

REFGOV

Reflexive Governance in the Public Interest

Fundamental Rights

Thematic applications in the fields of data protection and criminal law.

by Gloria González Fuster and Pieter Paepe

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**Reflexive Governance in the Public Interest (REFGOV):
Thematic applications in the fields of data protection and criminal law**

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Introduction

The aim of the presentation is to introduce the *Reflexive Governance in the Public Interest (REFGOV)* project and to offer an overview of VUB's contribution. We will first present the project, describing its general structure and detailing the role we are to play in its development. Second, we will examine the reflexive governance approach, placing particular emphasis on its articulation in the context of the project (i.e. as reflexive governance 'in the public interest'), as well as on its concrete application in the Fundamental Rights sub-network. Third, we will describe the precise objectives of our work for the project, detailing the methodology used for the research and presenting some initial findings of our current thematic studies on data protection and criminal law. Finally, we would like to open the floor for comments, suggestions and any eventual questions.

1. The REFGOV Project

1.1 Description

The *Reflexive Governance in the Public Interest (REFGOV)* project¹ is a five-year project funded by the European Commission (EC) in the context of the 6th Framework Programme for Research and Development. More concretely, it is supported in the context of "Research Area 5: Articulation of areas of responsibility and new forms of governance" of the "Citizens and Governance in a Knowledge-Based Society" programme. It is formally an Integrated Project (IP). Other projects funded in the same research area include, for instance, the IP *New Modes of Governance* (NEWGOV) or the Network of Excellence (NoE) *Efficient and Democratic Governance in a Multi-Level Europe* (CONNEX).

The REFGOV project brings together 29 partner-institutions and is coordinated by the Centre for Philosophy of Law - Centre de Philosophie du Droit (CPDR) of the Catholic University of Louvain (Louvain-La-Neuve). It is structured around five sub-networks developing five different themes, considered to be laboratories of new forms of governance. The five substantive sub-networks are the following:

- Services of General Interest;
- Global Public Services and Common Goods;
- Institutional Frames for Markets;
- Corporate Governance in the Public Interest; and
- Fundamental Rights Governance.

Additionally, a specific sub-network, named Theory of the Norm Unit, is dedicated to the theoretical dimension of the research. A Cross-Thematic Seminar has been put in place to ensure consistency thorough the project. VUB's contribution is framed in the Fundamental Rights Governance sub-network.

1.2 VUB's role in the project

VUB's contribution to REFGOV is taken care of jointly by the Institute for European Studies (IES) and the Law, Science, Technology and Society (LSTS) research group of the Faculty of Law. The Fundamental Rights sub-network, in which the contribution is framed, is coordinated by the Catholic University of Louvain (Louvain-La-Neuve).² This sub-network features four thematic applications, developing the following subjects:

- 1) Fundamental social rights;
- 2) Antidiscrimination law;
- 3) Data protection; and

¹ The project's site is: <http://refgov.cpdr.ucl.ac.be>.

² *European Integrated Project* by Prof. Dr. Olivier De Schutter.

Coordinated by the Centre for Philosophy of Law – Université Catholique de Louvain – <http://refgov.cpdr.ucl.ac.be>

4) Criminal law.

The VUB is responsible for the last two thematic applications: the applications in the fields of data protection, on the one hand, and of criminal law, on the other hand. It has two separate teams working on them:

a) research team on data protection: consisting of Prof. Dr. Bart De Schutter, Prof. Dr. Serge Gutwirth and Gloria González Fuster;

b) research team on criminal law: consisting of Prof. Dr. Paul De Hert and Pieter Paepe.

Both thematic applications are to be developed in a two years delay. The work started in June 2006 and it will be concluded in June 2008. The thematic applications were preceded by a year of work in which other researchers laid down the methodological foundations for the research the Fundamental Rights sub-network. The applications will be followed by two years during which the findings will be translated into operational terms, further dissemination will take place and the linkage of the results to the general hypothesis of the project will be ensured.

