The EU and the fight against terrorist financing after 9/11: institutionalizing cooperation beyond pillars

Abstract

Despite the issue of terrorism was far-back part of the EU internal security agenda, the 9/11 2001 attacks in the US and the subsequent bombings in Madrid 2004 represented a turning-point for EU commitment in the fight against terrorist financing. Since then on, insofar as funding of terrorist groups was perceived to be a field of particular vulnerability, the EU was impelled to transpose diverse binding global standards that were issued within international fora such as the UN and the FATF. With that purpose it has begun investing great efforts in strengthening its capacities to fight terrorist financing which until that time has been a quite underdeveloped issue-area. Accordingly it has extensively mobilized a large number of legislative instruments, operational measures and institutional venues from all its pillars thereby facing some problems of coordination. Drawing on new-institutionalist accounts the paper aims to examine and assess the process through which the EU has developed its policy and institutional counter-terrorist financing arrangements and institutionalized an ad hoc regime of cooperation which encompasses both supranational and intergovernmental modes of governance.
Introduction

Since the Twin Towers of the World Trade Center in New York collapsed revealing the exposure of contemporary states and societies to the global terrorist threat the fight against terrorist financing lies at the core of the international and European efforts to combat terrorism. The funding of terrorist groups is indeed perceived to be a field of particular vulnerability (Gilmore 2003). Insofar as terrorists need financial resources either to support specific attacks or to meet all the costs of developing and maintaining a terrorist network and to finance the propaganda necessary to sustain their activities, they require also the ability to move effectively the money throughout the global financial system (European Commission 2004). Accordingly identifying and disrupting any economic and material resources for terrorist groups and denying them access to the international financial system are enlisted among the top priority-objectives of the overall international and regional counter-terrorism strategies (Allen 2003; Spence 2006).

It is commonplace that, despite the issue of terrorism was far-back part of the internal security agenda of the European Union (EU), nonetheless the September 11 2001 attacks in the United States (US), followed by the bombings in Madrid and London in 2004 and 2005, represented an unprecedented turning-point for EU commitment in fighting terrorism more generally and terrorist financing more specifically (den Boer&Monar 2002; Mitsilegas&Gilmore 2007). Awareness that also Europe was a possible vulnerable target and recognition that no single national government was able to tackle the threat of modern terrorism on its own made concerted cooperation in the EU framework indispensable and served somewhat to catalyze the process of European integration itself (Spence 2006). While the EU was immediately under the pressure to react with an effective contribution to both international action against global terrorism and protection of the security of its own citizens, its direct engagement in terrorist financing was at that time still in its infancy.

With the purpose to transpose into EU legislation the global binding standards to undercut terrorist funding that were issued in particular within the international fora of the United Nations (UN) and the Financial Action Task Force (FATF)\(^1\), since 2001 on the Union has begun investing great efforts in strengthening its counter-terrorist financing capacities. Accordingly, it has extensively mobilized a large number of legislative instruments,

\(^1\) The FATF is an intergovernmental body established in 1989 in the context of the Organization for Economic Cooperation and Development (OECD) with the mandate to design and promote policies at both national and international level to fight money laundering and, after 2001, also terrorist financing.
operational measures and institutional venues across all the pillars and, so doing, it has faced problems of fragmentation, coordination and coherence between pillars and especially between those EU institutions dealing with the issue in question.

Drawing on new-institutionalist accounts the paper aims to examine and assess the process through which the EU has developed its counter-terrorist financing policy and institutional arrangements and contributed to help its Member States to work together internationally with key partners like the UN and the FATF. Looking at that process from a new-institutionalist perspective requires starting from the basic question of why an EU ad hoc counter-terrorist funding regime of cooperation, which encompasses both supranational and intergovernmental modes of governance, has developed in the way it has. This brings to the fore the following questions: what have been the driving forces behind this process? How has the Union’s three-pillar structure influenced it? Why some competences are supranational while others continue to be strictly intergovernmental? What has been the role played by supranational actors, especially the ‘executive’ ones, therein?

The paper is organized as follows. The first section provides the theoretical framework and the argument drawn from that on which the paper is grounded. The second part, after sketching the distinctive features of the issue of terrorist financing, details the international standards to undercut it the EU was required to implement in the wake of 9/11. The next sections move on considering the process through which an EU ad hoc regime for counter-terrorist financing cooperation has emerged and evolved since 2001 on, and addressing the basic questions above listed. The paper concludes by looking at what from the investigation can be inferred about the development of the EU into an internal security actor and the larger process of European integration.

**Approaching the topic from a new-institutionalist perspective**

Despite it has taken quite long to develop a sizeable amount of literature when compared to other EU policies, academic attention to the topic of EU internal security has particularly intensified over the past decade. Due also to the great heterogeneity of the subject-matter, scholars working in this research field commonly rely on a variety of theoretical perspectives and kinds of narrative, among which security studies, international relations theories, public policy analysis and institutionalist approaches. The paper opts for a new-institutionalist perspective in the belief that this theoretical framework is the best suited for investigating
policy and institutional change through time in this sensitive issue-area of EU internal security.

**Insights from the new-institutionalist literature**

New-institutionalist scholars basically argue that change is influenced by the institutional context within which it takes place. Drawing on the seminal work of March and Olsen (1989) all three schools of thought conventionally comprised under the new-institutionalist label, namely the rational choice, the historical and the sociological institutionalism, ascribe to institutions a primacy in providing the structure within which social and political interactions take place and thereby in explaining social and political phenomena, including stability and change (Hall&Taylor 1996; North 1995). While all three variants of new-institutionalism converge on focusing on the role that institutions play in influencing individual and collective behaviour and thereby determining political outcomes, the historical institutionalist approach attributes special attention to the temporal dimension and thereby it appears particularly appropriate for grasping the dynamics of change that have interested EU counter-terrorist financing cooperation.

