Post-9/11 institutionalisation of European Union Counter-terrorism: 
Emergence, Acceleration and Inertia.

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Abstract

The European Union transformation into a relevant international player in counter-terrorism has been the subject of a small but growing academic literature. Most analyses, however, have focused on the scope and relevance of the EU’s counter-terror measures and there has hitherto been a substantial lack of theoretically informed accounts of the development of this policy domain. This paper contributes to address the state of under-theorisation of this area of research by applying a historical institutionalist perspective to an empirical analysis of the sources and characteristics of the institutionalisation of EU counter-terrorism.

Drawing upon the work of Stone Sweet, Sandholtz and Fligstein the paper critically analyses the impact of external crises in the form of major terrorist attacks on the emergence of counter-terrorism as an area of European governance. It also highlights the key policy and institutional developments, studies the role of policy innovators on the institutionalisation of counter-terrorism and supports the relevance of ‘transformative’ or ‘evolutionary’ models for the understanding of institutional change in this domain.

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Introduction

The absence of theoretically informed analyses is a glaring gap in the ongoing research on EU counter-terrorism. Most studies in this area have been empirically based, some elegantly analytical, others thoroughly descriptive; but, with rare exceptions\(^1\), literature in this field remains under-theorised. Yet, at a time of increasing EU involvement in the combat against transnational threats to European security, to attempt to conceptualise and theorise EU involvement in counter-terrorism may prove very constructive. Exercises in conceptualisation could provide much needed order and coherence to the growing empirical analysis generated in recent years and contribute to a better understanding of the factors that affect EU action in this area.

In addition, this paper aims to highlight how such analyses would deliver some valuable lessons to the long-standing academic enquiry on how EU policy spaces emerge. Counter-terrorism is a highly sensitive aspect of a state’s security and sovereignty but, at the same time, has withstood since September 2001 intense integration pressures based on the transnational character of the threat. It therefore represents a highly relevant –and so far unexplored- case study for the understanding of the processes of European institutionalisation.

Hence, this paper aims to address this gap by using the analytical toolkit of historical institutionalism to explore the post-9/11 development of counter-terrorism as an area of European governance. In other words, to conceptually frame the process of institutionalisation of EU counter-terrorism. It appears natural that Historical institutionalism’s emphasis on delineating the origins and development of institutional structures and processes; and its implicit emphasis on ‘sequences in development, timing of events, and phases of political change’ (Schmidt, 1999: 2) would make it a particularly suitable framework to tackle this question.

Diverging from other new institutionalist accounts\(^2\), this paper draws heavily upon Stone Sweet, Sandholtz and Fligstein’s (2001) work on the emergence of new European political spaces and their account of the sources, causes and mechanisms
that affect the creation and institutionalisation of specific policy domains. Thus, following these authors, institutionalisation will be defined here as the ‘process through which European political space-supranational policy arenas or sites of governance, structured by EU rules, procedures, and the activities of the EU’s organisations- have evolved’ (Ibid: 3). By ‘governance’ is understood ‘the authority to make, interpret, and enforce rules in a given social setting’, hence a policy arena is institutionalised when ‘there exists a widely shared system of rules and procedures to define who actors are, how they make sense of each other’s actions, and what types of actions are possible’ (Ibid: 7, 12). This involves three requirements:

1) procedures governing the interactions that take place in that arena are generated and formalised, 2) private actors and groups orient their lobby activities to the EU level and 3) pressures mount to coordinate what goes in that arena with what goes in others, at the national or supranational level (Ibid: 21).

In essence, these authors see the creation of new areas of governance as a process of institutional innovation where new rules and procedures are generated and then adapted constantly and regularly. Stone Sweet et al. subscribe to the view that such institutional transformations can be an endogenous process or be based on exogenous crises. In the first instance, political actors become convinced of the necessity for further rules clarification or extension as a response to the political environment. It is a gradual process of ‘rewriting the rules’ that can nonetheless, if successful, produce a shift not only in the rules but also the goals of the social space.

On the other hand, exogenous shocks originate outside the policy space and produce the perception that change is necessary. Such events can have the effect of bringing new groups or a coalition of actors together to design a new political space in order to respond to the shock. Innovators, policy entrepreneurs or ‘skilled social actors’, can exploit this situation by providing new policy frames or manipulate existing ones in order to persuade others than certain policy innovations are appropriate.

Crucially, Stone Sweet et al. consider the nature and scope of institutionalisation as a dependent variable varying across policy domains and across time in any single arena. Therefore, and in order to systematically evaluate the extent of institutionalisation of a domain, a number of considerations should be addressed by the analyst, including:
i) What exactly is being institutionalised? (i.e. a mode or technique of governance, new policy ideas, networks of association…)

ii) To what extent are the processes in question likely to be reversed or rolled-back? (The greater the extent of the institutionalisation, the lower the likelihood of reversal)

To what extent are the modes of governance stable? (In other words, capable to reproduce themselves over time) How much of the future is determined by what has been decided in the past?

iii) What mechanisms or processes have produced the institutionalisation? How much dynamic adjustment has taken place? (That is, the extent to which actors come to adjust their expectations and choices to the arena of governance).

In examining these questions, and as it is common with historical institutionalist accounts, the paper follows a chronological approach to the study of processes of change. The empirical analysis of policy and institutional development is structured around three particular stages understood as critical junctures in the process of institutionalisation: post-9/11, post-Madrid and post-London. Here the aim is not to provide a detailed description of the Union’s counter-terror policies or structures; the focus is instead on key political decisions and institutional changes that have acted as milestones in the emergence of the EU’s counter-terror space. Subsequently the focus shifts towards characterising the process, highlighting the sources of innovation and evaluating the extent of the institutionalisation. The paper concludes by revisiting the main arguments and examining the linkages between these processes and the issue of the Union’s coherence as a counter-terror actor.

