Invisible Infringements: On the AFSJ's Under-Constitutionalisation

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Abstract 299
Keywords 300
I. The AFSJ as a Driver of Paradigm Shifts Within European Law 302
1. The EU's Preventive Turn Toward Big Data and Legal Automation 303
2. The EU's Turn Toward Supranationalised Security Governance 306
II. Beyond *Verwaltungskooperationsrecht:* The AFSJ's Under-Constitutionalisation 309
1. The AFSJ's Structural Adherence to *Verwaltungskooperationsrecht* 309
2. Under-Constitutionalisation and Its Discontents 311
III. Case Studies – Europol, Frontex, and PNR 314
1. Europol and Frontex as Informal and Procedurally Elusive Providers of Public Security 315
2. The Shortcomings of the Preliminary Reference Procedure 321
3. The PNR Directive and the Drawbacks of an Absent Administration 327
IV. Conclusion and Suggestions for Reform 328

Abstract

Reading the Legal Service's book on '70 Years of EU Law', one could almost have the impression that the EU is not in the business of combating crime and upholding public safety. In this contribution, I argue that this narrative choice is no coincidence. Much rather, it reflects a trend that permeates the Area of Freedom, Security and Justice (AFSJ).

There is an increasing discrepancy between the image the European Union (EU) and its Member States project to the outside – one of public safety as a domain reserved to sovereign nation states – and the AFSJ's institutional reality which is characterised by creeping supranationalisation. Perhaps counterintuitively, it is precisely this structural attachment to the limitation of the EU's competencies that has enabled its AFSJ-related powers to grow while often evading judicial scrutiny. The AFSJ, because it operates in ways to which EU law is not fully structurally committed, is not matched by

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effective constitutional safeguards of accountability, judicial review, and rights protection. It remains under-constitutionalised. EU security law renders invisible those infringements it produces and remains curiously removed from the Union's dedication to its citizens.

I defend this argument in three steps. First, I illustrate how EU security law drives fundamental paradigm shifts. Second, I show how the AFSJ's composite administration, due to its commitment to the paradigm of Kooperationsverwaltungsrecht and the principle of double exclusivity, remains under-constitutionalised. Third, I demonstrate how these problems manifest in legal practice by pointing to the activities of Europol and Frontex, as well as the Act on the Processing of Passenger Name Record (PNR) Directive. I conclude with suggestions for reform.

Keywords

AFSJ – Europol – Frontex – Composite Administration – Preliminary Reference Procedure – Rule of Law – Security – PNR – Legal Automation – Legal Remedies

The European Commission's Legal Service has published a book on '70 Years of EU Law' which assembles 'reflections on the principles and foundations of EU law'[1]. Reading the book, however, one could almost have the impression that the European Union is not in the business of combatting crime and upholding public safety. In a book spanning over 402 pages, the AFSJ is only ever mentioned once[2] in passing.

This omission can be explained with the Legal Service's narrative choice to describe the Union as a decisive force in expanding fundamental rights. Part 2 of the book narrates how 'the EU legislator has introduced increasing numbers of concrete rights for EU citizens […].'[3].Indeed, not only through its substantial legal protections but also by transforming each national judge into a judge of EU law,[4] the Union has established itself as a remarkably effective liberalising force. The EU has proven these credentials time and time again: One needs to look no further than the Court of Justice's jurisprudence on

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[1] 'Acknowledgements' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023), 7.

[2] Daniel Calleja and Tim Maxian Rusche, 'Introduction' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023), 15-32 (21).

[3] Calleja and Rusche (n. 2), 27.

[4] Calleja and Rusche (n. 2), 17.

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mass data retention[5] or on Member States' rule of law breaches[6]. The Legal Service's narrative choice therefore, in itself, undoubtedly reflects an important truth. What it obscures, however, is almost more remarkable: The increasing role of the Union as an entity which, through both its legislative and executive, *infringes* on fundamental rights.[7]

In this contribution, I will argue that the Legal Service's narrative choice is no coincidence. Much rather, it reflects a trend that permeates the AFSJ. The EU is increasingly growing into a role of a facilitator of public security. Naturally, it infringes on subjective rights in the course of doing so. Due to the AFSJ's structural attachment to intergovernmental composite administration and related judicial sub-principles, however, EU administrative law is currently underequipped to tackle such infringements. As a result, there is an increasing discrepancy between the institutional image the EU and its Member States project to the outside – one of public safety as a domain reserved to sovereign Member States[8] – and the AFSJ's institutional reality. This not only obscures important policy choices. In practice, this discrepancy also curtails judicial remedies and the binding force of the law, thus undermining EU security law's legitimacy and rendering invisible those individuals whose rights are affected. EU Security law, because it pursues legal aims, that the EU is not fully structurally committed to, remains partially under-constitu-

[5] ECJ, Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources, Minister for Justice, Equality and Law Reform, The Commissioner of the Garda Síochána, Ireland and the Attorney General, and Kärntner Landesregierung, Michael Seitlinger, Christof Tschohl and Others, judgement of 8 April 2014, case nos C-293/12 and C-594/12, ECLI:EU:C:2014:238; ECJ, Tele2 Sverige AB v. Post- och telestyrelsen and Secretary of State for the Home Department v. Tom Watson and Others, judgement of 21 December 2016, case nos C-2013/15 and C-698/15, ECLI:EU:C:2016:970; ECJ, La Quadrature du Net and Others v. Premier ministre and Ministère de la Culture, judgement of 6 October 2020, case nos C-511/18, C-512/18 and C-520/18, ECLI:EU:C:2020:791; ECJ, Bundesrepublik Deutschland v. SpaceNet AG and Telekom Deutschland GmbH, judgement of 20 September 2022, case nos C-793/19 and C-794/19, ECLI:EU:C:2022:702. These standards have recently been partly walked back in ECJ, La Quadrature du Net and Others v. Premier ministre and Ministère de la Culture II, judgement of 30 April 2024, case no. C-470/21, ECLI:EU:C:2024:370.

[6] ECJ, *Hungary v. Parliament and Council,* judgement of 16 February 2022, case no. C-156/21, ECLI:EU:C:2022:97; ECJ, *Poland v. Parliament and Council*, judgement of 16 February 2022, case no. C-157/21, ECLI:EU:C:2022:98; see also Julio Baquero Cruz and Jean-Paul Keppenne, 'Fundamental Values, Constitutional Identity and the Protection of the European Union Budget against Breaches of the Rule of Law' in: European Commission Legal Service (ed.), *70 Years of EU Law– A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023), 58-75. For a critical perspective see Maciej Krogel, 'Is It Enough to Say "Common Values" When We Mean the Essence of European Integration? Reassessing the Understanding of Art. 2 TEU as the Identity of the EU Legal Order', HJIL 86 (2026), 225-244.

[7] For an illustration see Jacob van de Beeten, 'Festschrift or Fiction? Ommissions, Gaps and Blind Spots in 70 Years of EU Law', HJIL 86 (2026), 167-196.

[8] See Art. 4 para. 2 sentence 3 TEU and Art. 72 TFEU.

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tionalised. By under-constitutionalisation, I mean that the EU's supranational security-related activities have *de facto* acquired a substantive weight and breadth that, in constitutional practice, are not matched by effective constitutional safeguards of accountability, judicial review, and rights protection.

I will lay out this thesis by first illustrating how, within the AFSJ, the EU drives forward some of the most fundamental paradigm shifts in European law (I.). Then, I will argue that, due to its commitment to intergovernmental composite administration, EU security law[9] is structurally underequipped to ensure adequate judicial review, thus undermining the binding force of the law in the AFSJ (II.). In a third step, I will demonstrate how these abstract problems manifest in legal and institutional practice (III.). I conclude with some suggestions for reform (IV.).

I. The AFSJ as a Driver of Paradigm Shifts Within European Law

It is no secret that many European policy-makers perceive terrorism and migration as two of the major challenges facing the EU. The Legal Service's book itself considers 'the refugee crisis following the war in Syria' to be one of the 'three major crises'[10] confronting the Union after the Treaty of Lisbon. Jolted by a series of terrorist attacks in the mid-2010s, the Juncker Commission heralded in the 'European Security Union'[11]. It was in this political context, that the EU established – and continues to produce – a wide range of security instruments and institutional reforms. AFSJ policy has thus become one of the main fields within which EU law is currently undergoing sweeping paradigmatic changes.

In what follows, I will identify two major paradigm shifts within the AFSJ: First, the AFSJ is driving a preventive turn toward big data and legal automation fuelled by large databases that are rendered interoperable and searchable through modern and potentially self-learning technologies (1). These developments, secondly, are propelling a creeping supranationalisation of security governance (2). Both of these paradigm shifts are interlinked and mutually reinforcing. Each has institutional as well as substantive dimensions.

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[9] I will primarily focus on security law which is aimed at upholding internal security. This means that questions of *criminal justice* as such – and that includes questions pertaining to the European Arrest Warrant and the European Public Prosecutor's Office – will be out of scope. This is not to say that the observations made here do not have some nontrivial connections to the field of criminal justice.

[10] Both quotes are from Calleja and Rusche (n. 2), 22.

[11] For an overview see: <https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/promoting-our-european-way-life/european-security-union_en>, last access 28 January 2026.

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1. The EU's Preventive Turn Toward Big Data and Legal Automation

Throughout the last years, the EU has established a comprehensive network of security- and migration-related treasure troves of data that complement already existent coordinative data pools like the Europol Information System (EIS).[12] These databases include, among others, Eurodac[13], the Visa Information System[14], the Schengen Information System[15], the Entry/Exit-System[16], the European Criminal Records Information System on convicted third-country nationals and stateless persons[17], the European Travel Information and Authorisation System (ETIAS) watchlist[18] and the Passenger Name Record (PNR) system[19]. It is the EU Commission's declared goal to render all these databases interoperable and searchable through modern big data technologies.[20] For that purpose, two Interoperability Regulations[21] have established a European Search Portal, a Biometric Matching Service, a Common Identity Repository and a Multiple Identity Detector. European security authorities hope that these instruments will allow them to merge data silos and thus profile individuals within disaggregated datasets.[22]

This legally and technically complex merging operation levels the conceptual differences between migration and asylum law on the one hand, and general security law on the other – two legal fields which not only rely on two different legal competencies, but have traditionally differed significantly in terms of policy objectives.[23] Migration is now viewed – at least partly, if not, by now, predominantly – as a *security concern*. Migration data, in the

12 For an overview see Niovi Vavoula, *Immigration and Privacy in the Law of the European Union* (Brill 2022).

13 See Regulation 603/2013/EU.

14 See the original Regulation 767/2008/EC; For the latest revision see Regulation 2021/1134/EU.

15 See the original Convention Implementing the Schengen Agreement (CISA) of 14 June 1985, OJ L 239, 22. September 2000; see also the latest revision in Regulation 2018/1860/EU.