2. The reflexive governance approach

2.1 The reflexive governance hypothesis

The REFGOV project officially focuses on “*emerging institutional mechanisms seeking to answer the question of market failures by means other than command-and-control regulation imposed in the name of the public interest*”. The main hypothesis guiding the research is that, in order to do so, governance devices need to integrate what are called ‘reflexive incentives’.

What are ‘reflexive incentives’? How could we describe the reflexive governance theory? What is its relation with other governance theories? The Theory of the Norm Unit is, as already mentioned, the sub-network whose contribution focuses on this theoretical dimension of the project. Its work is currently well advanced and it has notably highlighted the specificity of the reflexive governance theory regarding other theories, particularly concerning the ‘democratic experimentalism’ approach.³ Nevertheless, examining the details of the more abstract dimension of the reflexive governance theory is not within the scope of our research, and clearly neither within the scope of this presentation, so we shall now concentrate on explaining at a more operative level how has the reflexive governance approach been articulated to promote research on the ‘the public interest’ notion under the scope of the REFGOV project.

2.2 Reflexive governance in the public interest⁴

The notion of ‘public interest’ is at the very core to the REFGOV project. Indeed, the project takes as a starting point the most significant transformations of the modes of ‘public interest’ governance; it then identifies the problems that these transformations are intended to solve and the problems that they fail to solve, and, finally, it seeks to construct theoretical frameworks that could adequately address the identified problems.

³ For an overview of the Theory of the Norm Unit work, please see: Jacques LENOBLE and Marc MAESSCHALCK (2006), *Beyond Neo-institutionalist and Pragmatist Approaches to Governance*, REFGOV Working Paper series: REFGOV-SGI/TNU-1, Center for Philosophy of Law, UCL, Louvain. For the ‘democratic experimentalism’ perspective, please see: Charles F. SABEL and Jonathan ZEITLIN (2007), “Learning from Difference: The New Architecture of Experimentalist Governance in the European Union”, *European Governance Papers (EUROGOV)* No. C-07-02, (retrieved from: <http://www.connex-network.org/eurogov/pdf/egp-connex-C-07-02.pdf>).

⁴ The content of this heading is predominantly tributary to the presentation of the project in Reflexive Governance and Integrated Public Interest (REFGOV), Contract CIT3-513420, FP6 – 2002-Citizens. Coordinated by the Centre for Philosophy of Law – Université Catholique de Louvain – <http://refgov.cplr.ucl.ac.be>
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The definition of ‘public interest’ can be considered one of the major dilemmas currently being faced in the context of discussions on EU governance concerns. Theories on governance are generally built upon an implicit notion on how and by who is such ‘public interest’ to be defined. Certain hypothesis rely on the idea that the content of the ‘public interest’ concept can only be generated as some sort of ‘natural’ result coming from the tensions between individual actors seeking to maximize their own specific interests. Defense of ‘interjurisdictional competition’ would fall under such perspective. Other theories, on the contrary, assume that the definition of what is the ‘public interest’ is preferably to be left in the hands of a specially qualified and empowered actor, deliberately designated to adopt and eventually impose such type of decisions. Support for ‘harmonization’ efforts is typically rooted in an understanding closer to this standpoint. Unfortunately, none of those perspectives can be considered fully satisfactory simultaneously from the point of view of legitimacy and efficiency, since the first one tends to favor legitimacy by jeopardizing efficiency, while the second almost inevitably sacrifices legitimacy in the name of efficiency.

The project aims to overcome this dilemma by exploring new theoretical frameworks. More precisely, the project’s research is grounded on the mentioned hypothesis of the need for reflexive mechanisms to improve governance ‘in the public interest’. This hypothesis suggests that reflexive mechanisms could produce both the desired legitimacy and the desired efficiency, even if they can only produce them if they manage to involve all the concerned actors in a ‘collective learning process’. Moreover, it is assumed that the reflexive capacity of adaptation conditioning the learning process is not given and that, therefore, it requires specific incentives. Each sub-network of the REFGOV project develops the global issue of ‘reflexive governance in the public interest’ form a specific perspective, although they all echo these central, general concerns.