Historical institutionalism commonly explains change by relying on variables such as path dependence, critical junctures and the role of ideas. When arguing that the outcomes that emerge are strongly influenced by the process through which they were produced (Thelen&Steinmo 1992), it extends the core institutionalist statement that «institutions matter» as to cover also history, which matters insofar as historical events and contexts shape contemporary and future political choices and outcomes. The basic idea is that, once institutions are established, they are usually sticky and tend to resist to change or to become ‘locked-in’ (Pierson 1996). Thanks to mechanisms of ‘increasing returns’ and positive feedback that sustain and reinforce institutions over time, prior institutional choices constrain later in time the behaviour of the actors who made them and subsequent institutional developments. Path dependence lies on that «yesterday’s choices are the initial starting point for today’s» (North 1995:20) insofar as early institutional decisions generate incentives for actors to not discard existing institutions and policy choices inherited from the past (Pierson 2000). Thereby explanations of how institutions structure response to new challenges emphasize the impact of ‘policy legacies’ on subsequent policy choices (Hall&Taylor 1996). As long as institutions are recurrently subject to increasing returns and path dependence, continuity and stability are more likely than change (Steinmo 2008).
However, historical institutionalists argue also that «political development is punctuated by critical moments or junctures that shape the basic contours of social life» (Pierson 2000:251). Institutions remain essentially stable until they are faced with an exogenous shock which may induce organizations and actors to perceive that change is needed and provide them with political opportunities to enact new plans and ideas by embedding them in the new institutional arrangements they establish. External events and crises precipitate critical junctures that can weaken institutional stickiness and bring about institutional and policy change. The process through which organizations and actors perceive, interpret and solve the new problems they share after such external shocks is incremental and path-dependent (North 1995; Pierson 2000).

Both historical and above all sociological institutionalists investigate the ways in which also ideas may affect political outcomes and be crucial to change (Hall 1993). From a sociological institutionalist perspective institutions assign great weight to norms, conventions and ideas about how solutions can be connected to problems and they diffuse ‘frames of meaning’ which steer human and political action (Hall&Taylor 1996; Turnbull&Sandholtz 2001). In particular skilled social actors and institutional entrepreneurs may generate and diffuse ideas that make sense of given policy and institutional problems and accordingly advance solutions. Events and crises that happen in the external environment may for instance prompt organizations and actors to utilize old institutions for new ends and sometimes also generate clashes between organizations and actors that have divergent ideas, different interpretations and competing interests about the most appropriate policy response to a given exogenous shock.

**Basic argument**

Taking institutionalization as object of enquiry requires, following the theoretical accounts of Stone Sweet and his colleagues, looking at the process through which policy arenas «structured by EU rules and managed by EU organizations» emerge and evolve (Stone Sweet et al. 2001:21). They argue that, insofar as Europe has moved away from the Nation-State towards a larger site of supranational governance, wherein member states interact by means of a set of rules and stable organizations to assist their cooperation in a wide range of issues, complex linkages between modes of supranational and national governance have emerged (Stone Sweet et al. 2001). When these interactions are structured by EU rules, norms and procedures, and when «practices and structures are taken for granted» (Powell 1991:194),
they become institutionalized. When it comes to the case in question, it is argued that once policy, institutional and organizational arrangements to face the specific problem of terrorist funding have emerged, they have become institutionalized to the degree that they have stabilized into accepted EU rules, norms and procedures and they have been increasingly shaping subsequent expectations and interactions.

The paper relies on a combination of the diverse theoretical accounts above described. First, it argues that EU counter-terrorist financing developments have been affected by a sequence of ‘critical junctures’ (Pierson 1996) precipitated by the terrorist attacks in New York, Madrid and, to a lesser extent, London in 2001, 2004 and 2005 respectively. The universal shock represented by the 9/11 attacks has indeed made the fight against terrorist funding rise to the top of the political agenda of the UN and other international organizations such as the FATF. As members of those organizations EU national governments were immediately prompted to accomplish the international standards the UN and the FATF have purposely designed to undercut the sources of terrorist groups. To the degree that those terrorist strikes have provided EU policy-makers with an opportunity to endorse new initiatives, new EU competences and institutional arrangements, they have acted as a catalyst for the incremental development of EU counter-terrorist financing cooperation. Nonetheless, as Smith (2004: 100) argues as regards EU foreign policy, «common interests or problems do not by themselves lead to common solutions; even if EU states recognize the general need to speak with a single voice they must still find and articulate that voice».

Furthermore, it is argued that the way in which an ad hoc EU counter-terrorist financing regime has emerged and evolved is the result of a path dependent development. Path dependence here means that the opportunities and constraints under which EU actors, either the national governments or European organizations, have taken decisions regarding how to deal with terrorist financing are the historical product of their past involvement in that issue-area. Actually, although terrorism and money laundering were long since part of the EU internal security agenda, an EU specific commitment in counter-terrorist financing cooperation was not amongst the priorities of action in the pre-2001 period. It is thus argued that policy and institutional legacies regarding either implementation of UN resolutions and FATF recommendations or the way in which European counter-terrorism and anti-money laundering policies are organized and dealt with in the EU institutional three-pillar structure have influenced the current shape of EU counter-terrorist financing cooperation.
Indeed, insofar as EU capacities to fight terrorist funding cross different policy sectors, from anti-money laundering and foreign policy to law enforcement and judicial cooperation, one distinctive character of this issue-area is the employment of instruments from all three pillars for the achievement of an internal security objective, the involvement of a plurality of institutional actors and the concomitant coexistence of supranational and intergovernmental modes of governance. To this regard terrorist financing is emblematic of the challenge the EU is faced with in the overall counter-terrorism policy, which is not in itself a clearly defined policy area, and more generally within the domain of Justice and Home Affairs (JHA), as regards the pursuit of coordination and coherence between its pillars, policies, institutions and Member States (Spence 2006).