16 See Regulation 2017/2226 of 30 November 2017/EU.

17 See Regulation 2019/816/EU.

18 See Regulation 2018/1240/EU.

19 See Directive 2016/681/EU (PNR Directive).

20 See for example in Europol Strategy – Delivering Security in Partnership (2023), 5.

21 Regulation 2019/817/EU; Regulation 2019/818/EU.

22 See Niovi Vavoula, 'Artificial Intelligence (AI) at Schengen Borders', European Journal of Migration and Law 23 (2021), 457-484.

23 See Bettina Schöndorf-Haubold, '§ 35 Europäisches Polizei- und Sicherheitsrecht' in: Jörg Philipp Terhechte (ed.), *Verwaltungsrecht der Europäischen Union* (2nd edn, Nomos 2022), 1461-1566, para. 84; Valsamis Mitsilegas and Niovi Vavoula, 'The Normalization of Surveillance of Movement in an Era of Reinforcing Privacy Standards' in: Philippe Bourbeau (ed.), *Handbook on Migration and Security* (Elgar 2017), 232-251 (241-245).

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eyes of policy-makers, ought to be made available not just to migration authorities, but to law enforcement authorities in general. In this way, 'the law of the border becomes security law'.[24]

As a means of substantive change, EU agencies are in the business of automated predictive threat detection: These interoperable databases allow European security authorities to sift through massive amounts of data in order to predict potential threats to public security, ideally before they materialise. Such predictions often pertain not only to abstract situational analyses, but also to concrete prognoses about the dangerousness of specific individuals.[25] This, for example, is the case for the system established in the PNR Directive which obliges European security agencies to automatically analyse passenger name record data by not only matching them against existing databases, but also comparing them against so-called 'pre-determined criteria', algorithmic patterns which contain (allegedly) suspicious flight behaviours.[26] By connecting data from several different sources and running them through potentially self-learning algorithms, European security authorities hope to generate new investigative leads previously unavailable through traditional investigative work within siloed data alone.[27]. This, in the words of former Director of Europol Rob Wainwright, could allow EU agencies like Europol to be at the forefront of 'an agreed European security model based on intelligence-led policing'.[28]

Fuelled by its 'preventive turn'[29], AFSJ policy initiatives cause tectonic shifts in the system of European law. Some of these changes may be specific to certain Member States' legal cultures. Instruments like the PNR Directive, for example, relativise the substantial distinction between preventive and repressive policing, and the institutional separation of operative policing and intelligence services.[30] This decentralisation of security institutions has been central to German security law since the passing of the Grundgesetz and is

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[24] Valsamis Mitsilegas, 'The Preventive Turn in European Security Policy' in: Francesca Bignami (ed.), *EU Law in Populist Times* (Cambridge University Press 2020), 301-318 (305).

[25] On the concept of automated predictive threat detection Christian Thönnes and Niovi Vavoula, 'Automated Predictive Threat Detection After Ligue des Droits Humains' in: Evelien Brouwer, Elspeth Guild, Stefan Salomon and Christian Thönnes (eds), *The Future of the European Security Architecture*. Max Planck Institute for the Study of Crime, Security & Law Working Paper Series 2023, 12-24 (12).

[26] Art. 6 para. 3 of Directive 2016/681/EU (PNR Directive).

[27] See for instance the Commission's stated hope that the PNR system can identify dangerous persons who are 'as of yet, not known to the law enforcement authorities', Commission Staff Working Document, SWD (2020) 128 final, 24.

[28] Europol Review 2011, 5.

[29] A notion coined and explained in Mitsilegas (n. 24), 302-304.

[30] Christian Thönnes, 'Fluggastdatenspeicherung', Die Verwaltung 55 (2022), 527-559 (530).

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considered a crucial response to the centralised security apparatus under the Nazi terror regime.[31] Other shifts are even more fundamental in nature: No administration disposes of enough (human) civil servants to conduct surveillance on entire populations and predict threats before they appear. EU security law has chosen two responses to this conundrum: Reliance on private power and automation. EU law increasingly obliges private entities like financial institutions[32], airline carriers[33] or – potentially – providers of digital communication services[34] to use their access to massive amounts of customer data for the purposes of data retention and automated profiling.[35] Moreover, the attempt to predictively identify dangerous individuals within seas of data, because of human cognitive overload, leads to an increased delegation of decision-making and -preparation from humans to machines (such as self-learning algorithms).[36]

Of course, Member States' legal orders also pursue automated predictive threat detection. Given that the envisioned technologies only work when fed colossal amounts of data, however, the supranational level is particularly suited to organise access to the powerful, international – and often private – gatekeepers of big data.

Such big data-based surveillance and profiling regimes create a whole host of specific fundamental rights challenges.[37] This was recently emphasised by both the Court of Justice of the European Union (ECJ)[38] and the German Federal

31 See Matthias Bäcker, '§ 28 – The Security Constitution', in: Matthias Herdegen, Johannes Masing, Ralf Poscher and Klaus Ferdinand Gärditz (eds), *Constitutional Law in Germany* (C. H. Beck 2025), 1294-1246 (1291, para. 23).

32 This is established in Directive 2015/849/EU, see Lukas Landerer, 'The Anti-Money-Laundering Directive and the ECJ's Jurisdiction on Data Retention', eucrim (2022), 67-72.

33 This is established in Directive 2016/681/EU (PNR Directive).

34 Under the Commission's proposal for a Regulation on preventing and combating child sexual abuse material, such providers could be obliged to preventively search and detect such material within their services, see Thönnes and Vavoula (n. 25), 20-23.

35 See Valsamis Mitsilegas, 'The Privatisation of Surveillance in the Digital Age' in: Valsamis Mitsilegas and Niovi Vavoula (eds), *Surveillance and Privacy in the Digital Age* (Hart Publishing 2021), 101-158.

36 Timo Rademacher, 'Artificial Intelligence and Law Enforcement' in: Thomas Wischmeyer and Timo Rademacher (eds), *Regulating Artificial Intelligence* (Springer 2020), 226-250 (245); Karen Yeung, 'Why Worry About Decision-Making by Machine?' in: Karen Yeung and Martin Lodge (eds), *Algorithmic Regulation* (Oxford University Press 2019), 21-48; Thönnes (n. 30), 558.

37 For an overview see Evelien Brouwer, Elspeth Guild, Stefan Salomon and Christian Thönnes, The Future of the European Security Architecture (September 11, 2023). Max Planck Institute for the Study of Crime, Security & Law Working Paper Series 2023 – 06, available at SSRN: https://ssrn.com/abstract=4547775.

38 ECJ, *Ligue des droits humains ASBL v. Conseil des ministres*, judgement of 21 June 2022, case no. C-817/19, ECLI:EU:C:2022:491, paras 193-228.

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Constitutional Court (BVerfG).[39] There are, for instance, concerns regarding the necessity and proportionality of big data profiling regimes which are often untargeted and mostly affect unsuspicious citizens.[40] European law enforcement is increasingly looking for the proverbial needle in a haystack. Due to a statistical phenomenon known as *base rate fallacy,* this is bound to produce a high amount of false positive hits, thus casting unsubstantiated suspicion on a large amount of people.[41] In addition to concerns regarding the discriminatory nature of many policing algorithms[42], norms like Art. 11 Law Enforcement Directive (LED)[43] also address more principled concerns regarding legal automation: Under which circumstances can the loss of meaningful human control over the exercise of public power be justified?[44]

2. The EU's Turn Toward Supranationalised Security Governance

Institutionally, AFSJ policy relativises one the main characteristics distinguishing the EU as a 'constitutional union'[45] from nation states. The Legal Service's book[46] cites Walter Hallstein: 'The Community has no […] direct power of coercion […] and no police'. Almost sixty years later, this no longer fully holds true. The 2019 reform of the Frontex Regulation[47] introduces a 'standing corps', about 10,000 members of which come from the agency's original statutory staff.[48] This statutory staff can 'be deployed in operational areas' as members of multi-national border guard teams.[49] Although their actions are also subject to the relevant Member State's authorisation and national law,[50] this statutory Frontex staff is authorised to exercise coercive force

39 BVerfG, *Hessendata,* judgement of the First Senate of 16 February 2023, 1 BvR 1547/19 and 1 BvR 2634/20, paras 67-85.

40 See for the PNR context ECJ, *Ligue des droits humains* (n. 38), paras 125-192.

41 For statistics pertaining to the PNR system see Staff Working Document (n. 27), 28; on the phenomenon of base rate fallacy in predictive policing scenarios see Thönnes (n. 30), 549.

42 See Solon Barocas and Andrew Selbst, 'Big Data's Disparate Impact', Cal. L. Rev. 104 (2016), 671-732.

43 Directive 2016/680/EU ('Law Enforcement Directive').

44 Both the German Constitutional Court and the ECJ mainly discussed this as a problem for judicial remedies caused by algorithmic opacity, see BVerfG, *Hessendata* (n. 39), para. 100; ECJ *Ligue*, *des droits humains* (n. 38), para. 195, but there is a deeper principled argument about the loss of interpersonal relationships of recognition, see Thönnes (n. 30), 555.

45 For the academic history of the *Verfassungsbund* terminology see Ingolf Pernice, 'Die dritte Gewalt im europäischen Verfassungsverbund', EuR 31 (1996), 27-43.