2.3 Fundamental Rights Policy in the Public Interest

The basic premise of the Fundamental Rights sub-network research is that, in the present situation of the fundamental rights policy, fundamental rights do not contribute effectively to the definition of the public interest in the EU. Although fundamental rights are generally considered to be central to the definition of the ‘public interest’ in the EU, their precise significance —the good practices they should translate into— remains the product of blind non-cooperative mechanisms. This decentralised character of fundamental rights policies can be considered a source of inefficiencies, especially if we take into account that there is no collective learning mechanism to ensure that experiences pursued at the national or local level will benefit other jurisdictions. Those inefficiencies are an obstacle to the effective contribution of this field to the definition of the ‘public interest’.

A Fundamental Rights Policy in the Public Interest should move beyond these limitations, precisely by including effective, enhanced collective learning mechanisms. The current mechanisms for collective learning in the field of fundamental rights policies pay insufficient attention to the context in which these policies operate, especially to externalities. A reflexive approach to these mechanisms should take collective learning as the goal rather than as a beneficial, but unintended, side effect of human rights monitoring, and should have to take explicit account of externalities.

The sub-network intends to make proposals on the shaping of fundamental rights policies that, by including enhanced collective learning mechanisms, could help escape the dilemma of homogenisation and uniformity, on the one hand, and regulatory competition between jurisdictions, on the other hand. In this context, it examines the potential contribution of the Open Method of Coordination (OMC) to the regime of fundamental rights in the EU and, more generally, the conditions that any coordination in the field should fulfil to be effective. The research questions, inter alia, how to balance the need for local experimentalism, the preservation of differences between the Member States and the need for mutual exchange and learning, as well as how is the rise of EU constitutionalism to be reconciled with new forms of governance.

The final proposal should concern the improvement of European fundamental rights policy, better taking into account interdependency between the Member States,

based on a close scrutiny of the existing practices in the four fields studied and moving towards a more reflexive mode of governance in the domain of fundamental rights. As mentioned, to achieve its objectives the Fundamental Rights sub-network will carry on four different thematic applications, and we are responsible for two of them.

3. Thematic applications

3.1 Methodology and planning

The specific objective of the thematic applications is to test the possible added value of improved coordination between the Member States in the field of fundamental rights, identifying the different forms that such an improved coordination may take. The different fields chosen present different stages of implementation of the OMC: in some of them it is already developed to a large extent, in others its implementation is only being considered. How are the thematic applications going to be carried out? Following a shared approach, each of the thematic studies should identify the existing traces of new modes of governance in the field under scrutiny, locate their strengths and insufficiencies, and explore ways through which a more developed 'open method' of coordinating Member States' policies could produce beneficial effects, or which risks it could entail.

In practical terms, the research teams have received a detailed questionnaire to complete, which should function as the main guide for the research. Each research team should, near the conclusion of its work, organise a seminar involving different stakeholders and academics to discuss the findings. The research teams on data protection and criminal law are planning to hold a joint seminar during the spring of 2008, hopefully at IES. A final report with the research findings will be issued for June 2008. The four reports of the Fundamental Rights sub-network will be further discussed at later stages of the REFGOV project.

The research teams on data protection and on criminal law have already started to work on the questionnaires. A first common assessment and discussion of the answers is scheduled for the beginning of September. The questions are far too many to be detailed here, but it can be mentioned that the main subjects they concern are the following:

- Mapping of current practices: this part focuses on the analysis of the division of tasks between the EU and Member States in the field studied,⁵ the exercise of the attributed powers,⁶ the evaluation of measures adopted by the Member States⁷ and the evaluation of EU-level laws and policies.⁸

- Mapping of existing proposals: this part considers the changes discussed during the Constitutional debate, as well as current debate on the use of existing powers;⁹ it should normally include two concrete case studies on initiatives in which, at EU level: a) a national approach is supported by national actor, and b) a European approach is supported by a EU actor.

