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Safer Together?
The Impact of 9/11 on the European Integration Process

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Abstract

The terrorist attacks of 9/11 triggered a security crisis in the EU, which led to the realisation that international terrorism requires a common European strategy to combat it. Consequently, the European Council adopted various action plans and strategy papers defining measures in the fight against terrorism, which are to be assigned to policy areas that were previously under the sovereignty of the nation states: Justice and Home Affairs (JHA) and Foreign and Security Policy.

Based on the three leading integration theories (Liberal Intergovernmentalism, Post-Functionalism, Neo-Functionalism), a qualitative content analysis has been carried out to explore the extent to which 9/11 has influenced the EU integration process. Despite considerable initial difficulties in the post-9/11 period, the terror attacks in Madrid and London in 2004/2005 led to considerable developments with a supranational approach in the JHA and common foreign and security policy (CFSP).

However, in the fight against terrorism, the EU seems to be facing a conflict of goals with its integration objective of the establishment of an Area of Freedom, Security and Justice (AFSJ). A second content analysis of two anti-terrorism measures – the European Arrest Warrant and data retention – has shown considerable deficits in democratic, legal and social legitimacy. The partial lack of parliamentary and judicial control, limited transparency and weak protection of human rights make it clear that the aspect of security is at the forefront in the common anti-terrorism policy. The EU appears to accept significant restrictions on freedom, the rule of law and the protection of human rights when it comes to defending Europe against terrorism. Given the EU's inability to fulfil its self-imposed obligations concerning an AFSJ, the argument is made that the EU must shift its focus towards a balance between freedom, security and justice if it does not want to undermine its own legitimacy.

Key words: European Integration – 9/11 – International Terrorism – Security Crisis –Area of Freedom, Security and Justice

Word count: 28.379

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List of Abbreviations

AFSJ = Area of Freedom, Security and Justice
CFSP = Common Foreign and Security Policy
EAW = European Arrest Warrant
EC = European Community
ECSC = European Coal and Steel Community
EDA = European Defence Agency
EDPS = European Data Protection Supervisor
EEAS = European External Action Service
EEC = European Economic Community
EEW = European Evidence Warrant
EMU = Economic and Monetary Union
ENP = European Neighbourhood Policy
EPC = European Political Cooperation
ESS = European Security Strategy
ETA = Euskadi Ta Askatasuna
Euratom = European Atomic Energy Community
IRA = Irish Republican Army
JCCM = Judicial Cooperation in Criminal Matters
JHA Council = Justice and Home Affairs Council
LI = Liberal Intergovernmentalism
NATO = North Atlantic Treaty Organization
NF = Neo-Functionalism
OSCE = Organization for Security and Co-operation in Europe
PC = Police Cooperation
PESCO = Permanent Structured Cooperation
PF = Post-Functionalism
PLO = Palestine Liberation Organisation
QMV = Qualified Majority Voting
SIS = Schengen Information System
UN = United Nations
VIS = The Visa Information System

1. Introduction

“The Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster.”¹

The events of 9/11 have shown the world that it takes only a few minutes to create a historic moment. The series of four Islamist terrorist attacks against the United States cost not only almost 3000 lives but caused a global shock and resulted in the American declaration of the ‘War on Terror’ – supported by the international community, including the EU.²

Only ten days later, on 21 September 2001, the European Council met in an extraordinary session “in order to analyse the international situation following the terrorist attacks in the United States and to impart the necessary impetus to the actions of the European Union.”³ The Member States agreed that terrorism is a growing challenge to Europe and decided that “the fight against terrorism will, more than ever, be a priority objective of the European Union.”⁴ Although some European states had already experienced terrorist attacks for several decades, mainly in the form of nationalist and separatist movements, they were now facing international terrorism.⁵ The post-9/11-security crisis raised public awareness of the dangerous new potential of international terrorism and it quickly became evident to the European Heads of States that international terrorism requires a new type of response: a common counter-terrorism policy.⁶

Consequently, the EU has adopted the *Action Plan* which takes a multidisciplinary approach, encompassing all the Union’s policies and pursuing the following priorities: (1) enhancing police and judicial cooperation, (2) developing international legal instruments, (3) putting an end to the funding of terrorism, (4) strengthening air security,

¹ European Union, *Consolidated Version of the Treaty on the Functioning of the European Union*, Article 222, (Official Journal of the European Union, 2012), accessed 19 March 2020, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN>.

² David Holloway, *9/11 and the War on Terror* (Edinburgh: Edinburgh University Press, 2008), 1.

³ European Commission, *Conseil Européen Extraordinaire De Bruxelles*, (European Commission, Press Corner, 2001), accessed 19 March 2020, https://ec.europa.eu/commission/presscorner/detail/en/DOC_01_13.

⁴ *Ibid.*

⁵ Marianne van Leuwen, “Confronting Terrorism,” in *Confronting Terrorism. European Experiences, Threat Perceptions and Policies*, ed. Marianne van Leuwen (The Hague/London/New York: Kluwer Law International, 2003), 1.

⁶ Stanislaw Sulowski, “Counter-Terrorism: Correlating Security and Freedom,” in *Radicalism and Terrorism in the 21st Century: Implications for Security*, ed. Anna Sroka, Fanny Castro-Rial Garrone and Rubén Darío Torres Kumbrián (Bern: Peter Lang AG, 2017), 14.

(5) coordinating the European Union's global action.⁷ In addition, the European Council adapted an *Anti-Terrorism Roadmap* listing 46 measures, including, inter alia, the European Arrest Warrant (EAW) or data retention.⁸ In the following months, the EU intensified the cooperation on counter-terrorism among Member States by adopting instruments such as tackling the financing of terrorism. The terrorist attacks in Madrid on 11 March 2004 led to a replacement of the *Anti-Terrorism Roadmap* by an *EU Plan of Action on Combating Terrorism*, an extended catalogue of measures. In 2005, the Council of the European Union adopted *The European Union Counter-Terrorism Strategy* after the so-called '7/7' bombings in London, pointing out that "fighting terrorism is a top priority for the EU."⁹ Despite several updates and the adoption of a series of sub-programmes, these two documents, the *EU Plan of Action on Combating Terrorism* and *The European Union Counter-Terrorism Strategy*, are now providing the framework for the European efforts in the fight against terrorism.

The steps outlined in the documents can be assigned first and foremost to the policy field of the European Justice and Home Affairs (JHA). According to the Treaty on European Union, this policy field is intended to contribute to the further development of an area of freedom, security and justice (AFSJ) in which people are afforded the highest degree of security in accordance with human rights and the rule of law. This is stated in Article 3(2) TEU:

The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.¹⁰

Although the treaty provisions do not directly mention the fight against terrorism, the challenge of international terrorism nevertheless concerns the core of the AFSJ's integration objective. Adopted measures such as the aforementioned EAW or the data

⁷ European Commission, *Conseil Europeen Extraordinaire De Bruxelles* (2001).

⁸ European Council, *Anti-Terrorism Roadmap* (European Council, 2001), accessed 19 March 2020, <https://www.statewatch.org/news/2001/oct/sn4019.pdf> and Monica den Boer and Jörg Monar, "Kenynote Article: 11 September and the Challenge of Global Terrorism to the EU as a Security Actor," *Journal for Common Market Studies* 40, no. 4 (2002), 21, accessed 19 March 2020, <https://onlinelibrary.wiley.com/doi/10.1111/1468-5965.40.s1.2>.

⁹ Council of the European Union, *European Union Counter-Terrorism Strategy* (Council of the European Union, 2005), accessed 20 March 2020, <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2014469%202005%20REV%204> and Council of the European Union, *Counter-terrorism strategy* (Council of the European Union, 2018), accessed 20 March 2020, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3A13275>.

¹⁰ European Union, *Consolidated Version of the Treaty on European Union* (European Union, 2012), accessed 21 March 2020, https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF.

retention raise doubt as to the compatibility between the fight against terrorism and the AFSJ. Given that the *Charter of Fundamental Rights of the European Union* is not legally codified in the Lisbon Treaty, questions concerning the compliance of the EU anti-terrorism policy with the rule of law and human rights arise. This is accompanied by the consideration of whether there has been a conflict between granting freedom and justice on the one hand and the granting of security on the other.

The further development of the AFSJ is today a central integration project of the European unity.¹¹ The violation of fundamental rights and the relativization of principles of the rule of law would, according to the central thesis of this work, shake one of the pillars of European unification to its foundations and cast doubt on the legitimacy of Union policy. At the same time, however, international terrorism can also be seen as a “push factor” that has driven European integration – especially with regard to the common foreign and security policy (CFSP) – which has been widened and deepened.¹² This is mostly pronounced in the EU’s contribution in crisis management and post-construction efforts, the EU’s interaction with international organisations such as the UN, NATO, OSCE and several military operations that the EU conducted in the last years.¹³

Evidently, the 9/11 attacks and the associated threat of international terrorism have contributed to constitutional and institutional reforms within the EU.¹⁴ Against this background, the thesis deals with the overarching question of how the terrorist attacks of 9/11 have influenced the European integration process.

1.1 Literature and Research Review

The topic of terrorism is anything but a new research field. Long before the 9/11 attacks, scholars of many different academic disciplines have dealt with it, predominantly with the conceptual structure of terrorism – or to be more accurate, with the discussion of the

¹¹ European Parliament, “An area of freedom, security and justice: general aspects,” Fact Sheets on the European Union, 2020, accessed 24 March 2020, <https://www.europarl.europa.eu/factsheets/en/sheet/150/an-area-of-freedom-security-and-justice-general-aspects>.

¹² Ester Herlin-Karnell and Claudio Matera, “Introduction. The EU’s External Dimension of Anti-Terrorism Policy,” in *External Dimension of the EU Counter-Terrorism Policy*, ed. Ester Herlin-Karnell and Claudio Matera (The Hague: Asser Institute. Centre for the Law of EU External Relations, 2014), 11-12.

¹³ Giovanna Bono, “The Impact of 11 September 2001 and the ‘War on Terror’ on European Foreign and Security Policy: Key Issues and Debates,” in *The Impact of 9/11 on European Foreign and Security Policy*, ed. Giovanna Bono (Brussels: Brussels University Press, 2006), 13-14.

¹⁴ Herlin-Karnell and Matera, *Introduction. The EU’s External Dimension of Anti-Terrorism Policy* (2014), 11-12.

failure to agree on a universally-applicable definition of terrorism. Heated and fruitless debates on the definition have already been held in the 1970s and 80s, and still are today.¹⁵ Bruce Hoffman, a political analyst specialising in the study of terrorism, has remarked that “most people have a vague idea or impression of what terrorism is, but lack a more precise, concrete and truly explanatory definition.”¹⁶ Thus, various definitions have circulated, ranging from terrorism as “acts of small-group violence for which arguable claims of mass representation can be made”¹⁷ to a “symbolic act designed to influence political behaviour by extra-normal means, entailing the use or threat of violence”¹⁸ to “an instrument or political weapon developed by revolutionaries in the womb of autocracy.”¹⁹

But why is it so difficult to define terrorism? To Hoffman, “(t)he most compelling reason perhaps is because the meaning of the term has changed so frequently over the past two hundred-plus years.”²⁰ Schmid and Jongman take a similar view and add: “The nature of terrorism is not inherent in the violent act itself. One and the same act... can be terrorist or not, depending on intention and circumstance.”²¹ A large-scale survey of over 6000 research papers on terrorism between 1968 and 1988 by Schmid and Jongman makes it clear that the early research was mainly concerned with the question of what terrorism means by largely ignoring why and how such events happen. However, one of the few exceptions to the rule is the book *Terrorism and the Liberal State* by Paul Wilkinson who tries to reconstruct a pattern of reasoning behind terrorist attacks by looking at the society and the relationship between citizens and the state through a political philosophy lens. In order to ensure that liberal states avoid terrorist acts, he suggests broadening the “concept of internal defence to include the prompt and effective tackling of the problems of minorities.”²² However, similar to the fact that such ideas went mostly unheard, almost no attention was paid to the actual terrorists and the substance of their membership. Therefore, Andrew Silke sees 9/11 not only as a

¹⁵ Jack Porter Gibbs, “Conceptualization of Terrorism,” *American Sociological Review* 54, no.3 (1989), 329-330, accessed 31 March 2020, <https://www.jstor.org/stable/pdf/2095609.pdf>.

¹⁶ Bruce Hoffman, *Inside Terrorism* (New York: Columbia University Press, 2017), 1.

¹⁷ Richard Rubenstein, *Alchemists of Revolution: Terrorism in the Modern World* (New York: Basic Books, 1987), 31.

¹⁸ Thomas P. Thornton, “Terror as a Weapon of Political Agitation,” *Internal War*, ed. H. Eckstein (New York: Free Press, 1964), 73.

¹⁹ Paul Wilkinson, *Terrorism and the Liberal State* (London: The Macmillian Press, 1977), 78.

²⁰ Hoffman, *Inside Terrorism* (2017), 1.

²¹ Albert J. Jongman and Alex Peter Schmid, *Political Terrorism: A New Guide To Actors, Authors, Concepts, Data Bases, Theories, And Literature* (Piscataway: Transaction Publishers, 1988), 101.

²² Wilkinson, *Terrorism and the Liberal State* (1977), 29.

“profound failure of the intelligence communities” but also as a “result of failure in the research world.” The professor of terrorism, risk and resilience sharply criticizes that the research literature did not predict the terror attacks and condemns the fact the terrorist group Al Qaeda, whose members are held responsible for the attacks by the U.S., was not even on the research radar – even though the then leader of Al Qaeda, Osama Bin Laden, had been operating for many years before 9/11.²³ This, of course, changed quickly after 9/11 as everybody wanted to know what happened and who was behind this dangerous movement. Silke indicated that 9/11 had led to a much greater emphasis on Al Qaeda in particular and international terrorism in general, which was the subject of 57,3% of studies as compared to 23,3% of studies in the years prior to 11 September.²⁴

The instability which the “War on Terror” represents, as well as its far-reaching implications for domestic and international security worldwide, is addressed in *European Security, Terrorism and Intelligence: Tackling New Security Challenges in Europe* by Kaunert and Léonard. The book seeks to conceptualise the term ‘security’ in order to analyse the EU’s counter-terrorism policy by reflecting on the EU’s security actorness. The experts discuss the effectiveness of Europol and intelligence cooperation and conclude that the events of 9/11 changed the limited role that the EU held in European security prior to the attacks. Consequently, it had led to the EU’s opening towards security cooperation with third-parties such as the U.S.²⁵ By this they agree with Raphael Bossong who argues in his article *The Action Plan on Combating Terrorism: A Flawed Instrument of EU Security Governance* that the interaction with the U.S. in the field of security has led to the EU becoming an important partner for the U.S. However, with a more negative view on the European security policy, Bossong demonstrates that the *Action Plan*, against all expectations, could not serve as an effective instrument of the EU’s security policy. He sees the reason for that in a hectic policymaking after 9/11 leading to an agenda overload and a disregard of a strategic definition of the EU’s attempt of counter-terrorism.²⁶

While international terrorism and its impact on national security has received

²³ Andrew Silke, “An Introduction on Terrorism Research,” in *Research on Terrorism. Trends, Achievements & Failures*, edited by Silke Andrew (New York: Frank Cass, 2004), 22.

²⁴ Andrew Silke, “The Impact of 9/11 on Research on Terrorism,” in *Mapping Terrorism Research: State of the Art, Gaps and Future Directions*, ed. Magnus Ranstorp (New York: Routledge, 2007), 38-41.

²⁵ Christian Kaunert and Sarah Léonard, *European Security, Terrorism and Intelligence: Tackling New Security Challenges in Europe* (New York: Macmillian, 2013).

²⁶ Raphael Bossong, “The Action Plan on Combating Terrorism: A Flawed Instrument of EU Security Governance,” *Journal of Common Market Studies* 46, no. 1 (2008), accessed 30 March 2020, <https://onlinelibrary.wiley.com/doi/full/10.1111/j.1468-5965.2007.00766.x>.

increasing attention and has become a well-researched topic by and by, the effectiveness of implemented counter-terrorism measures have remained comparatively understudied. Nonetheless, a few published attempts have been made which are very much worth mentioning such as the book *The EU and Counter-Terrorism: Politics, Polity and Policies after 9/11* by Javier Argomaniz which offers an analysis of the “reactive and disjointed” institutionalisation of the EU’s counter-terrorism policy.²⁷ Another important analysis is the 2008 published article *The Absent Friend: EU Foreign Policy and Counter-Terrorism* by Daniel Keohane who questions the effectiveness of the measures by claiming the absent of a European foreign policy from the EU’s counter-terrorism policy.²⁸ Similarly critical is Oldrich Bureš who calls in his book *EU Counterterrorism Policy. A Paper Tiger?* the EU counter-terrorism policy a ‘paper tiger’ which still must overcome numerous political, legal and cultural challenges in order to be an effective counterterrorism device.²⁹

However, one question underlying all this work is not directly answered, namely the extent to which the measures are related to the EU’s goal of European integration. This question is of utmost importance as an effective common fight against terrorism can only be achieved by effectively integrated counter-terrorism measures. With this understanding the perspective shifts: the question is thus not to what extent the measures were effective in terms of fending off further terrorist attacks, but to what extent the European fight against terrorism is effective in terms of European integration. This question must be answered first in order to be able to assess the policy’s effectiveness regarding preventing terrorism. However, although Bureš and Keohane both analyse a “lack of implementation of measures” and an “inter-institutional deadlock”, they do not place these findings in the context of a debate on European integration. There is thus a lack on critical examinations of the theoretical basis supporting the analyses.

Richard Jackson et al. takes up this problem and notes that current problems and challenges facing terrorism studies today are, inter alia, the failure to develop and apply theories.³⁰ The Professors of Conflict Studies go even one step further and criticize a lack

²⁷ Javier Argomaniz, *The EU and Counter-Terrorism: Politics, Polity and Policies After 9/11* (London: Routledge, 2011).

²⁸ Daniel Keohane, “The Absent Friend: EU Foreign Policy and Counter-Terrorism,” *Journal of Common Market Studies* 46, no. 1, (2008), accessed 30 March 2020, <https://onlinelibrary.wiley.com/doi/full/10.1111/j.1468-5965.2007.00770.x>.

²⁹ Oldrich Bureš, *EU Counterterrorism Policy: A Paper Tiger?* (Farnham: Ashgate, 2011).

³⁰ Richard Jackson, Marie Breen Smyth and Jeroen Gunning, “Critical terrorism studies: framing a new research agenda,” in *Critical Terrorism Studies. A new research agenda*, ed. Richard Jackson Marie Breen Smyth and Jeroen Gunning (London & New York: Routledge, 2009), 225-228.

of critical and reflected terrorism studies. To them, it is alarming that scholars of terrorism are unaware of how the highly inflated terrorism threat is used politically to legitimize a variety of foreign and domestic political initiatives, many of which are of questionable legitimacy. As examples they cite the justification of foreign invasions and wars, the use of torture and increased domestic surveillance and expansion of the security services.³¹ It can be deduced from this criticism that, in view of the effectiveness of some terrorist measures in preventing terrorism, the question of their legitimacy is partly disregarded.

The lack of legitimacy of some of the EU anti-terrorism measures seem to challenge the development of the AFSJ, a political project that involves the rule of law. Bearing this in mind, the question is: How and in what way has 9/11 influenced the European integration process? The following two sub-questions can be derived from this, which must be examined in order to answer this comprehensive research question: To what extent has 9/11 been a trigger for the development of the AFSJ and CFSP? And in what way was the preservation and development of the AFSJ taken into account in terms of human rights and rule of law?

1.2 Organisation of the Thesis

The analysis of the impact of 9/11 on the European integration process is based on various theories of European integration, which assume that moments of crises such as 9/11 have either a positive influence on integration or have the exact opposite effect, leading to European disintegration. In order to find out whether 9/11 was a trigger for further integration or disintegration, the theoretical preliminary work of Frank Schimmelfennig is applied. The theoretical considerations of Monica den Boer et al., however, are used to examine the legitimacy of anti-terrorism measures in terms of compliance with the rule of law and human rights.

Having established the theoretical framework in Chapter 2 and explained the applied methodology in Chapter 3, attention is shifted to the historical development of the European integration in times of crises since the EU's foundation in Chapter 4. In focus of consideration are the various EU treaties, which are viewed from the perspective of political conceptions. What are the political interests behind the various integration projects? And what are the reasons for the ever-increasing integration of the EU?

³¹ Richard Jackson, Marie Breen Smyth and Jeroen Gunning, "Introduction. The case for critical terrorism studies," in *Critical Terrorism Studies. A new research agenda*, ed. Richard Jackson Marie Breen Smyth and Jeroen Gunning (London & New York: Routledge, 2009), 1-3.

Following that, Chapter 5 deals with the consideration of historical experiences in the fight against terrorism in Europe and their significance for developments after 9/11.

The second part of the thesis discusses the challenges that international terrorism poses to the EU and how it deals with it. In a first analysis, the conclusions and declarations of the individual EU institutions are analysed on the one hand, and the discussion papers relating to the EU counter-terrorism strategy are presented on the other. How the EU's strategy has evolved over the years, especially after the terrorist attacks in London and Madrid, and in what way it has influenced the development of the Lisbon Treaty is examined in Chapter 6 and 7. In Chapter 8 and 9, two selected counter-terrorism measures are analysed: a) the EAW, b) the storage and processing of personal data. In addition to examining the content of these measures, they are analysed from a human rights and rule of law perspective. In the final part of the thesis an assessment and evaluation of the EU's counter-terrorism policy is made in order to answer the question of the impact of 9/11 on the European integration process.

2. Theoretical Framework

At the outset, several conceptual clarifications are in place: How are the terms *crisis* and *European integration* understood? What approach is used to describe the potential impact of 9/11 on EU policies? And how is it possible to examine whether the measures taken by the EU are conforming with the AFSJ?