46 Calleja and Rusche (n. 2), 16.

47 Regulation 2019/1896/EU (Frontex Regulation).

48 See Art. 54 para. 1 lit. (a), Art. 55 Frontex Regulation.

49 See Art. 55 para. 3 and Art. 82 Frontex Regulation.

50 See Art. 82 paras 2 and 3 Frontex Regulation.

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to fulfil their tasks.[51] There now is an EU legislative act regulating the administrative use of firearms by EU agents.[52] These coercive powers elevate AFSJ law beyond the robust investigative powers the Commission wields in fields like competition law. Here too, Commission agents may conduct investigative measures. The use of coercive force, however, is explicitly reserved to the relevant Member State's civil servants.[53] Frontex officers also wear uniforms specifically identifying them as EU officers, as well as a 'blue armband with the insignias of the Union'.[54] Even though one may argue that Frontex officers are still part of a broader Member State operation, they will be perceived by affected subjects as a distinctly European police authority. These facts have led observers to describe these reforms as a first step towards a genuine EU police force.[55]

But even beyond these extreme examples, the EU has entered the business of security legislation. Its explicit legislative powers to do so are mostly confined to judicial and police cooperation on specific matters.[56] Yet, the Union has, with Member States' overwhelming support, used its legislative powers on the internal market and data protection to lay down rules on how European security agencies may use modern technologies for the purpose of protecting public security. The Artificial Intelligence (AI) Act[57] which, *inter alia*, regulates how law enforcement authorities may use AI software for the purposes of predictive policing and real-time remote biometric identification was recently adopted based on Articles 16 and 114 Treaty on the Functioning of the European Union (TFEU). Due to the complexity especially of transnational policing, modern police work will increasingly rely on modern technology. Regulating these technologies therefore means regulating policing.[58]

The fact that substantive EU law and EU institutions have to tackle these challenges means that EU security law now inches ever closer to the core areas of national security law. At least in German police and criminal procedure law, one of the main substantive paradigms regulating operative measures is the presence, for preventive measures, of a concrete threat or, for repressive measures under criminal procedural law, of a concrete (or other-

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51 See Article 82 para. 8 Frontex Regulation.

52 See point 2 of Annex V Frontex Regulation.

53 See for instance Article 20 para. 6 Regulation 1/2003/EC.

54 See Article 82 para. 6 Frontex Regulation.

55 Schöndorf-Haubold (n. 23), para 124; Melanie Fink, 'The Action for Damages as a Fundamental Rights Remedy', GLJ 21 (2020), 532-548 (532 f.).

56 See Title V on the AFSJ in the TFEU.

57 Regulation 2024/1689/EU.

58 For an overview of the AI Act's impact on security law see Christian Thönnes, 'The EU AI Act's Impact on Security Law – A Debate Series', Verfassungsblog, 9 December 2024, doi: 10.59704/148d0746da7c7f3c.

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wise qualified) suspicion.[59] While the norms on operative police measures are themselves almost exclusively regulated by German laws,[60] EU law increasingly determines or influences which data can be processed with which technologies under which type of human intervention: The Law Enforcement Directive, for example, contains data protection rules and a (partial) prohibition on automated decision-making,[61] the recently-adopted AI Act regulates the use of AI software for policing purposes[62] and the ECJ, in *Ligue des droits humains,* set standards for automated predictive, person-related threat detection.[63] Member State laws may determine when a concrete threat or suspicion justifies police action – but EU law increasingly influences *how* the epistemic basis for such measures may be produced.

This also has an institutional dimension: EU agencies like Europol may not ultimately put shackles on criminal suspects[64], confiscate illicit goods or close down suspicious businesses. Especially in complex, transnational investigations requiring intelligence-led policing, however, Europol may use its intelligence to request the initiation of national criminal proceedings[65], and then, through its operational support and coordination, significantly influence whom to arrest based on which intelligence.[66] In such complex investigations, it is unlikely that national or regional police authorities will possess the necessary resources and expertise to challenge the intelligence which Europol provides them – nor are they incentivised to do so.[67]

It would then seem artificial and implausible to maintain that substantive security law and institutional police conduct remain completely uninfluenced by the EU – or, when it comes to the judicial review of intelligence-induced

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59 For an overview over the structure of German security law see Bäcker (n. 31), paras 59-82.

60 Both federal laws for repressive policing and (mostly) *Länder* laws for preventive policing.

61 Article 11 Directive 2016/680.

62 For challenges the AI Act creates for national security law see Plixavra Vogiatzoglou, 'The AI Act National Security Exception', Verfassungsblog, 9 December 2024, doi: 10.59704/292082becc7cc8e6.

63 See Thönnes and Vavoula (n. 25); for a German perspective see Kristin Pfeffer, 'Vom Verfassungsstaat zur Sicherheitsunion', NVwZ 42 (2023), 1286-1293 (1288 f.).

64 '[Europol] shall not apply coercive measures in carrying out its tasks', nor does it have the 'power to execute investigative measures'. It may, however, 'provide operational support to the competent authorities of the Member States during the execution of investigative measures', Art. 4 para. 5 Regulation 2016/794/EU (Europol Regulation).

65 See Article 6 paras 1 and 1 a of the Europol Regulation. See on this power to request criminal proceedings Valsamis Mitsilegas and Fabio Giuffrida, 'Bodies, Offices and Agencies' in: Valsamis Mitsilegas (ed.), *EU Criminal Law* (2nd edn, Hart Publishing 2022), 349-479 (366 f.).

66 For an overview see Mitsilegas and Giuffrida (n. 65), 362-369.

67 It is Europol's declared strategy, to deliver, through its 'Innovation lab', innovative technological solutions to Member States that they would not be able to develop themselves, Europol Strategy – Delivering Security in Partnership (2023), 8.

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operative police measures, that EU agencies bear no legal responsibility for them. In terms of fundamental rights sensitivity, there is not always a clear red line that separates operative police measures from the big data-induced instruments that enable them. To the outside world, all but the coercive measures at the end of the investigative production chain may be invisible – but given how much complex data analysis informs modern policing in complex cases, the preparatory intelligence work that precedes ultimate police action will increasingly be decisive.[68]

II. Beyond *Verwaltungskooperationsrecht:* The AFSJ's Under-Constitutionalisation

Despite these developments, under EU primary law, maintaining security still remains 'the sole responsibility of each Member State'[69]. Perhaps counterintuitively, it is precisely this structural attachment to the limitation of the EU's competencies that has enabled its AFSJ-related powers to grow whilst often evading judicial scrutiny. This is because the AFJS's adherence to intergovernmental *Verwaltungskooperationsrecht* (1.) has, in the face of its simultaneous expansion, rendered it under-constitutionalised and curiously removed from the Union's citizens (2.).

1. The AFSJ's Structural Adherence to *Verwaltungskooperationsrecht*

When EU security agencies contribute to executive decision-making, their involvement is usually organised in multi-jurisdictional composite administrative procedures. Composite administrative decision-making occurs when several administrative entities (potentially across several jurisdictions) contribute in different ways and at different stages to an ultimate administrative decision – be it that an EU body provides input for an ultimate Member State measure or *vice versa*.[70] Ordinarily, composite administrative

68 See Andrew Guthrie Ferguson, *The Rise of Big Data Policing* (New York University Press 2017); Timo Rademacher (n. 36), 226-250.

69 Art. 4 para. 3 sentence 3 TEU; Art. 72 TFEU contains a similar commitment. On the conceptual nuances of the guarantees of national sovereignty over security matters Kaarlo Tuori, *European Constitutionalism* (Cambridge University Press 2015), 286-287.

70 For definitions see Herwig Hofmann, Multi-Jurisdictional Composite Procedures (June 4, 2019), Université du Luxembourg Law Working Paper Series Paper No. 2019-003, 2; Filipe Brito Bastos, 'An Administrative Crack in the EU's Rule of Law', Eu Const. L. Rev.16 (2020), 63-90 (64).

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procedures are an innovative way to maintain several administrative entities legally separate and decentralised, yet integrate them into a unified and effective legal procedure. As such, they fulfil two seemingly competing desires of the European constitutional-administrative system: 'uniform implementation of EU law throughout the EU and preservation of national administrative sovereignty'.[71] When several independent administrative levels are interwoven in a complex network, however, attributing legal accountability or guaranteeing comprehensive judicial remedies is no simple feat.[72] Partly owing to this reason, few systematic, overarching procedural regulations for composite administrative procedures exist. Much rather, they are mostly regulated on a policy-specific basis.[73]

In this way, the structural identity of the administrative law related to European security is still highly reflective of the AFSJ's structural commitments to intergovernmentalism: Upholding public security is strictly Member States' business – and EU authorities are merely there to provide informal support and coordination. Within the AFSJ, the idea that ultimate administrative power resides primarily within Member States is often seen as rooted in the EU's constitutional constraints. The principle of conferral[74] and Member State sovereignty are often considered to prevent the EU from wielding genuine executive power, especially within the particularly sensitive AFSJ.[75]

For that reason, when it comes to AFSJ matters, Member States formally make the final decisions. Due to the limited role the Treaties assign to the Union, EU security law, at its doctrinal foundation, is constructed according to the principles of what German legal scholars call *Verwaltungskooperationsrecht*.[76] This concept, sometimes also termed *Verbundverwaltungsrecht* and most closely translated with 'law of administrative cooperation', appropriately describes a paradigm within which administrative law conceives of EU authorities as adopting the role of service-oriented coordinators within a

71 Bastos (n. 70), 66.

72 Hofmann (n. 70), 3. It is for this reason that German constitutional law tends to avoid so-called *Mischverwaltung* (mixed administration), see Peter Huber, 'Das Verbot der Mischverwaltung', DÖV (2008), 844-851.

73 Herwig Hofmann, Gerard Rowe and Alexander Türk, 'The Present and Future Condition of European Union Administrative Law' in: Herwig Hofmann, Gerard Rowe and Alexander Türk (eds), *Administrative Law and Policy of the European Union* (Oxford University Press 2011), 906-938 (917). A unified proposal for EU administrative procedures is offered in Paul Craig, Herwig Hofmann, Jens-Peter Schneider and Ziller Jacques, *ReNEUAL Model Rules on EU Administrative Procedure* (Oxford University Press 2017).

74 See Art. 4 para. 1 TEU.

75 See for instance Schöndorf-Haubold (n. 23), para. 5; Tuori (n. 69), 288.

76 Gernot Sydow, *Verwaltungskooperation in der Europäischen Union* (Mohr Siebeck 2004), for the AFSJ, this paradigm is specifically emphasised by Schöndorf-Haubold (n. 23), paras 6, 136.