- Policy proposals: this concluding part should examine innovative mechanisms that could be proposed for the studied field, as well as mechanisms that could be 'exported' to other fields.

⁵ Including examination of the reasoning behind the division, and the advantages and disadvantages perceived to be linked to the decision.

⁶ Including analysis of the understanding of the principles of subsidiarity and proportionality by the actors, the use of comparative studies and impact assessments prior to preparation of legislative proposals, the role of international and European human rights law in the preparation of such proposals, the role of consultations and the eventual reorganization of stakeholders derived from such measures.

⁷ Considering notably the nature of the information on which evaluations are based, the inclusion of fundamental rights in the monitoring and the contribution of evaluating measures to collective learning.

⁸ Giving particular attention to the institutionalisation of evaluations, the procedures followed, the criteria used, the existence of meta-evaluations and the impact of evaluations in general.

⁹ Discussions on the following subjects should be highlighted: on the preparation of proposals by the EC, on the monitoring of acts and policies adopted by Member States, on the evaluation of acts and

As the scanning of the fields is already quite developed, we can advance some of the findings of the thematic applications. We will start with data protection, and then continue with criminal law.

3.2 Data protection

At first glance, EU data protection offers a heavily contrasted image, markedly reflecting the pillar structure of the EU and the division of tasks predominantly associated with each pillar in which data protection is relevant — i.e., the first and the third pillar. First pillar data protection is dominated by harmonization, while third pillar data protection is structured around a series of intergovernmental cooperation initiatives. First pillar harmonization is built upon Directive 95/46/EC (the ‘Data Protection Directive’)¹⁰ and has been developed and reinforced by a series of other legal instruments, such as Directive 2002/58/EC (the ‘e-Privacy Directive’)¹¹ or the more recent Directive 2006/24/EC (the ‘Data Retention Directive’)¹². The development of data protection on the basis of intergovernmental cooperation in the third pillar can be illustrated with a reference to the existence of specific sets of data protection provisions for the processing of data by the Schengen Information System (SIS) established by the Schengen Convention, by Europol, by Eurojust or by (the third pillar part of) the Customs Information System (CIS). The OMC has not been implemented in the field of data protection. There are however certain specific features in the data protection field that make it particularly interesting for research for innovative governance mechanisms, especially concerning ‘collective learning’ mechanisms.

It could be useful to recall that the right to data protection is a right related to the right to privacy, although not equivalent to it, covering all information concerning any identified or identifiable person. In a quite innovative manner, the Charter of Fundamental Rights recognised the right to data protection as an autonomous fundamental right in 2000, in Article 8. Article 8.3 states in this sense that personal data “*must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law*”. Until 2000, only a limited number of Member States had granted constitutional level recognition to the right to data protection. The Charter interestingly recognised, as a feature of the data protection right, the right to enjoy supervision by independent supervisory authorities.¹³ These authorities are sometimes referred to as ‘data protection officers’ or ‘privacy commissioners’.

Supervisory authorities are an essential element of EU data protection. Their historical origin dates back to the 1970s, even if it was the Data Protection Directive that first ensured its compulsory existence in each Member State, configuring them as independent bodies responsible for data protection supervision. The Data Protection Directive also foresees the establishment of an independent Working Party on the Protection of Individuals with regard to the Processing of Personal Data, generally known as ‘the Article 29 Working Party’, composed of representatives of the national supervisory authorities, of Community supervisory authorities (only one is in place at the moment, as explained below) and of the Commission. The Working Party is responsible

¹⁰ Directive 95/46/EC of the European Parliament and Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, pp. 31-50, 23.11.1995.

