VIABLE PROJECT OR WISHFUL THINKING? THE EUROPEAN UNION (EU) POLICY IN THE FIGHT AGAINST TERRORISM: QUEST FOR STRONG HUMAN RIGHTS SAFEGUARDS AND ENHANCED SECURITY

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ABSTRACT

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This thesis examines whether and how the EU counter-terrorism (CT) policy reconciles the demands of security with adequate protection of human rights. It starts from the assumption that human rights and security are mutually reinforcing and interdependent objectives in the CT fight where the erosion of one objective leads automatically to negative consequences in respect of the other objective. It specifically argues that the reconciliation of these two objectives has to be addressed at two distinct levels: first, in the framework of the EU primary law and, second, in the content of each EU CT provision. Consequently, the thesis examines both levels in order to respond to the research question. In the course of this investigation, the research has demonstrated that the legal framework resulting from the Treaty of Lisbon provides a basis for better addressing the human rights protection and security objectives of the EU CT policy. However, the analysis of three specific instruments – two in force and one at the level of a legislative proposal – provided contrasting results regarding the simultaneous fulfilment of the two imperatives outlined above. Moving beyond questions pertaining to the advancement of preventive criminal law and the possible reinforcement of a surveillance society, the thesis advances the hypothesis that, in the field, we are confronted more and more with what we could term 'grey laws' – following Dyzenhaus, Lynch and Reilly – due to their frailties as regards the tests of proportionality and legal certainty. Moreover, the thesis explores the EU's stance as an actor in the field and the applicability of Wallace's 'pendulum model' for CT decision-making, as well as the position of an individual subject to all the three measures indicated above. Solutions in order to overcome the identified shortcomings as well as further potential areas of research are also explored.

Preface and Acknowledgments

I would firstly like to pay a great tribute to my supervisors, Dr Benjamin Goold, Professor Lucia Zedner and Dr Katja Ziegler, for their insight, support, positive criticism and guidance throughout my DPhil journey at Oxford. I would also like to thank all my friends and colleagues from academia and the practice who have provoked my thinking and provided valuable feedback.

I wish to acknowledge the support given through the Jenkins scholarship for the year 2007-2008 and to convey a warm thank you to all the staff of the Law Faculty, of the Centre for Criminology and of St Antony's College.

This thesis stems from a keen interest in human rights and EU law and is rooted in a genuine belief in the EU's capacity to reinvent itself. It has been further nurtured by my Master's research and animated by the conviction that EU CT law can help advance the global efforts in fighting terrorism. At the same time, this same conviction allowed room for a series of questions concerning the features of this law. While my findings have identified problematic areas in need of reappraisal, they have also proven that there is scope for these 'young' EU laws to be reviewed in order to better address the relationship between human rights and security.

Finally, this journey would not have been possible without the borderless and constant love and support of my family and friends, to whom I am deeply grateful.

This thesis is dedicated to my parents, Cătălina and Doru, and to my grandparents who have been the biggest supporters of my dreams throughout the years.

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Table of Abbreviations

AFSJ	Area of Freedom, Security and Justice
WP 29	Article 29 Data Protection Working Party
CLJ	Cambridge Law Journal
CEPS	Centre for European Policy Studies
LIBE Committee	Civil Liberties, Justice and Home Affairs Committee
CFSP	Common Foreign and Security Policy
CMLR	Common Market Law Review
COSAC	Community and European Affairs Committees of Parliaments of the European Union
CFI	Court of First Instance
CoE	Council of Europe
Commission	The European Commission
COSI	Standing Committee on Operational Cooperation on Internal Security
CPT	Convention on the Prevention of Terrorism
CT	Counter-terrorism
CTC	Counter-Terrorism Coordinator
CJEU	Court of Justice of the European Union
Crim LR	Criminal Law Review
EDRI	Digital Rights in Europe
EAW	European Arrest Warrant
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
EDPS	European Data Protection Supervisor
EUConst	European Constitutional Law Review
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
EFA Rev	European Foreign Affairs Review
EHRLR	European Human Rights Law Review
EIoP	European Integration online Papers
EJIL	European Journal of International Law
EJIR	European Journal of International Relations
ELJ	European Law Journal
ELR	European Law Review
EP	European Parliament
EPPO	European Public Prosecutor Office
EUCFR	Charter of Fundamental Rights of the European Union
EJC	European Journal of Criminology
EU CT policy	EU counter-terrorism policy
Fordham Int'l LJ	Fordham International Law Journal

FRA	European Union Agency for Fundamental Rights
Hastings Int'l & Comp L Rev	Hastings International and Comparative Law Review
HRL Rev	Human Rights Law Review
IA	Impact Assessment
ISS	Internal Security Strategy
ICON	International Journal of Constitutional Law
ICMPD	International Centre for Migration Policy Development
Int'l & Comp LQ	International and Comparative Law Quarterly
ICL Journal	Vienna Online Journal of International Constitutional Law
IRLCT	International Review of Law, Computers & Technology
JHA	Justice and Home Affairs
JCMS	Journal of Common Market Studies
JEI	Journal of European Integration
JEPP	Journal of European Public Policy
JIANL	Journal of Immigration, Asylum and Nationality Law
OJLS	Oxford Journal of Legal Studies
PIU	Passenger Information Unit
PNR	Passenger Name Record
PLPR	Privacy Law and Policy Reporter
LT	Treaty of Lisbon
SALJ	South African Law Journal
UK	United Kingdom
UN	United Nations
US	United States
UNCHR	UN Commission on Human Rights
UNGA	UN General Assembly
UNSC	UN Security Council
UN Special Rapporteur	UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism
UNSWLJ	University of New South Wales Law Journal

TREVI	Terrorism, Radicalisation, Extremism and International Violence
EC Treaty	Treaty establishing the European Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

Table of Cases

Court of Justice of the European Union

General Court (*Court of First Instance*)

European Court of Human Rights and European Commission on Human Rights

Czech Republic

Germany

Romania

United States

Table of Legislation

EU Legislation

Treaties

TEU

EC Treaty

TEU

TFEU

Charter of Fundamental Rights of the European Union

Protocols

Agreements

Common Positions

Decisions

Directives

Framework Decisions

Regulations

Declarations

Council of Europe

Intergovernmental Treaties

United Nations

United Kingdom

United States

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‘Having an ideal means having a mirror’

Nichita Stãnescu

CHAPTER I: EXAMINING THE EU CT POLICY

This thesis examines and assesses the relationship between human rights and security within the EU counter-terrorism (CT) policy. It enquires whether, and if so how, the policy reconciles the security imperative with an adequate protection of human rights, while at the same time taking stock of the relevant academic research undertaken in the field, with a primary focus on the law domain. The aim and interest of this enquiry is to approach the research question from several perspectives. It will examine the arrangements of EU primary law for the fight against terrorism, as well as key secondary law instruments. In this latter context, the research will investigate whether three Area of Freedom, Security and Justice (AFSJ) measures with CT objectives are in keeping with core law principles, such as proportionality and legal certainty. These measures are the offence of public provocation to commit terrorist offences,[1] the so-called Prüm Decision[2] and the EU PNR proposal.[3] This will allow inferences as regards three aspects: the characteristics of CT laws termed ‘grey laws’ by this thesis, the CT policy (the model for policy formation and more broadly the EU’s vision for the field) and finally the impact on the individual. The following sections of this chapter will briefly describe the establishment of the EU CT policy and examine how

1 Introduced by Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism [2008] OJ L 330/21 (Council Framework Decision 2008/919/JHA).

2 Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime [2008] OJ L 210/1.

3 Two proposals have been tabled on the EU PNR: one in 2007 (Commission, ‘Proposal for a Council Framework Decision on the use of Passenger Name Record (PNR) for law enforcement purposes’ COM (2007) 654 final) which lapsed with the entry into force of the Treaty of

the EU has dealt with the two objectives mentioned above, as well as proposing a conceptual framework for the research.

1.1. Mapping the EU CT policy

1.1.1 The formation of a policy on CT

This section does not aim to provide an exhaustive picture of the EU's involvement in the fight against terrorism, as extensive literature has been published on this subject.[4] Instead, it intends to signpost some of the main steps the EU has taken in this field from being a 'non-actor in counter-terrorism'[5] to a player capable of developing a comprehensive policy, from operational cooperation outside of the treaties to treaty provisions and secondary legislation. This will inform the subsequent discussions.

The beginnings can be traced back to the activities of an informal group of intergovernmental nature referred to as TREVI (Terrorism, Radicalisation, Extremism and International Violence) and established in 1976. TREVI regrouped the Member States who formed the European Community in the 1970s and was intended as a non-bureaucratic law enforcement cooperation with a view of combating terrorism.[6] While

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Lisbon and one in 2011 (Commission, 'Proposal for a Directive of the European Parliament and of the Council on the use of Passenger Name Record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime' COM (2011) 32 final).

4 For a more comprehensive account of the history of EU action in the CT field see O Bures, *EU Counterterrorism Policy: A Paper Tiger?* (Ashgate Publishing 2011) 59 onwards.

5 J Argomaniz, 'Post-9/11 Institutionalisation of European Union Counter-Terrorism: Emergence, Acceleration and Inertia' (2009) 18 European Security 151, 152.

6 For more on TREVI as well as an interesting overview of the EU action in fighting terrorism see T Bunyan, 'Trevi, Europol and the New European State' in T Bunyan (ed), *Statewatching the New Europe: A Handbook on the European State* (Statewatch 1993); C Gueydan, 'Cooperation between Member States of the European Community in the Fight against Terrorism' in R Higgins and M Flory (eds) *Terrorism and International Law* (Routledge 1997) 105; J D Occhipinti, *The Politics of EU Police Cooperation: Toward a European FBI?* (Lynne Rienner 2003) 31; T Wahl, 'The EU as an Actor in the Fight against Terrorism' in M Wade and A Maljević (eds), *A War on Terror? The European Stance on a New Threat, Changing Laws and Human Rights Implications* (Springer 2009) 107-109; V Mitsilegas, E*U Criminal Law* (Hart Publishing 2009) 6, 162. Mitsilegas recalls that TREVI had 'no clear legal framework or standing under Community law' and that it 'ceased to exist following the entry into force of the Maastricht Treaty.'

it has served as a '[p]athfinder for several well-established institutions today, such as Europol',[7] TREVI has also been 'has been criticized by the European Parliament and by civil rights groups for its lack of transparency and of external democratic control'.[8]

The TREVI cooperation came to term with the advent of the Treaty on the European Union (TEU) of 1992, the so-called the Maastricht Treaty. The treaty established the 'pillar design' of the EU and added next to economic integration two crucial political projects: a Common Foreign and Security Policy (CFSP) and cooperation in Justice and Home Affairs (JHA).[9] While the treaty provides only one specific reference to terrorism in relation to police cooperation in criminal matters, other areas such as judicial cooperation in criminal matters allow for CT action to be taken. Consequently, terrorism becomes, 'as pointed out [by Chalk]', 'an internal security problem of the Union'.[10] The *La Gomera Declaration* in 1995 acknowledged terrorism as a growing threat to European democracies and to 'the free exercise of human rights', which, because it operated across national boundaries, required coordinated action on the part of the Member States.[11] The Declaration also rightly identified an area which, in the wake of 9/11, became one of the most valuable tools in fighting terrorism: information exchange. In connection with the possible areas of CT action, Wahl observed that

> the multifaceted nature of international terrorism, as it emerged in the 1990s […] revealed that not only internal security issues are at stake but foreign policy is also affected and even military implications had to

7 Wahl (n 6) 108.

> be considered. Therefore, condemning the threat of terrorism is conceived as a challenge to all three pillars.[12]

This approach is echoed *inter alia* in one of the CFSP's objectives namely the 'strengthen[ing] of the security in the Union in all ways' (Article 11 TEU) as well as in other provisions of the CFSP (eg: Articles 12 and 17 TEU).[13] The Amsterdam Treaty[14] brought about an important change with regards to the fight against terrorism by the establishment of the so-called AFSJ.[15] Article 29 TEU provides that:

> [t]he Union's objective shall be to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial cooperation in criminal matters and by preventing and combating racism and xenophobia.

Terrorism is mentioned among the main threats the AFSJ has to address. The first strategic multi-annual programme in the AFSJ, the Tampere Programme (1999-2004),

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8 M Anderson and others, *Policing the European Union* (Oxford University Press 1995) 56.

9 Treaty on European Union [1992] OJ C 191/1. This important step forward must, according to Wahl (n 6) 110, be read in conjunction with three developments: the fall of the Communist regimes in the 1990s, the reunification of Germany and the achievement of an area without internal frontiers where free movement of persons is ensured. The Single European Act [1987] OJ L 169/1 enshrined in Article 13 that this objective be 'progressively established over a period expiring on 31 December 1992'. The free movement of persons was realised by means of an intergovernmental agreement between some Member States of the European Communities, known as the Schengen Agreement signed in 1985 (Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders [2000] OJ L 239/13). A Convention Implementing the Schengen Agreement followed in 1990 which came into force in 1995 (Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders [2000] OJ L 239/19). The Amsterdam Treaty has integrated the Schengen *acquis* into the EU framework.

10 (n 4) 61. P Chalk, 'The Third Pillar on Judicial and Home Affairs Cooperation, Anti-Terrorist Collaboration and Liberal Democratic Acceptability' in F Reinares (ed), *European Democracies against Terrorism: Governmental Policies and Intergovernmental Cooperation* (Ashgate Publishing 2000) 175.

11 European Council, 'Presidency Conclusions' (1995) Annex 3 <http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressdata/en/ec/00400-C.EN5.htm> accessed 10 September 2011.

12 Wahl (n 6) 112.

13 References to Articles will be done on the basis of the consolidated versions of the Treaty on European Union (TEU) and of the Treaty establishing the European Community (EC Treaty) [2006] OJ C 321 E/1.

14 Treaty of Amsterdam amending the Treaty of the European Union, the Treaties establishing the European Communities and certain related acts [1997] OJ C 340/1.

15 For a comprehensive overview of the field see *inter alia* M Anderson and J Apap, *Striking a Balance between Freedom, Security and Justice in an Enlarged Europe* (Centre for European Policy Studies 2002); N Walker (ed), *Europe's Area of Freedom, Security, and Justice* (Oxford University Press 2004); J Apap (ed), *Justice and Home Affairs in the EU: Liberty and Security Issues after Enlargement* (Edward Elgar Publishing 2004); J W Zwaan, F A N J Goudappel (eds), *Freedom, Security and Justice in the European Union: Implementation of the Hague*

used the term 'terrorism' only once in the section entitled *A Unionwide fight against crime*, in relation to the setting up of joint investigation teams.[16] However, mutual recognition of judicial decisions, approximation of legislation, the role of Europol in 'supporting union-wide crime prevention, analyses and investigations'[17] and the need to set up a 'unit composed of national prosecutors, magistrates, or police officers of equivalent competence' (Eurojust)[18] can all be considered supporting elements in the fight against terrorism. The Nice Treaty did not make substantial changes to the Amsterdam Treaty with respect to the powers of the EU in relation to the AFSJ or terrorism in particular.[19] It has nevertheless introduced in Article 31 TEU provisions on Eurojust, amended the rules on enhanced cooperation and some provisions pertaining to security and defence.

While the Amsterdam Treaty established the pre-conditions for comprehensive action by the EU in order to fight terrorism, the EU did not adopt any major undertakings before 9/11. After this, it launched a 'multi-pronged response'[20] which entailed actions in all three pillars. Moreover, as early as 21 September 2001, the

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Programme (TMC Asser Press 2006); Mitsilegas (n 6); S Peers, *EU Justice and Home Affairs Law* (2nd edn, Oxford EC Law Library, Oxford University Press 2006) and S Peers, *EU Justice and Home Affairs Law* (3rd edn, Oxford EU Law Library, Oxford University Press 2011).

16 European Council, 'Towards a Union of Freedom, Security and Justice: the Tampere Milestones' SI (1999)800.

17 (n 16) [45]. For a brief history of Europol see Europol, 'History' <https://www.europol.europa.eu/content/page/history-149> accessed 10 September 2011.

18 (n 16) [46]. For a brief history of Eurojust see Eurojust, 'The History of Eurojust' <http://www.eurojust.europa.eu/about.htm> accessed 10 September 2011.

19 Treaty of Nice amending the Treaty of the European Union, the Treaties establishing the European Communities and certain related acts [2001] OJ C 80/1.

20 See P Wilkinson on the concept of 'multi-pronged EU response' in 'Lessons from the Struggle against Al Qaeda — Outlining a Holistic Multi-Pronged EU Response' <http://eeas.europa.eu/ifs/publications/articles/book2/book%20vol2_part4_chapter51_lessons%20from%20the%20struggle%20against%20al%20qaeda_paul%20wilkinson.pdf> accessed 10 September 2011. Den Boer observed that '11th of September terrorist acts in the USA seemed to unleash an unprecedented wave of policy interventions within the European Union. In the words of Justice Commissioner Vitorino the terrorist attacks have led to a "giant leap forward for EU Justice and Home Affairs Cooperation" ' in M Den Boer, '9/11 and the Europeanisation of the Anti-Terrorism Policy: a Critical Assessment' (2003) Groupement d'Etudes et de Recherches, Notre Europe Policy Papers 6 <http://www.notre-europe.eu/uploads/tx_publication/Policypaper6_01.pdf> accessed 10 September 2011.

European Council approved an action plan to fight terrorism.[21] On 26 September an 'Anti-Terrorism Roadmap' providing very specific actions to be taken, ranging from legislative action to operational cooperation and the setting up of working groups was also put forward.[22] The plan supported diverse actions such as 'enhancing police and judicial cooperation', 'developing international legal instruments', 'putting an end to the funding of terrorism', 'strengthening air security', and 'coordinating the EU's global action'.[23] However, the Action Plan and the Roadmap, while arguably an attempt to bring together different strands of the fight against terrorism, have been strongly criticised. Indeed, one scholar perceives them as 'emerg[ing] out of a hectic garbage-can process of agenda-setting and policy-making' and raised 'doubts as to the legitimacy and appropriateness of the EU's efforts, as it simultaneously tabled several highly controversial proposals and set very tight deadlines for agreeing on them', giving the impression that these were merely technical elements.[24]

Moreover, measures contemplated by EU decision-makers on which there was no consensus among the Member States before 9/11 were very quickly endorsed by governments in the months after. The Council Framework Decision 2002/475/JHA on combating terrorism (2002 Framework Decision on combating terrorism) introduced common standards regarding the definition of terrorist offences for all EU Member States.[25] Moreover, Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States 'replaced lengthy

21 Council Document SN 140/01, 'Conclusions and Action Plan of the Extraordinary European Council Meeting on 21 September 2001'.

22 Council Document SN 4019/01, 'Anti-Terrorism Roadmap'.

23 (n 21) 1-3.

24 R Bossong, 'The Action Plan on Combating Terrorism: A Flawed Instrument of EU Security Governance' (2008) 46 JCMS 27, 42-43.

25 Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism [2002] OJ L 164/3. In 2001 only seven Member States had specific legislation in this field. See P Rieker, *Europeanization of National Security Identity: the EU and the Changing Security Identities of the Nordic States* (Routlegde 2006) 44.

extradition procedures between Member States' with a judicial mechanism.[26] In the external dimension, the European Security Strategy (also referred to as the External Security Strategy) adopted in December 2003[27] identified terrorism as the first key threat. It emphasised the role of 'an international order based on effective multilateralism' as well as the need to develop a 'strategic culture that fosters early, rapid, and when, necessary, robust intervention'.[28]

The Madrid attacks led to a new wave of EU CT efforts. The 25 March 2004 European Council Declaration on Combating Terrorism, while referring to the European Security Strategy of December 2003, put forward a revised action plan to combat terrorism. [29] Stressing the importance of the timely and complete implementation of the measures adopted in the wake of 9/11 (eg: the 2002 Framework Decisions on combating terrorism and the European Arrest Warrant (EAW)), the Declaration insisted *inter alia* on the adoption of new measures such as the retention of communication traffic data and the exchange of information on convictions.[30] It also required the enhancement of operational cooperation and set out the position of

26 European Justice <https://e-justice.europa.eu/content_european_arrest_warrant-90-en.do> accessed 10 September 2011; Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L 190/1. On the preparatory works of the two Framework Decisions see H Nilsson, 'Decision-Making in EU Justice and Home Affairs: Current Shortcomings and Reform Possibilities' (2002) SEI Working Paper No 57. These measures as indicated by Bures had been in preparation since 1999 (n 4) 64.

27 Council Document 15895/03, 'A Secure Europe in a Better World: European Security Strategy'.

28 ibid 9-11. On the different strategic cultures developed by the EU and the United States (US) see W Rees and R J Aldrich, 'Contending Cultures of Counterterrorism: Transatlantic Divergence or Convergence?' (2005) 81 International Affairs 905.

29 Council Document 7906/04, 'Declaration on combating terrorism'.

30 See also Commission, 'Action Paper in Response to the Terrorist Attacks on Madrid' (2004) <http://www.statewatch.org/news/2004/mar/Comm-Action-Plan.pdf> accessed 10 September 2011. Also Bures on the actions undertaken in the aftermath of the Madrid attacks (n 4) 66 onwards.

the EU Counter-Terrorism Coordinator (CTC).[31] The CTC has a coordination and overview role, although he has no concrete powers 'at his disposal'.[32]

The second multi-annual programme, the Hague Programme adopted in November 2004, took stock of the Madrid attacks, stressing that '[t]he security of the European Union and its Member States has acquired a new urgency'.[33] It emphasised the need for full implementation of the measures foreseen in the March 2004 Declaration and in the EU Action Plan, as well as the crucial role of the exchange of information in the delivery of security (see section 1.1.2 of this chapter).

One year later, after the London attacks of 7 July 2005, the European Council adopted *The European Union Counter-Terrorism Strategy*.[34] The document – largely inspired by the CT strategy of the United Kingdom (UK) and pushed by the UK Presidency –[35] symbolised the EU's attempt to address the criticism related to its 'shopping list' approach in the field, with reference also to the EU Action Plan.[36] However, several scholars have considered that the strategy was only 'old wine into new bottles'[37] incapable of 'liv[ing] up to a stricter definition of strategy, which

31 The revised action plan also provided for the 'expan[sion] of the role of SitCen in carying out threat assessments' (n 29) 17. For more on the history and role of the SitCen see J van Buuren, 'Secret Truth: the EU Joint Situation Centre' (2009) <http://www.statewatch.org/news/2009/aug/SitCen2009.pdf> accessed 10 September 2011.

32 See (n 24) 42. For more on the work of the current CTC, Gilles de Kerchove, as well as on the former CTC, Gijs de Vries see Council, EU Counter-terrorism Coordinator <http://www.consilium.europa.eu/policies/fight-against-terrorism/eu-counter-terrorism-co-ordinator.aspx?lang=en> accessed 10 September 2011.

33 European Council, 'The Hague Programme: Strengthening Freedom, Security and Justice in the European Union' [2005] OJ C 53/1.

34 Council Document 14469/4/05 REV 4, 'The European Union Counter-Terrorism Strategy'.

35 R Bossong, 'The Public Good Theory and the 'Added Value' of the EU's Counterterrorism Policy' (2011) Economics of Security Working Paper Series Working Paper 42 <http://www.economics-of-security.eu/sites/default/files/WP42_Public_Good_0.pdf> accessed 10 September 2011, 15.

36 On the strategy see *inter alia* D Keohane, *The EU and Counter-Terrorism* (Centre for European Reform 2005) <http://www.cer.org.uk/sites/default/files/publications/attachments/pdf/2011/wp629_terrorism_counter_keohane-1499.pdf> accessed 10 September 2011; J Monar, 'Common Threat and Common Response? The European Union's Counter-Terrorism Strategy and its Problems' (2007) 42 Government and Opposition 292.

37 Wahl citing Knelangen (n 6) 120.

would present a clear set of priorities and make corresponding resource commitments'.[38]

The strategy, which described itself as a 'comprehensive and proportionate response to the international terrorist threat', underlined the 'EU's strategic commitment to combat terrorism globally while respecting human rights and making Europe safer, thereby allowing its citizens to live in an [AFSJ]'.[39] It consisted of four strands to this effect: prevent,[40] protect,[41] pursue[42] and respond.[43] Reiterating that the main responsibility lies with the Member States, the strategy indicated areas where the EU could provide improvement: 'strengthening national capabilities, facilitating European cooperation, developing collective capability and promoting international partnership'.[44] The link with the European Security Strategy was again clearly established, given that 'through its external action the European Union takes on a responsibility for contributing to global security and building a safer world.'[45] Moreover, the Action Plan is revised every six months and the EU CTC now issues

38 Bossong (n 24) 41. See also Bures who qualified the EU CT policy in 2006 as a 'paper tiger' O Bures, 'EU Counterterrorism Policy: A Paper Tiger' (2006) 18 Terrorism and Political Violence 57.

39 (n 34) 6, 3.

40 (n 34) 3 'To prevent people turning to terrorism by tackling the factors or root causes of which can lead to radicalisation and recruitment, in Europe and internationally'. In this sense see also Commission, 'Terrorist recruitment: addressing the factors contributing to violent radicalisation' (Communication) COM (2005) 313 final and Council Document 14781/1/05, 'European Union Strategy for Combating Radicalisation and Recruitment to Terrorism'.

41 (n 34) 3 'To protect citizens and infrastructure and reduce our vulnerability to attack, including through improved security of borders, transport and critical infrastructure'.

42 (n 34) 3 'To pursue and investigate terrorists across our borders and globally; to impede planning, travel, and communications; to disrupt support networks; to cut off funding and access to attack materials, and bring terrorists to justice'.

43 (n 34) 3 'To prepare ourselves, in the spirit of solidarity, to manage and minimise the consequences of a terrorist attack, by improving capabilities to deal with: the aftermath; the co-ordination of the response; and the needs of victims'.

44 (n 34) 4.

45 (n 34) 7.

regular reports concerning the strategy in the form of discussion papers, identifying trends and indicating areas for improvement or further analysis.[46]

The EU has also been active in the international scene as regards cooperation with third countries and other international and regional organisations in global CT efforts. While there are a plethora of measures that can be cited, this thesis only mentions some legal instruments which have raised important questions as regards their necessity and proportionality. These are the so-called 'Passenger Name Record (PNR) Agreements' with the US,[47] Canada[48] and Australia[49] and the Agreement between the EU and the US on the processing and transfer of Financial Messaging Data from the EU to the US for the purposes of the Terrorist Finance Tracking Program (EU–US TFTP Agreement).[50] These instruments have been echoed by developments at the EU level: the EU PNR proposal, options for setting up an EU TFTP.[51] This indicates a 'borrowing approach' by the EU in relation to US models,

46 <http://www.consilium.europa.eu/policies/fight-against-terrorism/eu-strategy.aspx?lang=en> accessed 10 September 2011.

47 Agreement between the European Union and the United States of America on the processing and transfer of Passenger Name Record (PNR) data by air carriers to the United States Department of Homeland Security (DHS) (EU–US 2007 PNR Agreement) [2007] OJ L 204/18.

48 Agreement between the European Community and the Government of Canada on the processing of Advance Passenger Information and Passenger Name Record data [2006] OJ L 82/15.

49 Agreement between the European Union and Australia on the processing and transfer of European Union-sourced passenger name record (PNR) data by air carriers to the Australian customs service (EU–Australia PNR Agreement) [2008] OJ L 213/49.

50 The first EU–US TFTP Agreement (Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for purposes of the Terrorist Finance Tracking Program [2010] OJ L 8/11) was voted down by the EP in February 2010. After renegotiations and a favourable vote from the EP, the second EU–US TFTP Agreement entered into force on 1 August 2010. Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for purposes of the Terrorist Finance Tracking Program [2010] OJ L 195/5.

51 Council Decision 2010/412/EU of 13 July 2010 on the conclusion of the Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for the purposes of the Terrorist Finance Tracking Program [2010] OJ L 195/3 art.2. See also the Commission, 'A European terrorist finance tracking system: available options' (Communication) COM (2011) 429 final.

the merits of which are still to be assessed with regards to their full compliance with human rights standards.[52]

The final important change for EU CT efforts pertains to the Treaty of Lisbon (LT) amending the Treaty on European Union and the Treaty establishing the European Community, which entered into force on 1 December 2009.[53] The Treaty abolishes the pillar structure, consolidates the AFSJ (with judicial and police cooperation in criminal matters coming within the Community method) and creates – as the second chapter of this study will argue – the basis for a more coherent, legitimate and effective policy in the fight against terrorism. The CT provisions from the last multi-annual AFSJ programme adopted in December 2009, the Stockholm Programme, are intimately linked with the building of an Internal Security Strategy (ISS) and will be examined in the next section of this chapter.[54]

So, we can see that, while the EU was legally equipped in order to adopt CT measures even before September 2001, it did not make extensive use of its powers. The 9/11 attacks acted as a 'catalyst' for the extremely rapid development of the CT policy, in particular as regards measures related to the AFSJ.[55] Furthermore, it can be observed that the 2001-2005 period was marked by contrasting results with regards to implementation of EU CT provisions and efforts to create harmonisation and mutual recognition mechanisms, as well as bodies with CT competencies. The subsequent period has been characterised by a heavy reliance on information management mechanisms. Moreover, within this setting, the articulation between security and

52 P Pawlak, 'Made in USA? The Influence of the US on the EU's Data Protection Regime' (2009) Centre for European Policy Studies (CEPS) <http://www.ceps.eu/node/2680> accessed 10 September 2011.

53 [2007] OJ C 306/1. References to Articles will be done on the basis of the Consolidated versions of the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) [2008] OJ C 115/01.

54 European Council, 'The Stockholm Programme – An Open and Secure Europe Serving and Protecting the Citizens' [2010] OJ C 115/1.

liberty has been somewhat dysfunctional and has raised concerns in terms of the building up of a security agenda with a potential negative impact on the objective of protection of human rights.[56]

1.1.2 Human rights and security in the EU CT field and paradigms for action

The commitment to human rights is a fundamental building block of the EU, along with human dignity, freedom, democracy, equality and the rule of law (Article 2 TEU as amended by LT). Furthermore, the entry into force of the LT created the pre-conditions for an enhanced protection of human rights within the EU by different mechanisms: the broadening of the jurisdiction of the Court of Justice of the EU (CJEU), the accession of the EU to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) (Article 6(2) TEU as amended by LT), and the binding character of the Charter of Fundamental Rights of the European Union (EUCFR) (Article 6(1) TEU as amended by LT). These aspects will be analysed in detail in the next chapter.[57]

Security is a concept with different meanings, cutting across diverse disciplines, including international relations, law, war studies and economics.[58] It is, at the same time, a notion 'under attack', especially since the conclusion of the Cold

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55 S de Jong, S Sterkx and J Wouters, 'The EU as a Regional Actor: Terrorism' (2010) EU–GRASP Working Paper No 9 <http://www.eugrasp.eu/uploads/media/WP09_The_EU_as_a_Regional_Actor_-_Terrorism_01.pdf> accessed 10 September 2011, 13.

56 For a recent analysis of the EU efforts in the CT field see C Eckes, 'The Legal Framework of the European Union's Counter-Terrorist Policies: Full of Good Intentions?' in C Eckes and T Konstadinides (eds), *Crime within the Area of Freedom, Security and Justice: A European Public Order* (Cambridge University Press 2011) 127. Throughout the text, the term CJEU will be used also in relation to the pre-LT framework where the Court was referred to as European Court of Justice (ECJ).

57 Section 2.1.1.2.

58 With the help of an adjective or even in the absence of it, security seems to possess metamorphose capacities that allow it to take up different roles. It can just as well relate to the classical national security domain as it can encompass the new field of human security or can refer to the right to security and liberty as enshrined in Article 5 of the ECHR.

War, [59] and a concept whose mere mention unleashes an extremely powerful rhetoric. [60] Security has been envisaged in different contexts in the Treaties establishing the European Communities,[61] and in the Treaty on the European Union.[62] As several scholarly articles have indicated, security was firstly conceived mainly as 'social security in relation to the free movement of workers', which was 'broadened to include social, political, economic and energy security with both internal and external implications'.[63]

Security both in its external and internal dimension has been translated in the Maastricht Treaty by the framework of the second pillar, the Common Foreign and Security Policy (CFSP) and via the third pillar, Police and Judicial Cooperation in Criminal Matters.[64] The internal security dimension was reinforced by the Amsterdam Treaty, with the Nice Treaty pursuing this logic. It can therefore be observed that two

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59 See V Mitsilegas, J Monar and W Rees, *The European Union and Internal Security : Guardian of the People?* (Palgrave Macmillan 2003) 45-46 'As the tension of the Cold War dissipated, a more differentiated concept of security, less tied to military issues, began to emerge. The "overlay" of superpower priorities was withdrawn from Europe and the sharp cleavages between the two halves of the continent were dissolved. […] [A] view of security began to evolve which was more multifaceted in nature and less state-centric in perspective. Part of the attempt was to determine whose security might be at risk in the post-Cold War situation as it was no longer apparent that states were the only vulnerable actors. The resulting conceptual approach viewed security as measurable on a variety of levels: the international system, the region, the state and the individuals.[…] Anderson notes that the concept of security has altered in two ways. One is the "de-territorialization" of the subject as security becomes an issue irrespective of national borders. The other aspect is "internalisation" […]'.

60 For a detailed analysis of the many facets and challenges that security unravels see L Zedner, *Security* (Routledge 2009).

61 Treaty establishing the European Coal and Steel Community 1951 (ECSC); Treaty establishing the European Economic Community 1957 (EEC-also referred to as EC); Treaty establishing the European Atomic Energy Community 1957 (EAEC or Euratom). The ECSC expired on 23 July 2002.

62 (n 13).

63 For a detailed account of the evolution of the term 'security' before and after Maastricht with a special focus on the link between security and liberty in the CFSP see University of Athens, University of Cologne, 'The Concepts of Security and Liberty in the Framework of the European Union: The Case of the EU's External Action' <http://www.libertysecurity.org/IMG/pdf_WP12_CHALLENGE_DELIVERABLE.pdf> accessed 10 September 2011, 6.For the dimension of 'security' in terms of discourse see H Larsen, 'The Concepts of Security in the European Union after the Cold War' (2000) 54 Australian Journal of International Affairs 337.

64 See Mitsilegas, Monar and Rees (n 59) 22-23, 6 for an account on international terrorism and the approach of the Member States forming the European Communities before the Maastricht Treaty indicating that '[s]ome internal security issues have actually been dealt with at the European level almost since the beginning of the integration process. For more than forty years cooperation on these issues remained a preserve of intergovernmental cooperation, first completely outside the EC integration process, then, from the mid-1970s on, increasingly linked to the EC framework but still retaining its intergovernmental basis.' See also V Randazzo, 'EU Security Policies and the Pillar Structure: A Legal Analysis' (2009) 10 Perspectives on European Politics and Society 506; U C Schroeder, 'Strategy by Stealth? The Development of EU Internal and External Security Strategies' (2009) 10 Perspectives on European Politics and Society 486.

dimensions of security are gradually becoming predominant in the EU context. The links between these two dimensions are numerous, especially with regards to threats that have both an internal and an external dimension, such as terrorism.[65] The first strategic document that clearly foresaw the link between the external and internal dimensions of security was the 2003 European Security Strategy, which identified terrorism as a key threat. It also acknowledged that tackling it 'may require a mixture of intelligence, police, judicial, military and other means'.[66] It also stressed that '[b]etter co-ordination between external action and Justice and Home Affairs policies is crucial in the fight against both terrorism and organised crime'.[67]

The Amsterdam Treaty introduced the concept of an 'area', where three core values (freedom, security and justice) interact in order to make EU citizens safe. In this context, terrorism is perceived as a particular threat, together with human trafficking and organised crime. It has been argued that the order in which the three concepts are presented (with security entrenched between liberty and justice) is not arbitrary.[68] It was considered that

> 'security' has been placed before 'justice' in the title of the AFSJ which can be taken as an indication that cooperation on internal security matters has been considered more important than judicial cooperation.[69]

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65 Anderson and Apap observed that the 'blurring' between external and internal security has already been realised 'as the threat of conventional military attack on Western Europe has declined with the collapse of the Soviet Union' (n 15) 1. See also W Rees, 'Inside Out: the External Face of EU Internal Security Policy' (2008) 30 JEI 97. See Bigo for a discussion on the 'legitimacy of merging external and internal security and the ethical implications of such a political choice' in D Bigo, 'Internal and External Aspects of Security' (2006) 15 European Security 385, 386. See also F Charillon, 'The EU as a Security Regime' (2005) 10 EFA Rev 517; M Den Boer, 'Fusing the Fragments: Challenges for EU Internal Security Governance on Terrorism' in D Mahncke and J Monar (eds), *International Terrorism: a European Response to a Global Threat* (Peter Lang 2006); C Beyer, 'The European Union as a Security Policy Actor: The Case of Counterterrorism' (2008) 13 EFA Rev 293.

66 (n 27) 7.

67 (n 27) 13.

68 S Carrera and F Geyer, 'Terrorism, Borders and Migration: The Commission's 2008 Policy Strategy in the Area of Freedom, Security and Justice' (2007) 131 CEPS Policy Brief 1 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1334194> accessed 13 July 2011.

69 Mitsilegas, Monar and Rees (n 59) 36.

Mitsilegas and others also suggested that this view is supported by the manner in which the December 1998 Action Plan for implementing the AFSJ provisions from the Amsterdam Treaty was drawn up.[70] They warned that the preference for security over freedom and justice within the EU could lead to

> [t]he proliferation of repressive, undemocratic measures which potentially threaten civil liberties and are justified through recourse to the elusive and easily manipulated premise of 'freedom from threat'.[71]

Nevertheless, the discourse of the first strategic multi-annual programme in the AFSJ, the Tampere Programme (1999-2004) seemed to provide a comprehensive framework whereby security and freedom were approached as mutually reinforcing elements:

> From its very beginning *European integration has been firmly rooted in a shared commitment to freedom based on human rights, democratic institutions and the rule of law*. […] The challenge of the Amsterdam Treaty is now to ensure that freedom, which includes the right to move freely throughout the Union, can be enjoyed in conditions of security and justice accessible to all.[72]

It can also be observed that the Amsterdam Treaty created a form of 'Europeanisation' of internal security by reinforcing the EU as an actor in the field with roles of coordination and cooperation.[73] Along with Europeanisation, many scholars have argued that, even before 9/11, the EU was creating a form of 'security continuum' (identified by Bigo as early as 1994[74]) with the collapse of, *inter alia*,

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70 'Action plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice — Text adopted by the Justice and Home Affairs Council of 3 December 1998' [1999] OJ C 19/1.

71 Mitsilegas, Monar and Rees (n 59) 86.

72 (n 16) 1 (emphasis added).

73 Radaelli conceives Europeanisation as '[t]he processes of (a) construction (b) diffusion and (c) institutionalization of formal and informal rules, procedures, policy paradigms, styles, 'ways of doing things' and shared beliefs and norms which are first defined and consolidated in the making of EU decisions and then incorporated in the logic of domestic discourse, identities, political structures and public policies.' C M Radealli, 'Whither Europeanization? Concept Stretching and Substantive Change' (2000) 4 EIoP <http://eiop.or.at/eiop/texte/2000-008a.htm> accessed 10 September 2011.

74 D Bigo, 'The European Internal Security Field: Stakes and Rivalries in a Newly Developing Area of Police Intervention', in M Anderson and M Den Boer (eds), *Policing Across National Boundaries* (Pinter Publishers 1994) 164.

illegal immigration, drug trafficking, asylum, and organised crime as security threats.[75]

The 'security continuum' is linked to a phenomenon known in today's political (and international relations) jargon as securitisation. Securitisation is linked with the 'elevat[ion]' of an issue 'from the level of routine political discussion to a special category status' leading thus to a 'higher priority […] to remedying the problem, and combating the risks justifies the allocation of increased resources.'[76] It also ' emphasises social processes by which issues become perceived and handled as security matters.'[77] Organised crime and illegal immigration, for example, are presented as fields where policies have clearly been affected by securitisation.[78]

The 9/11 attacks have generally led to a heightened level of security discussion, including the need to conceive coherent and coordinated external and internal security dimensions within the EU.[79] As section 1.1.1 highlighted, the EU was extremely active in the CT field during the months following 9/11, a tendency reinforced by the Madrid (2004) and London (2005) attacks. This led Wahl to consider that the EU's approach was 'very much influenced by the impression of terrorism against the EU's area of freedom, security and justice, and by "home grown" terrorism.'[80] The Hague Programme introduced the idea of 'urgency',

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75 Den Boer points out that 'a broad notion of security […] tends to conflate several notions into a security continuum' (n 20) 3

76 Mitsilegas, Monar and Rees (n 59) 46-47.

77 S Lavenex and W Wagner, 'Which European Public Order? Sources of Imbalance in the European Area of Freedom, Security and Justice' (2007) 16 European Security 225, 229. For the Copenhagen School see B Buzan, O Wæver and J de Wilde, *Security : a New Framework for Analysis* (Lynne Rienner Publishers 1998).

78 Mitsilegas, Monar and Rees (n 59) 47. Also see T Balzacq, 'The Three Faces of Securitization: Political Agency, Audience and Context' (2005) 11 EJIR 171; J Huysmans, *The Politics of Insecurity: Fear, Migration and Asylum in the EU* (Routledge 2006); T Balzacq, 'The Policy Tools of Securitization: Information Exchange, EU Foreign and Interior Policies' (2008) 46 JCMS 75.

79 Den Boer (n 20) 18.

80 (n 6) 119.

together with the assessment that more effective measures need to be in place within different fields, from illegal immigration to trafficking of human beings and terrorism. The coherence of the external and internal dimension was also emphasised. However, in the section entitled *Strengthening Security,* the means and sub-objectives or threats (ie terrorism, organised crime) are presented at the same level of analysis. Exchange of information, terrorism, operational cooperation, organised crime and corruption or police cooperation are thus addressed as sub-headings. This confusion between threats (terrorism), sub-objectives (fight against terrorism) and means (information exchange, police cooperation) obscures the security dimension of the programme, which could have benefited from a more coherent and clearer approach.

In the section entitled *Strengthening Freedom,* under the heading *Management of migration flows,* the programme introduces the rationale of striking the '*right balance* between law enforcement purposes and safeguarding the fundamental rights of individuals' in relation to biometrics and information systems.[81] The programme has been criticised, therefore, for 'a blurring of the scope and division between measures dealing with freedom, security and justice' and advocating 'an expansion, predominance and strengthening of the security dimension over the other two rationales'.[82] In the same vein, the Challenge project has assessed the programme as being biased towards security and relying on the balance metaphor. Bigo and others argued that:

> [t]he Hague Programme appears to marginalise the protection of fundamental rights and freedoms (liberty), the principle of equality and

81 (n 33) 16 (emphasis added). See also D Bigo, 'Liberty, Whose Liberty? The Hague Programme and the Conception of Freedom', in T Balzacq and S Carrera (eds), *Security versus Freedom? A Challenge for Europe's Future* (Ashgate Publishing 2006).

82 E Guild, S Carrera and T Balzacq, 'The Changing Dynamics of Security in an Enlarged European Union' (2008) 12 Challenge Research Paper 1 <http://aei.pitt.edu/11457/1/1746.pdfhttp://aei.pitt.edu/11457/1/1746.pdf> accessed 10 September 2011, 7.

> of democratic accountability and judicial control. The overall priority which guides the programme remains clear: strengthening security understood as coercion […].[83]

More generally, the response to 9/11 has had consequences at several levels. At a practical and measurable level, it has put forward a broad range of security measures, which directly or indirectly can support the CT fight. At an ideological and theoretical level, it has been argued that the setting established after 2001 has led to a *permanent state of emergency* and that there is a clear risk of trade-offs between security and human rights or, at best, a balancing act. While the rationale of the 'permanent state of emergency' has been more often used to refer to the approach of the US or of some Western countries such as the UK, it has also gained in importance as a term applicable to the EU as a whole. Den Boer observed in 2003 'the prevalence of a "sense of urgency" […] dominat[ing] JHA decision-making […] and legislative developments that have shown a pattern of threat and response'.[84] Apap and Carrera referred to a permanent state of emergency at EU level in relation to the 're-introduction of border checks on the basis of Article 2.2 of the Schengen Convention' and to the generalised surveillance phenomenon, exemplified by the EU–US PNR agreement.[85] These scholars, as well as numerous others,[86] have indicated that the EU created this permanent state of exception via diverse measures, ranging from data exchange and retention to biometrics identifiers and the freezing of funds. They

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83 Bigo and others, 'The Changing Landscape of European Liberty and Security: Mid-Term Report on the Results of the CHALLENGE Project' (2007) Challenge Research Paper No 4 <http://www.ceps.be/book/changing-landscape-european-liberty-and-security-mid-term-report-results-challenge-project> accessed 10 September 2011, 14; see also Challenge, 'A Response to the Hague Programme: Protecting the Rule of Law and Fundamental Rights in the Next Five Years of an EU Area of Freedom, Security and Justice?' <http://www.libertysecurity.org/IMG/pdf/CHALLENGEHagueProgramme.pdf> accessed 10 September 2011.

84 (n 20) 22.

85 J Apap and S Carrera, 'Maintaining Security within Borders: Toward a Permanent State of Emergency in the EU?' (2003) CEPS Policy Brief 41 <http://aei.pitt.edu/1947/1/PB41.pdf> accessed 10 September 2011, 1.

86 J Lodge, 'EU Homeland Security: Citizens or Suspects? (2004) 26 European Integration 253; D Bigo and S Carrera, 'From New York to Madrid: Technology as the Ultra-Solution to the Permanent State of Fear and Emergency in the EU' (2006) CEPS <http://old.ceps.eu/Article.php?article_id=314.> accessed 10 September 2011; Lavenex and Wagner (n 77); Argomaniz (n 5).

argued that 9/11 created favourable conditions for broad and diverse legislation, which in many cases also included CT objectives. Paye has even considered in relation to the EU that the EAW 'suspends procedures protecting constitutional freedoms' and 'initiates a suspension of the law'.[87] Agamben whose work has revived the theory of the state of exception[88] has also enquired into the 'qualification' of the state of emergency, namely the permanent state of exception, stating that 'the state of exception has by now become the rule'.[89] A characteristic of such a state is an emphasis on the executive accompanied by a limited role of parliaments.[90] Furthermore, Agamben's argument is that the 'tendency in all of the Western democracies' is that 'the declaration of the state of exception has gradually been replaced by an unprecedented generalisation of the paradigm of security as the normal technique of government'.[91]

Additionally, the EU did not escape the talk of balancing security and human rights, nor the balancing act as exemplified by the Hague Programme and by a series of measures proposed in the wake of 9/11.[92] The current research rejects the underlying logic of the balance as a basis for analysing EU initiatives designed to fight terrorism, drawing on the work of scholars such as Ashworth and Zedner.[93] The

87 JC Paye, *The Global War on Liberty* (Telos Press Publishing 2007) 144-145. Paye gives an example involving Spain and Belgium and the extradition of a Basque couple.

88 G Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford University Press 1998); G Agamben, *State of Exception* (University of Chicago Press 2005). See also accounts for the application of the state of exception by the Bush and Blair administrations in the series dedicated to the state of emergency in Theory, Culture & Society (2002) 19 (4) <http://tcs.sagepub.com/content/19/4.toc> accessed 11 September 2011.

89 Agamben *State of Exception* (n 88) 9.

90 ibid Chapther 1.

91 ibid 14.

92 For discussions on the balance metaphor applied to the three key concepts of the AFSJ see the positions of Anderson and Apap (n 15), Lavenex and Wagner (n 77). For a three-pronged possible approach to security and liberty see G Edwards and C O Meyer, 'Introduction: Charting a Contested Transformation' (2008) 46 JCMS 1.

93 Zedner (n 60) 134-137; L Zedner, 'Securing Liberty in the Face of Terror: Reflections from Criminal Justice' (2005) 32 Journal of Law and Society 507; A Ashworth, 'Security, Terrorism and the Value of Human Rights' and D Bigo and E Guild, 'The Worse-Case Scenario and the

balancing approach is misleading on several counts, among which are the false idea of a pre-existing imbalance between the two elements and the need to readjust it, the impression of 'quantifiable' goods and the risk of overlooking those 'whose interests lie in the scale when rebalancing is proposed'.[94]

In 2005 the Secretary-General of the United Nations (UN), Kofi Anan has also released a strong statement rejecting the logic of balancing indicating that

> [i]t would be a mistake to treat human rights as though there were a trade-off to be made between human rights and goals such a security and development. […] Strategies based on the protection of human rights are vital for both our moral standing and the practical effectiveness of our actions.[95]

The balancing exercise is, however, supported by Golder and Williams, who consider that 'the importance of the relevant human right is weighed against the importance of the societal or community interest in deciding whether to take legislative action […]'.[96] Sottiaux also starts from the assumption that 'decision-makers faced with the problem of terrorism must seek to balance the competing values of liberty and security […]'.[97]

Man on the Clampham Omnibus' in B J Goold and L Lazarus (eds), *Security and Human Rights* (Hart Publishing 2007) 208-210 and 112-114. On the balancing act see also R Dworkin, 'The Threat to Patriotism' (2002) 49 New York Review of Books 44; D Cole, *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism* (New Press 2003); J Waldron, 'Security and Liberty: The Image of a Balance' (2003) 11 Journal of Political Philosophy 191; P A Thomas, 'Emergency and Anti-Terrorist Powers 9/11: USA and UK' (2003) 26 Fordham Int'l LJ 1193; K Roach, 'Must We Trade Rights for Security? The Choice Between Smart, Harsh, or Proportionate Security Strategies in Canada and Britain' (2006) 27 Cardoza Law Review 2151; S Macdonald, 'Why We Should Abandon the Balance Metaphor: a New Approach to Counterterrorism Policy' (2009) 15 Journal of International & Comparative Law 95.

94 (n 60) 135-136.

95 UN General Assembly (UNGA), 'Report of the Secretary-General - In Larger Freedom: Towards Development, Security and Human Rights for All' (2005) UN Doc A/59/2005 [140]; see also Roach (n 93) 1.

96 B Golder and G Williams, 'Balancing National Security and Human Rights: Assessing the Legal Response of Common Law Nations to the Threat of Terrorism' (2006) 8 Journal of Comparative Policy Analysis: Research and Practice 43, 44.

97 S Sottiaux, *Terrorism and the Limitation of Rights: the ECHR and the US Constitution* (Hart Publishing 2008) 1.

In its November 2009 discussion paper, the EU CTC indirectly refuted the balancing argument by supporting a comprehensive approach with regards to security and human rights where the two objectives are mutually reinforcing:

> We need to maintain broad support for the fight against terrorism both within the EU, and internationally. Crucial to this is making the case that effective counter terrorism measures and the promotion of human rights really are mutually reinforcing goals.[98]

The last multi-annual programme in the AFSJ, the Stockholm Programme, attempts to engage in a discourse whereby security does not gain ground at the expense of human rights. This effort is supported by the new framework generated by the LT, which – as will be argued in the next chapter – enhances the democratic legitimacy of the EU CT policy, the main features of the rule of law and its effectiveness. The programme indicates from the outset the challenge of ensuring

> respect for fundamental freedoms and integrity while guaranteeing security in Europe. It is of paramount importance that law enforcement measures and measures to safeguard individual rights, the rule of law, international protection rules go hand in hand in the same direction and are mutually reinforced.[99]

The programme has also the merit of being *prima facie* more organised, more consistent and more thorough than its predecessor. Despite these positive elements, the programme continues to uncritically support measures such as the EU PNR, which have come under extensive criticism from human rights activists and scholars for their impact on human rights.

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98 Council Document 15359/1/09 REV 1, 'EU Counter-Terrorism Strategy – discussion paper November 2009', 5.

99 (n 54) 4; 24 'Respect for the Rule of Law, fundamental rights and freedoms is one of the bases for the Union's overall counter-terrorism work. Measures in the fight against terrorism must be undertaken within the framework of full respect for fundamental rights so that they do not give rise to challenge.'

The Stockholm Programme also lays the grounds for a European ISS and the Standing Committee on Operational Cooperation on Internal Security (COSI) set up under Article 71 TFEU is tasked with the development, monitoring and implementation of the strategy. It conceives of ISS as a political priority which

> should be developed in order to further improve security in the Union and thus protect the lives and safety of citizens of the Union and to tackle organised crime, terrorism and other threats. The strategy should be aimed at strengthening cooperation in law enforcement, border management, civil protection, disaster management as well as judicial cooperation in criminal matters in order to make Europe more secure. Moreover, the Union needs to base its work on solidarity between Member States and make full use of Article 222 TFEU.

The programme also emphasises that the ISS 'must take into account the external security strategy developed by the EU as well as by other [EU] policies, in particular those concerning the internal market.' [100]

Following the provisions of the Stockholm Programme and those of the LT, work has been done in order to set up the COSI and the ISS. [101] Within this framework, the European security model is assigned the 'following challenges':

> protecting rights and freedoms; improving cooperation and solidarity between Member States; addressing the causes of insecurity and not just the effects; *prioritising prevention and anticipation*; involving all sectors with a role to play in public protection (political, economic, social, etc.); communicating security policies to the citizens; and, finally, recognising the interdependence between internal and external security in establishing a "global security" approach with third countries.[102]

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100 (n 54) Section 1.1, 5; Section 4.1, 18. See also A Gruszczak, 'Internal Security Strategy for the European Union' (2010) Statewatch Briefing <http://www.statewatch.org/analyses/no-89-internal-security-briefing.pdf> accessed 10 September 2011 and 'Governing Internal Security in the European Union' (2009) 3 Central European Journal of International & Security Studies 86.

101 Council Document 7120/10, 'Draft Internal Security Strategy for the European Union: "Towards a European Security Model"' (ISS). Commission, 'The EU Internal Security Strategy in Action: Five steps towards a more secure Europe' (Communication) COM (2010) 673 final. See also European Union Committee, *The EU Internal Security Strategy* (HL 2010-12, 149).

102 ISS (n 101) 2 (emphasis added).

Internal security is framed as a 'wide and comprehensive concept which straddles multiple sectors' and 'EU internal security' equals 'protecting people and the values of freedom and democracy, so that everyone can enjoy their daily lives without fear.'[103] Moreover, the ISS configures the European security model as 'consisting of common tools and a commitment to […] a *mutually reinforced relationship between security, freedom and privacy*; […] *enhancing prevention and anticipation*'.[104] Additionally, the Commission Communication on the ISS places the prevention of terrorism and the need to address radicalisation and recruitment as one of the five objectives for 2011-2014.[105] The emphasis of the ISS on a concerted and comprehensive approach to security, freedom and privacy is to be welcomed and functions at least as counter-rhetoric to previous balancing or urgency approaches. However, there are some signs that the 'anticipatory move' (suggested by Bigo)[106] is still being pursued. In the space of two pages, the need to 'enhance prevention and anticipation' appears twice and is also included among the principles and guidelines for action under the European security model.