Finally it is claimed also that, despite the central place EU Member States continue to have, EU supranational actors, namely the European Commission and the Secretariat-General of the Council of Ministers that are the European institutional actors charged with executive functions (Christiansen 2002; Stetter 2007), have been increasingly involved in internal security policies and they have played altogether a significant role in shaping the current look of the EU counter-terrorist financing regime (Lewis&Spence 2006).

9/11 and the international counter-terrorist financing strategy

In the immediate aftermath of the 9/11 attacks and largely in response to US-led initiatives counter-terrorism activities have been booming worldwide and ranking high amongst the concerns of the UN and other international and regional organizations, such as the G8, the FATF and the Council of Europe. As soon as the disruption of the sources of terrorism came to the forefront of the international efforts to avoid replications of 9/11, a considerable range of binding measures regarding terrorist financing was issued in particular within the international fora of the UN and the FATF.

The threat of terrorist financing

The high relevance attributed by the international community to terrorist financing reflects the basic character of the ‘new’ terrorist threat to worldwide security. Mainly as a

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2 The Council Secretariat is here assumed to be a supranational institutional actor following the interpretation given by Christiansen (2002:35) according to which «in spite of the official nomenclature, the Council Secretariat is clearly an institution, possessing a formal structure with a set of internal rules and administrative practices which regulate the work of a body of permanent staff. And it is located at the European level, possessing a high degree of institutional autonomy and may therefore be regarded as supranational». 
consequence of globalization, growing use of mass media and spreading of international banking systems, modern terrorism has progressively achieved a transnational dimension (Dittrich 2005). It originates and develops across national boundaries affecting different national jurisdictions at the same time and thus eroding the capability of the single Nation-State to effectively respond (den Boer 2006). So doing, it basically blurs the traditional distinction between the domestic and the international dimensions of security (Bigo 2001; Ekengren 2006).

Alongside a global geographic scope of activity, it has a networked, fluid and adaptive organizational structure which crucially differentiates a terrorist movement such as Al Qaeda and other Islamist fundamentalist organizations from more traditional terrorist groups, such as the Basque ETA, the Irish Republican Army (IRA), the Popular Front for the Liberation of Palestine (PFLP) or the Tamil Tigers (LTTE) (Delpech 2002; Wilkinson 2005). In an increasingly globalized environment international terrorism profits by modern technologies to disseminate its propaganda, recruit new affiliates and carry out terrorist acts anyplace in the world (Neuhold 2006). Therefore terrorist financing covers both these aspects: the funding of terrorist networks, including recruitment and promotion of terrorist causes, and that of terrorist actions.

In order to get funds terrorists draw on either legal or illegal sources (Jacob 2006). They may receive donations by religious organizations or individual donors and contextually engage in criminal activities or do alliances directly with organized criminal groups, especially in drug trafficking and smuggling of precious stones and diamonds (Neuhold 2006; Winer&Roule 2002). In any case, moving the money efficaciously requires eluding national controls through complex financial transactions exactly like organized crime does though money laundering (Gardner 2007). Terrorist financing is thus strongly linked to money laundering, which is defined as the processing of criminal proceeds to disguise their illegal origin (Mitsilegas&Gilmore 2007).

Nonetheless, some differences exist. While the ultimate aim of a criminal organization is to earn money and to find a way to launder its illicit economic profits, which usually involve great amounts of money, for a terrorist group the acquisition of funds is not a goal in itself, rather a means for surviving and perpetrating a terrorist attack (Gardner 2007). Official data report that terrorist activities are basically quite cheap and relatively small sums of money are enough to carry out even a major operation. The 9/11 attacks were for instance estimated
to have cost between $400,000 and $500,000, whereas the Madrid bombings less than $10,000 (European Council 2004).

The usual smaller scale of the budgets at stake, combined to the fact that their source may at times be legal, makes the fight against terrorist financing more difficult as for the identification of a specific transaction as potentially suspected of terrorist ties, something compared by practitioners to the search of a needle in a haystack\(^3\). Nevertheless, tracking the ‘lifeblood’ of terrorists may ultimately help investigations aimed at identifying also the destinations of funds and thus the operative locations of terrorist cells (European Council 2004b). Besides, freezing funds and assets, independently from the amounts actually frozen, is a measure of a certain political relevance which may be sometimes also utilized to foreign policy purposes\(^4\).

**The international counter-terrorist financing initiatives**

Hence, widespread belief that more coordinated international action was needed to inhibit the passage of terrorist financial flows through domestic financial institutions contributed to focus on long-term prevention and to adopt a noteworthy number of international initiatives especially targeting the fight against the funding of terrorism (Allen 2003; Eling 2006).

The UN Resolution 1373 (UN 2001) of 28 September 2001 played a central role in that. This far-reaching and binding text was adopted by the UN Security Council (SC) under Chapter VII of the UN Charter, thus pointing out the massive threat posed to international peace and security. Observers converge on that Resolution 1373 represented one of the strongest acts ever taken in charge by the UN because of the unprecedented reach into many sectors of domestic legislation and security policy (Eling 2006).

The law-making character of the text is indeed detectable on that, while calling all the UN Members to increasingly cooperate in the prevention and suppression of terrorist acts and to implement already existing international conventions on terrorism, including the 1999 UN International Convention for the Suppression of the Financing of Terrorism, it imposed strict anti-terrorist financing obligations and set up a special Counter-Terrorism Committee charged with monitoring the compliance of its member states with all resolutions and conventions relevant to the issue.

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\(^3\) Personal interview with an official from the European Commission, DG Internal Market and Services, Brussels March 2009.