¹¹ Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications, known as the ‘e-Privacy Directive’), OJ L 201, pp. 37-47, 31.7.2002.

¹² Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, OJ L 105, pp. 54-63, 13.4.2006.

¹³ Art. 8.3 of the Charter of Fundamental Rights of the European Union: “*Compliance with these rules shall be subject to supervision by an independent authority*”.

for: a) providing expert opinion from Member State level to the European Commission on matters relating to data protection; b) promoting the uniform application of the Data Protection Directive in all Member States through cooperation between data protection supervisory authorities; c) advising the EC on any Community measures affecting the rights and freedoms of natural persons with regard to the processing of personal data; d) making recommendations to the public and to Community institutions on matters relating to the protection of persons with regard to the processing of personal data in the EC. The Article 29 Working Party has been very active since its creation and plays a significant role in the transfer of learning from national to EC level, as well as amongst national supervisory authorities and from the EC to the national level. Before the establishment of Article 29 Working Party, national supervisory authorities had already fomented cooperation and had established a series of networks that are still fully functional, such as the International Conference of Data Protection and Information Commissioners and the European Data Protection Authorities network. The Article 29 Working Party is however a particularly strong forum, as it is an EC-recognized forum.

The analysis of the role of supervisory authorities, of their networking activities and of the Article 29 Working Party is the basis of one of the most interesting analysis of EU data protection governance currently available, developed by Burkard EBERLEIN and Abraham NEWMAN.¹⁴ EBERLEIN and NEWMAN believe that the data protection field illustrates a promising alternative to the regulatory rigidity opposing ‘harmonization’ and ‘intergovernmental cooperation’, just like the OMC, although following a different strategy. They call the phenomenon ‘incorporated transgovernmentalism’ and state that it is based on the fact that in a series of sectors the institutions of the EU have directly incorporated organized groups of sub-national actors into the regulatory process. These ‘transgovernmental networks’ of national ‘regulators’ (in terms of EBERLEIN and NEWMAN) take on critical roles in defining and enforcing European rules, empowered by expertise, delegated political authority, and network ties; they are officially incorporated into supranational governance processes; and the distinctive character of such networks lies in the fact that they simultaneously wield power over rules as national regulators vested with domestic authority and formally coordinate the supranational regulatory framework. The legitimacy of ‘incorporated transgovernmentalism’ would be obtained via: a) the fact that each agency is appointed by an elected national government, enjoying therefore a marginal amount of procedural legitimacy; b) members relationships with sector participants.

Data protection offers, according to EBERLEIN and NEWMAN, are the earliest and most developed example of ‘incorporated transgovernmentalism’. This analysis is fully convincing inasmuch it reflects the capacity of supervisory authorities to influence data protection governance. Such capacity can hardly be discussed, especially taking into account the mentioned European recognition of the data protection right as an autonomous right featuring the existence of supervisory authorities. Supervisory authorities had already provided key input for the international recognition of the data protection right even before they were integrated in the EC institutional framework.¹⁵

The analysis could also be helpful in explaining why data protection policies in the third pillar have progressed differently in the first and in the third pillar and why, even if representatives from the national supervisory authorities have recurrently called for a standardization of data protection provisions in the third pillar, they have systematically failed in reaching this objective. The Article 29 Working Party is officially an EC-only body, despite much effort invested in trying to widen its advisory

¹⁴ EBERLEIN, Burkard, and Abraham NEWMAN (2006), *Innovating EU Governance Modes: The rise of incorporated transgovernmental networks*, Council for European Studies at Columbia University Working Papers (retrieved from: <http://www.councilforeuropeanstudies.org/pub/papers/EberleinNewman.pdf>), forthcoming. See also: NEWMAN Abraham (forthcoming), “Building Transnational Civil Liberties: Transgovernmental Entrepreneurs and the European Data Privacy Directive”, *International Organization*.