The study of politics and international relations consider crisis as a “relatively unusually event” which provide an “opportunity for change”. Such change can be brought about by leaders, as an “unexpected crisis” often triggers a rush to respond and solve the problem.³² Frank Schimmelfennig, professor of European politics, contemplates this actor-centred decision-making process as a “manifest threat” which presents a “significant probability of disintegration but may also trigger reform activities leading to more integration.”³³ If one relates this to 9/11, one can speak of a security crisis in the EU, which prompted the Member States to make changes in JHA and foreign and security policy by developing a common counter-terrorism strategy. Whether this led to a decrease or increase of the process of production, the status of deepening, or the functional reach, as Schimmelfennig defines European integration has to be examined.³⁴ Nonetheless, it is important to note that this thesis is not concerned with (dis)integration in the sense of enlargement but concentrates on intensifying cooperation.

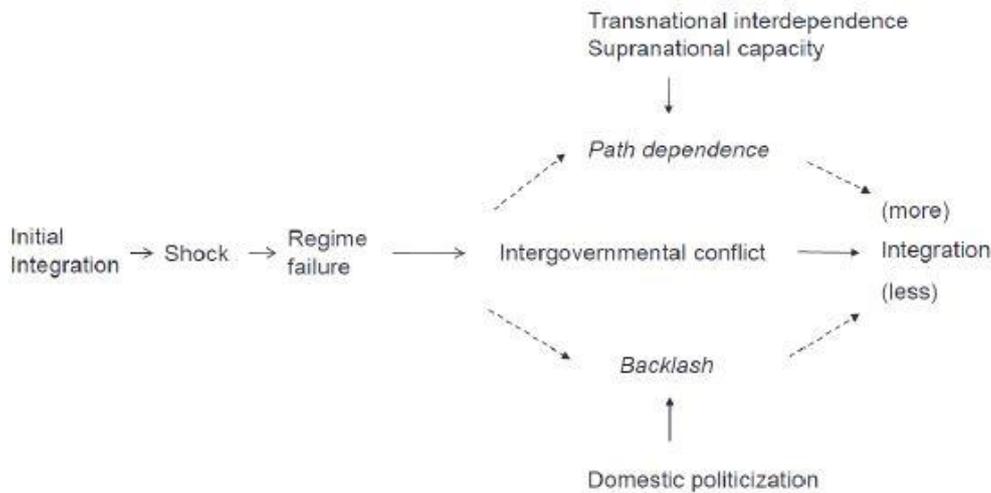
To understand the outcome brought about by 9/11, it is important to consider the existing conditions at the time.³⁵ Thus, the causes, the beginning and the course of the development of the post-9/11-security crisis is the puzzle this thesis addresses. To solve this, a theory model developed by Schimmelfennig is applied which is based on three of the leading integration theories: Liberal Intergovernmentalism (LI), Post-Functionalism (PF) and Neo-Functionalism (NF). All of them claim to explain the emergence, the process and the state of European integration.

³² Mai’a K. Davis Cross, *The Politics of Crises in Europe* (Cambridge: Cambridge University Press, 2017), 22.

³³ Frank Schimmelfennig, “European Integration (Theory) in Times of Crisis. A Comparison of the Euro and Schengen crises,” *Journal of European Public Policy* 25, no. 7 (2018), 969, accessed 7 April 2020, <https://www.tandfonline.com/doi/abs/10.1080/13501763.2017.1421252>.

³⁴ *Ibid.*, 970-972.

³⁵ *Ibid.*, 970.



Source: Schimmelfennig (2018), 972.

The baseline of the model is the LI approach that European integration is the “outcome of international interdependence and intergovernmental constellations of preferences and bargaining power.”³⁶ This means more precisely, when it comes to a crisis which is caused by an exogenous shock, and the present regime fails, the Member States return to intergovernmental conflict over sharing crisis burdens. The process of integration is initiated and controlled by governments and is motivated by interstate preferences and power constellations.³⁷ In contrast, NF sees endogenous and international crises as starting point. A functional and institutional momentum is at work, which is due to gaps and deficits in European integration and is driven by transnational and supranational actors.³⁸ The central idea of NF is the spill-over effect: A communitarisation, once deliberately started in one area, will compel the actors to also congregate other adjacent areas in order to guarantee the optimal functioning of the originally integrated area. Representatives of NF therefore assume that institutional integration leads to a dynamic development of its own, in which the control and power of governments are severely restricted.³⁹ However, whereas NF focuses on those processes of spill-over and path-dependence which result in integration beyond the baseline, PF assumes a backlash

³⁶ Frank Schimmelfennig, “European Union (Theory) in Times of Crisis. A Comparison of the Euro and Schengen crises,” in *Journal of European Public Policy* 25, no. 7 (2018), 972, accessed 11 November 2019, <https://www.tandfonline.com/doi/abs/10.1080/13501763.2017.1421252>.

³⁷ Ibid. and Frank Schimmelfennig, “Theorising Crisis in European Integration,” in *The European Union in Crisis*, ed. Desmond Dinan, Neill Nugent, William E. Paterson (London: Red Globe Press, 2017), 317.

³⁸ Frank Schimmelfennig, “Theorien der europäischen Integration,” in *Handbuch Europäische Integration*, ed. Peter Becker and Barbara Lippert (Wiesbaden: Springer VS, 2018), 3.

³⁹ Ibid. and Schimmelfennig, “Theorising Crisis in European Integration” (2017), 317.

caused by endogenous crises that lead to domestic politization of integration.⁴⁰ PF asserts that the initial integration leads to negative feedback processes. Accordingly, negative reactions at national levels cause a restriction of the integration process. The result is cultural and economic losers in integration and Eurosceptic parties that slow down or prevent the further progress of integration.⁴¹

In order to be able to carry out a comprehensive examination of the influence of 9/11 on European politics, including a rule of law perspective, another theory is applied. The political scientists Monica den Boer et al. developed a theoretical model to analyse the democratic, legal and social political legitimacy of measures in the field of counter-terrorism.

	<i>Democratic legitimacy</i>	<i>Legal legitimacy</i>	<i>Social legitimacy</i>
Indicators	Parliamentary scrutiny (investigation rights, active consultation) Ministers are accountable to parliament Parliament approves appointments Parliament controls policy plans and budgets	Formal adoption of a binding legal instrument, clarifying the jurisdiction, a legally controllable mandate and a right to complain or appeal Individual legal responsibility for law enforcement officials Procedural legitimacy	Transparency about activities by public reports or a website Independent monitoring by ombudsman or court of auditors Whenever possible, inclusion of citizens in consultation and debate

Source: Den Boer et al. (2008), 109.

Based on these three levels, den Boer et al. analyses the extent to what political action is justifiable from a constitutional point of view. The first pillar, democratic legitimacy, refers to parliamentary oversight. This umbrella term covers indicators as the control of a) legislative instruments, b) the mandate, and c) the governance of counter-terrorism institutions (e.g. Europol and Eurojust) and networks (e.g. data protection principles). According to this model, the democratic legitimacy is considered high when “either parliamentary control is exercised by all national parliaments of the EU Member States

⁴⁰ Frank Schimmelfennig, “European Union (Theory) in Times of Crisis. A Comparison of the Euro and Schengen crises,” (2018), 972, and Schimmelfennig, “Theorising Crisis in European Integration” (2017), 317.

⁴¹ Schimmelfennig, “Theorien der europäischen Integration“ (2018), 5.

and/or by the European Parliament.”⁴² The second pillar which covers the legal legitimacy relates to binding legal instruments that are formally adopted. The working procedure of these instruments are obligated to legal criteria. However, when neither the national courts nor the EU Court of Justice are in the position to exercise jurisdiction, the legal legitimacy is considered low.⁴³ The social legitimacy focuses on the responsibility and the response capacity towards citizens. This is accomplished by ensuring transparency with the help of public reports. In addition, social legitimacy is guaranteed when an institutionalized monitoring by a third party is taken place as well as when citizens and civil society groups are included in consultations and debates. In order to consider the level of social legitimacy high, a maximum of transparency and civil participation must be provided.⁴⁴

Together these three strings of legitimacy can be operationalised to survey the weight of legitimacy of the input of counter-terrorism measures from a rule of law point of view.⁴⁵ The assumption that the violation of human rights and the relativization of the rule of law principles shakes the foundation of the AFSJ should thus be examined.

⁴² Monica den Boer et al., “Legitimacy under Pressure: The European Web of Counter-Terrorism Networks,” *Journal of Common Market Studies* 46, no. 1, 106, (2008), accessed 8 April 2020, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1070289##.

⁴³ *Ibid.*, 108.

⁴⁴ *Ibid.*, 109.

⁴⁵ *Ibid.*

3. Methodological Procedure

The analytical approach employed in this study falls under the mantle of policy analysis and is concerned with a content analysis according to the interpretation scheme of Philipp Mayring (see Appendix, Figure 1).⁴⁶ The strength of this qualitative method lies first in its ability to evaluate all types of written texts. Since very different types of texts are processed in the context of the work, the content analysis proves advantageous for the study. The application of a content analysis ensures the ability to systematically process the text material in a theory-based manner, allowing it to profitably evaluate large quantities of different types of text.⁴⁷

In the framework of the thesis, however, two content analyses, each based on different sub-questions, textual material and category systems, are carried out. In both analyses the focus is not on the linguistic, but on the semantic aspect. The aim is thus not to identify rules of languages, but rather to study the relationship between words and their meanings. The analytical technique of structuring is applied. The first content analysis examines the behaviour and response of the EU after 9/11 until the entry into force of the Lisbon Treaty with respect to a common counter-terrorism policy, while the second content analysis investigates two measures adopted in the course of the EU's counter-terrorism policy (the EAW and the storage and processing of personal data) with regard to compliance with the rule of law and human rights. Nonetheless, both analyses serve to address the question of the impact of 9/11 on the European integration process. However, it must be stressed that it is not attempted to analyse the comprehensive catalogue of every single counter-terrorism action and related policy adopted by the EU. In fact, the policies which have had an impact on the development of the AFSJ and CFSP and which ideas are thus reflected in the Lisbon Treaty are carried out. Therefore, the focus is on a) the characterization of the process, b) the classification of the extent of institutionalisation and c) the consideration of the rule of law and human rights in the implementation of counter-terrorism measures.

The first analysis is based on the evaluation of the during the EU's anti-terrorism policy adopted strategy papers, framework decisions, directives, regulations, action plans and roadmaps. Additionally, the Constitutional Treaty and the Lisbon Treaty are

⁴⁶ Philipp Mayring, *Qualitative Content Analysis. Theoretical Foundations, Basic Procedures and Software Solutions* (Klagenfurt: Beltz, 2014).

⁴⁷ Philipp Mayring, *Qualitative Inhaltsanalyse. Grundlagen und Techniken* (Weinheim&Basel: Beltz, 2015), 130-131.

analysed. The second analysis, however, relies on the legislative basis of the EAW and the data retention directive as well as of the *Charter of Fundamental Rights of the European Union*. In both analyses, the coding system is operationalized deductively by using definitions and concepts from European integration theories. Thus, in the development of a category system, the first analysis draws on the previously mentioned model by Schimmelfennig. Following his approach, the first sub-question of the development of the AFSJ as well as a common foreign and security policy after 9/11 is examined by means of the following main categories which are carefully founded and revised within Mayring's process of analysis: (1) Force of response, (2) Intention of reaction, (3) Focus of response, (4) Crisis mechanism. The categories refer to the possible forms of reaction of the EU to a crisis, which differ in the theories and lead to different outcomes regarding the integration process (see Appendix, Table 1-4).

The second analysis takes a closer look at the policy areas of the AFSJ and attempts to assess whether and in what way the rule of law and human rights have been questioned or violated in the fight against terrorist violence. Therefore, the theoretical approach of den Boer et al. is used to develop the following analysis categories: (1) Parliamentary oversight & scrutiny, (2) Delegation of sovereignty, (3) Role of parliament regarding strategic policy plans & budget, (4) Legal instrument, (5) Legal monitoring, (6) Public accountability, (7) Institutionalized monitoring, (8) Participation of citizens, civil society groups & NGOs. These categories provide information on the extent to which counter-terrorism measures lead to high or low democratic, legal and social legitimacy (see Appendix, Figure 2 and Table 5). To answer the question of the consideration of human rights in the EU's counter-terrorism policy, the *Charter of Fundamental Rights of the European Union* is taken into account.

The classification of relevant text passages into the category system is both content-specific and chronological. The sequential disposition of the EU's behaviour concerning countering terrorism after 9/11 into three phases (post-9/11, after the London/Madrid attacks, the entry into force of the Lisbon Treaty) helps to classify the extracted text passages as well as to enable an exact observation of change in behaviour. The division into three phases is important since the counter-terrorism policy has been changed and extended over the time. The exact procedure of analysis and interpretation is defined in a coding guide which includes definitions, anchor examples and coding rules (see Appendix, Table 2-5).

4. The European Integration Process in Times of Crises

What began in 1950 with the Schuman Plan, which for many years was limited to economic policy areas, gradually developed into European integration in other policy areas, such as foreign and domestic policies.⁴⁸ The signing of the Maastricht Treaty is still regarded as the culmination of the European integration process, establishing a CFSP and cooperation in the fields of JHA.⁴⁹ Thus, the history reveals, that the EU has been in a state of constant change since its foundation. Jean Monnet, who is considered as one of the founding fathers of the EU, saw crisis as the cause for such change: “People only accept change when they are faced with necessity, and only recognize necessity when a crisis is upon them.”⁵⁰

A look at the history shows that the EU has been in several endogenous and exogenous crises since its foundation, inter alia: the British accession, the empty chair crisis, the economic and financial crisis in the 1970s, the Yugoslavian War. However, whether these crises have been an essential part of the “success of the European integration” as Monnet suggested and many still believe, is being thematised in the following by looking at the causes, reasonings and outcomes of those moments of crisis.⁵¹

4.1 From Paris to Maastricht

The Schuman Declaration from 1950 is widely regarded as the beginning of the European integration process, proposing to remove the German and French coal and steel industries from national influence and place them under the control of a common, supranational European authority, not least in order to secure a lasting peace.⁵² This proposal finally led to the signing of the Treaty of Paris in 1951, which established the European Coal and Steel Community (ECSC).⁵³ In the years that followed, new proposals were made to extend economic integration, which ultimately led to the signing of the Treaty of Rome

⁴⁸ European Parliament, “Developments up to the Single European Act,” Facts Sheets on the European Union: Historical developments of European integration, 2019, accessed 19 April 2020, <https://www.europarl.europa.eu/factsheets/en/sheet/2/developments-up-to-the-single-european-act>.

⁴⁹ European Council. Council of the European Union, “How Maastricht changed Europe. New tools for a new European agenda,” Impact, 2020, accessed 19 April 2020, <https://www.consilium.europa.eu/en/maastricht-treaty/#group-Impact-TL18vrBxpI>.

⁵⁰ Sam-Sang Jo, *European Myths: Resolving the Crises in the European Community/European Union* (Lanham: University Press of America, 2007), 156.

⁵¹ Desmond Dinan, “Crises in EU History,” in *The European Union in Crisis*, ed. Desmond Dinan, Neill Nugent, William E. Paterson (London: Red Globe Press, 2017), 16.

⁵² Derek W. Urwin, “The European Community: From 1945 to 1985,” in *European Union Politics*, ed. Michelle Cini, Nieves Pérez-Solórzano Borragán (Oxford: Oxford University Press, 2013), 20-21.

⁵³ *Ibid.*, 21.

in 1957, establishing the European Economic Community (EEC), which was later renamed into the European Community (EC), and the European Atomic Energy Community (Euratom). Although aiming at a united Europe, the created institutions were marked by intergovernmentalism.⁵⁴

By proposing a qualified majority voting (QMV) in the Council of Ministers, a deepening of the European integration was attempted, causing the first crisis in European integration. The French president Charles de Gaulle feared the sovereignty of France and boycotted the meetings of the Council. In political terms, the European integration was stopped, and the idea of a supranational common agricultural market failed. The ‘empty chair crisis’ could only be resolved by the adoption of the ‘Luxembourg Compromise’ which is a key event in European integration, because it represented the (start of the) turn from supranationalism to intergovernmentalism. The persisting national veto after 1966, the instability in the international political economy, and institutional changes that privileged the Council of Ministers and institutionalized the European Council as key decision-makers within the Communities in the time after the empty chair crisis suggested the limits of supranationalism.⁵⁵

The second crisis happened in the end of the 1960s when trade within the EU has been severely affected by fluctuations in value in national currencies. The result of an economic and financial crisis was taken as an inducement to extend the budgetary competences to the EU Parliament as well as to establish an exchange rate stability within the EEC. The establishment of an Economic and Monetary Union (EMU) by 1980 was seen as an important step towards the ultimate goal of a political union. This plan should fail for the first attempt, however, not least because of the war in the Middle East.⁵⁶

In 1973 the Arabs announced the increased oil prices and divided the European countries in the categories of ‘friends’ and ‘enemies’. This prevented the European Countries for creating a united front. By signing the ‘Middle East declaration’, however, the EC made steps towards a common European foreign policy. The crisis has also contributed to an institutional integration, with the European Council beginning to meet regularly in an informal manner to address Community affairs.⁵⁷ Another important lesson learned from the economic and financial setbacks was the weak European

⁵⁴ Ibid., 6-7.

⁵⁵ Dinan, “Crises in EU History” (2017), 27-28 and Urwin, “The European Community: From 1945 to 1985” (2013), 26.

⁵⁶ Dinan, “Crises in EU History” (2017), 25.

⁵⁷ Ibid., 31.

competitiveness, which led to the idea of deeper market integration in the form of a single market. However, this project had to be put on hold due to the ‘British budget question’ triggered by the British Prime Minister Margaret Thatcher, who called for a new deal for the UK’s contribution to the EU. After solving this problem, in 1985 a legislative programme was formulated to legalize the free movement of goods, services and capital. The single market programme became the heart of the Single European Act, which was signed in 1986 and marked the first major treaty change since the founding of the European Communities.⁵⁸

The euphoria over this integrative progress was soon to diminish by the breakup of Yugoslavia in the 1990s. The EC’s inability to prevent the disintegration of Yugoslavia due to the Member State’s different positions, revealed its incapacity to find and implement a common strategy and policy, calling into question the EC’s efficiency. The EC had to decide who and what it wanted to be in political terms. The need for further policy development became clear, resulting in the political will of the Member States to increase the capacities of the CFSP by establishing it as the second pillar of the Treaty on the EU, also known as the Maastricht Treaty.⁵⁹ Although the entry into force of the treaty took some time, with some countries holding referendums on its ratification, the treaty can ultimately be seen as the culmination of European integration. It established the European Union as the overarching association for the European Communities, the CFSP and cooperation in the fields of JHA, implemented in the new structure of the three pillars. Nonetheless, the CFSP and the JHA, traditionally regarded as areas of states’ sovereignty, were kept outside the supranational structure of the first pillar and instead built the second and third intergovernmental pillars.⁶⁰

4.2 Treaty of Amsterdam: Area of Freedom, Security and Justice

The hitherto heart of the European integration was replaced only a few years after its entry into force by the Treaty of Amsterdam. The greatest changes can be ascribed to the field of democratisation, for example, the treaty has considerably increased the powers of the European Parliament. Nevertheless, much has also happened in the area of JHA policy,

⁵⁸ Ibid., 32-33.

⁵⁹ Ibid., 36-37 and 43.

⁶⁰ Ibid., 33-36 and Steven P. McGiffen, *The European Union. A Critical Guide* (London: Pluto Press, 2005), 5 and European Union, *Treaty on European Union* (European Union, 1992), accessed 19 April 2020, https://europa.eu/european-union/sites/europaeu/files/docs/body/treaty_on_european_union_en.pdf.

such as the implementation of the political concept of the AFSJ.⁶¹

With the complementation of the internal market and the associated abolition of border controls, political cooperation in the policy areas of JHA was already extended in the Maastricht Treaty.⁶² However, the Treaty of Amsterdam brought all these measures together under the heading of the ‘area of freedom, security and justice’ and thus transferred the judicial cooperation in civil matters and the measures on the free movement of persons (migration, asylum and immigration policy) from the intergovernmental third pillar to the supranational first pillar, so that decisions on them were now taken under the co-decision procedure.⁶³ In concrete terms, this meant that the institutions of the EU were involved in the decision-making process and the European Court of Justice assumes its supervisory functions. This is a clear expression of the fact that the EU and its Member States place far greater political demands on the European integration process than when it was first agreed. This can be seen above all in the willingness of the EU states to transfer further competences to the Union, including in the area of internal security, which is part of the core area state sovereignty.

However, with signing the treaty, the EU Heads of State and Governments enshrined “the maintenance and development of the Union as an area of freedom, security and justice (...)” as a fundamental objective of the European Union.⁶⁴ Central elements of this are the exchange of information and the so-called principle of mutual recognition of court decisions, as laid down in the *Vienna Action Plan* and was discussed on the EU special summit in Tampere in 1999. Adopted was a comprehensive catalogue of measures to guarantee fundamental rights, to effectively prevent or combat crime and to harmonise national legal systems. Among other things, the action plan calls for comprehensive cooperation between the Member States and Europol (European Union’s law enforcement agency) in order to strengthen the police cooperation. At the same time, it states that closer links between the European judicial authorities are needed to combat organised crime effectively which should take place by the establishment of Eurojust (European Union’s Judicial Cooperation Unit). A European Police College as well as a European Police

⁶¹ European Union, “EU treaties,” EU law, n.d., accessed 18 April 2020, https://europa.eu/european-union/law/treaties_en.

⁶² McGiffen, *The European Union. A Critical Guide* (1992), 5.

⁶³ *Ibid.*, 9-12.

⁶⁴ European Union, *Treaty of Amsterdam* (European Union, 2 October 1997), 8, accessed 19 April 2020, https://europa.eu/european-union/sites/europaeu/files/docs/body/treaty_of_amsterdam_en.pdf.