**Post 9/11: Initial Stage in the Institutionalisation Process**

This article suggests that, since the terrorist attacks in New York and Washington in 2001 and, specially, Madrid in 2004; counter-terrorism has materialised as a distinctive, separate and multi-dimensional policy domain within the broader JHA pillar institutional space. This emergence is portrayed here as a process of policy innovation, establishment of rules and institutional engineering leading to the solidification of a counter-terror European policy space. A process rapidly developed
through three *critical junctures* represented by the terrorist attacks in 2001 in New York, 2004 in Madrid, and 2005 in London. These events are interpreted as external crises that *punctuated* the existing institutional equilibrium and encouraged rapid policy and organisational expansion followed by periods of slow down and inertia.

9/11 represents the first of the three *critical junctures* generating new paths of institutional development -branching points- and shaping the formation of this domain. It has been widely documented how the immense political salience of the attacks, and the resulting high-level attention, led to the rapid adoption of a record number of internal security policies that had remained stuck for years in the policy pipeline. Partly motivated by the EU’s drive to convince the US that it was a credible partner in this area, ‘existing arrangements were reinvigorated and draft agreements sailed through’ (den Boer, Monar 2002). A stark contrast with the rather slow progress of the pre-9/11 JHA inter-governmental decision-making: den Boer quotes ex-JLS Commissioner Vitorino unsurprisingly describing the European response to 9/11 as a ‘giant leap forward’ for criminal justice cooperation. Den Boer (2006: 90) characterises it, using Kingdon’s (1985) original concept, as a *window of opportunity* for the ‘hitherto slack and cumbersome decision-making in the Council. All of a sudden, decisions were possible on dormant dossiers’. Alternatively, the process will be interpreted here, following Krasner (1984: 242), as a *punctuated equilibrium*, an ‘episodic and dramatic’ change based on crises usually emanated from the external environment that ‘punctures’ periods of institutional equilibrium and continuity. In this way, the sense of emergency and ensuing political will generated by the events served to challenge the existing inertia in the work of the Justice and Home Affairs pillar.

The result was the approval of the EU’s first multi-dimensional Action Plan focused unequivocally and exclusively on counter-terror action. Containing over sixty measures that would be updated and periodically revised at subsequent meetings of the JHA Council, the ‘Anti-terrorist roadmap’ included *inter alia* initiatives on the field of civil aviation security, police and judicial cooperation, external action and terrorism financing (Council 2001). It constituted the embryo of the EU’s anti-terrorist policy, granted a framework for dispersed policies and became an internal
coordination mechanism providing goals, deadlines and implementation competencies.

The action plan was also accompanied by the highly significant June 2002 Framework Decision on Combating Terrorism. Being a contentious and politically controversial issue, terrorism had been resistant to previous efforts to approximate European responses. This measure went much further than the preceding attempts by recognising terrorism as a special offence in all EU member states (Council 2002: 3); a remarkable advance considering that only six out of fifteen member states possessed anti-terrorist legislation before September 2001. In doing so, the EU became the first international actor to settle on a common definition of terrorism. In also producing a basic level of harmonisation concerning penalties regarding terrorism offences, this Framework Decision constituted a fundamental precondition for the development of any substantial form of European governance in this area. With the issuing of a Common list of terrorist organisations as a Council Regulation on 27 September 2001, the unique feat of European governments agreeing to both a basic harmonisation of counter-terror legislation and a common operational response (i.e. freezing of the listed entities’ assets) was achieved.

These harmonising efforts apart, most of the post-9/11 policy drive centred on enhancing coordination efforts between national authorities, also leading to advances in operational cooperation. Thus, the Council Framework Decision of 13 June 2002 on the European Arrest Warrant replaced all the previous European instruments concerning extradition. It required each national judicial authority to recognise the requests for the surrender of a person made by another member state’s judicial authority (Council 2002: 2). Although fraught with problems during the implementation stage, the EAW is now widely regarded as the most important operational instrument in the European fight against terrorism for its impact in the reduction of the length of time of the extradition procedures and its extensive utilisation by national authorities (Commission 2005, 2006). Interestingly, it also represents a considerable success for the Commission’s policy entrepreneurship and integrationist drive: den Boer and Monar (2002: 21) have described how Commission officials ‘regarded the arrest warrant as one of the first genuine steps towards the
harmonisation of (criminal) procedure laws and, ultimately, towards the realisation of a European judicial area’.

The Arrest Warrant is not the only relevant operational mechanism emerging from the 9/11 policy drive. The 13 June 2002 Framework decision on Joint Investigation Teams, another key instrument that had spent years in Council limbo, also allowed for the establishment of teams comprising law enforcement and judicial representatives, jointly working in cross-border investigations involving two or more member states (Council 2002: 3).

Importantly, and despite terrorism not being explicitly mentioned in the document due to its controversial nature, most of these mechanisms originated from the 1999 Tampere European Council Conclusions. The Joint Investigation Teams were originally proposed as Recommendation 43 of the Presidency Conclusions. The fight against crime financing was extensively considered at the tenth Tampere Milestone. The importance of legal harmonisation of serious crimes, exactly what the 2002 framework decision does, was emphasised by paragraph 48 of the document (Council 1999). In the same vein, the European Arrest Warrant is the first concrete application of the principle of Mutual Recognition in the judicial cooperation in criminal matters, a principle referred at Milestone VI as the ‘cornerstone’ of the European law enforcement area.