\(^4\) Personal interview with an official from the General Secretariat of the Council of the EU, Brussels March 2009.
Resolution 1373 bound states to take any necessary measures to criminalize the financing of terrorism, to freeze funds and financial assets of individuals or groups involved in terrorist actions, to prevent funds from being made usable by terrorists. Further, it required them to deny safe havens or support to terrorists, to fight the supply of weapons and the counterfeiting of identity and travel documents, to obstruct free movement of terrorists by enhancing border controls, improving intelligence and information exchange.

A few weeks after the attacks also the FATF emerged as a proactive setter of international standards against the misuse of the global financial system by terrorist organizations. The FATF at the beginning of its activity in 1990 has already drawn up Forty Recommendations which set out the basic framework for anti-money laundering international action. These recommendations were up-dated in the following years and in particular in October 2001, when the overall remit of the FATF was extended beyond money laundering as to include also the fight against terrorist financing.

The so-called Eight ‘Special Recommendations’ (FATF 2001), to which a ninth was added in 2004, established new firm international standards to detect, prevent and suppress the financing of terrorism and terrorist acts by basically denying terrorists and their supporters access to the international financial system. Alongside again ratification and implementation of UN conventions and resolutions relevant to terrorism, the FATF governments were required to criminalize the financing of terrorism, terrorist acts and terrorist organizations, to freeze and confiscate terrorist assets, report suspicious transactions potentially linked to terrorism, to assist law enforcement agencies and regulatory authorities of third countries in terrorist financing investigations, to impose anti-money laundering requirements on alternative remittance systems, to strengthen customer identification measures in international and domestic wire transfers, to prevent non-profit organizations from being misused to finance terrorism.

Both the UN and the FATF played a significant role as international standard-setters and pushed its respective members, including EU Member States, to full compliance, which is seen as the essential condition to achieve effectiveness in counter-terrorist financing international efforts.

**European cooperation on terrorist financing-related issues before 9/11**

According to historical institutionalism understanding how the EU has responded to the terrorist attacks perpetrated since 2001 on and precisely how it has implemented the binding
provisions above described requires looking before at the genesis of European cooperation on terrorist financing-related issues. The current EU capacities and resources to deal with them have been in fact influenced by decisions taken in the past regarding the European legal and institutional framework for cooperation on terrorism and money laundering, both formally comprised under the domain of Justice and Home Affairs (JHA). The sensitiveness and political relevance of the matters embraced under the JHA heading which touch core functions of the Nation-State and are related to some of the major concerns of EU citizens, explains why the development of the EU into an internal security actor has been and continues to be a controversial and constantly disputed process. To this respect some scholars point out how change towards closer cooperation among national governments in this realm has frequently taken place in response to pressures exerted by new challenges and external events, rather than being driven by internal initiative or institutional design (Stetter 2007; Walker 2004). Other than being at the core of the substantial revisions of the founding treaties that the EU has undertaken in the most recent years, the genesis of internal security policies is indeed emblematic of the longstanding tension between sovereignty and integration on fundamental questions of security, law and order (Lavenex and Wallace 2005; Mitsilegas et al. 2003). Yet the extension of EU competences into these sensitive new policy areas has been historically featured by clashes between competing visions of European integration, namely between those supporting a greater role for the EU and those seeking to preserve national systems and hindering developments.

For this reason for long cooperation on internal security issues at European level has not been given real possibilities to take significant steps forward. In the period preceding the Treaty of Maastricht cooperation on terrorism was limited and fragmented. It began in the mid-1970s in response to a wave of terrorist actions in Western Europe, especially in some countries like Germany, Spain and Italy. It took place basically outside the European Community (EC) framework, such as in the context of the Council of Europe and ad hoc working groups, and the EC institutions did not play a significant role in that (de Lobkowitz 2002). Amongst those executive-driven groups the most important were the so-called TREVI Group, a committee of European senior officials representing national interior ministries engaged in sharing intelligence information mainly on terrorist and criminal organizations, and the Police Working Group on Terrorism (PWGT).
Quite more formal anti-money laundering cooperation and related EC provisions pre-date the Maastricht Treaty. The EC Member States together with the European Commission have long since been active inside regional and international fora dealing with money laundering, such as the Council of Europe, the UN and the FATF. Yet they have considerably contributed to the development of key anti-money laundering measures, including the 1990 Council of Europe Convention on Money Laundering, the 1988 UN Convention on Drug Trafficking and the 1990 FATF Forty Recommendations (Mitsilegas & Gilmore 2007), and agreed on the first Directive on money laundering which was adopted in 1991 under the EC Treaty.

Actually, money laundering is above all a criminal activity, even the largest organized criminal activity after drug trafficking, and the related legislation should be primarily designed to combat criminal offences and to set out sanctions. Nonetheless, a TEC legal basis was justified on the basis of the threat posed by money laundering to the integrity of the Community financial system and the internal market (Mitsilegas & Gilmore 2007).

Since the adoption of the first anti-money laundering Directive in 1991, the EU constitutional framework has considerably changed. In the early 1990s the end of the Cold War and the collapse of the Soviet Union and the former Communist regimes in Central and Eastern European countries touched off a sharp rise of cross-border organized crime, especially in terms of money laundering and drug trafficking. Besides, the creation of the Single Market and the removal of national boundaries to the movement of goods, capitals and people, while facilitating legitimate business, have also provided more opportunities for money laundering and financial crime.