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network of intergovernmental cooperation.[77] Fittingly for the purposes of security law, it is typical for EU *Verwaltungskooperationsrecht* to centre on the gathering, processing, and exchange of information.[78]

What matters for *Verwaltungskooperationsrecht* are informational relationships between different levels of administrations, not the (fundamental rights-informed) relationship between the administration and its citizens. While producing finely-grained rules for the former, *Verwaltungskooperationsrecht* fails in allocating legal accountability and thus containing the EU's power when it manifests externally and directly affects legal subjects.[79] Such effects are not, in principle, ruled out, but *Verwaltungskooperationsrecht* ordinarily conceives of them as indirect – mediated through Member States' direct security measures. The EU legislator did see the need to create checks on EU administrative power within this paradigm. But such checks mainly take the form of ever-flourishing mechanisms of both inner-administrative and independent executive *supervision and oversight.*[80] The activities of Frontex, for example, are supervised by a Management Board, a Fundamental Rights Officer, a Consultative Forum and an internal Data Protection Officer.[81] While certainly beneficial, even very comprehensive supervision and oversight mechanisms cannot generally substitute the effective legal remedies that Art. 47 Charter of Fundamental Rights (CFR) requires.[82]

2. Under-Constitutionalisation and Its Discontents

This leads to an *under-constitutionalisation* of EU security law: Despite all the concept's contentions and nuances[83] subjecting public power to systematic substantial restraints and comprehensive judicial review undoubtedly is

[77] On this paradigm see Eberhard Schmidt-Aßmann, 'Der Europäische Verwaltungsverbund und die Rolle des Europäischen Verwaltungsrechts' in: Eberhard Schmidt-Aßmann and Bettina Schöndorf-Haubold (eds), *Der europäische Verwaltungsverbund* (Tübingen: Mohr Siebeck 2005), 1–24.

[78] Hofmann, Rowe and Türk (n. 73), 919.

[79] See Schöndorf-Haubold (n. 23), para. 136.

[80] Hofmann, Rowe and Türk (n. 73), 931-932.

[81] See Article 99 Frontex Regulation.

[82] On EU law's over-emphasis on non-judicial review see Catharina Ziebritzki, *The EU's Liability for Its Refugee Camps* (Nomos 2025), 196; Hofmann, Rowe and Türk (n. 73), 937. The ECJ also emphasised that 'the lack of judicial review cannot be compensated for by parliamentary review', see ECJ, *Deutsche Lufthansa v. Berlin*, judgement of 21 November 2019, case no. C-379/19, ECLI:EU:C:2019:1000, para. 57.

[83] On that see Christoph Möllers, 'Pouvoir Constituant – Constitution – Constitutionalisation' in: Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional* Law (2nd edn, Hart Publishing 2009), 169-204 (195-199).

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one of the hallmarks of a constitutionalising process.[84] The constitutional significance of conceiving the EU legal order as a 'community based on the rule of law' was emphasised by the Court itself in *Les Verts*[85] – a decision quoted extensively in the Legal Service's book.[86] Within the AFSJ, an extremely dynamic field of legal developments, EU law has yet to redeem these aspirations. This is because AFSJ policy has outpaced the Treaties' constitutional framework. The Union's augmented role in security governance can no longer fully be constitutionalised within the composite administrative paradigm of *Verwaltungskooperationsrecht* which treats EU agencies as mere informal helpers and therefore does not adequately address the EU's impact on its citizens' fundamental rights. If, as AFSJ-specific *Verbundverwaltungsrecht* suggests, EU authorities *merely prepare* ultimate Member State action, and the actual *interferences with fundamental rights* will be fully attributable to Member States, it appears natural, that most of the constitutional safeguards, should pertain to the Member States, as well. This simplistic picture of what is, in fact, a profound enmeshment of supranational and national executive power promotes a misallocation of legal responsibility which in turn lends itself to convenient inaction[87] when it comes to checking the EU's executive power.

In the AFSJ context, this is particularly problematic. Many areas of EU law are governed by complex composite administrative procedures. Most of them, however, essentially pertain to economic governance – think of tele-

84 'At a bare minimum, the rule of law must reflect the common concern that public power should be limited by legal standards that are enforceable by independent courts […]', Bastos (n. 70), 80; see also Hofmann, Rowe and Türk (n. 73), 922 f.

85 ECJ, *Les Verts v. Parliament,* judgement of 23 April 1986, case no. C-294/83, ECLI:EU:C:1986:166, para. 23. The decision did not address AFSJ-specific problems. Much rather, the Court discussed the question whether it has 'jurisdiction to hear and determine an action for annulment brought under Article 183 of the Treaty against a measure adopted by the European Parliament' (para. 19). It did nevertheless proclaim a general legal principle which is rooted in the rule of law. In *Sogelma,* the General Court emphasised this and applied *Les Verts* underlying principles to EU agencies, see Court of First Instance, *Sogelma – Societá generale lavori manutenzioni appalti Srl v. European Agency for Reconstruction,* judgement of 8 October 2008, case no. T-411/06, ECLI:EU:T:2008:419, paras 33-57.

86 See Calleja and Rusche (n. 2), 19; Friedrich Erlbacher and Katarzyna Herrmann, 'Fundamental Values of the European Union: From Principles to Legal Obligations' in: European Commission Legal Service (ed.*), 70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023), 34-57 (35); Margherita Bruti Liberati, Thomas Ramopoulos and Daniele Bianchi, 'The European Union as a Worldwide Promoter of the Universality and Indivisibility of Human Rights' in: European Commission Legal Service (ed.*), 70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023),76-94 (76, 86).

87 See Violeta Moreno-Lax, 'Crisis as (Asylum) Governance: The Evolving Normalisation of Non-Access to Protection in the EU', European Papers 9 (2024), 179-208 (207 f.).

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communications, energy, infrastructure, or banking oversight law. This usually means that a highly professionalised executive will be dealing with large corporations represented by highly specialised lawyers. By contrast, criminal suspects targeted by Europol, or asylum seekers targeted by Frontex will often lack the necessary resources to have someone navigate the complexities of *Verwaltungskooperationsrecht* for them. One of the core features distinguishing AFSJ law from other legal areas is that, here, executive power often meets *natural* rather than merely *legal persons* – and these natural persons often come from particularly marginalised communities.

The AFSJ's under-constitutionalisation undermines the binding force of law. When affected parties are unlikely to obtain judicial review of EU action, the latter is less likely to be meaningfully guided by the law.[88] Courts also do not have the chance to interpret applicable EU law and thus help make it an effective mechanism regulating legal practice. This is compounded by the fact that, due to the AFSJ's intergovernmental roots, parliamentary oversight often falls by the wayside.[89] Hence, security is increasingly treated as a de-politicised task which is left to the functional considerations of a highly complex and sophisticated intergovernmental executive.[90] This development is fully in line with what the Copenhagen School has described as 'securitisation': A dynamic that perpetually expands security considerations to an increasing number of policy areas, by deeming such matters as technocratic and 'above politics', thereby delegating them away from ordinary legal and political processes.[91] Within the field of EU law, this could allow Member States to achieve desired policy goals without facing the level of political and legal scrutiny they would face 'at home'.[92] From a constitutional perspective, unchecked securitisation could thus undermine the legitimacy of European security law.[93]

The Legal Service has aptly described how one of the Treaty of Lisbon's chief accomplishments is 'to put the citizen at the heart of the democratic life of the Union'[94]. The Legal Service's book subscribes to the Union's citizen-

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88 On this objective function of judicial review for EU law Bastos (n. 70), 82.

89 See Hofmann, Rowe and Türk (n. 73), 930; Schöndorf-Haubold (n. 23), para. 138.

90 This observation is also made in Tuori (n. 69), 289.

91 See for instance Barry Buzan, Ole Wæver and Jaap de Wilde, *Security: A New Framework for Analysis* (Lynne Rienner Publishers 1997), 26.

92 As a general observation in Hofmann, Rowe and Türk (n. 73), 930.

93 See Ester Herlin-Karnell, The Constitutional Structure of Europe's Area of "Freedom, Security and Justice" and the Right to Justification (Hart Publishing 2019); Fiona de Londras, 'The Transnational Counter-Terrorism Order: A Problématique', Current Legal Probs 72 (2019), 203-251 (235-240, 245-247); Moreno-Lax (n. 87), 180-184.

94 Daniel Calleja and Clemens Ladenburger, 'The Future of European Union Law' in: European Commission Legal Service (ed.), *70 Years of EU Law – A Union for Its Citizens* (2nd edn, Publications Office of the European Union 2023), 381-392 (381).

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centred endeavour – it is, after all entitled '70 Years of EU Law – a Union for Its Citizens'. Indeed, at least since the ECJ rendered its plenary decisions on the rule of law crises in Hungary and Poland where it emphasised that the fundamental values enshrined in Art. 2 Treaty on European Union (TEU) 'define the very identity of the European Union as a common legal order'[95], said article can be read as a 'republican manifesto'.[96] In accordance with these republican values, EU security law, when it infringes upon the fundamental rights of individuals, ought to put them in a position to freely and effectively contest the Union's measures.[97] This would require coming to terms with AFSJ policy's external impact on legal subjects. Rather than offloading the 'hot-responsibility-potato'[98] to Member States, the Union should ensure that its substantive and procedural guarantees be designed in a citizen-centred way. It ought to overcome its near-exclusive focus on inter- and intra-administrative relationships.

In its current form, AFSJ policy seems curiously removed from the Union's dedication to its citizens as it tends to obscure the ways in which it affects them – both positively and negatively.[99] That may be one of the reasons why AFSJ policy remains effectively unmentioned in the Legal Service's otherwise thoroughly citizen-centred book.

III. Case Studies – Europol, Frontex, and PNR

I have argued that the AFSJ's commitment to intergovernmental *Verwaltungskooperationsrecht* hinders individual legal protection and thereby renders invisible how the Union infringes in fundamental rights. So far, I have made a rather abstract, conceptual argument. I would now like to highlight how this curious under-constitutionalisation manifests in legal practice. While this contribution cannot fully do justice to the AFSJ's complexities, it is useful to hone in on some of its institutions and instruments.