Thus, due to the political need to respond, European policy-makers reached for the recipes that they had decided upon two years previously. This approach entails the notion that the EU’s response did not come from careful study of the threat and its policy challenges but through a reactive borrowing from the Tampere ‘laundry list’. In institutionalist terms, the EU policy response was dependent on the path set by Tampere since the sunk costs derived from switching to one alternative (complete new policies tailored to the terrorist threat) from the pre-existing one (rapid adoption of Tampere instruments for criminal matters cooperation) were simply too high. In fact, it is arguable whether a choice was even possible as the shock of the events and the political pressure to ‘do something’ obliged member states to an immediate policy reaction.
This partially explains the incrementalist and disjointed response. The road map first and the subsequent Action Plan were not much more than an extensive list of measures and a strategic vision was sorely lacking in this first institutionalisation stage. Moreover the 2003 European Security Strategy, although it confirmed the emergence of terrorism as a priority for the Union, also failed to tackle this fundamental weakness.

The limited time-gap produced by the policy window ensured that the response would be channelled through the expansion of Tampere’s structures, preventing policymakers from exploring more significant institutional change. In this context, the Tampere European Council not only shaped policy decisions but fundamental choices in the post-9/11 development of the EU’s counter-terror organisational framework. Structures that had been either established (Eurojust, the Police Chiefs Task Force, the European Police College (CEPOL)) or strengthened (Europol) at Tampere were provided with new competences and increased resources (Gregory, 2005) and are now fundamental elements in the EU’s counter-terror toolkit.

Crucially, not only European agencies but also the organisational capacity of EU institutions received a boost on the back of enhanced political will. The European Commission JLS DG was reorganised and enhanced its administrative capacity, reforming Unit D-1 to take charge of policy formulation in this area. Furthermore the Council’s working groups specialised on terror issues, the third pillar’s Council Working Group on Terrorism (TWG) and the second pillar Counter-Terrorist Working Group (COTER), were expanded and prioritised, with member states releasing more resources and more experienced senior officials.

Hence formal institutional change in the immediate aftermath of 9/11 was visibly path dependent. The EU response to 9/11 largely accelerated the path for future institutional growth set out by the Tampere European Council. As contended by historical institutionalist authors, prior historical developments constrain consequent institutional innovation. Thus, the main method of institution-building in the immediate aftermath of 9/11 can be quite accurately described by using Lanzara’s concept of institutional bricolage as the recombination and reuse of ‘old’ structures to perform new functions. In opposition to the ‘exploration of alternative arrangements’
in response to a crisis, institutional bricolage allows the ‘the gradual shifting and drifting of an institution or a code, which increases its structural complexity while leaving its basic core untouched’ (1998: 27, 31). In this particular case this is reflected on the adoption of EU agencies of an anti-terrorist mission or the reshuffling of previous priorities within the organisations.

In this context, post-9/11 institutionalisation was sustained not only on institutional bricolage and policy expansion but also on the adoption of a system of rules to monitor the national implementation of Brussels’ decisions. Accordingly, a peer evaluation system was set up under the third pillar Article 36 Committee. It gathered teams of designated experts to monitor implementation and the effectiveness of national counter-terror systems and offer recommendations on the use of intelligence as evidence, effective investigative techniques and other methods (Council 2002).

This system was later reinforced after Madrid with the EU Counter-terror Coordinator reports on member states’ implementation of anti-terrorism measures (Council 2005). Notwithstanding the lack of infringement procedures for third pillar legislation, these are politically remarkable steps. As Nilsson points out ‘the mere fact that member states have accepted to have their antiterrorism arrangements evaluated by external evaluators is a sign of the importance attributed by member states to these measures’ (2006: 79).

The reality however is that the implementation record during this period is poor. As a result, many of the measures adopted on the 21 September 2001 European Council had not been implemented by national governments by the time of the Madrid attacks. In fact, by December 2004, nine EU countries had still not fully transposed the framework decision on combating terrorism, nine member states had yet to implement the decision on the joint investigation teams and Italy had significant problems with the parliamentary ratification of the Arrest Warrant (Monar, 2005: 142).

So it is clear that two and a half years later, the political will that followed the 9/11 ‘equilibrium puncture’ was rapidly diluting. Implementation was affected but so was the priority assigned to these policies. As a reflection of the closing of the window of opportunity in the problem stream⁶, by the 22 June 2002 Seville European Council, illegal immigration had replaced terrorism as the highest concern in the JHA agenda.
Equilibrium set in again as the Union moved further from the 9/11 critical juncture and the strength and speed of the institutionalisation process had come gradually to a relative standstill by 2004.

**Post-Madrid 2004: Institutionalisation Accelerates**

Given that the initial post-9/11 drive had greatly slowed-down by the end of 2003, there can be little doubt that the March 2004 Madrid bombings acted as a loud wake up call. As argued by a Commission official, ‘the moment that changes everything is the 11th of March’. The salience of the threat, brutally exposed by the 192 deaths, made a political necessity to accelerate the institutionalisation. Importantly, whereas the response to 9/11 had been influenced by previous EU commitments, the policies that followed Madrid were more closely tailored to the terrorist threat. In this regard, it is argued here that it was after Madrid that counter-terrorism started becoming a truly differentiated policy space and therefore the Madrid bombings had a deeper impact in EU anti-terrorism policy-making than 9/11 itself.