> As regards the concept of 'anticipation' Statewatch has underlined that it
>
> > implies built-in scenarios or profiles of people or activities which would require state intervention well prior to the assumed "threat" moving anywhere near to reality. For example, a group of people might discuss far-reached ideas but this is a long way from actual planning and preparing to do anything about them.[107]

103 ISS (n 101) 3, 4.

104 ISS (n 101) 5 (emphasis added).

105 (n 101) 7 onwards.

106 Bigo and others (n 83) 9 'This monitoring of the future in a desperate move to reduce uncertainty through technology and coordination has been called "prevention" in official language, but in fact works as a form of anticipation.'

107 Statewatch, 'The EU State Gears up for Action: Internal Security Strategy & the Standing Committee on Internal Security (COSI)' 2010 <http://www.statewatch.org/news/2010/feb/02iss-cosi.htm> accessed 10 September 2011.

For those who already feared that the EU was acting as a surveillance club, the above comments simply reinforce this idea. One might have expected that, as a consequence of the emphasis put on 'prevention and anticipation,' additional comments would have followed outlining the necessary human rights safeguards and risks that such an approach could have on the protection of the fundamental rights of individuals. Additionally, the dimension 'judicial cooperation in criminal matters' seems to be somewhat left aside by the ISS.[108] It therefore follows that, while the rhetoric is changing, some questionable logic is still being pursued and developed. In this context, the need to assess the relationship between human rights and security in a post-Lisbon instrument such as the EU PNR proposal is ever more acute.

1.2 Unfolding the research: objective, tools and structure

1.2.1 Innovative approach to a classical research question and scope of the research

Extensive scholarly literature exists on the EU CT strategy and the positioning of the EU as an actor in the internal security area (including governance aspects[109]), on the role of EU institutions or bodies such as Europol or Eurojust in shaping the EU CT

108 See also in this sense E Guild and S Carrera, 'Towards an Internal (In)security Strategy for the EU?' (2011) CEPS <http://www.ceps.eu/book/towards-internal-insecurity-strategy-eu> accessed 10 September 2011. See comments on the 'perils of an under-developed 'justice' dimension', 'too little involvement by the European Parliament' in M Busuioc and D Curtin, 'The EU Internal Security Strategy, the EU Policy Cycle and the Role of (AFSJ) Agencies: Promise, Perils and Pre-requisites' (2011) Study for the Directorate General for Internal Policies Policy Department C Citizens' Rights and Constitutional Affairs <http://www.europarl.europa.eu/activities/committees/studies/download.do?language=en&file=40728#search=%20policy%20cycle%20> accessed 10 September 2011, 13.

109 Here the term 'strategy' is taken to cover all the EU's efforts in the field not only the specific approach adopted since 2005 when the EU adopted the EU CT strategy. See *inter alia* J Wright, 'The Importance of Europe in the Global Campaign Against Terrorism' (2006) 18 Terrorism and Political Violence 281; L Lugna, 'Institutional Framework of the European Union Counter-Terrorism Policy Setting' (2006) 8 Baltic Security & Defence Review 101; M McGinley and R Parkes, 'Rights vs. Effectiveness? The Autonomy Thesis in EU Internal Security Cooperation' (2006) 16 European Security 245; D Zimmermann, 'The European Union and Post-9/11 Counterterrorism: A Reappraisal' (2006) 29 Studies in Conflict & Terrorism 123; Bures (n 4); Monar (n 36); Edwards and Meyer (n 92); Beyer (n 65); E Baker, 'Governing through Crime –the Case of the European Union' (2010) 7 EJC 187.

field.[110] In-depth legal analyses have also been undertaken concerning EU instruments framed as CT measures and their possible human rights implications,[111] as well as enquiries into transatlantic cooperation and the differences between the US approach and that of the EU.[112] As stated above, this research sets out to investigate whether EU CT policy reconciles the demands of security with the adequate protection of human rights and, if so, how it achieves this. The question is therefore two-fold (*whether* and *how*), descriptive and analytical. The research starts from the assumption that security and human rights are mutually reinforcing and interdependent objectives in the CT fight, where the erosion of one objective leads automatically to negative consequences for the other.[113]

It will be argued that the reconciliation of these two objectives has to be observed at two distinct levels and from different perspectives: both in the *legal*

110 M Deflem, 'Europol and the Policing of International Terrorism: Counter-Terrorism in a Global Perspective' (2006) 23 Justice Quarterly 336; M Den Boer, C Hillebrand and A Nölke, 'Legitimacy under Pressure: The European Web of Counter-Terrorism Networks' (2008) 46 JCMS 101; O Bures, 'Europol's Fledgling Counterterrorism Role' (2008) 20 Terrorism and Political Violence 498; M Coninsx and J L Lopes da Mota, 'The International Role of Eurojust in Fighting Organized Crime and Terrorism' (2009) 14 EFA Rev 165.

111 E Dumitriu, 'The E.U.'s Definition of Terrorism: The Council Framework Decision on Combating Terrorism' (2004) 5 German Law Journal 585; E Guild and E Brouwer, 'The Political Life of Data: The ECJ Decision on the PNR Agreement between the EU and the US' (2006) CEPS Policy Brief 110 <http://www.ceps.be/book/political-life-data-ecj-decision-pnr-agreement-between-eu-and-us> accessed 10 September 2011; K Hailbronner, V Papakonstantinou and M Kau, 'The Agreement on Passenger-Data Transfer (PNR) and the EU–US Cooperation in Data Communication' (2008) 46 International Migration 186; V Papakonstantinou and P De Hert, 'The PNR Agreement and Transatlantic Anti-Terrorism Cooperation: No Firm Human Rights Framework on Either Side of the Atlantic' (2009) 46 CMLR 885.

112 D Dubois, 'The Attacks of 11 September: EU–US Cooperation Against Terrorism in the Field of Justice and Home Affairs' (2002) 7 EFA Rev 317; W Rees, *Transatlantic Counter-Terrorism Cooperation: The New Imperative* (Routledge 2006); J Howorth, 'European Security & Counter-Terrorism?' in S Reich and A Chebel d'Appollonia (eds), *Immigration, Integration and Security: Europe and America in Comparative Perspective* (University of Pittsburgh Press 2008) (Howorth makes the distinction between the US approach of a 'war on terror' and the EU stand which rejects the war rationale).

113 See in this sense Mythen and Walklate who consider that '[i]f the pursuit of security comes at the expense of human rights, thus not only is the quality of that security compromised, but the very principles of democracy are threatened.' G Mythen and S Walklate, 'Terrorism, Risk and International Security: The Perils of Asking "What If?"' (2008) 39 Security Dialogue 221, 236.

framework designed by EU primary law for the CT fight and in the *content of specific secondary CT provisions adopted by the EU*.[114]

In connection with the latter level, the thesis will investigate whether three key measures for the CT fight – the offence of public provocation to commit terrorist offences, the Prüm decision and the EU PNR proposal – are in line with the imperative of the protection of human rights and in what ways they fulfil the security objective. It is argued that these three measures, all put forward during 2007 (with two currently in force and one at the stage of policy development), are able to provide insights into the EU approach in this field. Furthermore, they can also shed light on the functioning and the logic of EU criminal law.

The measures allow the 'triangulation' of a key CT harmonisation of criminal offences mechanism with CT instruments pertaining to information collection and exchange and with perceived competing and/or overlapping CT agendas. The first two elements are representative of the EU's efforts in the CT field and address areas where it can bring added value to national interventions. The third can inform us on the difficulties of elaborating an EU CT agenda, as well as on how this agenda is shaped. They answer both the *whether* and the *how* of the research question and also provide indications as to how EU measures in the CT field are influenced by other schemes put in place by other organisations (eg: CoE) or countries. The research does not take a position at this stage on the role of the 'permanent state of emergency' logic in relation to the EU approach to fighting terrorism. This aspect will be addressed in the final part of this thesis, after an overall analysis of the insights generated

114 Apap and Carrera have also clearly supported the fact that '[t]he respect of the fundamental rights and freedoms of every human being, as provided by international as well as European legal frameworks, needs to be taken as a point of departure in every single security initiative adopted and implemented on behalf of our 'security'. Security needs to go hand-to-hand with freedom.' (n 85) 11.

throughout the research. However, from the outset the research advocates a permanent state of awareness and strict observance of the rule of law in all its aspects.

The research utilises a *future perspective*, not only with respect to the analysis of the primary law framework as derived from the LT but also in relation to the instruments chosen for the analysis. It is posited that all the fields under analysis have a *future* feature. The LT is considered under a future heading because its provisions will form the basis for any future EU CT initiative and also because the full potential of the treaty for the field under analysis is yet to be developed (eg: the powers of EU agencies dealing with terrorist threats, implementation of Article 75 TFEU, etc.). Moreover, the research derives from the main research question three subsequent sub-questions and puts forward possible answers.

Firstly, the research sets out to explore the *characteristics of the CT laws chosen for analysis and derived from the AFSJ as an area of predilection for the CT policy*. Specifically, the research will examine whether these three measures can be considered 'laws of the future and for the future'.[115] They can be seen as 'laws of the future' because they provide valuable indications for the direction in which CT policies are heading (trend laws). Secondly, they are 'laws for the future' because they tap into the future on different grounds (an idea further developed in the relevant chapters of this research). Furthermore, and also based on the assessment criteria chosen by this thesis to examine these measures (developed in section 1.2.3.1 of this chapter), the research asks whether these laws can also be seen as 'grey laws'

115 For diverse references to 'laws of the future' or 'laws for the future' including related to the CT field see P M Norton, 'Law of the Future or a Law of the Past--Modern Tribunals and the International Law of Expropriation' (1991) 85 American Journal of International Law 474; C Walker, 'Anti-terrorism Laws for the Future' (1996) 146 New Law Journal 586; J McCulloch and S Pickering, 'Pre-crime and Counter-terrorism: Imagining Future Crime in the "War on Terror"' (2009) 49 British Journal of Criminology 628; Law of the Future Forum <http://www.lawofthefuture.org/blog/> accessed 10 September 2011.

following to some extent the reasoning of Dyzenhaus and the wording of Lynch and Reilly.[116] Dyzenhaus posited that a 'grey hole' is one 'in which there is the façade or form of the rule of law rather than any substantive protection' such as the case where 'the detainee has some procedural rights but not sufficient for him effectively to contest the executive's case for his detention.'[117] Moreover, the 'legal constraints on executive action' are perceived as 'insubstantial'.[118] In the context of this thesis it will be argued that 'grey laws' are being crafted by allowing formal or partial compliance with core law principles (such as proportionality or legal certainty) to be considered as sufficient in order to become legislation. The concept also covers the rationale of these measures as well as the problems encountered in the adoption process. The concept illuminates the frailties of CT laws. It does not oppose, however, 'grey laws' to 'black' or 'white' laws, but it holds that 'grey laws' can be 'undone' or better said reversed to a state of close adherence to the rule of law. One may argue that such 'grey laws' are, in Ericson's terms, 'counter-laws' or 'laws against law'.[119] It could also be said that such laws are inevitable results for the EU CT field. However, this thesis puts forward the argument that such 'grey laws' cannot be considered inherent and necessary shortcomings or inevitable casualties in the EU CT field and that there is scope for reversing such 'grey laws'.

116 D Dyzenhaus, *The Constitution of Law-Legality in a Time of Emergency* (Cambridge University Press 2006); A Lynch & G Williams, 'Shades of Grey: Freedom of Speech' in A Lynch & G Williams, *What Price Security? Taking Stock of Australia's Anti-Terror Laws* (UNSW Press 2006); A Lynch and A Reilly, 'The Constitutional Validity of Terrorism Orders of Control and Preventative Detention' (2007) 10 The Flinders Journal of Law Reform 105. References to a 'grey area' can be found in J S Nuttall, *European Political Co-operation* (Clarendon Press 2002) 294; J van Buuren, 'Security Ethics: A Thin Blue-Green-Grey Line' (2009) INEX Policy Brief No 1 WP 3 < http://www.ceps.eu/book/security-ethics-thin-blue-green-grey-line> accessed 10 September 2011. See also S Hiltner, 'Facing Grey Area Phenomena – Transformation through Transnational Crime and Violence in Southeast Asia' (2008) 109 ASIEN 54.

117 Dyzenhaus (n 116) 3, 50.

118 Dyzenhaus (n 116) 60.

119 R V Ericson, *Crime in an Insecure World* (Polity Press 2007) 24.

Secondly, the thesis will examine what can be inferred from the examined measures for the EU CT policy as a whole and what the model for policy formation that can be applied for the examined measures is (section 1.2.3.1 of this chapter). As regards the policy formation model, the thesis will start from the Wallace 'pendulum paradigm' and examine whether it can be applied to the measures in question, including in the LT setting.

Finally, the research will analyse *the impact of these CT instruments upon individuals* in terms of the limitations to rights such as freedom of expression, right to privacy and protection of personal data.

The research inscribes itself in the logic and recommendations of the Challenge Project (eg: rejection of the balance metaphor, Europeanisation versus intergovernmentalism, 'addressing "the gap" between social sciences research and EU policy-making').[120] At the same time, it looks at CT AFSJ-related measures by testing the adequacy of old models, proposing a very strict reading of necessity and proportionality and providing solutions for moving from a somewhat dysfunctional triangle to a protective triangle of the CT measures examined by this thesis.

1.2.2 Circumscribing the research terms and their relationship

1.2.2.1 On human rights and security

Adequate protection of human rights can be framed as covering general mechanisms of protection (such as judicial control and parliamentary oversight), as well as the

120 D Bigo, S Carrera and E Guild, 'The Challenge Project: Final Policy Recommendations on the Changing Landscape of European Liberty and Security' (2009) Challenge Research Paper No 16 <http://aei.pitt.edu/12224/1/1905.pdf> accessed 10 September 2011.

requirement that legislators observe the principles of proportionality and legal certainty when elaborating CT measures. Ashworth suggests that 'the structure of human rights can allow weight to be given to security considerations', taking into account the specific right in question.[121] Careful attention must therefore be paid as to how the EU justifies and designs restrictions on 'qualified' rights. This research will focus on such limitations by concentrating on freedom of expression (Article 11 EUCFR and 10 ECHR) and the right to privacy (Article 7 EUCFR and 8 ECHR) as key rights that might be endangered by EU CT legislation. The observance of the right to protection of personal data (Article 8 EUCFR and 16 TFEU) and to non-discrimination (Article 21 EUCFR) will also be examined.

This thesis contends that 'security' is best understood as supporting and guaranteeing the pursuit of other goods such as liberty, which encompasses human rights.[122] The perception of 'security' in an inflated state, a 'god' as portrayed by Bigo,[123] should be rejected as leading to misleading policy options. Furthermore, liberty should be protected not only from terrorist threats but also from disproportionate state interference, as argued by Zedner.[124]

This research will explore whether the three EU measures mentioned above fail or succeed in rising to the twin challenges of effectively securing people from

121 (n 93) 224-225.

122 See similar positions in the field from Zedner (n 60) 156: 'One persuasive line of philosophical argument is to re-conceive security not as an end in its own right but to see its pursuit as justified only insofar as it serves, or is at least compatible with, ulterior goods such as liberty, justice, equality, trust, and social inclusion (Dinwiddy 1978 : 21). It follows that it does not make sense to posit the relationship between security and these goods as in tension, still less as a zero-sum game, but rather as properly independent (Kelly 1990: 89).' Also see Bigo and Guild (n 93) 100. See I Loader and N Walker, *Civilizing Security* (Cambridge University Press 2007) for a reading of security as a public good. Also L Zedner, 'Seeking Security by Eroding Rights: the Side-stepping of Due Process' in Goold and Lazarus (n 93) 258.

123 D Bigo, 'EU Police Cooperation: National Sovereignty Framed by European Security?' in E Guild and F Geyer (eds), *Security versus Justice? Police and Judicial Cooperation in the European Union* (Ashgate Publishing 2008) 93.

terrorist threats without creating unjustified and disproportionate interference in the exercise of individuals' rights. To this end, this research will carefully scrutinise both the justification of CT measures according to their added value in delivering an enhanced security environment and the assessment of such measures as being the least intrusive option as regards the human rights dimension.[125]

1.2.2.2 Fighting 'new' or 'old' terrorism?

The events of 9/11 affected the manner in which the requirements of delivering security and human rights were conceived in different countries and organisations, bringing to the forefront the idea that such terrorist attacks are best understood through the theoretical lenses of 'new terrorism'. However, Burnett and Whyte rightly pointed out that the

> development of a coherent set of ideas around the 'new terrorism' as something both qualitatively and quantitatively different from what had gone before, began to emerge long before September 11th 2011 (see Guelke, 1998; Hoffman, 1998; Lesser et al, 1999; and Laquer, 1999).[126]

Burnett, Whyte, and other scholars such as Bigo, consider this qualification to be dangerous and not necessarily accurate.[127] Bigo argues that

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124 (n 60) 141. On the direct and indirect relationship between terrorism and human rights see UN Commission on Human Rights (UNCHR), Sub-Commission on Prevention of Discrimination and Protection of Minorities, 'Terrorism and human rights - Preliminary report prepared by Ms. Kalliopi K. Koufa, Special Rapporteur' (7 June 1999) UN Doc E/CN.4/Sub.2/1999/27 [25] .

125 (n 60) 139, 158-159 '[B]efore any new security measure is introduced there needs to be "an actual prospect that security will be enhanced" (Waldron 2003:209)'[…] 'what renders a security measure just is that it employs means that can be rationally defended as intrinsically appropriate to the end sought.'.

126 J Burnett and D Whyte, 'Embedded Expertise and the New Terrorism' (2005) 1 Journal of Crime, Conflict and Media 1, 2; see 4-7 for the main features of the 'new terrorism'. The work of the RAND project has also revolved around the concept of 'new terrorism' see Lesser and others, *Countering the New Terrorism* (RAND 1999) <http://www.rand.org/pubs/monograph_reports/2009/MR989.pdf> accessed 10 September 2011.

127 See also I Duyvesteyn, 'How New Is the New Terrorism?' (2004) 27 Studies in Conflict & Terrorism 439.

> we need to relativize the idea of a new world order after September 2001. It cannot be considered an "unprecedented event" that radically changed the face of the modern world, even if it was a tragic moment. It did not mark the birth of a new age of terrorism, or hyper-terrorism, or mega-terrorism, or some other type of terrorism (Meddeb 1991; Garwin 2002; Heisbourg 2002). […] [The] transnationalization of political violence by clandestine organizations has been a long process, with roots that go back at least as far as the decolonization process of the 1950s […] To the extent that novelties may be identified, they involve new combinations of traditional forms of action, and not, as so many official accounts have implied, some grand new force combining weapons of mass destruction with fanatical and irrational clandestine organizations.[128]

In contrast, Jackson offers an account of EU texts supporting the 'new terrorism' approach and the recourse, as a consequence, to new methods to counter-act the threat:

> EU texts frequently argue that 'the nature of terrorism has changed' (de Vries 2004a) and that the 'new' kind of 'indiscriminate cross-border religiously motivated terrorism' (de Vries 2005) is 'willing to use unlimited violence to cause massive casualties' (Council of the European Union 2003). […] *It also assumes that because the threat is 'new' and the terrorists are unlike any faced before, 'new' approaches and measures are required to counter it*.[129]

The data provided by Europol in its EU Terrorism Situation and Trend (TE-SAT) Report 2010 covering the year 2009 indicated that 'the Separatist terrorists killed more people in the EU in 2009 than in 2008' although the attacks decreased compared to the same period and indicated that despite only one perpetrated attack 'Islamist terrorism is still perceived as the biggest threat to most Member States'. [130] Subsequently, the 2011 TE-SAT has recorded three attacks conducted by Islamist terrorist as opposed to 160 by separatist groups. It has furthermore emphasised that

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128 (n 123) 103.

129 R Jackson, 'An Analysis of EU Counterterrorism Discourse post-September 11' (2007) 20 Cambridge Review of International Affairs 233, 237 (emphasis added).

130 Europol, 'TE-SAT 2010: EU Terrorism Situation and Trend Report' 'https://www.europol.europa.eu/sites/default/files/publications/tesat2010_0.pdf> accessed 10 September 2011, 6-7.

'the threat of attacks by Islamist terrorists in the EU remains high and diverse'.[131]

This research takes the view that the current threat should not be perceived as a simple dichotomy of 'new' against 'old' terrorism, and therefore will not start with the assumption that because the EU is faced with a 'new terrorism' then new methods are automatically required.

1.2.3 'Blackboard of the research'

1.2.3.1 Main assessment criteria and model for policy formation

The comparison of the legal framework generated by the LT with the provisions of the previous treaties will provide *in abstracto* elements of response as to how the EU reconciles the two imperatives of security and human rights protection in the CT field using democratic legitimacy, rule of law and effectiveness (as part of the proportionality principle) as normative assessment criteria.

'[T]he decisive say in public policies of parliaments,' which, due to 'their representative character [...] are regarded as the repository of a legitimacy capital', will be considered as a key element upholding the democratic legitimacy of CT measures.[132] Therefore, the involvement of the European Parliament (EP) as well as the participation of national Parliaments in the EU decision-making process leading to the adoption of CT legislation and their scrutiny over the activities of EU agencies

131 Europol, 'TE-SAT 2011: EU Terrorism Situation and Trend Report' <https://www.europol.europa.eu/sites/default/files/publications/te-sat2011.pdf> accessed 10 September 2011, 6, 9.

132 R Dehousse, 'European Institutional Architecture after Amsterdam: Parliamentary System or Regulatory Structure?' (1998) European University Institute, Working Paper RSC No 11 <http://www.iue.it/RSCAS/WP-Texts/98_11.html> accessed 10 September 2011. See R Holzhacker, 'Democratic Legitimacy and the European Union' (2007) 29 JEI 257 for an analysis of representative and deliberative conceptions of democratic legitimacy. More specifically, scholars of the field have argued that democratic legitimacy 'requires' in addition to the involvement of the governments of the Member States 'the intervention of a democratically elected body in the creation of criminal offences and sanctions.' Walker (n 15) 232.

dealing with the terrorist threat will be key in assessing the extent to which the EU CT policy is legitimate. Two main characteristics of democratic legitimacy will be considered: accountability and transparency.[133]

With respect to the rule of law, this is a 'multi-faceted ideal' as Waldron describes it[134] and it can be translated into formal (legal positivism) and substantive concepts of the rule of law, with advocates such as Raz and Dicey for the former and Dworkin, Sir John Laws and Trevor Allan for the latter.[135]

The EU has also placed the rule of law at the centre of its system.[136] In an extensive article, Pech approaches the 'rule of law' concept as a constitutional principle of the EU and provides a framework for understanding it within the EU context.[137] This thesis develops some of the positions adopted by Pech. Firstly referred to in the Court's case,[138] then formally enshrined in the treaties as of 1992,

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133 The concept of accountability will be analysed in the narrower sense as defined by Bovens: 'a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgment, and the actor may face consequences'. M Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework' (2007) 13 ELJ 447, 449. In 1998 the European Ombudsman, Jacob Söderman, indicated that 'transparency means that the processes through which public authorities make decisions should be understandable and open; the decisions themselves should be reasoned; as far as possible, the information on which the decisions are based should be available to the public.' J Söderman, 'The Citizen, the Administration and Community Law' (1998) General Report for the 1998 Fide Congress <http://www.pedz.uni-mannheim.de/daten/edz-b/omb/07/fide-1-eng.pdf> accessed 10 September 2011. Peers 2006 (n 15) 49. D Curtin and A J Meijer, 'Does Transparency Strengthen Legitimacy? A Critical Analysis of European Union Policy Documents' (2006) 11 Information Polity 109.

134 J Waldron, 'The Concept and the Rule of Law' (2008) 43 Georgia Law Review 1, 6.

135 For an extensive account see P Craig, 'Formal and Substantive Conceptions of the Rule of Law: an Analytical Framework' (1997) Public Law 467.

136 In its basic definition, the rule of law or 'legal legitimacy' as referred to by Peers 2006 (n 15) 53 relates to the fact that 'the Union is legitimate as it is properly established under the Treaties'. See C Lord and P Magnette, 'Notes towards a General Theory of Legitimacy in the European Union' (2002) ESRC 'One Europe or Several?' Programme Working Paper 39, 5.

137 L Pech, 'The Rule of Law as a Constitutional Principle of the European Union' (2009) Jean Monnet Working Paper 04 <http://centers.law.nyu.edu/jeanmonnet/papers/09/090401.pdf> accessed 10 September 2011. See also L Pech, 'A Union Founded on the Rule of Law' (2010) 6 European Constitutional Law Review 359.

138 Case C-294/83 *Les Verts v European Parliament* [1986] ECR 1339. See also Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECR I-06351. See also K S Ziegler, 'Strengthening the Rule of Law, but Fragmenting International Law: The *Kadi* Decision of the ECJ from the Perspective of Human Rights' (2009) 9 HRL Rev 288.

the principle is 'nowhere defined in EU primary law'.[139] The main feature relates to judicial review. Pech observes that, despite the divergences identified in the national understandings of the rule of law, some common features surface:

> dominant organisational paradigm of modern constitutional law in all the EU Member States, and […] unanimously recognized as one of the foundational principles undergirding all European constitutional systems […] never precisely defined, either by national constitutions or by courts.[140]

The rule of law is usually conceived as a meta-principle, which sets the premises for judicial review and from which specific principles of law such as legality, legal certainty and proportionality are deduced.[141]

For the purpose of the analysis of the general legal framework of EU CT policy, this research will focus on the existence at EU level of 'effective judicial control over the legality of the measures', and by analysing the extent to which the objective of 'the EU legal order' – namely '[to] ensur[e] a uniform interpretation and effective enforcement of EU measures through the judicial system' – is attained within this policy.[142] It will also explore the benefits of an external judicial review from the European Court of Human Rights (ECtHR) and the impact of the EUCFR.[143] The research will also explore the instruments or mechanisms provided for by the LT and which are likely to enhance the fulfilment of the security objective through the test of effectiveness as part of the principle of proportionality. The CJEU in its case

139 Pech 2009 (n 137) 20.

140 Pech 2009 (n 137) 42-43.

141 In this sense see the eight sub-rules of Lord Bingham and the qualification of 'umbrella principle' in Pech 2009 (n 137) 28-29, respectively 9, 48, 53.

142 Peers 2006 (n 15) 53. See Lord and Magnette (n 136) 5 for a discussion about legal and procedural legitimacy which would include 'the observance of certain formal procedures: transparency, motivation, balance of interests, evaluation, legal certainty, and participation of stakeholders'.

143 [2000] OJ C 364/1.

law has made different choices when examining the proportionality principle, adopting a three-test approach or simply stopping after only one assessment. Taking into consideration that what is being analysed is the general setting of a policy, then the effectiveness test has been considered a sufficient element for the specific enquiry.

With respect to the three specific CT instruments outlined above, the research focuses on specific principles deriving from the general principle of the rule of law, namely legal certainty and proportionality as assessment criteria. The impact of EU primary law (eg: democratic legitimacy of the adoption process and judicial review) will also be addressed in the analysis. Furthermore, it should be noted that the principle of legal certainty requires that laws be 'adequately accessible [for the] citizen' and

> formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.

It is however, indicated that the 'consequences need not be foreseeable with absolute certainty'.[144]

For the purposes of this research, the principle of proportionality[145] will mainly draw upon the multi-layered test adopted in German constitutional and administrative law, as well as by the case law of the CJEU.[146] It will also be informed

144 *Sunday Times v United Kingdom* (1979) Series A no 30, para [49].

145 The LT enshrines the principle in Article 5(4) of the TEU which requires that 'the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties. The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality.' Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality [2008] OJ C 115/206. The Protocol emphasises the need for a wide consultation on the draft legislative acts to be proposed and for 'a detailed statement making it possible to appraise compliance with the principles [...].'

146 See *inter alia* D Šušnjar, *Proportionality, Fundamental Rights, and Balance of Powers* (Martinus Nijhorf Publishers 2010) on the German four-pronged approach (legitimacy, suitability, necessity and proportionality in the narrow sense) 121 onwards, on the CJEU three-pronged approach

by the requirements observed by the ECtHR. Four elements will be considered. Therefore, the first requirement is that of the legitimate aim pursued by a proposed measure.[147] The second condition is linked to the need for a given measure to be suitable for achieving the envisaged ends (effectiveness test). [148] Thirdly, the necessity and subsidiarity conditions require that the chosen measure is judged as necessary in a given context and that it is the least restrictive measure for attaining the objective. Finally, the *stricto sensu* proportionality approach requires a balancing operation between the competing interests at hand, most commonly between the general interest and the individuals' rights. With respect to this latter element Šušnjar has indicated that two review standards can be observed in the CJEU case law: the analysis of the disproportionate character of the measure in relation to the aims pursued and secondly the examination of the interference as being intolerable and impairing the substance of the right.[149] It must be pointed out that the CJEU has used the above requirements in different approaches and combinations throughout its jurisprudence leading thus to a variable intensity in its proportionality review. [150] With respect to the ECtHR its

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(suitability, necessity and proportionality in the narrow sense) 163 onwards. On the 'three-part test' of the CJEU see also T Tridimas, *The General Principles of EU Law* (Oxford EC Law Library, Oxford University Press 2009) 139. For the four stages approach see also B J Goold, L Lazarus and G Swiney, *Public Protection, Proportionality and the Search for Balance* (Ministry of Justice Research Series, Ministry of Justice 2007). For a distinction between the CJEU reading of proportionality and the German Constitutional Court and also on the hypothesis according to which the CJEU could be perceived as applying a reasonableness test when performing a proportionality test and the links with liberal versus positivist concept of law see T-I Harbo, 'The Function of the Proportionality Principle in EU Law' (2010) 16 ELJ 158, 184.

147 Šušnjar (n 146) indicated that while the 'legitimate end test does not, according to the case law of the ECJ, formally constitute a part of the principle, it is closely connected to it', but also observed that 'its force is nevertheless limited' due to, among others, 'too broad […] treaty provisions.' 163, 167-168.

148 Šušnjar (n 146) 168-169 '[A]pplied on its own, the rigour varies. […] Because of the wide discretion granted to legislators, suitability outside the legal basis test is usually not an effective review standard.' See Case C-189/01 *Jippes and Others* ECR I-05689 for the concept of 'manifestly inappropriate' [82].

149 Šušnjar (n 146) 175.

150 P Craig, 'Judicial Review, Intensity and Deference in EU Law' in D Dyzenhaus, *The Unity of Public Law* (Hart Publishing 2004) 342 onwards; Šušnjar (n 146) 163; J Gerards, 'Pluralism, Deference and Margin of Appreciation Doctrine' (2011) 17 ELJ 80. With respect to the previous pillar divide, Bernitz and others observed that 'the Court will not wish to create unnecessary differences between the legal regimes, and will certainly find it easier and more natural to apply principles well-established by caselaw rather than devising new and different rules.' Also they took the view that 'the extent of judicial protection in Third Pillar cases is plainly inadequate, unless it is reinforced by judicial protection of fundamental rights and application of "*general principles of law*". In particular, the principle of proportionality […] and legal certainty (only clear rules can be enforced) seem to be important.' U Bernitz, J Nergelius and C Cardner, *General Principles of EC Law in a Process of Development* (Kluwer Law International 2008) 109. Also as Conway observed, 'the Court is well noted for the broad level at which it

approach to the principle of proportionality is closely connected with the margin of appreciation doctrine –as 'complementary concepts'–[151], to the right under inquiry and not necessarily '[…] involv[ing] a rigorous four-stage inquiry'.[152] Moreover, scholars have underlined that the 'proportionality test has not been applied in a uniform manner' and that 'the Court uses different variants for different contexts.'[153] The ECtHR test has also been perceived as 'exhibit[ing] all the characteristics of a flexible, open-ended, balancing test' and the 'democratic necessity standard' has not only been qualified as balance-oriented but also as 'a wholly unstructured one'.[154]

This thesis will also examine whether the triangle chosen for analysis inscribes itself squarely within the protective triangle created by the concepts of freedom, security and justice. Despite criticism of the spilling over of security into freedom and justice, it is nevertheless argued that the freedom-security-justice triangle can be a protective one if simple and essential elements such as proportionality and legal certainty are put back at the core of this area. This thesis holds that it is not enough for CT measures to simply 'border' the rule of law or the protective triangle as described above because this undermines the strength of EU law and more broadly the EU project. In this sense, the 'Fundamental Rights check-list' proposed by the

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characterises the purpose of European Community/European Union (EC/EU) law, through 'teleological' or 'meta-teleological interpretation.' G Conway 'Levels of Generality in the Legal Reasoning of the European Court of Justice' (2008) European Law Journal 14, 787, 790; 'Historical Interpretations of Constitutions – the EU and the US Compared' (2008) <http://www.qub.ac.uk/sites/QUEST/FileStore/Issue6/Filetoupload,146243,en.pdf> accessed 10 September 2011, 108. See also Case C-105/03 *Criminal proceedings against Maria Pupino* [2005] ECR I-05285 (*Pupino* case) in which the CJEU considered that Article 10 EC, which enshrines the loyal cooperation requirement, should be considered also applicable to third pillar measures.

151 Šušnjar (n 146) 88. See also on the ECtHR approach to proportionality: *Y Arai, The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia 2002); J Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention of Human Rights* (Martinus Nijhoff Publishers 2009).

152 Goold, Lazarus and Swiney (n 146) 48-49.

153 P Van Dijk and G J H Van Hoof, *Theory and Practice of the European Convention of Human Rights* (3rd ed Kluwer Law International 1998) 81.

154 S Sottiaux and G Van Der Schyff, 'Methods of International Human Rights Adjudication: Towards a More Structured Decision-Making Process for the European Court of Human Rights' (2008) 31 Hastings Int'l & Comp L Rev 115, 131, 133.

Commission[155] can be considered a useful tool combining the proportionality and legal certainty tests.

With respect to policy formation, Wallace argued that the JHA area can be observed through the lenses of a pendulum metaphor (see Figure 1). She posited that

> [t]he pendulum swings between the national political arenas of the participating member states, on the one hand, and the transnational arena, with its European and global dimensions, on the other hand. Each of these arenas has a kind of magnetic field which attracts -- or repels -- the policy-makers, the claimants of policy, and would-be policy-influencers. The relative strength of these magnetic fields varies across policy domains, over time, and between countries, with some strong forces of attraction, and some forces of resistance. [156]

The inadequacy of EU states, globalisation and specificity of Western Europe are taken by Wallace as premises of the pendulum model. According to Figure 1 congruent national policies, shared ideas and partial European polity would make the pendulum swing towards a European solution, whilst the national solution is preferred when there are dissonant national policies. In contrast,

> [i]f both sides are weak, then no coherent policy will emerge either at transnational or national levels. The movement of the pendulum encapsulates the process of EU integration, at times regular, other times irregular, at times oscillating and at some instances stationary. [157]

155 See Commission, 'Strategy for the Effective Implementation of the Charter of Fundamental Rights by the European Union' (Communication) COM (2010) 573 final, 5.

156 H Wallace and W Wallace, *Policy Making in the European Union* (Oxford University Press 2000) 41 onwards; see also Anderson and Apap (n 15) 22.

157 J Apap, 'Towards Closer Partnerships Requirements for More Effective JHA Cooperation in an Enlarged Europe' (2004) CEPS Working Document No 211 <http://aei.pitt.edu/6640/> accessed 10 September 2011, 7.

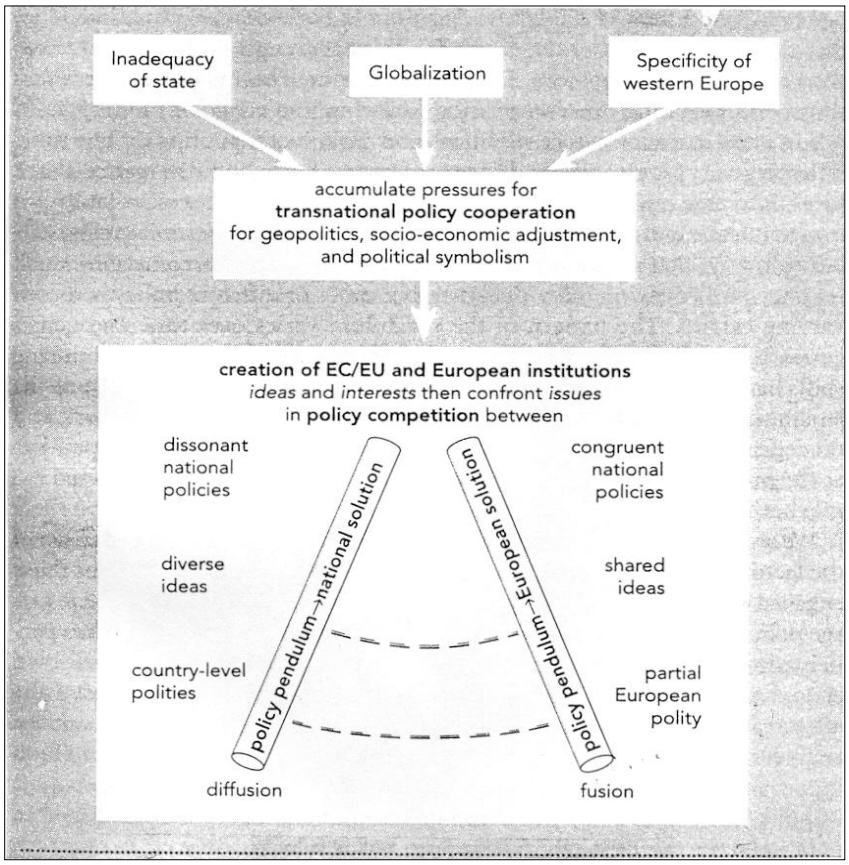

Figure 1

Source: H Wallace and W Wallace, *Policy Making in the European Union* (Oxford University Press 2000) 46

The thesis will explore whether and how the pendulum logic is or can be applied to the EU CT decision-making process related to the three measures that are the objects of this research.

1.2.3.2 Structure of the research

The enquiry into the legal framework of the LT and its implications for the CT policy will constitute the first section of the second chapter. After examining the general setting of the CT policy as resulting from primary law, this thesis will analyse in the second section of the second chapter a specific and key tool for CT: the offence of public provocation to commit terrorist offences as a limitation of freedom of expression and the risks of self-censorship. The section will also question whether the offence is

> cementing a criminal law of prevention, where the focus is not on the actual commission of acts, but on the control of individuals who are perceived as a threat at a temporal stage far removed from the commission of crime.[158]

In chapter three, the research will investigate how the field of information management addresses the two imperatives put forward by the research question, examining the Prüm Decision and the EU PNR proposal and focusing in particular on their impact on the right to privacy,[159] data protection and non-discrimination. This section will also examine whether the precautionary principle takes a predominant

158 V Mitsilegas, 'The Third Wave of Third Pillar Law. Which Direction for EU Criminal Justice?' (2009) 34 ELR 523, 526.

159 The preservation of the right to privacy has been understood as the possibility for individuals to be 'able to retain control over certain type of information about themselves and their dealings- and determine who has access to that information […] and to '[construct] their identity' and 'defend particular visions of the self'. B J Goold, 'Privacy, Identity and Security' in Goold and Lazarus (n 93) 52, 63.

role in the elaboration of such legislation and whether the development of a 'surveillance society' is supported by such schemes.[160]

The thesis will then look at the 'whether' dimension of the research question from the perspective of the security demands of some Member States as materialised in an intergovernmental treaty and look at what the position of the EU was in this respect. Therefore, chapter four will explore whether the intergovernmental approach (Prüm Treaty) and its subsequent partial integration into EU law (Prüm Decision) have entailed concerns with regards to the fulfilment of the EU's security and human rights protection objectives. It will also examine the capacity of the EU to position itself as a 'security provider' and 'norm maker' and the possible risks the treaty entailed for the coherence of the EU CT policy.[161]

The final chapter of the thesis, chapter five, will review the findings and draw conclusions as to the observance of human rights while delivering security within the EU. It will also discuss the main characteristics encountered in the laws under examination (eg: prevention and anticipation, the 'obsession' with having and exchanging information) and further develop the concept of 'grey laws'. Additionally, it will examine the pendulum metaphor for policy formation and assess the EU's role as an actor in the CT field. All these analyses can be termed the horizontal approach,

160 Goold has stressed that 'what makes 9/11 significant is that it marks the moment at which it became acceptable for governments to draw a direct and very public connection between the demand of security and the need for improved means of general surveillance, individual identification and social control. As Levi and Wall have observed, since 9/11 the 'surveillance society' model of security has become increasingly viewed as legitimate, with the result that there has been a considerable increase in the power of the state.' Goold ibid 51. See also in this sense D Lyon, *Surveillance Society: Monitoring Everyday Life* (Open University Press 2001); D Lyon, *Surveillance after September 11* (Polity Press 2003).

161 A Björkdahl, 'Norm-Maker and Norm-Taker: Exploring the Normative Influence of the EU in Macedonia' [2005] 10 EFA Rev 257; J Argomaniz, 'When the EU is the 'Norm-Taker': The Passenger Name Records Agreement and the EU's Internalization of US Border Security Norms' (2009) 31 JEI 119, 132; B Kienzle, 'The European Union as a Security Provider in its Neighbourhood: The Case of Non-proliferation of Weapons of Mass Destruction in the Mediterranean' (2006) Observatory of European Foreign Policy 72. On the issue of 'coherence' see T Balzacq and others, 'Security and the Two-Level Game: The Treaty of Prüm, the EU and the Management of Threats' (2006) CEPS Working Document 234 <http://www.libertysecurity.org/IMG/pdf/WD234_e-version.pdf> accessed 11 July 2011, 17.

as we consider the analysis of the policy as a field. In contrast, taking a vertical approach the thesis will investigate what would be the position of an individual subjected to all three measures indicated above. As regards the last point, it could be argued that – faced with measures that could severely hamper the 'construction of identity […] or the development of particular visions of the self'[162] or restrict the freedom of expression– the individual himself becomes a ticking bomb.[163]

To conclude, the challenge of the current research is to observe whether the 'triptych' of measures chosen for analysis inscribes itself within the protective triangle of Freedom, Security and Justice or at its borders. All of this being undertaken against the new background of the LT – with all its novelties and the difficulties of its transitional period.

162 Goold (n 159) 63.

163 For a view on how to counter-act the ticking bomb logic see L Zedner, 'Terrorism, the Ticking Bomb, and Criminal Justice Values' (2008) 73 Criminal Justice Matters 18.

CHAPTER II: DELIVERING SECURITY WHILST RESPECTING HUMAN RIGHTS IN THE EU LEGAL FRAMEWORK FOR FIGHTING TERRORISM: VIEWS FROM TWO LEVELS

The aim of this second chapter is to examine at two distinct levels whether and if so how the EU legal framework for fighting terrorism reconciles the security imperative with an adequate protection of human rights. To this effect, the first section will assess the implications of the LT by referring to the former legal setting. The second section will then go on to analyse how the offence of 'public provocation to commit terrorist offences' tallies with the two imperatives outlined above.

2.1 The capabilities of LT

EU CT policy measures in general but in particular those covered by the AFSJ have been criticised not only for the shortcomings observed in the substantive content of some provisions but also on a number of procedural and institutional accounts. These latter criticisms refer to, inter alia, weak involvement by the EP and national Parliaments in the decision-making process, a lack of parliamentary scrutiny with regard to EU agencies dealing with the terrorist threat, an incomplete system of judicial remedies as well as limited powers granted to these agencies and the fastidious and lengthy procedures for establishing enhanced cooperation. [164]

These elements account for weaknesses in the EU CT policy in regard to key legal principles: democratic legitimacy, accountability, 'rule of law', and

164 J Monar, 'The Dynamics of Home and Justice Affairs: Laboratories, Driving Factors and Costs' (2001) 39 JCMS 747; J Monar, 'Decision-Making: Freedom, Security and Justice' in A Arnull and D Wincott, *Accountability and Legitimacy in the European Union* (Oxford University

effectiveness.[165] Furthermore, this thesis argues that these shortcomings also have an influence on the manner in which human rights protection and security imperatives are pursued at the EU level.

With respect to the human rights imperative, it has been posited that legitimacy and accountability are 'intrinsic elements of human rights safeguards'.[166] Therefore, the fulfilment of the human rights protection objective depends not only on how each particular CT provision deals with the tensions between security and human rights protection, but also on the democratic legitimacy and the accountability of overall EU policy in this field and the respect for the rule of law within the policy.

With regards to the security imperative, EU CT policy has been criticised for not only adopting far-reaching measures endangering human rights (eg: the impact of the EU–USA PNR agreement on the rights to privacy and protection of personal data[167]), but also for its lack of effectiveness.[168] It is therefore important to focus in the first section of this chapter on how effectiveness is an important criterion for assessing the way in which the security imperative is fulfilled within the EU CT policy.

Press 2002); Peers 2006 (n 15); M Fletcher, R Lööf and B Gilmore, *EU Criminal Law and Justice* (Edward Elgar Publishing 2008); Guild, Carrera and Balzacq (n 82).

165 (n 148).

166 Peers 2006 (n 15) 48.

167 See Article 29 Data Protection Working Party (WP 29), 'Opinion 5/2007 on the follow-up agreement between the European Union and the United States of America on the processing and transfer of passenger name record (PNR) data by air carriers to the United States Department of Homeland Security concluded in July 2007' (2007) 01646/07/EN WP 138 <http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2007/wp138_en.pdf> accessed 13 September 2011, 2. The WP 29 stressed that 'the safeguards provided for under the previous agreement have been markedly weakened' and that '[t]he new agreement leaves open serious questions and shortcomings, and contains too many emergency exceptions.'

168 R Bossong, 'The EU's Mature Counterterrorism Policy: A Critical Historical and Functional Assessment (2008) LSE Challenge Working Paper <http://www2.lse.ac.uk/internationalRelations/centresandunits/EFPU/EFPUchallengepapers.aspx> accessed 13 September 2011.

In this context, the role of the LT is highly significant.[169] The Treaty represents an important breakthrough in the functioning of the EU and many of its policies (including the EU CT policy) in the opinion of several professionals[170] and academics.[171] Accordingly, this section will first examine the provisions of the LT likely to enhance the general framework for the protection of human rights in relation to this policy (eg: the decision-making process, the involvement of national Parliaments and increased judicial control) by using the concepts of legitimacy, accountability and rule of law as assessment criteria (section 2.1.1). Secondly, it will analyse the impact of the LT upon bodies and/or measures called to support the CT fight (the role of Eurojust and Europol, the European Public Prosecutor's Office (EPPO), COSI and enhanced cooperation) and their compatibility with the required level of protection for human rights by using effectiveness as a measure (section 2.1.2). Both analyses will be undertaken by comparing, where appropriate, the previous legal framework with that generated by the LT and will build upon the relevant views of academia and field specialists.

2.1.1 To what extent does the new EU legal framework arising from the LT enhance the protection of human rights in the EU CT policy?

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169 Signed on 13 December 2007, the LT was intended to enter into force on 1 January 2009 'if all the instruments of ratification had been deposited' (LT art 6(2)) (n 53). The negative outcome of the Irish Referendum held on 12 June 2008 and the subsequent reservations of the Czech Republic and Poland rendered the 1 January 2009 enforcement scenario an impossible one and the LT finally entered into force on 1 December 2009.

170 Statement by JM Barroso, President of the European Commission (13 December 2007) <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/07/818&format=HTML&aged=0&language=FR&guiLanguage=fr> accessed 13 September 2011; Speech by HG Pöttering, President of the European Parliament (14 December 2007) < http://www.proyectos.cchs.csic.es/euroconstitution/library/Lisbon%20Treaty/Poettering%2014.12.2007.pdf> accessed 13 September 2011; Statement by JM Socrates, President in exercise of the Council of the European Union at the time of signature of the LT (13 December 2007) <http://www.eu2007.pt/UE/vEN/Noticias_Documentos/20071213tratadolisboa.htm > accessed 13 September 2011.

171 M Dougan, 'The Treaty of Lisbon 2007: Winning Minds, Not Hearts' (2008) 45 CMLR 617; C Ladenburger, 'Police and Criminal Law in the Treaty of Lisbon: A New Dimension for the Community Method' (2008) 4 EUConst 20; Joint Study EPC, Egmont and CEPS, 'The Treaty of Lisbon: Implementing the Institutional Innovations' (2007) <http://www.ceps.eu/files/book/1554.pdf > accessed 7 July 2011; S Carrera and F Geyer, 'The Reform Treaty & Justice and Home Affairs, Implications for the Common Area of Freedom, Security and Justice' (2007) CEPS <http://www.ceps.be/book/reform-treaty-justice-and-home-affairs-implications-common-area-freedom-security-and-justice> accessed 7 July 2011.

In order for the objective of human rights protection to be fulfilled in the EU CT policy it is essential that a series of procedural and institutional guarantees be in place. These are likely to improve fundamental general mechanisms of human rights protection, such as parliamentary scrutiny and judicial oversight. These mechanisms, as briefly stated above, were weak within the specific context of the EU CT policy under the pre-Lisbon legal framework.[172] These shortcomings raise pertinent questions regarding the strength and adequacy of the general mechanisms of human rights protection in the pre-LT framework, also pointing to possible frailties of the EU CT policy in terms of legitimacy and accountability. It is for these reasons that it is crucial to critically evaluate whether the EU approach to law-making and policy formulation in the fight against terrorism has become sufficiently legitimate and accountable.

2.1.1.1 The quest for enhanced democratic legitimacy and accountability for EU CT policy

The level of democratic legitimacy and accountability of the EU CT policy may be measured through two elements:

- The involvement of the EP as well as the participation of national Parliaments in the EU decision-making making process leading to the adoption of CT legislation; and

172 Some limitations as regards judicial oversight are even maintained after the entry into force of the LT for a transitional period of five years. The LT foresees in Protocol No (36) on Transitional Provisions, in Title VII, art 10(1) and (3) that 'with respect to acts of the Union in the field of police cooperation and judicial cooperation in criminal matters which have been adopted before the entry into force of the Treaty of Lisbon, the powers of the institutions shall be the following at the date of entry into force of that Treaty: the powers of the Commission under Article 258 of the Treaty on the Functioning of the European Union shall not be applicable and the powers of the Court of Justice of the European Union under Title VI of the Treaty on European Union, in the version in force before the entry into force of the Treaty of Lisbon, shall remain the same, including where they have been accepted under Article 35(2) of the said Treaty on European Union.' Furthermore it is prescribed that 'in any case, the transitional measure mentioned in paragraph 1 shall cease to have effect five years after the date of entry into force of the Treaty of Lisbon.' [2008] OJ C 115/322.

- Scrutiny by the EP and national Parliaments of the activities of EU agencies dealing with terrorist threats

2.1.1.1.1 The decision-making process

Before the LT, CT provisions were enacted in all three pillars of the EU due to the diversity of objectives and measures entailed by this policy. Consequently, the measures required different adoption procedures.

In the first pillar, the Community pillar (domains 'where Member States have ceded sovereignity to the Union'), several provisions directly or indirectly relating to the fight against terrorism have been enacted in areas such as health protection, aviation and maritime transport security, protection of critical infrastructure, money laundering and terrorist financing.[173] The decision-making process for a series of measures deriving from the above fields under this pillar was usually through the co-decision procedure,[174] although consultation was also used.[175] According to the criteria set out for democratic legitimacy (according to which the EP must have a decisive say in the framing and adoption of CT policy), it can be observed that the co-decision procedure enhances the democratic legitimacy of the decision-making process as well as democratic accountability. In this procedure, the EP holds the same blocking powers as the Council with respect to the final outcome of the CT provisions and plays a substantive role in shaping the final version of the text. This not only enhances the democratic legitimacy of the policy, but also entails that, during the

173 For a detailed account see D Spence (ed), *The European Union and Terrorism* (John Harper Publishing 2007) 9. For more details see Commission, 'Taking stock of EU Counter-Terrorism Measures – Accompanying document to the Communication 'The EU Counter-Terrorism Policy: main achievements and future challenges'' (Staff Working Paper) SEC (2010) 911. Wahl (n 6) 115.

174 EC art 251.

elaboration of such legislation, human rights safeguards will be closely observed and promoted.[176] This view is upheld by the fact that 'since at least the late 1970s', the directly elected body representing EU citizens has 'played a very important role in promoting human rights as an integral component of EU policies in both the internal and external domains'.[177] Several non-exhaustive examples with general or specific relevance to the field under research support this line of thought: the work of the Temporary Committee on the alleged use of European countries by the CIA for the transport and illegal detention of prisoners,[178] its support for the setting up of the Fundamental Rights Agency,[179] its positions on the various PNR agreements,[180] on the adoption of the Council Framework Decision on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters[181]

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175 Eg: Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban [2002] OJ L 139/9 (Regulation (EC) No 881/2002).

176 S Peers, 'Revising EU Border Control Rules: a Missed Opportunity?' (2005) Statewatch analysis <http://www.statewatch.org/news/2005/jul/eu-border-code-final.pdf> accessed 7 July 2011. In this article Peers discusses the first proposal for immigration and asylum law to be subject to co-decision critically examining the potential added value of the EP in the decision-making process. See also R Rack and S Lausegger, 'The Role of the European Parliament: Past and Future' in P Alston (ed), *The EU and Human Rights* (Oxford University Press 1999) for a detailed account of the different positions and means of intervention of the EP in relation to human rights protection.

177 P Alston and J H H Weiler, 'An 'Ever Closer Union' in Need of a Human Rights Policy: The European Union and Human Rights' (1998) 9 EJIL 658, 698. See also *Activities in the field of human rights* in R Corbett, F Jacobs and M Shackleton, *The European Parliament* (8th ed John Harper Publishing 2011).

178 EP, Temporary Committee on the alleged use of European countries by the CIA for the transport and illegal detention of prisoners <http://www.europarl.europa.eu/comparl/tempcom/tdip/default_en.htm> accessed 7 July 2011.

179 EP resolution of 26 May 2005 on promotion and protection of fundamental rights: the role of national and European institutions, including the Fundamental Rights Agency P6_TA(2005)0208 [2006] OJ C 117 E/242.

180 EP resolution of 5 May 2010 on the launch of negotiations for Passenger Name Record (PNR) agreements with the United States, Australia and Canada, P7_TA(2010)0144 [2011] OJ C 81 E/70; see also Joined Cases C-317/04 and C-318/04 *European Parliament v Council of the European Union and Commission of the European Communities* [2006] ECR I -04721 on the annulment of Council Decision 2004/496/EC of 17 May 2004 on the conclusion of an Agreement between the European Community and the United States of America on the processing and transfer of PNR data by Air Carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection [2004] OJ L 183/83 and the annulment of Commission Decision 2004/535/EC of 14 May 2004 on the adequate protection of personal data contained in the Passenger Name Record of air passengers transferred to the United States' Bureau of Customs and Border Protection [2004] OJ L 235/1. In these cases, two of the four pleas for annulment were a breach of fundamental rights and a breach of the principle of proportionality. Also De Capitani provides a very detailed account of EP's evolution and role in the AFSJ in E De Capitani, 'The Evolving Role of the European Parliament in the AFSJ' in J Monar (ed), *The Institutional Dimension of the European Union's Area of Freedom, Security and Justice* (PIE Peter Lang 2010) 113 onwards.