¹⁵ Notably, it was the case regarding the Council of Europe 1981 Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Strasbourg, 28 January 1981, ETS

role to the third pillar. In the third pillar there is no equivalent body. There are a series of similar bodies, also composed of representatives of national supervisory authorities (that could be qualified, therefore, as 'derivative'), but they have very different functions. They are the Schengen Joint Supervisory Authority, the Europol Joint Supervisory Body, the Customs Joint Supervisory Authority and the Eurojust Joint Supervisory Body, and their tasks focus on the monitoring of data processing. This situation suggests that as EBERLEIN and NEWMAN have highlighted, the institutional incorporation of representatives of the network can be considered a key element in ensuring their impact.

It seems, however, that the analysis proposed by EBERLEIN and NEWMAN might be only partially correct. According to the research carried out, it suffers a major problem, as it assumes that data protection authorities enjoy regulatory powers, even though it is not always true. The Data Protection Directive only grants to those authorities supervisory power; national legislation might grant regulatory power, but it has not always been the case. The supervisory authorities enjoy therefore a limited domestic authority. It could be argued that, even if limited, such authority might be enough to effectively play a 'regulatory' role, but the validity of this assumption is unclear, especially if we take into account that processes such as harmonization or EC level cooperation amongst supervisory authorities might progressively reduce domestic authority. Moreover, the legitimacy input as identified by the authors appears to be particularly weak. In this sense: a) even if the authorities might be appointed by an elected national government, they are to act in total independence; b) members of the supervisory authorities might have relationships with sector participants, but they do not systematically encourage them.

The research has underlined that there is currently be another key player in the EU data protection field with the capacity of contributing to the overcoming of the dilemma between harmonization vs. intergovernmental cooperation, perhaps in a more innovative way than via the 'incorporation' through the Article 29 Working Party. Such key player is the European Data Protection Supervisor (EDPS), established by Regulation (EC) No 45/2001¹⁶ and operative since 2004.

The EDPS could be described as:

- a *hybrid* body, in the sense that it combines some features of the national supervisory authorities and some of the Article 29 Working Party: on the one hand, it has monitoring tasks, very much like national supervisory authorities, although with a different scope (namely, data processing by EC institutions and bodies inasmuch as it falls at least partially under the scope of EC law); on the other hand, it has a consultative role, similar to the consultative role of the Article 29 Working Party but enhanced, as its wider in scope and it is structurally integrated to EC legislative procedure;

- not a 'derivative' body (as it is not composed of representatives of other bodies), but as a 'semi-derivative' body, as the EDPS shall be chosen from persons "*who are acknowledged as having the experience and skills required (...), for example because they belong or have belonged to the supervisory authorities referred to in Article 28 of Directive 95/46/EC*".¹⁷ The EDPS is therefore *preferably* selected amongst members of the community of supervisory authorities, and the first EDPS and its Assistant had both previously been members of supervisory authorities and of the Article 29 Working Party;

- a body with a *pivotal* position in EU data protection: it can play a consultative role for matters falling under the first and the third pillar, and has cooperation duties regarding both pillars; moreover, it enjoys a privileged role concerning Data Protection Officers (DPOs), also established by Regulation No 45/2001 and compulsory in each EC institution and body. DPOs represent an *internal* mode of supervision, as opposed to the *external* the traditional supervisory mode, and the model is currently reaching the third pillar via Europol;

- a body with an *experimentalist* approach to data protection supervision: the EDPS uses a series of tasks that he is responsible for as a way to explore new modes of

¹⁶ Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, OJ L 8, pp. 1- 22, 12.1.2001.

¹⁷ Art. 28 of Directive 95/46/EC (EC) No 45/2001.

supervision — such is the case, for instance, of his activities regarding the joint supervision (in cooperation with national supervisory authorities) of Eurodac data processing.