It is on 25 March 2004 when the European Council adopted its most important pronouncement in this area. The Declaration on Combating Terrorism referred to the aforementioned implementation flaws by urging member states to fully implement the measures on police and judicial cooperation approved after New York as a matter of urgency. Moreover, the document called for new measures focused on reinforcing operational cooperation and intelligence exchange at the state level but, importantly, also between national authorities and European bodies such as Europol and Eurojust (Council 2004). The March Declaration also offered for the first time clear guidelines for action by setting out seven overarching strategic objectives. This was accompanied by the formal commitment by EU states to assist any EU member that fell victim to a terrorist attack. This Solidarity Clause is highly representative insofar it illustrates a symbolic ‘Europeanisation’ of the threat (Nilsson, 2006:81).

In parallel to the European Council Declaration, the Plan of Action was updated and greatly expanded to translate the seven strategic objectives into around 175 specific
measures. Tellingly, many of these were not exclusive to terrorism, which arguably continued the pattern towards the repackaging of security instruments as counter-terrorism to facilitate their rapid adoption. On the other hand, the Action Plan served to solidify counter-terrorism position on the EU’s agenda by presenting the measures in a scoreboard form, attributing tasks, setting clear deadlines to monitor implementation and ‘naming and shaming’ those failing to live up to their obligations. In conjunction with the Declaration, this document also served to expand the EU’s counter-terror governance to other fields. Subsequent Council initiatives listed in this document would include: border control (i.e. Inclusion of biometrics on passports), response management (i.e. Crisis coordination arrangements), infrastructure protection (i.e. Protection from attacks against information systems), judicial cooperation (i.e. Mutual recognition of confiscation orders) or information exchange (i.e. Exchange of criminal records information).

Moments of punctuated equilibrium provide multiple opportunities for actors to advance previously overlooked choices (Jones, True and Baumgartner, 1995: 101) and it is after Madrid that the Commission truly came into its own as a policy entrepreneur. In the months following the Council Declaration, the European Commission released as many as five Communications formulating policies in three separate areas: terrorism financing, critical infrastructure protection and response management. The Commission’s choice is revealing: not only were they considered priorities for EU action by the Declaration but these were fields where the Commission possessed important competencies derived from the Community pillar. Aware of member states’ initial suspicions, the Commission was generally cautious to avoid supranational recipes. It focused instead on increasing information exchange and enhancing coordination with mechanisms such as a European Programme for Critical Infrastructure Protection (EPCIP), a Critical Infrastructure Warning Information Network (CIWIN) or the networking of rapid alert systems (ARGUS). These and other initiatives contained in the Action Plan reflect a reinvigorated policy expansion. Alternatively, this new avalanche of measures supports the perception that the prevalence of critical junctures and rapid growth followed by decelerations and inertia, has led to what is widely seen as a characteristically ‘reactive and piecemeal’ policy-making response (den Boer 2003, Bures 2006, Zimmermann 2006, Edwards and Meyer 2008).
On the other hand, Madrid greatly contributed to the institutional strengthening of the counter-terror area of governance. Following the reorientation in the wake of 9/11 of the framework set up in Amsterdam and Tampere towards terrorism, new structures were added to the existing organisational arrangements. In this vein, the appointment by the Council’s High representative of a Counter-terror Coordinator to work within the Council Secretariat was without a doubt the Union’s flagship initiative in the post-Madrid period. The decision seemed to address in principle the call in the Declaration for new structures to ensure greater coordination in the European combat against terrorism. A new senior office placed under the CFSP High Representative, the Coordinator was tasked with improving coordination within the Council and auditing member states implementation of the Action Plan. Albeit possessing limited formal competencies, the establishment of this post added visibility to EU efforts and further relevance to the increasing institutionalisation of terrorism.

Alternatively, the establishment of the Situation Centre (Sitcen) under the CFSP High Representative at the Council’s Secretariat also represents a significant institutional advance. Created in the aftermath of the Madrid train bombings, and modernised and expanded in 2005, the centre is at the core of the EU’s embryonic intelligence architecture (Council 2007). There seconded analysts from external and internal intelligence services work with assessed (as opposed to operational or ‘raw’) intelligence from national and open sources to produce intelligence reports in counter-terrorism (UK House of Lords 2007: 56). Through Europol and Sitcen, the EU is now capable of producing its own independent evaluations of the terrorist threat.

Interestingly, the March 2004 attacks also brought about a Belgian-Austrian proposal for a European Intelligence Agency at the 19 March 2004 JHA meeting; an initiative that was summarily rejected by the big member states. Opposing anything related to a supranational intelligence agency, these national governments clearly favoured instead the centralisation of existing informal networks in the far less ambitious form of the Sitcen. This is important insofar it shows that the impetus for change would not go as far as to force the supranationalisation of something as precious for member states as intelligence.
In parallel with these new structures, other EU agencies strengthened their powers in the wake of Madrid. The ratification of three Europol protocols endows the agency with an operational role, by allowing it to provide assistance and facilitate coordination in JIT’s counter-terror operations (Peers 2007). In addition, Eurojust anti-terrorist resources were also enhanced with the creation of an internal team of national experts in terrorist matters (Eurojust 2005: 34).