Chiefs Task Force were also planned.⁶⁵

Although the treaty provisions on the AFSJ do not deal centrally with the fight against terrorism, this is mentioned rather incidentally, the challenge of international terrorism nevertheless concerns the core of the AFSJ, given the fact that the EU's counter-terrorism strategy is mainly based on its JHA. The question therefore arises as to whether the 11 September crisis and the EU's response to it can be seen as an "opportunity for further integration", or whether it is much more likely to jeopardize the AFSJ's integration project by anti-terrorism measures with little democratic, social and legal legitimacy.

⁶⁵ Council of the European Union, *Action Plan of the Council and the Commission on How Best to Implement the Provisions of the Treaty of Amsterdam on the Area of Freedom, Security and Justice* (Council of the European Union, n.d.), accessed 17 April 2020, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A31999Y0123%2801%29> and European Parliament, *Tampere European Council 15 and 16 October 1999. Presidency Conclusions* (European Parliament, 1999), accessed 19 April 2020, https://www.europarl.europa.eu/summits/tam_en.htm.

5. European Experiences with Terrorism and the Fight Against it before 9/11

Before looking into the EU's policy changes as a reaction to the security threat of international terrorism, it is important to examine the historical experiences in the fight against terrorism in Europe in order to understand its relevance to post-9/11 developments.

Until the moment when the World Trade Center collapsed and the Pentagon was attacked, terrorism was on the security policy agenda in only a few European countries since most states had been pretty much spared from terrorist attacks.⁶⁶ The UK and Spain, which have seen comparatively many terrorist attacks by the Irish Republican Army (IRA) and Euskadi Ta Askatasuna (ETA), were an exception to this rule as well as Germany, Italy, France and Greece which were also confronted with terrorist attacks, but more on a temporary basis.⁶⁷ What these countries had in common, however, is that the respective terrorist groups pursued objectives at a national level.⁶⁸ For example, the IRA's action, was motivated by the desire for Northern Ireland to become independent from the UK, and ETA pursued the goal of a Basque state independent from Spain.⁶⁹ Beyond that, however, the experience of European countries with terrorism as well as its criminal law treatment were very diverse.⁷⁰

Despite these differences, the first attempts to conduct a common fight against terrorism were made as early as 1970. This was due to an increase in terrorist incidents by endemic groups as well as organisations from the Middle East, such as the Palestine Liberation Organization (PLO). Although the attacks continued to be motivated mostly by national interests, the various terrorist groups began to exchange information on the international level, leading the Member States to realise that the terrorist threat in Europe requires a common response.⁷¹ The desire for greater intergovernmental cooperation ultimately led to the establishment of the European Political Cooperation (EPC), which

⁶⁶ Van Leuwen, "Confronting Terrorism" (2003), 1.

⁶⁷ Bureš, *EU Counterterrorism Policy: A Paper Tiger?* (2011), 32f.

⁶⁸ Sulowski, "Counter-Terrorism: Correlating Security and Freedom" (2017), 11.

⁶⁹ Dermot Walsh, "Irish Experience and Perspectives," in *Confronting Terrorism*, ed. Marianne van Leuwen (The Hague/London/New York: Kluwer Law International, 2003), 39 and Fernando Reinares, "Democratization and State Response to Protracted Terrorism in Spain," in *Confronting Terrorism*, ed. Marianne van Leuwen (The Hague/London/New York: Kluwer Law International, 2003), 69.

⁷⁰ Clive Walker, "Policy Options and Priorities: British Perspectives," in *Confronting Terrorism*, ed. Marianne van Leuwen (The Hague/London/New York: Kluwer Law International, 2003), 19.

⁷¹ Bernhard Blumenau, "The European Communities' Pyrrhic Victory: European Integration, Terrorism, and the Dublin Agreement of 1979," *Studies in Conflict & Terrorism* 38, no. 5 (2014), 406, accessed 24 April 2020, <https://www-tandfonline-com.proxy-ub.rug.nl/doi/pdf/10.1080/1057610X.2014.893404?needAccess=true>.

focused on diplomatic efforts on the issue of state-sponsored terrorism.⁷²

In the mid-70s, the recognition grew that efforts in combating terrorism through existing international cooperation on UN level remained ineffective. The conviction emerged that a regional approach could achieve greater success and was followed by the development of an EC counter-terrorism policy.⁷³ At the European Summit in Rome in 1975, the Heads of State and Government agreed on a proposal to set up ministerial working groups to deal explicitly with the phenomena of violence and crime. Shortly after, the Ministers of JHA of the Member State came together for the first constituent meeting of the intergovernmental TREVI group with the aim of exchanging information on terrorist activities, extremist violence or arms smuggling. Efforts were also made to network national security authorities, to jointly train police officers as well as to strengthen aviation security. Formed under the auspices of the European Council, the TREVI group was, however, not implemented in the EC treaties and not properly institutionalised.⁷⁴ Thus, the cooperation was causing great difficulties due to a lack of a common ground in legal terms since each Member State had its own system for dealing with terrorists. The biggest problem was the extradition of terrorists who fled to another EC state, since countries could deny it if they were convinced that the accused had committed political crime.⁷⁵ As a result, France called for a specific agreement to meet this challenge and tried to achieve this by vetoing the negotiations in the Council of Europe for the *European Convention on the Suppression of Terrorism in the Council of Europe*. In order to get France to withdraw its veto for the adoption of the treaty, the EC states complied with France's request and put the objective of drawing up an extradition agreement between the EC countries on the agenda of the European Council meeting in 1976.⁷⁶

This was followed by long negotiations and discussions on the actual focus of the agreement. Both France and Great Britain submitted a draft text, which differed widely. Unlike Great Britain, which preferred an agreement focusing solely on the problem of terrorism, France called for a comprehensive extradition agreement that would include any crimes punishable by at least five years' imprisonment (*escape judiciaire*).⁷⁷ The

⁷² Bureš, *EU Counterterrorism Policy: A Paper Tiger?* (2006), 58.

⁷³ *Ibid.*

⁷⁴ Blumenau, "The European Communities' Pyrrhic Victory: European Integration, Terrorism, and the Dublin Agreement of 1979," (2014), 406.

⁷⁵ *Ibid.*, 406-407.

⁷⁶ *Ibid.*, 407.

⁷⁷ *Ibid.*, 407.

negotiations on the proposals caused a lot of frustration and tensions, not least because France had little insight and support for other proposals, such as one put forward by Belgium that suggested an agreement which obligate all EC Member States to apply the European Convention among each other.⁷⁸

After about two years of negotiations, however, France agreed to the Belgian proposal and signed the *Agreement Concerning the Application of the European Convention on the Suppression of Terrorism among the Member States*, also called Dublin Agreement, but only on condition that the French proposal remains a long-term objective.⁷⁹ However, the Dublin Agreement was soon redundant and never entered into force as by the late 1980s all EC Member States had adhered to the European Convention. Moreover, scepticism about France's proposal of *escape judiciaire* continued to grow, not least because the benefits of the judicial cooperation that France was calling for already existed within the Council of Europe.⁸⁰

Bernhard Blumenthal states that the negotiations of the Dublin Agreement were a "testimony" to the hopes that the EC had placed in political cooperation and at as well as a proof of the complexity of counter-terrorism policy. Moreover, instead of showing speed and unity, the countries fought over details, "that only too openly demonstrated the devastated state of the European integration project at the time." The threat posed by terrorism was not great enough for countries to give up their sovereignty over prosecution and extradition. This was mainly due to the different experiences that the countries have made with terrorism to date.⁸¹

However, the Maastricht Treaty with its intergovernmental JHA pillar and the establishment of Europol brought new impetus to cooperation in the field of justice and home security. Nevertheless, the cooperation was rather slow as Europol's activities were initially limited to operations within the framework of the European Drug Unit. Although other areas of activity were gradually added, the agency was not able to carry out all the activities attributed to it until Europol was ratified by all EC Member States in 1999.⁸² Progress in judicial cooperation between the Member States, however, has been more rapid: in the 1990s, the *Convention on Simplified Extradition Procedure between the Member States of the EU* and the *Convention Relating to Extradition between EU Member*

⁷⁸ Ibid., 408-409.

⁷⁹ Ibid., 415

⁸⁰ Ibid., 416

⁸¹ Ibid., 416-417.

⁸² Bureš, *EU Counterterrorism Policy: A Paper Tiger?* (2006), 59.

States of the EU created two legal instruments, which, inter alia, set a lower threshold for extraditable offences. This represents a further attempt at uniform application of the provisions on combating terrorism in the EU.⁸³ However, the call for approximation of criminal legislation, as already set out in the Maastricht Treaty, was taken up again in the *Vienna Action Plan*, in particular regarding the obligation to set up an AFSJ.⁸⁴ Nonetheless, progress in this political area has also been rather moderate. The EU special summit in Tampere in 1999 tried to accelerate it by setting new targets and deadlines for the implementation of policies on immigration, asylum, border control and police cooperation. Some of these plans, however, were actually put into practice before 9/11, but many very much later.⁸⁵ Oldřich Bureš concludes from the delays in ratifying the Europol Convention and other important anti-terrorism measures in the 1990s that the impact of 9/11 on the EU's fight against terrorism should not be "underestimated." Although awareness of the threat posed by terrorism grew over the years, the EU states have not been able to develop a genuine common EU anti-terrorism policy until 9/11.⁸⁶

⁸³ Ibid.

⁸⁴ European Union, *Action Plan on How Best to Implement the Amsterdam Treaty* (1999) (European Union, n.d.), accessed 25 April 2020, <https://op.europa.eu/en/publication-detail/-/publication/4565d7d8-b5e4-4b4e-87ce-5f5e7f641383/language-sl>.

⁸⁵ Bureš, *EU Counterterrorism Policy: A Paper Tiger?* (2006), 59-60.

⁸⁶ Ibid., 60.

6. How to Challenge International Terrorism in the EU

The preceding review of the EU's first attempts to establish a common counter-terrorism policy shows that many measures were already in the pipeline – “but their practical implementation was often painfully slow,” as Bureš observes.⁸⁷ Ironically, the European Parliament has criticised the sluggish response of Member States to the terrorist threat just a week before the 9/11 attacks. It made recommendations and called on the Council, inter alia, to adopt “a framework decision on the harmonisation of legislation and the creation of a European area of freedom, security and justice.”⁸⁸ Accordingly, den Boer sees the terrorist attacks in the U.S. just a few days after the European Parliament's warning as a “political window of opportunity” through which already existing agreements could sail.⁸⁹ Although the terrorist attacks of 9/11 did not take place in Europe, they still hit the European states hard as the ‘new’ international terrorism triggered questions about the European security policy.⁹⁰

6.1 The First EU Counter-Terrorism Responses After 9/11

The changing character of the terrorist threat was immediately thematised by the EU, calling the international terrorism an “evil” which could only be eliminated by joint action. The EU's joint declaration from 14 September 2001 reaffirmed the Union's solidarity with the U.S. and its promise to stand alongside America in the fight against international terrorism – a position that was already made clear by the EU Commission immediately on 12 September 2001, pointing out that “(i)n the darkest hours of European history, the Americans stood by us. We stand by them now.”⁹¹ Whereas this statement by then EU Commission President Prodi, however, saw the terrorist attacks primarily as an

⁸⁷ Ibid., 59.

⁸⁸ European Parliament, *European Parliament recommendation on the role of the European Union in combating terrorism (2001/2016(INI))* (European Parliament, 2001), accessed 1 June 2020, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52001IP0273>.

⁸⁹ Monica den Boer, “The EU Counter-Terrorism Wave: Window of Opportunity or Profound Policy Transformation?,” in *Confronting Terrorism. European Experiences, Threat Perceptions and Policies*, ed. Marianne van Leuven (The Hague/London/New York: Kluwer Law International, 2003), 195.

⁹⁰ Christian Kaunert and Sarah Léonard, “The collective securitisation of terrorism in the European Union,” *West European Politics* 42, no.2 (2019), 266, accessed 1 June 2020, <https://www.tandfonline-com.proxy-ub.rug.nl/doi/pdf/10.1080/01402382.2018.1510194?needAccess=true>.

⁹¹ European Union, *Joint Declaration by the Heads of State and Governments of the European Union, the President of the European Parliament, the President of the European Commission, and the High Representative for the Common Foreign and Security Policy* (European Union, 2001), accessed 1 June 2020, https://ec.europa.eu/commission/presscorner/detail/en/DOC_01_12 and European Commission, *Statement by President Prodi on the attacks against the United States* (European Commission, 2001), accessed 2 June 2020, https://ec.europa.eu/commission/presscorner/detail/en/IP_01_1265.

attack against the U.S., the joint declaration explicitly states that “these terrible attacks were also directed against us all, against open, democratic, multicultural and tolerant societies.”⁹² Recognising that international terrorism is also a threat to Europe’s security, the EU communicated “urgent decisions on how the European Union should respond to these challenges.”⁹³ This included, inter alia, the further development of the CFSP “with a view to ensuring that the Union is genuinely capable out clearly and doing so with one voice.”⁹⁴ This should be done as soon as possible, along with the acceleration of a “genuine European judicial area.”⁹⁵ The need for an operational and thus integrated EU in the fields of foreign and security policy as well as justice was made clear by the *Joint EU-U.S. Ministerial Statement on Combating Terrorism* from 20 September 2001, which promises citizens improved security measures, legislation and enforcement. This included cooperation between the EU and the U.S. in the following areas: Aviation and other transport security, Police and judicial co-operation (including extradition), Denial of financing of terrorism (including financial sanctions), Denial of other means of support to terrorists, Export control and non-proliferation, Border controls, including visa and document security issues, Law enforcement access to information and exchange of electronic data.⁹⁶

In order to be able to ensure active cooperation with the U.S. in these policy areas, all measures mentioned must of course also be applied within the EU. In its *Anti-Terrorism Roadmap*, the EU made clear what exactly this project would look like and how it was intended to be implemented in the EU Member States. The roadmap was related to the *Action Plan* which emerged at the Extraordinary Meeting of the European Council of 21 September 2001. In addition to solidarity and cooperation with the U.S., it provided for a) the intensification of police and judicial cooperation between all EU Member States, b) the further development of international legal instruments, c) the prevention of the financing of terrorism, d) the strengthening of aviation security and e) the overall action of the European Union.⁹⁷

⁹² European Commission, *Joint Declaration* (2001).

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ European Council, *Joint EU – U.S. Ministerial Statement on combating Terrorism, 20 September 2001* (European Council, 2001), accessed 2 June 2020, https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/declarations/Statement%20on%20combating%20terrorism%20en.htm.

⁹⁷ European Commission, *Conseil Europeen Extraordinaire De Bruxelles* (2001).

The actions listed were not only similar to the promises that the EU made to the U.S. in its common fight against terrorism, but also showed many parallels to the objectives that the EU Council had already adopted two years earlier at the special summit in Tampere. The reiterated calls for the already previously demanded mutual recognition of judicial decisions, better access to justice in Europe, greater convergence in civil law and the intensification of cooperation against crime point to inadequate implementation and realisation of the milestones on the road to an AFSJ.⁹⁸ An issue that was also thematised at the extraordinary session of the JHA Council on 20 September 2001, saying that “the seriousness of recent events has led the Union to speed up the process of creating an area of freedom, security and justice (...).”⁹⁹ The fact that the policy objectives and related measures adopted in Tampere have not yet been (fully) put into practice is also clear from the *Action Plan*, which states:

(T)he European Council instructs the Justice and Home Affairs Council (JHA Council) to implement as quickly as possible the entire package of measures decided on at the European Council meeting in Tampere.¹⁰⁰

New on the political agenda, however, apart from strengthening of airspace security, was the planned “Union’s involvement in the world.”¹⁰¹ This included the EU’s participation in efforts made by international organisations to “prevent and stabilise regional conflicts.” This approach was innovative to the extent that the conclusion of the European Council summit in Tampere targeted a cooperation with third countries only in the context of migration policy, but not in terms of a European foreign and security policy.¹⁰² In the eyes of the European Council, the development of the CFSP is necessary for the EU’s performance in the fight against terrorism, as the CFSP is the only way to act effectively: “The fight against the scourge of terrorism will be all the more effective if it is based on an in-depth political dialogue with those countries (...) in which terrorism comes into being.”¹⁰³ According to the *Anti-Terrorism Roadmap*, the cooperation with third countries and international organisations was intended to put in practice by e.g. supporting India in its proposal for a general convention against international terrorism within the UN as well

⁹⁸ European Parliament, *Tampere European Council 15 and 16 October 1999. Presidency Conclusions*, accessed 2 June 2020, https://www.europarl.europa.eu/summits/tam_en.htm.

⁹⁹ European Council, *Conclusions adopted by the Council (Justice and Home Affairs)* (European Council, 2001), accessed 3 June 2020, https://www.asser.nl/upload/eurowarrant-webroot/documents/cms_eaw_80_1_Concl.JHAcouncil.20.09.2001.pdf.

¹⁰⁰ European Commission, *Conseil Europeen Extraordinaire De Bruxelles* (2001).

¹⁰¹ *Ibid.*

¹⁰² European Parliament, *Tampere European Council 15 and 16 October 1999* (1999).

¹⁰³ European Commission, *Conseil Europeen Extraordinaire De Bruxelles* (2001).

as by implementing international conventions on terrorism. The latter was supposed to happen “as quickly as possible”.¹⁰⁴

A number of aspects at this stage of the analysis already indicate that the EU perceived the terrorist attacks in the U.S. as a threat that has to be taken seriously: The first indication becomes clear when looking at the time intervals between the attacks in the U.S. and the first proposals for EU action. It took only ten days to adopt the first EU policy document on the need for action in the fight against terrorism within the EU – which was certainly also due to the fact that, as mentioned earlier, many measures were already under discussion before 9/11 but were implemented only slowly or not at all. Nevertheless, in view of the EU’s reaction time in previous crisis moments, one can speak here of rapid policymaking.

The second aspect concerns the roadmap which not only listed measures to combat terrorism (unlike previous agreements), but also set a precise deadline for the measures’ implementations. The measures were assigned to the responsible EU Body and the actions that must be taken to comply with each measure were described. It thus represented an “ideal typical” roadmap which, due to the rather vaguely formulated *Action Plan*, necessarily provided the Member States with steps for implementation in order to fulfil the EU objectives in the fight against terrorism.¹⁰⁵ To what extent the measures described in the roadmap have actually been implemented by the Member States will be discussed at a later stage of the analysis.

Finally, the European Parliament voted, with only 45 votes against out of a total of 500 (21 abstentions), in favour for the Council’s resolution, which, among other things, explicitly called on Member States to “speed up the process of ratification and implementation of the existing conventions on terrorism, (...) so far ratified by only one Member State.”¹⁰⁶ The EU Parliament had thus once again expressed by a clear majority the need it felt to implement a policy for a common fight against terrorism. It even went one step further and called on the European Council to transfer the judicial and police cooperation to the first pillar, which would make it a supranational issue.¹⁰⁷ This was a demand, however, that was not complied in the roadmap. On the contrary, the European

¹⁰⁴ European Council, *Anti-Terrorism Roadmap* (2001).

¹⁰⁵ Bossong, “The Action Plan on Combating Terrorism: A Flawed Instrument of EU Security Governance” (2008), 37.

¹⁰⁶ European Parliament, *Extraordinary European Council – Brussels, 21 September 2001* (European Parliament, 2001), accessed 3 June 2002, <https://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+PRESS+DN-20011004-1+0+DOC+XML+V0//EN&language=EN>.

¹⁰⁷ *Ibid.*

Council considered the intergovernmental JHA Council to be responsible for, inter alia, the implementation of the already pre-9/11 discussed EAW and the establishment of a common list of terrorist organisations as well as the formulation of a definition of terrorism.

Furthermore, it is noticeable that besides the EU Commission, the European Council, the JHA Council and the Member States, EU agencies such as Eurojust, Europol and the Police Chiefs Task Force have been declared responsible. However, the tasks of the agencies established in the course of the summit in Tampere 1999 were primarily to bring together actors as well as to provide information on developments. Executive activities, such as setting up joint investigation teams or extending mechanisms for the automatic exchange of information, remained in the intergovernmental hands of the EU Council. In addition, the supranational bodies of the EU, the Commission and the Parliament, were attributed relatively few responsibilities, accounting for six out of 46 measures.¹⁰⁸

The intergovernmental focus set here is also reflected in the adopted *Council Common Position of 27 December 2001 on the application of specific measures to combat terrorism*. Although it states “that terrorism is a real challenge to the world and to Europe and that the fight against terrorism will be a priority objective of the European Union,” the document can be read more as an instruction to the Member States to act than as having legal implications for the development of the CFSP and a common justice and police force.¹⁰⁹ It merely states gently that “Member States shall, through police and judicial cooperation in criminal matters (...), afford each other the widest possible assistance in preventing and combating terrorist acts.”¹¹⁰ Similarly, the *European Union Framework Decision on Combating Terrorism* of 13 December 2002 merely states the objectives to be achieved by the Member States, but how they are to be achieved is up to them. Nevertheless, the document can be seen as an important instrument of the EU’s anti-terrorism policy, as it provides a common definition of terrorism acts – an indispensable basic requirement for the criminal prosecution of terror suspects in the EU. Accordingly, having regard to the proposal from the Commission, the European Council decided to classify offences as terrorist acts when they are committed either to a)

¹⁰⁸ European Council, *Anti-Terrorism Roadmap* (2001).

¹⁰⁹ European Council, *Council Common Position of 27 December 2001 on the application of specific measures to combat terrorism* (European Council, 2001), accessed 8 June 2020, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001E0931&from=EN>.

