this position *plausible*, he notes there is little evidence to support such a position. However, if federalism isn’t necessarily a good thing, then why do some European governments appear to gravitate toward it?

McKay (1996) assigns pride of place as a political explanation for European union, rejecting the economic and ideological perspectives. Whereas, doubtless on the Continent this may have been a factor in furthering the federalist supranational cause (i.e., establishment of a European identity), there is little evidence in 1993 that Great Britain signed the TEU with its Scandinavian allies (but Norway) to join and become a like member of a Continental club. More than a decade has passed since McKay (1996) wrote his theory and there is even less evidence to support it now. Instead, the position of the United Kingdom appears to be that of the intergovernmental representative, a guardian of national sovereignty for itself as well as other European Union member-states.

However, McKay (1996) correctly warned that Maastricht was only the beginning of the process to evolve the EU into full union and not an end in itself. He notes:

“... the natural tension that exists between what might be called centralists (or nationalists) and the decentralists (or anti-nationalists). Centralists assign the highest priority to the union’s main political goal: the avoidance of electoral and political instability. Decentralists assign top priority to other values: distributional questions of wealth, income, cultural or linguistic identity, and equality.” (McKay 1996, 11)

The EC may have been a step toward federalism, but it remained an intergovernmental body throughout its existence. When the TEU was ratified, EU institutions became far more centralized than they had been under the Treaty of Rome. Although Maastricht mentions a common European citizenship, it fell short of creating European citizen’s rights. Additionally the TEU did not provide for a common defense. It merely opened the door by suggesting that a common defense policy be developed, again, to enhance the efficiency of interstate cooperation.

Defense and non-economic foreign affairs have remained an intergovernmental function. McKay (1996) notes, “Together with the provisions of the [Single European Act] these changes mark a clear move toward a federal-like political system. On their own, however, they amount to the creation of what might be called a peripheralized federalism” (McKay 1996, 19). It is telling that McKay (1996) does not assign the EU federal status, but rather *federal-like*. Whereas, the EU has federal institutions and the power of those institutions comes from a central authority, that power is peripheralized (i.e., moved from the center), and so retains considerable intergovernmental properties.

It should be recalled that the Maastricht treaty is just that – a treaty, not a constitution. Nevertheless, it is certain that the TEU was meant to be a provisional (and incremental) constitution until member-states could agree on a draft to be adopted formally. McKay (1996, 20) writes, in this atmosphere the European Union is a “species of federal state,” contrary to most models of federation that begin their existence with a formal constitution. Therefore, this begs the question, is the EU a federation or not? According to McKay (1996), the rather unsatisfying answer is, if so, it is a variety never before seen in government that does not fit the mold of any other federation, and was conceived under circumstances that heretofore always have been unsuccessful.

In October 2004, voters were presented with a new Constitution for ratification by 25 EU member-states over the next two years. Twelve member-states ratified or gave popular approval to ratify the new constitution; however, The Netherlands defeated the proposed EU Constitution, as did France in May 2005 (BBCa 2005). French President Jacques Chirac was also President of the European Council when the matter came before the electorate, but voters rejected the Constitution. Since Chirac was one of the EU’s most ardent federalists, the defeat was particularly poignant. Because several decades had passed since France considered Germany a security threat, the urgency of uniting under a single federal cap for self-protection long-since had waned; however, the TEU was not formed for resolving security issues, but rather resolving economic efficiency issues. The French electorate failed to see positive economic outcomes based in a EU federal governance solution. Since the EU expanded to 25 nations and EU immigration has been free flowing from eastern EU nations into the Big 5, unemployment and civil unrest in France had skyrocketed (BBCb 2005). The French were not prepared to give the

federal solution any permanence, in light of domestic economic distress and social destabilization perceived as being caused by EU expansion.

The United Kingdom cancelled its scheduled vote in the spring of 2006 with Prime Minister Tony Blair commenting there was no sense going forward with France unable to support the new constitution (BBCb 2005). According to the BBC (b) regarding the French referendum defeat, “Some critics said the constitution embodies unfettered free-market economics that would undermine the French welfare state and allow countries with cheaper labour to take French jobs. Others said it did not go far enough to promote European integration” (BBCb 2005). Piecemeal, nearly all the remaining states withdrew election plans and at this writing there is no immediate plan in place to begin constitutional negotiations anew.

The Dilemma of Joint Intelligence Under the TEU

Recalling that the TEU is an economic-centered treaty and that institutions of the EU are reflective of that origin, the absence of a codified transnational criminal law eliminates any need for a transnational executive law enforcement authority. This does not eliminate the need for Europol; however, it resolves the question – at least for the time being – as to whether or not to grant the agency executive powers. If there are no transnational criminal statutes and no EU Constitution on the horizon (near or far), there is no need for a transnational authority to enforce national laws.