The combination of those exogenous and endogenous factors led to the decision entered into force with the Maastricht Treaty in 1993 to include for the first time a policy-making area for intergovernmental cooperation on justice and home affairs within the EU law-making framework and to place it in the so-called ‘Third Pillar’. The insertion of interior affairs, together with foreign policies, within the EU constitutional settlement agreed upon in Maastricht is generally regarded as one of the most innovative achievements in the European history since the establishment of the European Communities in the 1950s (Stetter 2007). However, notwithstanding the foundation of a ‘single institutional framework’, namely the EU common institutional roof overarching all the pillars, the European governments by inventing that multi-pillar arrangement sought to preserve the domains of foreign (second

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pillar) and interior affairs (third pillar) from the supranational logic of the common market (first pillar) (Moravcsik 1993).

With regard to money laundering the new third pillar was endowed with the power to adopt legislation in criminal law and it incorporated issues of confiscation and criminalization of the laundering of the proceeds of serious crimes. Accordingly, some provisions under the first pillar regulate free movement of capital in order to monitor financial flows and concern both the conduct of financial operators and the means of carrying out financial transactions especially across borders, thus targeting the use of the financial system for money laundering purposes. Contextually, under the third pillar actions to combat money laundering are essentially viewed as part of the fight against organized crime and terrorism, and they are focused on the definition of offences and on strengthening mutual assistance.

Therefore the fight against money laundering crosses the borders between policy sectors and between EU pillars. Such a cross-pillar nature necessarily brings about a certain degree of fragmentation and legal and institutional complexity posing coordination and coherence challenges to the EU. In the first pillar, in accordance with the Community method, the Commission is charged with legislative initiation and implementation, often playing the role of ‘policy entrepreneur’ (Cram 1994). Whereas in the intergovernmental third pillar the policy-making is ‘intensively transgovernmental’: EU Member States are committed to a wider and stronger cooperative interaction at the EU level but they still adopt institutional formats over which they maintain considerable control (Wallace 2005) and there the Commission, which shares the drafting of legislation with national governments, is more likely to act as a facilitator of agreements amongst the latter rather than as a genuine policy entrepreneur.

To this respect, as scholarly literature and even EU official documents commonly recognize (inter alia Bendiek 2006; Edwards&Meyer 2008; Keohane 2005; Lugna 2006; Monar 2007; Rhinard et al. 2006), also the fight against terrorism is a crucial policy field insofar as it is spread across the pillar-divide. Most of the fields relevant to it where the EU is attributed competences to act are comprised under the intergovernmental set-up of the third pillar dealing with police, law enforcement and judicial cooperation in criminal matters and partially of the second pillar concerned with Common Foreign and Security Policy (CFSP). However, even the first pillar is involved as regards for instance air transport security, critical infrastructures protection and precisely terrorist financing.
Despite manifold shortcoming, considerable progress has nonetheless been hitherto achieved in the internal security field. Especially since the entry into force of the Treaty of Amsterdam in 1999 and the adoption in the same year of the far-reaching Tampere agenda\(^6\), new significant legal competences concerning internal security matters were ascribed to the EU thus providing great impulse to the institutional and substantive construction of the new objective of the Area of Freedom, Security and Justice (AFSJ)\(^7\). Establishing and maintaining an AFSJ in the Union has been in fact launched from the start as a major EU political project designed to strengthen the EU capability to protect its citizens from transboundary harmful threats, among which organized crime and terrorism.

**Institutionalizing the EU regime for counter-terrorist financing cooperation**

**The EU post-9/11 approach to terrorist financing**

In the extraordinary meeting held a few days after the attacks on September 21 the European Council launched an ambitious ‘Action Plan to Combat Terrorism’ whose cornerstones were «close cooperation between all the Member States of the EU» and the adoption of a «coordinated and interdisciplinary approach embracing all Union’s policies» (European Council 2001). That text basically put in writing EU Member States’ recognition of the added value of addressing the common threat of global terrorism all together. The European Council called for the use of all the tools at EU disposal, amongst which legislative and operational, repressive and preventive, internal and external measures, making the European collective response as comprehensive as possible and essentially multidimensional (Monar 2007).

Following the lead already taken in the sphere of terrorist financing by the US within both the UN and the FATF, the European Council declared that «combating the funding of terrorism is a decisive aspect. Energetic international action is required to ensure that that fight is fully effective. The European Union will contribute to the full». In accordance with that statement it instructed the JHA and the Economic and Financial Affairs (ECOFIN) Councils of Ministers «to take all the necessary measures to combat any form of financing for terrorist activities» (European Council 2001). Many of the provisions included within the

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\(^7\) So doing the EU asserted its ambition to construct a secure space in the Union, precisely «to maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external borders controls, asylum, immigration and the prevention and combating of crime» (Arts. 2 and 29 TEU and Art. 61(2) TEC).
Action Plan, which was finally adopted in November 2001, were focused on preventing the acquisition, retention and use of funds or assets by terrorist groups.

As for the implementation of the international standards to undercut terrorist funding framed in the context of the UN and the FATF, EU Member States, despite their traditional reluctance to hand over powers to European institutions in areas deeply entrenched in national sovereignty such as counter-terrorism, recognized that a collective implementation at EU level can add value in dealing with that demand more effectively. Furthermore, two additional factors have likely contributed to a collective instead of an individual implementation of the requirements. On the one hand, the fact that some national governments, among which those not previously familiar with terrorism, lacked the original primary legislation necessary to adopt some of the instruments to implement the provisions. On the other hand, the EU consistent past commitment in aligning on FATF and UN decisions and in transcribing both UNSC resolutions and FATF recommendations into EU legislation. Both made the EU as a whole feel compelled to execute at best all the prescriptions seeking to be ‘an exemplary implementer’ (Eling 2006).

EU commitment in the field was subsequently reinforced by the shock of the bombing attacks perpetrated in Madrid on March 11 2004. The ‘solidarity’ Declaration on Combating Terrorism of 29 March 2004 agreed upon by the European Heads of State and Government (European Council 2004) again strongly emphasized the need «to reduce the access of terrorists to financial and other economic resources» and «to address the factors contributing to the support for and recruitment into terrorism». Accordingly the European Council held in June 2004 included combating terrorist financing among the four priority areas of action foreseen by the revised Action Plan, set out new proposals for tackling terrorist funding more effectively and called for the quick development of an EU ad hoc strategy (European Council 2004a).