181 EP legislative resolution of 23 September 2008 on the draft Council Framework Decision on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters P6_TA(2008)0436 [2010] OJ C 8 E/138.

and on the first EU-US TFTP Agreement (so-called 'SWIFT Agreement').[182] The EP withheld its consent to the conclusion of the agreement on the grounds that it breached the proportionality principle amongst other arguments.[183]

However, the EP has been criticised for providing support in the co-decision procedure to first reading agreements reached following secret trilogues lacking transparency and thus undermining the democratic legitimacy of the process.[184] Therefore, whilst obviously working from the contestable assumption that the EP is a 'sufficiently legitimate institution'[185] and bearing in mind the distinct political sensitivities concerning the human rights protection imperative within this institution, it may, however, be satisfactorily argued that the application of the co-decision procedure increases the democratic legitimacy of this policy and sets the premises for an observance of the above-mentioned imperative.

In contrast, prior to the LT the second pillar of the EU, the CFSP,[186] was 'firmly rooted in the realm of intergovernmentalism'[187] with regards to its decision-making process and its requirement of a unanimous vote of the Council. It therefore reflected only limited political integration.[188] According to Article 21(1) TEU, the EP was only consulted on 'the main aspects and the basic choices' of the CFSP and it

182 EP legislative resolution of 11 February 2010 on the proposal for a Council decision on the conclusion of the Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for purposes of the Terrorist Finance Tracking Program P7_TA(2010)0029 [2010] OJ C 341 E/100.

183 EP resolution of 17 September 2009 on the envisaged international agreement to make available to the United States Treasury Department financial payment messaging data to prevent and combat terrorism and terrorist financing [2010] OJ C 224 E/8.

184 See Mitsilegas (n 6) 39-40. The aspect concerning secret trilogues and transparency will be addressed in detail in the following paragraphs.

185 Peers 2011 (n 15) 121; A M Muntean, 'The European Parliament's Political Legitimacy and the Commission's "Misleading Management": Towards a "Parliamentarian" European Union?' (2000) 4 EIoP <http://eiop.or.at/eiop/pdf/2000-005.pdf> accessed 7 July 2011.

186 TEU art 11-28 (Title V).

187 TA Börzel, 'Mind the Gap! European Integration between Level and Scope' (2005) 12 JEPP 217, 226.

188 Qualified majority is only accepted according to TEU art 23(2).

was required only that the 'views' of the EP be 'duly taken into consideration'. Important texts such as one of the earliest responses to 9/11, the controversial Council Common Position 2001/931/CFSP on the application of specific measures to combat terrorism, which transposed into EU law UN Security Council (UNSC) Resolution 1373 (2001),[189] have never been submitted to the EP. In light of this, the democratic credentials of the second pillar CT measures were frail when compared with the first pillar, principally because of the almost complete absence of the EP from the decision-making process.[190]

Finally, the third pillar concerning police and judicial cooperation in criminal matters has constituted the main ground for the elaboration of CT provisions (eg: definition of terrorist offences and the EAW).[191] The decision-making process in the third pillar was also largely intergovernmental, characterised by a unanimous vote of the Council (except for measures necessary to implement Council decisions and measures implementing conventions),[192] and only involved a consultation with the EP which was non-binding.[193] Peers observed that under this procedure, 'already

189 Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism [2001] OJ L 344/93. This Council Position has been criticised for its 'legal complexity within the framework of the EU' which 'makes it difficult to contest through judicial channels'; Amnesty International, 'Human Rights Dissolving at the Borders? Counter-terrorism and Criminal Law in the EU' (2005) <http://www.amnesty.org/en/library/info/IOR61/013/2005/en > accessed 7 July 2011; UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373.

190 It could also be argued, following the concept of Lord and Magnette (C Lord and P Magnette, 'E Pluribus Unum? Creative Disagreement about Legitimacy in the EU?' (2004) 42 JCMS 183), that several legitimating principles are upholding the general concept of EU legitimacy, and that in the case of the CFSP we are facing more the international legitimacy of the EU or the output legitimacy which looks at the EU's CFSP effectiveness. See also Arnull and Wincott (n 164).

191 TEU art 29-42 (Title VI).

192 TEU art 34(2). The two exceptions are governed by TEU art 34(2)(c) and (d).

193 TEU art 39(1).

intrinsically weak […] the opinions of the EP have had limited if any impact upon Council third pillar measures'.[194]

The limited role of the EP in an area where the security and fundamental rights of individuals are at the core of every measure demonstrated a serious lack of democratic accountability and legitimacy of this policy, as has been argued previously by other scholars.[195]

The LT attempts to address these criticisms and concerns regarding the decision-making processes of the EU CT policy, aiming to improve the democratic legitimacy and accountability of the policy. By a formal suppression of the pillar structure and by virtue of Article 1 TEU as amended by the LT (which prescribes that 'the Union shall replace and succeed the European Community'), it could be considered that the EU is heading towards a unified framework. However, Article 24(1) second subparagraph TEU as amended by the LT introduces an exception for the former second pillar. The CFSP is 'subject to specific rules and procedures.' It is 'defined and implemented by the European Council and the Council acting unanimously, except where the Treaties provide otherwise'. Moreover, 'the adoption of legislatives acts [is] excluded'.[196]

This represents a switch from three regimes to two major ones in terms of the adoption of EU provisions related to the fight against terrorism. As a result, a merger takes place between the first and third pillar. Consequently, apart from a few

194 Peers 2006 (n 15) 26, 31.

195 Eg: Walker (n 15) 232; I Tappeiner, 'The Fight against Terrorism. The Lists and the Gaps' (2005) 1 Utrecht Law Review 97, 115; Fletcher, Lööf and Gilmore (n 164) 62 'worrying and unacceptable democratic deficit'; J Lodge, 'Communicating Europe: Transparency and Democratic EU Governance' Jean Monnet European Centre for Excellence Online Papers <http://www.leeds.ac.uk/jmce/p-commun.htm> accessed 7 July 2011.

196 See for example J-C Piris, *The Lisbon Treaty: A Legal and Political Analysis* (Cambridge University Press 2010) 260.

exceptions,[197] the CT legislation of the former third pillar is now no longer governed by the consultation procedure but rather by the co-decision procedure (ie the 'ordinary legislative procedure' under the LT).[198] The EP as the representative of EU citizens thus acquires the same legislative powers as the Council, which represents the Member States and is composed 'of national representatives at the ministerial level whose appointments reflect national parliamentary majorities supporting the government they represent'.[199] Included under this procedure are essential aspects such as judicial cooperation in criminal matters (establishment of minimum rules concerning the rights of individuals in criminal procedure, 'the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension') or police cooperation.[200] The possible positive impact of the extended scope of the co-decision procedure and the EP's role in safeguarding human rights may be demonstrated by considering the amendment of the 2002 Framework Decision on combating terrorism under the co-decision procedure as opposed to the consultation procedure.[201] The co-decision procedure would have offered scope for a more transparent and open debate on a text of crucial importance for the EU CT policy, especially in relation to the breadth of the definition of 'public provocation' as the EP had a narrower view of this concept.[202] This aspect could support the position of the Law Society of England and Wales which saw in the EP '"an effective player"

197 The use of the special legislative procedure (unanimity vote in the Council and consultation of the EP) will be used for special aspects of police cooperation [TFEU art 87(3)]. In contrast, the creation of the EPPO [TFEU art 86] will require EP's consent and unanimity in Council. EP's consent will also be required for the identification of other areas of crime that meet the standards of TFEU art. 83(1) third subparagraph.

198 The provisions included under the former Title VI TEU together with those covered by Title IV EC are integrated in a new Title V formally designated 'Area of Freedom, Security and Justice'.

199 J Zemanek, 'Improving Union's Democratic Legitimacy: the European Parliament and National Parliaments' in J M Beneyto Pérez and I Pernice (eds), *The Government of Europe: which Institutional Design for the European Union?* (Nomos Verlagsgesellschaft 2004) 114.

200 TFEU art 82, 83 and 87(2).

201 EP legislative resolution of 23 September 2008 on the proposal for a Council Framework Decision amending Framework Decision 2002/475/JHA on combating terrorism P6_TA(2008)0435 [2010] OJ C 8 E/133.

202 For example, the term 'provocation' was replaced by the term 'incitement'; 'indirect incitement' has been excluded.

in ensuring the balance between security, freedom and rights […] operat[ing] as an effective counterbalance to the "lowest common denominator" decisions […] adopted in the Council'.[203] It remains to be seen whether this assessment will hold true for the discussions on the EU PNR Directive where the standards already agreed in the PNR agreements could impact the final outcome of the EU text.

Along with the extension of the co-decision procedure to the former third pillar, the LT confers on the EP a greater role in relation to international agreements pertaining to CT. Under Article 218(6)(a)(v) TFEU, the EP must consent to international agreements for fields to which 'the ordinary legislative procedure applies or the special legislative procedure where consent by the EP is required'. The EP has in fact for the first time under the LT used its veto on a CT agreement, namely the first EU-US TFTP Agreement. This power reinforces the democratic legitimacy of the EU and therefore EU CT policy, as Monar has pointed out.

During all stages of the procedure, the EP has to be fully and immediately informed.[204] Moreover, the EU negotiator must take into account the position of the EP – as expressed in resolutions, parliamentary debates and meetings – as it indicates the standards it considers necessary for consent to be granted.[205]

Therefore, the LT offers a framework for enhancing the democratic legitimacy of the decision-making process in the field of the fight against terrorism. It also provides an opportunity to enhance the democratic accountability of EU institutions involved in this area: not only are ministers who are represented in the Council

203 European Union Committee, *The Lisbon Treaty: An Impact Assessment* (HL 2007-08, 62-I) [6.29].

accountable to their national Parliaments but also the EP will be directly accountable to EU citizens for measures related to the fight against terrorism.

However, despite the clear positive elements that the LT offers, it also leaves some grey areas in terms of democratic legitimacy and the coherence of the CT policy. This is especially the case for restrictive measures directed against certain persons and entities with a view to combating terrorism (such as measures against persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban). In the pre-Lisbon landscape, two types of listings have been put forward: the 'Al-Qaida and the Taliban' list and the 'EU autonomous list'. The first is implementing UNSC Resolution 1390 (2002).[206] At EU level, this is reflected first in a second pillar instrument (Council Common Position 2002/402/CFSP)[207] and then into a first pillar instrument (Council Regulation (EC) No 881/2002).[208] The EU autonomous list reflects another UN blacklisting regime, namely that of UNSC Resolution 1373 (2001) which provides only for 'abstract criteria' which thus leave the EU to elaborate its own list directed against 'persons, groups and entities involved

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204 TFEU art 218(10).

205 For a detailed analysis on the EP's veto see J Monar, 'The Rejection of the EU–US SWIFT Interim Agreement by the European Parliament: A Historic Vote and its Implications' (2010) 15 EFA Rev 143.

206 UNSC Res 1390 (16 January 2002) UN Doc S/RES/1390.

207 Council Common Position 2002/402/CFSP of 27 May 2002 concerning restrictive measures against Usama bin Laden, members of the Al-Qaida organisation and the Taliban and other individuals, groups, undertakings and entities associated with them and repealing Common Positions 96/746/CFSP, 1999/727/CFSP, 2001/154/CFSP and 2001/771/CFSP [2002] OJ L 139/4.

208 (n 175). The Common Position in Article 2 provided that the 'European Community, acting within the limits of the powers conferred on it by the Treaty establishing the European Community: — shall order the freezing of the funds and other financial assets or economic resources of the individuals, groups, undertakings and entities referred to in Article 1. To this effect Regulation (EC) No 881/2002 was adopted. See also European Commission, 'Sanctions or restrictive measures' <http://eeas.europa.eu/cfsp/sanctions/docs/index_en.pdf#10.2> accessed 7 July 2011; See Wahl (n 6) 116-118 for more detailed comments on cross-pillarisation and the so-called 'blacklists'. See also I Cameron, 'European Union Anti-Terrorism Blacklist' (2003) 3 HRLR 225; M Jimeno-Bulnes, 'After September 11th: the Fight Against Terrorism in National and European Law. Substantive and Procedural Rules: Some Examples' (2004) 10 ELJ 235; Tappeiner (n 195); N Lavranos, 'UN Sanctions and Judicial Review' (2007) 76 Nordic Journal of International Law 1; Ziegler (n 138); G Harpaz, 'Judicial Review by the European Court of Justice of UN 'Smart Sanctions' Against Terror in the *Kadi* Dispute' (2009) 14 EFA Rev 65; C Eckes, *EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions* (Oxford University Press 2009).

in terrorist acts' based on decisions by national authorities.[209] As in the previous setting, they are implemented by a second and a first pillar instrument: Council Common Position 2001/931/CFSP on the application of specific measures to combat terrorism[210] and Council Regulation (EC) No 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism (Council Regulation (EC) No 2580/2001).[211] Both Council Regulation (EC) No 881/2002 and Council Regulation (EC) No 2580/2001 were submitted to the EP for consultation. It is also important to recall that these types of listings have been subject to strong criticism for the absence of legal certainty and insufficient protection of fundamental rights such as defence rights, a situation confirmed by the *Kadi* judgement of the CJEU.[212] With a view to addressing these shortcomings, the Commission put forward a proposal to amend Council Regulation (EC) No 881/2002.[213] The EP Civil Liberties, Justice and Home Affairs Committee (LIBE) was consulted on the proposal but did not deliver a formal opinion. Instead it tabled an oral question followed by a resolution.[214] At the same time, it requested the views of the Committee on Legal Affairs and of its Legal Service on the legal basis

209 CoE, 'UN Sanctions and Respect for Human Rights' < http://www.coe.int/t/dlapil/cahdi/Source/un_sanctions/EU%20update%20UN%20Sanctions%20sept%202009%20E.pdf > (2009) accessed 7 July 2011; (n 189).

210 (n 189).

211 [2001] OJ L 344/70. See also G Sullivan and B Hayes, 'Blacklisted: Targeted Sanctions, Preemptive Security and Fundamental Rights' (2009) European Center for Constitutional and Human Rights <http://www.ecchr.eu/index.php/id-2011-archive/articles/blacklisted-targeted-sanctions-preemptive-security-and-fundamental-rights.929.html> accessed 7 July 2011.

212 Joined Cases C-402/05 P and C-415/05 P (n 138); Lavranos (n 208) 1; CoE (Parliamentary Assembly), 'United Nations Security Council and European Union Blacklists' (2007) Doc 11454.

213 Commission, 'Proposal for a Council Regulation amending Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban' COM (2009) 0187 final.

214 Oral question of 16 November 2009 with debate pursuant to Rule 115 of the Rules of Procedure by Emine Bozkurt, Louis Michel and Michèle Striffler, on behalf of the Committee on Civil Liberties, Justice and Home Affairs to the Commission O-0136/09 and EP resolution of 16 December 2009 on restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, in respect of Zimbabwe and in view of the situation in Somalia P7_TA-PROV(2009)0111 [2010] OJ C 286 E/5.

for such measures under the LT.[215] The Commission and the Council argued that, for measures deriving from the CFSP (including fulfilling obligations from UN Resolutions), the correct legal basis was Article 215(2) TFEU. Under this legal framework, the EP would simply be informed as opposed to having a consultative role as under the former treaties. Following this reasoning and after the 2009 proposal to amend Council Regulation 881/2002 elapsed due to the entry into force of the LT, a new proposal was put forward under Article 215(2) TFEU and adopted by Council as early as 22 December 2009.[216]

In contrast, for EU autonomous sanctions against natural or legal persons and groups or non-State entities with regards to preventing and combating terrorism and related activities, the LT provides a new legal basis in Article 75 TFEU. This new provision confers the power on the EP and the Council to adopt regulations in accordance with the ordinary legislative procedure in order to define a 'framework for administrative measures with regards to capital movements and payments, such as the freezing of funds, financial assets or economic gains belonging to, or owned or held by' the subjects referred to above. The adoption of measures implementing the said framework is to be undertaken by the Council following a proposal from the Commission.[217] Moreover, it is prescribed that the acts adopted in accordance with Article 75 TFEU 'shall include necessary provisions on legal safeguards'. [218] It

215 EP Committee on Legal Affairs opinion of 4 December 2009 on the proposal for a Council regulation amending Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban JURI_AL(2009)430917 <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-430.917+01+DOC+PDF+V0//EN&language=EN> accessed 7 July 2011.

216 Council Regulation (EU) No 1286/2009 of 22 December 2009 amending Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban [2009] OJ L 346/42 (Regulation (EU) No 1286/2009).

217 TFEU art 75 second paragraph.

218 TFEU art 75 third paragraph.

follows that Article 75 TFEU allows not only an enhanced democratic control by means of the co-decision procedure (ordinary legislative procedure), but sets out for the first time the basis of a coherent and coordinated approach with regards to CT measures concerning capital movements and payments.

In this new setting, the choice of Article 215(2) TFEU – restrictive measures against natural or legal persons and groups or non-State entities – as the legal basis for the amendment of Regulation 881/2002 is contestable on several grounds. Firstly, according to established case law, the choice for a legal basis 'must rest on objective factors amenable to judicial review', such as 'the aim and the content of the legislative act in question.[219] Article 75 TFEU is narrower compared with Article 215 TFEU, both with regards to its content (administrative measures such as freezing of funds versus general restrictive measures) and its objectives (preventing and combating terrorism). It follows that the amendment of Council Regulation 881/2002 could have been grounded on Article 75 TFEU and not on Article 215(2) TFEU. It will be important to observe the Court's position with regards to this, as the EP brought forward on 11 March 2010 an action for the annulment of Council Regulation (EU) No 1286/2009 on the grounds of a legal basis (Article 75 TFEU instead of Article 215 TFEU).[220] Secondly, as Cameron points out, the distinction between internally (Article 75 TFEU) and externally (Article 215 TFEU) suspected terrorists and terrorist groups is debatable. This is especially the case where 'sanctions taken so far against EU external groups […] have the purpose and effect of limiting these groups' fund-raising activities and access to finances within the EU' and, '[as] such,

219 Case C-269/97 *Commission v Council* [2000] ECR I-2257 [43].

220 Case C-130/10 *European Parliament v Council of the European Union*.

also impinge on the Charter rights of EU citizens and residents'.[221] This can also be judged to be at odds with the necessary coherence of the CT policy.

It can therefore be concluded that, although the LT reinforces the CT arsenal, it creates imbalances in terms of the democratic control between similar measures, imbalances which were not present in the former Treaties. Moreover, it draws boundaries between the internal and external dimensions of the CT fight when the momentum requires a more coordinated and united approach which also considers the requests of civil society and academia to review the whole system of 'restrictive measures/sanctions', especially with regards to terrorism activities.[222]

In discussions of democratic legitimacy, we must also consider transparency, the so-called 'secret/informal trilogues' of the co-decision procedure, and the adoption of CT legislation.

In principle, the co-decision procedure enhances the transparency of the CT decision-making process, allowing an open debate within the EP. However, criticism has sparked concerning the practice of the so-called 'informal trilogues' introduced after the entry into force of the Amsterdam Treaty 'in order to respond to practical necessities and the growing legislative workload under co-decision'.[223] This type of informal negotiation can take place between representatives of the three institutions

221 I Cameron, 'Respecting Human Rights and Fundamental Freedoms and EU/UN Sanctions: State of Play' (2008) Study, Policy Department External Policies, Directorate General External Policies of the Union, European Parliament <http://www.europarl.europa.eu/activities/committees/studies/download.do?language=en&file=23608#search=%20SANCTIONS%20> accessed 11 July 2011, 17; Opinion EP Legal Affairs Committee (n 215) 8.

222 Amnesty International (n 189); Tappeiner (n 195).

223 F M Häge and M Kaeding, 'Reconsidering the European Parliament's Legislative Influence: Formal vs. Informal Procedures' (2007) 29 JEI 341, 344; M Shackleton and T Raunio, 'Codecision since Amsterdam: a Laboratory for Institutional Innovation and Change' (2003) 10 JEPP 171; H Farrell and A Héritier, 'The Invisible Transformation of Codecision: Problems of Democratic Legitimacy' (2003) Report No 7, Swedish Institute for European Policy Studies <http://www.sieps.se/en/publikationer/the-invisible-transformation-of-codecision-problems-of-democratic-legitimacy-20037 > accessed 11 July 2011.

involved (Commission, Council and EP) during all stages of the co-decision procedure and can lead to agreements even during the first reading in Parliament, brought about through informal negotiations.[224] Human rights activist Tony Bunyan considered that this type of '*deal* done in informal, secret trilogue meetings becomes formal and effectively binding on the parliament' and indicated that 'all the documents produced during many trilogues [....] are termed "informal" meetings and thus are not listed in the public Register of documents at the time or adoption of a measure.'[225] However, this practice has been improved over the years, allowing not only the fulfilment of the so-called 'output legitimacy', which concerns 'efficiency of policy production and effectiveness of policies resulting from decision-making',[226] but also supporting the legitimacy of the process. This is key for maintaining the status of the EP as a public arena for debating sensitive texts with potentially crucial impacts for human rights, as well as the force of the co-decision procedure as a tool for reinforcing the democratic legitimacy of the measures related to the CT fight. This line of reasoning is supported by the practice of EP Committees as well as by the EP's *Code of Conduct for negotiating in the context of codecision procedures* (Annex XX of the Rules of Procedure).[227] This Code prescribes clear provisions for the decision to enter into negotiations, for the composition of the negotiating team ('political balance shall be respected and all political groups shall be represented at least at staff level in these negotiations'[228]), the mandate of the negotiating team, the organisation of trilogues, and especially on the feedback and decision for the agreement reached.

224 Joint Declaration on the practical arrangements for the codecision procedure [2007] OJ C 145/5, Point 14.

225 T Bunyan, 'Secret Trilogues and the Democratic Deficit' (2007) Statewatch Viewpoint <http://www.statewatch.org/analyses/no-64-secret-trilogues.pdf> accessed 11 July 2011.

226 Häge and Kaeding (n 223) 342.

227 <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+RULES-EP+20090714+ANN-20+DOC+XML+V0//EN&navigationBar=YES> accessed 11 July 2011.

In this sense, the LIBE Committee holds 'orientation votes' in order to ascertain the mandate of the negotiation team[229] and has regular feedbacks from trilogues – sometime after each meeting – during the public LIBE meetings.[230] At the same time, in order not to undermine the negotiation process, it is difficult to conceive that all documents discussed during trilogues would be made public immediately after such meetings. However, a possibility would be to release such documents at a later stage after the negotiation process has been finalised. While this situation can be perceived as opaque, this opacity is predominantly linked with the uncertainty surrounding some points under discussion and with the need to leave room for further discussions either within the EP or within the Council. It follows that, while there is an inherent opacity as regards the conduct of the trilogues, the current practice of the EP and the existing provisions allow for an enhanced transparency in the process leading to the adoption of CT legislation under the co-decision procedure.

Thus, in theory, the amendments brought by the LT to the decision-making process are supposed to bring about enhanced legitimacy and accountability for the EU CT action and to also lay the foundations for strengthening the general mechanisms for the protection of human rights. In contrast, recourse to Article 215(2) TFEU for establishing restrictive measures in the CT field raises questions in terms of the democratic legitimacy and coherence of EU action.

2.1.1.1.2 Enhanced powers for national Parliaments

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228 ibid point 3.

229 The text of the negotiation mandate is published on the LIBE Committee's website. See for example Result following the Orientation Vote on the amended proposal for a regulation of the European Parliament and of the Council establishing an Agency for the operational management of large- scale IT systems in the area of freedom, security and justice (16 November 2010) <http://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/dv/833/833053/833053en.pdf > accessed 11 July 2011.

The democratic legitimacy of EU CT policy and, more specifically, the democratic legitimacy of the decision-making process depend not only on a greater involvement of the EP, but also on a closer participation of national Parliaments in line with the parliamentary approach and building on the ruling of the German Federal Constitutional Court (*Bundesverfassungsgericht*) on the Maastricht Treaty.[231] In the pre-Lisbon setting, the governments of the Member States had to ensure that Commission legislative proposals were received by their national Parliaments in due time. Additionally, a six-week period had to be observed between the moment when a legislative proposal or a proposal for a measure under Title VI TEU was made available in all languages to the EP and to the Council and the moment when it was recorded in the Council's agenda for adoption of an act or of a common position.[232] In this period, national Parliaments had no formal powers in the European procedure.

The LT attempts to overcome this shortcoming. It enshrines a 'right of direct information from the EU institutions'[233] and entitles national Parliaments to be involved in the elaboration of EU CT legislation by means of a reasoned opinion on whether proposals and legislative initiatives submitted to them under chapters 4 and 5 of Title V of the TFEU (judicial and police cooperation in criminal matters) at least eight weeks before their inclusion in the Council's provisional agenda comply with the subsidiarity principle.[234] According to Article 7 of the Protocol (No 2) on the

230 For example, Feedback on the Frontex Regulation negotiations on the LIBE agenda of 24 May 2011. Point 12 <http://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/oj/867/867690/867690en.pdf > accessed 11 July 2011.

231 Dehousse (n 132); Decision of 12 October 1993, 2 BvR L 134/92 and 2159/92: 'Democratic legitimacy in the Union of States constituting the European Union is necessarily conferred by feedback from the actions of the European institutions in the parliaments of the Member States'.

232 Protocol (No 9) the Role of National Parliaments in the European Union [2006] OJ C 321 E/227, Points 2 and 3.

233 Piris (n 196) 127. Protocol (No 1) on the Role of National Parliaments in the European Union [2008] OJ C 115/203.

234 The principle aims to ensure that decisions are taken as closely as possible to the citizen. The action at EU level, apart from the areas of exclusive competence, must intervene only 'if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level' (TEU art 5(3)).

Application of the Principles of Subsidiarity and Proportionality, '[e]ach national Parliament shall have two votes, shared out on the basis of the national Parliamentary system. In the case of a bicameral Parliamentary system, each of the two chambers shall have one vote.' Where the reasoned opinions on the non-compliance of a draft legislative act with the principle of subsidiarity represent at least a quarter of all the votes allocated to national arliaments, then 'the draft must be reviewed' (the so-called 'yellow card'). If the Commission maintains its proposal it has to put forward a reasoned opinion for consideration of the 'Union legislator'. In this case, if 'a majority of 55% of the members of the Council or a majority of the votes cast' in the EP takes the view that the proposal is incompatible with the subsidiarity principle 'the legislative proposal shall not be given further consideration' (the so-called 'orange card'). [235] Finally, the LT foresees also that an action for annulment 'on grounds of infringement of the principle of subsidiarity' before the CJEU can be brought forward by 'Member States, or notified by them in accordance with their legal order on behalf of their national Parliament or a chamber thereof.' [236]

In 2008 the Conference of Community and European Affairs Committees of Parliaments of the European Union (COSAC) decided to conduct a subsidiarity check mechanism as prescribed by the LT on the Commission proposal amending Framework Decision 2002/475/JHA on combating terrorism. [237] The national Parliaments of the Member States were called to pronounce by 28 January 2008 on whether the proposal infringed the subsidiarity principle.[238] Only one chamber of the

235 (n 145); TFEU art 69. Piris (n 196) 130-131.

236 art 8 Protocol (No 2) (n 145).

237 COM (2007) 650 final.

238 COSAC, 'Report on the results of the Test on the subsidiarity check mechanism of the Lisbon Treaty coordinated by COSAC' (2008) <http://oide.sejm.gov.pl/oide/en/index.php?option=com_content&view=article&id=197&Itemid=285 > accessed 11 July 2011.

UK Parliament, the House of Commons, considered there to be a clear breach of the principle. However, for several chambers of other national Parliaments, there were pending questions related to the proportionality of the measures included in the proposal (public provocation to commit terrorist offences, training and recruitment). This situation raises at least two questions with respect to the elaboration of EU CT legislation. Will national Parliaments which consider that such EU proposals infringe the subsidiarity principle be able to obtain the necessary blocking minority? What pressure can national Parliaments exercise (on their respective governments for example) if they have concerns relating to the substantive content rather than subsidiarity?[239]

From this practical example, it can be observed that the EU CT policy is likely to gain in terms of the democratic legitimacy of the decision-making process and observance of human rights protection through a more concrete, though narrow, form of involvement from national Parliaments. The democratic accountability of the policy is also likely to be enhanced. National Parliaments will have 'a more effective scrutiny of their own governments' [240] and will be accountable in front of their electorate, not only for the choices made concerning the implementation of EU acts, but also with respect to the control of the subsidiarity principle.

2.1.1.1.3 Scrutiny and evaluation of EU agencies by the EP and national Parliaments

239 For an analysis of the influence of national Parliaments over their respective governments see T Raunio, 'National Parliaments and the Future of European Integration: Learning to Play the Multilevel Game' in J DeBardeleben and A Hurrelmann (eds), *Democratic Dilemmas of Multilevel Governance : Legitimacy, Representation and Accountability in the European Union* (Palgrave Macmillan 2007). See also Piris (n 196) 122-123 on the manner in which national Parliaments have 'organised themselves in order to better control the European polity of their governments.'

240 M Tsakatika, 'The European and National Parliaments after the European Convention: Allies or Adversaries?' (2006) Paper to be presented at the Third Pan-European Conference on EU Politics, ECPR – Standing Group on the European Union <http://www.jhubc.it/ecpr-istanbul/virtualpaperroom/017.pdf> accessed 11 July 2011, (citing Neunreither) 12.

Parliamentary scrutiny over the activities of EU bodies dealing with terrorist threats is the third element chosen by this thesis as a means of analysing the democratic legitimacy of EU policy in the fight against terrorism. In the pre-Lisbon setting the activities of EU agencies such as Eurojust and Europol were the subject of very limited or even no form of parliamentary scrutiny at the EU level, with the exception of the budgetary oversight (Eurojust).[241] These agencies have become highly important players in the current EU environment of the CT policy and their profile has substantively increased over the years. As such, this calls for a closer analysis of the need to establish more adequate mechanisms for scrutiny of these agencies. This issue is also connected to the various criticisms raised over the years regarding the absence of a proper system of 'checks and balances' in the AFSJ.[242]

As regards Europol, the European Police Office mandated to 'support and strengthen action by the competent authorities of the Member States and their mutual cooperation in preventing and combating organised crime, terrorism […]',[243] it is 'accountable at EU level to the Council of Ministers for [JHA]'.[244] With regards to the EP, its competencies have been perceived as 'limited to informational and consultational rights', as observed by Riekmann,[245] together with the budgetary oversight when Europol became an EU agency by virtue of the Europol Decision. However, the 'informational right' granted by Article 48 of the Europol Decision to the EP can be a powerful tool of scrutiny. It empowers the competent committee of

241 N Lavranos, 'Europol and the Fight Against Terrorism' (2003) 8 EFA Rev 259.

242 J T Lang, 'Checks and Balances in the European Union: The Institutional Structure and the "Community Method"' (2006) 12 European Public Law 127.

243 art 3 Council Decision of 6 April 2009 establishing the European Police Office (Europol) (2009/371/JHA) (Europol Decision) [2009] OJ L 121/37.

244 Europol, 'Management' <https://www.europol.europa.eu/content/page/management-147> accessed 11 July 2011.

245 S P Riekmann, 'Security, Freedom and Accountability: Europol and Frontex' in Guild and Geyer (eds) (n 123) 24.

the EP to request the presence at its meeting of either the Council Presidency, the Chairperson of the Management Board or the Director in order to discuss matters relating to Europol, whilst taking into account the obligations of discretion and confidentiality. To date, this has allowed not only presentations by Europol's Director of EU Terrorism Situation and Trend Reports but also *in camera* discussions with EP members on the role entrusted to Europol within the framework of the EU–US TFTP Agreement.[246] This indicates that, while termed 'informational' right, the possibility granted to the EP under the Europol Decision is not merely symbolic or a simple formality but instead allows for substantive debates between Europol's representatives and members of the EP. In the same vein, Eurojust, an agency created in 2002 in order to facilitate judicial cooperation between the competent national authorities of the Member States with a view to reinforcing the fight against serious crime, is also only accountable to the Council of Ministers. By virtue of Article 32 (2) (consolidated version Eurojust Decision), the Council Presidency is only called to forward to the EP a 'report […] on the work carried out by Eurojust and on the activities of the [Joint Supervisory Body]'. [247]

From these two examples it is clear that the right of scrutiny of the only directly elected body at the EU level, the EP, was rather weak (with the exception of the budgetary oversight) within the pre-Lisbon framework despite some areas of improvement with regards to the Europol Council Decision.[248] This raised questions

246 art 4 second EU–US TFTP Agreement (n 50).

247 Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime (Eurojust Decision) [2002] OJ L 63/1. See consolidated version of the Eurojust Decision as amended by Council Decision 2003/659/JHA and by Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust [2009] OJ L 138/14, Council Document 5347/3/9 (Consolidated version Eurojust Decision).

248 The EP has shown a keen interest in a timely revision of the Europol framework. Consulted on a series of implementing Europol decisions on the eve of the entry into force of the LT it rejected the texts and called 'on the Commission or the Council to make a declaration in Plenary on a proposal for a new Europol decision which shall be submitted six months following the date of entry into force of the Treaty of Lisbon.' See for

regarding the accountability and transparency of these two EU bodies involved in the fight against terrorism. The LT enhances the competencies of these agencies with regards to judicial and police cooperation and, at the same time, provides external forms of oversight. Scrutiny of Europol's activities will be performed by the EP, 'together with national Parliaments', whilst evaluation of Eurojust's activities will be undertaken with the involvement of the EP and national Parliaments.[249]

However, these provisions are still at a rather abstract level. They must be implemented by concrete and specific secondary legislation prescribing the practical arrangements of these evaluations and their remits. They must indicate, *inter alia*, how to best translate the results of evaluations and scrutiny (ie reports, recommendations). The views put forward by academics as well as by other experts in the area before and after the entry into force of the LT, combined with the findings resulting from different initiatives exploring the issue of the democratic accountability of AFSJ agencies, are valuable elements that will inform the review of the legal framework of Europol and Eurojust (2013 for the former and 2012 for the latter).[250] Of particular interest in this respect is the practice of the Interparliamentary Committee Meetings LIBE Committee - National Parliaments. The 2010 meeting focused on the *Democratic accountability in the Area of Freedom, Security and*

example, Report of 16 November 2009 on the draft Council decision determining the list of third States and organisations with which Europol shall conclude agreements A7-0069/2009.

249 TFEU art 88(2) second subparagraph and art 85(1) third subparagraph.

250 See Commission, 'Delivering an area of freedom, security and justice for Europe's citizens Action Plan Implementing the Stockholm Programme' (Communication) COM (2010) 171 final, 18, 32. For a recent study on oversight of security and intelligence agencies in the EU see A Wills and M Vermeulen, 'Parliamentary Oversight of Security and Intelligence Agencies in the EU', (201) Policy Department C: Citizens' Rights and Constitutional Affairs <http://www.europarl.europa.eu/activities/committees/studies/download.do?language=en&file=48532> accessed 17 October 2011.

Justice - Evaluation Europol, Eurojust, Frontex and Schengen[251] while the 2011 one tackled the *Democratic Accountability of the Internal Security Strategy and the Role of Europol, Eurojust and Frontex.*[252] Such meetings have the merit of bringing together directly elected representatives, experts and academics in order to assess and explore venues for adequate scrutiny and evaluation of AFSJ agencies ahead of the 'Lisbonisation' of Europol and Eurojust. Until the secondary legislation is enacted, a possible solution would be for evaluation and scrutiny mechanisms to be conceived and to function on the basis of a gentlemen's agreement. This would reinforce the democratic legitimacy of the fight against terrorism by means of a close scrutiny and evaluation of agencies dealing with the terrorist threat.

With particular regard to Europol, the Commission in its Communication dated December 2010 on procedures for the scrutiny of Europol's activities by the EP, together with national Parliaments,[253] put forward some elements of response as to how this scrutiny could be devised before and after the Europol new legal framework is in place (proposal expected 2013). This was achieved by drawing on suggestions from previous resolutions of the EP concerning Europol, as well as from the current situation in national Parliaments with regards to the scrutiny of JHA.

By means of example, the Communication suggests the 'setting up of a permanent joint or interparliamentary forum'.[254] No equivalent initiative has been

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251 EP, LIBE Commitee Events <http://www.europarl.europa.eu/activities/committees/eventsCom.do?page=2&product=CHE&language=EN&body=LIBE> accessed 11 July 2011.

252 EP, LIBE Committe Events <http://www.europarl.europa.eu/activities/committees/eventsCom.do?page=1&product=CHE&language=EN&body=LIBE> accessed 17 October 2011.

253 COM (2010) 776 final.

254 ibid 15.

suggested for Eurojust, but discussions have been ongoing in different forums in relation to the form of this evaluation and its scope. It appears that the format of the scrutiny could be similar to the one envisaged for Europol in the Commission Communication, namely a permanent joint inter-parliamentary forum. With regards to the scope of the evaluation, the resulting position emanating from a seminar organised in September 2010 under the Belgium Presidency was that the evaluation should 'be limited to an overall or political assessment of the functioning of Eurojust and not its operational activities'.[255]

In view of this research, the future arrangements as regards methods of scrutiny and evaluation of Europol and Eurojust respectively should build on and bring to a higher level, if applicable, already existing arrangements or practices that have proven their efficiency. Additionally, they should combine structured formats of scrutiny and evaluation with ad-hoc debriefings allowing a comprehensive and in-depth appraisal of the work of the two agencies. The issue of access to classified documents as well as to information pertaining to the agreements concluded by the respective agencies should also be addressed within this context. This is all the more key in a field such as CT. The necessity to fully clarify Europol's role in the framework of the EU-US TFTP Agreement is a case in point as by virtue of the said agreement Europol has been charged with checking the lawfulness of an American subpoena delivered by the Treasury Department.[256] Data protection experts and

255 Council Document 17625/10, 'Eurojust and the Lisbon Treaty: Towards more effective action - Conclusions of the strategic seminar organised by Eurojust and the Belgian Presidency'.

256 On the question of access to classified information and more generally on scrutiny over AFSJ Agencies see Wills and Vermeulen (n 250). Council Document 11133/10, 'Explanatory note on the Europol mechanism under the draft TFTP mechanism' <http://www.statewatch.org/news/2010/jun/eu-tftp-europol-11330-10.pdf> accessed 11 July 2011. See also the position of the German delegation which indicated that the request of a member of the Bundestag to the Federal Ministry of Interior remained unanswered and that Europol termed different aspects pertaining to the agreement as touching a 'politically sensitive area'. Council Document 6266/11 <http://www.statewatch.org/news/2011/feb/eu-council-germany-europol-usa-tftp-6266-11.pdf> accessed 11 July 2011.

human rights groups have suggested that such a task should have been entrusted to a judicial body – as initially foreseen in the negotiating mandate – and not to a law enforcement agency. Moreover, it was questionable as to what extent this is really in line with Europol's current remits under the Council Decision. [257] The above situation only reinforces the importance of an adequate, timely and extensive scrutiny/evaluation over the activities of these two agencies.

The extension of the ordinary legislative (the former co-decision) procedure to the adoption of almost all pieces of CT legislation in the field of judicial and police cooperation in criminal matters, the consent procedure, the new role of national Parliaments with regards to subsidiarity control, and evaluation and scrutiny over Eurojust, respectively Europol by the EP and national Parliaments all support the idea that EU policy in the fight against terrorism has been enhanced in terms of democratic legitimacy and accountability under the LT. The accountability and legitimacy of a body such as SitCen has been deliberately left outside the scope of the analysis, which is centred on AFSJ-derived CT measures. However, democratic legitimacy and accountability are not the only yardsticks chosen by this thesis when considering whether human rights are treated adequately within the EU CT policy. The rule of law is also an important assessment criterion through which to analyse how the objective of human rights protection is translated in this highly sensitive area.

257 See European Data Protection Supervisor (EDPS), 'Opinion on the Proposal for a Council Decision on the conclusion of the Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for purposes of the Terrorist Finance Tracking Program (TFTP II)' [2010] OJ C 355/10.

2.1.1.2 The rule of law within the EU CT policy

Three aspects of the LT reforms are likely to enhance the rule of law and the accountability of EU CT policy. As a result, these three aspects will enhance the general framework for the protection of human rights. These elements are:

- The unification of the jurisdiction of the CJEU on matters concerning the AFSJ;
- The binding character of the EUCFR; and
- The accession of the EU to the ECHR.[258]

2.1.1.2.1 The jurisdiction of the CJEU: the pre- and post-Lisbon landscape

Judicial control should constitute a *sine qua non* element in an area where every security measure adopted by the EU could have enormous impacts on the fundamental rights of EU citizens and third country nationals.[259] It would imply that EU CT legislation can be subjected to a legality review, that it can be adequately interpreted, and that Member States can be held liable for not implementing such EU provisions correctly or in a timely manner. In the pre-Lisbon landscape and to some extent even after the entry into force of the LT, EU CT measures were and will be subject to different degrees of judicial control. This situation raises questions regarding the degree of human rights protection entailed by the system. The LT remedies to a large extent these shortcomings by addressing the 'exceptionalism' of the third pillar with regards to the Court's jurisdiction.[260]

258 Signed in Rome on 4 November 1950.

259 D Chalmers, 'Judicial Authority and the Constitutional Treaty' (2005) 3 ICON 448; Carrera and Geyer (n 171).

260 Ladenburger (n 171); T Tridimas and P Nebbia, *European Union Law for the Twenty-first Century: Rethinking the New Legal Order* (Hart Publishing 2004). See (n 172) for the limitations of the CJEU jurisdiction during the five years transitional period. S Carruthers, 'The Treaty of Lisbon and the Reformed Jurisdictional Powers of the European Court of Justice in the Field of Justice and Home Affairs' (2009) 6 EHRLR 784.

In the first pillar, CT-related provisions were subject to all the legal remedies offered to the European jurisdiction.[261] In contrast, the TEU did not afford the Court the right of review over second pillar measures apart from 'corollary issues such as the access to CFSP documents or the delimitation of CFSP powers in relation to other Community policies'. [262] The LT maintains this situation with regards to the jurisdiction of the Court over the second pillar: there will be no judicial oversight for measures concerning the fight against terrorism of the CFSP apart from some circumscribed exceptions. However, these exceptions are important – especially for CT policy – as they allow the CJEU to review the legality of 'decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union'.[263]

The most significant change in terms of justiciability and human rights safeguards, however, concerns the jurisdiction of the CJEU over former third pillar measures related to the fight against terrorism.[264] In this area, '[d]eficits of judicial protection […] in sharp contrast with the human rights sensitivity of police and judicial cooperation' have been identified.[265]

The 'preliminary ruling' procedure [266] considered as the most important judicial remedy guaranteeing the uniform application of Community law throughout

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261 See preliminary ruling procedure (EC art 234), annulment procedure (EC art 230), infringement procedure (EC art 226 and art 227), failure to act procedure (EC art 232).

262 D Thym, 'Reforming Europe's Common Foreign and Security Policy' (2004) 10 ELJ 5, 15.

263 TFEU art 275 second paragraph.

264 A Arnull, 'From Bit Part to Starring Role? The Court of Justice and Europe's Constitutional Treaty' (2005) 24 Yearbook of European Law 1; Tridimas and Nebbia (n 260).

265 Ladenburger (n 171) 25.

266 EC art 234.

the EU exhibited some important drawbacks in the third pillar.[267] Member States had the right to choose if they accepted the Court's jurisdiction or not 'by a declaration made at the time of signature of the Treaty of Amsterdam or at any time thereafter.'[268] Furthermore, Member States were at liberty to choose whether the procedure was initiated only by a last instance national court or by any court or tribunal of that State.[269]

This 'pick and choose' attitude not only 'limits the avenues of co-operation between Luxembourg and national courts' but 'may also be an impact on the consistency of the interpretation of Union law by national courts', as could be the case for the 2002 Framework Decision on combating terrorism.[270] Furthermore, the 'right of access to justice and the equality principle' could be seriously endangered as 'nationals of different Member States are not provided with the same actions at EU level'.[271]

Under the LT provisions, the CJEU gained compulsory jurisdiction for all measures of the AFSJ with regards to the preliminary ruling. This lays the foundations for a more uniform interpretation and application of CT acts of the former

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267 Rafaraci and Belfiore rightly point out that as the aim of the procedure is the same (uniform and consistent application of the law), 'there is no reason why to differentiate the functioning and the effects of preliminary rulings under the two pillars: "to hide behind outdated notions of sovereignty and intergovernmental structures which leaves citizens out in the cold is no longer defensible".' T Rafaraci and R Belfiore, 'Judicial Protection of Individuals under the Third Pillar of the European Union' (2007) Jean Monnet Working Paper No 10 <http://centers.law.nyu.edu/jeanmonnet/papers/07/071001.html> accessed 13 July 2011, 10. See also M Andenas and J Usher (eds), *The Treaty of Nice and Beyond: Enlargement and Constitutional Reform* (Hart Publishing 2003)] and the comments on the Pupino Case (n 150) where the Court concludes that the principle of conforming interpretation is binding in relation to framework decisions adopted in the context of Title VI TEU.

268 TEU art 35(2).

269 TEU art 35(3) (a) and (b).

270 Mitsilegas (n 6) 19. The author also underscored –relying on the example of the House of Lords in the Dabas case- that 'denying the right to send references to Luxembourg has not stopped domestic courts from taking into account Luxembourg interpretation of third pillar law and apply it in their domestic context ; N Fennelly, 'The Area of "Freedom, Security and Justice" and the European Court of Justice: A Personal View' (2000) 49 The International and Comparative Law Quarterly 1.

271 Rafaraci and Belfiore (n 267) 6.

third pillar.[272] Judicial control will also be increased via several mechanisms: national courts of last instance will be obliged to refer to the CJEU, and the Court will have to 'act with the minimum of delay' when the case concerns, for example, a person in custody accused of having participated in a terrorist attack.[273] Moreover, the acts of Europol and Eurojust could also form the object of a preliminary ruling under the LT. [274] This enhances the judicial accountability of these agencies in the fight against terrorism and addresses some of the shortcomings observed in the checks and balances system of this policy.

In contrast, both the TEU (Article 35(5) TEU) and the LT (Article 276 TFEU) have maintained a general exception clause from the CJEU's jurisdiction, excluding the possibility for the Court

> 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.

This provision has generated intense discussions as to its precise coverage considering the risk of being 'used to shield operational activities in the Member States when national authorities co-operate on the basis of Union law.'[275] It is interesting in this sense to recall that, in 2002, Working Group X when preparing the European Convention had already suggested the deletion of Article 35(5) in order for actions from police and other authorities 'acting in the framework of Union law' to be

272 TFEU art 267; Dougan (n 171).

273 TFEU art 267 third and fourth paragraphs.

274 TFEU art 267 first paragraph (b).

275 Mitsilegas (n 6) 20.

excluded.[276] The draft Constitutional Treaty had a similar provision to that of Article 35(5) TEU but indicated that the action had to be a matter of national law.[277] Hinarejos, in a detailed analysis of Article 35(5) TEU in relation to the first restriction concerning actions by police or other law enforcement authorities, puts forward arguments for and against the examination solely by national courts of such actions, underlining that this restriction 'somehow impairs the Court's role as authoritative interpreter of EU law'.[278] With regards to the second restriction pertaining to 'maintenance of law and order and the safeguarding of internal security', which echoed the general rule of Article 33 TEU, Hinarejos sees another possible limitation to the interpretative role of the Court if 'when asked by a national court whether a rule of EU law forbids certain Member State action […], the Court feels limited by the fact that it should not be seen to be assessing this sort of national action.'[279] In the absence of a clause similar to that of the draft constitutional treaty indicating that it concerns only actions which are a matter of national law, it is even more important, as noted by Hinarejos, that under the LT landscape national courts 'strive to review national action for compliance not only with national law, but also with EU law' and that the CJEU be 'allowed some leeway: it has to be able to discharge its duty as interpreter of EU law, even if this means, if some instances, framing its preliminary rulings by reference to national action that is caught by Article 276 TFEU.'[280] The Prüm Decision could be a case in point in this context.

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276 Working group X 'Freedom, security and justice', Working Document 29 (2002) < http://european-convention.eu.int/docs/wd10/5672.pdf> accessed 11 July 2011.

277 Draft Treaty establishing a Constitution for Europe, Article III-283, CONV 850/03.

278 A Hinarejos, 'Law and Order and Internal Security Provisions in the Area of Freedom, Security and Justice' in (2009) Eric Stein Working Paper No 2 <http://www.ericsteinpapers.eu/images/doc/eswp-2009-02-hinarejos.pdf> accessed 11 July 2011, 9.

279 ibid 11.

280 ibid 16, 15.

As regards the legality review of the framework decisions and decisions in actions brought by a Member State or the Commission enshrined in Article 35(6) TEU, it paved the way for challenges to third pillar measures related to the fight against terrorism. The article left no place, however, for the EP, the Council or so-called 'unprivileged actors'[281] (natural or legal persons) to challenge third pillar measures directly. The reasoning was that measures adopted under the third pillar aimed to 'promote cooperation, contributing to the pursuit of the objectives of the Union' and thus unlikely to 'directly interfere on the legal sphere of a closed category of individuals'.[282] However, it seems rather contradictory that, in relation to measures that place EU citizens at the heart of the project, there is no possibility for the same citizens to challenge the above-mentioned measures. As Rafaraci and Belfiore astutely put it:

> [It] must be examined, though, whether measures adopted under Title VI, and in particular framework decisions, are in reality more incisive on the sphere of individuals than they seem to be: the question relates to the feasibility of third pillar measures to be of direct and individual concern.[283]

The LT remedied these shortcomings by broadening the legality review to individuals as well as to the EP and to the Council in addition to the current actors. There is also a widening of the acts subject to review, with acts of the European Council and of agencies such as Europol and Eurojust producing effects on third parties coming to be

281 The qualification as being 'privileged' or 'unprivileged' in the EU jargon derives from the obligation to provide or not a justification to act. The institutional actors are not compelled to provide a reason to ask for legality review, whilst for the legal or natural person several conditions are prescribed: proceedings can be instituted 'against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.' (EC art 230 fourth paragraph). See Case C-25/62 *Plaumann & Co. v Commission* [1963] ECR 95.

282 Rafaraci and Belfiore (n 267) 22.

283 ibid.

covered.[284] Moreover, Article 263 fourth paragraph TFEU allows natural and legal persons to institute proceedings not only against an act which is of individual and direct concern for them,[285] but also 'against a regulatory act which is of direct concern to them and does not entail implementing measures'. Consequently, the rule of law is strengthened and CT-related acts can be more easily challenged by individuals.

Finally, the infringement procedure had no parallel in the third pillar.[286] Under the structure of the former treaties, the Commission was not allowed to identify, and the Court to sanction Member States, which had significant delays or implemented incorrectly important CT measures such as the Framework Decision on the EAW or the 2002 Framework Decision on combating terrorism.[287] In theory at least, the LT addresses this problem and Member States will be likely to face an infringement procedure. This could be the case after the transitional period of five years prescribed by the Protocol on Transitional Provisions for the national legislation on 'public provocation to commit terrorist offences'.[288] This amendment establishes a higher legal accountability for EU Member States with respect to the implementation of the EU CT policy, complementing the range of reviews granted to the Court in this highly sensitive field.[289] As in the previous treaty framework, not only the Commission but also a Member State will be entitled to initiate an infringement procedure if it

284 TFEU art 263 first paragraph.

285 A Cygan, 'Recent Developments in Judicial Review and Article 230 EC' (2003) 4 ERA-Forum 67.

286 EC art 226 and 227.

287 See Commission, 'Report based on Article 34 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States' COM (2005) 63 final. The report points to Member States that 'exercised the right to limit its temporal or substantive scope […]without complying with the Framework Decision, whether with regard to procedure (Article 32: CZ, LU, SI), the substance of the limitation (CZ, LU) or even the effective date (CZ).' 3. See also on TEU art 35(7) TEU V Hatzopoulos, 'Casual but Smart: The Court's New Clothes in the Area of Freedom, Security and Justice (AFSJ) after the Lisbon Treaty' in Monar (n 180) 158.

288 TFEU art 258.

289 See Case C-422/92 *Commission v Germany* [1995] ECR I-01097 for the discretion the Commission enjoys with respect to the date when it considers 'appropriate to bring an action' [18].

'considers that another Member State has failed to fulfil an obligation under the Treaties'.[290] However, this possibility is unlikely to be used by the Member States for fear of retaliation measures by other Member States. Therefore, the real added value of this procedure will mainly depend on the will and determination of the Commission to bring before the Court those Member States that have failed implementing CT provisions.

While, as proven above, the judicial control of EU CT measures is reinforced and unified by the provisions of the LT,[291] it must also be emphasised that the case law of the European jurisdiction has also been instrumental in securing the protection of the rights of individuals in the third pillar but also more generally in CT-related cases in cases such as *Pupino*,[292] *Segi and others v Council*, [293] or *Yusuf* and *Kadi*.[294]

2.1.1.2.2 The Charter of Fundamental Rights of the European Union

290 TFEU art 259.

291 Improvement by: uniformity in interpretation of CT legislation with the complete preliminary ruling; legitimacy by the right of individuals to attack acts in the legality review and greater accountability and efficiency by the introduction of the infringement procedure. The 'jurisdictional deficit' is lifted in principle with the exceptions mentioned above.

292 (n 150) [43] [44] [59] Eg: extension of the obligation of 'loyal cooperation' enshrined in Article 10 EC (Article 4(3) TFEU); interpretation of national law by reference to the Framework Decision which is circumscribed by the general principles of law. See also S Peers, 'Salvation outside the Church: Judicial Protection in the Third Pillar after the *Pupino* and *Segi* Judgments' (2007) 44 CMLR 883; T Magno, 'The Pupino Case: Background in Italian Law and Consequences for the National Judge' (2007) 8 ERA Forum 215; S Lorenwmeier, 'The Legal Effects of Framework Decisions-A Case-Note on the *Pupino* Decision of the European Court of Justice' (2006) 12 ZIS 583 <http://www.zis-online.com/dat/artikel/2006_12_97.pdf> accessed 11 July 2011.

293 Case C-355/04 P ECR I – 01657. The Court recalled that 'the right to make a reference to the Court of Justice for a preliminary ruling must therefore exist in respect of all measures adopted by the Council, whatever their nature or form, which are intended to have legal effects in relation to third parties' including thus Common Positions adopted on the basis of Article 34(2)(a) TEU if they entailed the above effects [53].

294 (n 138). The CJEU overruled the views of the Court of First Instance (CFI) (Case T-306/01 *Yusuf and Al Barakaat International Foundation v Council and Commission* [2001] ECR II-3533 and Case T-315/01 *Kadi v Council and Commission* [2001] ECR II-3649) which 'reduced its jurisdiction to basic scrutiny of whether *jus cogens* was violated' (C Eckes, 'Judicial Review of European Anti-Terrorism Measures-The *Yusuf* and *Kadi* Judgments of the Court of First Instance' (2008) 14 ELJ 74, 74) and rightly considered that the contested regulation should and must be made the subject of a judicial review by the Court. See also M M Winkler, 'When Legal System Collide: The Judicial Review of Freezing Measures in the Fight Against International Terrorism' (2007) Student Scholarship Series Papers, Paper 40 <http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1040&context=student_papers> accessed 11 July 2011; A Hinarejos, 'Recent Human Rights Developments in the EU Courts: The Charter of Fundamental Rights, the European Arrest Warrant and Terror Lists' (2007) 7 HRL Rev 793; E Guild, 'The Uses and Abuses of Counter-Terrorism Policies in Europe: The Case of the 'Terrorist Lists'' (2008) 46 JCMS 173.