Notably, effective legal protection is undermined by both a lack of adequate legal procedures and the absence of clear substantive rules on funda-

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95 ECJ, *Hungary v. Parliament and Council*, (n. 6), paras 127, 232; see also ECJ, *Poland v. Parliament and Council* (n. 6).

96 Armin von Bogdandy, 'The Republican Thrust of *70 Years of EU Law*: Theorizing "A Union for Its Citizens"', HJIL 86 (2026), 379-408.

97 Von Bogdandy (n. 96), 20-22.

98 De Coninck uses this metaphor in the context of Frontex border operations, see Joyce de Coninck, 'Shielding Frontex', Verfassungsblog, 9 September 2023, doi: 10.17176/20230909-182846-0.

99 Herlin-Karnell offers a similarly republican critique of the AFSJ in Herlin-Karnell (n. 93), 158.

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mental rights violations. The activities of Europol and Frontex are illustrative of these shortcomings (1.). The preliminary reference procedure, unfortunately, is not suitable to bridge these gaps (2.). Recent legal developments around the PNR Directive highlight a different way, in which the AFSJ's structural commitments create legal uncertainty (3.).

1. Europol and Frontex as Informal and Procedurally Elusive Providers of Public Security

Since *Verwaltungskooperationsrecht* conceives of EU security authorities as informational facilitators of external Member State action, their activities often take the form of informal or factual conduct, lacking external binding force. For example, this is the case when Europol requests the initiation of a (national) criminal investigation[100] or gives advice in its coordinative capacity, either in advance of operative measures based on its processing of personal data, or on-site during Europol agent deployments.[101]

While it may at first appear that such actions produce lesser infringements when compared to the ultimate operative measures undertaken by Member States – and that is the implicit premise of *Verwaltungskooperationsrecht* – Europol's activities may prove decisive in steering Member State action. Not only does Europol provide innovative technological solutions to Member States and provides operational support with ongoing investigations through so-called mobile offices.[102] Fuelled by its vast data processing capabilities, it also enhances national criminal investigations by providing intelligence-based support within specific 'analysis projects' which focus on certain crime areas or criminal networks.[103] This allows Europol to identify so-called 'high-value targets' and their associates.[104] For example, Europol itself recounted how it identified a 'hitman hired through an internet assassination website' based on an 'urgent, complex crypto-analysis'[105], how it targeted the main leader of a large-scale luxury car theft ring and helped unravel the criminal network[106],

100 Art. 6 paras 1 and 1 a Europol Regulation.

101 See Mitsilegas and Giuffrida (n. 65), 357; Timo Rademacher, 'Factual Administrative Conduct and Judicial Review in EU Law', REDP/ERPL 29 (2017), 399-435 (400).

102 Europol Report, Europol in Brief (2023), 11.

103 Europol Report, Europol in Brief (2023), 9.

104 Europol Strategy – Delivering Security in Partnership (2023), 5.

105 Europol Press Statement, 7 April 2021, see <https://www.europol.europa.eu/media-press/newsroom/news/dark-web-hitman-identified-through-crypto-analysis>, last access 28 January 2026.

106 Europol Press Statement, 31 May 2024, see <https://www.europol.europa.eu/media-press/newsroom/news/rent-drive-steal-how-luxury-car-thieves-were-stopped-in-their-tracks>, last access 28 January 2026.

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or how it analysed digital media through 'computer forensic tools' in order to identify 'an extremist preacher who was of interest to other investigations in the EU'[107]. In 2021, Europol's European Migrant Smuggling Centre alone identified 26 such high-value targets.[108]

Europol's role as a an 'information hub'[109] has recently been strengthened when it received vast troves of data that were not subject to regular categorisation procedures and unrelated to specific criminal activities listed in Annex 2B to the Europol Regulation.[110] When the European Data Protection Supervisor (EDPS) admonished Europol, the Regulation was quickly amended.[111] With the EDPS's legal action declared inadmissible by the General Court (GC),[112] and the amendments to the Europol Regulation passed in 2022, Europol now disposes of an even wider array of powers.[113] For instance, it can now directly gather data from private parties where Member States may need a warrant.[114] It can thus unleash big data technologies to establish new links and investigative leads within more than four petabytes of data.

Let us now imagine a case involving Europol's novel powers. By cross-referencing personal data within the vast databases at their disposal, or by generating new investigative leads through modern technologies, it may identify a person as a 'high-value target'. Europol may then trigger a national criminal investigation and advise Member States to take operative action against that individual.[115] Let us now assume that Europol's processing operation violated EU law. The underlying data may, for example, have been illegally obtained, or the technology used to process the data may have yielded a false positive – given the manifold issues with input data quality, algorithmic discrimination, and flawed statistical models,[116] this is not hard

107 Europol Review 2013, 28.

108 Europol Report, Europol in Brief (2023), 27.

109 EU Commission, 'The European Agenda on Security', COM(2015) 185 final, 4.

110 Apostolis Fotiadis, Ludek Stavinoha, Giacomo Zandonini and Daniel Howden, 'A data "black hole"', The Guardian, 10 January 2022.

111 Regulation 2022/991/EU.

112 General Court, *EDPS v. Parliament and Council*, order of 6 September 2023, case no. T-578/22, ECLI:EU:T:2023:522.

113 For an analysis of these developments see Sarah Tas, 'The Dangerous Increasing Support of Europol in National Criminal Investigations', New Journal of European Criminal Law 14 (2023), 534-551 (539 f.).

114 This is usually done in order to identify the competent national jurisdiction (Art. 26), but there are increased powers in so-called 'online crisis situations' (Art. 26a) and regarding Child Sexual Abuse Material (Art. 26b). On the implications see Tas (n. 113), 538.

115 Europol's power to ask Member States to initiate criminal investigations has been extended with Regulation 2022/991, see Article 6 Europol Regulation. For an overview see Thomas Wahl, 'Amended Europol Regulation in Force – Criticism Remains', eucrim (2022), 98-100.

116 See Barocas and Selbst (n. 42).

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to imagine. In such cases, the data subject's right of access to information on personal data relating to them held by Europol would be highly fragmented.[117] The assumption that the individual would learn of Europol's actions before Member States take operative action against them may therefore already be far-fetched. But even if that were the case, the affected individual would have almost no legal recourse against Europol.

That is because the EU legal order provides only insufficient legal protection against factual conduct by EU agencies. These procedural gaps have been illustrated by *Rademacher*[118]: The ECJ's case law on the 'binding effect' under Art. 263 para. 1 TFEU[119] reflects the fact that the action for annulment was not created to capture the kind of conduct in which Europol typically engages. It makes no sense to declare a factual or an informal act 'to be void', as Art. 264 TFEU states.[120] The action for annulment would therefore not be suitable to challenge the aforementioned Europol actions.[121]

Alternative procedures would also fail to provide adequate remedies against factual conduct. Consider the European action for damages[122]: First of all, there are many unanswered crucial substantive legal questions, when it comes to Europol's liability for fundamental rights violations, such as the necessary severity of harms, questions of causality and the attribution of legal responsibility.[123] The Court's recent decision in *Kočner v. Europol*, where it decided to hold Europol and a Member State jointly and severally liable for damage resulting from unlawful processing,[124] is a positive step forward in that regard. The Court's reasoning in that case, however, strongly relied on the specific wording and systematic context of Art. 50 para. 1 of the Europol Regulation of 2016 which has since been changed.[125] Art. 98 of the Frontex Regulation is worded quite differently. For this reason, and given the fact that the case pertained to an irregular data breach of intimate photos and messages

117 Tas (n. 113), 544.

118 See Rademacher (n. 101).

119 First ECJ, *IBM v. Commission of the European Communities*, judgement of 11 November 1981, case no. 60/81, ECLI:EU:C:1981:264; then an initial loosening of the criterion in ECJ, *AKZO v. Commission of the European Communities,* judgement of 24 June 1986, case no. 53/85, ECLI:EU:C:1986:256; then finally a restrictive interpretation in Court of First Instance, *Hans-Martin Tillack v. Commission of the European Communities,* judgement of 4 October 2006, case no. T-193/04, ECLI:EU:T:2006:292.

120 Rademacher (n. 101), 425.

121 See Mitsilegas and Giuffrida (n. 65), 357.

122 Articles 340 para. 2, 268 TFEU.

123 On that see Ziebritzki (n. 82), 287-319; Rademacher (n. 101), 430-435.

124 ECJ, *Marián Kočner v. Europol*, judgement of 5 March 2024, case no. C-755/21 P, ECLI:EU:C:2024:202, para. 71.

125 ECJ, *Kočner* (n. 124), paras 54-72.

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and not the regular course of investigative operations,[126] it remains to be seen whether the *Kočner* decision will provide guidance for future cases.

The General Court's case law on the liability of Frontex in multi-actor operations at the EU's external borders so far provides little hope for clarification[127]: In *WS and others v. Frontex,* two Syrian nationals sought compensation for their deportation from Greece to Türkiye in a joint operation carried out by Frontex and Greece. The General Court refrained from ruling on the applicants' substantive claim that Frontex had violated its human rights obligations, holding that Frontex merely 'provide[s] technical and operational support to the Member States' and has 'no competence […] as regards the assessment of the merits of the return decisions'[128]. For that reason, the GC argued, there was no 'causal link […] between the damage […] and the conduct of which Frontex is accused'. The GC instead invoked 'the sole responsibility of the host Member State'.[129] Several scholars have pointed out that, given Frontex's extensive involvement in the planning, monitoring, and execution of border operations, the agency carries joint responsibility when it comes to the execution of return decisions.[130] Interestingly, the GC refused to engage with the deportation's execution, instead heavy-handedly focusing on Greece's return decision.[131] As long as this case law stands, in multi-actor border operations there will continue to be 'blame-shifting by design'.[132]

Advocate General (AG) Ćapeta recently delivered her Opinion in the *WS and others v. Frontex* case.[133] Recommending that the ECJ set aside the GC's judgement, AG Ćapeta emphasises that the GC failed to adequately address the plaintiff's challenges. They did not intend to challenge the Member State's return decision. In fact, no return decision had ever been issued for them. *That* – and whether Frontex can be held liable for failing to verify the existence of such a return decision before executing it – was the point of the challenge. AG Ćapeta sides with the plaintiffs, finding that Frontex acted

126 ECJ, *Kočner* (n. 124), paras 111-113.

127 The action for damages has often been raised as a suitable remedy in such cases, see Fink (n. 55), 547 f.; Ziebritzki (n. 82), 390-393.