The Strategy on terrorist financing was swiftly drawn up by the Council on the basis of a proposal made jointly by the Council Secretariat and the Commission and it was adopted by the European Council in December 2004 (European Council 2004b). The Strategy portrayed a critical overview of the actions until then undertaken concerning the fight against terrorist financing and recommended a number of initiatives to be adopted to strengthen EU efforts.

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8 Personal interview with an official from the General Secretariat of the Council of the EU, Brussels March 2009.
9 Personal interview with an official from the General Secretariat of the Council of the EU, Brussels March 2009.
10 Together with information sharing, mainstreaming counter-terrorism in the EU external relations, and improving civil protection and the protection of critical infrastructures.
Since the beginning both the Council Secretariat and the Commission have agreed in framing terrorist financing as an issue-area inherently cross-pillar due to the link to money laundering on the one hand and to foreign policy on the other one, as they recognized that the adoption of a really comprehensive approach was unquestionably the best way to address the problem and also to maintain its own spheres of action. The Council Secretariat in a paper submitted to COREPER on March 8 2004\textsuperscript{11}, after pointing out that «the fight against terrorism is a cross-pillar activity engaging many EU actors and instruments», has highlighted the manifold problems of coordination until then encountered which have challenged the EU capability to respond coherently and effectively to international requirements. As detailed below, both Council Secretariat and Commission have been highly engaged in supporting and implementing the afore-mentioned international standards for fighting terrorist financing in the most coordinated and effective way: the former exerting executive functions predominantly within the intergovernmental context of transposition of UN resolutions whereas the latter taking the lead as regards supranational cooperation concerning FATF recommendations.

On the occasion of the European Council on 25 March 2004, following a proposal by the EU High Representative for the Common Foreign and Security Policy (CFSP), Javier Solana, the new Office of the EU Counter-Terrorism Coordinator (CTC) was created just with the aim to improve coordination in EU counter-terrorism policy. As regards specifically terrorist financing, the role of the CTC is that of facilitating either coordination between EU and national counter-terrorist funding efforts both internally and internationally, as well as coordination between EU institutions and also within EU institutions themselves, namely among the different interested bodies in the Council (i.e. the COTER, the MDG-Multi-Disciplinary Group on Organized Crime, the TWG-Terrorism Working Group, the ‘clearing house’)\textsuperscript{12}, and between the diverse Directorates General of the Commission dealing with counter-terrorist financing (i.e. DG Justice, Liberty and Security, DG Internal Market and Services, DG External Relations). The recently appointed EU Counter-Terrorism Coordinator (CTC)\textsuperscript{13} was tasked together with the Commission with ensuring the follow up of the strategy on terrorist financing on a cross pillar basis, and was also required to report on a six monthly basis to COREPER. The recently revised version of the Strategy (European Council

\textsuperscript{11} See doc. 7177/04.
\textsuperscript{12} See doc. 9791/04.
\textsuperscript{13} The former CTC , Gijs de Vries, was in office until March 2007 after his three year term finished, while the incumbent, Gilles de Kerchove, was appointed EU in September 2007
2008) drafted by the CTC stated that most of the actions mentioned in the 2004 Strategy have been carried out and coordination has considerably improved, while most difficulties and shortcomings have been encountered in the implementation phase.

**Transposing UNSC Resolution 1373**

Undoubtedly one of the cornerstones in the fight against terrorist financing is the regime of targeted financial sanctions foreseen by UNSC resolutions. Following the precedent path undertaken for implementation of UNSC Resolution 1267 (UN 1999) concerning Al-Qaida, Usama Bin Laden and the Taliban and Associated Individuals and Entities, the EU has adopted and implemented in the CFSP context of the second pillar an *ad hoc* set of rules to transpose UNSC Resolution 1373. Since the adoption of Resolution 1267 in 1999 the EU has been already applying sanctions to Al Qaeda and Taliban suspects in accordance with the list drawn up by the UN ‘Al-Qaida and Taliban Sanctions Committee’. However, after 9/11 the implementation of Resolution 1373, whose most important component is the so-called ‘freezing of assets’ provision, required imposing freezing measures against whatever terrorist group and not only against Al Qaeda and Taliban.

To this aim the EU decided to establish ‘from scratch’ (Eling 2006) its own autonomous system for identifying and designating individuals and organizations under suspicion of terrorism but not included under the 1267 sanctions regime. To do this the Council adopted in December 2001 a Common Position (2001/931/CFSP) on the joint bases of Articles 15 and 34 TEU, thus addressing both foreign policy and police and criminal law matters, together with a Council Regulation (EC) No 2580/2001 under Articles 60, 301 and 308 TEC, implementing the Community law aspects of the foreign policy part of the Common Position. The need to adopt also a first pillar regulation alongside of a second/third pillar common position was motivated by the fact that an asset freeze represents a hindrance to the Community provision for the free movement of capital.

Therefore, on the one hand, the Common Position, after expressing EU commitment to implement Resolution 1373 and to integrate its basic objective into the CFSP framework, lays clearly down the criteria for listing persons, groups or entities suspected of having links with terrorism and of being involved in terrorist acts and it identifies the actions that represent a terrorist act. On the other hand, the EC Regulation provides for the freezing of all funds, other financial assets and economic resources belonging to the persons, groups and entities listed in the Common Position and coming from outside the EU. Furthermore, all the
persons, groups and entities listed in the Common Position are subject to enhanced measures taken in the field of police and judicial cooperation in criminal matters.