Until the constitution fell in a popular vote, the measure to elevate the status of Europol must have been considered by Europol itself, the EU federal police agencies that populate Europol, and the nations that supported the notion of Europol as an executive authority. Germany’s Bundeskriminalamt would not share information with Europol before the vote because it does not have executive powers. It now appears that Europol will continue *not* to have executive powers and Germany will continue *not* to share information with Europol in a vicious circle. The failure of member-states to embrace European federalism appears to have swung the political pendulum back toward intergovernmentalism and, within the member-states, nationalism (perhaps even jingoism) has rooted. This is not to say the TEU will be undone, but significant damage has befallen federalist efforts. The ripple effect of this turn of events has been sufficient to influence intelligence policy across the whole of Europe.

To European law enforcement (certainly among other institutions), the failure of the constitution makes EU institutions appear weak, doubtless weaker than they actually are. However, intelligence perceptions carry considerable weight when negotiating for information. As a result, and taking into consideration what has been discussed earlier, bilateral and multilateral sharing will doubtless increase as a result of the constitution's failure. Member-state cooperation with EU agencies such as Europol and Eurojust likely will decline in the absence of serious negotiations to restart the constitutional process.

Examining the options, and based on what has been learned thus far, criminal intelligence will likely perform in a predictable manner. Agencies that already enjoy national support in their home country (the London Metropolitan Police Service in the UK, the Landeskriminalamt and the Bundeskriminalamt in Germany), doubtless will suffer little by the set back of European federalism. However, Europol and Eurojust, both EU institutions, likely shall suffer since plans to expand their respective roles under a federal cap are now minimally on hold and potentially are scuttled. Whether or not federalism is good for Europe is one issue, but there is little doubt that joint information fusion in intelligence is good for European law enforcement. One might speculate the failure of the EU Constitution will contribute to inefficiency in international information sharing; however, in this speculation is the supposition that a federal solution is intrinsically the most efficient, a supposition that by itself may be errant.

With defeat of the EU Constitution, EU institutions may find that further expansion may have become impossible at least for the foreseeable future. This is particularly so at Europol since law enforcement applications of the European Union are applied thinly in the original TEU; therefore, would the EU return to its economic-centered roots, those functions centering on crime and conflict management could be returned in whole to member-states as intergovernmental functions of sovereign nations.

Since the signing of the Maastricht Treaty, EU intelligence agencies have garnered support for joint and fused intelligence, regardless whether or not they are willing to participate at supranational levels. The two events are not connected but in historical parallel; however, what has happened in the meantime is that member-states (among others in the world) have self-initiated bilateral and multilateral information-sharing to generate fusion intelligence. Therefore, two unrelated constructs are parallel over the past decade: the upswing of federalism in the European Union and the upswing of fusion intelligence among the EU member-states. It is not

unreasonable to conclude that the EU merged these constructs in Europol and that the contemporary agency is a political product as much as it is a practical product. If this were so, the efficiency of the intergovernmental (decentralized) design of pre-Convention Europol would be expected to be greater than the (centralized) EU function of the post-Europol Convention era because of its earlier increased bargaining capacity as an independent actor. This conclusion suggests the operational constructs of Europol could benefit by changing from its present Convention-dependent format to that of a NGO, in essence returning to its original structural format.

Most nations never depended on Europol as a sole source intelligence brokerage (but those not having an intelligence function before 1999), and so member-states continue to form and expand cooperative regimes and coordinate policies at home to generate proprietary intelligence products. Bilateral and multilateral sharing have not decreased as would be expected with an emerging federal role. Instead agency-initiated sharing has become more prevalent in acquiring intelligence among the member-states. Taking this at face value, it is apparent that EU criminal intelligence agencies all along have preferred an intergovernmental solution above the federal solution to information-sharing *at international levels* for its structural superiority, the quality of information, and the lesser degree of perceived corruption. If this is the case, Europol was offered as an institutional solution to a problem that did not exist.

Conclusion

Historically speaking, at Europol's inception there was a problem in information sharing, and there remains a problem today. What remains to be seen is whether or not Europol itself can be made more efficient to carry out its mission. Once again, this would not be the responsibility of Europol executives, but rather those who control what power those executives possess. There is historical evidence that implies the executives of a decentralized Europol could quantitatively improve their lot in European intelligence through bilateral negotiations at the agency level – negotiations that are at present prohibited.

It is unclear if the preference of intergovernmentalism is inherent to international law enforcement information sharing, in the sense that only one preference exists. Instead, given the current state of the European Union, it appears that criminal intelligence agencies prefer federalism in gathering information for fusion analysis *at home*. This in no way suggests that an

intelligence agency operating within the framework of a strong federal European Union, providing a secure fusion intelligence product, is not similarly preferable. Given the evidence herein, a federal solution in criminal intelligence in the EU is not presently as *practical* as is the contemporary intergovernmental solution. For the foreseeable future decentralized intergovernmental solutions will be those most frequently pursued in information-sharing in establishing cooperative regimes to establish joint and fused intelligence. Moreover, an increase shall follow in bilateral and multilateral agreements facilitating more efficient systems.

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