¹¹⁰ *Ibid.*

“seriously intimidating a population, or,” b) “unduly compelling a Government or international organization to perform or abstain from performing any act, or,” c) “seriously destabilizing or destroying the fundamental political, constitutional, economic or social structures of a country or an international organization.”¹¹¹ However, that the definition is approximated in all Member States is especially important for the effective implementation of the actions adopted in the *Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedure between Member States*. The document states that the “objective set for the Union to become an area of freedom, security and justice leads to abolishing extradition between Member States and replacing it by a system of surrender between judicial authorities.”¹¹² According to the European Council, this new system would have the advantage of removing the complexity and risks of delay inherent in the current extradition procedures as the country requested for extradition may not check the legality of the arrest warrant.¹¹³ This makes the EAW an important cornerstone in the implementation of judicial cooperation between the EU Member States – an aspect that will be further elaborated in the course of the thesis.

With the two framework decisions of 13 June 2002, the first two measures of the roadmap were implemented within a few months. However, it should be stressed once again that the ideas underlying the two documents can be traced back to the Council meeting in Tampere in 1999, which realized the concept of the AFSJ. Thus, 9/11, while not sowing new seeds in terms of a common definition of terrorism and the EAW, had exerted the necessary pressure to create the two important instruments in the European fight against terrorism as well as to promote the creation of the AFSJ.

However, not only the policies relating to the AFSJ, but also the EU’s CFSP has changed in the wake of 9/11. In addition to the EU-U.S. partnership in the fight against terrorism, the *NATO-EU Declaration on ESDP* as well as the *Berlin-Plus Arrangement* are important regarding the development of the CFSP. The two documents form the EU-NATO strategic partnership, stipulating that NATO remains the basis for the collective defence of its members, whereas the EU, however, is enabled to conduct crisis

¹¹¹ European Council, *Council Framework Decision of 13 June 2002 on combating terrorism*, accessed 9 June 2020, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002F0475&from=EN>.

¹¹² European Council, *Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedure between Member States* (European Council, 2002), accessed 9 June 2020, https://eur-lex.europa.eu/resource.html?uri=cellar:3b151647-772d-48b0-ad8c-0e4c78804c2e.0004.02/DOC_1&format=PDF.

¹¹³ *Ibid.*

management operations independently in the course of its Security and Defence Policy. The partnership was decided with the aim of reducing conflicts of competence between NATO and the EU as well as of cooperating in the fight against terrorism.¹¹⁴

Nonetheless, the invasion of Iraq by the U.S. Army led to a conflict between NATO Member States – and between European states. While Europe was still united on the side of the U.S. in the wake of the terrorist attacks, the 11 September attitudes in the George W. Bush administration’s policy towards Iraq became a rift for Europe. While states such as the UK, Spain, Italy and Poland advocated the "War on Terror" in Iraq, Germany and France pleaded for a peaceful solution. Additionally, without having informed the EU beforehand, then British Prime Minister Tony Blair went to the side of the U.S. President George W. Bush in spring 2002.¹¹⁵ Likewise, without EU consultations, then German Chancellor Gerhard Schröder promised his voters his ‘No’ to any military intervention in Iraq in early August.¹¹⁶ By doing so, both violated the preamble of the Amsterdam Treaty, which states that the EU wants to pursue a CFSP.¹¹⁷ To this end, the EU Member States want to combine their national policies to form a European position in order to be able to speak with one powerful voice in international institutions.¹¹⁸ However, this intention was not taken into account by the states in the Iraq question.

In order to resolve the EU’s internal crisis by the EU states committing themselves to a consensus on security policy, the Council adopted the *European Security Strategy* (ESS).¹¹⁹ The then High Representative for the EU’s CFSP, an office introduced by the Treaty of Amsterdam, was given the task of formulating an ESS in summer 2003. The strategy, entitled “A Secure Europe in a Better World”, was adopted by the European Council in December 2003. For the first time in the EU’s history, the European security

¹¹⁴ EUR-Lex, *Cooperation with NATO* (EUR-Lex, n.d.), accessed 10 June 2020, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:l33243&from=EN> and European Parliament, *Berlin Plus agreement* (European Parliament, n.d.), accessed 22 June 2020, https://www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/berlinplus_/berlinplus_en.pdf and NATO, *The NATO-EU Strategic Partnership*, accessed 22 June 2020, <https://www.nato.int/docu/comm/2004/06-istanbul/press-kit/006.pdf>.

¹¹⁵ The White House, “President Bush, Prime Minister Blair Discuss War on Terror,” News & Policies, 2003, accessed 22 June 2020, <https://georgewbush-whitehouse.archives.gov/news/releases/2003/07/20030717-9.html>.

¹¹⁶ Deutscher Bundestag, “Historische Debatten (15): Der Irak-Konflikt,” Textarchiv, n.d., accessed 22 June 2020, https://www.bundestag.de/dokumente/textarchiv/35190802_debatten15-205952.

¹¹⁷ European Union, *Treaty of Amsterdam* (1997), 8.

¹¹⁸ *Ibid.*, 10.

¹¹⁹ European Council, *European Security Strategy*, (European Council, 2003), accessed 10 June 2020, <http://data.consilium.europa.eu/doc/document/ST-15895-2003-INIT/en/pdf>.

environment was analysed and “key security challenges and subsequent political implications for the EU” were identified.¹²⁰ The document clearly classifies terrorism as the main threat to Europe, as well as weapons of mass destruction, regional conflicts, failed states and organised crime.¹²¹ These threats would call for stability, good governance in the EU’s immediate neighbourhood and the strengthening of a world order based on multilateralism: “The development of a stronger international society, well-functioning international institutions and a rule-based international order is our objective.”¹²² According to the EU, relations with the U.S. are indispensable in this context (but not, however, in the sense of U.S. dominance), as are relations with Japan, China, Canada and India.¹²³ In order to guarantee European security, the document sees the EU’s range of tasks in humanitarian rescue missions, peacekeeping tasks and combat operations in crisis management.¹²⁴ In order to realize all these initiatives, however, it requires a “common threat assessment” as well as “improved sharing of intelligence among Member States”, as stressed in the document.¹²⁵ The final part of the joint strategy sets out the options for action available to the EU if it wants to play an active role in shaping the world order: the EU should be able to conduct several Common Security and Defence Policy operations simultaneously and also be able to intervene in an early and robust manner. Flexibility and mobility were two points of reference which the European armed forces would have to follow in the future. The *ESS*, which at first glance looks like a tool to deepen the CFSP, is, however, dependent on the *Berlin-Plus Arrangement*, which in turn makes the EU’s Security and Defence Policy heavily dependent on NATO.¹²⁶ For example, the agreement stipulates that NATO has the prerogative to intervene in conflicts. In addition, the EU needs NATO’s capabilities to carry out its own missions – factors which do not exactly speak in favour of an autonomous and independent foreign and security policy.¹²⁷

Furthermore, it must be stressed that here again the argument can be made that the 9/11 security crisis merely acted as a push factor and not as an initiator of a new

¹²⁰ European Union External Action, “Shaping of a Common Security and Defence Policy,” (EEAS, 2016), accessed 10 June 2020, https://eeas.europa.eu/topics/common-security-and-defence-policy-csdp/5388/shaping-of-a-common-security-and-defence-policy-_en.

¹²¹ European Council, *European Security Strategy* (2003), 5-7.

¹²² *Ibid.*, 9-10, 11.

¹²³ *Ibid.*, 16.

¹²⁴ *Ibid.*, 11.

¹²⁵ *Ibid.*, 14.

¹²⁶ *Ibid.*

¹²⁷ EUR-Lex, *Cooperation with NATO* (2002).

approach. Accordingly, the *Berlin-Plus Arrangement* was anything but a direct reaction to the terrorist attacks of 11 September. In fact, the cooperation between NATO and the EU dated back to the conflicts in the Western Balkans in the mid-1990s. The foundation for cooperation between the two organisations was not laid with the *Berlin-Plus Arrangement*, but at the NATO summit in Washington, D.C. in 1999 and the European Council in Nice in 2000.¹²⁸ The Treaty of Nice, which was already signed in February 2001 and introduced the Common Security and Defence Policy as part of the CFSP, states that the EU

shall respect the obligations of certain Member States, which see their common defence realised in the North Atlantic Treaty Organisation (NATO), (...) and be compatible with the common security and defence policy established within that framework.¹²⁹

Moreover, the *ESS* indeed provided a toolbox for the EU's security – but only for external terrorist threats. For internal security within the EU, the *Action Plan* and its associated roadmap served as a basis. However, the insight that “no single country is able to tackle today's complex problem on its own” and that the “strengthening of mutual solidarity of the EU makes us a more credible and effective actor”, as stated in the *ESS*, sounds good in theory, but looked different in practice.¹³⁰ The *Action Plan* and its related policy papers and framework decisions has had serious implementation problems, causing hazardous security gaps. It is therefore not surprising that the European Member States failed with their anti-terrorism policy to prevent the terror attacks in Madrid in 2004. The reasons for this drastic failure can be partly found in the fact that many EU Member States did not feel too strictly bound to the EU counter-terrorism policy. This can certainly be attributed to the rapid policymaking in response to 9/11, which partly took place without “sufficient support among publics and parliamentarians in the EU Member States”, as Bureš and Bossong observe. Reasons may be given that a high degree of policy ambiguity is directly linked to “more diverse and less ‘binding’ forms of implementation.”¹³¹ Such policy ambiguity becomes visible when looking at the comprehensive scope of the 46 measures in the roadmap from which many were very broad formulated such as ensuring the better coordination between Europol, Eurojust and the Police Chiefs Task Force or examining

¹²⁸ Ibid.

¹²⁹ European Union, *Treaty of Nice* (European Union, 2001), 7, accessed 10 June 2020, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12001C/TXT&from=EN>.

¹³⁰ European Council, *European Security Strategy* (2003), 3.

¹³¹ Bossong, “The Action Plan on Combating Terrorism: A Flawed Instrument of EU Security Governance” (2008), 32.

measures to be adopted in the field of civil protection.¹³² The *Action Plan* was missing a specialized focus since some of the measures listed in the roadmap were not directly linked to terrorism, such as establishing a network for exchanging information on visas issued.¹³³ In this context, the institutional problem of the rotating presidency of the Council should also be mentioned, since each country currently holding the presidency sets different priorities and thus strongly influences the policy direction. For example, the Spanish Presidency from January 2002-June 2002, unlike the previous Belgian Presidency, placed the focus of the JHA on illegal migration policy which has had a large impact ranging from anti-terrorism legislation to legislation on immigration and asylum, including visa policy and border controls. As each Presidency only lasts six months, there is not much time to fully implement their respective agendas, which may mean that the objectives set do not coincide with the agenda of the following Presidency and are therefore not pursued in a focused manner.

However, the implementation problem can also be explained with the institutional limitations of the EU as the EU could not impose top-down decisions as well as hierarchical control by EU institutions were impossible. After all, police and judicial cooperation in criminal matters as well as foreign and security policy were still policy areas that were in the hands of the Member States and were thus solved intergovernmentally. This made the *Action Plan* more of a symbol, showing the EU's good will to stand together in the fight against terrorism than being a powerful tool.

Finally, it certainly also played a role that many Member States did not consider the terrorist threat perceived by 9/11 to be all too serious due to the geographical distance from the U.S. However, this changed immediately with the terrorist attacks in Madrid in 2004 and in London one year later, as the terrorist threat was suddenly very close and clearly discernible.

6.2 After London and Madrid – New Approaches or Old Demands?

The threat posed by the international terrorist groups was felt first-hand by Europeans with the attack on Madrid's public transport system on 11 March 2004 which killed hundreds of innocent civilians. What was new here was not only that international terrorism took place in Europe for the first time after 9/11, but also that the assassins were

¹³² European Council, *Anti-Terrorism Roadmap* (2001), 4 and 10.

¹³³ European Council, *Anti-Terrorism Roadmap* (2001), 9.

part of a “sleeper cell” of Al Qaeda, the international terrorist network that is held responsible for the attacks by the U.S.¹³⁴

The EU quickly recognized the need to respond – unlike after 9/11 – in a coordinated way. However, this would not be done through new policy plans, but through the implementation of already existing instruments:

The Commission does not believe that the right answer to these attacks is proposing new legal instruments or new institutions. First, because most of the legislative and institutional framework is proposed or in place and simply needs to be approved and/or implemented on the ground. Second, because we cannot afford to wait for long legislative procedures to give answers to such atrocities. Priority is now on coordinating operational action.¹³⁵

The “improved operational coordination and cooperation” is highlighted as a decisive instrument for success in the European fight against terrorism. The European Commission points out that the implementation of legislative measures to combat terrorism has been “slow, poor and insufficient” – a statement that shows that the EU came to its senses on its failure of preventing European soil from international terrorism.¹³⁶ According to the EU Commission, it was of the highest priority that the five Member States that have not taken the necessary measures to issue the EAW do so without delay. Already at this point, a significant change can be seen as the EU Commission announced that it intended to monitor the matter in cooperation with Eurojust. The same applied to the implementation of the *Framework Decision on Combating Terrorism*, which ensures that the definition of terrorist crimes is similar throughout the Union, and “to set common minimum maximum sentences applicable to these atrocious crimes.”¹³⁷ The Commission was planning to report the shortcomings in the implementation of certain Member States to the European Council. In addition, the EU Commission’s action paper stipulated that the Member States were now obliged to provide evidence of the implementation of certain framework decisions, such as those concerning the execution of orders to freeze property or evidence in the European Union by a set deadline.¹³⁸

The measures demanded by the EU Commission as well as the *Declaration on Combating Terrorism*, formulated by the European Council on 25 March 2004, are just

¹³⁴ European Commission, *European Commission action paper in response to the terrorist attacks on Madrid* (European Commission, 2004), accessed 12 June 2020, https://ec.europa.eu/commission/presscorner/detail/en/MEMO_04_66.

¹³⁵ Ibid.

¹³⁶ Ibid.

¹³⁷ Ibid.

¹³⁸ Ibid.

as extensive as the adopted *Action Plan* after 9/11. Nonetheless, the 18-page declaration also mainly emphasizes the need for the full implementation of all measures adopted so far, rather than it presents new instruments or approaches. The only new items on the political agenda are the plan to improve the exchange of information on anti-terrorism between the Member States, the plan to strengthen border controls and the introduction of a counter-terrorism co-ordinator who will work within the Council Secretariat. Its task is in particular to “maintain an overview of all the instruments at the Union’s disposal with a view to regular reporting to the Council and effective follow-up of Council decisions.”¹³⁹ Also new, and of particular importance, specifically in terms of legal legitimacy, is *Directive 2004/82/EC*, adopted by the Council on 29 April 2004, which requires carriers to transfer passenger data. *Regulation (EC) 2252/2004* also introduced a new measure: the introduction of security features and biometric data in passports, such as fingerprints. However, especially the plans developed for improved exchange of information between the secret services of the Member States make it clear that there was still a lack of mutual trust.

This issue should be tackled with a revision of the *Action Plan*. The new *EU Plan of Action on Combating Terrorism*, adopted on 25 March 2004, replaced the *Anti-Terrorism Roadmap* and was intended to enhance the Member States’ capacities to support the objectives of the *EES*. Also in view of the *Declaration On Solidarity Against Terrorism*, in which the Member States agreed to a common fight against terrorism with all their available means, the new strategic objectives of the plan included, inter alia, “to deepen the international consensus and enhance international efforts to combat terrorism.”¹⁴⁰ Moreover, “the capacity within EU bodies and member states to detect, investigate and prosecute terrorists and to prevent terrorist attacks” is aimed to maximise.¹⁴¹

At first glance, the revised *Action Plan on Terrorism* looks very similar to the previous roadmap. It also lists competent bodies envisaged for a measure as well as a deadline for completing the action. However, on closer inspection, some innovations can be identified. For instance, a new column for describing the status of an action has been added. In this way it can be easily determined in which Member States the implementation

¹³⁹ European Council, *Declaration on Combating Terrorism* (European Council, 2004), 13, accessed 12 June 2020, <https://icare4all.org/wp-content/uploads/2018/10/Declaration-on-combating-terrorism.pdf>.

¹⁴⁰ European Council, *EU Plan of Action on Combating Terrorism* (European Council, 2004), 5, accessed 12 June 2020, <https://www.eumonitor.eu/9353000/1/j9vvik7m1c3gyxp/vi7jgsy4c6vl>.

¹⁴¹ *Ibid.*

of measures is still missing. Overall, the plan appears much more orderly than the roadmap. Firstly, because the individual measures and actions are assigned to the respective objectives of the *EU Plan of Action on Combating Terrorism*, which makes the intention behind the measures clearer. Secondly, because the measures are assigned to the respective political decisions. Due to the fast and hectic policymaking after 9/11, it was difficult to keep track of the different declarations and framework decisions. The revised action plan provides clarity by adding information on when and by whom the respective measure was decided. The EU also seems to have learned its lesson in terms of deadlines, as the word ‘urgent’ which was often used in the roadmap, can no longer be found. Instead, the month and year are now mostly mentioned as deadlines, both for the adoption of a measure and for its implementation.

Of particular note is the fact that while in the old roadmap the Member States were still largely responsible for the implementation of the measures, in the revised *Action Plan* the European Commission is increasingly listed as the competent body. For instance, it is responsible for the exchange of information and intelligence between law enforcement authorities of the Member States – a competence that was previously attributed to the European Council. Nevertheless, the action plan is and remains a comprehensive political project whose implementation remains primarily in the hands of the Member States.

The focus of action can still be found in the area of JHA policy, inter alia, by strengthening common institutions as Eurojust and Europol and networking national databases. What is new is that the EU no longer excludes military action against terrorism and its supporting states: “The revised Plan of Action (...)recall(s) that (...) Member States agreed to act jointly and mobilise all available means, including military resources, if one of them is victim of a terrorist attack.”¹⁴² Nonetheless, the measures listed in the action plan show that it continues to regard terrorism as a specific form of crime to which the primary response is crime prevention and law enforcement by police and judicial authorities.

In order to implement the ‘old’ objective in the ‘new’ action plan, “to enhance the capability of the European Union and its member States to deal with the consequences of a terrorist attack,” the EU has established a new institution in the field of a European security and defence policy: the European Defence Agency (EDA).¹⁴³ Its objectives are to develop effective defence capabilities and to coordinate the armaments activities of the

¹⁴² Ibid.

¹⁴³ Ibid.

Member States and possible joint purchases of weapons. However, the agency cannot be considered as a supranational EU institution by virtue of its decision-making body, the Steering Committee. In addition to the High Representative as Chairman of the Ministries of Defence, the Steering Committee is composed of all EU Member States and is in turn subject to the guidelines of the European Council.¹⁴⁴ This applies both to the guidelines for the Agency's activities and the financial framework, which will be determined by the Council acting unanimously.¹⁴⁵

However, the EU was expanding its cooperation in security matters not only between its Member States, but also beyond its borders – following the objectives of the *EES*.¹⁴⁶ Thus, the *European Neighbourhood Policy* (ENP) was launched in May 2004 with the aim of establishing a “ring of countries, sharing the EU's fundamental values and objectives” around the EU.¹⁴⁷ The EU saw the necessity for this, especially after the EU Eastern enlargement in May 2004. Under this foreign policy instrument, however, the EU works closely with its neighbours to promote security, stability and prosperity. To accomplish this, the EU defines specific areas for action in its strategy paper, inter alia, political dialogue, justice and home affairs, transport and information society – “integrating related components from all three ‘pillars’ of the Union’s present structure.”¹⁴⁸ The *ENP* is thus a political instrument that not only transforms the EU’s foreign policy into a ‘soft power’, but can also help to implement the objectives of the *ESS* in the area of JHA through, for example, the fight against organised crime and money laundering.

Speaking of powers, however, the first tactics of ‘hard powers’ were also emerging. The EU's first military mission was Operation Concordia, which was designed to monitor the *Ohrid Framework Agreement* in the former Republic of Macedonia. The mission began in 2003 and was based on the so-called *Berlin-plus Arrangements* between NATO and the EU.¹⁴⁹ However, the EU is not only carrying out missions related to NATO, but also cooperates with the UN, such as in the Operation Artemis in Congo in

¹⁴⁴ European Council, *Council Joint Action 2004/551/CFSP of 12 July 2004 on the establishment of the European Defence Agency* (European Council, 2004), 1, accessed 13 June 2020, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004E0551&from=DE>.

¹⁴⁵ *Ibid.*, 3.

¹⁴⁶ European Commission, *European Neighbourhood Policy* (European Commission, 2004), 2, accessed 14 June 2020, https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/2004_communication_from_the_commission_-_european_neighbourhood_policy_-_strategy_paper.pdf.

¹⁴⁷ *Ibid.*, 19.

¹⁴⁸ *Ibid.*, 3 and 6.

¹⁴⁹ NATO, *The NATO-EU Strategic Partnership* (n.d.), 5.

2004 with the aim of improving the security situation and supporting UN soldiers on the ground.¹⁵⁰ Another important partner to the EU is the OSCE, which is only present in its participating states and Kosovo.¹⁵¹

As a further military instrument, the EU introduced the so-called Battle Groups. The idea can be traced back to a meeting of the EU Council in 1999. The implementation of such an EU Rapid Reaction Force, however, had long been lacking and was given new impetus with the *Headline Goal 2010*, a military capability that was set by the European Council in June 2004. The aim was to create non-permanent military combat units which, depending on its mission, are composed of elements of different types of troops. The composition of the forces is usually multinational, i.e. the individual elements are reported by several nations. The armed forces are under the direct control of the European Council. Possible places of intervention are countries that have collapsed or are affected by state failure, with the aim of separating the conflict parties from each other to deepen the peace process.¹⁵² However, it is important to stress at this point that the Battle Groups cannot be considered as an EU army, nor as a contender to the NATO Response Forces. Rather, they are designed as a ‘fire brigade’ for acute humanitarian emergencies. The forces designated for such operations shall remain within their respective missions and shall be placed under the authority of the National Command only in the event of an EU operation, under the authority of the military operation commander.¹⁵³ Nevertheless, the establishment of the EU Rapid Reaction Force has increased the EU’s active ability to act while being a crucial step towards the achievement of the *ESS*’ objective of regional conflict prevention. Thus, the first slight contours of an EU security architecture were beginning to emerge.