In this context, the establishment of Sitcen, a Counter-terror Coordinator and the expansion of Europol and Eurojust operational powers highlighted an incipient ‘Brusselisation’ of counter-terrorism. This ‘Brusselisation’ has nonetheless been constructed over the existing institutional base set out by Tampere. Unlike post-9/11 institutional bricolage, organisational change after Madrid is better addressed applying Schickler’s notion of ‘layering’: the necessity, generally due to institutional locks-in, for new institutions to be built around existing institutions rather than dismantling the old structures (Héritier 2004: 58). Accordingly, Sitcen, the Counter-terror Coordinator and the networks and coordinating bodies created in the fields of terrorism financing, infrastructure protection and consequence management can be represented as a patch up of new elements to the existing institutional framework in response to the Madrid events. Incidentally, the post-Madrid political choice of layering over bricolage has contributed significantly towards the ‘over-crowdedness’ of this policy space, a criticism often raised by experts and policy-makers.

**Post-London 2005: Stability and Inertia**

The July 2005 London bombings represent the third critical juncture in the institutionalisation process. The immediate reaction to the attacks was to speed up ongoing work and build on the existing framework. Thus, the UK Presidency piled up the pressure on the approval of individual measures such as the European Evidence Warrant and the Communication Data Retention that give more powers to police authorities to access personal communication data and share their evidence with other member states’ authorities (European Parliament 2006).
More substantially, the July bombings led to important changes in the perception of the threat, and consequently the nature of the response, and resulted in the formulation of a general strategy to guide subsequent EU efforts in this area. Under this perspective, the *European Union Counter-terrorism Strategy*, adopted by the JHA Council meeting on 1 December 2005 was an attempt to streamline and clarify the EU’s counter-terror efforts. Portrayed in the document as ‘the next phase of the agenda of work set out at the March 2004 European Council’ (Council 2005: 6), the Strategy broadened the perception of the threat by moving from the almost exclusive focus on Al-Qaeda present in earlier texts to emphasise the danger from home grown terrorism emerging as a product of radicalisation processes and terrorist recruitment.

Thus, out of the four pillars of action that are part of the Strategy (i.e. Prevent, Protect, Pursue and Respond) it is the former that is particularly relevant. Although combating radicalisation had been part of the 2004 Hague JHA Programme and became an EU priority for the first time on the 2004 European Council Declaration, it is the 2005 Strategy which cemented the need to accompany repressive measures with preventive actions. The inclusion of this new preventive dimension has extended EU involvement to new areas (i.e. addressing incitement and recruitment, developing a media and communication Strategy and a non-emotive lexicon, promoting inter-cultural dialogue) and has added an extra layer of complexity to the response (*Ibid*: 8).

By setting the general parameters for the EU response under a holistic approach, the Counter-terror Strategy represents another constituent element in the process of institutionalisation, complementing other important mechanisms such as the Anti-terrorist Action Plan, or the peer evaluation system. It should also be praised for reflecting a greater understanding of the multidimensionality of the threat, although some authors have criticised its belatedness, arguing that it should have been a precondition for the Action Plan. Keohane (2005), for instance, contends that the Anti-terrorist Action Plan is too unwieldy for policy guidance, so the Strategy is fundamental to provide a set of principles that would bring some clarity and direction.

On the other hand, this would arguably overestimate the impact of the document in practice. Brussels policymakers have contended that the main rationale behind the Strategy was to clarify to the European public the efforts that the Union is committing
in this area. In fact there is little that is new in the document and the four pillars are essentially a reformulation of the seven strategic objectives present in the Council Declaration. Indeed a decision-maker from the Council branded the Strategy as just ‘repackaging’ and ‘marketing’ in an interview with the author. An official from a national representation had an even more cynical view and portrayed it as an effort by the British Presidency to visibly show leadership in this field. Rather than guiding the EU’s internal efforts, the document’s main significance may reside instead in the fact that it has clearly highlighted counter-terrorism political salience within the Union.

In parallel, additional examples of post-London policy entrepreneurship from the Commission have emerged in a number of policy sectors. In border control, this consists of measures such as the 2007 agreement with US authorities for the transfer of Passenger Name Records (PNR) data and the initiative for a European PNR system. Regarding prevention, a 2008 proposal aimed to amend the Framework Decision on Combating Terrorism and criminalise incitement, training and recruitment to terrorism. Under the Pursue pillar, initiatives include a rapid alert system on lost and stolen explosives or a network of experts on bomb-disposal and de-activation (Commission, 2007). Emerging from here is the significant trend of an increasingly reassured JLS DG, strengthened by their increased expertise and experience on these matters. It is important to note as well that the Commission’s credibility has gradually improved amongst member states, particularly after the supranationalist instincts of some of their initial proposals on police data and intelligence exchange were toned down following national criticisms.

Additionally, with the incorporation in 2007 of the third pillar aspects of the Prüm Treaty into the Union legal framework, horizontal exchange of criminal data information has entered a new stage. This mechanism allows direct access by law enforcement agencies to other states’ databases on DNA, fingerprints and vehicle registration and the formation of joint law enforcement operations. There are concerns of the double legal framework that Prüm creates in this area (Bunyan, 2007: 4), yet few doubts in its future contribution towards the intensification of operational cooperation in counter-terror investigations.
Shifting the focus to the structures, a substantial development has been the commencing of the work of the European Border Agency (Frontex) from its base in Warsaw (Poland) in May 2005. Clearly an immigration control mechanism and somewhat independent from the political dynamics associated with the counter-terror policy space, the agency is still part of the 2005 Strategy as an element enhancing the protection against terrorist infiltration.

Another relevant change was the appointment of a successor for Gijs de Vries as Counter-terror Coordinator. The promotion of Gilles de Kerchove (former Director for Justice and Home Affairs at the EU Council Secretariat) on 18 September 2007 might indicate a growing maturity and durability of the post. The 6 months delay in the appointment suggests otherwise; and it must be noted that some member states were in favour of terminating the post even if the final result of the discussion was only the downgrading of its political visibility13.