While the comprehensive jurisdiction of the Court under the LT combined with a progressive case law lead to a stronger rule of law observance for the CT policy, the Charter is another element likely to strengthen the EU's legitimacy in this field. Jointly proclaimed by the EP, the Council and the Commission on 12 December 2007 and referred to in Article 6 TEU, 'the Charter [...] must be seen as a symbolic means of signalling that the legitimacy of the Union is to be unconditionally based on the aspiration to effectively protect and promote individual fundamental rights'.[295]

While the six-chapter Charter is 'merely […] codify[ing] existing standards of protection', [296] as the rights enshrined in it are drawn essentially from other international instruments such as the ECHR, the LT gives the EUCFR the same legal value as the treaties, making it legally binding upon its entry into force. With a view of avoiding eventual conflicts on the interpretation of similar or identical rights enshrined in both the EUCFR and the ECHR, Article 52(3) of the EUCFR prescribes that 'the meaning and the scope of those rights shall be the same as those laid down' by the ECHR. However, the following sentence specifies that this should not 'prevent Union law' from 'providing more extensive protection'.[297]

Chapter VI, *Justice*, is the most relevant for CT measures as it lays down the so-called defence rights, such as the right to a fair trial and to an effective remedy, the presumption of innocence, the principle of legality and proportionality of penalties

295 A Menéndez, 'Chartering Europe: the Charter of Fundamental Rights of the European Union' (2001) Arena Working Paper 13 <http://www.sv.uio.no/arena/english/research/publications/arena-publications/workingpapers/working-papers2001/01_13.xml> accessed 11 July 2011. See also S Peers and A Ward, *The European Union Charter of Fundamental Rights* (Hart Publishing 2004); S Douglas-Scott, 'The Charter of Fundamental Rights as a Constitutional Document' (2004) 1 EHRLR 37.

296 Hinarejos (n 294) 795.

297 On the scope of application of EUCFR (art 51) see Dougan (n 171) 663; D Denman, 'The Charter of Fundamental Rights' (2010) 4 EHRLR 349.

and the right not to be tried or punished twice for the same offence.[298] If an individual sees his funds frozen as a consequence of his inclusion on one of the 'terrorist lists', he will be entitled to invoke not only the ECHR but also an EU act, the EUCFR, and specifically the right to have an effective remedy (Article 47) in order to make his/her cause heard. The EUCFR also introduces the so-called third generation rights, amongst which, and relevant to the subsequent analyses, is the right to protection of personal data (Article 8) and good and transparent administration (Article 41).

The EUCFR also aims 'to make rights more visible' and to create an increased awareness among EU institutions and their officials as well as among Member States, as to the imperative of protecting human rights when legislating and implementing EU CT measures. In this sense, it should be recalled that Commission communications from as early as 2005 have identified key steps for compliance with the Charter in Commission legislative proposals.[299] This aspect is reinforced in the Commission Communication from October 2010 on the *Strategy for the effective implementation of the Charter by the EU*.[300] This pointed to the actions to be taken by EU institutions with a view to a close adherence to human rights standards in the stage of policy preparation as well as during the legislative process. It also provides indications as to the observance of the EUCFR by Member States when implementing EU law. The Communication also takes into account the situation whereby the initiative for CT acts in the AFSJ would come from a quarter of the Member States (chapters 4 and 5 of Title V TFEU) and supports a similar approach, namely impact

298 EUCFR art 47–50.

299 EU Charter of Fundamental Rights <http://www.eucharter.org/home.php?page_id=66> accessed 11 September 2011; 'Compliance with the Charter of Fundamental Rights in Commission legislative proposals Methodology for systematic and rigorous monitoring', COM (2005) 0172 final.

300 (n 155).

assessments analysing also the human rights implications of a foreseen measure.[301] It would indeed be questionable as to why a double standard should be applied when dealing with Commission proposals as opposed to initiatives of the Member States in which the final result is an EU piece of legislation. The above-mentioned 2010 Commission Communication clearly emphasises the need for thorough impact assessments when sensitive proposals are put forward with a specific focus on the impact on fundamental rights. Acts designed to set up CT measures will inevitably fall under the category of sensitive proposals. In the pre-Lisbon setting, the Prüm Decision is an example of how an important instrument in the fight against terrorism has become EU law in the absence of an impact assessment (IA), supported only by the limited experience of a very few Member States who were involved in formulating the Prüm Treaty. In contrast, it is argued that the IA accompanying the 2011 EU PNR proposal, while formally integrating the Check-List proposed by the Commission Communication mentioned above as well as addressing human rights considerations, still falls short of thoroughly substantianting an additional surveillance mechanism with a broad coverage and its impact on a core right for the individual such as privacy (aspects further developed in chapter three).

2.1.1.2.3 The accession of the EU to the ECHR

While the EUCFR establishes the most modern catalogue of fundamental rights and strengthens their visibility, the accession of the EU to the ECHR also deserves consideration, as it will reinforce the credentials of the EU CT policy in relation to the rule of law. The accession, prescribed in Article 6(2) TEU, represents an issue

301 See also Commission, 'Smart Regulation in the European Union' (Communication) COM (2010) 543 final.

extensively discussed in 1994[302] but which was not addressed at that time due to the constitutional changes required in the Community and EU treaties.[303] The accession of the EU to the ECHR 'would be consistent with the development of a legal order which is no longer directed at economic operators, but at citizens of the Union'.[304] It is argued that it would also create the pre-conditions for enhancing the rule of law and the accountability of the CT policy by granting individuals an additional legal remedy against violations of fundamental rights by EU acts with CT objectives. At the same time, such external scrutiny 'in no way conflicts with the Court of Justice role as the court of last instance for the interpretation of [EU] law'.[305] However, the benefits of the accession must be considered as a medium to long term perspective taking into consideration the ratification process.

While it is beyond the scope of this thesis to examine in detail the EU accession to ECHR, it is important to briefly outline that the specific Protocol concerning the accession has been phrased instead in highly abstract terms, focusing on 'preservation of the specific characteristic of the Union and Union law' and 'arrangements for the Union's possible participation in the control bodies' of the ECHR. [306] However, practitioners and academia have extensively debated the circumstances in which the accession should take place bearing in mind the complex interactions between the two courts (co-defendant mechanism, the appointment of an

302 Opinion 2/1994 on Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms [1996] ECR I -1759.

303 A parallel provision regarding the accession of the EU to the ECHR has been added in Article 59 of the ECHR by Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention (CETS No 194).

304 L Betten and N Grief, *EU law and Human Rights* (Longman 1998) 119.

305 H C Krüger, 'Reflections Concerning Accession of the European Communities to the European Convention on Human Rights' [2002] 21 Penn State International Law Review 89, 96. See also J Coppel and A O'Neill, 'The European Court of Justice: Taking Rights Seriously?' (1992) 12 Legal Studies 227.

306 Protocol (No 8) relating to Article 6(2) of the Treaty on European Union on the accession of the European Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms [2008] OJ C 315/273.

EU judge to the ECtHR, 'the issue of domestic remedies where the EU law is at stake' as also identified by Lock[307]).[308] Moreover, the situation has been further clarified in the respective negotiation mandates of the two parties, as well as in the elaboration of the draft agreement on the accession of the EU to the ECHR and in the explanatory report.[309] In short, the Accession Treaty must follow the Article 218 TFEU procedure and be ratified by all forty-seven ECHR contracting parties.

It follows from the above that the submission of the EU to scrutiny by the ECtHR will provide an additional guarantee that the compliance of EU CT acts with human rights standards will be scrupulously analysed. It will also foster a stronger human rights culture and enhance the profile of the EU on the international scene as a leading actor in the protection of human rights.

Therefore, the three amendments of the LT discussed above can be seen as essential elements enhancing the rule of law within the EU policy in the field of the fight against terrorism. More importantly, they allow higher standards to be set for the protection of human rights.

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307 T Lock, 'EU Accession to the ECHR: Implications for the Judicial Review in Strasbourg' (2010) 35 ELR 777, 778.

308 N Lavranos, 'Concurrence of Jurisdiction between the ECJ and other International Courts and Tribunals' (2005) 14 European Environmental Law Review 213; CoE (Parliamentary Assembly), 'Council of Europe-European Union A Sole Ambition for the European Continent' (2006) Report Doc 10847; O de Schutter, 'Accession of the European Union to the European Convention on Human Rights', (2007) Background document for the Hearing organised by the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe <http://www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/deschutter_background_paris_110907_/deschutter_background_paris_110907_en.pdf> accessed 11 July 2011; CoE (Commission for Democracy through Law (Venice Commission)), 'Comments on the Accession of the EU/EC to the ECHR' (2007) Doc CDL(2007)096; F Van Den Berghe, 'The EU and Issues of Human Rights Protection: Same Solution to More Acute Problems? (2010) 16 ELJ 112. See also the different contributions submitted for the Hearing of the Constitutional Affairs Committee of the EP EU's accession to the European Convention on Human Rights: Towards a stronger and more coherent protection of human rights in Europe 18 March 2010, EP, Constitutional Affairs Committee Events <http://www.europarl.europa.eu/activities/committees/eventsCom.do?language=EN&body=AFCO> accessed 11 July 2011.

309 The latest version of the draft agreement goes back to 19 July 2011 (Informal Group on Accession of the European Union to the Convention (CDDH-UE), 'Draft legal instruments on the accession of the European Union to the European Convention on Human Rights' (2011) CDDH-UE(2011)16). For more on the accession process see CoE, 'EU accession to the European Convention on Human Rights' <http://www.coe.int/lportal/web/coe-portal/what-we-do/human-rights/eu-accession-to-the-convention> accessed 1 November 2011.

2.1.2 Bodies and mechanisms supporting the security imperative and the human rights interplay

After observing the potentially positive steps taken in order to ensure that human rights are fully respected while fighting terrorism, this thesis now moves on to investigate the impact of the LT on the tools used to ensure and enhance the EU CT fight, as well as their adequacy with regards to human rights standards. When referring to the 'bodies and mechanisms' provided for by the LT, this section will focus on the following elements: the new powers entrusted to Europol and Eurojust and their role in the EU efforts in fighting terrorism, the EPPO's possible position in CT investigations, the role of COSI and the revised rules on enhanced cooperation. The analysis of the above-mentioned amendments will be accomplished, where relevant, by critically inquiring into the relevant pre- and post-LT provisions by means of the normative benchmark of effectiveness as part of the principle of proportionality as indicated in chapter one.

2.1.2.1 AFSJ agencies dealing with the terrorist threat

2.1.2.1.1 Eurojust – the judicial arm of the EU in the CT field

Since its establishment in 2002, Eurojust has dealt with a significant number of terrorism-related cases –albeit 'small compared to other types of criminal activity'[310] and has helped to coordinate cross-border investigations and prosecutions in the field.

310 According to the Eurojust 2008 and 2010 Annual Reports <http://www.eurojust.europa.eu/press_releases/annual_reports/2008/Annual_Report_2008_EN.pdf> <http://www.eurojust.europa.eu/press_releases/annual_reports/2010/Annual_Report_2010_EN.pdf> accessed 11 July 2011, Eurojust dealt with 33 terrorist cases in 2004, 25 in 2005, 44 in 2006, 34 in 2007, 39 in 2008, 21 in 2009 and 28 in 2010. O Bures, 'Eurojust's Fledging Counterterrorism Role' in Bures (n 4) 111, 117. See also N Thwaites, 'Eurojust: Beacon in EU Judicial Co-operation' (2006) 77 Revue internationale de droit pénal 293; H Xanthaki, 'Eurojust: Fulfilled or Empty Promises in EU Criminal Law' (2006) 8 European Journal of Law Reform 175; M Labayle and H G Nilsson, 'The Role and Organisation of Eurojust: Added Value for Judicial Cooperation in Criminal Matters' in

It has also organised strategic and tactical meetings with a view to enhancing judicial cooperation, exchanging information and establishing best practices between the Member States on this matter.[311] Conscious of the need to provide a strong profile for this EU body by making it more operational, the Council amended Eurojust's 2002 legal framework in 2009 (amended Eurojust 2009 Decision).[312] Some of these technical amendments have been beneficial in raising the effectiveness of the body and have also indirectly reinforced the CT efforts of the EU.

By means of the amended Eurojust 2009 Council Decision irrespective of the EU Member States involved in a CT case, the Eurojust national members ('prosecutor, judge or police officer of equivalent competence'[313]) have – as opposed to the previous state of play – a 'common basis of powers'.[314] By virtue of their ordinary powers enshrined in Article 9b, Eurojust national members are entitled to 'receive, transmit, facilitate, follow up and provide supplementary information in relation to the execution of requests for, and decisions on, judicial cooperation, including regarding instruments giving effect to the principle of mutual recognition' which concern terrorism related cases. Furthermore, Article 9d foresees the possibility of national members acting 'in their capacity as competent national authorities' to take measures 'in urgent cases and in so far as it is not possible for them to identify or to contact the competent national authority in a timely manner'. This provision could be helpful in a terrorist case where it is necessary to act rapidly and effectively, as it entitles national members 'to authorise and to coordinate controlled deliveries in their

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Monar (n 180) 195 onwards.

311 Eurojust annual reports 2008 and 2010 (n 310).

312 (n 247).

313 (n 247) art 2. The references are made with respect to the consolidated version of the Eurojust Decision.

314 (n 247) recital 5.

Member State or to execute in relation to their Member State a request for, or a decision on, judicial cooperation, including regarding instruments giving effect to the principle of mutual recognition.'

Two other elements of the amended Eurojust 2009 Council Decision also enhance the effectiveness of Eurojust's CT efforts. The first concerns the possibility of setting up an "On-Call Coordination" centre, 'able to receive and process at all times requests' – including terrorist related ones – referred to it' (Article 5a).[315] The second refers to the improvement of the transmission of information to Eurojust. Member States are compelled to inform their national members of any case where 'at least three Member States are directly involved' and where judicial cooperation requests or decisions 'have been transmitted to at least two Member States and there are indications that the case may have a serious cross-border dimension or repercussions at EU level or that it might affect Member States other than those directly involved' (Article 13(6)(c)).

As regards initiation of CT investigations and prosecutions the amended Eurojust 2009 Decision maintains the 2002 provisions whereby Eurojust acting either through its national members (Article 6) or as a College (Article 7) '*may* ask the competent authorities of the Member States concerned to [consider] undertak[ing] an investigation or prosecution of specific acts'. Therefore, this is only a possibility open to Eurojust if it deems it necessary in the course of a specific case.

In contrast, the TFEU allows for the adoption of secondary legislation (regulations) that are able to regulate the initiation by Eurojust of criminal

315 See Labayle and Nilsson on the somewhat 'vague' character of the provision for an On-Call Coordination Centre (n 310) 199.

investigations, as well as *the possibility to propose* 'the initiation of prosecutions conducted by competent national authorities, particularly those relating to offences against the financial interests of the Union' according to Article 85(1)(a) TFEU. This raises the question of how exactly the initiation of a terrorist investigation will be realised via Eurojust, bearing in mind that the rules concerning criminal investigations are very different from one Member State to another. This aspect is clearly emphasised in the Declaration on Article 85(1), second subparagraph, TFEU of the Conference of the Representatives of the Governments of the Member States. This states 'that the [said] regulations […] should take into account national rules and practices relating to the initiation of criminal investigations'.[316] In this sense, the 2004 report of the House of Lords on 'Judicial Cooperation in the EU: the role of Eurojust' had already provided a clear example of such differences, as 'in England and Wales criminal investigations are the responsibility of the police, whereas in Continental jurisdictions they are frequently carried out under judicial supervision'.[317] In this situation, it is of utmost importance to consider in detail the implications of transforming Eurojust 'from a body of "horizontal" co-operation between national members to a "vertical" centralised model of investigations', as Professor Vogel puts it. Several academics and experts cited by the House of Lords for the Report on the LT welcomed the additional powers entrusted to Eurojust, including the prerogative to initiate investigations provided that strong accountability mechanisms are in place.[318] At the time of writing the issue of Eurojust's initiation of investigation is highly debated among practitioners and academics as a tool to 'help solve practical

316 [2008] OJ C 115/347.

317 European Union Committee, *Judicial Cooperation in the EU: the Role of Eurojust* (HL 2003-04, 138) [31].

318 ibid [88]; (n 203) [6.192-6.195]. See also House of Commons Library, 'The Treaty of Lisbon: Amendments to the Treaty establishing the European Community' (2007) Research Paper 86, 43-44.

problems and bring real added value to the fight against serious crime'.[319] In this context, the need for a 'EU procedural code with appeal to the [CJEU]' in order to 'permit proper review of decisions to investigate' as well as for supporting evidence for such a measure are particularly important vectors that should be further pursued.[320]

If it can be inferred from the comments made above that the effectiveness of the CT fight might be enhanced by the possibility of Eurojust initiating a terrorism-related investigation, this must go hand in hand with strong safeguards concerning the rights of victims as well as those of defendants. The adoption in 2010 of a Directive on the right to interpretation and translation during criminal proceedings[321] and the proposals for a Directive on the right to information during criminal proceedings, [322] as well as a Directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest[323] currently being examined within the EP and Council, paved the way for the gradual adoption of procedural rights in criminal proceedings. This is to be welcomed.[324]

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319 Council Document 14428/11, 'Strategic Seminar. Eurojust: New Perspectives in Judicial Cooperation' Report, 11. See also (n 255).

320 Council Document 14428/11 (n 319) 13.

321 Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings [2010] OJ L 280/1.

322 EP, Legislative Observatory, 'Judicial cooperation in criminal matters: right to information in criminal proceedings' <http://www.europarl.europa.eu/oeil/FindByProcnum.do?lang=2&procnum=COD/2010/0215> accessed 20 October 2011. See also Council Document 16342/11, 'Note - Proposal for a Directive of the European Parliament and of the Council on the right to information in criminal proceedings: - Approval of the final compromise text with a view to a first reading agreement with the European Parliament'.

323 EP, Legislative Observatory, 'Judicial cooperation in criminal matters: right of access to a lawyer in criminal proceedings and right to communicate upon arrest' <http://www.europarl.europa.eu/oeil/file.jsp?id=5920502> accessed 20 October 2011.

324 The idea is not novel as the Commission put forward already in 2004 a proposal on this, which faced many reservations among the Member States: 'Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union' COM (2004) 328 final. The 2004 Commission proposal clearly stated from the outset that it did not intend 'to duplicate what is in the European Convention (Article 5: Right to liberty and security and Article 6: Right to a fair trial), but rather to promote compliance at a consistent standard' as it has been proven that in practice the level of protection varies greatly. Furthermore, the proposal was seen as a clear implementation of one of the key principle of the AFSJ, the principle of mutual recognition.

Therefore, it can be concluded, from a theoretical standpoint, that the path which Eurojust is currently on could enhance the effectiveness of judicial cooperation in the fight against terrorism, provided that, *inter alia*, adequate provisions with regards to procedural rights in criminal proceedings are also in place. The same comment is even more valid when it comes to the setting up an EPPO, as will be argued below.

2.1.2.1.2 The EPPO: a useful tool for CT?

The prospect of an EPPO responsible for 'investigating, prosecuting and bringing to judgement, where appropriate in liaison with Europol, the perpetrators of, and accomplices in, offences against the Union's financial interests' which 'shall exercise the functions of prosecutor in the competent courts of the Member States in relation to such offences' is not a novelty in the EU landscape.[325] It had already been proposed in the 1997 'Corpus Juris' report,[326] elaborated under the aegis of the European Legal Area Project and then in 2002 in the Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor.[327] The relative originality engendered by the TFEU in the CT fight would be the possibility for the Council, acting unanimously and after 'obtaining the consent of the EP and after consulting the Commission', to extend the 'powers of the European Public Prosecutor's Office to include serious crime having a cross-border dimension […] affecting more than one Member State'.[328]

325 TFEU art 86.

326 Delmas-Marty M, *Corpus Juris Introducing Penal Provisions for the Purpose of the Financial Interests of the European Union* (Economica 1997)

327 COM (2001) 715 final.

328 art 86(4) TFEU.

The TFEU is opaque with regards to the establishment of the EPPO and simply provides that the EPPO will be set up 'from Eurojust'. This comment can be interpreted in several ways, as is noted in the House of Lords report mentioned above. Eurojust could oversee the work of the EPPO or vice versa, or there could be continuity between the activities of the two bodies.[329] At the seminar organised by the Belgian Presidency in September 2010 on Eurojust, more detailed possibilities were suggested in relation to the links between the two bodies but also on aspects to be taken under consideration with respect to the setting up of the EPPO.[330] Under this latter heading reference was made to the 'adoption of clear rules regarding criminal procedure and collection, admissibility and evaluation of evidence', the choice of jurisdiction or prosecutorial policies among other elements.[331] The evidence given on this subject by several experts called before the House of Lords for the LT report also suggested a very cautious approach towards this new body.[332] It has even been advanced that the reluctance of certain Member States will be so important that its creation will only be possible by means of enhanced cooperation.[333] This possibility, although interesting from a purely effectiveness point of view, could seriously undermine the coherence of EU action in the AFSJ.

Furthermore, it must also be observed that the TFEU does not foresee any accountability mechanism to which a potentially powerful body such as the EPPO

329 (n 317) [95].

330 (n 255).

331 (n 255) 11-12. It is also worth noting that Peers argued that the 'model of centralized prosecution and decentralized trials is half-baked', indicating that the same model had not been pursued for the establishment of the International Criminal Court, bearing in mind especially the risks incurred by the rights of defendants. Peers 2006 (n 15) 491.

332 (n 203).

333 Labayle and Nilsson (n 310) 213.

would be subject to. This is an essential element for the legitimacy of the players involved in EU CT.

In January 2011, a study on Improving Coordination between the EU Bodies Competent in the Area of Police and Judicial Cooperation: Moving towards a European Prosecutor was published. This work considered it 'premature to recommend how best to reorganise the responsibilities of the various bodies currently active in the field, if [an EPPO] was to be created'. It strongly supported as an essential step in this reflection a 'thorough impact and needs assessment', covering 'all relevant actors (Eurojust, EJN, Europol, OLAF, etc.) and EU judicial co-operation in criminal matters in general'.[334] This is consistent with the timetable set by the Commission, which intends to release a Communication on the establishment of an EPPO from Eurojust only in 2013.[335]

Given the above points, it is desirable to leave open the question of whether the EPPO would improve the effectiveness of the CT fight. The suggestion of the above-mentioned study represents a viable and pragmatic approach in view of the preparation of the 2013 Communication. At that point in time, it will be easier to assess the progress made in the judicial cooperation in criminal matters, as well as the shortcomings and effectiveness of the bodies connected with the possible setting up of an EPPO.

334 Deloitte Entreprise Risk Services, Study prepared for the Directorate General for Internal Policies, Policy Department D: Budgetary Affairs <http://www.europarl.europa.eu/activities/committees/studies/download.do?language=en&file=33811> accessed 11 July 2011.

335 (n 250) 19.

2.1.2.1.3 Europol - police cooperation and CT efforts

Europol has striven to build its role in the CT fight against a background of mistrust on the part of national authorities reluctant to provide information to this EU structure, and in an environment that preferred bilateral and informal contacts instead of formal ones passed through Europol.[336] Additionally, Europol's initial legal basis (a Convention) has been considered a major shortcoming, as any minor change

> has proven to last five years and longer. Particularly in comparison to younger institutions like Eurojust or CEPOL this becomes an obvious and unnecessary disadvantage […] A delay of more than five years for putting a minor change to Europol's mandate into effect is clearly not tolerable.[337]

Many of Europol's tasks are particularly relevant for EU CT efforts: obtaining, collating and analysing information and intelligence; performing analysis on serious crime, including terrorism; preparing 'threat assessments, strategic analyses and general situation reports'; requesting the competent authorities of the Member States concerned to initiate, conduct or coordinate investigations and participation in joint investigation teams.[338] By means of example Europol is producing an annual report EU Terrorism Situation and Trend Report (TE-SAT) designed to inform, as the name indicates, on trends, facts and figures pertaining to terrorist activity within the EU.[339] Moreover, the Analysis Work Files (AWF), such as the ones on Islamist Extremist

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336 The current section will focus on the elements of the Europol 2009 Decision with CT implications that can be examined in terms of effectiveness. For a detailed presentation of Europol's role in CT see O Bures, 'Europol's Counterterrorism Role: a Chicken-Egg Dilemma' in Bures (n 4) 85 onwards. See also European Union Committee, *Europol: Coordinating Fight against Serious and Organised Crime* (HL 2007-08, 183) [267-270] on the deficits identified on information exchange which can hamper the effectiveness of the agency in the CT fight. See also Bures (n 4) 89 on the limited impact of the Counter-Terrorist Tasks Force (CTTF) established after 9/11 and tasked to 'collect and analyse all relevant information and intelligence concerning current threats and draft threat assessments documents' but which '[i]n practice, […]was criticized for serious shortcomings in handling real-time data.'

337 Council Document 9184/1/06 REV 1,'Friends of the Presidency's report to the Future of Europol', 5.

338 art 5 Europol Decision (n 243); For a detailed analysis see Mitsilegas (n 6) 169 onwards. Also Deflem (n 110).

339 (n 131). See also Bures for a role of Europol in providing 'a common terrorist threat assessment at strategic level' (n 336) 104.

Terrorism (HYDRA) or Non-Islamist extremist terrorist organisation threatening the EU (DOLPHIN),[340] are an important and effective specific operational tool via which Europol is observing specific terrorist cases. Europol is also considered to have important potential with regards to intelligence-led policing and threat assessment. The Hague Programme put forward the concept of 'setting up and implementing a methodology for intelligence-led law enforcement at the EU level' and 'a new Organised Crime Threat Assessment', elements which were pursued and materialised during the UK Presidency.[341] The Stockholm Programme has followed the intelligence-led policing approach which is perceived as one of the ten guiding lines of the ISS.[342]

The 2009 Europol Council Decision strengthened the legal framework of this agency – replacing the highly convoluted and cumbersome system of the convention– and put forward amendments likely to be considered suitable and effective in the CT fight. One of these amendments concerned the possibility granted to Europol to 'establish and maintain other systems processing personal data' after decision of the Management Board and approval by Council (Article 10). Bures also saw the expansion in Europol's competence to 'international serious crime' as

> impli[ng] that any terrorist attack on one Member State, including lone terrorists like the "Unabomber" should be automatically considered an attack on all MS and thus within Europol's sphere of competence.[343]

340 Europol, 'Frequently Asked Questions (FAQ) on the association of Third Parties to Europol's AWFs' (2009) <http://www.statewatch.org/news/2009/nov/europol-awfs-third-parties.pdf> accessed 11 July 2011. See also M Niemeier and M A Wiegand, 'Europol and the Architecture of Internal Security' in Monar (n 180) 177. 'It can safely be said that AWF represent the true added value of Europol's work […].'

341 HL report (n 336) [69].

342 Council Document 7120/10 (n 101).

343 (n 4) 106.

With respect to the first point emphasised above it must be observed that while Europol has been perceived as a 'model for data protection in the police and justice sector of the EU' and one of the 'most controlled police agency in Europe',[344] the combined provisions on collection, exchange and analysis of personal data as well the range of actors involved require particular attention as to the observance by Europol of the rights to privacy and protection of personal data.

Finally, the entry into force of the LT enhanced the role of Europol in CT as well as the democratic legitimacy of the procedures linked to this body. Both branches of the legislative power – the Council and the EP – will be called on to adopt legislation concerning Europol through the ordinary legislative procedure (Article 88 TFEU). Moreover, Article 88(2)(b) TFEU includes a task initially suggested in the proposal for a Council Decision establishing Europol but dropped during negotiations.[345] This concerns 'the coordination, organisation and implementation of investigative and operational action carried out jointly with the Member States' competent authorities or in the context of joint investigative teams, where appropriate in liaison with Eurojust.'[346] The provision could be particularly useful in a CT case. Additionally, Article 88(3) TFEU underscores that while operational action by Europol is allowed (always coordinated with the authorities of the Member State(s) whose territory is concerned), the 'application of coercive measures shall be the exclusive responsibility of the competent national authorities.'

344 Europol, 'Democratic accountability of the ISS and the role of Europol' (2011) <http://www.europarl.europa.eu/document/activities/cont/201110/20111010ATT28844/20111010ATT28844EN.pdf> accessed 15 October 2011.

345 On a critique of a right to initiate an investigation see HL report (n 336) [111].

346 COM (2006) 817 final Article 5(1)(b) had a slightly different wording, in the end referring to 'liaison with European or third country bodies.'

The Europol 2009 Council Decision provisions, together with the new competencies granted by the LT, can be seen as suitable in addressing the security imperative of the CT fight. At the same time, however, the new powers entrusted to Europol call for thorough scrutiny of its activities by both European and national legislators in order to make this agency accountable for all of its activities.

Thus, while the effectiveness of Europol and Eurojust in the CT fight is likely to be improved by the new powers entrusted to them by the LT, the prospect of setting up an EPPO must be subjected to a thorough assessment. It is also important to observe whether the EU can benefit in this field from the role of COSI and from new rules on enhanced cooperation.

2.1.2.2 COSI and CT

The establishment of COSI within the Council is prescribed by Article 71 TFEU. The committee ensures that operational cooperation on internal security is promoted and strengthened within the Union and 'shall facilitate, promote and strengthen coordination of operational actions of the authorities of the Member States competent in the field of internal security'. [347] It is also prescribed that representatives of the Union bodies, offices and agencies concerned may be involved in the proceedings of this committee, while the EP and national Parliaments shall be kept informed of the proceedings.[348] The Council Decision setting up COSI develops the tasks entrusted to the committee. These tasks include the assistance provided to the Council in relation to the solidarity clause of Article 222 TFEU (actions following a terrorist attack or a

347 See Council Decision of 25 February 2010 on setting up the Standing Committee on operational cooperation on internal security (2010/131/EU) OJ L 52/50, art 2.

348 ibid art 5 and 6(2).

natural or man-made disaster) and the role of 'facilitat[ing] and ensur[ing] effective operational cooperation and coordination under Title V TFEU', both relevant to the effectiveness of the CT fight.[349] It is also clearly indicated that COSI cannot be involved in conducting operations nor participate in the preparation of legislative acts.[350] COSI is also entrusted with ensuring coherence between the actions of the different agencies and bodies of the field. [351]

Within the framework of the ISS, several stakeholders have commented on COSI's tasks and insertion within the AFSJ landscape. Several questions have been raised concerning the broad and even vague terms of its mandate as well as its exact reach. With respect to the task foreseen in Article 3(2) of the Council Decision, which requires COSI to 'evaluate the general direction and efficiency of operational cooperation, to identify possible shortcomings or failures and adopt appropriate concrete recommendations to address them', the following has been posited:

> If COSI takes this role seriously, it will not only have an effect on the Council's policy priorities in this area, but also on national policing policies. That means it will have at least an indirect impact on legislation on matters of internal security. [352]

Moreover, it has also been pointed that this is 'another rather opaque Council body' with only an obligation to inform the EP and national Parliaments, which in the past has been interpreted 'by the Council to mean the bare minimum'.[353]

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349 ibid art 3(1) and (3) .

350 ibid art 4.

351 ibid art 5.

352 C Hillebrand, 'COSI and the EU's Internal Security Strategy' (2010) <http://europeonthestrand.ideasoneurope.eu/2010/08/10/cosi-the-eu's-internal-security-strategy/> accessed 11 July 2011. For further discussion on the Internal Security Strategy and COSI see HL Report (n 101) [177]-[190]; Statewatch, 'Observatory: EU Internal Security Strategy' <http://www.statewatch.org/iss.htm> accessed 11 July 2011.

353 Hillebrand (n 352); Statewatch (n 352).

The JHA Council Conclusions of 24-25 February 2011 called on COSI to 'coordinate, support and monitor the development and implementation of the ISS as one of its priority tasks', as well as to coordinate with the Commission with regards to the implementation of the Strategy in order to indicate a shared agenda.[354]

While COSI certainly has the potential to improve the effectiveness of CT by streamlining activities pertaining to operational cooperation and acting as a coherence and coordination centre, it must also address issues pertaining to a lack of transparency. The presence of COSI members in meetings of the LIBE Committee of the EP or in inter-parliamentary meetings (ie EP–national Parliaments) is to be welcomed and pursued as a matter of practice. COSI could also take a more proactive approach in this regard by favouring timely and comprehensive reporting to the EP and national Parliaments.[355]

2.1.2.3 The new rules on enhanced cooperation: a gain for CT?

The Amsterdam Treaty established the mechanism of *enhanced cooperation* – subsequently amended by the Nice Treaty with a view to clarifying and simplifying it – with the intention of creating a legal framework within the EU for so-called 'variable geometry' projects.[356] In fact, it made it possible – under a series of cumulative conditions – for those Member States that wished to engage in projects falling within the non-exclusive competence of the Community (at least eight), aimed at furthering the objectives of the EU and the Community and used as a last resort,

354 <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/119495.pdf> accessed 11 July 2011.

355 See Council Document 14614/11, 'Report to the European Parliament and national Parliaments on the proceedings of the Standing Committee on operational cooperation on internal security for the period January 2010 – June 2011'.

'when it has been established within the Council that the objectives of such cooperation cannot be attained within a reasonable period by applying the relevant provisions of the Treaties.'[357] In the third pillar the mechanism –with some additional provisions (Articles 40 and 40a TEU) – has never been used for the field under research. The reasons for this could be linked to the rather fastidious and lengthy procedures involved in such a cooperation, as well as to the preferences of Member States to evolve in a purely intergovernmental environment (such as the Prüm Treaty).

In this context, the LT tries to address some of the shortcomings of the procedure of the former third pillar. For a series of specific domains, the enhanced cooperation mechanism is coupled with a so-called 'emergency brake'. Maintaining many of the conditions set out in the previous framework, the LT raises the number of participating Member States to nine and underlines that 'non-participating Member States have an obligation not to impede implementation of enhanced cooperation by participating Member States'.[358] According to Article 329(1) second subparagraph TFEU authorisation for enhanced cooperation is 'granted by the Council, on a proposal from the Commission and after obtaining the consent of the [EP].' As regards the emergency break, this mechanism is triggered when a Member State considers that a legislative draft could 'affect fundamental aspects of its criminal justice system'. In this scenario, the matter is referred to the European Council and the ordinary procedure is suspended. If an agreement is reached in the European Council within four months then the matter is referred back to Council and the procedure is allowed to continue. If no agreement is found, however, nine Member

356 JA Emmanouilidis, 'Institutional Consequences of Differentiated Integration' (2007) Center for Applied Policy Research <http://www.cap-lmu.de/publikationen/2007/differentiated.php> accessed 11 July 2011.

357 TEU art 43 and art 43A.

358 P Craig, *The Lisbon Treaty: Law, Politics and Treaty Reform* (Oxford University Press 2010) 441. TEU art 20 and art TFEU 326 -334.

States can still pursue the procedure provided they notify the EP, the Commission and the Council and authorisation for enhanced cooperation is deemed to have been granted.[359]

The TFEU envisages this possibility for several elements of the judicial and police cooperation, some of which have direct and/or indirect relevance for CT. For example, the following measures could be subject to both the emergency brake and enhanced cooperation: 'the establishment of minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension such as terrorism[360] (Article 83 TFEU), as well as 'rules on mutual admissibility of evidence between Member States, the rights of individuals in criminal procedures, the rights of victims of crime, any other specific aspects of criminal procedure which the Council has identified in advance by a decision' (Article 82(2)(a) to (d) TFEU). Furthermore, the provisions on the EPPO require unanimity for their adoption, but also include the possibility in the absence of unanimity of a group of at least nine Member States referring the matter to the European Council using the procedure described above.[361]

Moreover, the same procedure can be applied in relation to police cooperation (Article 87(3) TFEU) for measures concerning operational cooperation between law enforcement authorities. The logic of the Amsterdam and Nice treaties is therefore pursued in the LT, with the argument that, within the EU of twenty-seven Member States, room must be made for several forms of cooperation, taking into account their

359 For example, art 87(3) second subparagraph TFEU.

360 This could have been the case for the adoption of the definition of 'public provocation to commit terrorist offences' if it was adopted under the Lisbon regime.

361 TFEU art 86(1) second and third subparagraphs.

various needs and capabilities. If this argument can be accepted, it should also be pitted against counter-arguments such as the impact of such legislation on the principle of legal certainty in order to observe whether such an action is justified or not. Furthermore, we need to analyse the implications of such an endeavour on the medium and long term. This is particularly important for the field in question.

According to some academics, the emergency brake has been introduced in order to 'make the approximation of criminal law more palatable to Member States by permitting them a get-out clause […].'[362] However, the justification for enhanced cooperation must be carefully assessed as there is a clear risk of a 'patchwork of legal rights and obligations', as noted by the Law Society of England and Wales.[363] Moreover, as Professor Dashwood observed, there is an additional problem linked to enhanced cooperation, which is the one of 'defining its boundaries and preventing spill-over'.[364]

Concurrently, in the specific field under analysis, enhanced cooperation mechanisms are to be preferred to intergovernmental mechanisms such as the Prüm Treaty – which are signed by a few Member States and then transformed into EU law instruments binding on all Member States because they allow for the full application of Union rules and safeguards. The 'fear' of not being left behind and a certain form of political pressure force Member States to agree to such general mechanisms without a clear impact assessment, upholding the need to regulate a specific field in judicial and police cooperation at the EU level.

362 HL Report (n 203) [6.48].

363 HL Report (n 203) [6.57] .

364 HL Report (n 203) [6.58].

2.1.3 Concluding remarks: an effective and mindful of human rights framework is not enough

The elements emphasised above concerning an enhanced democratic legitimacy, a stronger rule of law and improved accountability of the EU CT policy under the LT are pre-conditions for a higher level of protection for human rights within this policy. Apart from a clearly improved legal framework which *in abstracto* enhances the objective of protecting human rights, several elements are essential for the successful outcome of this policy. These include the willingness of the institutional players to support and actively engage with this objective and the concrete arrangements foreseen in the upcoming revisions of the legal frameworks of Europol and Eurojust. This will allow for the *in abstracto* strength brought by the LT to the protection of human rights within this policy to be complemented by a more than necessary *in concreto* approach, which places human rights concerns at the heart of the European fight against terrorism. Moreover, it can be concluded that the legal framework developed by the LT is likely to improve the effectiveness of the fight against terrorism by granting enhanced powers to judicial and police cooperation agencies, as well as by clarifying and supplementing the rules on enhanced cooperation. However, the proposal to set up an EPPO must be carefully analysed alongside the rationale behind the recourse to enhanced cooperation. At the same time, additional human rights safeguards such as the procedural rights in criminal proceedings must be adopted. Furthermore, when drafting secondary legislation on the basis of relevant treaty articles, close observance must be paid to the human rights provisions relevant in the field. Finally, the role of COSI, while a positive step with regards to enhanced coherence and the effectiveness of operational cooperation, must be further explored and developed together with stronger transparency mechanisms.

2.2 The EU offence of 'public provocation to commit terrorist offences'

The previous section argued that the EU primary law framework relevant for the fight against terrorism must foster a series of core elements (enhanced legitimacy and accountability, strong rule of law and effectiveness) in order to allow delivery of both protection of human rights and security. This section turns to a key instrument established by the EU in the CT fight, the 2002 Framework Decision on combating terrorism. More specifically, it sets out to analyse the amendment to this text as laid down in Council Framework Decision 2008/919/JHA by which 'public provocation to commit terrorist offences' becomes an offence related to terrorist activities ('public provocation'). The section will firstly provide the context in which this EU prevention measure was brought forward, subsequently examining whether it is a proportionate restriction of freedom of expression and whether it complies with legal certainty.

2.2.1 Addressing the future – public provocation as a tool for the prevention of terrorism

Defining terrorism at international level has been, and to some extent still remains, a difficult legal exercise. For example, the UN as well as the CoE has delivered sectoral definitions, some with reference to the political aim pursued by such acts and some simply enumerating the acts that should be considered terrorist offences. In the EU, 9/11 provided the context and the necessary political grounds for the adoption of a terrorism offence, the main elements of which had to be reproduced in all EU Member States. The 2002 Framework Decision on combating terrorism defines not

only the acts that must be considered terrorist offences[365] but also the offences linked to terrorist groups and terrorist activities.[366] The text also includes provisions on criminal penalties and imposes minimum thresholds with regard to custodial sentences, as well as rules on the liability of legal persons, jurisdiction and prosecution.[367]

However, the Framework Decision did not cover or covered only partially (according to the Commission's IA)[368] public provocation to commit terrorist offences, recruitment or training for terrorism, which proved to be constantly increasing, especially via the internet. The EU Strategy for Combating Radicalisation and Recruitment to Terrorism called for action at the legislative level in order to counter incitement to terrorism.[369] In 2007 the Commission put forward a proposal to amend the 2002 Framework Decision on combating terrorism in order to criminalise the above-mentioned acts.[370]

It should be noted that comparable initiatives had already been put forward at different levels, including regional, national and international. The CoE in May 2005 adopted the Convention on the Prevention of Terrorism (CoE CPT),[371] which criminalised public provocation, recruitment and terrorism training. In September

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365 It has to be mentioned that in international law there is no clear-cut agreement on a comprehensive definition of terrorism due to the sensibilities related to the concept under analysis. See B Saul, *Defining Terrorism in International Law* (Oxford University Press 2006).

366 See (n 25) art 1-3.

367 See (n 25) art 5, 7 and 9.

368 Commission Staff Working Document accompanying document to the proposal for a Council Framework Decision amending Council Framework Decision 2002/475/JHA on combating terrorism, SEC (2007) 1424.

369 (n 40) [9]. The IA (ibid 11) also makes reference to a specific paragraph of the Revised Radicalisation and Recruitment Action Plan (Council Document 16530/1/06 REV 1) but the document was classified in 2007. Only a partially declassified version was released in November 2010 (Council Document 16530/1/06 REV 1 EXT 1)

370 The IA referred to studies counting around 5000 websites involved in such activities. (n 368) 13.

371 ETS No 196. See also other initiatives such as Organization for Security and Co-operation in Europe (OSCE), 'Decision No 7/06 Countering the use of internet for terrorist purposes' < http://www.osce.org/mc/23078> accessed 13 July 2011.

2005, the UNSC in its Resolution 1624 (largely sponsored by the UK as a consequence of the July 2005 attacks) called upon all states 'to prohibit by law incitement to commit a terrorist act or acts'.[372] The UK subsequently enacted the Terrorism Act 2006, which criminalised encouragement to terrorism and which complied, in the UK Government's view,[373] with the CoE CPT obligations.[374]

Criminalising public provocation to commit terrorist offences is – as pointed out by the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (the UN Special Rapporteur) –

> consistent with a proactive approach to the countering of terrorist acts and the prevention of radicalization […] allow[ing] States to ensure that terrorist offences are punishable by custodial sentences heavier than those imposable under national law for similar offences committed without a terrorist intent.[375]

In the same vein, Borgers and van Sliedregt[376] note that criminalisation of the preliminary stage – which can also be assessed through the lens of the precautionary principle – is part of a trend observed in several countries across different continents[377] in relation to CT legislation. This can occur 'in an 'external' objective

372 UNSC Res 1624 (14 September 2005) UN Doc S/RES/1624; See also UNGA, 'Report of the Secretary-General - Uniting against terrorism: recommendations for a global counter-terrorism strategy' (2006) UN Doc A/60/825.

373 See also Joint Committee on Human Rights, *Government Response to the Committee's First Report of Session 2006-2007: The Council of Europe Convention on the Prevention of Terrorism* (2007-08, HL 67, HC 380). It must be underlined however that while the UK signed the CoE CPT in 2005, it is yet to ratify it. CoE, Treaty Office <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=196&CM=1&DF=&CL=ENG> accessed 1 November 2011.

374 Chapter 11, Part 1, Offences, s.1. For other examples see A Conte, *Human Rights in the Prevention and Punishment of Terrorism. Commonwealth Approaches: The United Kingdom, Canada, Australia and New Zealand* (Springer 2010).

375 UNGA, 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin: Ten Areas of Best Practices in Countering Terrorism' Report (2010) UN Doc A/HRC/16/51 [29] .

376 M Borgers and E van Sliedregt, 'The Meaning of the Precautionary Principle for the Assessment of Criminal Measures in the Fight against Terrorism' (2009) 2 Erasmus Law Review 171, 181.

377 This aspect has also been reflected in a comprehensive report from 2009. See in this sense International Commission of Jurists, 'Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights' (2009) <http://ejp.icj.org/IMG/EJP-Report.pdf> accessed 13 July 2011 and 'Response to the European Commission Consultation on Inciting, Aiding or Abetting Terrorist Offences' (2008) <http://old.icj.org/IMG/EC_Questionaire_final.pdf> accessed 13 July 2011.

way, by criminalising certain acts of endangerment, and in an 'internal' subjective way, by criminalising the purpose for which a certain action is performed'.[378]

The criminalisation of public provocation to commit terrorist offences provides a good opportunity to examine how lawmakers address human rights protection and security imperatives when dealing with a CT tool which strikes at the heart of the rights and freedoms that define an individual: freedom of expression as enshrined in Article 11 EUCFR and Article 10 ECHR. By criminalising incitement to terrorism, the legislator intervenes at a very early stage in the crime chain raising the question whether 'a criminal law of prevention' is being gradually built up at EU level. [379] Examining whether the offence complies with the principles of proportionality and legal certainty is a compulsory step in the legal endeavour of this thesis in order to observe whether the two imperatives of the CT policy have been simultaneously and adequately addressed.

2.2.2. Public provocation – a justified, proportionate and effective restriction of freedom of expression?

As indicated in the first chapter of this thesis, the analysis of the proportionality principle has been constructed around a multi-stage process. It sets out to examine whether restrictions imposed on individuals' rights (in the present case, freedom of expression) by the enactment of the offence of 'public provocation' are legitimate, suitable and necessary in order to address the identified problem. It also examines whether such limitations are proportionate *stricto sensu*, in that the measure strikes the right balance between an individuals' rights and the public interest. The failure to

378 Borgers and van Sliedregt (n 376) 181-182.

meet any of the four conditions mentioned above leads automatically to the disproportionality of the given measure.

(a) The *legitimacy* of a measure is the first condition required by the principle of proportionality and is usually the one most easily fulfilled. Fighting terrorism and protecting the Member States from its atrocities by criminalising different behaviours considered conducive to terrorist attacks fulfils aims such ensuring a high level of security through measures to prevent and combat crime, and the protection of the rights and freedoms of others as prescribed in Article 10(2) ECHR and Article 52(3) EUCFR.

Sottiaux observed that, as 'the legitimate aims are expressed in rather broad terms, […] it will be fairly easy for the respondent government to convince the Convention organs that the limiting measure serves one of the prescribed purposes.'[380] Therefore, the need to criminalise public provocation to commit terrorist offences is supported by a legitimate purpose.

(b) Subsequently, it must be assessed whether the measure is also *suitable to attaining the assigned goal, namely '[c]ountering the increasing dissemination of terrorist propaganda and terrorist expertise in particular through the Internet.'*[381] As pointed out by Rivers, 'the question whether a policy is capable of pursuing a legitimate aim is […] a question of capacity, or potential contribution' and not 'whether the decision is correct, given the rule, let alone whether the policy is correct given the public interest', which leaves 'considerable scope for discretion' at this

379 (n 158).

380 Sottiaux (n 97) 43.

381 (n 368) 24.

stage of the evaluation.[382] Bringing public provocation under the incidence of EU criminal law can be perceived as suitable in achieving the goal of preventing the commissioning of terrorist offences as well as the application of other EU cooperation mechanisms such as the EAW. Nevertheless, criminal measures alone must not be the only instrument deployed by Member States in curbing terrorist propaganda and radicalisation. Investing in social policies aimed at addressing the exclusion of different fringe groups within the population and fostering the democratic confrontation of different political ideologies are also complementary measures which must go hand in hand with criminal law instruments in order to effectively combat the radicalisation phenomenon.

(c) The third step in the proportionality test consists of assessing the *necessity of the measure*, and requires the demonstration that other less restrictive but equally effective measures were unavailable to curb the terrorist threat. The case for combating 'dissemination of terrorist propaganda aiming at mobilisation or recruitment and instruction […]' has been thoroughly argued in the 2007 IA which also laid down a series of options to address the identified problem following consultations with a wide range of stakeholders and examination of academic work on the use of the internet for terrorist purposes.[383] The IA proposed five possible policy options:

(1) No policy change […];

382 J Rivers, 'Proportionality and the Variable Intensity of Review' (2006) 65 CLJ 174, 197.

383 The Impact Assessment Board requested a revision of the first draft of the IA on the following points: a better definition of the problem to address, the actual gaps present in the legislation of the Member States as well as a more detailed analysis concerning the impact on fundamental rights (n 368). For the definition of the problem see (n 368) 12 onwards.

> (2) Forbidding internet service providers to give access to material aiming at public provocation to commit terrorist offences, recruitment or training for terrorism […];
>
> (3) Enhancing law enforcement authorities' capacities and expertise to counter the use of the Internet for terrorist purposes […];
>
> (4) Urging Member States to sign and/or ratify the Council of Europe Convention on the prevention of terrorism […];
>
> (5) Revising the Framework Decision on combating terrorism in order to introduce parallel offences to those foreseen under the Council of Europe Convention on the prevention of terrorism and make public provocation to commit terrorist offences, recruitment and training for terrorism, also via the Internet, punishable:[384]

A closer examination of the five options reveals that, in fact, the actual choice is between 'no policy change' and the revision of the 2002 Framework Decision on combating terrorism. This is also due to the fact that some options are actually complementary and/or dependent upon enactment of the offence of 'public provocation to terrorism' or due their limited impact, cannot be considered as a real policy option.

Option (2), namely *forbidding internet service providers to give access to material aimed at public provocation to commit terrorist offences* appears rather disproportionate and ineffective being ruled out by the Commission itself. It would impose new obligations upon internet service providers. These players would be compelled to apply different (and sometimes expensive) blocking techniques (dynamic filtering or black lists systems) with a view to 'prevent[ing] users from accessing [the] material' cited above.[385] Beyond the issue of the questionable

384 Commission, Staff Working Document accompanying document to the proposal for a Council Framework Decision amending Council Framework Decision 2002/475/JHA on combating terrorism, Summary of the Impact Assessment SEC (2007) 1425, 4.

385 (n 368) 28.

effectiveness of such measures (due to 'relocation' capacities, change of jurisdiction and lack of criminalisation of public provocation),[386] the measure would severely hamper the exercise of the freedom of expression under both formats.[387] Therefore, not only is such a policy option more restrictive than the sole amendment of the 2002 Framework Decision on combating terrorism, but appears more of a complementary option than a fully-fledged alternative.

In the same vein, option (3), in which law enforcement authorities would see their capacities and expertise enforced in order to counter the use of the internet for terrorist purposes, is worth considering but again as a complementary solution.[388] The effectiveness of such an approach depends on the national legal provisions in force in relation to public provocation to terrorism. In the absence of harmonised rules, it is also conceivable that countering terrorist propaganda on the internet will be effectively pursued in one Member State and not punished in another one. Therefore, the measure, while less restrictive, cannot be considered an effective measure on its own.

Option (4), which would involve *an EU declaration encouraging the signature and ratification of the Convention by all Member States*, while certainly less restrictive, is also the least effective measure of the ones observed in this context, bearing no sanctions for non-compliance.

386 (n 368) 29.

387 (n 368) 45. The Commission underscored that dynamic filtering would 'automate censorship' while the black lists impact would depend on the actual construction of the list including its safeguards.

388 The IA posited that it 'is worthy to be considered as a standing-alone option' while immediately underscoring that the full potential of such an option would be the enactment of relevant criminal provisions (n 368) 47. Following this logic, the IA conceives option 3 together with option 5 as the preferred policy option (n 368) 66.

It follows that the assessment on whether there were other less restrictive while equally effective measures is brought back to policy option (1) versus policy option (5). Under option (1) 'No policy change' the Commission included the impact of the CoE CPT which criminalises public provocation. Additionally, while the IA deals with the question of existing EU or EC legislation that could prevent the dissemination of terrorist propaganda and expertise from the perspective of its incomplete coverage it is argued that this can also be analysed under option (1) as the *status-quo*.

With regards to EU criminal law measures, Articles 2 and 4 of the 2002 Framework Decision on combating terrorism are relevant for the discussion. Article 2(2)(b) requires Member States to take the necessary measures to ensure that intentional acts of participation 'in the activities of a terrorist group, including by supplying information or material resources […] with the knowledge of the fact that such participation will contribute to the criminal activities of the terrorist group', are punishable. This could indeed entail that public provocation could be covered by such provisions, but only in the event that it relates to the activities of a terrorist group. The IA drew the same conclusion for the national provisions implementing Article 2, even where some Member States (Germany, Spain, Portugal) have adopted a broader scope in relation to Article 2(2)(b), which does not, however, account for the criminalisation of 'general publicity not linked to a terrorist group'.[389] In the same vein, Article 4 on 'Inciting, aiding or abetting, and attempting' is also not able to fully cover the concept of 'public provocation'. Firstly and following the narrow interpretation also pursued by the Commission, it is difficult to conclude that the provisions of Article 4(1) on

389 (n 368) 17, Annex IV, 96; see also 93-95.

'inciting, aiding or abetting an offence referred to in Article 1(1), Articles 2 or 3 of the Framework Decision 2002/475/JHA' could be interpreted as covering a series of terrorist propaganda messages such as 'those that glorify suicide-bombers, justify terrorism or generally encourage joining the Djihad' or 'terrorist propaganda aimed at fund-raising or recruiting'.[390] The same assessment can be drawn for Article 4(2) which prescribes only the criminalisation of the attempt to commit a series of offences foreseen in the Framework Decision.[391] In the same vein as for Article 2, the IA notes in respect to Article 4 that

> [s]ome Member States go beyond […] by making the attempt to incite punishable [but] [i]t is […] doubtful that such national rules cover the dissemination of terrorist propaganda and terrorist expertise through a website or a chat-forum, where the main perpetrator and circumstances of the eventual offence are not determined.[392]

Additionally, the Commission in its inquiry attempted to show that, not only were the criminal law provisions insufficient, but also relevant EC provisions (ie 'Television without frontiers Directive',[393] 'Directive on electronic commerce',[394] and the so-called Data Retention Directive[395]) were not adequate to fill the legal gap identified either because their scope was narrower or their intervention was dependent upon the criminalisation of the dissemination of terrorist propaganda being penalised in all

390 (n 368) 17, Annex IV, 97.

391 (n 368) 97. 102.

392 (n 368) 17, Annex IV, 101.

393 Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities [1997] OJ L 202/60.

394 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L 178/1.

395 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 [2006] OJ L 105/54.