In order to further deepen the CFSP as well as defence policy developed to date, a strong desire for reform emerged, particularly with regard to the EU’s institutional foundations. In June 2004, the European Constitutional Treaty was adopted by the European Council, which attempted to define the powers of the EU to its Member States

¹⁵⁰ European External Action Service, “Artemis/DRC,” Missions and operations, 2015, accessed 22 June 2020, http://www.eeas.europa.eu/archives/csdp/missions-and-operations/artemis-drc/index_en.htm.

¹⁵¹ OSCE, “The European Union,” Partnerships, n.d., accessed 22 June 2020, <https://www.osce.org/partnerships/european-union>.

¹⁵² European Parliament, *Headline Goal 2010* (European Parliament, 2004), accessed 13 June 2020, https://www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/sede110705headlinegoal2010_/sede110705headlinegoal2010_en.pdf.

¹⁵³ *Ibid.*, 2.

and the roles of European institutions.¹⁵⁴ The treaty stated the expansion of the internal coordination mechanisms as well as the reduction of the veto possibilities of individual Member States in order to keep the EU capable of acting after the 2004 Eastern enlargement.¹⁵⁵ Furthermore, the rights of the European Parliament were to be strengthened in order to increase democratic legitimacy of the EU.¹⁵⁶ A further innovation of the Constitutional Treaty was the newly established Council of Foreign Ministers and the office of EU Foreign Ministers.¹⁵⁷ This should solve the problem that has existed up to now in the coordination of the EU's foreign policy: the lack of cooperation between governments, because they often took decisions on their own authority without at least informing their partners.¹⁵⁸ The EU Foreign Ministers should then be subordinated to the newly created European External Action Service (EEAS).¹⁵⁹ However, before the treaty could enter into force, it had to be ratified by all EU Member States. This was a step on which the reforms sought by the treaty ultimately failed, as the treaty was rejected in referenda in France and the Netherlands.¹⁶⁰

The failed entry into force of the treaty was followed in November by *The Hague Programme*. As the successor to the Tampere Programme, it set the guidelines for the common policies of the European Union in areas such as the legal framework, migration, and the fight against crime and terrorism for the period from 2005 to 2010. The development of an AFSJ remains in focus since not all original aims has been achieved yet.¹⁶¹ With reference to the 9/11 attacks as well as the Madrid bombings, the European Council stresses that the prevention and suppression of terrorism will be a “key element in the near future.”¹⁶² In this context, the Council also noted the failure to implement measures adopted under the Tampere programme and concludes: “The evaluation by the Commission of the Tampere programme showed a clear need for adequate and timely

¹⁵⁴ Official Journal of the European Union, *Treaty Establishing a Constitution for Europe*, 47 (2004), 20-23, accessed 14 June 2020, http://publications.europa.eu/resource/cellar/7ae3fd7e-8820-413e-8350-b85f9daaab0c.0005.02/DOC_1.

¹⁵⁵ *Ibid.*, 27 and 29.

¹⁵⁶ *Ibid.*, 25.

¹⁵⁷ *Ibid.*, 29-30.

¹⁵⁸ *Ibid.*, 143.

¹⁵⁹ *Ibid.*, 140.

¹⁶⁰ European Parliament, “Draft Treaty establishing a constitution for Europe (not ratified),” About Parliament, n.d., accessed 14 June 2020, <https://www.europarl.europa.eu/about-parliament/en/in-the-past/the-parliament-and-the-treaties/draft-treaty-establishing-a-constitution-for-europe>.

¹⁶¹ European Council, *The Hague Programme: Strengthening Freedom, Security and Justice in the European Union* (European Council, 2005), 1, accessed 14 June 2020, <https://www.easo.europa.eu/sites/default/files/public/The-Hague-Programme.pdf>.

¹⁶² *Ibid.*

implementation and evaluation of all types of measures in the area of freedom, security and justice.”¹⁶³ Terrorism, unlike in the Tampere Programme, is listed as a separate issue which fight against it requires, according to the document, the full implementation of all measures listed in the action plan.¹⁶⁴

That the implementation of measures in the fight against terrorism, as criticised in *The Hague Programme*, is still lacking six months later, is once again clearly demonstrated to the EU by the so-called 7/7 London bombings. The series of terrorist attacks committed by British citizens on the London Underground on 7 July 2005 prompted the EU to draw up a renewed anti-terrorism strategy. However, the *European Union Counter-Terrorism Strategy*, adopted by the European Council in December 2005, is not providing great innovations, but rather insists on strengthening the measures and proposals already adopted. The strategy, however, created a uniform framework for precisely those measures, constituting the fight against terrorism at three levels: international, European and national. Based on four pillars – prevent, protect, pursue and respond, the EU wants to “combat terrorism globally while respecting human rights, and make Europe safer, allowing its citizens to live in an area of freedom, security and justice.”¹⁶⁵ In particular the first pillar, which is aiming with its activities “to prevent people turning to terrorism,” is showing the EU’s new approach in the fight against terrorism.¹⁶⁶ The increased focus on combating radicalisation and recruitment to terrorism is not surprising against the background that both bombings in London and Madrid had been executed by so-called ‘home-grown terrorists’, citizens who commit terrorist attacks in their own countries against their fellow citizens. The issue of domestic terrorism is to be tackled through a very ambitious agenda, which together with the *Action Plan for Combating Radicalisation and Recruitment into Terrorism*, provides activities to “counter methods, propaganda and conditions through which people are drawn into terrorism.”¹⁶⁷ However, according to the strategy, this challenge has to be tackled primarily by the Member States, at the national, regional and local level. The EU’s work in this field lies in providing support for the coordination of national policies and sharing information. Whereas Member States have the primary responsibility for combating

¹⁶³ Ibid.

¹⁶⁴ Ibid., 8.

¹⁶⁵ European Council, *The European Union Counter-Terrorism Strategy* (European Council, 2005), 3, accessed 15 June 2020, <https://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2014469%202005%20REV%204>.

¹⁶⁶ Ibid.

¹⁶⁷ Ibid., 7.

terrorism, the EU can merely add value by a) strengthening national capabilities, b) facilitating European cooperation, c) developing collective capability and d) promoting international partnership.¹⁶⁸

The situation is different with the second pillar – protection. Although a division of responsibilities is here also clearly visible, the strategy emphasises that “the interdependency of border security, transport and other cross-border infrastructures require effective EU collective action.”¹⁶⁹ In order to provide greater assurance to the European citizens, the new European Borders Agency (Frontex) is responsible for strengthening controls and surveillance at the EU’s external borders. The Visa Information System (VIS) and a second generation of the Schengen Information System (SIS) are to be established for the exchange of information, supporting police and judicial cooperation and managing external border control. Another new instrument envisaged by the strategy and which is supposed to promote the cooperation between the Member States is the introduction of the European evidence warrant (EEW). Building on the EAW, the EEW as a judicial decision enables objects, documents and data from other Member States to be confiscated in criminal proceedings.¹⁷⁰

The fourth pillar, respond, focuses on EU crisis management operations, employing military and civilian assets. Here the responsibility clearly falls to the EU, which states: “The ability of the EU to take consistent or collective action will also be essential to an effective and efficient response.”¹⁷¹ Nevertheless, the Member States have the leading role in “providing the emergency response to a terrorist incident on their territory.”¹⁷²

Moreover, it is striking that the key priorities of the strategy continue to call for the development, implementation and ratification of measures and contracts that have been already adopted – an indicator that even the attacks on European soil were not yet threatening enough for some Member States to surrender their sovereignty in certain policy areas, especially in JHA, to the EU. In order to address this issue in a more targeted manner and to advance cooperation in the common fight against terrorism, the EU introduced a ‘high-level political dialogue on counter-terrorism’, meaning a meeting of

¹⁶⁸ Ibid., 4.

¹⁶⁹ Ibid., 10.

¹⁷⁰ EUR-Lex, *European arrest warrant (EAW)* (EUR-Lex, n.d.), accessed 15 June 2020, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:jl0015&from=EN>.

¹⁷¹ European Council, *The European Union Counter-Terrorism Strategy* (2005), 15.

¹⁷² Ibid.

the European Council, the Parliament and the Commission once per Presidency “to ensure inter-institutional governance.”¹⁷³ Furthermore, COREPER, the committee of Permanent Representatives in the EU, monitors the progress on the strategy on a regular basis and in active dialogue with the Counter-Terrorism Co-ordinator and the Commission. It is important to stress that the political oversight role belongs to the intergovernmental European Council.¹⁷⁴

However, as the bombings in Madrid and London have shown, the EU’s response to the attacks has not changed fundamentally. Neither the *EU Plan of Action on Combating Terrorism* nor *The European Union Counter-Terrorism Strategy* contained any significant new approaches, but rather called for the full implementation of the measures taken by the EU after 9/11. This has been, however, partly successful – for example, the *ENP* has made an important contribution to the development of a common foreign and security policy. The European Constitutional Treaty can also be considered a partial success despite its failure in ratification. In response to the terrorist threat in Europe since 9/11, it called for a deeper European integration in the foreign, security and defence policy – and was thus paving the way for a comprehensive institutional reform of the EU through the Lisbon Treaty.

6.3 The Lisbon Treaty – Signpost for the Future?

The Lisbon Treaty, which came into force in 2009, stemmed from the constitutional project launched at the end of 2001 and put an end to years of political wrangling, compromise and consideration of national reservation.¹⁷⁵ The period of reflection on the future of Europe, which the EU declared after the rejection of the Constitutional Treaty in order to reconnect citizens with the European project, was over. However, from its signing in 2007 until its final ratification in all 27 EU Member States, there was not only a lot of dispute within the Community, but also within the countries themselves, inter alia, with two referenda having to be held in Ireland.¹⁷⁶ This is not surprising in view of the numerous personnel and legal changes that the treaty brought with it – especially when

¹⁷³ Ibid., 5.

¹⁷⁴ Ibid.

¹⁷⁵ European Parliament, “The Treaty of Lisbon,” Fact Sheets on the European Union, February 2020, accessed 19 June 2020, <https://europarl.europa.eu/factsheets/en/sheet/5/vertrag-von-lissabon>.

¹⁷⁶ Eurobarometer, *Lisbon Treaty Referendum Survey Ireland 2009* (Eurobarometer, 2009), 5, accessed 22 June 2020, https://ec.europa.eu/commfrontoffice/publicopinion/flash/fl_265_en.pdf.

one considers that the attempt at reform through the European Constitutional Treaty already failed.

As mentioned elsewhere in this paper, the EU's political system has previously been based on the so-called 'three pillars': the European Communities, the CFSP and the police and judicial cooperation in criminal matters. In contrast to the political affairs of the first pillar, which were decided on a supranational level by the majority principle in the European Council and with the participation of the European Parliament, the second and third pillars were organised on an intergovernmental level. The principle of unanimity was applied, and the EU Parliament had no say.¹⁷⁷ The EU was thus only active as an umbrella organisation. Consequently, especially in the CFSP, the EU could not act as an independent institution, but always only in the form of its individual Member States.

This pillar model was dissolved by the Lisbon Treaty and the EU took over the legal entity of the European Communities, enabling it to conclude international agreements on its own responsibility. In addition, the supranational decision-making procedures as well as the participation of the European Parliament were introduced for the police and judicial cooperation in criminal matters, which had previously only applied to the European Communities.¹⁷⁸ At the same time, the police and judicial cooperation in criminal matters was split into two new areas, namely the police cooperation (PC) and the judicial cooperation in criminal matters (JCCM).¹⁷⁹ Together with the policy areas of border controls, asylum and immigration, they serve the overall concept of the AFSJ.¹⁸⁰

According to the Lisbon Treaty, the EU intends to develop common policies in these areas. In the medium term, these are to become an integrated system of overall protection, a common European asylum system with a uniform asylum status and common procedures as well as a common European-wide management of migration flows.¹⁸¹ This already shows that responsibilities of the EU in the policy area of AFSJ have been considerably extended by the treaty. A further indicator of this can be found in the first chapter on the general provisions on the AFSJ: Article 61H allows the Union to establish a legal framework for the freezing of funds and assets by regulations in order to

¹⁷⁷ European Parliament, *The Maastricht and Amsterdam Treaties* (European Parliament, 2020), accessed 22 June 2020, https://www.europarl.europa.eu/ftu/pdf/en/FTU_1.1.3.pdf.

¹⁷⁸ European Union, *Treaty of Lisbon. Amending the Treaty on European Union and the Treaty Establishing the European Community* (European Union, 2007), 64, accessed 16 June 2020, http://publications.europa.eu/resource/cellar/688a7a98-3110-4ffe-a6b3-8972d8445325.0007.01/DOC_19.

¹⁷⁹ *Ibid.*, 63-64, 67.

¹⁸⁰ *Ibid.*, 57.

¹⁸¹ *Ibid.*, 60-62.

combat terrorism.¹⁸² In the area of judicial cooperation in civil matters, Article 65 emphasises the principle of mutual recognition of judicial and extrajudicial decisions. It also expressly permits measures for legal harmonisation. In addition to the catalogue of competences, the securing of effective access to law, the development of alternative dispute resolution methods and the further training of judges and judicial staff have been added.¹⁸³ The mutual recognition of judicial decisions and the approximation of the laws of the Member States have now also been made the basis for judicial cooperation in criminal matters by Article 69a.¹⁸⁴ Accordingly, the EU institutions are empowered to take such measures to ensure this mutual recognition and to make proposals on the admissibility of evidence, the rights of defendants and the rights of victims.¹⁸⁵ In addition, the treaty envisages the creation of a European Public Prosecutor's Office, by means of regulations based on Eurojust, which would take over the functions of the Public Prosecutor's Office in the courts of the Member States in such proceedings concerning the fight against crimes against the Union's finances.¹⁸⁶ In the field of police cooperation, the Union's options for action are extended in so far that Europol's tasks may now include investigating and taking operational action together with the competent authorities of the Member States.¹⁸⁷

In order to make the responsibilities and distribution of tasks between the EU and its Member States in each policy area more transparent, the Lisbon Treaty for the first time created a 'catalogue of competences', which differentiates between exclusive, shared and supporting competences.¹⁸⁸ Article 3 to 6 assigns the various policy areas in which the EU is responsible to the respective type of competence. For example, monetary union and the customs union are exclusive EU competences, whereas agricultural policy as well as the European JHA policy are shared competences, meaning that the EU has competence, but the Member States can legislate where the Union does not do so itself.¹⁸⁹ Policy areas in which the EU can only support, coordinate and complement include health and education policy.¹⁹⁰ In addition, the treaty mentions the intergovernmental areas of economic and employment policy as well as foreign and security policy, where the EU

¹⁸² Ibid., 59.

¹⁸³ Ibid., 62-63.

¹⁸⁴ Ibid., 63-64.

¹⁸⁵ Ibid., 64.

¹⁸⁶ Ibid., 67.

¹⁸⁷ Ibid., 68.

¹⁸⁸ Ibid., 46.

¹⁸⁹ Ibid., 46-47.

¹⁹⁰ Ibid., 48.

can lay down guidelines, but only by unanimous decision of the Member States in the Council of Ministers.¹⁹¹

Furthermore, the rights of the European Parliament have been significantly strengthened by extending the co-decision procedure as well as by extending its competences in relation to budgetary law and the conclusion of international agreements – a demand that was already expressed in the European Constitutional Treaty. This makes the European Parliament an equal player vis-à-vis the European Council. In addition, the election of the President of the European Commission by the European Parliament strengthens both the President of the Commission, who would have an independent basis of legitimacy, and the European Parliament, whose approval should be required by majority vote. Also, the participation rights of national parliaments have been strengthened, affirming democracy and the protection of fundamental rights. By informing the national parliaments earlier about proposals of the European Commission, they can reject those during the legislative procedure if they feel the principle of subsidiarity (areas in which the EU does not have exclusive competences) has been violated.¹⁹² Moreover, the right of participation for the citizens has been extended by the citizens' initiative which allow EU citizens to call for new policy proposals and to force the European Commission to address an issue and propose legislation.¹⁹³

To make the Union more effective, the Lisbon Treaty introduced the QMV for decisions at the European Council. Accordingly, any decision requires the approval of a majority of states (55%), which must also represent 65% of the population. However, in the framework of the CFSP, the abolition of the unanimity principle was not possible, as many Member States did not want to give up their sovereignty.¹⁹⁴

Nevertheless, there have also been some important developments to the CFSP, and in particular to its institutional arrangements – starting with the change of name from *European Security and Defence Policy* to the *Common Security and Defence Policy*. Although it seems to make only a semantic difference, it is of far more importance, as it shows the ambition to more integration in this policy area.¹⁹⁵ Even though the CFSP is

¹⁹¹ Ibid., 46 and 48.

¹⁹² European Parliament, “The principle of subsidiarity,” Fact Sheets on the European Union, 2020, accessed 16 June 2020, <https://www.europarl.europa.eu/factsheets/en/sheet/7/the-principle-of-subsidiarity>.

¹⁹³ Ibid., 18.

¹⁹⁴ European Union, *Treaty of Lisbon. Amending the Treaty on European Union and the Treaty Establishing the European Community* (2007), 18.

¹⁹⁵ Ibid., 34.

still ruled on an intergovernmental level, the new position of the permanent President of the European Council, who serves two and a half years, and the establishment of the EEAS signals closer cooperation.¹⁹⁶ Not least, because the hitherto rotating Presidency of the CFSP was excluded by the Lisbon Treaty which resulted in limited agenda-setting powers of the Member States. Moreover, the extended powers of the High Representative of the Union for Foreign Affairs and Security Policy who functions as the Vice President of the European Commission and the Chairman of the Foreign Affairs Council improve the visibility of the CFSP worldwide. Especially with the latter personnel renewal, it seems that the EU has learned its lesson after the debacle of the Iraq crisis: The High Representative now functions as a point of contact for third parties when it comes to the position of Europeans in crisis situations.¹⁹⁷

In addition, the EDA is important within the CFSP framework for combining forces and inciting the Member States to modernize their armed forces. Regarding terrorism, it is striking that the treaty mentions combating it as one of the primary tasks of the common security and defence policy, whereas it was a secondary task in the area of police and judicial cooperation in the Treaty of Amsterdam:

The tasks (...) in the course of which the Union may use civilian and military means, shall include joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation. All these tasks may contribute to the fight against terrorism, including by supporting third countries in combating terrorism in their territories.¹⁹⁸

Later in the treaty, a ‘mutual defence clause’ as well as a ‘solidarity clause’ can be found, which commit the Member States to “aid and assistance by all the means in their power” if one Member State is a “victim of armed aggression on its territory” as well as to “act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster.”¹⁹⁹ The solidarity clause, also provided for mutual assistance in dealing with the consequences of terrorist attacks and disasters was activated in advance in the wake of the attacks in Madrid in March 2004. However, until the entry into force of the treaty it was merely political but not legally binding. In addition, in close cooperation with the intergovernmental EDA, the EU was aiming to achieve by

¹⁹⁶ Ibid., 17 and 306.

¹⁹⁷ Ibid., 20-21.

¹⁹⁸ European Union, *Treaty of Amsterdam* (1997), 35.

¹⁹⁹ European Union, *Treaty of Lisbon. Amending the Treaty on European Union and the Treaty Establishing the European Community* (2007), 35 and 100.

2010 that every Member State has “the capacity to supply (...) either at national level or as a component of multinational force groups, targeted combat units for the missions planned, structured at a tactical level as a battle group (...).”²⁰⁰ In order to achieve this the treaty stipulates that the Member States’ defence apparatus are as far as possible harmonized.²⁰¹ In order to speed up the cooperation and to be able to act despite bureaucratic barriers, the EU has launched the process of permanent structured cooperation (PESCO), allowing groups of at least nine states to join forces for extending their defence cooperation. Despite close cooperation at the European level, the Member States remain responsible for their armed forces.²⁰² Neither the Commission nor Parliament has a say in the military CFSP.

Speaking of forces, the *ENP* is mentioned in the treaty as an important aspect regarding stability and opportunities for prosperity in and around Europe. As an offer to those countries that have no EU membership perspective it is intended to link them more closely to the EU. The *ENP* is used as a key instrument to promote democracy, the rule of law and social market economies:

The Union shall develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation.²⁰³

Accordingly, the Lisbon Treaty enabled the EU to strengthen the implementation of its foreign policy by expanding the ‘Petersberg tasks’, which were incorporated into the Treaty of Amsterdam and included humanitarian and rescue tasks, peacekeeping, and crisis management. These tasks were further completed in the Lisbon Treaty by conflict prevention, military advice and assistance tasks, joint disarmament operations and post-conflict stabilization tasks.²⁰⁴

As it turns out, the Lisbon Treaty has brought with it many institutional changes – in particular, the policy areas affecting the CFSP and the AFSJ have undergone major reforms. Nevertheless, it should be emphasised that the analysis has only focussed on those policy areas directly related to the common fight against terrorism. Accordingly, no mention was made here of the many other reforms, such as the tightening of the EU accession criteria or the regulation of the voluntary withdrawal of Member States from

²⁰⁰ Ibid., 154.

²⁰¹ Ibid., 155.

²⁰² Ibid., 66-68.

²⁰³ Ibid., 14.

²⁰⁴ Ibid., 35.

the EU.²⁰⁵ The legally binding nature of the EU Charter of Fundamental Rights by means of a cross-reference in the treaty was not discussed here either but will play an important role later in the analysis when some anti-terrorism measures are examined closely on the issue of legitimacy.

Before doing so, however, the next step is to examine to what extent the far-reaching changes that the Lisbon Treaty introduced to the policies of the EU and its Member States can be traced back to 9/11, and what integration theory can be used to explain the EU's response to the security crisis triggered by the attacks.