Notwithstanding these policy and institutional developments, it is hard not to conclude that whereas Madrid and New York were clearly key punctuating events, the transformational drive following London petered out rather quickly. An illustration is the 2006 debacle of the Commission proposals to enact the passerelle in Justice and Home Affairs. In May 2006 Commissioner Frattini proposed the replacement of unanimity by qualified majority voting in JHA by making use of the bridge clause of the treaty. It is interesting to see that Frattini’s discourse was to achieve more efficient and fluid decision-making in counter-terrorism, a hitherto highly effective mechanism to bring about changes in broader criminal matters cooperation. Significantly, over a half of member states rejected the proposal at the 4 December 2006 JHA Council. The Commission failed even in the wake of the well-publicised August 2006 plot to blow up with liquid explosives transatlantic carriers taking off from Heathrow. Making use of Bulmer and Burch distinction (1998), this clearly was a critical moment – and instance where opportunity for change arises - that did not convert into a juncture – when a clear departure from previously established patters occur - whilst the political window of opportunity opened by the London bombings in July 2005 had been firmly closed by then.
It is not difficult to argue that the lack of any major attack in the three years following London have resulted in political stagnation. A case in point is that whereas the fight against terrorism was on the European Council agenda in every meeting between the 11th of March 2004 and December 2005, since then it did not re-merge a single time until December 2007. Furthermore, in the year previous to the 2007 Portuguese Presidency, there had not been a single discussion on terrorism at the ministerial level. During this period major plots have been frustrated and terrorists arrests continued unabated yet these events have not generated the massive attention brought about by New York, Madrid and London. There can be little doubt that foiled plots create little public pressure and are harder to convert into critical junctures. In this context injections of political will achieve a lot less and interior ministers’ target-hardening proposals do not carry the same weight, failing to cajole other ministries as transport or industry, into costly reforms. The losing of political momentum is particularly prevalent in a number of areas, cases in point being the critical infrastructure directive, the evidence warrant or the CBRN programme, where negotiations have stalled or progressed extremely slowly. In the meantime, the security-liberty pendulum has clearly swung back, as the questions of civil liberties and data protection have become increasingly central in Brussels, particularly at the European Parliament, centre of passionate debates on the Commission proposal to criminalise incitement.

There is little doubt that a period of stability has settled in this area. It could be argued that this may be due to the increasing consolidation of the system but there is in fact still significant room for manoeuvre in some sectors. A more important factor is the nature of the ‘terrorist cycle’, which results in the prioritisation of terrorism as an emergency requirement but then it is progressively demoted once it loses its political urgency. This concurs with Sharp’s argument that some windows may not be temporary as the characteristics of certain issues mean that they are continuously activated (Zahariadis, 1995: 83). Therefore a cyclic process of acceleration-inertia may be both prevalent and intrinsic to this field of EU action.
Conceptual Account

The result of this cycle of punctuating events followed by equilibrium is that counter-terrorism has been formalised as a policy domain within the Union. Through processes of organisational and policy development, counter-terrorism has become an institutionalised space. The emergence of this new policy area has been reflected on the Europeanisation of issue areas (i.e. terrorism financing) but primarily on the EU’s increase of competencies, to varying extent, in absorbed or expanded policy fields.

Although Tampere established the foundations of this policy umbrella by setting the framework of development of the third pillar, it is not until 9/11 and, especially Madrid, when counter-terrorism visibly emerges as an explicit policy space. In this regard, Tampere is a critical moment, an opportunity for the formulation of counter-terrorism as distinctive policy field, but the issue was barely mentioned in the programme that set the boundaries and substance of criminal matters cooperation. Since gradual endogenous change did not succeed, the impact of external events was needed so that a critical juncture, the practical exploitation of a critical moment, resulted in the departure from previously established patterns.

Following from this, a number of the mechanisms of institutional change discussed by Stone Sweet et al. played key roles in the construction of new capacities for making joint EU policies in this area. Undoubtedly, exogenous factors are the most significant when explaining how counter-terrorism was raised to the top of the EU agenda. The shock brought about by the 9/11 attacks momentarily focused European leaders attention onto the extent of the threat and Madrid ensured that this was transformed into a more sustained commitment. Thus, external crises in the form of major terrorist attacks have acted as engines of institutionalisation, producing critical moments that have resulted in institutional innovation. Institutionalisation has been produced through starts and stops, critical junctures and equilibrium punctures followed by periods of inertia and incrementalism. This follows the notion that institutional expansion is regulation through crisis, in the sense that crises can be regarded as the main occasion for system development. This is not necessarily a novelty: Middle Eastern terrorism significantly contributed to the development of the informal form of
cooperation that the Trevi group represented since 1975. In fact, the history of European cooperation in justice and home affairs is often based on reactions to external threats or dangers.

The difference resides however in the transnational nature of the new wave of terrorist threat. Whereas previous forms of terrorism in Europe have generally been bounded by national borders, the non-hierarchical, networked, cross-border character of jihadist terrorism transformed fundamentally the characteristics of the threat. Madrid brought the realisation that no country is in principle spared from terrorist violence and London highlighted that the source of this violence is increasingly home-grown. Therefore, the necessity to enhance the existing coordination levels, approximate legislations and close operational gaps across Europe have quite naturally directed member states towards the use and enhancement of existing EU structures.