Member States.[396] Consequently, while current EU and EC measures can be seen as less restrictive compared to the enactment of new terrorist offences, they do not provide the same guarantees of effectiveness in combating terrorist propaganda.

Similarly, a possible harmonisation via the CoE CPT would yield improvements provided that all EU Member States sign and ratify the instrument. However, while the Convention entered into force in June 2007, it has not yet been signed and ratified by all EU Member States,[397] a situation which gives them an important window of opportunity with respect to the pace of this particular type of harmonisation. Furthermore, the definition of 'terrorism' employed by the two international organisations is not the same as discussed in a subsequent section. From this perspective, it is argued that a general definition such as that of the EU as opposed to sectoral ones, and a coherent approach throughout the EU that benefits from a series of judicial cooperation mechanisms, are to be preferred to an intergovernmental scheme such as the setting of the CoE.

Taking into account the different drawbacks of the options presented above, it can therefore be inferred that the revision of the 2002 Framework Decision on combating terrorism appears the least restrictive measure to address the spreading of terrorism dissemination, with the exception of the baseline scenario (no action at EU level-status quo). The insertion of these offences within the EU legal framework compared to the simple application of the CoE CPT in the Member States presents a series of advantages in terms of legal certainty and effectiveness.

396 (n 368) 106.

397 At the time of writing seventeen Member States had ratified the CoE CPT. With respect to the entry into force the situation is as follows: in 2007 for four, in 2008 for three, in 2009 for four, in 2010 for four and in 2011 for two Member States respectively. (n 373).

Framework Decisions require all Member States to implement the provisions in their national legislation within a given period of time. In the current case, Member States had from December 2008 until 9 December 2010 to implement the new provisions. While this is clearly an improvement compared with the CoE regime, the lack of an infringement procedure for non-compliance with the deadlines imposed or incorrect transposition cannot be sanctioned by the CJEU during the transitional period. Nevertheless, the Court can rule on the validity and the interpretation of framework decisions. Also, the insertion of the offence of public provocation in the amendment of the 2002 Framework Decision on combating terrorism triggers the application of the relevant rules on jurisdiction, liability and criminal penalties foreseen by the Framework Decision, as well as the intervention of other cooperation mechanisms relevant to this field such Council Decision 2005/671/JHA on the exchange of information concerning terrorist offences [398] or Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union (Council Framework Decision 2006/960/JHA). [399]

It must nevertheless be pointed out that the IA identified seven out of eighteen Member States which in their replies to the Commission questionnaire considered that there was no need for additional legislation in the field (as opposed to five in favour, three abstentions or open answers, one only supporting criminalisation of terrorist propaganda and two only legislation regarding bomb-making and other terrorist expertise). [400] Additionally, when consulted on whether 'public provocation' and

398 [2005] OJ L 253/22; See IA (n 368) 51-54 for more details on the advantages of the EU instrument.

399 [2006] OJ L 386/89.

400 (n 368) Annex I, 72.

apology should be criminalised and, if yes, with what coverage (ie direct incitement, CoE CPT standard and apology) an important number of Member States (sometimes half of those completing the survey) have provided open answers or indicated that none of the proposed options would be a solution.[401]

(d) This brings the analysis to the last part of the proportionality test, namely the *balancing test*.[402] While this assessment is carried out on *in concreto* restrictions imposed upon the exercise of a right by courts, the ways in which EU and national legislation are circumscribing offences can already inform the reader on the way in which the balance will play. The prescription of a hypothetical danger combined with the breadth of the 2002 definition of terrorism and the requirement of 'indirect incitement' – as it will be argued in the subsequent sections – provide a broad scope for potentially criminalising in fact legitimate manifestations of freedom of expression. Moreover, in order for the offence to be constituted the EU text does not require, in line with the CoE CPT, that 'a terrorist offence be actually committed' (Article 3(3) of the 2002 Framework Decision on combating terrorism as amended by the 2008 text – Article 1). This 'precarious' balance between rights and interests in Council Framework Decision 2008/919/JHA stems from the already problematic balancing act created in the 2002 Framework Decision on combating terrorism when devising the definition of 'terrorist offences' (as will be argued in section 2.2.3.1). In these circumstances, it is difficult to consider that the balance struck by Council Framework Decision 2008/919/JHA is not impregnated by a strong security rationale, despite attempts to build in a series of safeguards albeit general in nature. The Commission proposal on the amendment of the 2002 Framework Decision on

401 (n 368) Annex I, 73-74.

402 Rivers (n 382) 14.

combating terrorism seemed to retrieve from the CoE CPT only the provisions concerning the criminalisation of 'public provocation to commit terrorist offences, recruitment and training to terrorism', but not those concerning the safeguards (proportionality, specific provisions on freedom of expression).[403] The EP's amendments,[404] as well as the final text as adopted by Council, have addressed this shortcoming, enhancing also to some extent the legal certainty of the text. Firstly, Council Framework Decision 2008/919/JHA introduced provisions at the level of the recitals (recital 15) and of the Articles (Article 3) on the respect of the principle of proportionality in the implementation of the criminalisation foreseen by the Framework Decision.[405] Secondly, it adds an Article 2 on *Fundamental principles relating to freedom of expression*[406] following the model used in Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law.[407] Additionally, incitement to public provocation and the attempt to commit the said offence are ruled out by the 2008 text (Article 4(2) and (4) of the 2002 Framework Decision on combating terrorism as amended by the 2008 text – Article 1).

Looking at the national level the UK definition of 'encouragement of terrorism' as devised by the 2006 Terrorism Act is an example of lack of

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403 See also in this sense the position of the EP Rapporteur on the proposal in the Explanatory Statement to the report (Report of 24 July 2008 on the proposal for a Council Framework Decision amending Framework Decision 2002/475/JHA on combating terrorism A6-0323/2008).

404 (n 201) Amendments 10 and 18.

405 'In the implementation of this Framework Decision, Member States shall ensure that the criminalisation shall be proportionate to the legitimate aims pursued and necessity in a democratic society and shall exclude any form of arbitrariness and discrimination.' art 3. This is an echo of art 12(2) CoE CPT.

406 'This Framework Decision shall not have the effect of requiring Member States to take measures in contradiction of fundamental principles relating to freedom of expression, in particular freedom of the press and the freedom of expression in other media as they result from constitutional traditions or rules governing the rights and responsibilities of, and the procedural guarantees for, the press or other media where these rules relate to the determination or limitation of liability.'

407 [2008] OJ L 328/55 art 7(2).

proportionality *stricto sensu* (combined with strong legal certainty caveats). The offence only requires that there is likelihood that a statement 'be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement or other inducement'. It prescribes not only direct or indirect incitement but allows also mere recklessness for the commission of the offence. Under the heading of indirect incitement the offence includes statements of glorification of terrorism 'from which those members of the public could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated by them in existing circumstances'. Furthermore, it is 'irrelevant whether any person is in fact encouraged or induced by the statement to commit, prepare or instigate any such act or offence.' [408] This prompted the UN High Commissioner for Human Rights Louise Arbour to warn the UK government as early as 2005 against the clear imbalances and vagueness embedded in such an offence, a criticism also voiced by numerous scholars and civil rights activists. The problems connected with the necessary *mens rea* required for the offence as well the removal of the requirement of danger together with the breadth of apology are some of the major concerns surrounding this offence. In this instance, security interests not only obscure the safeguarding of freedom of expression but they have the potential to empty the right of its substance. [409]

408 (n 374) 1(1), 1(2), 1(3) and 1(5).

409 Justice, 'Terrorism Bill Briefing for Consideration of Lords Amendments' (2006) <http://www.justice.org.uk/data/files/resources/242/Terrorism_Bill_HCconsiderationHLamendments_JUSTICE_briefing_feb06.pdf> accessed 13 July 2011 [5]; E Barendt, 'Threats to Freedom of Speech in the United Kingdom' (2005) UNSWLJ 895; Article 19, 'Submission to the 91st Session of the United Nations Human Rights Committee on Respect for Freedom of Expression in the United Kingdom of Great Britain and Northern Ireland' (2007) <http://www.unhcr.org/refworld/country,,ART19,,GBR,,4756cffb0,0.html > accessed 13 July 2011; Joint Committee on Human Rights, *Report on the Council of Europe Convention on the Prevention of Terrorism* (2006-07, HL 26, HC 247); E Barendt, 'Incitement to, and Glorification of, Terrorism' in I Hare and J Weinstein, *Extreme Speech and Democracy* (Oxford University Press 2009); I Awan, 'The Problem with Defining Terrorism and the Impact on Civil Liberties – Britain is Beginning to Create a Monster with Large Claws, Sharp Tech and a Fierce Temper?' (2008) 1 Journal of Politics and Law 2; S C Ekaratne, 'Redundant Restriction: The U.K.'s Offense of Glorifying Terrorism'

The proportionality examination conducted in this section leads to the following conclusions. Legitimacy and suitability are fulfilled by the measure under analysis. Furthermore, the amendment of the 2002 Framework Decision was the least restrictive measure after the 'no policy option'. Finally, the last step of the proportionality test is a victim of and dependent upon a previously criticised balancing act allowing only a partial positive assessment of the weighting of rights versus interests. This amounts to one of the characteristic of what the thesis has termed 'grey laws', which can be termed 'negative connectivity' and which reflects the risks of relying on basic acts already questioned under the proportionality and legal certainty headings.[410] From the above, it is inferred that the introduction of the offence of public provocation into EU law can be considered only to some extent a proportionate measure in response to the growing terrorist propaganda as some outstanding shortcomings remain. They are related to the full observance of a *stricto sensu* proportionality assessment, an assessment which also calls into question whether the construction of the offence as currently enshrined in EU law meets the requirements of legal certainty. The next section will tally up with this examination.

2.2.3 The offence of public provocation and its compliance with legal certainty

The principle of legal certainty applied to the current inquiry would entail that individuals must be able to foresee without unnecessary difficulty from the reading of the offence of 'public provocation to commit terrorism offences' whether their speech could qualify as an offence. The offence of public provocation to terrorism is defined in the Council Framework Decision 2008/919/JHA as being:

(2010) 23 Harvard Human Rights Journal 205; E Mylonaki and T Burton, 'An Assessment of UK Anti-Terrorism Strategy and the Human Rights Implications Associated with its Implementation' (2011) Journal on Terrorism and Security Analysis' 1.

> the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of one of the offences listed in Article 1(1)(a) to (h), where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed.

This definition is almost identical to the one enshrined in Article 5 of the CoE CPT. This latter definition was judged in 2006 by the UN Special Rapporteur as 'a sound response which would respect human rights' being based on a 'double requirement of a subjective intent to incite (encourage) the commission of terrorist offences and an objective danger that one or more such offences would be committed.[411] However, in light of the *Leroy v France* case law,[412] as well as in keeping with the requirements of Article 12 CoE CPT, the UN Special Rapporteur in his December 2010 report on the Ten Areas of Best Practices in Countering Terrorism has:

> introduced a slight modification to that definition to refer to conduct that causes an objective danger of a terrorist offence being committed whether or not "expressly" advocating a terrorist offence (rather than the Convention reference to "directly" advocating such an offence).[413]

The subsequent analysis presented in this section will come back to the issue of direct and indirect incitement and objective danger. Firstly, it is important to underline that, while the concepts of 'public provocation' in the EU and CoE frameworks seem identical, their scope is different due to distinct legal definitions adopted by the EU and the CoE. When the CoE CPT defines 'public provocation to commit terrorist offences, training and recruitment to terrorism', it does not address the concept of 'terrorist offences'. Article 1 on Terminology reaffirms that 'for the purpose of the

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410 For the use of the terms 'negative connectivity' see T P M Barnett, 'Recasting the Long War as a Joint Sino-American Venture ' (2007) Baker Center Journal of Applied Public Policy <http://thomaspmbarnett.com/globlogization/tag/core-gap#ixzz1dSFTLHj5> accessed 13 July 2011.

411 UNCHR, 'Promotion and Protection of Human Rights: Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin' (2006) UN Doc E/CN.4/2006/98, [56 (c)]. See also UNGA, 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin: Australia: Study on Human Rights Compliance while Countering Terrorism' (2006) UN Doc A/HRC/4/26/Add.3 [26], [27].

412 App no 36109/03 (ECtHR, 2 October 2008).

Convention "terrorist offence" means any of the offences within the scope of and as defined in one of the treaties listed in the Appendix.'[414] The Appendix lists eleven international sectoral conventions, which are concerned with specific acts such as 'unlawful seizure of aircraft', 'terrorist bombings', or 'terrorism financing'. Hunt made the case that, as the definitions included in these conventions – with the exception of the International Convention for the Suppression of the Financing of Terrorism[415] – do not address the issue of the 'terrorist motive', the definition given by the CoE is 'over-inclusive' as it 'also catches "ordinary" criminals who carry out the acts falling within the scope of those conventions'. He also noted the 'under-inclusive' effects of such a definition 'because the acts falling within the scope of those other conventions do not by any means cover the whole range of dangerous acts which terrorists may commit'.[416]

2.2.3.1 The EU definition of 'terrorism' – the first legal certainty check

The EU definition of terrorism is broader than that of the CoE and subsequently the legal certainty test conducted on the offence of public provocation to terrorism will be informed by the scope of the definition of terrorist offences to which it relates. Terrorist offences as defined in the EU by the 2002 Council Framework Decision are: 'intentional acts as referred to in points (a) to (i), as defined as offences under national law, which, given their nature or context, may seriously damage a country or an international organisation where committed with the aim of':

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413 (n 375) [30] and [31].

414 Furthermore, the Explanatory Report to the CoE CPT discarded the possibility of using the EU definition of terrorism with the argument that the Council of Europe 'had not received the mandate to draft a comprehensive convention on terrorism but rather a limited scope specific instrument for the prevention of terrorism' CoE, 'Council of Europe Convention on the Prevention of Terrorism – Explanatory Report' <http://conventions.coe.int/Treaty/en/Reports/Html/196.htm> accessed 13 July 2011. Saul (n 365) 149.

415 UNGA International Convention for the Suppression of the Financing of Terrorism (adopted 9 December 1999, entered into force 10 April 2002) 39 ILM 270.

-seriously intimidating a population, or
-unduly compelling a Government or an international organisation to perform or abstain from performing any act, or
-seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation[417]

It can be observed that, as in Article 2(1)b of the International Convention for the Suppression of the Financing of Terrorism,[418] terrorism is defined in relation to the aims ('purposes' in the UN text) it intends to achieve, but with some differences. The inclusion in the EU text of terms such as 'seriously' and 'unduly' next to the aim pursued by a terrorist act 'raises the threshold' of seriousness compared to the UN Convention. [419] However, the Framework Decision considers sufficient the '*probability* of a serious damage to a country or international organisation' instead of actual damage (provisions absent in the UN instrument). It also leaves an important fringe of flexibility by using the 'particularly imprecise […]' expression of 'fundamental structures of a country or an international organisation' and including a reference to 'given their nature and context', which 'may widen the scope of offences by eliminating the need to prove an intention to intimidate, compel or destabilise'.[420] However, a correct reading of Article 1(1), even with due attention paid to the qualitative elements 'given their nature and context', cannot replace the requirement of the aim as this is an essential part of the EU definition of terrorism.

Furthermore, the acts enumerated in points a) to h) of Article 1 of the Framework Decision concern not only attacks against the life or physical integrity of

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416 A Hunt, 'The Council of Europe Convention on the Prevention of Terrorism' (2006) 12 European Public Law 603, 611.

417 (n 2) art 1(1).

418 (n 415).

419 Saul (n 365) 164. S Peers, 'EU Responses to Terrorism' (2003) 52 Int'l & Comp LQ 227, 231.

420 Saul (n 365) 164.

a person. They also cover activities such as the 'seizure of aircraft, ships or other means of public or goods transport', 'extensive destruction to a Government or public facility, a transport system (...) or private property likely to endanger human life or result in major economic loss'.[421] This last act has come under extensive criticism, being seen as 'increasing the risk of violent demonstrations in democratic societies being regarded as terrorism'[422] and thus affecting the right to the freedom of association and legitimate protest.[423] Guittet similarly argued that 'any dissidence, any opposition group can be considered an act of terrorism inside the EU.'[424] Moreover, criticisms pertaining to the inclusion of acts of property destruction in the definition of terrorism have also arisen in relation to the UK definition of terrorism, which is similar to the EU one.[425]

However, recital 10, although not binding, prescribed that

> nothing in this Framework Decision may be interpreted as being intended to reduce or restrict fundamental rights or freedoms such as the right to strike, freedom of assembly, of association or of expression, including the right of everyone to form and to join trade unions with others for the protection of his or her interests and the related right to demonstrate.

This had to be read in conjunction with the binding Article 1(2) which stated that the EU text 'shall not have the effect of altering the obligation to respect fundamental

421 See Peers (n 419) 231 for an indication of the different sources of inspiration for points (a) to (f).

422 Saul (n 365) 165. See also Peers (n 419) 237.

423 Amnesty Report 2005 (n 189) referring to the concerns of some Member States and several NGOs; Wahl (n 6) 124.

424 E-P Guittet, 'European Political Identity and Democratic Solidarity after 9/11: the Spanish Case' (2004) 29 Alternatives: Global, Local, Political 441 <http://www.questia.com/PM.qst?a=o&d=5008295377> accessed 13 July 2011.

425 Liberty, 'Liberty's Response to Lord Carlile's Review of the Definition of Terrorism' (2006) <http://www.liberty-human-rights.org.uk/pdfs/policy06/response-to-carlile-review-of-terrorism-definition.pdf> accessed 13 July 2011, 9.

rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union.'[426]

The broad definition of terrorism can be considered the effect of the enormous pressure put on the EU in the aftermath of 9/11. However, while the proposal[427] for this Council Framework Decision[428] was put forward only eight days after the events in the US, the discussions on such an instrument had already been ongoing within European institutions.[429]

Nevertheless, the perceived emergency generated by the attacks reduced the room for debate – for example concerning its compliance with the legal certainty requirement – and counter-arguments[430] and made possible the adoption of a far-reaching definition with open concepts.[431]

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426 Peers (n 419) 243 was also pointing out that 'the Framework Decision represents a significant attempt to construct a broad and defensible definition of the concept of terrorism that builds upon fragmented initiatives in the United Nations. It contains adequate protections for human rights *if* its preamble and statements to be attached to it are fully applied apart from its great confusion about the circumstances in which violent political activity could nevertheless be considered legitimate.'

427 COM (2001) 521 final.

428 Framework decisions were the only EU instrument allowing, in matters concerning police and judicial cooperation in criminal matters (Title VI TEU), the approximation of laws and regulations of the Member States. In this case national authorities were compelled to achieve the results set out in the framework decision, but could choose the form and methods for attaining the above-mentioned objectives (art 34(2)b TEU).

429 (n 25).

430 As early as 20 September 2001, the Council welcomed the Commission's proposal and the Article 36 Committee was instructed to analyse the text in detail with a view of a political agreement in Council for December 2001 (Council Document 12647/01, 'Note: Proposal for a Council Framework Decision on combating terrorism', Council Document 14845/1/01 REV 1, 'Outcome of proceedings: Proposal for a Council Framework Decision on combating terrorism'). The main changes included in the Presidency text in comparison with the Commission one concerned a series of amendments to the definition of terrorism, the provisions on penalties and jurisdiction (Council Document 12647/2/01 REV 2, 'Outcome of proceedings: Proposal for a Council Framework Decision on combating terrorism'). The EP was consulted on the text on 28 September 2001. The LIBE Committee, as the lead committee, dealt with the text in three meetings: 9 October (Point 25. Exchange of views on the EAW and the FD on combating terrorism EP, LIBE Committee Draft Agenda <http://www.europarl.europa.eu/meetdocs/committees/libe/20011009/446157en.pdf> accessed 13 July 2011); 15 October (Point 4. Presentation of the draft report, EP, LIBE Committee Draft Agenda <http://www.europarl.europa.eu/meetdocs/committees/libe/20011015/446162en.pdf> accessed 13 July 2011) and 12 November (Point 4. Vote on the draft report EP, LIBE Committee Draft Agenda <http://www.europarl.europa.eu/meetdocs/committees/libe/20011112/446169en.pdf> accessed 13 July 2011). The EP adopted with an overwhelming majority its opinion under the consultation procedure on 29 November 2001 (EP legislative resolution of 29 November 2001 on Proposal for a Council Framework Decision on combating terrorism P5_TA(2001)0633, [2002] OJ C 153 E/35). The main amendments touched upon the tightening of the definition of 'terrorism', the definition of a 'terrorist group', the rules on incitement, aiding, abetting and attempt and those on jurisdiction. As mentioned above, the Council reached a political agreement on the text in December 2001 and in view of the important changes foreseen in the final text the Council decided to reconsult the EP. The latter agreed with the Council's text without putting forward any

In the interest of balance, it should be noted that the definition has also been welcomed on the grounds of the need for a uniform approach throughout the EU with respect to such an offence and the fact that the limited uncertainties that might arise had to be dealt with by the national judge.[432] It could also be posited that the manner in which national legislations construct the definition of terrorism is the ultimate test of legal certainty, allowing clarifications and precision to be brought to the EU definition. However, this does not address the breadth of the EU 2002 definition, as Member States had to transpose into their own legislation all the EU requirements. Moreover, the EU Network of Independent Experts on Fundamental Rights observed that

> a review of the measures adopted by the Member States for the transposition of the Council framework decision of 13 June 2002 on combating terrorism shows that the States' transposition measures have not solved the problem of the imprecise definition in this instrument – for the most part, the definition of terrorism given in the framework decision is simply reproduced in national criminal law.[433]

In this context, it is not possible to posit that relying on the good reasoning of judges will alleviate the problems pertaining to imprecise definitions. The question of the

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new amendments (EP legislative resolution of 6 February 2002 on the draft Council framework decision on combating terrorism P5_TA(2002)0043 [2002] OJ C 284 E/122). The final text was adopted on 13 June 2002 and the Framework Decision entered into force on 22 June 2002.

431 T Bunyan, 'The war on Freedom and Democracy: an Analysis of the Effects on Civil Liberties and Democratic Culture in the EU' (2002) <www.statewatch.org/news/2002/sep/analysis13.htm> accessed 13 July 2011; EU Network of Independent Experts on Fundamental Rights (CFR-CDF), 'The Balance between Freedom and security in the Response by the European Union and its Member States to the Terrorist Threats' (2003) <http://www.statewatch.org/news/2003/apr/CFR-CDF.ThemComment1.pdf> accessed 13 July 2011. The Network underlined that 'the definition as such is not adequate to meet the requirement of lawfulness' 11; J M Sorel, 'Some Questions about the Definition of Terrorism and the Fight Against its Financing' (2003) 14(2) EJIL 365; Saul (n 365) 162; G Guillaume, 'Terrorism and International Law' (2004) 53 Int'l & Comp LQ 537, 540; Peers (n 419) 243; C Walter 'Defining Terrorism in National and International Law' in C Walter and others, *Terrorism as a Challenge for National and International Law Security versus Liberty?* (Springer 2004) 29, 34; S Douglas-Scott, 'The Rule of Law in the European Union – Putting Security into the Area of Freedom, Security and Justice' (2004) 29 ELR 219, 231; EU Network of Independent Experts on Fundamental Rights, 'The Requirements of fundamental rights in the framework of the measures of prevention of violent radicalization and recruitment of potential terrorists' (2005) Opinion no 3 <http://cridho.cpdr.ucl.ac.be/documents/Avis.CFR-CDF/Avis2005/CFR-CDF.Avis3-2005.pdf> accessed 13 July 2011, 15-16; M De Goede, 'The Politics of Preemption and the War on Terror in Europe' (2008) 14 EJIR 161, 169.

432 Dumitriu (n 111).

433 EU Network 2003 (n 431) 16.

breadth of such a definition and its compliance with the requirements of legal certainty is even more salient in a context where the model definition of terrorism put forward in December 2010 by the UN Special Rapporteur is more restrictive than the EU one, focusing specifically on threats to the life or physical integrity of individuals.[434] Therefore, property would be covered only as a by-product of an attack against human life. Moreover, as has been pointed out by the EU Network of Independent Experts on Fundamental Rights, it is also 'regrettable that the Commission did not consider, among the criteria for evaluating the adequacy of the implementation of the FD 2002 by the Member States, the requirements deriving from the EUCFR […] or the general principles of EU law'.[435]

In such a context then, the breadth of the 2002 terrorism definition and the questions surrounding its legal certainty cast doubt on the legal certainty of the EU definition of public provocation. In this sense, the International Commission of Jurists considered that acts from the 2002 terrorism definition could, in fact, be 'legitimate political protest' and, when connected to the 2008 definition of public provocation, they would create the risk that 'legitimate criticism and dissent' is also covered by this offence. Moreover, it indicated that

> [i]n national implementation of the amendment to the Framework Decision, this definition could be used to justify measures which criminalise provocation of relatively low- level acts such as destruction of property, with consequences for unjustified interference with freedom of expression.[436]

The analysis now moves on to examine the construction of the definition of public provocation. The offence is composed of (a) an act of communication ('the

434 (n 375) 22.

435 EU Network 2005 (n 431) 16 (translation from French).

436 2008 (n 377) 5.

distribution, or otherwise making available, of a message to the public') combined with (b) a subjective intent to incite the commission of terrorist offence and (c) an objective danger that the terrorist offence might be committed. This definition allows for the conduct to directly or indirectly advocate the commission of terrorist offences. From the perspective of the legal certainty test, the questions pertaining to indirect incitement and danger, appear as the most problematic ones and will be scrutinised in the subsequent sections.

2.2.3.2 On indirect incitement

This research considers that, despite concerns surrounding its exact boundaries, there is interest in criminalising indirect incitement at EU level but *only* in a revised format, supported by a double requirement of intent and danger, combined with detailed human rights safeguards, a revised definition of terrorism and a protective reading by courts as regards freedom of expression.

(a) *The pros of criminalising indirect incitement*

Criminalising indirect incitement was identified by the Commission IA as well as by the preparatory works leading to the elaboration of the CoE CPT as a measure likely to 'remedy the existing lacunae in international law'.[437] The IA accounts for contrasting replies from the various stakeholders as to the inclusion of 'indirect incitement' within the scope of the offence of public provocation for fear of arbitrary restriction and suppression of legitimate political speech. However, it has been

437 (n 414) [97]. As regards 'indirect incitement', this has also been at the heart of several discussions between the members of the CoE that held different positions as to a potential inclusion of this dimension within the final definition as Hunt describes it extensively (n 416) 621. For the purpose of this section, it is important to remember that, despite opposition from a few delegations, it was felt that the advantages of the CoE CPT in this field would reside exactly in the criminalisation of 'indirect incitement'.

considered to be in line with the assessment undertaken for the CoE CPT where the condition of intention, of an objective danger of committing terrorist offences and human rights safeguards with regards to freedom of expression provided the required level of legal certainty even when indirect incitement comes into play. The IA accounted for seventeen Member States out of eighteen that replied to Commission questionnaires, which had or were on the verge of 'adopting legal solutions to tackle the dissemination of messages encouraging the commission of terrorist propaganda.' However, the concepts used were extremely diverse and it appeared that 'in many cases indirect incitement [was] not covered'.[438] An earlier study from 2004 done by Ribbelink under the aegis of the CoE on the concepts of 'apologie du terrorisme/glorification of terrorism' and 'incitement to terrorism' traced, at that time, six countries with specific legislation on the above-mentioned topics (Bulgaria, Denmark, France, Hungary, Spain, and the UK), to which were added another two (Italy and Switzerland) as their legislation indirectly criminalised incitement to acts of terrorism.[439] The study also indicated that

> [e]ven when terrorism and/or terrorist acts are not defined within national legislation, the law describes and penalises specific acts as crimes and/or criminal offences, regardless of political and/or religious motivation, thus bringing terrorist acts under criminal offences as described in the law', including incitement to terrorism. [440]

However, the general tendency detected by the study is that countries are proceeding to the adoption of specific provisions concerning terrorist offences and that this definition is construed by reference to the goals of a terrorist act (as in the UN

438 IA (n 368) 19.

439 O Ribbelink, *"Apologie du Terrorisme" and "Incitement to Terrorism"* (Council of Europe Publishing, 2004) <http://book.coe.int/ftp/2864.pdf> accessed 13 July 2011, 15.

440 ibid 22.

Convention for the Suppression of the Financing of Terrorism or in the 2002 Framework Decision on combating terrorism). [441]

The IA also recalled the findings of the Europol TE-SAT Report from 2007, which indicated that 'the number of police investigations into terrorist propaganda seems small compared to the amount of propaganda circulating on the Internet', a situation also 'partially explained by the lack of legislation allowing for arrests or investigations'.[442] Alegre questioned the said reasoning and posited that '[i]t may be […] that many Member States do not see the necessity for criminal proceedings to combat this phenomenon.'[443] In response, it can be seen that the Europol TE-SAT 2008 brings additional findings with regards to the spreading of terrorist propaganda, including it within the main trends of the year 2007. It is noted that 'the number of suspects arrested for propaganda has increased' and with respect to the percentage of arrested suspects for Islamist terrorism per offence in 2006 and 2007, it is shown that offences linked to propaganda have increased from 0% in 2006 to 6% in 2007.[444] The section entitled 'Trends' notes that 'more terrorism propaganda is being produced and distributed over the internet than ever before'. [445] The Europol TE-SAT 2009 supports the findings of previous years with regards to terrorism propaganda,

441 ibid 42.

442 (n 368) 54.

443 S Alegre, 'Human Rights Concerns Relevant to Legislating on Provocation or Incitement to Terrorism and Related Offences' (2008) Briefing Paper, Directore-General Internal Policies, Policy Department C, Citizens Rights and Constitutional Affairs <http://www.libertysecurity.org/IMG/pdf_HumanRights.pdf> accessed 13 July 2011; International Commission of Jurists 2008 (n 377).

444 Europol, 'TE-SAT 2008: EU Terrorism Situation and Trend Report' <https://www.europol.europa.eu/sites/default/files/publications/tesat2008.pdf> accessed 10 September 2011, 12, 19.

445 ibid 42.

especially the use of the internet for spreading such messages,[446] a trend again confirmed in the 2010 and 2011 TE-SAT reports.[447]

(b) *The relationship between glorification of terrorism and indirect incitement*

With respect to the concept of 'apologie du terrorisme/glorification of terrorism' (understood as 'public expression of praise, support or justification for terrorists and/or terrorist acts'), the IA identified eight Member States which had specific legislation on this matter (for example, the UK which in 2006 also criminalised 'glorification of terrorism'[448] by means of the offence of 'encouragement').[449] Hunt observes that 'apologie' or 'glorification' has been seen as sometimes overlapping with the dimension of 'indirect incitement', although its main dimension is seen as covering 'acts that have *already happened'*, in comparison with incitement, which deals with actions committed before the incited act.[450]

In a paper of the Office of the UN High Commissioner for Human Rights, it was indicated that the requirement of objective danger 'separates incitement to terrorism from an act of glorification of terrorism'.[451] The Explanatory Report to the CoE CPT indicated that 'presenting a terrorist offence as necessary and justified may constitute the offence of indirect incitement', which would in fact amount to glorification of terrorism. However, this has to be combined with the requirements of

446 Europol, 'TE-SAT 2009: EU Terrorism Situation and Trend Report' <https://www.europol.europa.eu/sites/default/files/publications/tesat2009_0.pdf > accessed 10 September 2011.

447 (n 130) and (n 131).

448 (n 374) 18.

449 Joint Committee on Human Rights (n 409). See also Barendt (n 409) for a detailed analysis of the UK provisions in the field.

450 (n 416) 617.

451 Office of the UN High Commissioner for Human Rights, 'Human Rights, Terrorism and Counter-Terrorism' (2008) Factsheet 32 <http://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf> accessed 14 July 2011, 43.

intent and danger that a terrorist offence would be committed.[452] Furthermore, the CoE study revealed that several states indicated the 'possible tension, or even the infringement of human rights, in particular the freedom of expression, which may result from making "apologie du terrorisme" a specific criminal offence'. The Netherlands in its reply has even inscribed the fact that 'the creation of such an offence is not envisaged since that would seriously infringe the constitutional freedom of expression'.[453] In contrast, Spain considered it necessary to criminalise 'the glorification of terrorists or terrorist methods' as this was 'manifestly illegitimate from every constitutional viewpoint.'[454]However, the study also agreed that as long as the criminalisation of 'apologie du terrorisme' met the requirements of Article 10(2) ECHR, it 'could constitute a legitimate measure under international human rights law'. It nevertheless questioned 'the pressing need' to adopt a uniform definition for all members of the CoE when only an extremely limited number of countries have adopted specific rules on the matter.[455]

452 (n 414) [98].

453 (n 439) 40, 41.

454 (n 439) 169.

455 (n 439) 48.

In his report on the protection of human rights and fundamental freedoms while countering terrorism, the UN Secretary-General clearly distinguished incitement and glorification, indicating that while the first 'may be legally prohibited, the second may not.' He also emphasised that

> [w]hile such statements [ie of glorification] might offend the sensitivities of individual persons and society, particularly the victims of terrorist acts, it is important that vague terms of uncertain scope such as "glorifying" or "promoting" terrorism not be used when restricting expression.[456]

(c) *What should be understood by 'indirect incitement'*

With regards to indirect incitement, the CoE Explanatory Report gave the example of the *Hogefeld* case law,[457] where it was considered that 'certain restrictions on messages that could be considered *indirect incitement* were in line with the ECHR'.[458]

The public provocation definition designed by the CoE CPT and the EU Framework Decision does not give any indication as to what exactly can be covered under the concept of indirect incitement. Both the IA of the Commission[459] and the CoE Explanatory Report suggested that acts such as

> dissemination of messages praising the perpetrator of an attack, the denigration of victims, calls for funding for terrorist organisations or other similar behaviour, [including] presenting a terrorist offence as

456 UNGA, Report of the Secretary-General, 'The protection of human rights and fundamental freedoms while countering terrorism' (2008) UN Doc A/63/337 [61].

457 *Hogefeld v Austria* App no 35402/97 (ECtHR, 20 January 2000).

458 (n 414) [91].

459 IA (n 368) 15. 'Terrorist propaganda in this impact assessment refers to a variety of contents. From glorification of suicide bombers as "martyrs" to open encouragement to join terrorism, including direct invitations to "kill the heretic" without forgetting the justification of terrorism or the dissemination of images of brutal assassinations as a way to gain publicity for the terrorists cause or prove their power, increasing fear. Thus, this term covers terrorist propaganda for diverse purposes: mobilising, recruiting or fund-raising.'

> necessary and justified may constitute the offence of indirect incitement'.[460]

The Commissioner on Human Rights in his observations on the draft CoE CPT also highlighted this aspect.[461] It is also posited that, while the reference to indirect incitement is abstract and general, it must be combined with the requirements of intent and danger. Nevertheless, the Commissioner has argued that while the current reference to indirect incitement has the merit of having a general application, it also leaves entirely up to the Contracting Parties the task of providing further clarification as to what is understood by indirect incitement. He indicated that if the text:

> [were] incorporated as it stands in the States Parties' domestic law, it would be particularly difficult to predict the circumstances in which a message would be considered as public provocation to commit an act of terrorism and those in which it would represent the legitimate exercise of the right to express an idea or voice criticism freely. It would be up to the domestic court to decide, in each case, in the light of the particular circumstances, whether or not there was incitement to commit acts of terrorism, on the understanding that the judgment of the domestic court could be reviewed in due course by the European Court of Human Rights. Giving the domestic court such wide discretion could hinder compliance with the principle of legality in criminal law.[462]

The same comment is valid with regards to the EU 2008 Framework Decision. However, providing a list of actions that could amount to indirect incitement in a legal text seems likely to also create loopholes (by leaving outside the scope acts which could also be termed indirect incitement) and to undermine the value of indirect incitement. While it is true that this may lead to different interpretations from one Member State to another, the key element is to secure the connection between indirect incitement and the requirements of intent and danger. The inclusion of indirect

460 (n 414) [95], [98].

461 CoE (Commissioner for Human Rights), 'Opinion on the Draft Convention on the Prevention of Terrorism' (2005) CommDH(2005)1 [30].

462 ibid [28].

incitement in the definition of public provocation has raised much criticism with respect to both the breadth and vagueness linked to this concept, and the breadth of the 2002 definition detailed above, and highlights the risks of legal certainty-free legislation.[463] The International Commission of Jurists has also drawn attention to the 'arbitrary, discriminatory or excessive *application* of indirect incitement offences', which 'may be counter-productive in alienating communities who will be disproportionately affected by the law' and could create 'a chilling effect in inhibiting constructive political, media and community debate on issues related to terrorism'.[464] Furthermore, it is indicated that a likely effect of laws containing a broad offence of indirect incitement is self-censorship.[465] Nevertheless, it must be pointed out that the above comments have, as a premise, faulty and problematic applications of the concept of indirect incitement. The UN Secretary-General, referring to UNSC Resolution 1624, confined incitement just to its direct form indicating that

> for States to comply with international protections of freedom of expression, laws should only allow for the criminal prosecution of direct incitement to terrorism, that is, speech that directly encourages

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463 S Braman, 'Conference on Anti-terrorism Legislation in Europe since 2001 and its Impact on Freedom of Expression – General Report' (2008) <http://www.coe.int/t/dlapil/codexter/Source/Working_Documents/ConfAntiTerrorism(2008)03%20E.pdf> accessed 14 July 2011. 'Provisions criminalising "indirect" incitement significantly expand the range of activities of concern and are likely to be challenged as overbroad, vague, and not meeting the requirements of legal certainty.' […] 'It is possible to develop standards against which to judge claims of direct incitement or related activities, but it is not possible to establish such standards for indirect incitement. For this reason, laws that go beyond the well-established concept of direct incitement to also include indirect incitement are likely to be challenged on grounds of over-breadth, vagueness, and inability to meet the legal standard. […] A key conclusion of the Banisar report, confirmed by conference participants, was that the level of detail in a law matters. The more detail specified in a law, the more operational effort and resources go to its implementation. Where a broad principle is stated without additional detail, implementation may remain at rhetoric level only. Detail is needed in two places. First, rights to be protected under an anti-terrorism law (limits to the law) need to be presented in as much detail as the powers granted. Second, procedures to be followed when implementing the law must also be spelt out in detail.' 2, 6.

464 International Commission of Jurists 2008 (n 377) 2 (emphasis added).

465 See in this sense Hunt's position in relation to the UK definition of encouragement in A Hunt, 'Criminal Prohibitions on Direct and Indirect Encouragement of Terrorism' (2007) 10 Crim LR 441; also A Chong and W Kadous, 'Freedom for Security: Necessary Evil or Faustian Pact? (2005) 28 UNSW Law Journal 887, 892: 'The difficulty in drawing the line between 'robust debate' and 'seditious commentary' is what makes these laws so potentially damaging. The history of such laws is that individuals and organisations err on the side of caution, and impose on themselves a form of self-censorship. This is not conducive to healthy and open discourse, an essential element of a democratic society.'

> the commission of a crime, is intended to result in criminal action and is likely to result in criminal action.[466]

The EP, when consulted on the Commission's proposal amending the 2002 Framework Decision, deleted the reference to indirect incitement and left only the reference to messages 'clearly and intentionally advocating the commission of terrorist offences'.[467] In response to the Secretary-General's interpretation of UNSC Resolution 1624 and to those criticising the inclusion of indirect incitement in the definition of public provocation, it could be argued – following Ronen – that such a strict position would lead to the ineffectiveness of the measure (incitement to terrorism). The requirements of subjective intent and objective danger should function as sufficient and strong safeguards in the face of potential abuses.[468] Moreover, the extremely speech-protective US standards developed in the Brandenburg case law, as well as that of the UN Special Rapporteur, have conceived room for indirect incitement provided that the other elements of the offences were proven. However, indirect incitement is problematic in the current EU setting particularly due to its imprecise boundaries and because of the breadth of the 2002 definition of terrorism, thus leading to the criminalisation not only of the remote acts of a crime chain, but also acts of relatively low gravity. Legal certainty is thus seriously endangered and weakened by the combined effect of the 2002 and 2008 terrorist provisions. Nevertheless, the option of indirect incitement should not be completely discarded but consideration should be given to an amendment along the lines suggested by the UN Special Rapporteur and with a narrower definition of terrorist offences. The suggestion concerned making reference to conduct *expressly or not* inciting terrorist

466 (n 456) [62].

467 (n 201) Amendment 12.

468 Y Ronen, 'Incitement to Terrorist Acts under International Law' (2010) 23 Leiden Journal of International Law 645.

offences instead of conduct *directly or indirectly* inciting the commission of terrorist offences. The proposed new adverb qualifying the conduct brings a possible solution to the criticism surrounding indirect incitement. [469]

2.2.3.3. On the requirement of danger

It flows from the Explanatory Report of the CoE CPT and also from the ECtHR case law that the appreciation of the danger that one or more terrorist offences would be committed is in the hands of the national authorities, which will take into account the quality of the author, the context and the circumstances in which the distribution of the message took place. The ECtHR in cases concerning Article 10 ECHR in relation to 'apologie du terrorisme/glorification of terrorism' or 'incitement to terrorism' has always paid special attention to the particularities of the case, the profile of the speaker and its history.[470]

Nevertheless, academics and NGOs have noted that the expression 'causes a danger' (used in both the CoE CPT and the Framework Decision 2008/919/JHA), does open the possibility of the criminalisation of speech which does not carry an immediate risk of a terrorist act but only a more remote possibility.[471] The suggestions put forward supported the logic of the Johannesburg principles on freedom of speech

469 In relation to indirect incitement, Sottiaux indicates that 'attempts to move beyond the punishment of direct advocacy of violence are less innovative that some would argue. […] the Strasbourg Court's art.10 jurisprudence is rife with cases in which it upheld convictions for what were at most indirect encouragements of violence. Similarly, the notoriously protective incitement test, adopted by the US Supreme Court in *Brandenburg v Ohio*, is generally interpreted to allow for the punishment of indirect advocacy of illegal action.' S Sottiaux, '*Leroy v France*: Apology of Terrorism and the Malaise of the European Court of Human Rights' Free Speech Jurisprudence' (2009) 3 EHRLR 415, 417. UN Special Rapporteur (n 375) [30]-[32] Practice 8.

470 *Hogefeld* case (n 457); *Incal v Turkey* ECHR 1988-IV; *Zana v Turkey* ECHR 1997-VII; *Erdogdu and Ince v Turkey* ECHR 1988-VII.

471 International Commission of Jurists 2008 (n 377).

and the Brandenburg case law,[472] and required the proof of an 'imminent risk' that a terrorist offence be committed, for public provocation to terrorism to take place.

The Johannesburg Principles and, more specifically, Principle 6 require that:

> expression may be punished as a threat to national security only if a government can demonstrate that:
> (a) the expression is intended to incite imminent violence
> (b) it is likely to incite such violence
> (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence[473]

It could be questioned as to whether the right way forward would be to include a requirement of 'imminence' of the danger within the definition itself, or to consider that the task of appreciating the degree of 'imminence' lies in the hands of the judiciary taking into account the particularities of each case. This is especially relevant when it is a question of incitement on the internet, for which it has been argued that 'the *Brandenburg* standard [ie imminence]' is 'unworkable'.[474] It was even noted that 'the "imminence" requirement would prevent any conceivable regulation of subversive and violence-conducive speech on the internet, because in cyberspace words are usually "heard" long after they are "spoken".'[475]

The EP's resolution considered that in order to adhere more closely to the requirement of legal certainty, the incriminating conduct had to 'manifestly cause a danger' by shifting the qualification of the danger from a hypothetical one to a more

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472 *Brandenburg v Ohio*, 395 US 444 (1969).

473 Article 19, Johannesburg Principles on National Security, Freedom, of Expression and Access to Information (1996) <http://www.article19.org/data/files/medialibrary/1803/joburg-principles.pdf> accessed 14 July 2011. According to the Introduction, '[t]he Principles are based on international and regional law and standards relating to the protection of human rights, evolving state practice (as reflected, inter alia, in judgements of national courts), and the general principles of law recognized by the community of nations'.

474 J P Cronan, 'The Next Challenge for the First Amendment: the Framework for an Internet Incitement Standard' (2001-2002) 53 Catholic University Law Review 425, 428.

475 ibid.

concrete one.[476] However, it is not clear that the term 'manifestly' is the most adequate one from a legal perspective. Whilst it puts a stronger emphasis on the link between conduct inciting terrorist acts and the danger that one or more terrorist offences be committed, it does not seem to bring about a real improvement in the text. The appreciation of what constitutes danger is usually left to the courts and, when considering the requirements of the ECtHR, several aspects must be taken into consideration when assessing the danger entailed by a speech, including effects, circumstances, content of the message, status and history of the speaker for example as outlined above. A court striving for a sound judgement will discard hypothetical dangers and appreciate the danger *in concreto,* a situation in which the adverb 'manifestly' loses value. A solution would be to use the standard developed by Judge Holmes in the *Schenck* case[477] as well as by Judge Bonello in the partially dissenting opinion on *Sürek v Turkey* (No. 3),[478] namely the requirement that the danger be 'real and present'.[479] It is posited that such a standard 'has served as a persistent but erratic touchstone for judicial efforts to define the boundaries of other unlawful action'.[480] While it can be argued that courts will be called on to assess danger in concrete situations and therefore will have to take into consideration the circumstances of each particular case, it appears that the introduction of the requirement of 'clear and present danger' could provide a closer adherence to the requirements of legal

476 (n 201) Amendment 12.

477 *Schenck v United States* 294 US 47 (1919) [52].

478 App no 24735/94 (ECtHR, 8 July 1999).

479 See also the reference to the 'real and present danger' test in the judgement of the ECtHR Second Section in *Vajnai v Hungary* App no 33629/06 (ECtHR, 8 July 2008) [49]; also CoE (Commission for Democracy through Law (Venice Commission)), 'OSCE/ODIHR Guidelines on Freedom of Peaceful Assembly' (2008) Doc CDL(2008)062 [64].

480 D G Barnum, 'The Clear and Present Danger Test in Anglo-American and European Law' (2006) 7 San Diego International Law Journal 263, 288; D G Barnum, 'Indirect Incitement and Freedom of Speech in Anglo-American Law' (2006) 3 EHRLR 258.

certainty in relation to the definition of public provocation, thus enhancing the protection of freedom of expression.

It follows from this analysis that the definition of public provocation would benefit in terms of legal certainty from a narrower scope and from a better circumscription of the concept of 'danger', while leaving within the content of the offence 'indirect incitement.'

The manner in which European and national legislators draft the contours of public provocation is of absolute importance in securing a text in line with the principles of proportionality and legal certainty. Moreover, the reasoning adopted by courts, and especially by the ECtHR, gives us an insight into what are, in the Court's eyes, protected freedom of speech messages and those that do not receive such protection, as well as the criteria for assessing these differences.

2.2.4 The role of the ECtHR case law on incitement – an equivoque assessment

The sections above have shown that the current definition of public provocation, while workable and operational, raises a series of questions with regards to its compliance with the proportionality and legal certainty tests in its current form due to the breadth of the 2002 definition, the large coverage of indirect incitement and the qualification of danger. This situation puts a considerable onus on national and European courts when assessing acts that might fall under the offence of public provocation to terrorism.

The ECtHR in its case law on incitement and/or glorification of terrorism has focused on the nature of the expression in question and its possible impact[481] combined with the specific context of the case (timing, status of the person)[482] and, more importantly, examined whether this was likely to incite to violence (or hatred in some cases).[483] In this respect, Sottiaux considered that the ECtHR's case law in the field has moved from a flexible, 'context-based democratic necessity approach ([…] *Zana*)' versus 'a fixed formula […] with a 'speaker-based incitement approach […] *Sürek (No.1) v Turkey*' where it is inquired 'whether an expression 'incites to violence against an individual, a public official or a sector of the population.' He nevertheless recalled that

> the incitement standard functions as a multi-faceted test, which allows the Court to take into account a variety of factors in an overall assessment: the content of the expression, the likelihood and seriousness of its consequences, and the speaker's intention. Although the Court never explicitly listed these various components of its incitement inquiry as independent requirements to be satisfied in each case, the case-law indicates that the test gives more structure and predictability to the Court's art.10 adjudication than its previous case-by-case application of the democratic necessity test. The incitement jurisprudence is perhaps one of the better developed areas of free speech law under the Convention.[484]

In contrast, the position adopted by the ECtHR in *Leroy v France*[485] has been criticised because the Court focused extensively on the context in which the cartoons

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481 *Arslan v Turkey* App no 23462/94 (8 July 1999); *Karatas v Turkey* ECHR -1999 IV; *Ceylan v Turkey* ECHR- 1999 IV.

482 As regards status, see *Brind and others v The United Kingdom* App no 18714/91 (Commission Decision, 9 May 1994) and *Hogefeld* (n 457) (terrorist cases), *Castells v Spain* (1992) Series A no 236, *Jerusalem v Austria* ECHR 2001-II (politicians in opposition or individuals or associations participating in the political life).

483 *Özgür Gündem v Turkey* ECHR -2000 III; *Zana* (n 470); See also in this sense CoE (CODEXTER), 'Collection of Relevant Case-Law of the European Court of Human Rights Related to "Apologie du Terrorisme" and "Incitement to Terrorism' (2004) CODEXTER (2004) 19; CoE (CODEXTER), 'Collection of Relevant Case-Law of the European Court of Human Rights on Incitement to Terrorism (2004-2008)' (2008) CODEXTER (2008) 28; CoE (CODEXTER), 'Freedom of Expression and Apologie du Terrorisme' (2008) CODEXTER (2008) 30. In contrast, the approach adopted by the US Supreme Court requires specific intent combined with direct or indirect incitement to unlawful conduct, likelihood and imminence of conduct.

484 (n 469) 419-420.

485 (n 412).

of Mr Leroy were distributed (two days after 9/11 in the sensitive Basque Region). At the same time, it seemed to treat as an afterthought requirements pertaining to the intent to incite the commission of a terrorist offence or of danger that a terrorist offence could be committed, thus leading to an obscure reasoning heavily relying on the legal argumentation of the Appeal Court of Pau.[486] Sottiaux even argued that the incitement to violence test was completely avoided by the Court and, more importantly, that 'rather than treating apology of terrorism as an instantiation of (indirect) incitement to terrorism, […] the *Leroy* decision recognises apology as a separate category of unprotected speech under art. 10.'[487] It is thus understandable why *Leroy* has been perceived as a warning for future case law on incitement to and glorification of terrorism due to its suppression of the freedom of expression. In this context, it can only be hoped that the ECtHR will revert to its previous position in relation to incitement cases and proceed to a thorough examination of a case weighting all the elements at hand. The risk of self-censorship is even higher when laws, questionable on the grounds of legal certainty, are interpreted in a contestable manner by the judiciary. In the same vein, Sottiaux suggested that 'it is clear that the European Court's treatment of illegal advocacy would benefit from a more predictable standard.' He posited that

> [t]he current incitement test gives little guidance to decision-makers seeking to restrict unlawful advocacy, to courts applying art.10 and to individuals seeking to exercise their right to freedom of expression. This last aspect is particularly worrying because it may result in self-censorship and entail a chilling effect on legitimate speech.[488]

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486 ibid [42], [45]. The ECtHR argued very succinctly that despite the limited character of the publication it 'entailed reactions that could stir up violence thus demonstration its likely impact on the public order in the region.' [45] (translation from the original version of the judgement published only in French).

487 Sottiaux (n 469) 421, 425.

488 Sottiaux (n 469) 426. See also S Douglas-Scott, 'The Hatefulness of Protected Speech: A Comparison of the American and European Approaches' (1999) 7 William & Mary Bill of Rights Journal 305, 327 - 328 'It is difficult to maintain that Article 10 has provided a coherent

2.2.5 Public provocation – a 'win-win' situation for security and human rights?

The above analysis proved that the offence of public provocation adheres only to some extent to the proportionality and legal certainty tests. Moreover, the current definition secures the fulfilment of the security imperative of the fight against terrorism. However, it does not ensure a fully workable solution for an adequate protection of freedom of expression with important risks pertaining to a 'chilling effect'. Following the criteria designed in Chapter I, Council Framework Decision 2008/919/JHA can be considered a law of and for the future. It is a law of the future (trend law) as it follows and builds upon developments and initiatives undertaken at national, regional and international level in order to tackle terrorist propaganda, including while on internet. It also qualifies as a law for the future as it aims to prevent the said propaganda and the perpetration of future terrorist offences. At the same time, this Framework Decision has also characteristics of what this thesis has described as 'grey laws'. These relate to a dysfunctional balancing of rights and interests and to a lack of legal certainty regarding the offence of public provocation. In order to reverse this situation, a law prescribing such an offence should establish higher standards in terms of respect of human rights combined with an effective response to security demands.

A way forward in this sense would require a narrowing down of the material acts foreseen in the 2002 definition of terrorism combined with a public provocation definition adjusted to refer to conduct which, expressly or not, incites terrorist offences, as well as combined with a requirement of a clear and present danger that

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vision of free expression. In some cases, the Court of Human Rights has shown itself to be a keen defender of free speech, particularly in the context of political speech. […] In other cases, the court has shown itself less inclined to champion freedom of expression and more willing to defer to member states interests […].'

one or more terrorist offences be committed. Only such 'engagement with the future' could avoid the scenario of 'a law of prevention' as outlined in chapter one.[489]

489 Mitsilegas (n 158). In this context, it must be recalled that by virtue of the art 2 of the Protocol (No 22) on the position of Denmark [2008] OJ C 115/299 'acts of the Union in the field of police cooperation and judicial cooperation in criminal matters adopted before the entry into force of the Treaty of Lisbon which are amended shall continue to be binding upon and applicable to Denmark unchanged.'

CHAPTER III: INFORMATION MANAGEMENT INSTRUMENTS PUT TO THE SERVICE OF THE EU CT FIGHT: ARE HUMAN RIGHTS AND SECURITY IN SYNC OR IN TENSION?

After having examined how one of the key CT harmonisation mechanisms deals with the demands of security and protection of human rights, this chapter will analyse to what extent two important EU initiatives in the field of information collection, storage, analysis and exchange – namely the Prüm Decision[490] and the EU PNR proposal[491] – have been devised to address both the security and the protection of human rights imperatives in the fight against terrorism. To this effect, the principles of proportionality and legal certainty will again be used as assessment criteria. Before proceeding to these specific analyses, however, it is essential to outline the background against which these instruments have developed in order to observe similarities with other undertakings in the field or in order to point out possible shifts in terms of policy orientation. Therefore, the research will provide firstly a brief overview of some relevant instruments of the field, their underlying rationale and the data protection regime. It will conclude by summing up and interpreting the findings derived from the analysis of the Prüm Decision and the EU PNR proposal and by examining the broader implications of such tools for the EU's CT approach.