All these features characterize the EDPS as an interesting mechanism for the transfer of learning. The EDPS has until now worked effectively in furthering the integration at EU level of the concerns of the international network of supervisory authorities. Tensions between his interests and those of the national supervisory authorities could however appear, and some different approaches have already been supported in relation to the future of supervisory authorities in the third pillar, particularly in the context of the discussions surrounding the Proposal for a Council Framework Decision on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters, at the moment being discussed at Council level. Other obstacles that can be encountered, rendering unpredictable the exact impact of EDPS' work on the design of EU data protection policies, is the possible avoidance by the policy-makers of the use established EU decision-making procedures, resulting in a non-participation of the EDPS. The integration of the Prüm Treaty¹⁸ at EU level can be cited as an example of the possible lack of effectiveness of the EDPS in the definition of the 'public interest', as his possible contribution was very negatively reduced by the innovative approach to decision-making of the Prüm Treaty integration.

Despite these nuances, it must be acknowledged that the EDPS, as well as the Article 29 Working Party, deserve detailed study and reflection in the search for innovative methods of policing fundamental rights at EU level. This is particularly true from the reflexive governance approach, as they represent mechanisms with special potentialities to foster collective learning. Moreover, EU data protection being based in the notion of independence of supervisory authorities, the field is especially interesting to study the overcoming of any simplified opposition between EU and Member States interests.

3.3. Criminal law

As exposed earlier, the main two hypotheses to define the public interest are, on the one hand, the hypothesis that the public interest will be the natural result from the tensions between individual actors seeking to maximize their own specific interest, and, on the other hand, the hypothesis that the definition of the public interest is to be left in the hands of a for that purpose designated body. It is precisely these two hypotheses the theory of reflexive governance wants to reconcile, or escape from. In the field of EU criminal law, these two hypotheses take the form of the principle of mutual recognition and the question of the harmonization of national (material and/or procedural) criminal law.

According to the principle of mutual recognition, that since the Tampere European Council of 1999 has been labeled as the 'cornerstone' of EU criminal law, a criminal law decision of a first state takes effect as such within the second state. In other words, the second state does not, in principle, have the power or the discretion to refuse to execute the criminal law decision if the first state. So, we read in the framework decision on the European arrest warrant (the first framework decision implementing the principle of mutual recognition), that "*Member States shall execute any European arrest warrant on the basis of the principle of mutual recognition*" (Article 1 (2)). However, the principle of mutual recognition cannot lead to a violation of fundamental rights. Therefore, framework decisions implementing the principle of mutual recognition provide for the obligation to respect fundamental rights and fundamental legal principles. So the 12th recital of the Framework decision about the European arrest warrant reads that it "*respects fundamental rights and observes the principles recognized by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the*

¹⁸ Convention between the Kingdom of Belgium, the Federal Republic of Germany, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands and the Republic of Austria on the stepping up of cross-border cooperation, particularly in combating terrorism, organized crime and illegal immigration, Prüm, 27 May 2005.

European Union". Similarly, and even more clearly, the framework decision on the application of the principle of mutual recognition to financial penalties¹⁹ states in its Article 3 that it "shall not have the effect of amending the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty". Its Article 20, paragraph 3, reads: "Each Member State may, where the certificate referred to in Article 4 gives rise to an issue that fundamental rights or fundamental legal principles as enshrined in Article 6 of the Treaty may have been infringed, oppose the recognition and the execution of decisions". Therefore, the respect of fundamental rights *limits* the operation of the principle of mutual recognition.

The practical operation of the principle of mutual recognition is not possible without a certain degree of mutual *confidence* or *trust* between the states. Mutual recognition functions only if there is mutual trust between the Member States' legal orders. However, mutual trust cannot be presupposed nor promulgated, but must be constructed. It is precisely here that the question of harmonization of national (material and/or procedural) criminal law come into play. EU harmonizing legislation provides therefore one possible solution to the problem of installing mutual trust between the Member States' legal orders. However, this presupposes that the EU legislator has a clear view on what level of mutual trust, and hence what level of protection of fundamental rights asked for by the public interest, is needed.