On the other hand, the influence on the institutionalisation process generated by the impact of the attacks and the character of the threat was reinforced by endogenous institutional developments. More specifically, the elimination of border controls as a stage in the completion of the Common Market has been identified as an aggravating factor affecting the seriousness of the threat. In this respect, the EU’s 2005 Counter-terror Strategy emphasises freedom of movement within the Union as a feature of the internal market that terrorists abuse:

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\text{The European Union is an area of increasing openness, in which the internal and external aspects of security are intimately linked. It is an area of increasing interdependence, allowing for free movement of people, ideas, technology and resources. This is an environment which terrorist abuse to pursue their objectives. (Council, 2005: 6)}
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As a result, this circumstance is presented as a rationale for the indispensable development of ‘concerted and collective European action’. In the same way that the removal of border controls raised questions regarding the capacity of the nation state to regulate immigration and combat crime, which led to the compensatory measures of Schengen (Turnbull and Sandholtz, 2001: 218), this process raised the necessity of joint European policies in counter-terrorism.
Stone Sweet et al. contend that a comprehensive analysis of institutionalisation should identify the innovators, those actors that persuade others to support a set of institutional changes. In this respect, a number of governments, unsurprisingly those most affected by the threat, were very aware of the necessity for common policies in this area. Unlike Britain, Spain had for several years actively been trying to place their domestic terrorist problem on the EU agenda and after the events in New York, Spain and London ensured that these efforts were shared by a number of EU member states, namely, France, UK, Germany, Italy, Belgium and the Netherlands. The periodic arrest of terrorist cells across Europe and the worrying signs of radicalisation in some groups within their Muslim communities have fuelled their attempts to prioritise this issue on the EU agenda. Hence the ‘big 5’ member states had been since 2001 the most vocal supporters within the Council for more substantial EU policies in this area and the G-6 grouping has become a laboratory for proposals that have been later reintroduced at Council meetings. Political initiative by these governments has been accompanied by the Commission’s determination to raise its profile in an area that had been hitherto out of its reach by active policy entrepreneurship under Commissioners Vitorino and Frattini.

The analysis points to the fulfilment of Stone Sweet et al. three requirements for an institutionalised policy space. First, ‘procedures governing the interactions that take place in the arena’ are generated and formalised through instruments such as the four pillar Counter-terror Strategy, the over-100 measures Anti-terrorist Action Plan, the peer evaluation system or the Counter-terror Coordinator and Commission’s implementation scoreboard. These and other political, policy and institutional mechanisms delineate the outer borders of the policy space and contribute to the solidification of the institutionalisation process.

Second, ‘pressures [have mounted] to coordinate what goes in that arena with what goes in others, at the national or supranational level’. Anti-terrorist concerns have spilled over a wide variety of other areas such as border control, immigration, social integration, transport or health policy. As a case in point, an interviewee in a national Permanent Representation described rather graphically to this author how the issue had become relevant to the work of such a substantive number of departments that ‘now even the guys from environment find terrorism under every stone’.17
Moreover, the multi-dimensional character of both the threat and the response has demanded that governments establish very significant coordination efforts between separate ministries, government departments, public institutions and security organisations. These demands have been similarly replicated at the European level, a Commission representative at the JLS Directorate General, for instance, declared in one interview how coordination meetings involved almost every individual DG within the Commission.18

Finally ‘private actors and groups orient their lobby activities to the Union’. Decision-making in counter-terrorism, as pertaining to a sensitive security area, is tight, obscure and restricted to a small number of government actors, generally within interior ministries and security forces. As shown above, these actors have nonetheless increasingly orientated their efforts to the EU level in a ‘coordination reflex’. All in order to harmonise legislation, exchange best practices, coordinate policies and even provide contentious new instruments to their national security authorities that they would have struggled to get accepted by their domestic constituencies.19 Moreover, even some private business interests, detached from the policy-making process, have started to gravitate towards Brussels by the redirection of substantial EU funding to security research in areas such as infrastructure protection. All these three aspects were non-existent before the September 2001 attacks pointing to rapid change towards an institutionalised space.

With these characteristics in mind, it is important to offer some ideas on the extent of institutionalisation by addressing those questions posed by Stone Sweet et al in the introduction that remain unexplored. For instance, what is the likelihood of the processes in question to be reversed or deinstitutionalised? The more institutionalised the arena or mode of governance, the less likely is the roll back. In this regard, the latter seems unlikely. An important rationale behind this view is that public support for European cooperation and joint policies in this area remains very high.20 Moreover, although there is significant variation in experiences and perception of the terrorist threat across Europe to the point that some authors reject the notion of a ‘common threat perception’ (Bakker 2006: 54), the Union’s major and most influential members still feel that the threat is significant. Conversely, we should be careful not to dismiss partial deinstitutionalisation. The discussions in 2007 about the
future of the Coordinator post proves that there is a real possibility that some of the structures in this congested institutional setting merge, contract or disappear in the near future.

Secondly, to what extent are the modes of governance stable and likely to reproduce themselves over time? Stone Sweet et al. understanding of institutionalisation implies not only the emergence but also the solidity of the arenas. It is argued here, in agreement with Turnbull and Sandholtz’s rational choice approach, that ‘the stability and reproduction of institutions are more likely when an expanding number and variety of actors find in the institutions useful means of pursuing their needs and objectives’ (2001: 219). In other words, the more institutions remain useful for actors, the more they will be utilised. The answer to this question should take into consideration not only national policy-makers’ discussion of anti-terrorist mechanisms at the EU level but also the practitioners’ operational usage of the Union’s instruments. Regarding the latter category of actors, despite evidence from interviews showing that practitioners still see Brussels as something remote to their day-to-day activities, this is gradually changing thanks to European decisions that have affected their operational work such as the European Arrest warrant or the work of some institutions such as CEPOL in fostering practitioner networks. Intelligence exchange in counter-terrorism with Europol, although still not entirely satisfactory for their representatives, is increasing and so is the number of national counter terror investigations to which they provide analytical support. This is highly relevant considering that Europol did not identify terrorism among its priority activities for the following year in its pre-9/11 work programme (Occhipinti, 2003: 141). Eurojust’s reputation in this area amongst national magistrates is high and the ‘quality’ and extent of its case workload has rapidly grown since its first significant involvement in 2001. There is, therefore, some factual evidence that national security actors are becoming more involved in JHA. This circumstance and the upgrading of working and steering groups at the Council (i.e. TWG, COTER) point towards increasing socialisation at the horizontal and across levels of a multi-level governance system.