In charge of the strictly intergovernmental workings concerning the procedures of listing and de-listing of terrorist suspects is the Council Secretariat-Directorate General E for EU external affairs, which is only marginally supported by the Commission-DG External Relations. The Council Secretariat has indeed over time been acquiring substantial executive functions in the intergovernmental areas of CFSP and police and judicial cooperation in criminal matters as EU Member States were extremely reluctant to lose sovereignty by empowering the Commission in those sensitive fields. For this reason since 1999 the Council Secretariat on behalf of the Council has taken successfully the lead as for implementation of Resolution 1267 and updating of EU legislation in accordance to changes in the UN ‘blacklist’. That legacy has clearly influenced the post-9/11 institutional and organizational arrangement chosen for managing the implementation of Resolution 1373, where the Council Secretariat exerts a prominent executive role and is endowed with the delicate responsibility to assist the ad hoc working group created within the Council responsible for managing the EU blacklist.

A purely intergovernmental working group made up of secret services’ national delegates, the so-called ‘clearing house’, was indeed set up after 9/11 to evaluate the requests to add suspects on the list which can be submitted either by an EU Member State or by a third country on the basis of a competent judicial authority’s decision, and to accomplish a six-monthly review of decisions on listing, de-listing and freezing of funds. This very secretive process14, being the clearing house's internal decision-making not open to any political scrutiny, was since March 2007 partially upgraded. Following diverse judgments of the Court of First Instance annulling a 2002 Council decision to freeze the funds of the People’s Mojahedin Organization of Iran (PMOI) on the basis of an EU breach of fundamental rights, the Council opted for the establishment of a clearer and more transparent procedure. This entailed on the one side the introduction of the so-called ‘due process’ which includes statement of reasons to motivate listings and asset freezes, and notification procedures towards listed persons or entities, and on the other side, the replacement of the clearing house by a new working group made of representatives of EU Member States, called the ‘Working Party on implementation of Common Position 2001/931/CFSP on the application

14 Personal interview with an official from the General Secretariat of the Council of the EU, Brussels March 2009.
of specific measures to combat terrorism’, conventionally labeled ‘CP 931 WP’\textsuperscript{15}, whose workings continue, however, to take place in strictly confidential meetings.

Undoubtedly the establishment of \textit{ad hoc} rules and the institutional engineering which followed the EU decision to put in place its own mechanism for identification of terrorist suspects and for the freezing of their assets constitutes an example of quite successful policy innovation. Independently from concerns about questions of human rights which have been raised with regards to listing and freezing’s procedures (Guild 2008), insofar as the creation of the list of persons suspected of links with international terrorism and the following preventive actions against them depend greatly on the pooling of information from intelligence services of the EU Member States, the agreement they reached basically represents a substantial move towards the designed objective. Problems are more likely to arise when it comes to implementation as even EU officials from the Council Secretariat admit to not exactly know to what extent freezing of assets’ measures are actually implemented by national governments once a decision taken\textsuperscript{16}. To this respect the fact that in the second and in the third pillar the Commission has not the power to start infringement procedures towards unfurling Member States does not help successful implementation.

\textbf{Transposing FATF Special Recommendations}

The other founding element of the EU counter-terrorist financing regime falls predominantly under the Community pillar and concerns the implementation of the FATF Nine Special Recommendations (SR), which required the extension of EU anti-money laundering legal and regulatory framework as to cover also the offence of terrorist funding. As cooperation at EU level during the 1990s has been much more focused on transnational organized crime rather than on terrorism, those actors in charge with anti-money laundering tasks could broadly rely on the experience matured in that field. Especially the Commission and precisely DG Internal Market (DG Markt) has utilized the expertise and the competence already acquired in the first pillar dealing with money-laundering to initiate legislation related to terrorist financing, typically behaving as an active policy entrepreneur. The Commission has indeed the exclusive right to initiate proposals on terrorist financing as regards first pillar provisions linked to financial crime and it has successfully persuaded the Council of Ministers and the European Parliament to approve proposed laws. Yet, together

\textsuperscript{15} See doc. 10826/07, 21.06.2007.

\textsuperscript{16} Personal interview with an official from the General Secretariat of the Council of the EU, Brussels March 2009.
with the fifteen old EU Member States it is a member of the FATF and therein DG Markt leads the European delegation seeking to coordinate as much as possible EU Member States’ participation, despite they still tend to be jealously of their national prerogatives.

Since the 2001 attacks on much legislative activity has been thereby enacted to protect the financial system and other vulnerable professions and activities from being misused for purposes of money laundering and terrorist financing. Especially in the initial months of major political pressure for action, the Commission has been able to accelerate the adoption of some legislative measures with terrorist financing’s implications that were already under discussion before 9/11. Amongst those acts are included the ‘Protocol to the Convention on Mutual Assistance in Criminal Matters’\(^{17}\), which provides for the exchange of information between Member States concerning bank accounts held by any person who is subject to criminal investigations and represents a considerable improvement of cooperation in the fight against economic and financial crime, and the so-called ‘second anti-money laundering Directive’\(^{18}\). While controversial negotiations on the Directive have been lasting since the summer of 1999, the Commission has demonstrated particular skill in profiting by the ‘window of opportunity’ (den Boer 2006) represented by the post-9/11 urgency and leveraging on the close link between money laundering and terrorist financing to push the European Parliament to agree on the text already approved by the Council. A compromise was finally achieved at the conciliation stage and the second anti-money laundering Directive was adopted in December 2001 amending the earlier 1991 Directive.