Harmonization of national criminal law is, however, not the only mechanism to build the necessary mutual trust which the area of freedom, security and justice presupposes. What are then other institutional mechanisms in the domain of EU criminal law having the capacity to install mutual trust between the Member States' legal orders? It seems that collective learning mechanisms provide a useful tool to construct the mutual confidence between the Member States. Moreover, collective learning would also benefit the EU legislator: the information gathered through the collective learning mechanisms would guide the legislator to judge whether, and if so, how to intervene in a particular domain. We will give here a short overview of the existing and proposed collective learning mechanism within the EU's third pillar.

A first learning mechanism is provided by the common practice to introduce in Framework Decisions some obligation for the member states to report the national implementation or transposition measures, which could be seen as a mechanism or tool to control the member state's obligation to transpose, even though there is no infringement procedure in the framework of the third pillar. Although the reporting obligation is therefore not designed for learning purposes, it has the potential to stimulate learning. It must however be stressed that these national reporting obligation are very useful to assess whether Member States have fulfilled their *legal* obligation to transpose a *particular* Framework Decision, and do not allow the assessment of the difficulties encountered when applying the transposition measures, or whether the aim pursued by the Framework Decision is attained in practice.

The introduction of a mechanism of peer evaluation, where Member States evaluate each other, provides a second example of a learning mechanism. Certain areas of EU criminal law, more exactly in the area of the fight against organized crime and terrorism, have seen the introduction of a mechanism of 'peer evaluation', where Member States evaluate each other, providing an opportunity to learn from each other. The evaluation object is very wide: not only national legal rules are to be scrutinized but also the 'practices' at national level and of international cooperation, clearly going beyond the issue of member states compliance with transposition obligations. However, the learning potentiality of these peer evaluation mechanisms is seriously hampered by the fact that the reports drawn up are, in principle, confidential, although the evaluated member state may publish the report on its own responsibility.

A third collective learning mechanism is learning through the expertise provided by stakeholders. A useful example is provided by the European Crime Prevention Network (EUCPN), which was founded in 2001. This network is composed of national contact points and a contact point designated by the Commission. The EUCPN has a

¹⁹ Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition in criminal matters, OJ (2005) L 76/16.

double goal: developing the various aspects of crime prevention at Union level and supporting crime prevention activities at local and national level. The EUCPN's tasks include the organisation of cooperation, contacts and exchanges of information and experience between member states, as well as between member states and the EU and other groups of experts and networks specialising in crime prevention matters; the collection and analysis of information on existing crime prevention activities, on best practices,²⁰ and on data on criminality and on its development in the Member States, in order to contribute to consideration of future national and European decisions, whereby the EUCPN shall assist the Council and the Member States with questionnaires on crime and crime prevention; providing expertise to the Council and to the Commission in all matters concerning crime prevention. The EUCPN is therefore essentially designed to collect and evaluate experiences, existing activities, best practices and data on crime prevention. Those elements will not only be exchanged horizontally – between member states – , but also vertically – between the EU and the member state level. Moreover, this horizontal and vertical mutual learning is explicitly intended to have a (possible) normative impact: the mutual learning is designed to give guidance to the Council and the Commission.

Conclusion

This overview of our initial findings for the REFGOV project confirms that the thematic applications being carried have a strong potential to fruitfully contribute to the research on reflexive governance. Ideally they should also illustrate that the reflexive governance approach might be a useful tool to analyse governance issues in the studied fields. The presentation will hopefully lead to comments, suggestions or questions that could help us to better work in these directions.

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²⁰ See the EUCPN's document containing a methodology for assessing good practice projects and pan-EPUs Integrated Project ucpn.org/keydocs/Good%20practice%20Methodology.pdf
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