3.1 A scattered and convoluted landscape for information management tools in the EU?

Information exchange has been seen to be a key priority in the development of the AFSJ and as a counterpart action accompanying the dismantling of internal borders

490 (n 2).

among the Schengen Member States and the growth of trans-border crime. Even if this concept was present from the establishment of the AFSJ, 9/11 and the attacks on EU soil in 2004 and 2005 have triggered even more intense activity on the part of policy-makers in order to put into effect, as soon as possible, different information management devices with the declared aim of fighting terrorism.[492] Therefore, far-reaching mechanisms have been created in the field which prompted and/or reinforced the reflection that the EU was turning into a 'surveillance society'.[493] In this setting, the rise of 'dataveillance'[494] and the model of the 'panopticon'[495] combined with a predilection towards actuarial justice[496] raise the question of whether the security objective is prioritised over human rights in this field. While 'dataveillance' is already under way, the elaboration of rules in the field of data protection ('data-protection-veillance') encountered several setbacks and ad-hoc rules have been established for several information exchange mechanisms. Moreover, the chronology of some initiatives reflects accurately the way in which instruments have been developed: rather hastily, sometimes with overlapping proposals (based on questionable IAs as

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491 (n 3).

492 For example, the March 2004 European Council Declaration on Combating Terrorism under the 'Objective 4: To protect the security of international transport and ensure effective systems of border control' emphasised the need to 'develop and implement a common EU approach to the exchange and analysis of passenger information' (n 29). The Council Declaration of 13 July 2005 in response to the London bombings stressed again the role of information exchange with a particular emphasis on proposals related to data protection and availability principles and 'enhanced interaction' between EU databases such as SIS II, VIS or EURODAC. Council Document 11116/05, 'Council Declaration on the EU response to the London bombings', 7.

493 For example, M Tzanou, 'The EU as an Emerging 'Surveillance Society': The Function Creep Case Study and Challenges to Privacy and Data Protection' (2010) 4 ICL Journal 407 <http://www.internationalconstitutionallaw.net/download/3cfc9dc8bab2837b52b43428259005ce/ICL_Journal_Vol_4_3_10.pdf> accessed 10 September; C Akrivopoulou and A Psygkas (eds), *Personal Data Privacy and Protection in a Surveillance Era: Technologies and Practices* (IGI Global 2010); K D Haggerty and M Samatas (eds), *Surveillance and Democracy* (Routledge 2010); T Bunyan, 'Just over the Horizon — the Surveillance Society and the State in the EU' (2010) 51 Race & Class 1; G Buttarelli, 'The Surveillance Policy in Europe, Today and Tomorrow' (2010) Conference for the 30th Anniversary of the CRID <http://www.edps.europa.eu/EDPSWEB/webdav/shared/Documents/EDPS/Publications/Speeches/2010/10-01-22_Namur_surveillance_EN.pdf> accessed 13 September 2011.

494 R Clarke, 'Information Technology and Dataveillance' (1998) < http://www.rogerclarke.com/DV/CACM88.html> accessed 13 September 2011.

495 M Foucault, *Discipline and Punishment: The Birth of the Prison* (Vintage Books 1979); J Semple, *Bentham's Prison: a Study of the Panopticon Penitentiary* (Clarendon Press 1993); D Lyon (ed), *Theorizing Surveillance, the Panopticon and Beyond* (Willan 2006).

496 M Feeley and J Simon, 'Actuarial justice: The Emerging New Criminal Law' in D Nelken (ed), *The Futures of Criminology* (Sage 1994) 173.

regards the justification of the real needs in the area) and labelled as merely technological responses to rising threats.[497] However, the current section does not intend to provide a comprehensive account of the field,[498] but rather to signpost some mechanisms and to set the scene for the examination of the Prüm Decision and the EU PNR proposal.

3.1.1 Activism within the EU

3.1.1.1 Under the spell and net of the availability principle – big ambitions and modest results as regards implementation

The June 2004 Commission Communication 'Towards enhancing access to information by law enforcement agencies' upheld the view that the key 'for effective access to and collection, storage, analysis and exchange of data and information' lies in the 'principle of equivalent access to data between law enforcement authorities'.[499] The mechanism behind this principle would have given 'EU law enforcement authorities and officials equivalent rights of access to data and databases within other EU Member States on comparable conditions as law enforcement authorities in that Member State.'[500] This principle was re-worded in the space of few months into the availability principle and introduced in the Hague Programme (November 2004).[501] Furthermore, already at this stage and following the logic of the 2003 Commission

497 The following comments will not cover EU databases such as the Schengen Information System (SIS), the Visa Information System (VIS), EURODAC or the European Criminal Records Information System (ECRIS).

498 See in this sense the Commission, 'Communication on the Overview of Information Management in the area of freedom, security and justice' COM (2010) 385 final.

499 COM (2004) 429 final, 7.

500 ibid.

501 (n 33). For more on the evolution of the principle see L Hempel, M Carius and C Ilten, 'Exchange of Information and Data between Law Enforcement Agencies within the European Union' (2009) 29 Discussion Paper, Zentrum Technik und Gesellschaft, 25 onwards.

Communication on 'Transfer of Air Passenger Name Record (PNR) Data: A Global EU Approach',[502] the programme emphasised the necessity for the Commission to put forward 'a proposal for a common EU approach to the use of passengers data for border and aviation security and other law enforcement purposes'.[503]

At the same time as the release of the Hague Programme, a new initiative of the Member States was surfacing: the Initiative of the Kingdom of Sweden with a view to adopting a Framework Decision on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union, *in particular as regards serious offences including terrorist acts* (the Swedish Initiative).[504] The initiative relied on indirect access to information upon request, considered one of the four modalities of the implementation of the principle of availability, along with 'direct access to the databases of another Member State', 'indirect access to information of another Member State through a central index on a hit-no-hit basis' and 'the creation of central European databases'.[505]

The initiative was transformed into Council Framework Decision 2006/960/JHA.[506] In this text the emphasis on 'serious offences including terrorist acts' was removed, which has led Hempel and others to argue that this was a sign of the 'normalisation' of terrorism among other offences. However, terrorism continued to be one of the most important aims that legitimised various and complex

502 COM (2003) 826 final.

503 (n 33) section 2.2.

504 [2004] OJ C 281/5 (emphasis added).

505 See Council Document 7641/05, 'Approach for the implementation of the principle of availability'; see also (n 501) for the main elements of the initiative qualified as being 'rooted in policy principle of "equivalent access"', 10.

506 (n 399).

mechanisms of information exchange within the EU, an aspect that is also present in the construction of the Prüm Decision and the EU PNR proposal.[507]

With respect to data protection provisions, the use of information and intelligence exchanged directly or bilaterally under the Framework Decision is regulated by the national data protection law of the receiving Member State, with the indication that 'information and intelligence shall be subject to the same data protection rules as if they had been gathered in the receiving Member State' (Article 8 (2)). At the same time, 'the providing competent law enforcement authority may pursuant to its national law impose conditions on the use of the information and intelligence by the receiving competent law enforcement authority' (Article 8(4)). Moreover, the processing of personal data in the implementation of this instrument had to be in accordance with instruments adopted in the framework of the CoE: Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of 28 January 1981 – ETS No 108 – (CoE 108),[508] its Additional Protocol regarding supervisory authorities and transborder data flows of 8 November 2001 – ETS No 181 [509] – and Recommendation No R (87) 15 of the Committee of Ministers on regulating the use of personal data in the police sector (CoE Recommendation 87).[510] The Framework Decision seems to have had rather limited success, as the 2010 Commission Communication on the overview of information

507 (n 501) 28 'Terrorism is now seen — so to say, normalised — as one serious offence among others, whereas next to organised crime its importance to justify transnational data exchange remains unquestioned: 'It is important to promote the exchange of information as widely as possible, in particular in relation to offences linked directly or indirectly to organised crime and terrorism […]' (preamble, para. 10). Nevertheless, the rewording of the title expresses clearly the intention to stress the continuity of the EU policy on transnational data exchange since the Schengen Convention.'

508 <http://conventions.coe.int/Treaty/en/Treaties/Html/108.htm> accessed 13 September 2011.

509 <http://conventions.coe.int/Treaty/en/Treaties/Html/181.htm>. accessed 13 September 2011.

510 <http://www.coe.int/t/dghl/cooperation/economiccrime/organisedcrime/Rec_1987_15.pdf> accessed 13 September 2011.

management in the AFSJ recorded only two states using it 'on a frequent basis'.[511] This was confirmed by the May 2011 Commission Report on the operation of the Swedish Initiative, which named Slovenia and Sweden as the two while also indicating that 'almost two-thirds of the Member States […] have transposed' it.[512] In addition, there are no statistics on the exchange of information and intelligence with respect to the offences covered, making assessment of the added value of the instrument in the fight against terrorism impossible. Moreover, it has been indicated that the sub-performance of the Swedish Initiative is linked to a great extent to the perception of forms to be filled in by Member States as 'too cumbersome for practitioners',[513] leading to the conclusion that practical problems and the preference for other channels of communication – formal and/or informal – hinder the effectiveness of the instrument.

Council Decision 2005/671/JHA on the exchange of information concerning terrorist offences[514] can also be perceived as one of the measures implementing the availability principle.[515] It obliges 'each Member State to transmit information concerning criminal investigations, prosecutions and convictions for terrorist offences to Europol and Eurojust' (Article 2(3)). However, this instrument exhibited a series of shortcomings in its functioning. The CTC, supported by the findings of the Europol report, has pointed out in a November 2008 Paper on the 'unsatisfactory'

511 (n 498) 11.

512 Commission, 'Operation of the Council Framework Decision 2006/960/JHA of 18 December 2006 ("Swedish Initiative") (Staff Working Paper)' SEC (2011) 593 final, 6, 11. The document also indicated that the 'underlying principles of the Framework Decision have been implemented' despite the fact that 'it has not reached its full potential yet' and emphasised that 'the interoperability programme within the EU Information Management Strategy will foster the usage of this instrument and increase the importance of this information exchange tool in the future.'

513 International Centre for Migration Policy Development (ICMPD), 'Study on the Status of Information Exchange amongst Law Enforcement Authorities in the Context of Existing EU Instruments' <http://ec.europa.eu/home-affairs/doc_centre/police/docs/ICMPD%20Study%20LEA%20InfoEx.pdf> accessed 10 September 2011, 41-42.

514 (n 398).

515 Hempel, Carius and Ilten (n 501) 25.

implementation of Decision 2005/671/JHA that this was due to 'three types of obstacles […]':

> -the refusal by the judicial authorities in certain Member States to transmit information relating to investigations in progress;
> -some agencies with dual competencies as Law Enforcement and as Security Services are experiencing legal difficulties in identifying what can be shared with Europol;
> - the requirement laid down in Article 2(3) of the Decision, that the information affects, or is likely to affect two or more Member States.[516]

If the last aspect could be remedied at EU level, the remaining two depend on the specific requirements of the national legal system in question and on the willingness and mutual trust between the judicial and police authorities of the Member States. At a theoretical level, this situation could be depicted as the refusal to relinquish parts of national sovereignty in the name of integration and can be seen through the lens of the 'information property' concept developed by Bigo and others.[517] Data from December 2010 on the implementation of Council Decision 2005/671/JHA do not provide more encouraging results. They indicate that only seventeen Member States have implemented the Decision as regards transmission of information to Eurojust.[518] This is another example where, despite an explicit deadline for Member States to comply with the provisions of the Decision – 30 June 2006 (Article 6) – and in the absence of a sanction for lack of implementation and of a detailed report on the use of this instrument by national authorities, it is very difficult to assess the effectiveness of the mechanism in the fight against terrorism as well as its compliance with human rights standards.

516 Council Document 15983/08, 'EU Counter-Terrorism Strategy – Discussion paper'.

517 (n 501) 10;D Bigo and others, 'The Principle of Availability' (2007) Challenge (Liberty and Security) <http://www.libertysecurity.org/article1376.html> accessed 13 September 2011.

518 Council Document 15893/10 ADD 1 REV 1, 'EU Action Plan for Combating Terrorism' 3.

Furthermore, in October 2005 the Commission released a proposal for a Council Framework Decision on the exchange of information under the principle of availability (availability principle proposal), thus complying with the requests made in the Hague Programme.[519] The proposal had a very broad scope as the information to be exchanged included DNA profiles, fingerprints, vehicle registration information, ballistics, telephone numbers and other communication data, minimum data for identification of persons contained in civil registers (Annex II). The functioning model was supposed to rely on online access, for 'equivalent competent authorities of other Member States and Europol', to 'the information contained in electronic databases to which their corresponding competent authorities have online access' (Article 9(1)). It was also foreseen that 'index data of information that is not accessible online' would be made 'available for online consultation' (Article 10(1)). The proposal had not been adopted before the entry into force of the LT and is currently obsolete due to the collapse of the pillar structure. Neither the Commission nor the Member States have announced any intention to pursue such an initiative. The adoption of other relevant texts in the field (such as the Prüm Decision and the Swedish Initiative) have brought forward more pragmatic approaches as concerns the principle of availability. While the technical requirements imposed by the proposal would have entailed significant expense, the obsolete Commission text is nonetheless to be welcomed in its attempt to propose the adoption of common criteria for all the Member States as regards exchange of personal data. However, beyond the technicalities of the proposal, the logic of the initiative has been brought into question as it has been considered 'the natural enemy of the decisive principle of data

519 COM (2005) 490 final.

protection — the principle of purpose limitation'.[520] The principle, which has 'characteristics in common with the methodological approach of mutual recognition' and must rely on mutual trust,[521] has been used in various contexts beyond the actual proposal. This led European Data Protection Authorities to put forward in 2007 a Common Position on the use of the availability principle in law enforcement.[522] The Future Group in 2008 even acknowledged that the principle raised 'a number of […] important issues, i.e. issues of a legal, organisational and technical nature' and that 'a sound data protection regime' was 'a prerequisite for the implementation of the principle'.[523] The Stockholm Programme kept the principle high on the strategic agenda, considering that it 'will continue to give important impetus to [the] work' on the management of the information flow.[524]

In this patchwork of initiatives, one must also recall the November 2005 Commission Communication on 'Improved effectiveness, enhanced interoperability and synergies among European databases in the area of Justice and Home Affairs.[525] Stating that 'interoperability is a technical rather than a legal or political concept',[526] the Communication avoided analysing the political and legal implications of such a

520 Hempel, Carius and Ilten (n 501) 39.

521 Fletcher, Lööf and Gilmore (n 164) 94.

522 Spring Conference of the European Data Protection Authorities, Cyprus 10-11 May 2007 <http://www.edps.europa.eu/EDPSWEB/webdav/shared/Documents/Cooperation/Conference_EU/07-05-11_Larnaca_availability_EN.pdf> accessed 13 September 2011.

523 Informal High Level Advisory Group on the Future of European Home Affairs Policy ('The Future Group'), 'Freedom, Security, Privacy – European Home Affairs in an Open World' (2008) Report <http://www.statewatch.org/news/2008/jul/eu-futures-jha-report.pdf> accessed 13 September 2011. Aspect also underlined by the European Data Protection Authorities (n 522). For a critique of the principle see T Bunyan, 'The "Principle of Availability" - the Free Market in Access to Data/Intelligence Will Rely on "Self-regulation" by the Law Enforcement Agencies and Make Accountability Almost Meaningless' (2006) Statewatch <http://www.statewatch.org/analyses/no-59-p-of-a-art.pdf> accessed 13 September 2011. For the modalities of implementing the principle see Council Document 13558/1/5 REV 1, 'Report by the Friends of the Presidency on the technical modalities to implement the principle of availability'.

524 (n 54) section 4.2.2.

525 COM (2005) 597 final.

526 ibid 3.

choice. In contrast, criticism has been voiced concerning the vagueness of the definition and the lack of a thorough debate on the limits of such a concept,[527] especially since 'technologies cannot be considered as *faits accomplis* or extra-political matters of fact.'[528] Moreover, this approach reflects what Balzacq has termed 'de-politicization', which is perceived as one of the three implications (along with intelligence-led policing and cross-pillarisation) of securitising tools such as information exchange.[529]

3.1.1.2 Stepping too far from proportionality: The Data Retention Directive

Another instrument that must be mentioned is the Data Retention Directive.[530] By virtue of this instrument, providers of publicly available electronic communications services or of public communications networks are required to retain traffic and location data for a period than can vary between six months to two years for the purposes of the investigation, detection and prosecution of serious crime (Article 1(1) and (2)). The Directive has come under heavy criticism from a wide range of actors, including EU institutions and bodies, national constitutional courts, IT experts, civil society, and academics.[531] They criticise its disproportionate character, its lack of legal certainty and the establishment of a form of constant surveillance of the entire

527 EDPS, 'Comments on the Communication of the Commission on interoperability of European data bases' (2006) <http://www.edps.europa.eu/EDPSWEB/webdav/shared/Documents/Consultation/Comments/2006/06-03-10_Interoperability_EN.pdf> accessed 13 September 2011.

528 P De Hert and S Gutwirth, 'Interoperability of Police Databases within the EU: An Accountable Political Choice?' (2006) 20 IRLCT 21, 23.

529 Balzacq 2008 (n 78) 93.

530 (n 395).

531 For an overview of the different positions, contributions and studies on the Data Retention Directive see EDRI, 'Telecommunication Data Retention' <http://www.edri.org/issues/privacy/dataretention> accessed 10 September 2011. See also F Bignami, 'Protecting Privacy Against the Police in the European Union: The Data Retention Directive' (2007) Duke Law School Faculty Scholarship Series Paper 76 <http://lsr.nellco.org/cgi/viewcontent.cgi?article=1076&context=duke_fs&sei-redir=1#search=%22data+retention+directive%22> accessed 10 September 2011. For a broader discussion on data retention see J-F Blanchette, D G Johnston, 'Data Retention and the Panoptic Society: The Social Benefits of Forgetfulness' (2002) 18 The Information Society 33.

population contrary to the requirements of Article 8 ECHR and Article 7 EUCFR. The April 2011 Commission evaluation report on the Directive shows great discrepancies between the Member States as regards its implementation, the impact on economic operators and consumers and on the rights to privacy and data protection.[532] The EDPS reacted to this evaluation and indicated that, despite the efforts deployed by the Commission in aggregating data, the necessity and proportionality of the measure have not been substantiated and less intrusive measures must be sought.[533]

3.1.2 Activism outside – the EU and the world

At an international level, the EU has also been very active in the field of information exchange for the purpose of fighting terrorism. The PNR agreements and the EU–US TFTP Agreement mentioned in the first chapter are prominent examples. However, these instruments have come under sharp criticism for the shift they introduce in the tools deployed for crime control and for their serious privacy-intrusive character, which leads to different forms of surveillance of broad categories of individuals.[534] In this context, the EP – under its consent powers granted by the LT – has struck down the first EU–US TFTP Agreement. This was done on the grounds that the provisions were not sufficiently narrowly tailored and thus undermined the protection of the rights to privacy and data protection.[535] Moreover, the EP (an actor that has over

532 COM (2011) 225 final. The report also observes differences in the purposes of data retention, the list of authorities having access to data, and the retention periods.

533 EDPS, 'Opinion on the Evaluation report from the Commission to the Council and the European Parliament on the Data Retention Directive (Directive 2006/24/EC) of 31 May 2011' (2011) <http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2011/11-05-30_Evaluation_Report_DRD_EN.pdf> accessed 10 September 2011.

534 For different positions and criticism of the PNR agreements see EDRI, 'Airline Passenger Data' < http://www.edri.org/issues/privacy/pnr> accessed 10 September 2011.

535 (n 182).

many years asked for sound proof as to the necessity of PNR data),[536] when confronted with requests to give its consent on the Australia and US PNR agreements in 2010, called upon the Commission to put forward a global approach to PNR transfers to third countries.[537] The Commission complied with this request in September 2010 and started new negotiations with the US, Canada and Australia with a view to establishing new PNR agreements. At the time of the writing of this thesis, the EP has given its consent to the new EU–Australia Agreement despite outstanding criticism.[538] In contrast, the envisaged EU–US PNR Agreement in its May 2011[539] version has been starkly criticised, including by the Legal Service of the Commission on several counts. Criticisms levelled against it were that it infringed the principle of proportionality by the extended scope for which PNR data would be used by US, it imposed an excessive retention period of fifteen years and it provided no real judicial redress on the US side. After further discussions the EU and the US have initialled a new PNR agreement on 17 November 2011 which is seen by the Commission as an improvement compared with the 2007 in respect to data protection requirements and legal certainty.[540] The above comments indicate that the field of information exchange agreements for law enforcement purposes is still struggling to find an appropriate mix of adequate safeguards for protecting the privacy and personal data of individuals

536 A search in the EP's Legislative Observatory lists not least than seventeen various EP positions on the PNR agreements as well as on the EU PNR proposal <http://www.europarl.europa.eu/oeil/search_words_titles.jsp > accessed 13 September 2011.

537 EP resolution of 5 May 2010 (n 180); Commission, 'On the global approach to transfers of Passenger Name Record (PNR) data to third countries' (Communication) COM (2010) 492 final.

538 EP legislative resolution of 27 October 2011 on the draft Council decision on the conclusion of the Agreement between the European Union and Australia on the processing and transfer of Passenger Name Record (PNR) data by air carriers to the Australian Customs and Border Protection Service P7_TA(2011)0470.

539 Council Document 10453/11, 'Draft Agreement between the United States of America and the European Union on the use and transfer of Passenger Name Record data to the United States Department of Homeland Security' <http://www.guardian.co.uk/world/interactive/2011/may/26/privacy-us-national-security> accessed 10 September 2011.

540 'Note' (2011) <http://www.statewatch.org/news/2011/jun/eu-usa-pnr-com-ls-opinion-11.pdf> accessed 10 September 2011; Commission, 'New EU-US agreement on PNR improves data protection and fights crime and terrorism' (2011) Press Release <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/1368> accessed 18 November 2011.

whilst delivering effective law enforcement measures. Against such a background, the EU is currently putting forward or developing – as will be discussed below – EU PNR and TFTP schemes.[541] In this process, it is imperative to have in view the discussions on the above agreements as well as the position adopted by European courts[542] and national constitutional courts[543] as to what constitute disproportionate measures with respect to the right to privacy and the limitations that can be brought to the right to protection of personal data.

3.1.3 Activism yes, but a positive and structured one?

The different approaches adopted in a very short period in the field of information collection and exchange have entitled Geyer to pose the following question:

> how do all the measures taken together interact and how can this kind of virtual security architecture transform societies that claim to be liberal and democratic?[544]

In response to the question raised in the first section of this chapter (3.1), it seems that indeed we are confronted with a somewhat scattered and convoluted framework in terms of information management. The Hague Programme is a prominent reflection of this approach, also revealing structural pitfalls as emphasised in the first chapter of the

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541 Commission, 'A European terrorist finance tracking system: available options' (Communication) COM (2011) 429 final.

542 Eg: *Malone v The United Kingdom* (1984) Series A no 82; *Amann v Switzerland* ECHR 2000-II; *S. and Marper v The United Kingdom* App no 30562/04 and App no 30566/04 (ECtHR, 4 December 2008); Case C-524/06 *Huber v Germany* [2008] ECR I-09705.

543 Romanian Constitutional Court, Decision No 1258 from 8 October 2009 regarding the unconstitutionality exception of the provisions of Law no 298/2008 regarding the retention of the data generated or processed by the public electronic communications service providers or public network providers, as well as for the modification of law 506/2004 regarding the personal data processing and protection of private life in the field of electronic communication area <http://www.legi-internet.ro/english/jurisprudenta-it-romania/decizii-it/romanian-constitutional-court-decision-regarding-data-retention.html> accessed 10 September 2011; Bundesverfassungsgericht, Judgement of 2 March 2010, 1 BvR 256/08,<http://www.bverfg.de/pressemitteilungen/bvg10-011en.html> accessed 10 September 2011; Czech Constitutional Court, 2011/03/22 - PL. ÚS 24/10: Data Retention in Telecommunications <http://www.concourt.cz/view/pl-24-10"> accessed 10 September 2011.

544 F Geyer, 'Taking Stock: Databases and Systems of Information Exchange in the Area of Freedom, Security and Justice' (2008) 8 CEPS Challenge Paper 9 <http://www.ceps.be/book/taking-stock-databases-and-systems-information-exchange-area-freedom-security-and-justice> accessed 10 September 2011, 2.

thesis (section 1.1.2) by mixing objectives of the AFSJ (such as the fight against terrorism) and the means to attain such objectives (information exchange). This creates the risk that means become ends in themselves. In the area of information exchange, it established a guiding principle (the availability principle), a series of milestones to be reached, and it also underlined the role to be played by new technologies. Unfortunately, it did not sketch a specific strategy for the field. The results of 2010 Study of the ICMPD are informative in this sense:

> The main finding […] is that existing cross-border information exchange is functioning reasonably well and that much information is readily available and accessible to law enforcement. However, there is still significant room for improvement regarding co-ordination and standardisation-factors which have an impact on the efficiency and effectiveness of cross-border information exchanges. *The existing legal and technical instruments are broadly sufficient and there is no need to introduce new instruments for cross-border information exchange.*[545]

The Stockholm Programme and the subsequent undertakings in the field attempt to address this structural problem, working towards an Information Management Strategy.[546] Nonetheless, it remains to be seen how the Prüm Decision and the EU PNR proposal fit within this landscape. There is a risk that they simply add a layer of complexity to the already 'charged' information management area by producing a 'security theater' rather than real security, with unknown consequences for individuals' rights.[547]

3.1.4 'Dataveillance' – but what about 'data-protection-veillance'?

545 ICMPD Study (n 513) 7 (emphasis added).

546 (n 54) 38.

547 B Schneier, *Beyond Fear: Thinking Sensibly about Security in an Uncertain World* (Copernicus Books 2003) 38. '[…] some countermeasures provide the feeling of security instead of the reality. These are nothing more than security theater. They're palliative at best.'

It must not be forgotten that the third pillar information exchange instruments presented above have been developed in the absence of a general framework for data protection in the field of police and judicial cooperation in criminal matters. They have either functioned on the basis of specific provisions concerning data protection or have 'outsourced' the level of protection to the CoE 108. The instrument supposed to serve as the backbone for the entire field of judicial and police cooperation in criminal matters is 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 (FDDP).[548] This was put forward in 2005[549] but was only adopted in November 2008, therefore leading to a 'reversed law-making flow' where the specific rules have preceded the general one.[550] Moreover, the FDDP is extremely limited in its scope (covering only inter-states processing) and exhibits an '*undoubted pro-security perspective*', where every principle is combined with a series of exemptions that allegedly '[open] the door to the police to do otherwise than the principle prescribes, if they see fit.'[551] This last qualification is paradoxical for an instrument designed primarily to ensure the protection of individuals.[552] The fractured and deficient data protection setting of the third pillar could therefore be a cause of legal uncertainty and uneven protection of personal data across the EU, fitting rather uneasily with calls for enhanced information exchange.

548 [2008] OJ L 350/60.

549 COM (2005) 475 final.

550 P De Hert and V Papakonstantinou, 'The Data Protection Framework Decision of 27 November 2008 regarding Police and Judicial Cooperation in Criminal Matters – A Modest Achievement However not the Improvement Some Have Hoped For' (2009) 25 Computer Law and Security Review 403, 405. See also for criticism E De Busser, *Data Protection in EU and US Criminal Cooperation* (Maklu 2009) 108.

551 De Hert and Papakonstantinou (n 550) 409, 411.

552 EDPS, 'Third Opinion on the Proposal for a Council Framework Decision on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters [2007] OJ C 139/1; EP recommendation to the Council of 14 December 2006 on the progress of the negotiations on the framework decision on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters, P6_TA(2006)602' [2006] OJ C 317 E/506.

However, the LT has resulted in a positive outlook as regards data protection in the former third pillar in the medium to long term. Article 16 TFEU requires the setting up of a comprehensive data protection regime, one which could, in light of Declaration 21 attached to the LT, accommodate specific rules on police and judicial cooperation in criminal matters provided they fit within the general regime.[553] This is also the stance adopted in the Commission Communication on a 'Comprehensive approach to personal data protection in the EU'[554] and supported by the EDPS[555] and the Article 29 Data Protection Working Party (WP 29).[556] The Communication also highlights some key areas to which the reform of the data protection regime is directed, such as purpose limitation and data minimisation, strengthening of data subjects' rights (eg: access, rectification, erasure, and blocking), reinforcing and harmonising the powers of national data protection authorities. The Council Conclusions on the Communication welcomed the directions proposed by the Commission emphasising the aspect of adequate fine-tunning as regards data protection rules for the former third pillar within a comprehensive approach.[557] At its turn, the EP strongly emphasised the need for the data protection provisions of the former third pillar to be covered by the general principles of data protection, thus putting an end to a very long-standing 'piecemeal' approach.[558] It can be expected that the new EU regime of data protection to be proposed by the Commission will tally up

553 Declaration on the protection of personal data in the fields of judicial co-operation in criminal matters and police co-operation police and judicial co-operation in criminal matters [2008] OJ C 115/345.

554 COM (2010) 609 final.

555 EDPS, 'Opinion on the Communication on a comprehensive approach on personal data protection in the European Union of 14 January 2011' (2011) <http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2011/11-01-14_Personal_Data_Protection_EN.pdf> accessed 10 September 2011.

556 WP 29 and Working Party on Police and Justice, 'Future of Privacy Joint Contribution to the Consultation of the EC on the legal framework for the fundamental right to protection of personal data of 1 December 2009' (2009) 02356/09/EN WP <http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2009/wp168_en.pdf> accessed 10 September 2011.

557 <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/119461.pdf> accessed 10 September 2011.

558 EP resolution of 6 July 2011 on a comprehensive approach on personal data protection in the European Union P7_TA(2011)0323.

with some of the shortcomings of the FDDP by laying down new rules for the ex-third pillar domain. Nevertheless, specific regimes such as the Swedish Initiative or the Prüm Decision will still be maintained and possible revisions of these instruments – including the data protection aspects – may take place in 2012, after the Information Exchange Model is in place. It is against this background of a conflated and complex apparatus of measures which includes various data protection regimes that the Prüm Decision and EU PNR proposal must be examined. This analysis will also be helpful in assessing whether or not the two measures have characteristics of grey laws and in indicating what type of AFSJ the EU is building.

3.2 The Prüm Decision and the EU PNR proposal(s) at a glance

The Prüm Decision draws on an intergovernmental treaty concluded outside the EU framework – between seven Member States (Austria, Belgium, Germany, France, Luxemburg, Spain and the Netherlands) – with a view to stepping up cross-border police cooperation, especially in the fight against terrorism, cross-border crime and illegal immigration. Signed on 27 May 2005 in the German city Prüm, the treaty has been referred to as the Prüm Treaty.[559] The Treaty entered into force on 1 November 2006 and, as early as the informal ministers' meeting in Dresden on 15–16 January 2007, the German Presidency put forward the idea of 'reformatting' parts of the Treaty as an EU instrument. On 5 February 2007, a full-fledged calendar was in place, inviting the Council to agree on those parts of the Prüm Treaty that should be integrated into EU law (only third pillar provisions or first and third pillar) and to

559 Council Document 10900/05, 'Convention between the Kingdom of Belgium, the Federal Republic of Germany, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands and the Republic of Austria on the stepping up of cross-border cooperation, particularly in combating terrorism, cross-border crime and illegal migration, Prüm Convention of 27 May 2005'.

'agree that the technical implementation of the provisions shall be based on the solutions already existing in relation to the implementation of the Prüm-Treaty'. [560]

After the EP delivered its opinion on 7 June 2007,[561] a general approach on the text was adopted within the Council on 12 June 2007. [562] A year later, the necessary administrative and technical provisions for the implementation of the decision were agreed upon and the so-called Prüm Decision, together with the Council Decision 2008/616/JHA implementing the Prüm Decision, were adopted on 23 June 2008.[563] With respect to information exchange elements, the Prüm Decision incorporated into EU law the following aspects relevant to CT policy: automated searching and comparison of DNA profiles, automated searching of dactyloscopic data and vehicle registration data, supply of information in order to prevent terrorist offences and supply of non-personal and personal information for major events.[564]

In relation to the EU PNR, the Commission put forward the proposal for a Council Framework Decision on the use of Passenger Name Record (PNR) for law enforcement purposes in November 2007.[565] It thus complied with the request lodged during the European Council of March 2004, which was reiterated in the Hague Programme and at the extraordinary Council meeting of 13 July 2005 after the London bombings. The proposal's main purpose was to impose the obligation upon air carriers to make the PNR data from passengers on international flights available to the competent authorities of the Member States for the purpose of preventing and combating terrorist offences and organised crime. A Passenger Information Unit

560 Initiative of the Kingdom of Belgium, the Republic of Bulgaria, the Federal Republic of Germany, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Slovenia, the Slovak Republic, the Italian Republic, the Republic of Finland, the Portuguese Republic, Romania and the Kingdom of Sweden, with a view to adopting a Council Decision on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime, [2007] OJ C 71/35. Council Document 6003/07, 'Note - Integration of (parts of) the Prüm Treaty into the Union Legal Order'.

(PIU), to be designated in principle in each Member State, would have been responsible for collecting and analysing the PNR data from air carriers (or designated intermediaries) and for carrying out risk assessments of passengers.

In the subsequent two years, a series of discussions followed within Council, as well as with various stakeholders, and there have been several amendments to the initial Commission text.[566] However, no unanimous agreement was reached in Council on the text before the entry into force of the LT. Civil society, academics and actors such as the EP, the Agency for Fundamental Rights (FRA) and data protection authorities (EDPS, WP 29) have strongly criticised the proposal for its failure to substantiate the necessity and the proportionality of the scheme.[567] Nevertheless, despite these concerns, the setting up such a mechanism was maintained in the Stockholm Programme without questioning the rationale of the measure.[568] Also announced in two subsequent Commission communications (on the overview of information management of AFSJ and on the global approach to transfers of PNR data to third countries),[569] the proposal for a Directive for an EU PNR was re-tabled in

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561 EP legislative resolution of 7 June 2007 on the initiative by the Kingdom of Belgium, the Republic of Bulgaria, the Federal Republic of Germany, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Slovenia, the Slovak Republic, the Italian Republic, the Republic of Finland, the Portuguese Republic, Romania and the Kingdom of Sweden on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime P6_TA(2007)0228 [2008] OJ C 125 E/20.

562 Council Document 10267/07, 'Press Release – Council of Ministers Justice and Home Affairs, Luxembourg 12-13 June 2007'.

563 Council Decision 2008/616/JHA on implementation of Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime [2008] OJ L 210/12; EP legislative resolution of 22 April 2008 on the initiative of the Federal Republic of Germany with a view to the adoption of a Council Decision on the implementation of Decision 2008/.../JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime P6_TA(2008)0128 [2009] OJ C 259 E/111.

564 The supply of information for major events (art 13 and 14) will only be briefly examined in this research.

565 (n 3).

566 For an overview of the work conducted in this period see Historical Archive at Statewatch, 'Observatory: EU surveillance of passengers (EU-PNR, 2003-2008) - revisited 2011' <http://www.statewatch.org/eu-pnrobservatory.htm> accessed 10 September 2011.

567 The individual positions of these actors will be presented in the following sections of the chapter.

568 (n 54) 4.2.2. Managing the flow of information.

569 (n 498) and (n 537).

February 2011. In this context, in the subsequent analyses of the EU PNR mechanism, the research will focus on the 2011 proposal while making references and comparisons, where relevant, with the 2007 proposal in order to uncover the approach with respect to the delivery of both human rights and security imperatives.

3.3 The Prüm Decision and the EU PNR proposal(s) and the proportionality principle

The examination of the proportionality of the two measures will be conducted following the same multi-layer logic pursued in the second chapter which comprises legitimacy, suitability, necessity and proportionality *stricto sensu.* Both the Prüm Decision and the EU PNR proposal can be considered *legitimate measures* under the objective of *prevention of disorder or crime* as enshrined in Article 8(2) ECHR. They also serve an objective of general interest recognised by the Union, namely 'the realisation of an area of freedom, security and justice' (Article 3 TEU) and the delivery of a 'high level of security through measures to prevent and combat crime' (Article 67 TFEU). The 'legitimisation' process is further strengthened by the emphasis that the two measures put on 'combating terrorism'.[570] The two texts can also qualify as *suitable* in achieving the legitimate aims identified above, as such an assessment must only conclude that a measure has the capacity – in relative and not in absolute terms – to attain the said objectives and that 'it is not manifestly

570 While the EU PNR proposal focuses on terrorism, serious crime and serious transnational crime, the Prüm Decision has a broader coverage. The Title of the Decision ('[…] stepping up of cross-border cooperation, *particularly in combating terrorism* and cross-border crime') would indicate that there is a particular focus on terrorism. However, Article 1 and the Decision as a whole do not have such an emphasis. The exchange of DNA data is used for the 'investigation of criminal offences' (Article 3) while the exchange of dactyloscopic data is used not only for the 'investigation of criminal offences' but also for the 'prevention of criminal offences' (Article 8), thus expanding the use of dactyloscopic data. The only specific provisions pertaining to terrorism can be found in Article 16 on *Supply of information in order to prevent terrorist offences*. It follows that the Prüm Decision is another example of how information collection and exchange mechanisms with a broader reach than terrorism are caught up in the 'fight against terrorism' legal activism, with the consequences of being pushed higher in the EU agenda with relatively little debate and amendment.

inappropriate for attaining the objectives pursued'.[571] For this reason, the current analysis will mainly focus on the remaining two requirements: necessity and the balance between rights and interests. It must also be pointed out that some aspects of the two measures are likely to raise issues not only in respect of this balance but also with regard to respect for the principle of legal certainty. Consequently, the research will either deal with such issues under both headings or only one heading, depending on the concrete subject under consideration.

3.3.1 The Prüm Decision – importing and layering proportionality?

3.3.1.1 The necessity requirement – a missed opportunity

3.3.1.1.1 In search of evidence

No broad and thorough analysis intended to reveal the shortcomings of and necessary improvements to AFSJ information management instruments had been undertaken at the time the Prüm initiative emerged onto the EU scene. Despite the request put forward by the EDPS in his Opinion on the initiative, such an evaluation did not happen before Council proceeded with the adoption of the Prüm Decision.[572] At the same time, the expectations stemming from the availability principle were growing. This was especially true in a context in which the discussions on the Commission proposal on the availability principle did not yield substantive advancements.

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571 Case C-309/10 *Agrana Zuker* [2011] OJ C 298/9 [40].

572 EDPS, 'Opinion on the Initiative of the Kingdom of Belgium, the Republic of Bulgaria, the Federal Republic of Germany, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Slovenia, the Slovak Republic, the Italian Republic, the Republic of Finland, the Portuguese Republic, Romania and the Kingdom of Sweden, with a view to adopting a Council Decision on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime' [2007] OJ C 169/9 [30], [31], [79].

The Member States justified the Prüm Decision only superficially, combining an efficiency argument with the need for accountability and safeguards in terms of data exchange. At no point did the preamble of the Decision give evidence in support of such an instrument. Drawing on the requirements contained in the Hague Programme as regards information exchange and, more particularly, the implementation of the availability principle, recital 9 simply acknowledged that '[t]hese requirements are satisfied by the Prüm Treaty', justifying therefore the application 'of the essential parts of the Prüm Treaty […] to all Member States.'[573]

No IA supported the initiative of the Member States who wished to impose on all twenty-seven Member States a mechanism that was currently only proving its merits among seven Member States.[574] An IA would have laid down the definition of the problem, offered different policy options with a view to addressing the information exchange gap identified, tackled the question of the compliance of the proposal with fundamental rights and mapped out the possible costs incurred by Member States as a result of the proposal. Only Austria and Germany provided evidence in support of the information exchange mechanism proposed by the Prüm Decision. However, these countries had similar databases and it is possible that, at the time of the initiative, the positive hits registered were just the result of 'backlog' clearance.[575] This is also the position advanced by the House of Lords report on the

573 (n 2).

574 For similar criticism see EP resolution of 7 June 2007 on the Prüm initiative (n 561) and European Union Committee, *Prüm: an Effective Weapon against Terrorism and Crime?* (HL 2006-07, 90) [108]-[110]; S Kierkegaard, 'Security and DNA Data Transfer within the EU: The Prüm Decision – An Uncontrolled Fishing Expedition in "Big Brother" Europe' (2008) 24 Computer Law and Security Report 243, 249.

575 In July 2007, Burgess was pointing out that '[w]ithin two months of the Prüm Treaty being in place the Germans presented impressive statistics regarding cooperation between Germany and Austria on sharing DNA samples. German searches of Austria's DNA database apparently turned up 1,510 matches or 'hits' (enabling a request for further information from the searching state), with the Austrian authorities able to connect 710 'open' criminal cases in Germany with known suspects. The hits in the Austrian database were made in connection with 14 homicides, 885 thefts, and 85 robberies or instances of extortion.' M Burgess, 'The Prüm Process: Playing or Abusing the System?' (2007) European Security Review 2.

Prüm Treaty, which warned of the 'misleading' reasoning included in a paper of the Presidency indicating that '[p]rosecution authorities are confident that the number of hits will increase constantly as further Prüm countries take part in this process'.[576] The EDPS held similar views on the matter, arguing that such limited exchange cannot be 'used as giving sufficient empirical basis for making the system applicable to all the Member States' and that 'even if the Prüm Convention itself would be necessary and proportionate, it does not by itself mean that the present initiative should be evaluated in the same way.'[577] This situation reveals a first important shortcoming in the legal construction of the Prüm Decision and is likely to invalidate any future inferences about the proportionality of the measure.

Additionally, posing the need to exchange DNA, dactyloscopic and vehicle data as a *given*, the Prüm Decision does not inquire into the important consequences – legal, technical, economic, and social – entailed by Article 2 of the Decision ('Establishment of national DNA analysis files'). This article basically requires Member States, who had no national DNA database at the time of the adoption of the Decision, to set up such a database. The lack of an IA obscured to some extent this essential element at the core of the decision, as well as the implications of the foreseen measures on the rights to privacy and data protection or the costs for the Member States. This is in sharp contrast to the Commission policy, which as of March 2001 'has decided that any proposal for legislation and any draft instrument to be adopted by it […] be scrutinised for compatibility with the Charter of Fundamental Rights of the European Union.'[578] Finally, there are no explanations as to why the

576 HL Report (n 574) [36] (emphasis added) [37], [38].

577 EDPS (n 572) [34] and [35].

578 (n 299) 2. 'Application of the Charter of Fundamental Rights of the European Union' SEC (2001) 380/3.

Prüm Decision (in particular Article 16) reproduces some provisions present in the Swedish Initiative (Article 7) or in the Convention Implementing the Schengen Agreement (Articles 39 and 46).

Furthermore, it would also appear that the Decision suffers from circular reasoning in the sense that the exchange of DNA and dactyloscopic data and more specifically the creation of DNA databases is presumed instead of being proven as necessary. In this context, the value of the verb 'to argue' is nullified as necessity and proportionality *stricto sensu* seem to be 'borrowed' from the Prüm Treaty with minor amendments and without even a formal attempt to map the pros and cons of the measures. This is also evident in the way the Decision deals or better said does not deal with the issue of less restrictive measures.

3.3.1.1.2 The Prüm Decision – less restrictive than the accountability principle proposal but also the least restrictive measure?

The lack of an IA is not only problematic with respect to the evidence supporting the adoption of the Prüm Decision but also in relation to the examination of *other less restrictive measures* open to the legislator. This step has not even been formally considered by the Member States, which have actually 'validated' the proportionality test of the Prüm Treaty in terms of information exchange mechanisms. The same assessment holds true for the balance between public interests and the rights endangered, which will be analysed in section 3.3.1.2. The research endeavours to fill this gap so as to thoroughly conduct the proportionality assessment. For this purpose, it will examine the Prüm Decision against the availability principle proposal.

With respect to the availability principle proposal, it is important to point out that the availability principle proposal does not 'entail any obligation to collect and store information either with or without coercive measures for the sole purpose of making it available to the competent authorities of other Member States or Europol' (Article 2(2)). In contrast, the Prüm Decision by means of Article 2 on 'Establishment of national DNA analysis files' requires Member States to 'open and keep national DNA analysis files', which inevitably raises questions as regards the impact of such databases on the rights to protection of personal data and privacy. From this perspective then, it can be argued that the availability principle proposal imposed a less restrictive measure than the Prüm Decision.[579] It also attempted to do away with the 'piecemeal' approach in terms of the data protection by taking as a standard the FDDP (at that time still in the stage of a proposal).[580] However, the same cannot hold true with respect to the types of data covered by the two instruments, as well as the modalities of accessing the information.

Prüm only covers three types of data, while the Commission proposal envisaged three additional types of data (ballistics, phone numbers and minimum data from civil registers) (Annex II). Furthermore, Prüm proposed in regard to DNA, dactyloscopic and vehicle registration data a combination of direct (for vehicle registration data) and indirect access (for DNA and dactyloscopic data) to databases. In the setting of indirect access on the 'hit/no hit' model, Member States would allow 'other Member States' national contact points access to the reference data in their databases'. They would have 'the power to conduct automated searches by comparing

579 EDPS, 'Opinion on the Proposal for a Council Framework Decision on the exchange of information under the principle of availability (COM (2005) 490 final)' [2006] OJ C 116/8 [32], [49]; on the issue of what is understood by 'available information' see [21] – [28].

580 ibid [46].

[profiles]', but 'only in individual cases and in compliance with the requesting Member State's national law' (Articles 3 and 9 of the Prüm Decision). If a hit is found, the national contact point of the requesting Member State 'shall receive in an automated way the reference data for which a match has been found'. However, any further personal data and information exchange connected to this data 'shall be governed by the national law, including the mutual legal assistance rules, of the requested Member State' (Articles 5 and 10).

As indicated above, the availability principle proposal also foresees direct and indirect access to information, but refuses to create a distinction between the types of data that are to be accessed via a direct or indirect model. Considering the risks connected with the model of direct access,[581] it is argued that the Prüm Decision is a less restrictive measure in terms of access to information checked against the principle of availability proposal. This assessment is also supported by the EDPS, which advocated a 'more cautious approach' by limiting the types of data and by supporting 'indirect access, via index data' which would allow stakeholders 'to monitor to what extent the principle of availability can effectively support law enforcement, as well as the specific risks for the protection of personal data.' [582]

From the above, one can draw a cautious assessment as to the fulfilment of the necessity requirement within the proportionality test with respect to the Prüm Decision. These 'construction pitfalls' fit into the characteristics of what this thesis calls 'grey laws', as they promote a somewhat formal compliance with the necessity test. Such a situation, in a strict reading of the proportionality principle, should have a

581 See EDPS concerns (n 579) as regards the direct access to information: interoperability, new usages for existing databases [35], 'powers of designated authorities to refuse the provision of information', 'responsibility for accuracy', 'powers of national data protection authority of the originating Member State' [36].

582 EDPS (n 579) [69].

'guillotine effect' on the last part of the proportionality test, namely the balancing of rights versus interests. It can also be argued that, although the shortcomings of the necessity test undermine the final part of the proportionality test, it is worth investigating it in order to observe whether this last step is also deficient as regards its legal construction.

3.3.1.2 The Prüm Decision balancing act – mix of positive and negative features

3.3.1.2.1 Key elements of proportionality *stricto sensu* referred to the national level

By its nature as a non-harmonisation instrument, the Prüm Decision has transferred onto the Member States the obligation to strike a fair balance in terms of offences (*ratione materiae*) and persons (*ratione personae*) covered and as regards the retention periods (*ratione temporis*).[583] In contrast, the EP – when consulted on the initiative – opted for a Framework Decision which would have allowed the approximation of Member States' laws as regards the type of offences (a narrowing down to terrorist offences and offences stipulated in the EAW Framework Decision) and the persons whose data can be stored in the DNA and/or dactyloscopic databases (eg: suspects, convicted persons, witnesses).[584] The solution envisaged by the EP would have allowed a more specific balancing act at EU level for both the security objective as well as for the observance of the rights to privacy and data protection. It would also have been consistent with the title of the instrument, which has an emphasis on 'terrorism and cross-border crime'.

583 Already in 1997 the Council was calling Member States to 'consider establish[ing] DNA databases' to be built 'in accordance with the same standards and in a compatible manner'. At the same time, the Council indicated that 'it is up to each Member State to decide on the conditions under which, and the offences regarding which, the DNA analysis results may be stored in a national database.' Council Resolution of 9 June 1997 on the exchange of DNA analysis results [1997] OJ C 193/2.

584 EP resolution of 7 June 2007 on the Prüm initiative (n 561) Amendments 18, 19 and 22.

In this context, some considerations are necessary with respect to the establishment of DNA databases for the purposes of law enforcement, a practice already used since the 1990s and growing in popularity ever since.[585] The 2011 National Forensic DNA Databases Report drawn up by the Council for Responsible Genetics rightly summarises the current state of play:

> A crime prevention tool that was originally intended only to identify the most dangerous convicted felons on a case by case basis, DNA collection and analysis is now routinely being used for a multiplicity of purposes that pose significant privacy and civil rights concerns to every citizen.[586]

This Report is a welcome attempt to map all the countries around the globe that have established or plan to set up DNA databases. The methodology is focused on identifying the '(i) law on point, (ii) entry criteria, (iii) sample collection, (iv) removal criteria, (v) sample retention, and (vi) database access'.[587] Its findings concur with other evidence, which indicates that there is currently an important diversity among the EU Member States as regards the structure of their DNA databases.[588] The UK, for example, has the largest DNA database in Europe, including data from individuals

585 The US and the UK have been pioneers in this sense and are now the countries with the largest databases in the world. See on the expansion from sexual offences and violent crimes to a wide range of other offences in the US: D H Kaye, 'Two Fallacies of DNA Banks for Law Enforcement' (2001-2002) 67 Brooklyn Law Review 179; D H Kaye and M E Smith, 'DNA Identification Databases: Legality, Legitimacy, and the Case for Population-Wide Coverage' (2003) Wisconsin Law Review 413; M A Rothstein and M K Talbott, 'The Expanding Use of DNA in Law Enforcement: What Role for Privacy?' (2006) 34 The Journal of Law, Medicine & Ethics 153. Moreover, in addition to the Prüm Decision international undertakings as regards DNA exchange are also ongoing such as the DNA Interpol Gateway where fifty-five countries submit data (<http://www.interpol.int/Public/ICPO/FactSheets/FS01.pdf> accessed 10 September 2011) or the 'Prüm-like agreements' that some EU Member States have with the US. For example, Agreement between the Government of the Federal Republic of Germany and the Government of the United States of America On Enhancing Cooperation in Preventing and Combating Serious Crime, Washington, 11 March 2008.

586 Council for Responsible Genetics, 'National Forensic DNA Databases' (2011) <http://www.councilforresponsiblegenetics.org/dnadata/fullreport.pdf> accessed 10 September 2011, 15.

587 ibid 18.

588 See in this sense *Marper* case (n 542) [46-47] 'In most of these countries (including Austria, Belgium, Finland, France, Germany, Hungary, Ireland, Italy, Luxembourg, the Netherlands, Norway, Poland, Spain and Sweden), the taking of DNA information in the context of criminal proceedings is not systematic but limited to some specific circumstances and/or to more serious crimes, notably those punishable by certain terms of imprisonment. The United Kingdom is the only Member State expressly to permit the systematic and indefinite retention of DNA profiles and cellular samples of persons who have been acquitted or in respect of whom criminal proceedings have been discontinued. Five States (Belgium, Hungary, Ireland, Italy and Sweden) require such information to be destroyed ex officio upon acquittal or the discontinuance of the criminal

investigated for crimes, stemming from serious ones to minor offences, as well as data from individuals who volunteer fingerprints or samples in connection with an investigation. The EDPS, while making a comparison between the UK DNA database and the German one, which includes only the 'profiles of those convicted of serious offences', pointed out that '[o]ne could even assume that in Germany the collection of DNA for wider purposes would not be compatible with the case law of the Constitutional Court.'[589] In the same vein, the House of Lords report on the Prüm Treaty highlighted the differences deriving from a lack of harmonisation of the rules concerning the collection and retention of data. Furthermore, it indicated the possible discrepancies stemming from false presumptions of what another Member State includes in its DNA database.[590] This aspect has been further reinforced by the acknowledgment that

> individuals within England and Wales are subject to a far greater extent to the full surveillant capabilities of DNA databases and their dis/empowerment effects, as explained by Prainsack and Toom (2010), perhaps without citizens of England and Wales benefitting from the positive "empowering" effects of a rise in criminal detections derived directly from this technology. Moreover, the real benefits for England and Wales of enhanced arrangements for cooperation might not yield corresponding benefits without greater investment by other EU states.[591]

Moreover, the ECtHR in the *Marper* landmark ruling has found that the UK DNA database was in breach of Article 8 ECHR due to

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proceedings. Ten other States apply the same general rule with certain very limited exceptions: Germany, Luxembourg and the Netherlands allow such information to be retained where suspicions remain about the person or if further investigations are needed in a separate case.'

589 (n 572) [50].

590 (n 574) [40-42].

591 C I McCartney and others, 'Transnational Exchange of Forensic DNA: Viability, Legitimacy, and Acceptability' (2011) European Journal on Criminal Policy and Research 1, 3. See also the position of the Home Affairs Committee in its report on *The National DNA Database* (HC 2009-10, 222-I) 'It is not known how many crimes are solved with the help of the stored personal profiles of those not previously convicted of a crime.' [15].

> the blanket and indiscriminate nature of the powers of retention of the fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences, [which failed] to strike a fair balance between the competing public and private interests and that the respondent State has overstepped any acceptable margin of appreciation in this regard. […][592]

While indicating the threshold of unacceptable interference in an individual's privacy, *Marper* also warns about the stigmatising effects of the retention of data on individuals not convicted of offences and the links with the presumption of innocence.[593] As such, it represents a strong defence of the right to privacy, especially as regards two of the five sub-categories of the right to private life as identified by Contartese, namely 'the 'freedoms to' – the right to be free to develop one's identity and to live one's life in the manner of one's choosing.'[594] The UK DNA database has also attracted extensive criticism because, at a more fundamental level, it also raises questions about the nature of the relationship established between the individual and the state, leading to the creation of a 'category of "pre-suspects"'.[595] From the above, it follows that the balancing act in which Member States engage when designing DNA and/or dactyloscopic databases is particularly sensitive. It encompasses not only the rights to privacy and protection of personal data but also society choices mirroring perceptions of risks and dangers. This is further influenced by the manner in which EU legislation regulates the exchange of information pertaining to DNA and dactyloscopic data.

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592 (n 542) [125].

593 L Campbell, 'A rights-Based Analysis of DNA Retention: "Non-conviction" Databases and the Liberal State' (2010) 12 Criminal Law Review 890. Campbell points out that while the ECtHR has indicated that the ''the retention of the applicants' private data cannot be equated with the voicing of suspicion […] the right in not being stigmatised by the State should be enjoyed by all individuals, in contrast to the presumption of innocence which accrues only to those charged with a crime.' 903-904.

594 C Contartese, 'Balancing the Protection of Genetic Data and National Security in the Era of New Technology: The Role of the European Court of Human Rights' in Akrivopoulou and Psygkas (n 493) 143.

595 Human Genetics Commission, 'Nothing to Hide, Nothing to Fear?' (2009) Report <http://www.hgc.gov.uk/UploadDocs/DocPub/Document/Nothing%20to%20hide,%20nothing%20to%20fear%20-%20online%20version.pdf> accessed 10 September 2011, [3.1.4], [3.1.5].