128 General Court, *WS and others v. Frontex,* judgement of 6 September 2023, case no. T-600/21, ECLI:EU:T:2023:492, paras 64 and 66 respectively.

129 General Court, *WS and others v. Frontex* (n. 128), para. 66.

130 For example Fink (n. 55).

131 For critiques of the decision see De Coninck (n. 98).

132 Melanie Fink, 'Why It Is so Hard to Hold Frontex Accountable', EJIL: Talk!, 26 November, 2020; *Hillary* and *Schotel* argue that the decision undermines both the credibility of the Court and EU agencies in general, Lynn Hillary and Bas Schotel, 'The Implications of the 2023 Frontex Judgment on the EU Agencies and the Legal Credibility of the Court', European Law Blog, 14 February 2024.

133 Opinion of Advocate General Ćapeta, *WS and others v. Frontex*, delivered on 12 June 2025, case no. C-679/23 P, ECLI:EU:C:2025:427.

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unlawfully by its omission to verify the existence of a return decision. She also states that there was a causal link between Frontex's omission and the plaintiff's decision to flee to Iraq from Türkiye[134], as well as expressing openness to joint and several liability shared by Frontex and Member States in joint return operations.[135] While AG Ćapeta's Opinion is certainly encouraging, it remains to be seen whether the ECJ will follow her reasoning in this case – and whether *WS and others v. Frontex* will succeed in producing reliable criteria for attributing legal responsibility to Frontex in multi-actor operations at the EU's external borders.[136]

Perhaps even more importantly for our aforementioned individual who, in our case example, becomes the subject of illegal data processing by Europol, the action for damages does not provide for *preventive protection*. A damage must have been *caused* for it to be compensated through this action. The mere *prospect* of future harm caused by, for example, illegal data processing, even if there is a plausible expectation that such future harm will occur, is not currently covered by Art. 340 TFEU.[137] Even under the Court's doctrine established in 1974 in *Kampffmeyer,* according to which the Union (then: the Community) could be held liable for 'imminent damage foreseeable with sufficient certainty even if the damage cannot yet be precisely assessed'[138], it would be unlikely for preventive actions for damages against Europol to succeed. This is because it is not foreseeable which concrete steps, if any, Member States will take based on Europol's advice. Neither is how, when and which fundamental rights will be affected in the future.

The lack of preventive protection also explains why awarding *symbolic damages* in actions under Art. 340 TFEU would likely fail to bridge the aforementioned gap in legal protection. It is true that, in earlier case law, the Court has occasionally used symbolic damages to acknowledge a breach of Union law, and has even hinted that mere recognition of the unlawfulness of the contested act as such may suffice as compensation.[139] It is also true that a focus on symbolic damages, may remove the ECJ's reasons for adhering to

134 Opinion of Advocate General Ćapeta (n. 133), para. 116.

135 Opinion of Advocate General Ćapeta (n. 133), para. 93.

136 For an analysis of AG Ćapeta's Opinion see Laura Salzano, '"We Were Just Cooperating!"', Verfassungsblog, 30 July 2025, doi: 10.59704/6b353778a623166e.

137 Rademacher (n. 101), 434 f.

138 ECJ, *Kampffmeyer v. Commission and Council,* judgement of 14 July 1967, case no. 56-60/74, ECLI:EU:C:1967:31, para. 6.

139 See for example ECJ, *Annibale Culin v. Commission of the European Communities,* judgement of 7 February 1990, case no. C-343/87, ECLI:EU:C:1990:49, awarding 'the token sum of one franc by way of compensation for the non-material harm' para. 29; see also ECJ, *Abdulbasit Abdulrahim v. Council and Commission,* judgement of 28 May 2013, case no. C-239/12 P, ECLI:EU:C:2013:331, para. 72. I am grateful to the reviewers for this suggestion.

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its criterion of 'sufficiently serious breach' of EU law which it usually requires under Art. 340.[140] Where the recognition of unlawfulness alone is deemed compensation enough, there is less of a chilling effect on the exercise of the Union's discretionary powers – an effect the ECJ has previously cited as a justification for the seriousness requirement.[141] Yet, even if the EU courts were to adopt this stance, they would still struggle to overcome both the clear wording of Art. 340 and the systemic logic of actions for damages more generally. Damages must have been *caused* in order to be compensated. Art. 340's lack of preventive protection will apply even where the compensation sought is merely symbolic.[142]

The EU legal order's procedural shortcomings within AFSJ policy thus prevent the fundamental right to data protection (Art. 8 CFR) from achieving one of its main purposes: conferring preventive protection against future substantive rights violations based on illegal data processing.[143] The EU legal order knows no such thing as a comprehensive action for declaratory relief.[144] This stands in stark contrast to, for example, the German and French administrative legal orders[145], the former of which provides for the *allgemeine Feststellungsklage*[146], and the latter of which knows urgent applications for protection of a fundamental freedom (*référé-liberté*)[147].

To illustrate how such legal remedies can be instrumental in delivering preventive protection for Art. 8 CFR, consider the Higher Administrative Court of Münster's 2018 decision on mass data retention: In this case, a German internet access provider asked the Court to declare it exempt from obligations arising from the German Act on Telecommunications under which it could be obliged to engage in mass retention of its customers' internet traffic and location data. The plaintiff argued that a preventive declaration was necessary since they would otherwise run the risk of incurring administrative fines for failing to comply with their legal obligations. Naturally, this litigation was brought as an action for declaratory relief (*Feststellungsklage*). The Court

140 Rademacher (n. 101), 433; Ziebritzki (n. 82), 249.

141 See for example ECJ, *Vermehrungsbetriebe GmbH v. Council and Commission,* judgement of 25 May 1978, case no C-83/76, ECLI:EU:C:1978:113, paras 5-6.

142 This is also emphasised by Rademacher (n. 101), 434.

143 On that purpose see Ralf Poscher, 'The Right to Data Protection – A No-Right Thesis' in: Russell Miller (ed.), *Privacy and Power* (Cambridge University Press 2017), 129-142.

144 Even if there was, the principle of separated judicial review or *double exclusivity* would still create gaps in legal protection, see below in sub-section (2).

145 For an overview over the legal developments towards such procedural tools in Germany, the UK, France, and Austria see Rademacher (n. 101), 426-428.

146 See § 43 Verwaltungsgerichtsordnung (German Code of Administrative Court Procedure).

147 See Article L. 521-2 Code de justice administrative (French Code of Administrative Justice).

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ruled for the plaintiff, arguing that German law was in violation of the ECJ's case law on mass data retention and emphasising that the *Feststellungsklage* conferred preventive protection in this case.[148]

If this case had occurred under the Union's procedural regime, such preventive protection would have likely been unavailable. The action for damages would fail to confer adequate legal protection, even if it was only aimed at symbolic damages. The internet service provider in question would have had to either reluctantly comply with the unlawful obligation – and thereby become an unwilling accomplice to a violation of their customers' right to data protection –, or to wait until EU authorities take executive action against them, thereby incurring significant legal and financial risks.

Similar observations would hold for our aforementioned case pertaining to unlawful Europol action: Our affected individual would have to wait and see what one, or potentially several Member States do with their illegally obtained, and potentially inaccurate information. The effects of this delay may be irreversible.[149] As soon as Europol communicates some form of suspicion regarding a serious crime to one or several Member State authorities (or even private parties), the harm to fundamental rights, for instance to the reputation of the affected person, is already done. Going forward, the individual can always expect being confronted with this suspicion. Legal action against Member State measures which are based on Europol's illegal processing would entail moving before potentially several courts across multiple jurisdictions, hoping that some of them will trigger a preliminary reference procedure in order to have the ECJ decide on the legality of Europol's actions under Art. 267 para. 1 lit. b) TFEU.

2. The Shortcomings of the Preliminary Reference Procedure

Indeed, the preliminary reference procedure appears to be where the Legal Service would place its hopes in such cases. The Legal Service is, of course, right in emphasising this procedure's transformative effect.[150] Under Art. 267 TFEU, the Court is also able to rule on instruments that are non-binding to Member States.[151] The Legal Service's emphasis on the preliminary reference procedure's

[148] Higher Administrative Court of Münster, order of 22 June 2017, 13 B 238/17, para. 27. This general line of judicial reasoning was later confirmed by the German Federal Administrative Court in a similar case, see Federal Administrative Court, judgement of 14 August 2023, 6 C 7.22 (6 C 13.18); ECJ, *SpaceNet* (n. 5).

[149] On the irreversible nature of illegal data processing Rademacher (n. 101), 423.

[150] See Liberati, Ramopoulos and Bianchi (n. 86), 87.

[151] See ECJ, *FBF v. ACPR,* judgement of 15 July 2021, case no. C-911/19, ECLI:EU:C:2021:599, paras 52-57.

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importance for fundamental rights compliance is therefore perfectly reasonable – generally speaking. For the particular context of AFSJ policy, however, I think that this procedure is not a perfect fit, at least under the current constitutional configuration of EU law. While a general discussion of the strengths and drawbacks of the preliminary reference procedure would exceed this article's scope,[152] I will just briefly mention three reasons here:

First, the ECJ can only decide on preliminary references if there are national judges willing to make them. In itself, that is a trivial fact which has not hindered the procedure's general success. However, the AFSJ's structure makes it particularly unlikely for preliminary references to come forth.[153] That is because it is structurally committed Member States' ultimate responsibility for upholding public security. For that reason, it conceives of EU agencies as mere informal supporters regulated by *Verwaltungskooperationsrecht*. Given the AFSJ's emphasis on Member States' ultimate authority in security matters, many national judges will consider EU law irrelevant for the question of whether a national security measure conforms with national law – and thus sweep Europol's contribution under the proverbial rug. One example could be German criminal procedural law: German courts have traditionally held that the question whether criminal evidence was legally collected (questions concerning *Beweiserhebung*) is to be strictly separated from the question whether said evidence may be used in court (*Beweisverwertung*).[154] Courts may argue that, even if Europol illegally processed data relating to the defendant, that only bears on a *Beweiserhebungsverbot*, but not on a *Beweisverwertungsverbot*.[155] A reference to doctrines of this kind will provide national judges with a useful justification to avoid a preliminary reference procedure which, to them, especially in AFSJ-related cases, may appear counterintuitive and cumbersome anyway. Europol's contribution to fundamental rights harms would thus be rendered procedurally invisible.