²⁰⁵ Ibid., 16 and 40.

7. 9/11 – Trigger for Integration or Disintegration?

As the previous analysis has shown, 9/11 has contributed significantly to EU integration. However, the question remains open as to what kind of integration is involved in the policy areas of JHA and CFSP, or to put it another way: Which theory describes the outcome of the integration process the best? To answer this question, all three phases, (1) the immediate post-9/11 period, (2) the period after the Madrid and London bombings, and (3) the entry into force of the Lisbon Treaty must be considered individually.

The security crisis that 9/11 triggered externally in the EU has caused an avalanche of response actions by the EU. The Member States agreed unanimously that the new threat of international terrorism required a comprehensive and, above all, a common response. The mass of policy papers, declarations and framework decisions adopted by the EU within a few weeks after the attacks proposed many measures to combat terrorism at European level, aiming to intensify the judicial and police cooperation. Increased cooperation in the CFSP was also sought, aiming to cooperate with third countries and international organisations as laid down in the *Anti-Terrorism Roadmap*.²⁰⁶ Nonetheless, it is misleading to understand those new measures as groundbreaking, as many of them already had been discussed before 9/11 and were only waiting for adoption. It is therefore easy to see 9/11 as a path-dependent kick-off for the common fight against terrorism and the Europeanisation of the CFSP and JHA, as it is to be argued from a NF point of view.²⁰⁷ It is devastating to assume that the terrorist threat has prompted the European states to implement the adopted measures without delay. The reality was quite different as difficulties in implementation have considerably slowed down the process of European integration that was initially hoped for – and even more: they are possibly to blame for the fact that the terrorist attacks in Madrid in 2004 could not be prevented.²⁰⁸

However, such an unequal ‘Europeanisation’ is not unusual from a LI perspective as first and foremost those states would agree to cede competences that have been hit hardest by a crisis.²⁰⁹ In the case of 9/11, however, there is no ‘hierarchy of involvement’, as all states were equally affected by the crisis. Nonetheless, it seems logical that those

²⁰⁶ European Council, *Anti-Terrorism Roadmap* (2001), 73.

²⁰⁷ Schimmelfennig, “European Union (Theory) in Times of Crisis. A Comparison of the Euro and Schengen crises” (2018), 973.

²⁰⁸ Bossong, “The Action Plan on Combating Terrorism: A Flawed Instrument of EU Security Governance” (2008), 32.

²⁰⁹ Schimmelfennig, “Theorising Crisis in European Integration” (2017), 320.

states that have already experienced terrorism in the past (such as Spain) and thus have a different perception of the danger posed by terrorism, were aiming to speed up the integration process by implementing measures quickly. The situation is different in the case of those states (e.g. Austria) that have so far been relatively spared from terrorism. Accordingly, the perception of the threat in a state has a considerable influence on the government's ability to justify invasive measures adopted at EU level.²¹⁰ Hence, although there is a vulnerability of all, the interdependence is asymmetrical, which corresponds to the LI approach.²¹¹ This shows that the implementation of EU policy at the national level is a key part of the policymaking process, after all, the impact of the decisions taken by the EU depends on whether and to what extent they are accepted by the individual states. Considering that the judicial and police cooperation as well as the CFSP were assigned to the intergovernmental third pillar, it evinces the issue of the EU's missing competences in top-down decision making in those policy fields.

Therefore, the first phase after 9/11 with regard to the European integration process can be described as a wave that quickly subsided at the implementation level after rapid and hectic policymaking. The initial will to cooperate and to relinquish competencies weakened and the aimed integration failed, according to LI, due to the preferences and power of states.²¹² The supranational organisations were not powerful enough to build up a sufficient momentum with the initial will of European integration. The transformative potential and gradual process emphasised by the NF, "whereby political actors in several distinct national settings are persuaded to shift their loyalties, expectations, and political activities toward a new and larger centre, whose institutions possess or demand jurisdiction over pre-existing national states," did not become reality.²¹³ This is particularly evident in the *ESS*, which, while emphasising the development of cooperation, does not provide for communitarisation in the areas of JHA and CFSP. It does oblige the Member States to adopt a common approach, but not a communitarised one – so that the power constellation of the Member States has not essentially changed. However, considering that international terrorism did not directly affect the EU in the first phase after 9/11, it is not surprising that the Member States were

²¹⁰ Jörg Monar, "Common Threat and Common Response? The European Union's Counter-Terrorism Strategy and its Problems," *Government and Opposition* 42, no.3 (2007), 301-302, accessed 4 July 2020, <https://onlinelibrary-wiley-com.proxy-ub.rug.nl/doi/pdfdirect/10.1111/j.1477-7053.2007.00225.x>.

²¹¹ *Ibid.*

²¹² *Ibid.*

²¹³ Ernst B. Haas, "International Integration: the European and the Universal Process," *International Organization* 15, no-3 (1961): 366–367.

reluctant to cooperate and surrender competences. Again, in line with LI, the states did not want to centralise policy and give supranational organisations powers of surveillance and sanctions as the danger still seemed relatively remote.²¹⁴

The claim to subsidiarity of the individual states became particularly clear in the policy area of the CFSP. Considering that cooperation in security and defence matters is often seen as undermining the state's authority, it is not surprising that the Member States fought over the Iraq-question and were not able to speak with one European voice. The different views on how to solve the security problem can be compared to the 'chicken game', which is characterised by tough negotiations.²¹⁵ While all states had the common goal of making Europe safer from terrorism, the approach was different. This led to a situation where all players risked the worst when trying to find the best solution – in this case, the credibility of the EU and the progress of integration.

However, the disagreement over the actions needed to combat terrorism and the fact that the states were only partially able to assume responsibility and security tasks associated with it were reflected in the following second wave, triggered by the Madrid bombings on European soil. The attacks demonstrated that no country is spared from international terrorism and made the EU aware of the enormous gaps that still existed in its security policy. Consequently, the EU revised the *Action Plan*, which, however, still focused on implementing the measures already adopted. To exert pressure for the immediate implementation, the EU announced regular reports on the deficits of individual states as well as it tightened the deadlines. In this context, the new position of the counter-terrorism co-ordinator was introduced, whose tasks is to monitor the implementation of the anti-terrorism policy and to ensure that the EU plays an active role in the fight against terrorism.²¹⁶ Although the desire for supranational supervision is already evident here, the *Action Plan* was and remains a political project in the hands of the states. This development is best explained by the LI, which assumes that the integration process and the supranational organisations created in its course remain instruments under the control of the Member States – an assumption that differs greatly from the NF.²¹⁷

Nonetheless, the fact that states have accepted that the implementation of counter-terrorism measures be externally monitored and evaluated should not be downplayed as

²¹⁴ Schimmelfennig, "Theorising Crisis in European Integration" (2017), 320.

²¹⁵ Glenn H. Snyder, "'Prisoner's Dilemma' and 'Chicken' Models in International Politics," *International Studies Quarterly* 15 (1971): 82-84.

²¹⁶ European Council, *EU Plan of Action on Combating Terrorism* (2004), 7.

²¹⁷ Schimmelfennig, "Theorising Crisis in European Integration" (2017), 321.

it does show the importance that the states attach to these measures. It is therefore not unreasonable to argue here that it was after Madrid that counter-terrorism started becoming a truly differentiated policy space and the Madrid bombings had a deeper impact on the EU anti-terrorism policymaking than 9/11 itself. Nevertheless, the attacks in London one year later showed that cooperation was not enough. Despite this realisation, however communitisation still seemed to be impossible, as the *European Union Counter-Terrorism Strategy* adopted in the wake of the attacks showed. Also, the failed ratification of the Constitutional Treaty, which would have advanced the integration process considerably, not least through the planned extension of the QMV, shows the desire to maintain the states' position of power. The negative referenda in the Netherlands and France brought citizens into play as another actor, who, according to PF, were motivated by their fear of losing national identity by expanded integration. However, despite the failed referenda, there can be no question of a decisive moment of a negative feedback mechanism.²¹⁸ Rather, it can be seen as a delay, because only a short time later (despite a failed first vote even here) the Lisbon Treaty entered into force, which took over essential elements of the Constitutional Treaty.

However, although the Member States were unable to overcome their sovereignty reservations, they went way further in the negotiations on the Lisbon Treaty than it was previously assumed. For one reason, the AFSJ is listed in the treaty as a competence shared between the Union and the Member States and is thus transposed into a single legal framework.²¹⁹ The Member States have dissolved the intergovernmental third pillar by introducing the ordinary legislative procedure as a standard procedure.²²⁰ As in the past, various policy areas are grouped together under this umbrella term of the AFSJ. They encompass Union competences and modalities of cooperation between Member States in the areas of civil and criminal justice, police and border management, but also in the fields of asylum and immigration.²²¹ The commonality of these areas of responsibility has so far resulted in particular from their connection with the internal market and the associated free movement of persons. With the new formulated Article 2, the Lisbon Treaty now singles the AFSJ out from the integration objective of the internal

²¹⁸ Schimmelfennig, "Theorising Crisis in European Integration" (2017), 323.

²¹⁹ European Union, *Treaty of Lisbon. Amending the Treaty on European Union and the Treaty Establishing the European Community* (2007), 47.

²²⁰ *Ibid.*, 51.

²²¹ European Union, *Treaty of Lisbon. Amending the Treaty on European Union and the Treaty Establishing the European Community* (2007), 57.

market concept and declares it an independent integration objective.²²²

However, it would be wrong to assume that this is tantamount to the supranationalisation of this policy field. On closer examination, it is striking that this is to a great extent still an intergovernmental area. This can be seen in several points: Firstly, notwithstanding the fact that the treaty provides for the application of the supranational legislative procedure (the ordinary procedure) in the AFSJ, the Commission does not have the sole right of initiative in the field of police and judicial cooperation in criminal matters – it is shared between the Commission and the Member States. The term “cooperation” continues to be systematically used instead of “common policy.”²²³ Secondly, in some cases, for example, when it comes to provisions related to operational cooperation between police authorities, the ordinary legislative procedure will be suspended and replaced by a procedure in which the Council has decision-making power and must vote unanimously.²²⁴ This power of the Council to shape the AFSJ is directly emphasised in the treaty, which states: “The European Council shall define the strategic guidelines for legislative and operational planning within the area of freedom, security and justice.”²²⁵ This passage is of immense importance in the assessment of the Lisbon Treaty with regard to the integration process as it makes clear that the Commission is being made an executive body here, with the Council determining the shape of the AFSJ. Thirdly, this half-hearted supranational decision-making method is limited by an ‘emergency brake’, which allows Member States to ask the Council for an attempt at conciliation should they disagree with a provision. If no agreement can be reached, the Member States are allowed, provided that at least nine states are involved, to introduce an enhanced cooperation on the basis of the draft directive in question.²²⁶ In addition, the power of the Court of Justice of the European Union in the AFSJ has been largely undermined. For example, it

shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.²²⁷

²²² Ibid., 11.

²²³ Ibid., 67.

²²⁴ Ibid., 60.

²²⁵ Ibid., 58.

²²⁶ Ibid., 65.

²²⁷ Ibid., 110-111.

Against this background, the solidarity clause enshrined in the treaty appears questionable in terms of its actual significance – it appears more like a symbol of unity to the outside world than as a political instrument affirming European integration.

Where the AFSJ initially appears as a supranational policy due to the dissolution of the pillar structure, but closer examination still shows intergovernmental characteristics, the CFSP is clearly marked as intergovernmental, but shows isolated traces that come close to the characteristics of supranationalism. This becomes especially clear when looking at the High Representative of the CFSP which wears a double hat as Commissioner and representative of the Council – a fact that further blurs the distinction between intergovernmental and supranational institutions.²²⁸ However, one cannot help but notice that the cooperation of the Member States in the foreign and security policy has become more and more structured since 9/11 – especially demonstrated in the potential for higher effectiveness in the military sector. Whereas in the Treaty of Amsterdam the scope of the CFSP was still limited to “humanitarian and peacekeeping operations”, the EDA aims to improve cooperation on armaments policy.²²⁹ With the *ESS*, conceptual progress has been made for the first time, the EU possessed military capabilities for conflict containment – hard power has been added to soft power.²³⁰ Although the EU still does not have an army, the Battle Groups are to be technically and logistically capable of conducting larger operations in the future. The desire for the EU to develop from a civil power to a military power in the international arena is more than evident here. Nevertheless, the intergovernmental character should not be overlooked, as the Battle Groups are still controlled nationally, whereby the ability of the EU to engage militarily in multinational combat depends on the willingness of the Member States.²³¹ Furthermore, the example of the introduction of PESCO shows that there often seems to be a lack of a united position, as a result of which states are allowed to act intergovernmentally through the specific agreement of PESCO.²³² This also means that the military budget is funded by those states that are militarily engaged, and a common budget for the military CFSP does not exist. These shortcomings in the military field make it all too clear that the EU is not a power capable of acting globally. It is rather a

²²⁸ *Ibid.*, 21.

²²⁹ European Union, *Treaty of Amsterdam* (1997), 12.

²³⁰ European Council, *European Security Strategy* (2003), 14.

²³¹ European Union, *Treaty of Lisbon. Amending the Treaty on European Union and the Treaty Establishing the European Community* (2007), 154.

²³² *Ibid.*, 53.

regional regulatory power which is entirely controlled by the Member States.

Moreover, the QMV only applies if a decision a) establishes an action/position in accordance with a previous decision of the EU, b) is implemented on the proposal of the High Representative of the CFSP following a formal request to the Council, or c) was examined by a special representative.²³³ As the most important actors, the Council and therefore the states, decide in this policy area almost exclusively by unanimity, the argument of the intergovernmentalism is becoming increasingly to the fore. Nevertheless, given the dominance of the Council, it should not go unmentioned that the European Parliament is not completely absent from the CFSP. It can exert influence, even if only slightly, for example by creating a space for discussion and by overseeing external actions in its committees. Moreover, it has direct influence above all in the civilian CFSP, as it plays an important role in the Union's budget, which gives it a say in non-military operations and in the personnel question of the EEAS.²³⁴ Especially the latter is a further indication that the CFSP cannot be defined as being exclusively intergovernmental. The diplomatic body with its chairman, the High Representative, is responsible for the coordination for foreign activities and thus endeavours to show a uniform European attitude – at least externally.

Against this background, the explanatory approach of the LI is not entirely suitable for the foreign and security policy. However, the development of the CFSP is also far from being able to explain it with the NF approach. The situation is similar with the JHA/AFSJ. As an official partly supranational managed policy area, it repeatedly has limitations that give strength to intergovernmentalism and thus leave the states in charge.

This dilemma shows the difficulty to assign the development of the anti-terrorism policy to a single principle – intergovernmentalism or supranationalism. Many 'ingredients' of the neo-functionalist dynamics of integration can be identified: increasing transnational interdependence, functional spillover between differently integrated but interdependent policy areas, endogenous preferences and path dependency.²³⁵ The LI, however, continues to be supported by the immense power of governments, which prevents supranational actors from autonomously expanding their activities.²³⁶ Although the LI theory can explain the immediate post-9/11 phase and also the period after the

²³³ Ibid., 26, 29, 30, 37.

²³⁴ Ibid., 120.

²³⁵ Schimmelfennig, "Theorising Crisis in European Integration" (2017), 321-322.

²³⁶ Ibid., 319-320.

Madrid and London bombings, it has reached its limits with the Lisbon Treaty. The state of the anti-terrorism policy with the entry into force of the Lisbon Treaty can probably best be described as a state of suspense, with one foot in intergovernmentalism and the other in supranationalism. While the first phase after 9/11 was characterised by community thinking, followed by a slow shift towards a community approach after the attacks in Madrid and London, the third phase resulted in a supranational approach – which is neither entirely supranational nor exclusively intergovernmental.

8. AFSJ vs Counter-Terrorism – The Compatibility of Freedom, Security and Counter-Terrorism

Although the development of the integration process with regard to the anti-terrorism policy since 9/11 can certainly be assessed positively from the perspective of liberal intergovernmentalism and neo-functionalism, various actors, including the European Commission, have repeatedly voiced criticism of legitimacy of various anti-terrorism measures.²³⁷ The criticism refers in particular to democratic deficits and human rights abuses, and the freedom vs security discussion also remains prominent. Since many anti-terrorism measures fall within the policy area of JHA, the AFSJ is thus heavily affected – whose development is seen as central integration goal of the EU. Therefore, a close look at selected measures is necessary in order to make a holistic assessment of the integration process.

8.1 Measures of Counter-Terrorism in the Mirror of Human Rights and Rule of Law Requirements

With view to the AFSJ, the European Parliament has made it to one of its main priorities to ensure a “fair balance between protection of citizens’ fundamental rights and security and counterterrorism requirements”.²³⁸ And also the Lisbon Treaty states that “(t)he Union shall constitute an area of freedom, security and justice, respecting fundamental rights and respecting the different legal systems and traditions of the Member States.”²³⁹ In doing so, the EU refers, inter alia, to the *Charter of Fundamental Rights of the European Union*, which codifies political, economic and social rights in EU law. It contains 54 articles divided into seven titles: dignity, freedoms, equality, solidarity, citizen’s rights, justice and general provisions.²⁴⁰ Following the entry into force of the Lisbon Treaty in 2009 (but without being part of the treaty), the Charter has the same

²³⁷ European Commission, *Operational Human Rights Guidance for EU external cooperation actions addressing Terrorism, Organised Crime and Cybersecurity* (European Commission, 2014), 15-17, accessed 1 July 2020, https://ec.europa.eu/international-partnerships/system/files/manual-hr-guidance-ct-oc-cyber-november-2015_en.pdf.

²³⁸ European Parliament, “An area of freedom, security and justice: general aspects” (n.d.).

²³⁹ European Union, *Treaty of Lisbon. Amending the Treaty on European Union and the Treaty Establishing the European Community* (2007), 57.

²⁴⁰ European Union, *Charter of Fundamental Rights of the European Union* (European Union, 2012), 2, accessed 5 July 2020, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012P/TXT&from=EN>.

legal value as the treaties of the European Union.²⁴¹ The Union's actions, in particular European legislation (by means of regulations and directives) and European administration, must therefore be measured against the Charter. By implementing Union law, for example by transposing European directives into national law or by applying European regulations through their national administrations, the Member States are legally bound to the Charter.

Against this background, one may find it surprising that the EU does not take this principle quite so seriously in its anti-terrorism policy, since many of the measures have a significant impact on the rights of individuals. The catalogue of measures is geared towards the authorities' ability to control and intervene in a way that cannot be overlooked, and which clearly illustrates the tension between the fundamental rights of freedom, security and justice. Despite the fact that the tension is anything but new, and that it cannot be exclusively associated with the European fight against terrorism, the question of the balance of the three rights is particularly pressing here. However, in order to be able to assess the relationship between those values on which the AFSJ is built on, the following section examines which of the principles is at the forefront of a) the EAW and b) the storage and processing of personal data.

8.1.1 European Arrest Warrant

In the aftermath of the attacks of 11 September, it quickly became clear that, while the EU had a number of general legal options and structures at its disposal, it did not have sufficient legal *acquis* specially aimed at combating terrorism. This was particularly evident from the fact that it was not possible to extradite suspected terrorists quickly, given that not all Member States had yet ratified the Convention on Extradition from 1995/96.²⁴² The *Action Plan* therefore focused on the adoption of legislative measures, including the introduction of the EAW. It should be noted here that the negotiations on this have been simplified, since the first preparations for the EAW were already made

²⁴¹ European Union, *Treaty of Lisbon. Amending the Treaty on European Union and the Treaty Establishing the European Community* (2007), 13.

²⁴² European Union, *Simplified extradition procedure between Member States* (European Union, 2008), accessed 7 July 2020, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:114015a&from=EN> and Huseyin Durmaz, "Extradition of Terror Suspects and Developments in Extradition Process," in *From Understanding and Responding to Terrorism*, ed. Huseyin Durmaz, Bilal Sevinc, Ahmet Sait Yayla and Siddik Ekici (Washington D.C.: IOS Press, 2007), 76.

before 9/11.²⁴³ Nevertheless, there were considerable delays in the negotiations due to differences of opinion as to which offences the EAW should be applied. Consequently, it was only in December 2001 that the Council reached agreement on the *Framework Decision on the European Arrest Warrant*. The decision simplifies and shortens the extradition of criminals and suspects since the country requested for extradition is not in principle allowed to check the legality of the arrest warrant.²⁴⁴ This can be seen as a breakthrough for the principle of mutual recognition in the field of criminal law and an important step towards the creation of a single European law enforcement area, which, however, goes far beyond the problem of terrorism.

The framework decision lists 32 offences for which extradition must take place, even if the act is not punishable under the law of the extracting state. In addition to terrorism, these include, inter alia, trafficking in human beings, corruption, money laundry, facilitation of unauthorised entry and residence, fraud, rape and forgery of and trafficking with official documents.²⁴⁵

One of the differences between the previous extradition practice and the EAW is that the principle of double criminality has been abolished and replaced by the principle of mutual recognition. In addition, the general decision-making competence lies within the judicial authorities and thus excludes the political level. The last point raises critical questions regarding democratic legitimacy, as it is assumed that the EAW can only be considered legitimate if there is parliamentary control – a prerequisite that does not seem to be met by excluding the political level.²⁴⁶ Although the framework decision states that each Member State may call on the assistance of central authorities, they are not obligated to do so and parliamentary control is therefore not automatically guaranteed.²⁴⁷ The low level of involvement of the European Parliament in legal cooperation in criminal matters (under which the EAW falls) is also explicitly emphasised in the Lisbon Treaty, it says: “(T)he European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules.” Due to the

²⁴³ European Union, *Conclusions and Plan of Action of the Extraordinary European Council Meeting on 21 September 2001* (European Union, 2001), 1, accessed 1 July 2020, <https://www.consilium.europa.eu/media/20972/140en.pdf>.