3.3.1.2.2 The balancing act at EU level

While the above comments had the purpose of indicating the important responsibility that the Decision has placed on the Member States in terms of establishing databases containing sensitive information, the approaches adopted by the Decision concerning the different information exchange provisions cannot be ignored as regards the balance between rights and interests.

Firstly, the Prüm Decision provides for distinctions between the three types of databases to which it applies. DNA analysis files can be opened and kept *only* for 'the *investigation* of criminal offences' (Article 2), while 'data from the file for the national automated fingerprint identification systems' can be checked for '*prevention and investigation* of criminal offences' (Article 8).[596] The scope is broader in the case of 'vehicle registration data', which can checked not only for the above purposes but also for 'other offences' and for 'maintaining public security' (Article 12). Furthermore, the automated searches foreseen in Articles 3(1) and 9(1) can 'only be conducted in *individual* cases' and the reference data must 'not contain any data from which the data subject can be directly identified' (Articles 2(2) and 8). As emphasised above, any other supply of personal data or information connected with the reference data (Articles 5 and 10) is governed by the national law of the requested Member State, making the model of indirect access to information for DNA profiles and dactyloscopic not only a less restrictive measure as opposed to direct access but also an adequate *stricto sensu* proportionality approach. At the time of writing, there are no statistics on the breakdown by offences in relation to automated searching or comparison of DNA profiles, respectively automated searching of dactyloscopic data.

596 (emphasis added).

Considering that the Prüm Decision in its very title puts an emphasis on 'combating terrorism and cross-border crime', the report to be submitted by the Commission in 2012 on the implementation of the Decision should specifically detail the instances in which the Decision has been helpful in the fight against terrorism.

Furthermore, Article 7 establishes the possibility of collecting cellular material and supplying DNA profiles. In ongoing investigations or criminal proceedings, a requested Member State would have to *actively* collect and examine cellular material from a particular individual present within its territory and provide the DNA profile obtained to the requesting Member State under a series of cumulative and restrictive conditions. These include specification of the purpose for which the cellular material is required, an 'investigation warrant or statement issued by the competent authority, as required under that Member State's law, showing that the requirements for collecting and examining cellular material would be fulfilled if the individual concerned were present within the requesting Member State's territory' and finally the requirement that, 'under the requested Member State's law, the requirements for collecting and examining cellular material and for supplying the DNA profile obtained are fulfilled'.[597] The provisions have been judged as 'quite far going […] and undetermined' and 'requir[ing] a more limited interpretation of this article' by virtue of the principle of proportionality.[598] The proactive collection of DNA profile and cellular material as a security enhancer, whilst adequately protecting human rights, is dependent on and limited by the different rules established at the level of the requested and requesting Member States. The criticism surrounding this provision – especially in the aspect concerning its 'undetermined' character – is symptomatic of

597 Article 7 first paragraph (a) – (c).

the nature of the EU instrument chosen by Council, which does not aim to approximate Member States' legislation. At the same time, this cannot be taken to imply that the balance between security interests and protection of personal data and privacy has not been respected. It nevertheless indicates that the balancing act could differ from one Member State to another according to their national provisions as regards collection of cellular material and supply of DNA profiles.

At the same time, the Prüm Decision seems to tip the balance between rights and interests by means of Article 26, which allows the processing of personal data 'for other purposes' but only

> with the prior authorisation of the Member State administering the file and subject only to the national law of the receiving Member State. Such authorisation may be granted provided that processing for such other purposes is permitted under the national law of the Member State administering the file.

While the conditions for further processing must obey a series of conditions, this nonetheless constitutes a serious departure from the observance of the principle of purpose limitation and, given the sensitivity of the data processed, it could be considered whether such a processing should be allowed even under strict but different conditions varying from one Member State to another.

The positive aspect of Article 26 is that it maintains the balance between security and protection of personal data and privacy by prescribing the immediate deletion of supplied data after 'data comparison or automated replies to searches' (Article 26(2) second subparagraph). This rule has only two exceptions linked to the

598 EDPS (n 572) [54].

need to prepare a 'police or judicial request for legal assistance' or for recording purposes (Article 26(2)(b) and (c)).

It follows from the above that the Prüm Decision has only partially complied with the proportionality test. While the balancing act adopted by the Decision which relies on indirect access to DNA and dactyloscopic data is to be welcomed as it provides important safeguards against abuse of the right to protection of personal data, it still has serious problems. These include the lack of a thorough justification of the need to set up such databases in Member States, which did not have them prior to the decision and the legal, technical and financial implications of these new databases. Moreover, a stricter balancing act at EU level could have been envisaged, one that ensures that at least the offences for which DNA profiles and dactyloscopic data can be checked and the persons whose DNA and dactyloscopic data can be taken are identified. It could be argued that, from a very strict reading of the proportionality test, the Prüm Decision as it stood in 2007 should not have become legislation as necessity was not fully argued but rather assumed and upheld by the powerful 'incantations' of the availability principle in a revised and moderated approach. Additionally, the Prüm Decision – by virtue of its legal format – has moved the most important part of the proportionality debate into the camp of the Member States for key aspects of the instrument in terms of offences, individuals or retention periods. The Prüm Decision entitled national legislators to consider the assessment of the mere necessity of establishing DNA or dactyloscopic database as 'forfeited', leaving open only the question of how to design the said database. Formal and partial necessity tests and mixed assessment as regards the *stricto sensu* proportionality test are characteristics that can be observed with respect to the Prüm Decision. These issues support the concept of 'grey law' put forward at the beginning of this thesis. It

remains to be seen whether the same can be inferred about the EU PNR proposal, which seems to sit uncomfortably with the proportionality principle in a *prima facie* analysis.

3.3.2 The EU PNR proposal(s) – defeating or rewriting the proportionality principle?

The PNR agreements concluded by the EU, the EU PNR proposals and the Data Retention Directive – to name only some of the most prominent examples – challenge the 'long history of institutional privacy protection' within Europe.[599] Together they lead to a situation where more and more individuals, irrespective of their connection to the crime chain, become simultaneously player and spectator in one of the most sensitive offences in the criminal arsenal: terrorism. Such measures also challenge the mere concept of proportionality, stretch the limits of prevention to border precaution[600] and impose a new model as to how the EU addresses threats pertaining to terrorism or serious crime. As legitimacy and adequacy are conditions that have been considered as fulfilled by the EU PNR scheme, what must be currently examined is whether the measure is necessary and whether 'a fair balance is struck between the demands of the general interest and the protection of the applicants' fundamental rights'.[601]

599 Papakonstatinou and De Hert (n 111) 885.

600 The shift towards precaution will be addressed at a later stage in this chapter, as well in the concluding chapter of the thesis. See in this sense the position of G González Fuster, P De Hert and S Gutwirth, 'Recommendation Report: Situating Privacy and Data Protection in a Moving European Security Continuum' (2011) INEX Work Package 2 <http://www.inexproject.eu/index.php?option=com_docman&task=doc_details&gid=58&&Itemid=72> accessed 10 September 2011, 7-8.

3.3.2.1 The necessity of an EU PNR system – an ill-defined exercise

3.3.2.1.1 A lack of sufficient evidence for an already contested logic

The rise of the threat deriving from terrorism and serious crime and the nexus with international travel were put forward by the Commission in the 2007 and, subsequently, in the 2011 IA as a key problem for European societies. The emphasis on terrorism is more prominent in the 2007 IA, while the 2011 IA first underlines 'the spread of cross-border crime', moving only afterwards to specific issues such as terrorism.[602] This is part of a trend mentioned before in this research and which is linked to the 'normalisation' of terrorism in the criminal arsenal.[603] At the same time, the 2011 IA as opposed to the 2007 IA provides under the heading 'Definition of the problem' a sub-heading of 'Threat of terrorism and serious crime'. Under this, diverse figures appear regarding criminal offences per population in the EU, 'costs of coercion from underpayment of wages resulting from trafficking in human beings', 'number of problem opium users in Europe' and 'the economic and social costs of crime against individuals and households 2003/04'.[604] While statistically interesting and indicating the importance of effectively fighting cross-border crime, it is unclear why such detailed and somewhat disconnected facts have been brought to the forefront in an IA supporting the introduction of an EU PNR system.[605] The use of

601 M H Maras, 'From Targeted to Mass Surveillance: is the EU Data Retention Directive a Necessary Measure or an Unjustified Threat to Privacy' in B J Goold and D Neyland (eds), *New Directions in Surveillance and Privacy* (Willan Publishing 2009) 87.

602 Commission, 'Impact Assessment: Accompanying document to the European Parliament and Council Directive on the use of Passenger Name Record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime' (Staff Working Paper) SEC (2011) 132, 8. See also Commission, 'Impact Assessment: Accompanying document to the Proposal for a Council Framework Decision on the use of Passenger Name Record (PNR) for law enforcement purposes' (Staff Working Document) SEC (2007) 1453.

603 Hempel, Carius and Ilten (n 501).

604 IA 2011 (n 602) 8.

605 See also EDPS, 'Opinion on the Proposal for a Directive of the European Parliament and of the Council on the use of Passenger Name Record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime of 25 March 2011' (2011) <http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2011/11-03-25_PNR_EN.pdf> accessed

PNR data in a law enforcement context is framed in the Commission's own words as a 'criminal intelligence tool' rather than an 'identity verification tool'. It is stated as having three main aims:

> -re-active […] in investigations, prosecutions, unravelling of networks after a crime has been committed,
> -real time […] prior to the arrival or departure of passengers in order to prevent a crime, watch or arrest persons before a crime has been committed or because a crime has been or is being committed. In such cases PNR data are especially useful for running such data against predetermined assessment criteria in order to identify persons who were previously 'unknown' to law enforcement authorities and for running the data against databases of persons and objects sought;
> -pro-actively […] for analysis and creation of assessment criteria, which can then be used for a pre-arrival and pre-departure assessment of passengers. [606]

Furthermore, it is acknowledged that, while PNR data have been used for 'customs and law enforcement [...] manually and only in relation to a limited number of flights' for a long period of time due to technological constraints, current technology allows 'the advance electronic transfer, analysis and (subsequent retention) of data.' [607] Before examining the evidence put forward in support of a PNR scheme, it is important to firstly consider the relationship between PNR data and advance passenger data as foreseen in Directive 2004/82/EC of 29 April 2004 on the obligation of air carriers to communicate passenger data (API Directive).[608] Article 3(1) of the Directive prescribed

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10 September 2011 [11]; also E Brouwer, 'Ignoring Dissent and Legality: The EU's Proposal to Share the Personal Information of All Passengers' (2011) CEPS Liberty and Security in Europe <http://www.ceps.eu/book/ignoring-dissent-and-legality-eu ' s-proposal-share-personal-information-all-passengers> accessed 10 September 2011.

606 IA 2011 (n 602) 11.

607 ibid.

608 [2004] OJ L 261/24.

> an obligation for carriers to transmit at the request of the authorities responsible for carrying out checks on persons at external borders, by the end of check-in, information concerning the passengers they will carry to an authorised border crossing point through which these persons will enter the territory of a Member State.

The specific data requested concerned 'number and type of travel document used, name, date of birth, nationality, border crossing point of entry into the territory of the Member States, code of transport, departure and arrival time of the transportation, total number of passengers carried on that transport, the initial point of embarkation' (Article 3(2)). In contrast, 'the information that can be extracted from the PNR data' (a total of nineteen pieces of information, as indicated in the Annex attached to the proposal [609]) 'mainly depends on the information that the passenger submits him/herself to the reservation system'[610] and can be used, unlike advanced passenger data, for checking against assessment criteria and creation of travel patterns. In addition, not only is there a difference between the types of data that are sent to national authorities, but also between the methods of data transmission. The API Directive requires that the information be sent 'by the end of check-in at the request of the authorities responsible for border checks' (Article 3) and must be deleted 'within 24 hours after transmission' except for a narrow exception (Article 6(1) third subparagraph). The Directive also *allows* that personal data referred to in Article 3(1) be used by Member States for law enforcement purposes but only 'in accordance with

609 (1) PNR record locator; (2) Date of reservation/issue of ticket; (3) Date(s) of intended travel; (4) Name (s); (5) Address and Contact information (telephone number, e-mail address); (6) All forms of payment information, including billing address; (7) All travel itinerary for specific PNR; (8) Frequent flyer information; (9) Travel agency /Travel agent; (10) Travel status of passenger including confirmations, check-in status, no show or go show information; (11) Split/Divided PNR information; (12) General remarks (including all available information on unaccompanied minors under 18 years, such as name and gender of the minor, age, language(s) spoken, name and contact details of guardian on departure and relationship to the minor, name and contact details of guardian on arrival and relationship to the minor, departure and arrival agent); (13) Ticketing field information, including ticket number, date of ticket issuance and one-way tickets, Automated Ticket Fare Quote fields; (14) Seat number and other seat information; (15) Code share information; (16) All baggage information; (17) Number and other names of travellers on PNR; (18) Any collected API information; (19) All historical changes to the PNR listed in numbers 1 to 18.

610 E Brouwer, 'The EU Passenger Name Record System and Human Rights: Transferring Passenger Data or Passenger Freedom?' (2009) CEPS Working Document No 320 <http://www.ceps.eu/book/eu-passenger-name-record-pnr-system-and-human-rights-transferring-passenger-data-or-passenger-f> accessed 10 September 2011, 3.

their national law and subject to data protection provisions under Directive 95/46/EC' (Article 6(1) fifth subparagraph). In contrast, the EU PNR proposal would *impose* on air carriers the obligation to send to PIU's all the PNR data, collected from every international flight entering or leaving the territory of a Member State, '24 to 48 hours before the scheduled time for flight departure' and 'immediately after flight closure' (Article 6(2)). The difference is thus considerable as regards the volume and content of the data transferred, the retention period and the objective for which data would or could be used.

Moreover, limited and contrasting results have been observed concerning the implementation of the Directive as regards the use of API data by authorities and their effectiveness,[611] thus leading WP 29 to conclude in 2006 that there was no need for additional legislation.[612] In the 2011 IA, the Commission is silent on the manner in which the Directive has been implemented and, more particularly, on its effectiveness as regards law enforcement purposes. While this is clearly a minus in the process of building up the IA and in substantiating thoroughly the necessity of a PNR scheme, one can also understand why limited attention is given to the API Directive. Despite the fact that it allows for the use of API data for law enforcement purposes, the Directive remains a 'border management tool […] used as an identity verification'. It is therefore unable to serve also as an 'intelligence tool', thus justifying the focus on the value of PNR data for fighting terrorism and serious crime.[613] In this sense, both

611 Brouwer (n 610) 12.

612 WP 29, 'Opinion 9/2006 on the Implementation of Directive 2004/82/EC of the Council on the obligation of carriers to communicate advance passenger data' (2006) 1613/06/EN, WP 127 <http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2006/wp127_en.pdf> accessed 10 September 2011; see also, Commission, 'Annex to the Communication from the Commission to the Council and the European Parliament: Report on the Implementation of The Hague programme for 2007: Follow-up of the implementation of the legal instruments in the field of justice, freedom and security at national level: 2007 Implementation Scoreboard : Table 2' (Staff Working Document) SEC (2008) 2048.

613 (n 602) 10.

the 2007 and the 2011 IAs develop the importance of real-time and proactive use of PNR data which relies on 'assessment criteria' in order to identify 'high risk passengers'. However, the same texts provide very limited, somewhat general and even confusing evidence supporting the use of privately collected and held data for law enforcement purposes. While the 2011 IA attempts to address the evidence gap criticised by various actors in 2007 (ie the EP,[614] as well as stakeholders such as the FRA,[615] the EDPS,[616] WP 29[617] and academics[618]), it fails to rise fully to the challenge.

Firstly, the 2011 IA following the 2007 one foregrounds, based on the experience of some Member States, to the role plaid by the analysis of travel routes or of the credit card information as resulting from the PNR in unveiling drug or human trafficking.[619] Secondly, the IA acknowledges in very general terms that the experience of third countries and Member States which have used PNR data indicates 'critical progress in the fight against crime, in particular, drugs, and human trafficking and the fight against terrorism'. In contrast, there is no specific mention in the IA about the experience gained by the EU through the PNR agreements concluded with the US, Canada and Australia. The European Policy Centre argued that this 'could be

614 EP resolution of 20 November 2008 on the proposal for a Council framework decision on the use of Passenger Name Record (PNR) for law enforcement purposes P6_TA(2008)561 [2010] OJ C 16 E/44.

615 European Union Agency for Fundamental Rights (FRA), 'Opinion on the proposal for a Council Framework Decision on the use of Passenger Name Record (PNR) for law enforcement purposes' (2008) <http://fra.europa.eu/fraWebsite/attachments/FRA-opinion-PassengerNR_EN.pdf> accessed 12 September 2011.

616 EDPS, 'Opinion on the draft Proposal for a Council Framework Decision on the use of Passenger Name Record (PNR) data for law enforcement purposes' [2008] OJ C 110/1.

617 Article 29 Data Protection Working Party and Working Party on Police and Justice, 'Joint opinion on the proposal for a Council Framework Decision on the use of Passenger Name Record (PNR) for law enforcement purposes, presented by the Commission on 6 November 2007' (2007) 02422/07/EN, WP 145 <http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2007/wp145_en.pdf> accessed 12 September 2011.

618 See *inter alia*: Brouwer 2009 (n 610); P De Hert and V Papakonstantinou, 'The EU PNR Framework Decision Proposal: Towards Completion of the PNR Processing Scene in Europe' (2010) 26 Computer Law & Security Review 386; Brouwer 2011 (n 605); F Boehm, 'EU PNR: European Flight Passengers Under General Suspicion – The Envisaged European Model of Analyzing Flight Passenger Data' in S Gutwirth and others (eds), *Computers, Privacy and Data Protection: an Element of Choice* (Springer 2011).

explained by the fact that this experience […] is insignificant' and referred to the 2010 report by the US Department of Homeland Security which indicated that 'PNR has been used in one criminal judicial proceeding.'[620] However, the same report indicates that, out of 216 'EU PNR sharing instances', 75% concerned terrorism-related cases, a statistic which supports the EU PNR proposal.[621] In this instance, it is questionable why there is no such reference in the Commission IA to these figures, nor to the US experience in general. This absence can be seen as an attempt 'to avoid any association with the US PNR initiative in order to reduce internal opposition in the EU'.[622] Furthermore, not only there is a lack of evidence provided, but some arguments can give rise to confusion, such as is the case of the use of PNR data by Belgium for seized drugs. The EDPS rightly indicates that in fact Belgium has not yet established a system similar to the one proposed by the Commission 'which could mean that PNR data may be useful in targeted cases'.[623]

At the same time, we must recognise that the IA is only one of the formats in which evidence of the use of PNR data is provided. Nevertheless, in light of the important consequences the proposal would entail, the IA should have indicated that additional and concrete information regarding the crucial role of PNR data in uncovering serious crime would be provided – on a *need to know* basis and

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619 (n 602) 12.

620 (n 602) 13; Schwenke M and Langner B, 'Passenger Name Record' Centrum für Europäische Politik (CEP) (2011) <http://www.cep.eu/fileadmin/user_upload/Kurzanalysen/Fluggastdaten/PB_Passenger_Name_Record_Data.pdf> accessed 12 September 2011.

621 Privacy Office U.S. Department of Homeland Security, 'Update to the 2008 Report concerning Passenger Name Record Information derived from Flights between the EU and the US' 5 February 2010 <http://www.dhs.gov/xlibrary/assets/privacy/privacy_pnr_review2010update_2010-02-05.pdf> accessed 12 September 2011, 7.

622 Pawlak (n 52) 6.

623 EDPS 2011 (n 605) [12]. See also the comments of Brouwer 2011 (n 605). The manner in which Belgium receives PNR data and, more generally, how PNR data are examined in the absence of an EU PNR scheme and their effectiveness for combating terrorism and serious crime are discussed in W Geluykens, 'The Effectiveness of the Exchange of Passenger Name Records (PNR) in Europe' Master's Degree Dissertation (2009-2010) University of Gent <http://lib.ugent.be/fulltxt/RUG01/001/458/490/RUG01-001458490_2011_0001_AC.pdf> accessed 12 September 2011.

acknowledging the *need to share* information – in the course of the legislative process.

In this setting, it is difficult to conceive of the IA as successful in thoroughly substantiating the necessity of setting up, at EU level, a PNR system.[624] Nevertheless and as briefly highlighted above, it must be accepted that the exercise of publicly providing very specific evidence on the use of PNR data for combating terrorism and serious crime must be balanced against the risks of undermining the effectiveness of the system. As Member States are being provided with concrete evidence on the value of PNR data, one possible way forward in addressing this problem could be to consider providing the same information to the EP relevant committee, as well as to the European and national Data Protection Authorities, mirroring the information and clearance granted to the Committees of the US Congress (eg: Homeland Security, Intelligence). The starting point could be the model of *in camera* meetings of the LIBE Committee, but enhanced in regard to the obligations of secrecy and confidentiality incumbent on those accessing classified information on the use of PNR data for terrorism and serious crime. In support of this approach which combines safeguarding of secrecy and transparency towards the legislator, one must recall the position of the House of Lords in its report on the EU PNR Framework Decision. While it observed that a UK Home Office representative was unable to provide, either publicly or on confidential basis, evidence that the UK experience has been helpful in combating terrorism, the same report noted that at a later stage the relevant committee

624 See also in this sense FRA, 'Opinion on the Proposal for a Directive on the use of Passenger Name Record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime (COM(2011) 32 final)' (2011) <http://fra.europa.eu/fraWebsite/attachments/FRA-PNR-Opinion-2011_EN.pdf> accessed 12 September 2011; European Economic and Social Committee, 'Opinion on the Proposal for a Directive of the European Parliament and of the Council on the use of Passenger Name Record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime COM(2011) 32 final – 2011/0023 (COD)' (2011) SOC 414; Brouwer (n 605); Council Document 8118/11, 'Position of the German delegation on the Directive'

was provided with evidence indicating that 'PNR data, when used in conjunction with data from other sources, can significantly assist in the identification of terrorists, whether before a planned attack or after such an attack'. [625]

It is not only that the evidence provided by the Commission must be reinforced in order to fall squarely into the necessity test, there is a lack of thorough justification as to the necessity for so many as nineteen PNR fields in light of the criticism that these fields have raised. This is especially important considering the fact that we are discussing data collected and stored by private actors – indirectly becoming security actors – which will receive a secondary use – to be analysed as a separate interference with the right to privacy – and that such data collection and analysis must obey a key principle of data protection, namely purpose limitation.[626] Furthermore, and in line with the assessment done by the FRA

> the author of measures restricting the right to respect for private life […] should clearly define the objective served by the collection and processing of personal data, and only then decide which of these personal data should be processed, and by what means. This method would ensure that proportionality is taken into account from the outset.[627]

Moreover, there should be a clarification as to the actual value of category 10 – *Travel status of passenger, including confirmations, check-in status, no show or go* – which

<http://www.statewatch.org/news/2011/apr/eu-pnr-german-position-8118-11.pdf> accessed 12 September 2011. Germany has even suggested a verification of the information provided in the explanatory memorandum 'because some of it is apparently incorrect'.

625 European Union Committee, *EU Passenger Name Record (PNR) Framework Decision* (HL 2007-2008, 106) [44], [49]. See also European Union Select Committee, *The United Kingdom Opt-in to the Passenger Name Record directive* (HL 2010-11, 113) which supports the setting up of an EU PNR scheme.

626 FRA (n 615) [18-19]; see also for the minimum safeguards to be foreseen in a law in the case of secret surveillance *Weber and Saravia v Germany* ECHR 2006-XI [95].

627 FRA (n 615) [18].

has been criticised by several stakeholders given that this type of information is available only upon check-in. [628]

The collection and subsequent transmission of PNR data for law enforcement purposes must also be read against the background of a strong case law stemming from both the ECtHR and the CJEU with respect to privacy and data protection rights. In this sense, the ECtHR, in *Marper v The United Kingdom*, has reiterated the jurisprudence according to which '[t]he mere storing of data relating to the private life of an individual amounts to an interference within the meaning of Article 8'.[629] The *Huber v Germany* case of the CJEU,[630] besides bringing forward the issue of discrimination, put the accent on 'the indirect effects of foreseeing secondary uses of information originally stored for other purposes' and on the 'use of any existing database or available data for the purpose of crime fighting'.[631]

It is also known that the Court 'tends to allow states a wide margin of appreciation' when the proclaimed aim of a measure is the combating of terrorism. However, the same Court has considered that '[t]he margin will tend to be narrower where the right at stake is crucial to the individual's effective enjoyment of intimate or key rights (see *Connors v. the United Kingdom*, no. 66746/01, § 82, 27 May 2004 […])' and has emphasised the need for having specific safeguards when data

628 Meijers Committee – Standing committee of experts on international immigration, refugee and criminal law, 'Note on the Directive on the use of PNR data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime (COM(2011)32)' (2011) <http://www.statewatch.org/news/2011/jul/maijers-cttee-eu-pnr-opinion.pdf> accessed 12 September 2011, 4.

629 (n 542) [67].

630 (n 542).

631 González Fuster G and others, '*Huber*, *Marper* and Others: Throwing New Light on the Shadows of Suspicion' (2010) CEPS <http://www.ceps.eu/book/huber-marper-and-others-throwing-new-light-shadows-suspicion> accessed 12 September 2011, 3.

undergoes automatic processing.[632] Additionally, the ECtHR has also indicated some clear minimum safeguards in respect to secret surveillance that should be provided in the respective law in order to ensure its foreseeability. These are type of offences covered, categories of people covered by the measure, clear rules for storing and processing of data, retention periods and deletion conditions, along with the existence of effective supervision mechanisms.[633] With respect to 'exploratory or general surveillance' – relevant to the EU PNR proposal – the Court has simply indicated in its *Klass and others v Germany* case that the German G10 Act did not allow such a form of surveillance but did not further elaborate on the issue.[634]

Unfortunately, neither the IA nor the explanatory memorandum tackle the rapid development of surveillance mechanisms or the important implications of relying on extensive risk-assessment criteria for the criminal justice system and for the rights and freedoms of individuals. While some might see such discussions as purely academic and without concrete bearing on the legislative process, this research argues that, in light of the impact of the EU PNR proposal, such reflection would have not only been welcome, but is actually a necessary condition in the construction of the proposal.[635] This would have allowed going into more depth than the classical impact on fundamental rights usually included in an IA, as the choice to be made by the legislators is not merely a legal and technical one but a 'society choice', as also

632 Opinion Advocate General Léger C-317/04 [230] n (180). *Marper* (n 542) [102] [103] 'The need for such safeguards is all the greater where the protection of personal data undergoing automatic processing is concerned, not least when such data are used for police purposes. The domestic law should notably ensure that such data are relevant and not excessive in relation to the purposes for which they are stored; and preserved in a form which permits identification of the data subjects for no longer than is required for the purpose for which those data are stored […]. The domestic law must also afford adequate guarantees that retained personal data was efficiently protected from misuse and abuse'.

633 *Weber and Saravia* (n 626) [95]; *Rotaru v Romania* ECHR 2000-V [59]; *Liberty and others v The United Kingdom* Application no 58234/00 (ECtHR, 1 July 2008) [61]-[63] and [68].

634 (1977) Series A no 28 [51]. See also P Breyer, 'Telecommunications Data Retention and Human Rights: The Compatibility of Blanket Traffic Data Retention with the ECHR' (2005) 11 ELJ 365, 368.

pointed out by De Vries, Bellanova and De Hert.[636] At the same time, one could argue that the EU has already made this 'society choice' by entering into PNR agreements with the US, Canada and Australia and that to some extent there is foreclosure on the matter. This argument has, however, limited legal mobility. By means of example, the EU, in order to upheld the data protection rules enshrined Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data, had to enter into negotiations with the US in view of an international agreement following the adoption by US Congress in November 2001 of the Aviation and Transportation Security Act. This act 'included, among many other things, a provision requiring all foreign air carriers flying into or over the United States to provide the Commissioner of Customs with specific passenger and crew manifest information'.[637] The opposite would have led to refusal of landing rights for all flights coming from the EU. It would appear that, in this situation, the EU has made a 'rational choice' in respect of PNR data rather than a 'society choice'.

Unfortunately, even in 2011, the Commission by the manner in which it has constructed the necessity argument for systematically using PNR data in a law enforcement context, has avoided the substantive debate surrounding this subject and confined itself to a legal and technical exercise. Furthermore, not only does the EU PNR proposal suffer from a formal logical fallacy, namely 'circular reasoning for the interference with privacy rights under Article 8 of the European Convention of

635 See also in this sense recommendation 2 of Fuster, De Hert and Gutwirth (n 600) 5. 'EU institutions must therefore imperatively assess the impact of security measures taking into account the full range of fundamental rights and legal principles that could be affected'.

636 K de Vries, R Bellanova and P De Hert, 'The German Constitutional Court Judgment on Data Retention: Proportionality Overrides Unlimited Surveillance (Doesn't It)?' (2011) <http://works.bepress.com/cgi/viewcontent.cgi?article=1052&context=serge_gutwirth> accessed 19 September 2011, Provisional conclusion (iv), 14.

637 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L 281/31. C Patton, 'No Man's Land: The EU–US Passenger Name Record Agreement and What It Means for the Union's Pillar Structure' (2008) 40 The George Washington International Law Review 527, 531.

Human Rights, and Articles 7 and 8 of the Charter on Fundamental Rights of the European Union', [638] but it also exhibits informal logical fallacies that could be reflected in the links between the figures on serious crime or the use of PNR data on a non-systematic basis and the creation of an EU PNR system. Additionally, one can question, in line with the EDPS, why the necessity of the EU PNR system is not to be assessed after the 'results of the current work on the European Information Exchange Model expected for 2012', which would provide a clearer picture with respect to the efforts undertaken by the EU in this field.[639]

The above comments suggest that the necessity of systematically using PNR data for terrorism and serious crime has not been sufficiently developed or supported by conclusive evidence in the 2011 IA and the Explanatory Memorandum. However, it is also argued that this situation can be addressed by a thorough discussion at the start of the legislative process.[640] It remains to be seen whether, as part of the necessity appraisal, the EU PNR scheme was the least restrictive measure the Commission could have put forward.

3.3.2.1.2 Other less restrictive measures – When five are in fact two

In order to examine less restrictive measures, the research looks at the policy options available in order to address the mounting threat coming from terrorism and serious crime combined with international travel as put forward in the 2011 IA. The latter

638 WP 29, 'Opinion 10/2011 on the proposal for a Directive of the European Parliament and of the Council on the use of passenger name record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime' (2011) 00664/11/EN, WP 181 <http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2011/wp181_en.pdf> accessed 12 September 2011, 3.

639 EDPS 2011 (n 605) [24].

640 See also the Presidency position on the need for 'statistics and raw data before any message is passed on to the Parliament.' Council Document 12373/11, 'Discussion paper on the way forward - Proposal for a Directive of the European Parliament and of the Council on the use of Passenger Name Record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime'.

devises five such options. However, on closer examination we can account for only two main options being considered: (1) no EU action (*status quo*) or (2) introducing a legislative proposal for the use of passenger data for law enforcement purposes.[641] This latter option has several sub-themes: (i) access to data 'for prevention, detection, investigation and prosecution of terrorist offences and serious crime', or the above scope combined with other policy objectives; (ii) 'decentralised collection and processing of data by the Member States' as opposed to 'centralised collection and processing of data at EU level'; and (iii) collection of data only for air travel or travel by sea, rail and air.[642]

Under the *status quo*, no EU action would be taken as regards an EU PNR. The 2011 IA accounts for only six EU Member States in which a PNR system is already functioning (the UK) or specific legislation has been enacted or tests are being undertaken (Belgium, Denmark, France, Sweden and the Netherlands). These countries have different rules as regards the scope, collection and processing of PNR data, their retention period or the obligation imposed on air carriers. From this situation, the 2011 IA infers that, while national PNR systems can enhance the security of those specific Member States, they can hamper the rights of passengers due to diverging data protection standards,[643] endanger legal certainty, and lead to different and onerous obligations on air carriers. One could argue, however, that while the *status quo* is a less restrictive measure compared with the setting up of an EU PNR, it risks hindering the objective of human rights protection of the CT fight within

641 The option of encouraging cooperation between Member States in the format of good practices has, due to its limited effectiveness, been discarded from further analysis in the corpus of the IA (n 602) 22. This option, while certainly the less restrictive measure, cannot support effectively the fulfilment of the two main objectives of the EU fight against terrorism, which are protection of human rights and the delivery of security. They could be envisaged as a complement to other measures but not as a standalone solution.

642 IA 2011 (n 602) 20-22.

643 ibid 27.

the EU without allowing for enhanced security for the EU as a whole. The reasoning is defendable, but it must be borne in mind that the necessity of the scheme itself has not been fully proven. Moreover, while the risks of different data protection standards are present, leading to different degrees of protection, the Commission does not provide clear indications on which Member States among the twenty-one remaining intend to establish a PNR system.[644] A case in point is that, four years after the first EU PNR proposal, the 2011 IA accounts for only three other Member States which 'have either enacted relevant legislation and/or are currently testing using PNR data'[645] (Belgium, Sweden, and the Netherlands in addition to the UK, France, and Denmark).

With respect to the first sub-theme of the EU PNR proposal dealing with the scope of the proposal (also dealt with in the section on the balance of rights and interests), it is unclear why the Commission has even mentioned the option of collecting and analysing PNR data for purposes other than terrorism and serious crime, such as aviation security, immigration or health and safety, when the identified problem focuses only on terrorism and serious crime. Furthermore, such a broad scope goes against the principle of purpose limitation and cannot be considered as proportionate when other less intrusive measures are available for addressing the above-mentioned objectives. The insertion of such a sub-option in the IA displaces attention from questioning, for example, the proportionality of collecting PNR data only for terrorism and serious transnational crime purposes as opposed to terrorism and serious crime, as well as undermining consistency with the purpose limitation

644 See also the EDPS 2011 view on this point (n 605) [21].

645 IA 2011 (n 602) 14.

principle.[646] In the same vein, extending the collection of PNR data to sea and rail carriers in addition to air carriers, while potentially beneficial for the security of the EU, raises even greater concerns as regards the interference with the right to privacy and protection of personal data of passengers. This interference is perceived as clearly disproportionate, as imposing onerous costs on non-air carriers and, more generally, as symptomatic of the advancement of a 'surveillance society'. At the same time, this clearly disproportionate character helps in perceiving the proposed EU PNR scheme as proportionate by comparison.

In the end, the Commission had to choose between a decentralised model for an EU PNR as opposed to a centralised one. Despite the risks of elaborating different assessment criteria for passengers and the higher costs incurred by such an option, the Commission defended the choice for a decentralised model, arguing that Member States

> would be more willing to use […] sensitive information under the auspices of their own national systems than with an EU Centralised Unit, thus rendering the processing of PNR data much more effective and contributing to increasing security in the EU quite substantially.[647]

Bearing in mind the reluctance of the national authorities to exchange information in relation to Council Framework Decision 2006/960/JHA, this approach can be considered a justified one. Additionally, the creation of a centralised database runs the risk of 'increasing the system's potential for errors and misuse'.[648] Nevertheless, in relation to protection of personal data, the 2011 IA acknowledged that an EU Centralised Unit 'might be in a better position to ensure that the data is transmitted

646 See also Cases C-92/09 and C-93/09 *Volker und Markus Schecke GbR and Hartmut Eifert v Land Hessen* [2011] OJ C 13/6.

647 IA 2011 (n 602) 28-29.

648 See position German delegation (n 624).

and used within the uniform safeguards and redress mechanisms for the data subjects' and 'would also ensure that exactly the same rules apply to all passengers'.

Unfortunately, the Commission discarded this option somewhat rapidly, indicating that 'such extensive processing […] would be very cumbersome and outweigh the other advantages of having an EU Centralised Unit'.[649] In contrast, under the decentralised system it is indicated that 'it would be clear which Member State will be responsible for implementing the passenger's data protection rights and the passenger would know where to seek redress in the event of any violation of such rights.'[650] Moreover, the creation of an EU Centralised Unit brings into focus concerns such as interoperability and mission creep, the difficulty of establishing assessment criteria that would cover twenty-seven Member States – an aspect which should also raise concerns as to the difficulty of doing an EU assessment of the threat – and risks generating 'trust issues' in relation to the authorities of the Member States. In such a setting, the choice of a decentralised system, albeit with in-built deficiencies pertaining to the development of assessment criteria and to the national laws implementing the FDDP, can be considered as a justified one.

It follows that, from the different options proposed by the Commission, the solution of a decentralised EU PNR system applicable to air travel only for the purpose of preventing, detecting, investigating and prosecuting terrorist offences and other serious crime appears to be *the less* restrictive one, while ensuring that the effectiveness of the fight against terrorism is not compromised. However, this

649 IA 2011 (n 602) 31.

650 IA 2011 (n 602) 29.

measure cannot be considered *the least* restrictive one when examined against a narrower scope in respect of the offences.

In addition, when examining the scores allocated by the 2007 and the 2011 IAs to the preferred option in terms of impact on privacy/data protection it can be observed that the measure was considered as producing a medium positive impact on privacy (++) in 2007,[651] while in 2011 the same measure is judged as having a medium negative impact on data protection (--).[652] It is striking that the justifications in support of the preferred option as regards observance of privacy and data protection are very similar in the two IAs. Why did the Commission shift its ranking between 2007 and 2011? Unfortunately, the Commission has not provided the details needed to answer such a question, and nor has it given a more substantiated argumentation of the need to set up an EU PNR system when the only positive impacts registered have been for 'increased security in the EU' and 'encouragement of a global approach'. Looking at the summary table of the impacts of the policy options considered by the Commission and with particular interest at those areas currently forming the EU PNR proposal, one could schematically conclude that the balance between rights and interests clearly inclines towards the side of the general interest represented by the security of the EU. The following paragraphs will explore whether this first superficial assessment holds true for the entire PNR proposal and what the consequences are for the respecting of the security and human rights protection imperatives of the CT fight.

651 IA 2007 (n 602) 27.

652 IA 2011 (n 602) 37.

However, it should be restated that the balancing act will, however, be tainted by an inconclusive assessment as regards the necessity of the EU PNR scheme. This is due to several factors: errors of legal argumentation, lack of sufficient, appropriate and concrete evidence in support of the scheme, confusion as regards the available options (perhaps intentional) and, finally, insufficient grounding of the logic of collecting and analysing PNR data for law enforcement purposes. Indeed, the latter is simply described and not thoroughly justified, as the necessity test would require considering the impact of such a system upon individuals' privacy and protection of personal data. Therefore, the necessity of the EU PNR mechanism has only been formally, partially and inconsistently substantiated by the Commission and thus should be perceived as one of the characteristics of what this thesis has termed 'grey laws'.

3.3.2.2 The balance of rights and interests – a difficult interplay

The 2011 EU PNR proposal challenges the right to privacy as enshrined in Articles 8 ECHR and 7 EUCFR, the right to protection of personal data as foreseen in Article 8 EUCFR and 16 TFEU and the right to non-discrimination as laid down in Article 21 EUCFR. It also raises questions with respect to the freedom of movement of persons as provided for in Article 21(1) TFEU and in Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (Directive 2004/38/EC).[653] In order to analyse the balance in the current proposal, the thesis will focus on a series of elements that can be divided as follows: issues pertaining to the scope of the proposal (*ratione materiae*); aspects

653 [2004] OJ L 158/77.

related to the retention period (*ratione temporis*) and matters concerning the geographical coverage of the proposal (*ratione loci*). In contrast, the provisions on information exchange and data protection, while certainly important for examining the rights–interests balance within the proportionality principle, will instead be examined under the heading of legal certainty. In the current section, it is only important to emphasise that efforts have been made by the Commission in order to strike a better balance between data protection and privacy rights and security interests.

3.3.2.2.1 Ratione materiae

The scope of the PNR proposal will be addressed from two angles: firstly, from the perspective of the offences covered by the proposal and, secondly, from the perspective of the processing of PNR data. In this sense, the 2011 proposal brings some welcome clarifications compared with the 2007 text, although it too does not address fully the requirement of proportionality.

As regards offences, the PNR data will be used only for the prevention, detection, investigation and prosecution of terrorist offences, serious crime and serious transnational crime (Article 1(2) and Article 2(g), (h) and (i)). In contrast, the 2007 proposal referred to terrorism and organised crime. While the delimitation of offences is, *prima facie*, somewhat narrow, the actual coverage of the offences envisaged by the proposal is important. One must recall the case made in the second chapter on the breadth of EU terrorist offences, especially in light of the 2008 amendment of the 2002 Framework Decision on combating terrorism, which introduced the offence of 'public provocation to commit terrorist offences'.

Additionally, when defining 'serious crime', the proposal refers to the offences listed in Article 2(2) of the Framework Decision on the EAW 'if they are punishable by a custodial sentence or a detention order for a maximum period of at least three years under the national law of the Member State' (Article 2(h)). It furthermore indicates that 'Member States may exclude those minor offences for which, taking into account their respective criminal justice system, the processing of PNR data pursuant to this directive would not be in line with the principle of proportionality'. While this clarification is welcomed and mindful of the specificities of the different legal systems of the twenty-seven Member States, this same liberty undermines to some extent the objective of harmonisation pursued by the Directive and leads to uncertainty as to what will actually be covered under the heading 'serious crime'.[654] At the same time, the terminology ('minor offences') used by the EU PNR proposal is open to criticism. Of the thirty-two offences listed in Article 2(2) of the EAW Framework Decision, a considerable number – irrespective of their scope under national law – can hardly be satisfactorily termed 'minor' (eg: terrorism, rape, sexual exploitation of children, racism and xenophobia). It follows then that, from a purpose limitation angle as well as from a legal certainty perspective, it would be worth considering a limitation and an identification of the specific offences falling under the scope of the proposal.[655] This is even more important when considering that the necessity of an EU PNR scheme has not been sufficiently substantiated.[656]

654 See in this sense Brouwer (n 605) 2.

655 See also in this sense the position of the EDPS (n 605) [27]. A cross-checking between the Member States as to what they would qualify as 'minor offences' from the list included in Article 2(2) of the Framework Decision on the EAW in respect of the EU PNR scheme would allow a narrowing down from the outset of the scope of the EU instrument. See also Boehm (n 618) 182.

656 FRA 2011 (n 624) 16. It must also be observed that in the Commission Report 'On the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States' it has been indicated that 'there is general agreement among Member States that a proportionality check is necessary to prevent EAWs from being issued for offences which,

However, if the provisions on offences of the Commission 2011 EU PNR proposal remain unchanged through the legislative process, Member States will be called to make a further balancing act in respected of the offences falling within the range of the EU PNR proposal with a view to safeguarding proportionality. Moreover, an additional balancing exercise will be required if Member States decide to set up national PNR schemes with different formats to the one proposed by the Commission. In this sense, recital 28 of the EU PNR proposal accommodates the possibility of national schemes

> of collection and handling of PNR data for purposes other than those specified in the Directive, from transportation providers other than those specified in the Directive, regarding internal flights subject to compliance with relevant data protection provisions, provided that such domestic law respects Union *acquis*.

This situation calls into question the actual harmonisation effect of the Directive[657] and raises questions pertaining to the respect of the principle of purpose limitation in these national settings as well as regarding the extent of the control that an individual can still have over his personal data.

Moving on to the issue of the processing of PNR data, it must be underlined that the 2011 proposal benefits from clearer and more structured rules compared with the 2007 proposal, although they are more limited. However, and as emphasised earlier, the processing of PNR data (especially in respect of checks against pre-determined assessment criteria) raises the question of profiling – developed below – and the compliance of such practice with the rights to privacy, protection of personal data and non-discrimination.

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although they fall within the scope of Article 2(1)[...] of the Council Framework Decision on the EAW, are not serious enough to justify the measures and cooperation which the execution of an EAW requires.' COM (2011) 0175 final, 7.

As regards the method of pushing data, the 2011 proposal retains only the 'push method' as opposed to the 2007 one which provided for a combination of 'push' and 'pull' methods. This is to be welcomed as it is more consistent with data protection requirements. It allows air carriers to have control over the data they collect and it eliminates potential concerns about the role of public authorities in filtering the data and thus voiding of meaning the control exercised by air carriers.[658]

With respect to the processing of PNR data, a division is operated as regards the offences covered by the Directive. Therefore, only as regards terrorist offences, the assessment of passengers before their scheduled arrival or departure can be done in two ways: (a) by processing PNR data against pre-determined criteria and (b) by comparing 'PNR data against relevant databases, including international or national databases or national mirrors of Union databases, where they are established on the basis of Union law, on persons or objects sought under alert […].'[659] On a descending scale, the assessment prior to arrival or departure with respect to serious transnational crime is undertaken in respect of pre-determined criteria, while for serious crime only the databases mentioned above can be consulted. This architecture reflects the concern of fine-tuning the gravity of the offence in line with the level of intrusion into an individual's personal data and privacy. This is welcome from a purpose limitation perspective.

Concerning the issue of the databases to be checked, it must be emphasised that the indication pertaining to 'persons or objects sought under alert' can already point towards the type of databases which are to be the object of the search – such as

657 See also Geluykens (n 623) 31-32; EDPS (n 605) 10.

658 IA 2011 (n 602) 24.

the Schengen Information System, for example. Nevertheless, in the interest of a fair balance between the rights to privacy and protection of personal data and security interests, as well as with a view of enhancing the legal certainty of the text, we must consider whether the text of the Directive should not reiterate the purpose limitation principle in connection with these databases, specify exactly what EU databases are envisaged and, for the national databases, introduce a requirement that they be communicated to the Commission on a model similar to that of Article 5 dealing with the list of competent authorities.[660]

In view of the interference with the right to privacy that the above PNR data processing entails, the 2011 text prescribes specific safeguards and clarifies that in respect of the two forms of assessment – in relation to pre-determined criteria and databases – 'any positive match resulting from […] automated processing must be reviewed individually by non-automated means.' Furthermore, the transfer to the competent authorities of the Member States of 'PNR data or the results of the processing of PNR data of the persons identified' following the two mentioned assessments 'for further examination' will only take place on an individual basis (Article 4(4)), provision which further ensures proportionality *stricto sensu*. Additionally, 'the risk of direct discrimination and discriminatory profiling' present in the 2007 proposal is eliminated by several provisions.[661] In relation to Article 4(2)(a) - assessment against pre-determined criteria- it is indicated that this should be done in a non-discriminatory manner and 'shall in no circumstances be based on a person's race or ethnic origin religious or philosophical belief, political opinion, trade union

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659 Article 4(2)(b).

660 See in this sense the suggestions of the WP 29 (n 638) 5; see also EDPS (n 605) [18].

661 FRA 2011 (n 624) 7.

membership, health or sexual life' (Article 4(3)). This aspect is reiterated by Article 11(3) which indicates that processing of such data shall be prohibited and if received by PIUs they should be 'deleted immediately'.[662] This can be considered a positive step in the PNR scheme especially taking into consideration that Article 6 of the FDDP allows such processing 'when this is strictly necessary and when the national law provides adequate safeguards.' Additionally, the competent authorities entitled to request or receive PNR data or the result of the processing of PNR data are not allowed to 'take any decision that produces an adverse legal effect on a person or significantly affects him only by reason of the automated processing of PNR data' (Article 5(6)).[663] Moreover, the special categories of data[664] mentioned above (sensitive data) are excluded from the scope of the decisions taken by the competent authorities (Article 5(6)), aspect which can be considered an important and additional safeguard in terms of data protection. At the same time, a more compliant data protection course of action could be taken in two other areas. The first concerns the deletion of 'sensitive data' if received by PIUs foreseen in Article 11(3) and mentioned above. While such deletion is an essential safeguard, it should be preferred – in line with stakeholders such as the WP 29 – that a clear provision on the fact that 'the filtering process should be done by the carrier before data is pushed to the receiving authority' be foreseen.[665] Secondly, in light of the breadth of category 12 –

662 The 2007 Commission proposal had only a general statement indicating that '[n]o enforcement action shall be taken by the Passenger Information Units and the competent authorities of the Member States only by reason of the automated processing of PNR data or by reason of a person's raceor ethnic origin, religious or philosophical belief, political opinion or sexual orientation' – Article 3(3) (n 2).

663 See on this point and more particularly on what is understood by the term 'decision' L Bygrave, 'Minding the Machine: Art 15 of the EC Data Protection Directive and Automated Profiling (2000) 40 PLPR <http://www.austlii.edu.au/au/journals/PLPR/2000/40.html> accessed 12 September 2011. See also the wording of Article 7 of the FDDP 'A decision which produces an adverse legal effect for the data subject or significantly affects him and which is based solely on automated processing of data intended to evaluate certain personal aspects relating to the data subject shall be permitted only if authorised by a law which also lays down measures to safeguard the data subject's legitimate interests'.

664 According to the qualification of the FDDP in Article 6.

665 WP 29 2011 (n 638) 7.

general remarks – consideration could be given to either deleting it or exhaustively prescribing its constitutive elements.[666]

Finally, with respect to the scope of sensitive data excluded from processing by PIUs and the suggestion to extend the list of discrimination grounds[667] in order to coincide with those foreseen by Article 21 EUCFR, this would be a welcome step. It would strengthen the protection of the individual when confronted with an extensive collection and analysis of data and is a practical example of how draft legislation adheres to the requirements of the Charter, in line with the Commission position on the review of the data protection framework.[668] Moreover, the exclusion of processing 'sensitive data' is also welcome, especially when considering the questionable effects of profiling programmes based on racial, ethnic or religious indicators on an individual's rights, especially the right of non-discrimination.[669]

However, the issue of profiling briefly touched upon in the 2011 IA accompanying the proposal and the subject of several comments from stakeholders especially in relation to the 2007 proposal[670] is at the core of the EU PNR proposal. One of the definitions of profiling as provided by the UN Special Rapporteur is as follows:

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666 EDPS (n 605) [47]; WP 29 (n 638) 7.

667 FRA (n 624) [3.2].

668 COM (2010) 609 final (n 554) [2.1.6].

669 See also in this sense the comments of the Special Rapporteur who underlined that 'profiling based on stereotypical assumptions that persons of a certain "race", national or ethnic origin or religion are particularly likely to commit crime may lead to practices that are incompatible with the principle of non-discrimination.' [39] UNGA, 'Implementation of the General Assembly Resolution 60/251 of 15 March 2006 entitled 'Human Rights Council: Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin' (2007) UN Doc A/HRC/4/26.

670 On profiling techniques with a focus on Europe see L Bygrave (n 663); M Hildebrandt and S Gutwirth (eds), *Profiling the European Citizen: Cross-disciplinary Perspectives* (Springer 2008); G González Fuster, S Gutwirth and E Ellyne, 'Profiling in the European Union: A High-risk Practice' (2010) INEX Policy Brief No 10 CEPS <http://www.ceps.eu/book/profiling-european-union-high-risk-practice> accessed 12 September 2011; S Gutwirth, Y Poullet and P De Hert, *Data Protection in a Profiled World* (Springer Science 2010).

> the systematic association of sets of physical, behavioural or psychological characteristics with particular offences and their use as a basis for making law-enforcement decisions. Profiles can be either descriptive, i.e. designed to identify those likely to have committed a particular criminal act and thus reflecting the evidence the investigators have gathered concerning this act; or they may be predictive, i.e. designed to identify those who may be involved in some future, or as-yet-undiscovered, crime.[671]

Considering the importance of automated processing of data in the EU PNR instrument, one might question why the Commission did not seize the opportunity raised by the current procedure to have a thorough discussion on the concept of 'profiling' and about the possible impacts of such an extended practice on individual's rights, especially the rights to privacy and data protection. Moreover, it would have also been interesting to explore how this intelligence-led model system fits with the current criminal justice systems of the twenty-seven Member States. Instead, the IA and the Explanatory Statement approached the question relying on Article 15 of the Data Protection Directive and Article 7 of the FDDP, which allow automated decision-making provided that it is 'authorised by a law which also lays down measures to safeguard the data subject's legitimate interests'. *Prima facie* such a balancing act could be considered as respecting security interests while respecting privacy and data protection rights. However, beyond the technicalities of the legal construction of the EU PNR scheme one must not forget an essential aspect of the proposal: in the name of security, data concerning all individuals boarding an international flight will be checked against pre-determined criteria and databases. The secondary screening that an individual might undergo can therefore be the result of PNR data analysis but this must be read in conjunction with Article 4(2)(a) and (b) and Article 5(6), which require individual reviewing by non-automated means.

671 (n 669) [33].

Despite safeguards, several risks are present when automated processing is involved. Firstly, it is key to acknowledge that

> through profiling practices, a series of features or conducts, which by themselves are fully legitimate and fall with the area of an individual's freedom, are transformed into signs pertaining to a pre-defined mistrusted category. Thus, forms of behaviour that are per se not only innocent, but constitutionally protected, are obliquely transformed into indications of criminal activity, or at least undesirability.[672]

Moreover, Goold warned about the place of 'categorical identities' which 'provide the basis for assessments of risk and pre-emptive measures aimed at increasing security'[673] as, 'taken to an extreme, [they have] the potential to undermine the way in which ordinary individuals understand themselves'.[674] This possible effect for the construction of the self must be read in conjunction with an inherent problem in profiling techniques, which is unlikely to be completely addressed: transparency.[675] This prompted Solove to argue that precisely this 'lack of transparency [...] makes it nearly impossible to balance the liberty and security interests'.[676] This setting is also conducive to the building up of a 'pre-determined privacy', where the mere essence of the right might be affected. This last assessment is especially valid when considering different mechanisms of information collection and exchange taken together and applying simultaneously to the same individual: the Data Retention Directive, the PNR agreements and the future EU PNR Directive, to give just some examples. Moreover, as the data retention period also has an impact on the processing of PNR data, a series of comments in connection with an individual's right to privacy and data protection will be done only after examining this point. It must also be emphasised

672 Fuster, Gutwirth and Ellyne (n 670) 8.

673 Goold (n 159) 54.

674 ibid .

675 Fuster, Gutwirth and Ellyne (n 670) 5 also drawing on P De Hert and S Gutwirth, 'Privacy, Data Protection and Law Enforcement: Opacity of the Individuals and Transparency of Power' in E Claes, A Duff and S Gutwirth (eds), *Privacy and the Criminal Law* (Intersentia 2006) 61 onwards.

that the establishment of pre-determined assessment criteria will also be examined under the legal certainty section.

676 D Solove, 'Data Mining and the Security-Liberty Debate' (2008) 74 The University of Chicago Law Review 343, 361.

3.3.2.2.2 Ratione temporis

Examined against the thirteen years retention period (five in an active database and eight in a dormant state) proposed by the 2007 EU PNR proposal (Article 9), the 2011 text is a clear improvement. It undoubtedly strikes a better balance between security interests and data protection and privacy rights. However, this positive assessment by comparison does not equate with the acknowledgement that the balancing act as regards data retention in the 2011 EU PNR proposal is not disproportionate. This appraisal must be informed by several factors and preceded by a brief presentation of the 2011 retention period setting. According to Article 9 of the 2011 EU PNR proposal, PNR data will be kept for thirty days 'after their transfer to the PIU of the first Member State on whose territory the international flight is landing or departing.' After this period, the data will be retained for an additional period of five years during which all data allowing the identification of the passenger to whom PNR data refer will be 'masked out'. These retention periods must be examined against three elements: (a) current data-retention periods proposed in EU instruments with relevance for the field in question; (b) possible thresholds and positions of national and European courts; and (c) the specificity of the PNR scheme and the limits of comparison with other instruments assessed against the EU data protection and privacy principles.