Finally, how much future institutional and policy decisions are shaped by pre-existing structures and policy choices? The more past decisions tend to structure future ones, the more an area can be described as institutionalised. This is the most difficult aspect
to evaluate but it should be noted that the relative recentness of the development of this field still implies a lack of a significant institutional legacy. Probably we are far from expecting major lock-ins occurring in this area. Yet, as institutionalisation solidifies, institutional competencies are clarified, networks expand and actors’ socialisation increases, processes of dynamic adjustment correspondingly develop. Some of these adjustments have been identified above and show political actors increasingly diverting their expectations, decision-making and investments to the counter-terror space of governance.

**Conclusion**

This paper has shown that a historical institutionalist perspective can represent a constructive approach to frame the post-9/11 development of EU counter-terrorism. Yet the analysis presented in this paper not only provides further empirical evidence to the study of the institutionalisation of European governance arenas, it also raises some important empirical questions.

Hence, although counter-terrorism as a policy domain has become a space of governance at the European level, it is neither a common policy nor a supranational arena. Whilst Member states are the pillars of European counter-terrorism and national authorities still do the lion’s share of the counter-terror work in practice, EU action has so far focused on cooperation and coordination rather than integration and harmonisation.

This has been reflected in the political choices made by national governments at key moments of the institutionalisation process. The very limited powers and resources and weak mandate provided to the European Counter-terror Coordinator is an excellent illustration. Others are the post-Madrid rejection of the proposal for a European intelligence agency and the provision of intelligence competences to the Situation Centre instead, the prevalent use of soft legislation (i.e. framework decisions), the failure of a Commission proposal for a European Public Prosecutor to take hold or national governments’ rejection to the use of the passerelle in 2006.
These choices reflect the paradox of the conviction by member states of the need to involve the EU in combating terrorism but their equal reluctance to provide EU institutions with greater powers due to the political sensitivity of this issue.

Member state choices towards coordination and enhanced intergovernmentalism over the delegation of powers to EU institutions are understandable as it is uncertain that an extra layer of operational bodies at the European level would produce a more efficient response to the threat. Yet this fundamental choice, aggravated by the cross-pillar nature of the policy domain and the aforementioned expansion of an already over-crowded organisational field, has also generated the need for a huge coordination effort between the national and European levels and across the Union’s institutional structure.

Thus, the political choices that European governments have adopted in the process of institutionalisation of this composite policy have imposed severe coordination demands. This raises some interesting questions: how is the EU’s institutional structure coping with these demands? And to what extent do they undermine the EU’s capacity to develop a holistic response and its capacity to produce across-the-board policies between the different policy sectors? Importantly, the root to these questions may well be found at the political decisions that originally shaped the formation and development of this policy domain.
ENDNOTES

1 A 2008 JCMS special issue on EU counter-terrorism (46:1) being a good example, where some contributors aimed to test a variety of conceptualisations on different aspects of the EU anti-terrorist response.


3 I use here Collier and Collier (1991: 29) definition of a ‘critical juncture’: ‘a period of significant change, which typically occurs in distinct ways in different countries (or in other units of analysis) and which is hypothesised to produce distinct legacies’


5 In opposition to the principle of harmonisation, mutual recognition is built on the trust and confidence of one Member State in the legal system of other Member States producing a process where the judicial decisions taken by one Member State are recognized and enforced by other Member States.

6 As noted by Kingdon, windows of opportunity can open either in the ‘problem stream’ (i.e. terrorist attack) or in the ‘politics stream’ (i.e. elections).

7 Interview with Commission Official, DG JLS, January 2006.

8 These were: deepen international efforts, impede terrorist access to funding and other resources, investigate and prosecute terrorists, protect transport and ensure effective border control, enhance states’ consequence management, address support and recruitment into terrorism and assist third countries in their fight against terrorism.


10 Interview with Council Official, General Secretariat, DG H - Justice and home affairs, January 2006.

11 In fact the strategy is remarkably similar to UK’s 4 Ps national counter-terrorism strategy of Prevention, Pursuit, Protection and Preparedness. Interview with National Official, Member State Permanent Representation, January 2006.

12 Interview with Commission Official, DG JLS, April 2008.

13 Interviews with Commission, Council and Permanent representation Officials, April 2008.

14 Interview with Commission Official, DG JLS, April 2008.

15 EurActiv, EU makes headway on anti-terror law, 24-9-08.

16 With the significant exception of Anarchist terrorism, as a number of authors have highlighted.

17 Interview with National Official, Member State Permanent Representation, January 2006.

18 Interview with Commission Official, DG JLS, January 2006.

19 As seen in particular with the controversial Data Communication Retention Directive.


22 Interview with Europol Officials, Serious Crime Unit and SC-5 Unit, January 2006.

23 Interview with Eurojust Official, Terrorism Team, January 2006.
REFERENCES