²⁴⁴ European Council, *Council Framework on the European arrest warrant and the surrender procedure between Member States* (2002), 2.

²⁴⁵ *Ibid.*, 3.

²⁴⁶ Den Boer et al., “Legitimacy under Pressure: The European Web of Counter-Terrorism Networks” (2008), 106.

²⁴⁷ European Council, *Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedure between Member States* (2002), 5.

absence of legally binding parliamentary control, the democratic legitimacy can be considered low.²⁴⁸

Social legitimacy appears at first glance to be very similar to parliamentary legitimacy, as here too, the aspect of transparency is the focus of evaluation. However, social legitimacy in general is very difficult to assess in the security sector, and in anti-terrorism sector in particular, due to the often-necessary secrecy of the activities.²⁴⁹ Nevertheless, a minimum amount of information should be disclosed to the general public. In the case of the EAW, this can be even assessed as a positive development in view of the confidentiality issue, as individual cases can be viewed online.²⁵⁰ Moreover, the General Secretariat of the Council provides annual reports which are based on questionnaires answered by the Member States. However, the aimed transparency is not fully given as not all states provide data or interpret the questions differently.²⁵¹ Giant gaps in social legitimacy can also be found in the missing involvement of citizens and NGOs as well as the activities' monitoring by an independent actor. Accordingly, one can speak of medium to low social legitimacy.

The situation is different as regards legal legitimacy, not least because the EAW is based on a framework decision, which is regarded as the most important factor for legitimacy in legal terms.²⁵² Additionally, legally controllable mandates are provided and the right to complain or appeal is given.²⁵³ Nevertheless, there is no *high* level of legal legitimacy, since the jurisdiction lies solely with the national courts. A prerequisite for a high level of legal legitimacy, however, would be shared jurisdiction between national courts and the European Court of Justice.²⁵⁴

²⁴⁸ Den Boer et al., "Legitimacy under Pressure: The European Web of Counter-Terrorism Networks" (2008), 106-107.

²⁴⁹ Ibid., 108.

²⁵⁰ For example: Eurojust, *Case law by the Court of Justice of the European Union on the European Arrest Warrant* (Eurojust, 2020), accessed 2 July 2020, [http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/caselawanalysis/Case%20law%20by%20the%20Court%20of%20Justice%20of%20the%20European%20Union%20on%20the%20European%20Arrest%20Warrant%20\(March%202020\)/2020-03_Case-law-by-CJEU-on-EAW_EN.pdf](http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/caselawanalysis/Case%20law%20by%20the%20Court%20of%20Justice%20of%20the%20European%20Union%20on%20the%20European%20Arrest%20Warrant%20(March%202020)/2020-03_Case-law-by-CJEU-on-EAW_EN.pdf).

²⁵¹ Council of the European Union, *Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant – 2006* (General Secretariat, 2007), accessed 4 July 2020, <https://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2011371%202007%20REV%203>.

²⁵² Den Boer et al., "Legitimacy under Pressure: The European Web of Counter-Terrorism Networks" (2008), 107.

²⁵³ European Council, *Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedure between Member States* (2002), 6.

²⁵⁴ Den Boer et al., "Legitimacy under Pressure: The European Web of Counter-Terrorism Networks" (2008), 108.

A look at the different legitimacies of the EAW has once again highlighted the intergovernmental character of the judicial cooperation in criminal matters. Due to the lack of complete harmonisation of national criminal law to date, the EAW is based on the automatic recognition and enforcement of judicial decisions between the Member States. However, mutual recognition is based on trust – an aspect which is pushing the European integration process to its limits.²⁵⁵ This is illustrated, inter alia, by safeguards that the framework decision introduced to limit the effects of mutual recognition. Accordingly, for example, the executing judge can refuse to execute a judgement on limited or listed grounds.²⁵⁶

Another issue that arises in connection with mutual recognition is that of dual criminality. The elimination of this previous need for extradition must take place even if the act is not punishable under the law of the extraditing state. However, since the 32 offences to which this applies are only very vaguely formulated, there is a considerable scope for discretion for the national courts. Consequently, there is concern about possible human rights violations, which can be illustrated by the following example: Member State A issues an arrest warrant for two citizens who have committed the same crime. One of the two accused is located in Member State B, the other in Member State C. If, however, only one of the two Member States considers the offence to be one of those covered by the 32 offences for which double criminality is not applicable under the framework decision, it can be argued that the fundamental right of equality has been violated. The problem arising from the first supranational ‘pillar’ and the third intergovernmental ‘pillar’ are evident here. Although the EU as legislator in this case refrains from violating fundamental rights – as it is stated that “(t)his Framework Decision respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on the European Union and reflected in the *Charter of Fundamental Rights of the European Union* (...)” – it is difficult to prevent the violation of fundamental rights because of the intergovernmental structure in this policy field.²⁵⁷ This shows the importance of examining the extent to which human rights are recognised under the EAW mechanism. Some human rights are guaranteed in Article 11 and 12, such as the right to be informed about the EAW or the right to legal assistance and translation. However, the protection

²⁵⁵ European Council, *Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedure between Member States* (2002), 2.

²⁵⁶ *Ibid.*, 3-4.

²⁵⁷ *Ibid.*, 2.

offered is more than inadequate, as for example, the right to be considered innocent until proven otherwise is not guaranteed.²⁵⁸

It can therefore be concluded that the EAW does not fundamentally violate fundamental rights. However, the Council did not pay sufficient attention to the obligation to respect human rights and the rule of law when adopting the framework decision. This results in an indirect threat to fundamental rights. Moreover, the EU's rule of law is threatened as the EAW, as an instrument of intergovernmental cooperation, is weakly legitimised democratically and socially and largely beyond judicial control.

In conclusion, the EU should not base the principle of mutual recognition solely on trust when central judicial protection mechanisms such as double criminality are abolished and compliance with international human rights is not fully ensured. A clear legal framework is needed in which the protection of fundamental rights plays a prominent role and is under parliamentary control.

8.1.2 Storage and Processing of Personal Data Within the EU

Even before 11 September, the exchange of information was considered as a key prerequisite for a successful fight against terrorism. To this end, the EU has set up various databases, such as VIS and SIS, which institutions such as Europol and Eurojust use for law enforcement purposes.²⁵⁹ Especially after 9/11, the EU Commission and the EU Council repeatedly pointed out the necessity of data exchange between authorities and Member States.²⁶⁰ However, almost as long as the importance of data storage has been sworn to, various actors, including the EU Parliament, have criticised the lack of protection of personal rights.²⁶¹ Consequently, there was a long-lasting debate on whether and to what extent the Council can oblige the Member States to retain telecommunications data by means of a framework decision or whether such a decision requires the consent

²⁵⁸ Ibid., 6.

²⁵⁹ European Commission, *The European Union celebrates the 25th anniversary of the Schengen Area* (European Commission, 2010), accessed 7 July 2020, https://ec.europa.eu/commission/presscorner/detail/en/MEMO_10_249 and ETIAS info, "The Schengen Zone Security System: SIS, VIS, and Eurodac," ETIAS info, n.d., accessed 7 July 2020, <https://www.etias.info/schengen-zone-security-system-sis-vis-eurodac/>.

²⁶⁰ European Commission, *Communication from the Commission to the Council and the European Parliament* (European Commission, 2004), 7, accessed 4 July 2020, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004DC0698&from=DE>.

²⁶¹ European Parliament, "Wednesday, 14 December 2005 – Strasbourg," Debates, 2005, accessed 4 July 2020, <https://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20051214+ITEM-011+DOC+XML+V0//EN>.

of the European Parliament. Since the directive was understood as a measure of police and judicial cooperation in criminal matters, the decision-making power laid exclusively with the Council. Opponents of data retention and members of the European Parliament, however, took the view that data retention would at least partially encroach on the area of the ‘first pillar’ and thus on the competence of the EU Parliament. Data retention must therefore – if at all – be introduced by a directive adopted by the EU Parliament together with the Council. In March 2005, the European Commission officially endorsed this legal interpretation.²⁶² As a result, the EU Parliament amended the original draft in decisive points, and data should now only be evaluated for the prosecution of particular serious crimes. On 14 December 2005, the European Parliament voted in favour of the “compromise proposal” by 378 votes to 197.²⁶³ The passed *Directive 2006/24/EG* obliged the Member States to adopt national laws requiring service providers to retain certain data arising from the provision and use of public electronic communications services for a minimum of six months and a maximum of two years.²⁶⁴

With regard to the implementation bodies of this directive, Eurojust and Europol, it should be noted that their activities are under the control of the Council, which determines both the budget and the political leadership. Parliamentary control, on the other hand, is limited to a certain amount of information that governments are obliged to provide to the national parliaments.²⁶⁵ Consequently, the European Parliament has no say whatsoever in the fundamental direction of this working area of Europol and Eurojust. Instead, the control of both institutions is the responsibility of the European Data Protection Supervisor (EDPS). The membership of the body is composed of representatives of national data protection authorities that review the data collection.

²⁶² Ibid.

²⁶³ Ibid.

²⁶⁴ European Union, *Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC* (European Union, 2006), 3, accessed 4 July 2020, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32006L0024&from=en>.

²⁶⁵ European Union, *Council Act of 26 July 1995 drawing up the Convention based on Article K.3 of the Treaty on European Union, on establishing of a European Police Office (Europol Convention) (95/C 316/01)* (European Union, 1995), 5, accessed 4 July 2020, [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31995F1127\(01\)&from=ES](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31995F1127(01)&from=ES) and European Union, *Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust), and replacing and repealing Council Decision 2002/187/JHA* (European Union, 2018), 3, accessed 4 July 2020, [http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/EurojustRegulation/Eurojust%20Regulation%20\(Regulation%20\(EU\)%202018-1727%20of%20the%20European%20Parliament%20and%20of%20the%20Council\)/2018-11-21_Eurojust-Regulation_2018-1727_EN.pdf](http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/EurojustRegulation/Eurojust%20Regulation%20(Regulation%20(EU)%202018-1727%20of%20the%20European%20Parliament%20and%20of%20the%20Council)/2018-11-21_Eurojust-Regulation_2018-1727_EN.pdf).

Persons affected by data storage can contact the EDPS directly to have the admissibility of the collection, storage and use of personal data checked.²⁶⁶ With regard to transparency, it can be noted that both agencies publish annual reports on their websites, claiming to enhance “transparency on its activities and facilitating access to Europol documents by individuals.”²⁶⁷ This even goes so far as to allow people, if they cannot find documents online, to submit an application for access to the desired documents.²⁶⁸

The situation is somewhat similar as regards legal legitimacy, with the European Court of Justice having powers to interpret the agencies’ conventions. Moreover, the data protection is legally legitimised due to a) the legal basis by the directive and b) the founding conventions of Europol and Eurojust.²⁶⁹ The main conditions for sufficient legal legitimacy are thus met, but it should nevertheless not be overlooked that judicial authorities cannot control the activities of Europol and Eurojust, i.e. in this context the exchange and storage of data.

It can therefore be concluded that there is a medium level of legitimacy in all three areas. Nevertheless, the enormous criticism of human rights violations due to data collection and storage must not be ignored here.

In the EU, the protection of personal data has been established by various legal instruments, such as the recent data protection convention, the *Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters*.²⁷⁰ The Commission makes explicitly reference to this, that police and judicial cooperation between the EU states, especially in the fight against terrorism, can only be extended in compliance with data protection provisions. Accordingly, the right to privacy and personal data protection must be respected in the EU. In doing so, the EU refers to the Charter of Fundamental Rights, which describes in Article 7 and 8 comprehensive guarantees of fundamental rights in the area of data protection. According to the Charter,

²⁶⁶ European Union, “European Data Protection Supervisor (EDPS),” Institutions and bodies, 2020, accessed 4 July 2020, https://europa.eu/european-union/about-eu/institutions-bodies/european-data-protection-supervisor_en.

²⁶⁷ Europol, “Public Access To Europol Documents,” Publications & Documents, 2020, accessed 4 July 2020, <https://www.europol.europa.eu/publications-documents/public-access-to-europol-documents>.

²⁶⁸ Ibid.

²⁶⁹ European Union, *Europol Convention* (1995), and European Union, *Regulation (EU) 2018/1727* (2018).

²⁷⁰ European Union, *Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters* (European Union, 2008), accessed 4 July 2020, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008F0977&from=EN>.

every person has the right to respect for his/her communications and the right to the protection of personal data concerning him/her.²⁷¹

However, the framework decision, which at first sight may appear to be an important instrument in the field of data protection, has significant shortcomings. First of all, the directive sets out a number of scenarios under which Member States are allowed to impose restrictions on compliance with the directive, as for example,

to safeguard national security (i.e. State security), defence, public security or the prevention, investigation, detection and prosecution of criminal offences or of unauthorised use of the electronic communications systems.²⁷²

Although the collection and processing of sensitive data is only allowed under the premise of “necessity and proportionality”, this broad notion leaves considerable room for interpretation, which can lead to circumvention of the directive. Moreover, there are no rules on the processing of data by Europol and Eurojust, just as there are no rules on the exchange of data with third countries.²⁷³ Consequently, the violations of the right to respect for communications and the right to privacy cannot be fully prevented by the directive.

It becomes clear that data processing at European level raises considerable problems in terms of the rule of law and human rights. The reference to the threat of terrorism undermines standards of international law and pushes the protection of personal freedom to the background. Thus, however, the criticism of human rights violations, which was loud from the outset, was finally heard by the European Court of Justice, which declared *Directive 2006/24/EG* invalid on 8 April 2014 on the grounds that it was incompatible with the *Charter of Fundamental Rights of the European Union*. This positive decision from a human rights point of view, however, is not entirely effective as the court decision met with resistance in many EU states. Given that the Charter is not applicable to purely national situations – here the fundamental rights of the Member States remain the sole yardstick – data continues to be stored in many countries, including, inter alia, Sweden, France and the Netherlands.²⁷⁴

²⁷¹ European Union, *Charter of Fundamental Rights of the European Union* (2012), 7.

²⁷² European Union, *Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters* (2008).

²⁷³ Ibid.

²⁷⁴ European Union Agency for Fundamental Rights, “Data retention across the EU,” Data protection, 2017, accessed 7 July 2020, <https://fra.europa.eu/en/publication/2017/data-retention-across-eu>.

9. AFSJ at Risk?

The previous examples illustrated the problematic balance between the values of freedom, security and justice. The analysis of both anti-terrorism measures has shown that the EU bodies responsible for monitoring the compliance with the values of freedom and justice – the EU Commission and the EU Parliament – have not been given sufficient powers. In both the EAW and the storage and processing of personal data, all three forms of legitimacy (social, legal and democratic) are at most medium to low. Furthermore, it can be noted that the two measures examined represent a threat to civil liberties. Various decisions have a deep impact on the rights of self-determination and the privacy of the individual. However, it must be emphasised at this point that the EU is aware of this threat as it repeatedly stresses that human rights must be respected when implementing the measures. In order to ensure this, the EU has in some cases introduced ‘protective mechanisms’, such as the *Council Framework Decision 2008/977/JHA*.²⁷⁵ However, there are some loopholes in this framework decision which justify the disregard of human rights in anti-terrorism policy. Moreover, such ‘protective mechanisms’ only apply in policy areas that are dealt with at European level – and not in those areas for which the Member States are responsible, such as the police and judicial cooperation in criminal matters. Additionally, the European integration idea reaches its limits in the case of the EAW.²⁷⁶ Due to the lack of harmonisation of national laws as well as the missing parliamentary control, the EAW is based on mutual trust, which can be exploited to circumvent the observance of human rights by means of room of interpretation in the legal text.

In this picture, it can be concluded that since 9/11 security policy interests have been in the foreground and the protection of fundamental rights has been partially pushed to the background. Consequently, it must be noted that the EU is not fully living up to its self-imposed goal of developing the AFSJ. Although the aspect of security has received considerable attention since 9/11, the frequent lack of parliamentary and judicial control prevents the balance between security on the one hand and freedom and rule of law on the other.

This is not least since the AFSJ’s focus on security is traditionally reserved for

²⁷⁵ European Union, *Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters* (2008).

²⁷⁶ European Council, *Council Framework on the European arrest warrant and the surrender procedure between Member States* (2002).

national sovereignty and territoriality. The Union is given only a purely subsidiary role in this area, limited to cross-border internal security challenges and subordinated to a set of rules protecting the competences and autonomy of Member States. All this has contributed significantly to the fact that the AFSJ has so far been an area of cooperation between Member States with few elements of real integration. The pillar division of the AFSJ – with its clear disadvantage in terms of coherence and parliamentary and judicial control – is also a result of the hesitation and partly unwillingness of some Member States to move towards a more comprehensive common policymaking in the more sensitive areas of the AFSJ. Although the Lisbon Treaty formally abolished this division, it does not do so without leaving clear traces of the former third pillar in the decision-making procedures in some police and judicial cooperation in criminal matters as well as in maintaining the overall cooperative orientation of the AFSJ.

Moreover, if one considers that the EU has not been able to fulfil its human rights obligations, which it has imposed on itself, it can be argued that this undermines the EU's own legitimacy. However, it would be going too far to claim that the development of the AFSJ has already failed. Due to the imbalance of the three values, the AFSJ has stumbled quite a bit – but this is not a state that is unchangeable. The fact that the EU always considers the need to respect human rights when adopting measures means that there is hope that the complex tension between freedom, security and justice will stabilise in the future.²⁷⁷

To achieve this, however, the EU should place more emphasis on transparency in its anti-terrorism policy. This should be ensured on the one hand by extended civilian monitoring and on the other hand by effective accountability of the executive bodies. Moreover, the relevant legal acts on the respective anti-terrorism measures should be revised regarding the scope for interpretation. This should also be accompanied by a legal codification of the *Charter of the Fundamental Rights of the European Union*, which the Lisbon Treaty has so far failed to do.²⁷⁸ Although some of the rights in the Charter are of direct relevance to the AFSJ, the treaty provisions on the AFSJ do not contain any direct reference to the Charter. The reference in Article 67 to the fact that the Union “shall constitute an area of freedom, security and justice with respect for fundamental rights” could hardly have been formulated more vaguely and could have been introduced in this

²⁷⁷ For example: European Council, *European Security Strategy* (2003), 12.

²⁷⁸ European Union, *Charter of Fundamental Rights of the European Union* (2012).

form even without the existence of the Charter.²⁷⁹ Clearly, the opportunity has been missed here to make the rights of the Charter an integral part of the Lisbon Treaty, which would have allowed for their applicability to AFSJ. This would have considerably strengthened the ‘freedom’ and ‘justice’ components of the AFSJ, at least constitutionally.

²⁷⁹ European Union, *Treaty of Lisbon. Amending the Treaty on European Union and the Treaty Establishing the European Community* (2007), 57.

10. Conclusion

This thesis set out to examine the impact of 9/11 on the European integration process by looking at the various important legal instruments adopted by the EU as part of its counter-terrorism policy. The analysis highlighted the Member States' understanding of a European security that is dependent on joint action, which, however, requires a harmonisation of policy areas that had hitherto been in the hands of the states' national sovereignty: the JHA and foreign and security policy. Given that the negotiation of sovereignty rights since the beginning of the EU has been a point that has always influenced the European integration process, it is not surprising that the 9/11-security crisis was not spared from this obstacle. As it turned out, many Member States found it difficult to implement the measures adopted in response to the threat of international terrorism, such as the EAW or data retention.

Thus, the terrorist attacks in Madrid and London in 2004 and 2005 became a wake-up call, the terrorist threat was suddenly very close and immediately felt. In response to this 'home grown' international terrorism, the EU has not, as one might have expected, initiated the development of a new strategy, but has rather called for the implementation of the measures already adopted – which, as must be emphasised again at this point, were by no means new, but were already widely discussed even before 9/11. In fact, it was not 9/11, but rather the events in Madrid and London, which led to a real turnaround in the European security policy. This assumption is supported not least by the significant developments in the JHA and CFSP following the attacks on European soil.

The analysis has shown that the reform brought about by the Lisbon Treaty, which had previously failed with the Constitutional Treaty, has had considerable implications for the EU's institutions and decision-making procedures as well as for individual policy areas. Institutionally, there have been far-reaching shifts, particularly in the triangle between Parliament, Council and Commission. The European Parliament has been significantly strengthened by extending its co-decision, assent, control and budgetary rights. At the same time, the European Council under its 'new' President has also gained in influence. In addition, foreign policy structures have been comprehensively reformed with the creation of the office of the EU High Representative for Foreign Affairs and Security Policy and the EEAS under his/her authority. However, the fact that these reforms have by no means led to EU policy at supranational level becomes particularly clear with regard to the treaty provisions on the AFSJ and CFSP. Although the AFSJ has become an independent policy area through the treaty, it has, just like the CFSP, many

limitations in policymaking which clearly point to intergovernmental control. Thus, the competences here do not lie solely with the Union but are shared between the Commission and the Member States. Also, the ordinary legislative procedure, is suspended in matters of police cooperation and replaced by unanimity in the Council. Moreover, various ‘emergency brakes’ and the limited power of the European Council of Justice strengthen the power of the Member States. The situation is similar in the CFSP. Despite new institutions and agencies which at first glance give the impression of supranationalism, the CFSP is and remains in the intergovernmental hands of the Council.

The answer to the first sub-question of the extent to which 9/11 can be considered a trigger for the development of the AFSJ and CFSP is thus both simple and difficult to answer. The simple answer to the question is that the terrorist attacks in New York and Washington, D.C. can certainly be seen as an “opportunity for change” – which, however, was only taken seriously when measures were implemented after the attacks in Madrid and London. The complexity of answering the question, however, lies in explaining the integration process and its outcome from a perspective of integration theories. As already mentioned above, the first period after the 9/11 attacks was characterised by the conviction of a common anti-terrorism policy – but also by the still partly reluctant behaviour of the Member States to cede sovereignty to the EU. The consequences of this community thinking but intergovernmental acting became clear by the attacks in 2004 and 2005. A rethinking, or better a change in action, slowly but surely became apparent. The community approach determined the negotiations of the states at European level, which finally even developed into a supranational approach with the Lisbon Treaty. From these observations it can be deduced that the first two phases, post-9/11 and after Madrid/London, were characterised by liberal intergovernmentalism. The interest of the states in greater security were the decisive factor in the negotiations on integration. This did not change decisively with the entry into force of the Lisbon Treaty, despite supranational characteristics in the AFSJ and CFSP. Accordingly, the development can best be explained by a supranational approach that has been adopted by the EU for those policy areas in the Lisbon Treaty.