Second, these problems are compounded by the principle of separated judicial review, also termed *double exclusivity* since it prevents both the ECJ from ruling on national measures, as well as national courts from invalidating

152 For further references see Virginia Passalacqua and Francesco Costamagna, 'The Law and Facts of the Preliminary Reference Procedure', European Law Open 2 (2023), 322-344.

153 For an example see Ziebritzki (n. 82), 212-214.

154 See Bundesgerichtshof (German Federal Court of Last Instance in criminal matters), judgement of 21 February 1964 – 4 StR 519/63.

155 For a short illustration on how violations of EU primary and secondary law may intersect with German criminal procedural law in a case relating to the illegal use of an AI-based remote biometric identification system see Christian Thönnes, 'Daniela Klette und die Frucht der vergifteten Maschine', Verfassungsblog, 22 March 2024, doi: 10.59704/38f07745e9336f86; for a general illustration see Tobias Singelnstein, 'Folgen des neuen Datenschutzrechts für die Praxis des Strafverfahrens und die Beweisverbotslehre', NStZ 40 (2020), 639-644.

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Union measures.[156] The abovementioned case touches on complex substantive legal questions caused by the enmeshment of the EU's composite administrative system: How should the illegality of a measure taken on one administrative level upstream bear on the legality of an ensuing measure taken on another administrative level downstream? Or, worded differently: How to address the downstream effects of EU agencies' preparatory measures? There are no obvious answers to this problem of *derivative illegality*,[157] but, it would seem reasonable to hold that European courts, national and supranational, ought to find such answers collaboratively. However, the *Kooperationsverwaltungsrecht* paradigm which makes the legislature refrain from providing clear guidelines to such questions, combined with a strict adherence to double exclusivity, renders a collaborative development of doctrinal answers difficult. Double exclusivity does follow neatly from the EU's constitutional aims, namely guaranteeing uniform implementation of EU law whilst respecting Member States' administrative autonomy.[158] However, it also ignores the factual interdependence of administrative reality. Even though, within the AFSJ's administrative union, EU and national authorities are deeply enmeshed, within judicial review they are artificially treated as strictly separate.[159]

Double exclusivity, moreover, would still cause significant procedural problems, even if the Union were to introduce some form of general declaratory relief which conferred preventive protection.[160] Consider our Europol case: Even if an affected person succeeded in having the ECJ declare both the processing itself and any future transmission of processing results to Member State authorities unlawful under EU law, this would not prevent national law enforcement authorities – who might nonetheless become aware of those results – from taking action. Such policing measures would be based on national security law which, as illustrated above, does not necessarily make their legality dependent on the lawfulness of the intelligence which informed them. In any case, Art. 276 TFEU would bar the ECJ from ruling on such national policing measures.

The Legal Service has pointed out that the ECJ, in *Borelli* and *Berlusconi*, has addressed issues relating to the combination of double exclusivity and derivative illegality before. On the one hand, there are those procedures where national authorities adopt binding preparatory acts which leave no

[156] Bastos (n. 70), 68.

[157] On potential solutions see Filipe Brito Bastos, 'Derivative Illegality in European Composite Administrative Procedures', CML Rev. 55 (2018), 101-134.

[158] Bastos (n. 70), 66.

[159] On this Hofmann, Rowe and Türk (n. 73), 930; Bastos (n. 70), 64; for an illustration pertaining to Frontex see Fink (n. 55), 532.

[160] On the necessity of general declaratory relief for preventive protection see above in subsection (1).

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discretion to the subsequently deciding EU authority, and on the other are those where the EU administration enjoys full discretion in making a final decision.[161] In the former *Borelli* constellation, EU courts are precluded from reviewing a final EU decision based on national preparatory acts and national courts ought to review preparatory acts based on their national law.[162] In the latter *Berlusconi* constellation, EU courts have exclusive jurisdiction to review the final decision made by EU authorities, whilst national courts may not review national preparatory acts.[163] With this distinction, the ECJ managed to establish legal certainty by concentrating judicial review of composite decision-making at one judicial entity, whilst at the same time keeping administrative levels neatly apart, and thus conforming with the constitutional principles behind double exclusivity. EU courts will not apply national law and national courts will not have the final say on EU law.[164]

Unfortunately, though, I am not convinced that the doctrinal principles established in *Borelli* and *Berlusconi* effectively resolve the complex judicial questions in AFSJ matters. *Berlusconi* was rendered in the context of the Single Supervisory Mechanism[165], where national authorities (here: national supervisory banking authorities) prepare a final decision taken by an EU authority (here: the European Central Bank). By contrast, composite decision-making in the AFSJ usually works the other way around: EU authorities (Frontex, Europol etc.) prepare final national decisions (by law enforcement authorities or courts).[166] This, combined with the particular competency-related sensitivity of AFSJ matters, will make implementing *Berlusconi*-like rules quite difficult: You cannot concentrate AFSJ decision-making at the ECJ since Art. 276 TFEU prohibits the Court from reviewing 'the validity of proportionality of operations carried out by the police or other law-enforcement services of a Member States'. On the other hand, conferring exclusive judicial review on Member State courts would run counter to *Foto-Frost* in that they would be allowed to make final decisions on matters relating to EU law, thus potentially undermining EU law's uniform application.[167] One

161 For an even more finely-grained distinction see Bastos (n. 70), 67.

162 ECJ, *Oleificio Borelli SpA v. Commission of the European Communities*, judgement of 3 December 1992, case no. C-97/91, ECLI:EU:C:1992:491, paras 10-15.

163 ECJ, Silvio Berlusconi and Finanziaria d'investimento Fininvest SpA (Fininvest) v. Banca d'Italia and Istituto per la Vigilanza Sulle Assicurazioni (IVASS), judgement of 19 December 2018, case no. C-219/17, ECLI:EU:C:2018:1023, paras 43-47.

164 For this observation with further references to ECJ case law see Bastos (n. 70), 74.

165 See Council Regulation 2013/1024/EU.

166 *Hofmann* also distinguishes between 'top-down'- and 'bottom-up'-procedures, Hofmann (n. 70), 7.

167 ECJ, *Foto-Frost v. Hauptzollamt Lübeck-Ost*, judgement of 22 October 1987, case no. 314/85, ECLI:EU:C:1987:452, para. 15.

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single Europol or Frontex action may be ruled legal in one Member State, but illegal in another.

Such divergences could, of course, be avoided if national courts were restricted to reviewing whether AFSJ-related measures conform to their respective national laws. But this would create the exact inverse of the gap in legal protection produced by *Berlusconi:* Where in *Berlusconi,* national law will remain disapplied such that national authorities may violate it at their leisure,[168] in the AFSJ, the preparatory actions of *EU security agencies* (and their compatibility with *EU law*) would be rendered procedurally invisible.

The ECJ's decision in *Rimšēvičs* likely will not alleviate the aforementioned concerns either. True, in annulling a national legal act adopted by the Latvian Anti-Corruption Office, the ECJ created an exception to the principle of double exclusivity.[169] The Court's reasoning, however, was narrowly tailored to the Statute of the European System of Central Banks (ESCB Statute) (an explicit remedy under Art. 14.2 in particular) and the European Central Banking system. The Court even explicitly acknowledged the AFSJ and Art. 276 TFEU as an example, where its reasoning would *not apply.*[170] I therefore do not see a *Rimšēvičs* moment on the horizon for the Union's constitutional configuration in general, and the AFSJ in particular.[171]

The principle of double exclusivity thus remains a procedural hurdle in the context of AFSJ policy. Some national courts may decide to refer questions on the legality of Europol's actions to the ECJ. But given double exclusivity's implicit assumption 'that any given decision will be adopted *either* by national *or* by EU authorities'[172], they will be left alone with the question on how to deal with the *enmeshment* of EU and national measures. This undermines affected individuals' capacity to challenge the *entirety* of AFSJ-related decision-making processes.[173]

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168 This is rightly criticised by Bastos (n. 70), 78-79.

169 ECJ, *Ilmārs Rimšēvičs and European Central Bank v. Republic of Latvia*, judgement of 26 February 2019, case nos C-202/18 and C-238/18, ECLI:EU:C:2019:139.

170 ECJ, *Rimšēvičs* (n. 169), paras 58-59.

171 This view is shared by René Smits, 'A National Measure Annulled by the European Court of Justice', Eu. Const. L. Rev. 16 (2020), 120-144 (139-142); Alicia Hinarejos, 'The Court of Justice Annuls a National Measure Directly to Protect ECB Independence: *Rimšēvičs*', CML Rev. 56 (2019), 1649-1660 (1657). There is a plausible alternative reading, which interprets the decision as 'a genuine constitutional moment', see Daniel Sarmiento, 'Crossing the Baltic Rubicon', Verfassungsblog, 4 March 2019, doi: 10.17176/20190324-204345-0. Even so, I think that this constitutional moment would struggle to get around the explicit wording of Art. 276 TFEU. I am grateful to Paolo Mazzotti for helping me press this point.

172 Bastos (n. 70), 68.

173 Likewise Bastos (n. 70), 81.

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Third, the procedural design of preliminary references does not seem to be tailored to AFSJ-related cases. Contrary to the action for annulment and the action for damages, the preliminary reference procedure was originally designed as a 'non-contentious procedure'[174] aimed at clarifying abstract questions on the correct interpretation of EU law.[175] For that reason, the procedure decentres plaintiffs and instead heavily relies on the factual input provided by the national judge. It also privileges the Commission and Member States – the Union's 'inner circle'.[176] In the aforementioned AFSJ-related cases, affected subjects will litigate how a concrete EU executive measure affects them *specifically*. Contrary to the preliminary reference procedure's original purpose, this is *very much a contentious situation* in which many factual questions vis-à-vis the affected individual as well as the EU agency in question will need to be addressed[177]: What are the particular circumstances and characteristics of the plaintiff? What technology exactly did Europol use and how did it engage with the particulars of the case? Given the marginal role plaintiffs play in establishing the relevant facts of the preliminary reference, it is unclear that the procedure is well equipped to tackle such questions, and procedurally involve the plaintiff while doing so.[178] That may not be a problem when the plaintiff is an international corporation represented by highly specialised attorneys, as is usually the case in competition law cases – but Frontex's and Europol's actions typically affect individuals who are less affluent and well-versed with the intricacies of EU law.