In 2004, following the launch of the aforementioned Strategy and the Solidarity Declaration, the Commission prepared a far-reaching Communication focused on the prevention of and the fight against terrorist financing through measures to improve the exchange of information, to strengthen transparency and enhance the traceability of financial transactions. Most of the elements included in the Communication were inserted also in the 2005 ‘third anti-money laundering Directive’\(^{19}\) which repealed the previous two including more explicitly in the title terrorist financing and once again reaffirming the aim to comply with FATF standards. It clearly served to incorporate into Community legislation most part


of the latest version of the FATF Recommendations as revised in 2003, together with a number of associated measures aimed at covering the FATF requirements, among which: Regulation (EC) No 1889/2005 on control of cash entering or leaving the Community which implements SR IX on cash couriers; Regulation (EC) No 1781/2006 on information on the payer accompanying transfers of funds, which lays down rules for payment service providers to send information on the payer throughout the payment chain thus implementing SR VII on wire transfers; Directive 2007/64/EC on payment services (PSD) in the internal market, which provides the legal foundation for the creation of an EU-wide single market for payments and in combination with the third directive implements SR VI on alternative remittances.

Yet, following the publication of Council Decision 2000/642/JHA of 17th October 2000 concerning arrangements for cooperation between Financial Intelligence Units (FIUs) of the EU Member States as for exchanging information, the Commission launched the FIU.Net initiative, a EU-wide network of all national FIUs aimed at sharing information in a secure environment on terrorist funding and supporting cooperation between the various FIUs. Furthermore, the Commission set up a sort of forum for discussion, the so-called EU FIUs Platform, aimed at enabling the EU FIUs to exchange views and experiences on technical issues related to relevant provisions included in the Third Directive, focusing on differences in their respective operational structures in order to explore possibilities of increased harmonization.

Finally, the Third Directive involves the use of comitology as some relevant decisions on amendments to the Directive and other legislative instruments are taken by the regulatory Committee on the Prevention of Money Laundering and Terrorist Financing which was established in 2005. The Committee, which is still chaired by the Commission’s DG Markt, and it includes representatives of all the EU Member States, met for the first time on 12 January 2006 and was charged also with the competence to prepare and to coordinate the EU participation at the FATF meetings.

Conclusions

The above investigation provides evidence that, despite the EU does not act only in response to a terrorist attack, nevertheless strikes such as those in New York and Madrid have clearly boosted and speeded up activities. In the overall context of EU counter-terrorist policy especially cooperation in disrupting terrorist funding, which was quite underdeveloped in
the pre-2001 period, has significantly advanced and it has become even highly sophisticated (Nilsson 2004). The EU has indeed undertaken a significant body of work through either the adoption of rules and various legislative instruments, for the most part in implementation of UN conventions and resolutions and FATF recommendations but also at its own initiative, or institutional engineering (i.e. the establishment of new *ad hoc* working groups and committees).

Despite the treaties attribute a relatively limited role to the Union in the fight against terrorism insofar as most part of the competences, the tools and the resources are still in the hands of its Member States, however, the EU has much contributed to help national governments to work together internationally with partners such as the UN, the FATF and other multilateral organizations (de Vries 2005). It has thus proved able to profit by the 9/11 ‘window of opportunity’ to develop on a cross-pillar basis *ad hoc* policy and institutional arrangements to strengthen its internal security actorness *vis-à-vis* both its citizens, in line with its ambition to establish a genuine area of safety for its citizens grounded on the supply of freedom, security and justice, and outsiders in the international scene.

Despite the current stalemate of the treaty reform process that the EU has undergone in recent years leaves the future in a state of uncertainty, the emergence of key and rapidly expanding policy areas of cooperation such as that dealing with the fight against terrorist financing suggests that the European political project is far from being in the doldrums. This reinforces the assumption according to which, incremental changes that take place in the intervals between major intergovernmental bargains may be as crucial as constitutional decisions in making the process of European integration move forward (Christiansen & Jørgensen 1999; Cram 1994; Heritiér 1999). External events and crises that occur in between treaty reforms are often amongst the strongest stimuli for change as they constantly prompt the EU to react looking for the most effective and comprehensive response across all the toolboxes it has at disposal at supranational and intergovernmental level, as the case in question demonstrates.

Indeed insofar as the EU potential role as a safety-provider depends on how its capacities are organized (Boin *et al.* 2006), the way in which EU counter-terrorist financing cooperation is carried out is extremely important. Especially the inter-institutional relations between the key executive supranational actors involved in the context of counter-terrorist financing cooperation, namely the Commission and the Council Secretariat, have proven to be highly relevant. The two institutions have been able to cooperate well as they basically shared an
interest in the smooth and coherent working of the EU fight against terrorist funding and they met in framing the extreme importance of cross-pillar coordination in an issue-area which clearly encompasses supranational and intergovernmental modes of governance.

Yet this reminds in many respects the need to manage cross-pillar complexity which characterizes the whole EU internal security domain, which is unquestionably amongst the most complicated to understand. Despite deadlocks, shortcomings and coordination problems, from late 1990s on, also thanks to critical junctures such as terrorist attacks, it has undoubtedly undergone a kind of exceptional ‘career’ (Monar 2002). It has quickly become one of the key and fastest-growing areas of EU action, with more than one hundred texts adopted every year, a striking increase in the number of relevant institutional venues and actors involved in policy-making, a noteworthy impact on European and national structures. Small wonder that the new Treaty agreed upon in Lisbon in 2007, if finally ratified, foresees a prominent position for the AFSJ in the new list of fundamental objectives of the Union, thus demonstrating that it is no longer only concerned with economics and markets and recognizing the potential ‘polity-building’ nature of internal security policies (Sbragia 2003).

Furthermore, the new Treaty entails a large remit of changes for the AFSJ, among which its full communitarization through the abolition of the pillar division. To this respect the paper seems to suggest that the provision of the Lisbon Treaty entailing the elimination of the pillars comes more from recognition that complicate dynamics lie behind the formal persistence of the pillar system and have put it under strain during the day-to-day EU activities, rather than from a genuine innovation.

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