Be that as it may, looking at the development of policy fields from the perspective of integration theories is only one side of the coin. To draw a holistic picture of the impact of 9/11 on the European integration process, it was essential to analyse the individual anti-terrorism measures. For this purpose, the EAW and the data retention were examined under the aspects of democratic, legal and social legitimacy, as well as regarding the

observance of human rights. In both cases, the result is sobering: the measures are only moderately or not at all legitimised in democratic, legal and social terms. The lack of parliamentary control, the limited transparency and involvement of citizens and the poor power of the European Court of Justice lead to an imbalance in the relationship of freedom, security and justice in the EU. In view of the lack of protection of human rights in the implementation of the measures, the dilemma facing the EU is evident. On the one hand, the common anti-terrorism policy is supposed to lead to an increased security in the EU, and on the other hand, this should be done in accordance with human rights standards and the rule of law.²⁸⁰ The problem of simultaneously upholding the values of freedom, security and justice is far from new. However, it is not insoluble either: legal codification of the EU Charter of Fundamental Rights, effective accountability, greater transparency and parliamentary, judicial and civilian oversight in decision-making and implementation would already lead to a stronger focus on freedom and justice in the EU anti-terrorism policy.

Of course, it should not be disregarded here that only two measures were examined, and it is not possible to speak with certainty of a generally weak legitimacy in the field of anti-terrorism policy. Therefore, the question of the preservation and development of the AFSJ with regard to human rights and the rule of law in the course of the European anti-terrorism policy cannot be clearly answered. This would require an extended investigation of all measures adopted in the fight against terrorism. In particular, the adaption of a common definition of terrorism, changes in asylum and refugee policy as well as the increased cooperation between the EU and the U.S. in the fight against terrorism would have been revealing and are thus worth further investigation.

Nevertheless, the two measures mentioned here are already sufficient to demonstrate the risk that the great integration goal, the AFSJ, may fail if too much emphasis is placed on the security aspect. Considering the risk of failure of the AFSJ, it can be argued that the euphoric view on the European integration process since 9/11 is somewhat waning. The political relevance of significant developments in the JHA and CFSP – which have led to many security policy issues now being discussed at European level – is questioned in view of the AFSJ. The observed low level of transparency, the lack of involvement of citizens and the still strong role of the executive body in the relevant policy areas, and not least the lack of protection of human rights, raise doubts as

²⁸⁰ European Council, *The European Union Counter-Terrorism Strategy* (2005), 2.

to whether the EU has possibly lost sight of its real target in the course of the fight against terrorism. Accordingly, the EU's self-imposed goal of an AFSJ that is "based on the principles of transparency and democratic control" must be pursued more vigorously in the future if it does not want to undermine its own legitimacy and if it does not want to dwarf the positive effects of integration in recent years.²⁸¹ Thus, the impact of 9/11 on the integration process can be assessed positively, albeit with an aftertaste of sharpness in legitimacy and bitterness in unprotected human rights.

²⁸¹ European Union, *Presidency Conclusions. Tampere European Council. 15 and 16 October 1999* (European Union, 1999), accessed 15 July 2020, https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/00200-r1.en9.htm.

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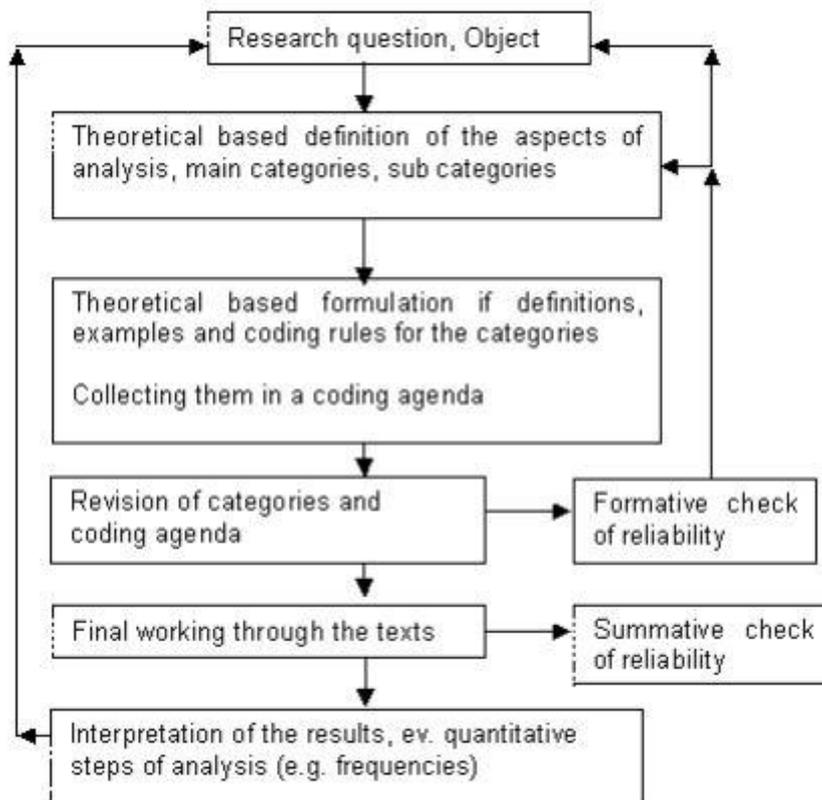
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Appendix

Figure 1: Step Model of Deductive Category Application, Analysis 1 and 2



[Source: Philipp Mayring, "Qualitative Content Analysis," *Forum Qualitative Sozialforschung* 1, no.2 (2000), accessed 11 November 2019, <http://www.qualitative-research.net/index.php/fqs/article/view/1089/2383>].

Table 1: Category System for Analysis 1, Overview

	Liberal Intergovernmentalism	Neo-Functionalism	Post-Functionalism
Force of Response	Member States <ul style="list-style-type: none"> • Supranational organisations are under control of the Member States 	Supranational organisations & transnational society <ul style="list-style-type: none"> • Political actors shift their loyalties, expectations and political activities toward supranational organisations/actors 	Eurosceptic parties <ul style="list-style-type: none"> • Domestic level
Intention of Reaction/ Desired Outcome	Neither positive nor negative feedback <ul style="list-style-type: none"> • Profit & efficiency 	Positive feedback <ul style="list-style-type: none"> • Resilience & integration • Institutional autonomy 	Negative feedback <ul style="list-style-type: none"> • Reluctance, stagnation & disintegration
Focus of Response	National interests, state preferences, power of states <ul style="list-style-type: none"> • Integration is limited by states' self-preservation and autonomy • States are willing to delegate national competences if they are not able to deal with a challenge/crisis effectively on their own 	Transnational interdependence <ul style="list-style-type: none"> • Empowerment of new transnational actors • Disintegration is increasingly unattractive 	Maintenance of national identity and welfare <ul style="list-style-type: none"> • Concerns about competitiveness, redistribution, sovereignty and immigration
Crisis Mechanism	Intergovernmental bargaining <ul style="list-style-type: none"> • Asymmetrical interdependences • Agreement to cooperate/ to establish international institutions is a collective outcome of interdependent rational state choices • three-stage process: (1) defining preferences, (2) bargaining to substantive agreements, (3) creating/adjusting institutions 	Path-dependency & spillover <ul style="list-style-type: none"> • Dynamic process, complex, unpredictable • Transnational actors develop preferences and capacities on their own 	Polarisation at national level <ul style="list-style-type: none"> • Politicization to mobilize Eurosceptic citizens

[Source: Own illustration based on Schimmelfennig (2017)].

Table 2: Coding Guidelines for Analysis 1: LI

	Definition	Anchor Example	Encoding Rules
Force of Response	Actors responding to the crisis/challenge are the EU Member States/national governments	“The European Council adopted the Declaration on Combating Terrorism at its meeting on 25 March 2004 (...).”	The driving force for integration must be the Member States/national governments <ul style="list-style-type: none"> • European Council • National Ministers
Intention of Reaction/ Desired Outcome	Member States/national governments pool decision-making and delegate competences to supranational institutions to maximise the benefits of integration <ul style="list-style-type: none"> • States are willing to delegate national competences if they are not able to deal with a challenge/crisis effectively on their own 	“The seven EU strategic objectives to combat terrorism endorsed by the European Council (...) were as follows: (...) To enhance the capability of the European Union and of member States to deal with the consequences of a terrorist attack.”	Member States must seek maximum benefits from integration
Focus of Response	Member States shape integration according to their national interests <ul style="list-style-type: none"> • Integration should only take place if it helps to fulfil national interests • National peculiarities should be preserved as much as possible 	“The Union (...) shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.”	National interests must be the starting point for states to enter negotiations
Crisis Mechanism	Member States/national governments bargain hardly to agree on a joint response <ul style="list-style-type: none"> • The adjustment burdens are usually unequally distributed • Three-stage process: (1) defining preferences, (2) bargaining to substantive agreements, (3) creating/adjusting institutions 	“European leaders reach an agreement on the draft European Constitution on 18 June 2004.”	All three stages must take place in the correct order

[Source: Own illustration based on Schimmelfennig (2017) & (2018)].

Table 3: Coding Guidelines for Analysis 1: NF

	Definition	Anchor Example	Encoding Rules
Force of Response	Actors responding to the crisis/challenge are supranational organizations and transnational societies who build sufficient momentum to push the functional scope, level of centralization, and territorial extension	“The Commission is going soon to put forward legislation on cross-border hot pursuit. It is increasingly outdated to continue to work on a basis that national police forces can only act on limited circumstances beyond the borders of their Member States.”	The driving force for initial steps of integration must be supranational organizations and transnational societies <ul style="list-style-type: none"> • E.g. European Parliament, European Court of Justice, European Commission, European Agencies (EDA...)
Intention of Reaction/ Desired Outcome	More integration → beyond the level that governments had originally intended <ul style="list-style-type: none"> • Institutional autonomy is sought 	“Enhanced cooperation shall aim to further the objectives of the Union, protect its interests and reinforce its integration process.”	The aim must be more integration
Focus of Response	Political actors shift their loyalties, expectations, and political activities toward a new and larger centre, whose institutions possess or demand jurisdiction over pre-existing national states	“The European Defence Agency shall contribute to the regular assessment of participating Member States’ contributions with regard to capabilities, in particular contributions made in accordance with the criteria to be established (...) on the basis of Article 2 (...)”	Transnational actors must be given more power <ul style="list-style-type: none"> • E.g. by extending their sphere of influence in policy areas or by introducing QMV
Crisis Mechanism	Integration takes place due to institutionalisation and path-dependency <ul style="list-style-type: none"> • Spillovers create demand for further integration: externalities are internalized, dysfunctions repaired, integration contracts updated, and transnational and supranational actors established/accommodated • Path dependency only works reliable if disintegration is unattractive 	“The EU and the Member States have made great progress in a range of areas, but the persistence of the terrorist threat and the complexity of the fight against the phenomenon raise the need to come up with innovative solutions.”	Spillover effects must be recognisable and disintegration must be unattractive

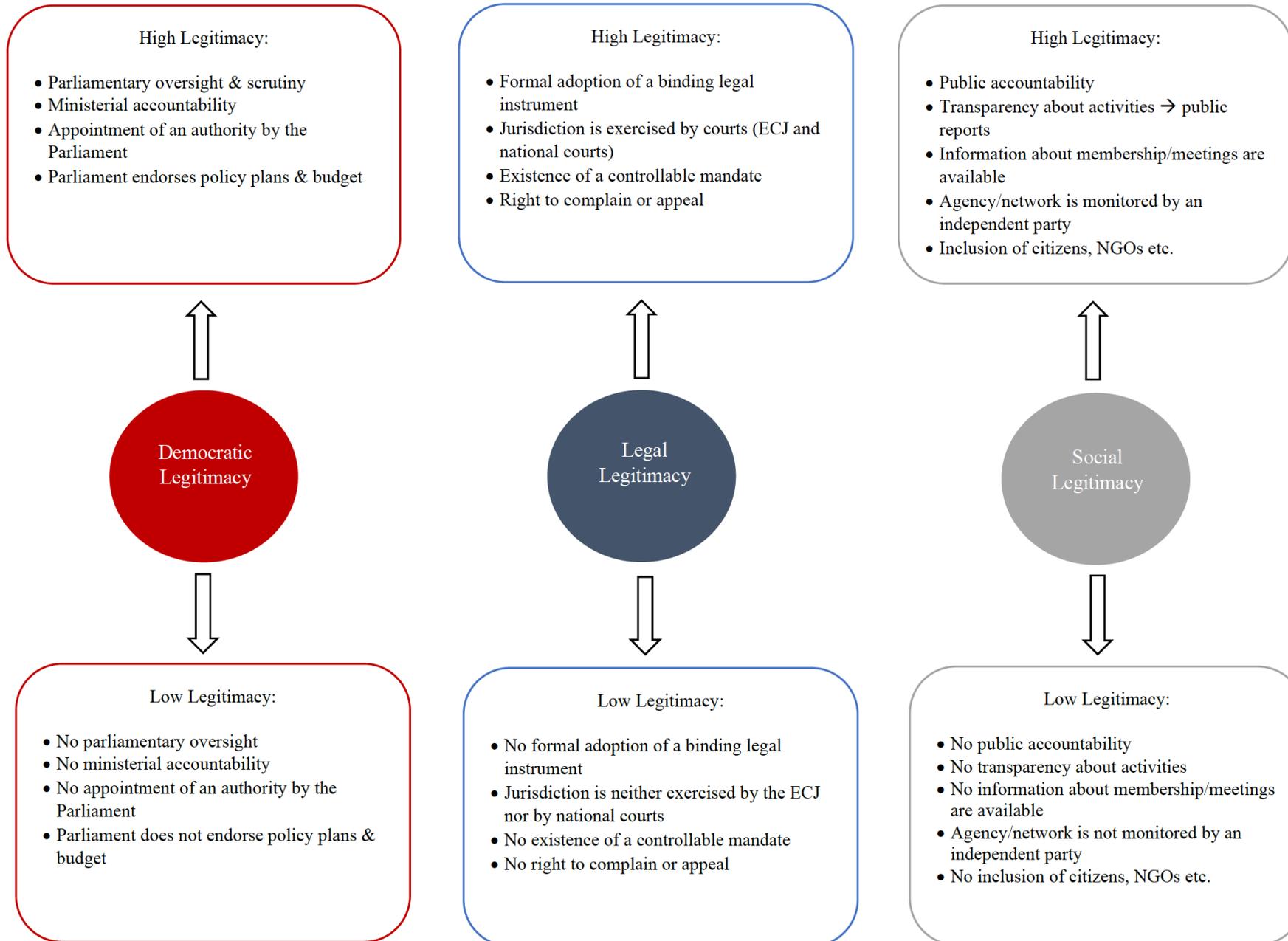
[Source: Own illustration based on Schimmelfennig (2017) & (2018)].

Table 4: Coding Guidelines for Analysis 1: PF

	Definition	Anchor Example	Encoding Rules
Force of Response	<p>The force in European integration is mass politics</p> <ul style="list-style-type: none"> • Eurosceptic parties • Citizens 	<p>“Almost all supporters of the ‘no’ political parties followed the voting instructions of their camp.”</p>	<p>The forces must be domestic and Eurosceptic</p>
Intention of Reaction/ Desired Outcome	<p>Stagnation of integration process or even less integration</p>	<p>“62% of Dutch citizens believe that the victory of the ‘No’ in the referendum will lead the other Member States holding a similar referendum to vote ‘No’.”</p>	<p>The intention must be stagnation or even disintegration</p>
Focus of Response	<p>Maintenance of national identity and welfare</p> <ul style="list-style-type: none"> • Concerns about competitiveness, redistribution, sovereignty and immigration 	<p>“The second most mentioned reason is the loss of national sovereignty (...), followed by opposition to the national government or certain political parties (...) and by the references to the ‘cost’ Europe has for Dutch tax-payers.”</p>	<p>The motivation must be the fear of losing sovereignty</p> <ul style="list-style-type: none"> • Negative effects of integration must outweigh
Crisis Mechanism	<p>Eurosceptic citizens are mobilized, Eurosceptic parties are empowered and the support for European integration is undermined</p>	<p>“‘No’ votes in referenda in France (29 May 2005) & the Netherlands (1 June 2005) against the new European Constitution lead to a ‘period of reflection’.”</p>	<p>There must be a polarization by Eurosceptic domestic forces</p>

[Source: Own illustration based on Schimmelfennig (2017 & 2018)].

Figure 2: Aspects for the Assessment of the Degree of Legitimacy, Analysis 2, Overview



[Source: Own illustration based on den Boer et al (2008)].

Table 5: Coding Guidelines for Analysis 2: Degree of Legitimacy

	Definition	Anchor Example	Encoding Rules
Parliamentary oversight & scrutiny	<p>The Parliament (EU or national) controls</p> <p>a) legislative instruments, mandates and institutions</p> <p>b) the policies' outputs (effectiveness, results, performance)</p> <p>Elements of oversight:</p> <ul style="list-style-type: none"> • investigative capacity • independence from executive • access to classified information • ability to maintain secrecy and adequate support stuff 	<p>“The Chief Executive shall take all necessary measures to ensure the efficiency and effectiveness of the Agency’s work. He/she is responsible for the oversight and coordination of the functional units (...). He/she shall be the head of the Agency’s stuff.”</p>	<p>The parliamentary oversight & scrutiny can be considered high if all five elements are given and executed by the parliament</p> <p>The parliamentary oversight & scrutiny can be considered medium if only some elements are given and executed by the parliament</p> <p>The parliamentary oversight & scrutiny can be considered low if none to only one element is given and executed by the parliament or if the agency’s oversight is not performed by the parliament but another body/party</p>
Delegation of sovereignty	<p>Delegation of sovereignty from the voters through the parliament and ministers to administrative bodies</p>	<p>“The Chief Executive (...) are appointed by the Steering Board on a proposal from the Head of the Agency for three years.”</p>	<p>The delegation of sovereignty is given if the parliament approves the election/appointment of an authority</p> <p>The delegation of sovereignty is not given if the election/appointment of an authority is not approved by the parliament but a third party</p>
Role of parliament regarding strategic policy plans & budget	<p>The power of the parliament to adopt strategic policy plans and the budget</p>	<p>“Within the framework of the guidelines of the Council (...), the Steering Board (...) may amend the financial provisions for the implementation of the Agency’s general budget.”</p>	<p>The democratic legitimacy in this aspect can be considered high if the parliament formally endorses strategic policy plans and the budget</p> <p>It can be considered medium if the parliament has a say in either the policy plans or the budget</p>

		“The Agency shall operate under the authority and the political supervision of the Council, (...) from which it shall receive regular guidelines.”	It be considered low if the parliament has no say in neither the policy plans nor the budget
Legal instrument	An instrument that applies a formally defined legal mandate to the relevant organization <ul style="list-style-type: none"> • A court/legal authority carries the legal responsibility for ruling in matters of contested interpretations and complaint procedures 	“The Agency shall have the legal personality necessary to perform its functions and attain its objectives. Member States shall ensure that the Agency enjoys the most extensive legal capacity accorded to legal persons under law.”	The legitimacy is given if the legal instrument is formally adopted and provides a legal personality The legitimacy is not given if the legal instrument is not formally adopted and does not provide a legal personality or if the legal personality is not carried out by a court/legal authority
Legal monitoring	Direct jurisdiction over agencies/measures by courts (national or European Court of Justice)	“Each Member State shall be liable, in accordance with its national law, for any damage caused to an individual as a result of legal or factual errors in data stored or processed at Europol. Only the Member State in which the event which gave rise to the damage occurred may be the subject of an action for compensation on the part of the injured party, who shall apply to the courts having jurisdiction under the national law of the Member State involved.”	The legal monitoring can be considered high if there is a direct jurisdiction through national courts and the European Court of Justice It can be considered medium if there is a direct jurisdiction through national courts or the European Court of Justice It can be considered low if there is neither a direct jurisdiction through national courts nor the European Court of Justice
Public accountability	Public accountability means <ol style="list-style-type: none"> Provided transparency about activities by e.g. public reports Provided information about memberships/meetings of institutions by e.g. a website 	“Europol maintains an extensive library of documents on its mission and its works. (...) Europol maintains a public register that facilitates access to its	Public accountability can be considered high if the agency publishes public reports on a regular basis and provides updates information online

		documents. If a Europol document has not been published on, or cannot be downloaded from, the register, an individual can request access (...).”	Public accountability can be considered medium if some information are available for the public Public accountability can be considered low if neither public reports nor information on the website are provided
Institutionalized monitoring	The agency is monitored by an independent party (e.g. by a court of auditors, ombudsman, committee or public watchdogs) who investigates the performance of the agency and brings the results into the public domain	“In addition, the joint supervisory body shall monitor the permissibility of the transmission of data originating from Europol. (It) shall be composed of not more than two members or representatives (...) guaranteed to be independent.”	Institutionalized monitoring can be considered high if an independent party investigates and publishes the results It can be considered low if there is either no monitoring or it is performed by a dependent party
Participation of citizens, civil society groups and NGOs	Citizens, civil society groups and NGOs are included in consultations and debates	---	Inclusion is given if citizens, civil society groups and NGOs are included in consultations and debates Inclusion is not given if neither citizens nor civil society groups and NGOs are included in consultations and debates

[Source: Own illustration based on den Boer et al. (2008)].