Overall, I therefore maintain that the preliminary reference procedure, is just not an adequate tool to provide the kind of multi-faceted dialogue that EU security law's difficult doctrinal challenges require.[179] Given its procedural design, constitutional context and unidirectional nature, it fails to fully capture the complexity of administrative enmeshment in some AFSJ-related cases.

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174 Passalacqua and Costamagna (n. 152), 340.

175 The Court emphasised this in an order issued in the context of *Costa v. Enel,* see ECJ, *Costa v. Enel,* order of 3 June 1964, case no. 6/64, ECLI:EU:C:1964:34.

176 See Passalacqua and Costamagna (n. 152), 335-337.

177 This also distinguishes AFSJ-related cases from ECJ, *FBF v. ACPR* (n. 151). The guidelines and recommendations issued by the European Banking Authority may be soft law norms, but they are still abstract norms.

178 See Passalacqua and Costamagna (n. 152), 335-340; for a more in-depth critique see Jos Hoevenaars, *A People's Court? A Bottom-Up Approach to Litigation Before the European Court of Justice* (Eleven Publishing 2018).

179 See also Schöndorf-Haubold (n. 23), paras 69 f.; Hofmann, Rowe and Türk (n. 73), 935.

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3. The PNR Directive and the Drawbacks of an Absent Administration

The last example pertains to the PNR Directive. Contrary to, for instance ETIAS[180], the PNR system completely relies on Member State authorities (so-called 'Passenger Information Units' or PIUs) to gather flight passengers' data and conduct automated predictive threat detection.[181] Perhaps in an effort to safeguard Member States' administrative sovereignty, the EU legislator shied away from entrusting a European security agency with such sensitive tasks; there is no 'PNR Central Unit'[182]. Moreover, the fact that the EU legislator chose to implement the PNR system via a Directive, rather than a Regulation, leaves Member States a lot of administrative leeway.

In *Ligue des droits humains,* the ECJ severely curtailed the PNR system's scope and demanded procedural safeguards for fundamental rights compliance.[183] This has created a contentious legal situation which seems to be compounded by the lack of a proper European PNR administration directly bound by EU laws. First, almost all national transposition laws now need to be amended. Since all transposition laws indiscriminately expanded the PNR system's scope to all European flights, and the Court decided that such indiscriminate surveillance of free movement within the Union would be disproportionate,[184] all these laws now violate EU law and should therefore remain disapplied. Given that PIUs are national authorities, however, they are directly bound by national transposition laws, and only indirectly by the re-interpreted PNR Directive. Paradoxically, Member States' security authorities are therefore now compelled by law to exercise public power for Union purposes based on laws that are incompatible with EU law and should therefore not be applied.[185] Since the clear wording of transposition laws differs so starkly from the re-interpreted PNR Directive, they cannot be saved through systematic interpretation. They are, to put it differently, *zombie laws,* not quite dead, not quite alive.[186]

Second, in terms of procedural safeguards, the Court only formulated loose and open criteria, instead delegating the selection of included intra-EU

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[180] The European Travel Information and Authorisation System as established by Regulation 2018/1240/EU.

[181] Art. 4 para. 2 lit. a), Art. 6 para. 2 lit. a), para. 3 PNR Directive.

[182] Interestingly, there *is* an ETIAS Central Unit, see Art. 7 of the ETIAS Regulation.

[183] For a summary and critique of the decision see Christian Thönnes, 'A Directive Altered Beyond Recognition', Verfassungsblog, 23 June 2022, doi: 10.17176/20220623-153431-0.

[184] ECJ, *Ligue des droits humains* (n. 38), para. 171.

[185] On the German transposition law see Thönnes (n. 30), 537-540.

[186] Similar uncertainty vis-à-vis national transposition laws ensued after the invalidation of Directive 2006/24/EC in ECJ, *Digital Rights Ireland* (n. 5).

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flights[187], the formulation of 'clear and precise rules' for human review of automated hits[188] as well as strategies to avoid high false-positive rates[189] and indirect discrimination[190] to Member States. This restraint is perhaps motivated by the principle of separated judicial review: If the Court formulated clearer standards, it would essentially be making administrative law for administrations over which it has no jurisdiction. Yet, recent attempts by Member States to circumvent the ruling,[191] demonstrate that, for security law, this completely decentralised implementation may not be conducive to fundamental rights compliance.

If the EU legislator, in creating the PNR Directive, had not been committed to the AFSJ's characteristic deference to Member States' administrative sovereignty, and had instead established a European PNR Central Unit, the aforementioned sources of uncertainty may have been diminished: A PNR Central Unit would have been directly bound by the re-interpreted PNR Directive (or then: Regulation). It could also have provided guidance to national PIUs on how to comply with the Court's findings – and EU citizens could have challenged the Central Unit directly, rather than having to navigate procedural detours through national PIUs which are confused as to which law applies to them. Due to its particular sensitivity to fundamental rights, it is typical for security law, that administrative standards evolve through judicial reactions to contentious legal challenges.[192] The efficiency of that dynamic appears to depend on a capable administration that is, in turn, directly bound to and accountable under the law.

IV. Conclusion and Suggestions for Reform

With this contribution, I do not intend to claim that the EU's project to organise security on a supranational level is fundamentally illegitimate. On the contrary, it seems plausible that complex, international criminal networks are best combated at the supranational level. I therefore hope that this critique can spark a conversation about how the Union's laws and institutions have to change for the AFSJ to truly grow into the constitutional role both the EU Commission and many Member States seem to envision for it. The institutional reality of EU security law has outgrown the AFSJ's original

[187] ECJ, *Ligue des droits humains* (n. 38), paras 167-175.
[188] ECJ, *Ligue des droits humains* (n. 38), para. 206.
[189] ECJ, *Ligue des droits humains* (n. 38), para. 203.
[190] ECJ, *Ligue des droits humains* (n. 38), para. 197.
[191] See the Council Discussion Paper 11911/22 of 9 September 2022; Elif Mendos Kuşkonmaz, 'The Grand Gala of PNR Litigations', Eu Const. L. Rev. 19 (2023), 294-319 (309-310).
[192] On the evolution of German and European security law see Bäcker (n. 31), paras 5-24.

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structural premises.[193] This is no tragedy, it just calls for legal reform. In order to mend its current under-constitutionalisation, the AFSJ must overcome its commitments to intergovernmental *Kooperationsverwaltungsrecht*, fully commit to the EU's security-related power and build it a solid, citizen-centred, constitutional foundation.

This work will require steps to be taken by a wide array of actors on several levels. Some potential solutions, such as a re-conception of the criteria of Art. 340 TFEU[194], or narrow exceptions to the principle of double exclusivity could be achieved through the ECJ's jurisprudence. Some steps could also be taken via secondary legislation: A general and comprehensive Union act on administrative procedure would provide more legal certainty. An augmentation of procedural pathways may also be achievable by secondary legislation. It may, for example, be possible to specify the procedural criteria of Art. 340 para. 2 TFEU in such a way that the action for damages could confer preventive protection in a manner similar to general actions for declarative judgement.[195] Such reforms, however, would always run the risk of clashing with the wording of the Treaties which, of course, take precedence.[196]

It is also conceivable that the Member States could contribute by amending their laws of administrative and criminal procedure: They could, for example, stipulate that in any case involving significant input from an EU agency, such as Europol, affected persons must be informed, and that, as part of any ensuing national judicial proceeding, it must be possible to summon and question Europol agents and to examine Europol documents. In Germany, similar mechanisms have been devised to involve national authorities, such as intelligence agencies, and their documents where their activities are relevant for the case at hand, including, if necessary, through a confidential *in-camera* procedure.[197] National police and criminal procedure laws could also clarify their criteria for *derivative illegality,* with a view to achieving roughly uniform standards across Europe. It seems only fair that intelligence that could not have been obtained *but for supranational integration* should be subjected to supranational standards.

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193 For a similar observation see Bastos (n. 70), 88.

194 See the proposals in Rademacher (n. 101), 430-435; Fink (n. 55), 547-548; Ziebritzki (n. 82), 389-393.

195 Rademacher (n. 101), 434.

196 It is for this reason that I am slightly less optimistic about the potential of the action for damages than Ziebritzki appears to be, see Ziebritzki (n. 82), 248-249.

197 See § 99 of the German Code of Administrative Court Procedure (VwGO). I am grateful to Ralf Poscher for this suggestion.

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Some of the deliberative work will have to be done by *us* – that is, by legal scholarship and practitioners such as the Legal Service. The radically increased role of the Union in security matters will challenge us to re-think some of the paradigms through which we view European administration.

Ultimately, however, what I have described above calls for *constitutional reform.* The Union's current constitutional constraints impose limits on the AFSJ's expansion. The principle of double exclusivity, for example, appears to be deeply rooted in the EU's constitutional conception of itself as an administrative union. As long as the *entirety* of enmeshed composite proceedings cannot be adequately subjected to judicial review, there will remain gaps in legal protection that are barely bridgeable. So long as Union authorities – and above all, the Member States – insist on a constitutional configuration and an administrative law that hold them accountable only to the extent appropriate for informal yet ultimately insignificant service-providers to national administrations, they should be constitutionally limited to that role. European law enforcement cannot have its cake and eat it, too. It cannot reap the benefits of a supranational security apparatus built on a Security Union that vigorously wields robust executive power, when it comes to migration management and active crime-fighting – while at the same time invoking the traditional, intergovernmental image of strictly sovereign nation states when it comes to being held legally accountable.

A fully emancipated Security Union hinges on a fully constitutionalised European security apparatus – and that may well require a reform of the Treaties. I readily admit that such reform would be extremely challenging and therefore politically unlikely. Until that happens, however, the Security Union – however prudentially reasonable it may appear – will continue to bear the blemish of under-constitutionalisation.

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