(a) With respect to the issue of the data-retention timelines present in other EU mechanisms one must mention the Data Retention Directive, which prescribes a period from six months to two years for retaining telecommunications data (Article 6), as well as the API Directive, which requires deletion of data after 24 hours (Article 6(1) third subparagraph). Additionally, the 2008 Australia PNR agreement prescribed

a retention period 'for no more than three-and-a-half years after the date of receipt of the PNR data by Customs, after which time the data may be archived for two further years'.[677] The Canada PNR agreement imposed a period of three years and a half for a person not subject to an investigation in Canada with gradual depersonalisation, while the US PNR Agreement enshrined a fifteen years retention period (out of which seven in an 'active analytical database' and eight in a dormant database).[678] The agreement initialled on 17 November 2011 between the EU and the US maintains a fifteen years retention period only for terrorism and ten years for serious transnational crime. Data are to be de-personalised after six months of reception and included in a dormant database after the first five years.[679] Finally, the text of the new agreement with Australia prescribes a retention period of five and a half years.[680] In contrast, in 2004 the Australian scheme 'appl[ied] a general policy of non retention' of PNR data with only a very limited percentage of PNR data being 'temporarily retained, but not stored'.[681]

(b) As regards the position of national and European courts, one must refer to the position taken by several Constitutional Courts in respect to the Data Retention Directive as well as to the *Marper* ruling of the ECtHR on indefinite retention of DNA data by the UK of persons arrested but not convicted. The German Constitutional Court, in its judgement on the German law implementing the Data

677 (n 49), Annex Point 12.

678 (n 48) and Commission Decision of 6 September 2005 on the adequate protection of personal data contained in the Passenger Name Record of air passengers transferred to the Canada Border Services Agency (2006/253/EC) [2006] OJ L 91/49 Annex Point 8 onwards; (n 47) US Letter to the EU, point VII.

679 Commission, Press Release (n 540).

680 Council Document 10093/11, 'Agreement between the European Union and Australia on the processing and transfer of Passenger Name Record (PNR) data by air carriers to the Australian Customs and Border Protection Service' art 16.

681 WP 29, 'Opinion 1/2004 on the level of protection ensured in Australia for the transmission of Passenger Name Record data from airlines' (2004) 10031/03/EN, WP 85 <http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2004/wp85_en.pdf> accessed 13 September 2011, 6; EDPS (n 605) [15].

Retention Directive, considered the retention of the telecommunications data of innocent persons for six months to be a maximum and not a minimum, while the Romanian Constitutional Court has taken a step further. It considered that

> the continuous retention of personal data transforms though the exception from the principle of effective protection of privacy right and freedom of expression, into an absolute rule. The right appears as being regulated in a negative manner, its positive role losing its prevailing role'.[682]

Apart from the emphasis on protecting rights which are 'effective […], not illusory ones',[683] the Romanian court has also questioned the impact of the obligation on the construction of the presumption of innocence and warned against the transformation of 'users of electronic communication services or public communication networks into people susceptible of committing terrorism crimes or other serious crimes.[684] The Czech Constitutional Court has held similar views on the implementation of the Data Retention Directive, questioning in an *obicter dictum* the mere necessity and adequacy of an 'instrument of global and preventive retention of location and traffic data on almost all electronic communications […] from the perspective of the intensity of the intervention to the private sphere of an indefinite number of participants to electronic communications.'[685] Finally, the *Marper* ruling has clearly held that the indefinite retention of the data of persons arrested but finally not convicted did not respect a fair balance between rights and interests.[686]

682 (n 543); See also de Vries, Bellanova and De Hert (n 636).

683 *Moreno Gómez v Spain* ECHR 2004-X [61].

684 (n 543).

685 ibid.

686 (n 542).

(c) Against the factual data and the legal reasoning presented above, the thirty days and, more particularly, the five-year period proposed by the Commission are open to criticism at least for failure to substantiate thoroughly these very precise thresholds, especially bearing in mind the criticism the proposal faced in 2007 as regards the retention period. It could even be argued in view of the case law referred to above that a retention period of five years – even if combined with safeguards such as the 'masking out' – for the data of all individuals on an international flight entering or exiting the EU raises important questions with respect to a fair balance between rights and interests. It would even seem that the IA has intentionally left a 'legal silence' around the justification of the retention periods. This is even more striking when looking at the retention period and the different layers of protection enshrined in the PNR Agreement cited above. As regards the five years, while certainly an important departure from internal standards such as those of the API and the Data Retention Directives, it has similarities with the retention periods proposed in the concluded or envisaged PNR agreements the EU has with third countries. Moreover, there is an essential difference between the logic of retention expressed in the API or the Data Retention Directive and the PNR schemes. The latter is an intelligence tool where the establishment of behavioural patterns, travels trends and patterns in serious transnational crime and terrorism plays an important role and requires an analysis covering a certain length of time. While it can be assumed that, based on the experience of the intelligence community, the five-year period has been judged as sufficient for effectively combating terrorism and serious crime, the Commission does not provide any conclusive evidence in support of this time frame, nor does it engage sufficiently in demonstrating that such a period respects the EUCFR requirements and could stand the test in the EU court or in national courts, especially in light of the

jurisprudence cited above. Geluykens indicated with reference to the 2007 EU PNR proposal that 'the data should not be kept longer than a year in an active database' and that, '[c]oncerning the sleeping database, practice has proven that a period between two and four years is already sufficient'.[687] This is an additional indicator that the five years proposed by the Commission is in need of additional evidence supporting it or in need of revision.

Conditions are also put in place in order to allow – during the five-year period – only a limited number of PIU staff to access this data with a view to 'carrying out analysis of PNR data and develop[ing] assessment criteria' (Article 9(2)). However, access to the full PNR data – during a period where they should remain, as a rule, masked out and used for 'general intelligence purposes'[688] – will be permitted only to the Head of the PIU under a series of cumulative conditions and on a case-by-case basis. Access to all non-masked PNR data will be allowed only in connection with the prevention, detection, investigation and prosecution of a terrorist offence or serious crime. This possibility is further circumscribed by the requirement of 'carrying out an investigation' combined with a 'specific and actual threat or risk' or a 'specific investigation or prosecution'. These conditions can be perceived as a balancing effort in order to preserve the privacy of individuals while pursuing a security goal. However, a series of caveats must be acknowledged in relation to the five-year retention period.

Firstly, the fact that the Head of PIU can have full access to PNR data indicates that, despite the masking out of data, the data 'remain identifiable' as

687 Geluykens (n 623) 42.

688 EDPS (n 605) [45].

underlined by the EDPS.[689] Moreover, the Commission's indirect equivalence of 'anonymisation' and 'masking out' is misleading (Article 9(2)), as 'masking out is an attempt at data minimisation and access control, which are important data protection principles' (as underlined by the WP 29), but it cannot be equated with 'anonymisation'.[690] Secondly, the thirty days and five years are likely to be 'multiplied' in the case of frequent travellers of international flights entering or exiting the EU, leading also to a multiplication of the personal data concerning the same individual being held by the PIUs or competent authorities of the different Member States and checked for terrorism or serious crime purposes. In this setting it is very difficult to argue that an individual still holds effective control over his data or that he can adequately protect and develop particular 'visions of the self'.[691] Thus in these instances [and having in view the concept of 'continuous offences'], it could be argued that privacy would be under a continuous attack to the point where the essence of the right could be impaired.

Additionally, the EU PNR proposal also envisages cases where the five-year limit can be circumvented. This is the case when specific PNR data transferred to competent authorities are being used in a specific criminal investigation or prosecution. In this context, the Member State whose authority is retaining the data is the one regulating the retention period in accordance with its national law (Article 9(3)).

Considering that the EU PNR scheme can be seen as a 'surveillance mechanism' which must be examined as an interference with the right to privacy and

689 EDPS (n 605) [44].

690 WP 29 (n 638) 6.

taking into consideration the possibility of this instrument setting standards for future systems, it is imperative that the justification be as precise and comprehensive as possible and the safeguards at their highest level. As emphasised above, there seems to be an over-focus on some issues pertaining to the retention period, while other areas are left unexplored – whether intentionally or unintentionally. In this context, the argument stemming from the German Constitutional Court on the maximum retention period of six months for telecommunications data might not be entirely useful in the current setting despite its appealing protection standard. It must be recalled that, in the PNR scheme, after the first thirty days of retention the data will be masked out for the remaining five years even if access to the full PNR data is still possible. This is different to telecommunications data, which by their nature are kept as such for periods going up to two years. It would follow that a first shift in focus could be on the necessity to keep full PNR data for thirty days as opposed to shorter periods of time. Subsequently, consideration could be given as to the possibility of breaking into two the period of five years: for the first three years PNR data could be masked out and for the remaining two years the data could be anonymised, serving only 'general intelligence purposes'.[692] Additionally, the indirect reliance on a standard already agreed in relation to third countries –ie the PNR agreements – should not have absolved the Commission from laying down specific reasons for this precise retention period.

However, probably the most important element to be solved as regards the retention period is the risk linked to the silent, gradual and, more importantly, tangible erosion of the right to privacy, an encroachement which threatens the ability of this

691 Goold (n 159).

692 EDPS (n 605) [45].

right to empower individuals. In this sense, the request of the UK delegation to extend, on an optional basis, the PNR scheme to intra-EU flights, would lead to monitoring of individuals throughout the EU at a previously unseen level.

More clarity is also needed in respect of the results of a positive match and of 'false' positive matches (Article 9(4)). The balance between rights and interests could benefit from a more specific deadline under which PIUs have to communicate the results of matching. Moreover, for false positive matches – which could be helpful in avoiding repetitive secondary screenings for example – further clarifications should be sought, including 'how other national authorities' should 'be informed there has been a false match'.[693]

It follows that the retention period as currently proposed by the 2011 EU PNR proposal still falls short of data protection expectations while at the same time providing only a 'sense' of enhanced security, therefore leading to an unsuccessful balancing act. However, this could be changed provided that further amendments, clarifications and evidence are put forward. A substantive case must be made in defence of a thirty days storage period of full PNR data as opposed to a 24-hour retention period in the case of the API Directive, as well as clearer indications regarding storing data for five years.[694]

693 Brouwer (n 605) 5.

694 German delegation (n 624).

3.3.2.2.3 Ratione loci

The balance between rights and interests in the EU PNR scheme is further challenged by the extension of its scope to internal flights, whereby an increase in security must be assessed against freedom of movement. The proposal in Article 17 already foresees a review of the feasibility and necessity of including internal flights in the scope of the Directive four years after its entry into force. It is interesting to see that, in terms of order, the Commission proposal first lists a feasibility reason and not the necessity argument, raising questions about the legal construction of this instrument.

The UK delegation has, however, already proposed to extend the provisions of the Directive to internal flights on an optional basis since its entry into force. It justified this approach by indicating that the 'volume of journeys between member states is three times greater than between Member States and third countries' and by arguing that '[n]ot collecting PNR on intra-EU routes – while at the same time introducing measures for extra-EU PNR collection – serves simply to displace rather than address the risk.'[695] At no point has the proportionality of such a measure been argued by the UK delegation despite its optional character. The discussions taking place within the Council advanced the option of collecting and processing PNR data on targeted intra-EU flights and consideration was also given to limiting the collection of PNR data from international flights to targeted ones.[696] Nevertheless, the positions among the delegations were contrasted and the Commission firmly opposed the targeted option, arguing that it would render the system ineffective. Moreover, the

695 Council Document 6359/11, 'Proposal for a Directive of the European Parliament and of the Council on the use of Passenger Name Record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime - Proposed amendments'.

mimetic argument of the Commission, which is to say that third countries with which the EU has agreements also request *all* PNR data, serves only one element of the proportionality test, ie effectiveness. At a minimum and in light of its extremely intrusive character, the smallest safety net that could be envisaged should be to assess such an option after feedback from the experience of the PNR scheme for international flights or, *in extremis*, allowing on an optional basis targeted intra-EU flights. However, this last option runs the risks of undermining the harmonisation efforts sought by the Commission when tabling the proposal, allowing criminals to seek ways of avoiding the targeted flights.

The inclusion of internal flights within the scope of the Directive has also raised the question of its compatibility with the rules on free movement. At the level of primary law, Article 21(1) TFEU emphasises that '[e]very citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to limitations and conditions laid down in the Treaties and by the measures adopted to give them effect', This is reiterated by Article 45 EUCFR. With respect to the right to entry Article 5(1) of Directive 2004/38/EC emphasises that 'no entry visa or other formality may be imposed on Union citizens.' [697] Article 45(3) TFEU prescribes limitations justified on 'grounds of public policy, public security or public health' to the freedom of movement of workers. Article 27 of Directive 2004/38/EC lists the same grounds for limitations and furthermore specifies that those

> taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such

696 See Council Document 11392/11, 'Summary of discussion-Working Party on General Matters, including Evaluation (GENVAL)' point 4, 3.

697 (n 653).

> measures. Personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.

Relevant to this discussion is also the so-called Schengen Borders Code.[698] While Article 7(2) first subparagraph of the Code enshrines the principle that 'all persons shall undergo a minimum check in order to establish their identities on the basis of the production or presentation of their travel documents', Article 7(2) third subparagraph indicates that,

> on *a non-systematic basis*, when carrying out minimum checks on persons enjoying the Community right of free movement, *border guards may consult* national and European databases in order to ensure that such persons do not represent a genuine, present and sufficiently serious threat to the internal security, public policy, international relations of the Member States or a threat to the public health.[699]

Additionally, in its case law the CJEU has underlined that 'the public policy exception is a derogation from the fundamental principle of freedom of movement for persons which must be interpreted strictly' taking the example of an entry in the SIS which should be read in conjunction with other evidence supporting the claim that the presence of a person within the Schengen Area poses a 'genuine, present and sufficiently serious threat affecting one of the fundamental interests of society'. [700] It has also pointed out to the likely incompatibility with free movement of controls

698 Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders [2006] OJ L 105/1. See also amending acts at < http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/l14514_en.htm> accessed 10 September 2011.

699 (emphasis added). See also art 21 for the provisions on checks within the territory. For a broader analysis of the rules on free movement relevant for the current case and reference to case law see Council Document 8230/11, 'Legal Service Opinion: Proposal for a Directive of the European Parliament and of the Council on the use of Passenger Name Record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime – Possible extension of the scope of the Directive to internal flights between EU Member States – Compatibility with the principle of free movement of persons and the Schengen Borders Code'.

700 *Commission v Spain* C-503/03 [2006] ECR I-1097 [45], [53]. See also Legal Service (n 699) point 14.

'carried out […] in a systematic, arbitrary or unnecessary manner'. *Per a contrario* controls which do not have the above features could be accepted.[701] For the purposes of this analysis and in connection with Article 7(2) of the Schengen Borders Code it must be underlined that, while checks on passengers will be systematic in the PNR scheme, such checks will not be conducted by border guards. Moreover, limitations to freedom of movement of EU citizens and their family members must obey the rules enshrined in Article 27 of Directive 2004/38/EC mentioned above. The principle of proportionality and the fact that the measures must be 'based exclusively on the personal conduct of the individual concerned' is key in this context. Nevertheless, more precision as to how the rules of an EU PNR Directive – if applicable to internal flights – would interact with those concerning free movement should be sought in the text of the Directive.

However, the PNR scheme is likely to develop a different type of borders, which are more pervasive because they are diffuse, variable and have different degrees of visibility. The checks of PNR data against pre-determined assessment criteria and/or against databases and, more particularly, the results of such checks can be considered a form of border. Those for which no match has been found will cross a so-called 'invisible border' when boarding a flight, while for those for which a positive match has been found a 'very fine but visible border' will be constructed. This combined with further analyses could lead to the erection of a border in the form of secondary checks, refusal of boarding or the taking of other measures. What is even more pervasive is that mechanisms such as the PNR scheme or the Data Retention Directive not only empty the value of privacy as the 'right to be left alone' they are

701 Case C-321/87 *Commission v Belgium* [1989] ECR – 997, [15]. See also Legal Service (n 699) point 11.

also likely to impose borders in terms of the development of the self or to 'lock' to full potential of the right to privacy. Faced with measures such as those indicated above, the individual cannot even assess what the borders of what could be called the 'safe zone' are, as the assessment criteria are constantly changing and there is no possibility of knowing what factor could be flagged as 'dangerous' at a given moment in time. In this instance, the law itself is not only 'grey' but becomes a dangerous tool.

It follows from the above analysis that the 2011 proposal, while better placed than the 2007 Commission proposal to defend the proportionality principle, does not comply with the principle in its core requirements. The necessity of the systematic collection and analysis of PNR data is far from being established and the exercise of the proportionality *stricto sensu* – subject to modifications – can only stand a formal and somewhat technocratic assessment. Additionally, proportionality would seem to be fulfilled by proxy, that is by invoking the PNR agreements and their standards. Moreover, the 2005 predicament of De Hert as to the possible reluctance of the ECtHR to sanction '"hard" and "soft" surveillance and other law-enforcement counter-measures'[702] combined with the different readings courts have with respect to proportionality[703] call for an extremely thorough reflection on the necessity and proportionality of a PNR scheme within the EU context. At the same time and in line with De Vries, Bellanova and Gutwirth, it is important to acknowledge that the EU PNR scheme is more than an issue of mere proportionality. It is a 'society choice' that must be faced as such by the EU legislators.[704] However, this statement should not be

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702 P De Hert, 'Balancing Security and Liberty within the European Human Rights Framework: A Critical Reading of the Court's Case Law in the Light of Surveillance and Criminal Law Enforcement Strategies after 9/11' (2005) 1 Utrecht Law Review 68.

703 (n 542) and (n 543).

704 (n 636) (iv) 15.

read as a 'society choice' trumping the analysis of the proportionality of the EU PNR proposal because the proportionality test is at the core of the construction of EU law.

In response to the question of the present section, one could say that the EU PNR scheme as it stands today endangers proportionality and re-writes it at the same time. It endangers it by a lack of strength in key points in the legal argumentation of the scheme. Along the same lines as the Data Retention Directive, it also re-writes proportionality to the extent that it reinforces the trend of collecting and analysing data of entire categories of individuals whose connection to the criminal system is, *a priori*, inexistent. At present, the shortcomings of the EU PNR proposal qualify the proposed law as a 'grey law', but there is scope in reversing this tendency. The key, in view of this research, resides in reviewing each step of the proportionality test under a very strict lecture grid. This requires extensive evidence as to the necessity of PNR data for fighting terrorism, the demonstration that the EU PNR is the least restrictive measure and that a fair balance has been struck between interests and rights. Reversing this tendency would be crucial for the rights endangered by this initiative, allowing them to be, in the words of the ECtHR, 'practical and effective' and not 'theoretical and illusory', as well as beneficial for delivering security and not simply a 'security theater' (as Schneier puts it).[705] This is all the more important when considering that the EU PNR scheme must be 'read' in conjunction with existing instruments in the information management field. Beyond the discussion on the gradual building up of a 'surveillance society', the adoption of legislation that only partially and formally complies with core EU law principles undermines from the outset the reply to the question engraved at the core of the fight against terrorism:

705 (n 547). *Christine Goodwin v The United Kingdom* ECHR 2002 – VI, [74].

have fundamental rights been adequately protected while delivering security? Only a positive and new 'reading' and 'writing' of the EU PNR proposal allows us the opportunity to curb the above tendency.

3.4 The compliance of the Prüm Decision and of the EU PNR proposal(s) with the legal certainty principle

Accessibility and foreseeability are key features of the legal certainty principle as reiterated in the case law of the ECtHR,[706] as well as by the CFI (currently the General Court of the EU).[707] These features can be particularly challenged by systems which, due to the nature of the data stored or their broad coverage and 'profiling' capabilities, have the potential of 'locking' core rights for an individual's development (such as privacy and protection of personal data). It is therefore important to examine both the Prüm Decision and the EU PNR proposal from this angle in order to observe whether or not they exhibit 'in-built' deficiencies which make full compliance with the legal certainty principle impossible.

3.4.1 The Prüm Decision – legal certainty but with pre-existing and new caveats

The legal certainty features of the Prüm Decision with respect to the provisions on information exchange call for general and specific comments. Firstly, it must be pointed out that the Prüm Decision has not been successful in slowing down the 'piecemeal and circumstantial approach',[708] despite the calls of privacy experts who stressed the absolute necessity of adopting the general framework for data protection

706 *Gillan and Quinton v the United Kingdom* App no 4158/05 (ECtHR, 10 January 2010) [76]; See also *Rotaru v Romania* (n 633) [191]; *Silver v The United Kingdom* (1983) Series A no 61 [87]-[88]; *Sunday Times v The United Kingdom* (n 144) [45].

707 Case T-43/02 *Jungbunzlauer v Commission* [2006] ECR II-3448.

as a '*condicio sine qua non* for the exchange of personal data by law enforcement authorities'.[709] The conclusions of the Heiligendamm meeting of the G6 countries as regards information exchange in criminal matters and data protection provisions are symptomatic of how these two issues have been dealt with within the EU in the last decade. It is stated that

> [t]he ministers underscored that rapid implementation of the availability principle must not depend on the adoption of a framework decision on data protection in the third pillar.[710]

The first general shortcoming of the Prüm Decision in terms of legal certainty pertains to the choice of the data protection standard, namely the CoE 108 and its Additional Protocol, as well as CoE Recommendation 87. These instruments have been perceived as 'provid[ing] for a *minimum level of protection* of personal data' and 'the Convention by which all the Member States are bound *does not provide for the necessary preciseness as has been recognised already at the time of the adoption of Directive 95/46/EC*', while the '[r]ecommendation is by its nature not binding.'[711] De Hert and Papakonstantinou have also analysed the Convention and found it to be 'too broad and partly outdated'.[712]

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708 Papakonstantinou and De Hert (n 111) 886.

709 EDPS (n 572) [12].

710 Statewatch, 'EU: Meeting of the interior ministers of France, Germany, Italy, Poland, Spain and the United Kingdom' <http://www.statewatch.org/news/2006/mar/06eu-interior-minister-conclusions.htm> accessed 13 September 2011. This approach is critically examined in two reports of the House of Lords: the report on the meeting of the G6 Interior Ministers at Heiligendamm and the report on the Prüm Treaty. European Union Committee, *Behind Closed Doors: the Meeting of the G6 Interior Ministers at Heiligendamm* (2005-06, HL 221) [42-43]; HL Report (n 574) [18] [90-92].

711 EDPS (n 572) [60] (emphasis added). Moreover, the attempt at considering CoE Recommendation 87 and Recommendation No R (92) 1 of the Committee of Ministers to member states on the use of analysis of deoxyribonucleic acid (DNA) within the framework of the criminal justice system (CoE Recommendation 92) as 'binding upon Member States' as suggested by Symeonidou-Kastanidou does not yield significant improvements. E Symeonidou-Kastanidou, 'DNA Analysis and Criminal Proceedings: The European Institutional Framework' (2011) 19 European Journal of Crime, Criminal Law and Criminal Justice 139, 142.

712 (n 111) 889.

Not only does the Prüm Decision rely on the modest CoE 108 but the provisions on Data Protection included in Chapter 6 rely heavily – as also observed by the EDPS – on the 'simultaneous applicability of two (or more) legal systems' and are destined to 'give substance to the traditional system of mutual legal assistance in criminal matters, based on national sovereignty' rather than create a real AFSJ.[713] More specifically, the chapter on data protection also includes provisions questionable or superfluous as regards legal certainty, alongside the provisions which do have an adequate level of legal certainty. Under the heading of questionable provisions one may include Article 24(2), which indicates that the provisions on data protection 'shall apply to data which are or have been supplied pursuant to this Decision, save as otherwise provided in the preceding Chapters.' The last part of the sentence is ambiguous and creates confusion, especially considering that – again as also pointed out by the EDPS – no contrary specifications have been identified in the respective chapters.[714]

More important is what can be understood by the phrase 'data which are or have been supplied pursuant to this Decision', namely 'whether Chapter 6 only applies to personal data that are or have been exchanged between the Member States or that it also applies to the collection and processing of DNA material and fingerprints in a Member State pursuant to Articles 2 and 8 of the initiative.'[715] Article 2 prescribes that 'Member States shall open and keep national DNA analysis files […]. Processing of data kept in those files, under this Decision, shall be carried out in accordance with this Decision, in compliance with the national law applicable to the

713 EDPS (n 572) [67].

714 ibid [64].

715 ibid.

processing.' On the other hand, the definition of 'processing of personal data' under Article 24(1)(a) refers to 'operations […] performed upon personal data, […] such as collection'. This must be read in conjunction with the second sentence of Article 2, namely the fact that only processing of data kept in the DNA files shall be carried out in accordance with the Prüm Decision. This would imply that the data protection provisions of the Prüm Decision do not regulate the collection of cellular data and dactyloscopic data.

Additionally, the provisions on a data subject's right to information (Article 31) are deficient, as they frame a 'right to information at the request of the data subject'. This situation has been judged as

> contrary to an essential element of data protection, namely that the data controller provides a data subject from whom data relating to himself are collected with some basic information on this collection, without being requested to do so by that data subject. […] the data subject will in many cases not know about the collection of his data.[716]

In contrast, it is posited that the rules on 'Accuracy, current relevance and storage of data' (Article 28), as well as those on logging from Article 30,[717] engage to a great extent with the requirements of clarity and foreseeability, although again there are some caveats. This is supported by the technical provisions enshrined in the Council Decision implementing the Prüm Decision, Council Decision 2008/616/JHA. A possible shortcoming is linked to Article 28(3), which prescribes that '[p]ersonal data which should not have been supplied or received shall be deleted', a provision which led the EDPS to ask 'how does the receiving Member State know that these data had

716 ibid [75].

717 See however the criticism of the EDPS on logging (n 572) [75].

not been lawfully supplied under the law of the supplying Member State? This could lead to difficult questions when these issues arise in cases before national courts.'[718]

At the same time, it could be argued that Article 28(3) must be read in conjunction with Article 28(1), which could alleviate some of the above concerns:

> Should it transpire ex officio or from a notification by the data subject, that incorrect data or data which should not have been supplied have been supplied this shall be notified without delay to the receiving Member State or Member States. The Member State or Member States concerned shall be obliged to correct or delete the data.

Nevertheless, the EDPS, despite his criticism as regards the data protection standards of the Prüm Decision and the risks entailed by some specific provisions included in Chapter 6, has concluded that the data protection requirements 'have been carefully drafted, as specific provisions on top of a general framework for data protection' (that has yet to be adopted) and that 'in general terms the provisions offer in substance an appropriate protection.'[719]

Legal certainty is also ensured when Article 25(2) prohibits the exchange of data on the basis of the Decision 'until the provisions of […] Chapter [i.e. General Provisions on Data Protection] have been implemented in the national law of the territories of the Member States involved in such supply', leaving for Council to decide 'whether this condition has been met'. In exchange, paragraph 3 has allowed such an exchange to those Member States, which are already part of the Prüm Treaty.[720] In relation to this aspect, it must be observed that the actual implementation

718 ibid [68].

719 ibid [74].

720 'Paragraph 2 shall not apply to those Member States where the supply of personal data as provided for in this Decision has already started pursuant to the Treaty of 27 May 2005' (Prüm Treaty).

of the Prüm Decisions decisions (Decision 2008/615/JHA and Decision 2008/616/JHA) requires a comprehensive arsenal of national measures of application. Whilst the exchange of information for CT purposes foreseen by Article 16 had to be set up by 26 August 2009, the provisions concerning the exchange of DNA, dactyloscopic and vehicle registration data had to be implemented by 26 August 2011. In order to meet the latter deadline, a series of conditions had to be fulfilled which can be summed up in what the Council has labelled the evaluation procedure. This comprehensive evaluation comprises 'information by the concerned Member State, pursuant to Article 36(2), that it has implemented the obligations of the concerned chapter(s), replying to a standardised questionnaire (on legislation, data protection authorities, procedural measures, technical and organisational measures, data subjects' rights)[721], pilot run, evaluation visit and report and finally decision by the Council.' At the time of the publication of the Commission Communication on overview of information, namely July 2010, only ten Member States were 'authorised to commence the automated exchange of DNA profiles, five […] for fingerprints and seven for vehicle registration data'.[722] In May 2011, the Council Conclusions on the implementation of the 'Prüm Decisions' welcomed the progress made by some Member States while indicating that the 26 August 2011 deadline will not be met by all Member States and that 'the implementation of the "Prüm Decisions" requires a comprehensive and extensive effort in a multidisciplinary fashion that builds on close cooperation between legal, forensic and technical experts'.[723] It is also important to point out that criticism has already been voiced as regards national measures of

721 Council Document 661/1/09, 'Evaluation procedure for implementing the data exchange provisions pursuant to Council Decisions 2008/615/JHA and 2008/616/JHA (Prüm Decisions).'

722 (n 498) 12.

723 Council Document 10653/11, 'Draft Council Conclusions on the implementation of the 'Prüm Decisions'.

implementation of the Prüm Decisions/Treaty. For example, according to Monti, Italian law No 85 which ratifies the Prüm Convention fails to clearly specify 'the technicalities behind DNA profiling', includes 'sloppy wording that certainly will not facilitate the work of lawyers, prosecutors or judges' and has provisions on data security which are judged as weak.[724]

A specific comment must be made in relation to Article 16 regarding exchange of information in order to prevent terrorist offences, which raises questions in respect of legal certainty not only because of the construction of the article itself but also due to the breadth of the EU definition of terrorist offences. It allows spontaneous exchange of information in individual cases provided that 'particular circumstances' point out to offences covered by Articles 1 to 3 of EU Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism. It entitles Member States' national contacts to deliver personal data and information ('surname, first names, date and place of birth and a description of the circumstances giving rise to the belief referred to in paragraph 1') about individuals in relation to which there are indications that they *might* commit terrorist offences. Article 16 also has similarities with Article 7 on spontaneous exchange of information and intelligence of the Council Framework Decision 2006/960/JHA on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union. This will be examined below. [725]

724 A Monti, 'Italian DNA Database: The Devil is in the Details' (2009) EDRI <http://www.edri.org/edri-gram/number7.16/dna-database-italy> accessed 12 September 2011.

725 (n 399). 'The Framework Decision replaced Articles 39 (1), (2), (3) and 46 of the Convention Implementing the Schengen Agreement as far as related to exchange of information and intelligence for the purpose of conducting criminal investigations or intelligence operations.' Report Operation of the Council Framework Decision 2006/960/JHA (n 512) 3.

A first problem we face in Article 16 is connected to the amendment of Framework Decision 2002/475/JHA by Framework Decision 2008/919/JHA, which criminalised 'public provocation to commit terrorist offences' and 'recruitment and training for terrorism'. In the case of 'public provocation to commit terrorist offences' in particular, the risk of actually providing information on a person exercising his right to freedom of expression under the format of extreme political speech cannot be ignored. As an element of enhanced legal certainty, it could be imagined that more precision could have been sought as regards 'the particular circumstances giving reason to believe that some data subjects will commit terrorist offences'. While further clarification as to the coverage of the terms 'particular circumstances' would be welcomed, this should be done in a non-exhaustive way which leaves sufficient flexibility to competent authorities in their proceedings. Furthermore, while the limited set of personal data that can be exchanged enhances the legal certainty of the instrument,[726] Article 16 is silent on the retention period of such data as opposed to the supply of personal data provided under Article 14 (Major events). In this latter case data 'must be deleted without delay' once the purposes for which they were collected 'have been achieved or can no longer be achieved' and 'in any event after not more than a year' after being supplied.

While Framework Decision 2006/960/JHA uses the narrower term 'factual reasons' instead of the concept of 'particular circumstances', it allows such a spontaneous exchange not only for the prevention of the offences listed in Article 2(2) of the EAW but also for their detection and investigation (Article 7(1)). Additionally, it states in a generic manner that '[t]he provision of information and intelligence shall

726 In this sense, the final provision can be judged as more protective than the EP's amendment which referred to personal data in general, thus potentially broadening the categories of personal data likely to be submitted on the basis of Article 16 (n 561) Amendment 39.

be limited to what is deemed relevant and necessary for the successful detection, prevention or investigation of the crime or criminal activity in question' (Article 7(2)). In contrast, the Prüm Decision foresees the possibility for the supplying Member States to 'impose conditions on the use made of such data and information by the receiving Member State' (Article 16(4)) which enhances the legal certainty of the text as well as the balance rights-interests. It follows that Article 16 can be perceived as a *bonus-malus* provision with respect to legal certainty creating grey areas in a 'preventive landscape'.

The analyses undertaken above have shown that the Prüm Decision has added to the legal complexity of the third pillar domain by imposing a specific *regime* in terms of data protection but it has also a strived to provide an adequate degree of legal certainty. However, while from an overall perspective this assessment can be considered a correct one, the legal certainty of the Prüm Decision - by its very legal nature- will be finally enhanced or endangered by the legislation of the Member States.

3.4.2 The EU PNR proposal and legal certainty: improvements combined with persistent and important questions

In the context of the EU PNR proposal, the precision that a law must attain is especially important and represents an essential guarantee against arbitrariness, as the Court has upheld on several occasions, in particular in relation to secret surveillance – as already emphasised in section 3.3.2.1.1. It follows that the systematic and indiscriminate collection and analysis of passenger data must be subject to extremely detailed provisions concerning 'the persons authorised to consult the files, the nature

of the files, the procedure to be followed or the use that may be made of the information thus obtained.' [727] The current section will focus on certain areas considered crucial in terms of 'legal certainty'. These are the use of PNR and assessment criteria, status of PIUs and competent authorities, exchange of information and, finally, data protection provisions. It will particularly inquire as to whether there are 'permanent' shortcomings (eg: assessment criteria) with the PNR scheme as regards legal certainty or whether we can make a transition from 'grey' to 'just' laws.

3.4.2.1 The uses of PNR and the assessment criteria

While the 2011 proposal has been successful in comparison with the 2007 proposal in clarifying and further specifying the purposes for which processing of PNR data can take place (thus enhancing its legal certainty), the provisions on establishment of assessment criteria sit uncomfortably with the requirements of foreseeability and predictability.

The 2011 text conceives of four detailed situations where PNR data can be processed by PIUs. The first two situations pertain to assessments prior to the scheduled arrival or departure of passengers against pre-determined criteria or databases according to the offences targeted (Article 4(2)(a) and (b)). The third concerns 'requests from competent authorities to provide […] and process PNR data in specific cases for the purposes of prevention, detection, investigation and prosecution of a terrorist offence or a serious crime'. Finally, the fourth hypothesis deals with the analysis of PNR data 'for the purpose of updating or creating new criteria for carrying out assessments' (Article 4(2)(c) and (d)). The 2011 text retains

727 See *Rotaru v Romania* (n 633) [57].

the vague term ‘associates’ only in recital 6 while the 2007 proposal it was proposed that PNR data be processed in order to identify not only ‘persons who are or may be involved in a terrorist or organised crime offence’, but also their associates (Article 3(5) first indent). The 2011 proposal has also dropped the reference to the delivery of ‘intelligence on travel patterns and other trends relating to terrorist offences and organised crime’ (Article 3(5) third indent). While the 2011 proposal for an EU PNR Directive has also formally banned the term ‘risk’ in connection with the ‘pre-determined criteria’, risk is an inherent component of the establishment of ‘assessment criteria’ in a PNR scheme.[728] Despite the possibility of establishing ‘guidelines at EU level on how passengers should be assessed’ by means of best practices via the advisory comitology procedure,[729] the biggest strength of such assessment criteria, namely their ‘opacity’ and their ability not to be easily presumed by the general public, is also their biggest weakness in relation to legal certainty. Additionally, there is the ‘difficulty for individuals to defend themselves against decisions which are taken, using as a reference (at least partially) patterns derived from the data of *other* individuals’.[730] In this context, it is questionable whether adequate legal certainty can be achieved as regards assessment criteria under any format.

3.4.2.2 PIUs and the competent authorities

The provisions on PIUs are only a modest improvement compared to those of the 2007 proposal. While the 2007 proposal was silent on the nature of such unit (Article

728 The 2011 IA (n 602) uses the term when defining ‘fact-based assessment criteria’ in footnote 23 and in relation to high-risk passengers (n 602) 28. See also Commission Communication (n 537) 4-5.

729 IA (n 602) 29.

730 EDPS (n 616) [22].

3(1), the 2011 proposal refers to 'an authority competent for the prevention, detection, investigation or prosecution of terrorist offences and serious crime or a branch of such an authority' (Article 3). In light of the essential role these units are called to play in the EU PNR scheme – including analysis of PNR data and setting up of assessment criteria – the provisions are still rather weak and left at a very abstract level, creating risks as regards legal certainty. There is a clear need for more detailed information to be provided in the text of the Directive on the functioning of PIUs, their staff (including seconded ones) and the PIUs that would serve several Member States (eg: exchange of data between the units of the Member States forming the PIU or issues of oversight).[731]

The same general character can be observed for the provisions on competent authorities, for which the only specification is that they have to be competent for the prevention, detection, investigation or prosecution of terrorist offences and serious crime (ie the same nature as the PIUs). Brouwer rightly observed that following the results of the evaluation of the Data Retention Directive as regards 'competent authorities' – which indicated wide differences among the Member States– it might be useful to consider a 'greater degree of harmonisation with respect to the authorities having access and the procedure for obtaining the data'.[732] A clarification of the relationship between PIU staff and the staff of the competent authorities also in the light of the information exchange that should take place on the basis of Article 7 would also be welcome. Moreover, the need for further clarification as regards the status and functioning of the PIUs and of the competent authorities is reinforced by

731 See also recommendation and criticism of the EDPS (n 605) [31]- [34] and C N M Pounder, 'A Data Protection Critique of the Proposed Passenger Name Record Directive' (2011) Amberhawk <http://amberhawk.typepad.com/files/pnr-proposal-website-com-_2011_32.pdf> accessed 12 September 2011, 4.

732 Brouwer (n 605) 6.

one of the findings of the 2007 House of Lords report on the EU PNR – starting from the case of the wrongly accused Maher Arar – which observed that '[t]he principal risk of error in using PNR data seems to us to arise, not from the quality of the data, but from the erroneous interpretation of the data, even if accurate.'[733]

3.4.2.3 Information exchange

Despite their detailed character and the distinctions made as regards the retention period of PNR data, the rules on information exchange leave a series of questions as regards legal certainty. A first example is that of Article 7(2) of the 2011 EU PNR proposal, when PNR data and the results of processing PNR data are requested by a PIU for a specific case of prevention, detection, investigation or prosecution of terrorist offences or serious crime. It is prescribed that the request for data '*may* be based on any one or a combination of data elements, as deemed necessary by the requesting' PIU, a provision which is vague and leaves a crucial element of discretion to PIUs. [734] Article 7 devises three additional situations where either access during the five years period is allowed or direct requests from competent authorities of the Member States to PIUs or early access is needed. The purposes connected with these particular cases, while narrowly tailored ('exceptional circumstances in response to a specific threat or a specific investigation or prosecution related to terrorist offences or serious crime' Article 7(3), for the 'prevention of an immediate and serious threat to public security' Article 7(4) or in order to respond to 'a specific and actual threat related to terrorist offences or serious crime' Article 7(5)), could benefit from additional clarification. For example, in line with the EDPS the differing remits

733 (n 625) [27].

734 See also Pounder who also criticises the term 'deemed necessary' (n 731) 8.

related to an ‘immediate and serious threat’ as opposed to a ‘specific and actual threat’[735] are not yet ‘clear’.

3.4.2.4 Data protection provisions

As regards data protection, the 2011 EU PNR proposal foresees that the provisions of the FDDP should apply to all processing of data pursuant to the Directive, which implies also the processing at domestic level. The proposal prescribes that ‘the right to access, the right to rectification, erasure and blocking, the right to compensation and the right to judicial redress’ will have to be as those adopted under national law in implementation of the FDDP. The same goes for the rules on confidentiality, data security and transfer of data to third countries. For the latter situation, the transfer should take place on a case-by-case basis, for the purposes of the Directive as specified in Article 1(2) and under the condition that a ‘third country agrees to transfer the data to another third country only for the purposes […] specified in Article 1(2) and only with the express authorisation of the Member State’ (Article 8). While the 2011 proposal once again benefits from clearer provisions than the 2007 one – which referred to at the time not adopted FDDP –, the choice made by the proposal is questionable. This is because the FDDP exhibits – as argued also by the EDPS – shortcomings such as too extensive limitations to the information rights of individuals and ‘derogat[ion] from the adequacy requirement in case of “legitimate prevailing interests, especially important public interests”.’[736] The 2011 proposal attempts to remedy aspects pertaining to a lack of information concerning the purposes of data processing – as well as the question of providing information in an

735 EDPS (n 605) [37].

736 ibid [40], [41].

intelligible form – by imposing such an obligation on the air carriers, 'other ticket sellers for the carriage of passengers by air and on the Member States' (Article 11(5)). However, there is no clarity on how information would be provided to individuals as regards checks of their PNR data against pre-determined criteria and databases.

Moreover, the choice of the FDDP as a data protection standard is open to criticism on at least two additional accounts. Firstly, the PNR data when dealt with by air carriers are protected by the high standards of the Data Protection Directive 95/46/EC, while when used in a law enforcement context the safeguards are lowered. This has been termed an 'inverse data protection effect' by Pounder, in the sense that '[t]he more controversial the purpose […] the lower the level of protection; the less controversial the purpose […], the higher the level of data protection.'[737] Secondly, in a context where works are underway for the revision of Directive 95/46/EC with the intention *inter alia* of extending the general rules of data protection to the former third pillar, it is questionable why the Commission did not consider another path to address the data protection regime of the EU PNR scheme. While academic commentators such as Hijmans and Scirroco argue about the direct effect of Article 16 TFEU,[738] the need to adopt such a framework must be a priority for EU lawmakers. At this stage, there is not enough visibility on the type of instrument or instruments (regulation, directive) that the Commission intends to use in order to bring forward a comprehensive approach on data protection. Also, the extent to which the ex-third pillar will be covered by these general rules and/or by a sectoral regime is still unclear. Nevertheless, Commissioner Reding has many times emphasised the need to

737 (n 731) 7.

738 H Hijmans and A Scirocco, 'Shortcomings in EU Data Protection in the Third and Second Pillars: Can the Lisbon Treaty Be Expected to Help?' (2009) CMLR 46.

have a uniform level of data protection, thus indicating that the choice could incline towards regulation.[739] The EDPS[740], as well as the WP 29[741], when commenting on the issue have considered that, while it was conceivable that sectoral rules be provided for the field, they had to be covered by the general data protection rules. In this context, pushing forward the EU PNR proposal in the absence of a general framework for the protection of individuals with regard to the processing of personal data would only reveal unnecessary haste and modest standards in terms of data protection (as the reference point will continue to be the FDDP). The EDPS has also suggested a more positive approach that could be endorsed as a middle ground solution that could serve the legal certainty requirement. This is for the proposal to 'explicitly prevent the application of the exceptions of the Framework Decision in the context of processing PNR data'.[742]

Two main observations can be drawn on the legal certainty of the 2011 EU PNR proposal. It is better addressed than was the case with the 2007 proposal but it still has a series of shortcomings. In this latter respect, it is posited that, while some deficiencies (competent authorities and PIUs and standards in terms of data protection) can be remedied in the process of amending the Commission proposal, the legal certainty problems connected to the establishment of pre-determined assessment criteria cannot be completely alleviated by the same process mentioned above. In response to this deficiency, it could be argued that while there is no predictability as to what will constitute pre-determined assessment criteria, safeguards are put in place

739 EDRI, 'The Privacy Platform Meeting: Reding Outlines The Way Forward' <http://www.edri.org/edrigram/number9.6/privacy-platform-way-forward> accessed 10 September 2011.

740 (n 555) Sections 3.2.5 and 9.

741 (n 556).

742 (n 605) [41].

as regards the follow-up of a positive match resulting from an automated decision-making process based on these assessment criteria.

It follows from the above analysis that the Prüm Decision and the EU PNR proposal not only do not succeed in fully addressing the legal certainty requirements, but they also fuel uncertainty or delegate some legal certainty choices to the national level.

3.5 The Prüm Decision and the EU PNR proposal: potentially enhanced security and (potentially) endangered rights

The above analyses allow the following conclusions with respect to the main research question of this thesis, namely whether and how specific EU CT instruments support at the same time the human rights protection and security imperatives of the CT fight and its sub-questions (ie laws of and for the future, 'grey laws'). The Prüm Decision has secured at first sight a workable solution with respect to the fulfilment of the two imperatives, despite there still being some caveats. However, by displacing an important part of the proportionality appraisal onto the Member States the actual adequacy of the Decision in respect of the two imperatives mentioned above will be dependent on the choices made by Member States especially with respect to the structure of their DNA and dactyloscopic databases. In contrast, for the EU PNR proposal, only preliminary assessments can be put forward. The 2011 EU PNR proposal, reacting to the criticism of the 2007 version, strives to better and simultaneously address both objectives in specific points of the proposal itself. At the same time, it would appear that an important part of the above criticism has fallen on deaf ears, as the very necessity of the scheme has not been adequately substantiated,

thus impairing the subsequent inferences as to the relationship between security and human rights within the proposal.

Keeping in mind the qualifications proposed in the first chapter, the two information management instruments are laws 'of the future', in that they reveal certain trends in EU CT policy. These include the use of biometrics and data collected initially by the private sector for commercial purposes, heavy reliance on technology and the automatisation of a series of processes combined with an important focus on prevention. This focus and the role of proactive searches make such measures also 'laws for the future'. The EU PNR proposal is particularly representative in this sense, as two of its three purposes are aimed at addressing 'future' or 'possible' threats.

Moreover, as analysed above, the two measures bear the hallmarks of 'grey laws', showing failures as regards the fulfilment of the proportionality and legal certainty principles. At this stage, it is particularly important to highlight that both instruments have failed, in different ways, to fully comply with the first element of the proportionality test, namely necessity, and under a strict reading of the principle this should invalidate the entire proportionality test. Furthermore, their likely effects and underpinning logics also point to them being 'grey laws'. With respect to effects, the Prüm Decision and the EU PNR proposal must be read in the broader context of the EU information management tools already labelled as fostering a 'surveillance society'. While it cannot be argued that both mechanisms reinforce to the same extent the 'surveillance' phenomenon, they nevertheless can be perceived as supporting or at best not countering it. The potential of the Prüm Decision to become a surveillance tool will mainly depend on the categories of offences and of individuals that Member States decide to include in their DNA and dactyloscopic databases, as well as on the

use made of Article 16 on Supply of information to prevent terrorist offences. In contrast, the EU PNR proposal, if adopted, will increase the surveillance of EU citizens and third country nationals entering or exiting the EU via an international flight by the systematic collection and analysis of PNR data.

Such surveillance has consequences at different levels: it has an impact on both dimensions of the right to privacy, namely its negative dimension (the right to be left alone) as well as its positive one (the development of the self). Moreover, it modifies the relationship between the individual and the state by raising issues of trust[743] and 'is now engrained in policymaking'.[744] Furthermore, the surveillance PNR type not only adds a layer of additional 'observation' of individuals but also indicates a propensity within the EU for pursuing and implementing 'imported' foreign logics on EU soil (an issue developed in chapter five).[745] The pervasive and strong rhetoric which holds that 'If you have nothing to hide, then you have nothing to fear' and is used to support surveillance techniques indirectly creates, as noted by Baggini, a 'false dichotomy' of suspects and innocents.[746] This sophism must be avoided as it shifts the debate from the realm of rights, where constant monitoring amounts to unacceptable intrusions into the right to privacy of individuals, to the realm of possible security benefits. Concepts such as 'fear' and 'hiding' should not be allowed

743 M H Maras, 'The Social Consequences of a Mass Surveillance Measure: What Happens When We Become the 'Others'?' (2011) xx International Journal of Law, Crime and Justice 1, section 2.

744 See the considerations on the protection of the right to privacy in the fight against terrorism of the UN Special Rapporteur in UNGA, 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin' (2009) UN Doc A/HRC/13/37 [58].

745 See in this sense the comments of Argomaniz (n 161) 132, Pawlak (n 52), V Mitsilegas, 'Extraterritorial Immigration Control in the 21st Century: The Individual and the State Transformed' in B Ryan and V Mitsilegas (eds), *Extraterritorial Immigration Control* (Martinus Nijhoff Publishers 2010) '[...] what this move also means is that the EU is essentially importing the whole US (and UK) model of intelligence-led, generalised surveillance based on profiling via the gathering of a wide range of every day information on all passengers for 'security' purposes' 57-58.

746 J Baggini, 'Bad Moves: the Innocents that have Nothing to Fear' <http://www.butterfliesandwheels.com/badmovesprint.php?num=65> accessed 13 September 2011.

to interfere in the legal reasoning undertaken in the CT field, as they risk vitiating the said process and bias the outcome towards security.

Furthermore, discussions about the 'surveillance society' and 'risk society' call into play the precautionary principle. Initially used in environmental law and under very narrow conditions, the principle has gained ground in other fields such as the fight against crime, especially in the wake of 9/11 where, paradoxically, the conditions for its fulfilment have been interpreted very broadly. For Zedner

> the precautionary approach treats all possible sources of suspicion or threat [and] drives an increasing 'demand for governance of the unknowable' (Power 2004: 40-1) and fuels a consequent desire to 'collect data on anything that is possible regardless of it relevance to the real risks the organization is supposed to be addressing' (Ericson 2007: 13).[747]

Moreover, uncertainty has been perceived as 'the dominant driver of current trends in crime control and anti-terrorism policy.'[748] In this context, the EU PNR proposal can be considered as supported by a precautionary logic and part of the 'dispositif of risk' as conceived by Aradau and van Munster, where *dispositif* is 'a combination of rationalities and technologies, a "family of ways of thinking and acting, involving calculations about probable futures in the present followed by interventions into the present in order to control that potential future".'[749] It aims to secure the future by collecting millions of personal data and running them against opaque assessment criteria and various databases.

747 Zedner (n 60) 84-85.

748 ibid 85.

749 C Aradau and R van Munster, 'Taming the Future' in L Amoore and M de Goede (eds), *Risk and the War on Terror* (Routledge 2008) 25.

The precautionary principle is less visible in the Prüm Decision. Some influences could, however, be observed in the manner in which Member States design their DNA and dactyloscopic databases, namely by allowing a broad coverage in terms of offences and individuals whose personal data are collected and who are in different stages of the criminal process or with a remote connection to the crime chain. Additionally, the Prüm Decision has an important 'prevention strand' in that it allows the proactive 'collection of cellular material and supply of DNA profiles' even under restricted conditions (Article 7) and by the provision of Article 16, which is directly linked with the prevention of terrorist offences. Moreover, from a more general perspective, the risk with the precautionary logic is that it could obscure and diminish the importance of the necessity test and subsequently of the proportionality one.

The two measures analysed above also share the problems of the Hague Programme: a scattered and ambiguous but 'overambitious' programme, 'which creates [according to Geyer] expectations and thereby artificial pressure on the legislative processes.' [750] The Stockholm Programme has attempted to provide solutions to the said criticism by pointing to 'the need for coherence and consolidation in developing information management and exchange' and the development of a 'European Information Exchange Model based on the evaluation of the current instruments', such as the Prüm Decision and the so-called Swedish Framework Decision', whose 'assessments will determine whether these instruments function as originally intended and meet the goals of the Information Management Strategy.[751]

750 (n 544).

751 (n 54) 18.

However, these welcome undertakings do not address some substantial issues observed when examining the Prüm Decision and the EU PNR proposal.

First, the role of each information management tool with respect to the fight against terrorism should be clarified by providing thorough factual evidence. The Prüm Decision is a clear example in this sense as, while it was adopted as an important CT instrument, its actual added value in CT terms remains to be proven. Secondly, there seems to be a constant difficulty in providing a clear and positive answer as to the simultaneous fulfilment of the two main objectives of the CT fight. While this can derive from the very nature of the EU instrument, which leaves important room for manoeuvre to Member States or from the manner in which old and new provisions on information exchange and data protection interact or individuals' rights are addressed, the fact remains that 'legal brackets' seems to be erected around the protection of human rights objectives and, to a lesser extent, around the security imperative. The 'legal brackets' entail uncertainty in the delivery of the objective and have a direct impact on the qualification of a right as being 'effective' as opposed to 'illusory'. This situation is likely to support the view put forward in the first chapter of this thesis, which questioned whether there was a likelihood that, as a result of the three measures, the individual becomes a 'ticking bomb' (or better said 'a permanent ticking bomb') due to the game of uncertainties surrounding the actual protection granted to the rights to privacy, protection of personal data and freedom of expression and the extent to which their essence is preserved. The likely outcome of 'grey laws', of legally 'crippled' laws, is that they put an unacceptable and disproportionate 'lock' on the exercise of rights which are key to the very being of an individual.

In the end, a possible outcome at the level of the CT policy is that the EU comes to promote a model tainted by uncertainty, which seems to function in the future/conditional mode along the following lines: security will be enhanced; human rights might be endangered but safeguards are put into place.

CHAPTER IV: THE EU CT AGENDA-SETTING AND THE PRÜM TREATY

The previous chapter addressed the question of whether and how EU CT policy complies adequately with the objectives of human rights protection and security by looking at specific information management instruments. After having examined primary and secondary law provisions relevant for CT, approximation of laws and operational cooperation mechanisms, the current chapter looks again at the Prüm regime but from a broader perspective, namely that of CT agenda-setting. A considerable body of literature has been developed around the Prüm Treaty and its relationship with the EU framework and several and diverse views have been put forward such as: 'replay of Schengen',[752] 'breach [of the] letter [and of the] spirit, of Article 10 of the EC Treaty',[753] 'detrimental to EU integration', 'dismantl[ing] trust among the Member States', 'countervailing political force to the European Union's [AFSJ]', a competing model of security[754] or, on the contrary, a 'pragmatic' step oriented towards the EU framework[755] and a blow to democratic legitimacy.[756] However, six years after the signing of the Treaty there is scope in revisiting the field and some of the questions raised at that time. The research will therefore focus on whether in its EU CT policy the EU adequately accommodated human rights and security by integrating parts of the Prüm Treaty into the EU framework. It will also

752 Luif P, 'The Treaty of Prüm: A Replay of Schengen?' (2007) EU-Consent <http://www.eu-consent.net/library/deliverables/D38c.pdf> accessed 15 September 2011, 6.

753 HL Report on the Prüm Treaty (n 574) [22].

754 Balzacq and others (n 161) 1, 3, 17 (a similar version has been published under the title 'The Treaty of Prüm and EC Treaty: Two Competing Models for EU Internal Security' in Balzacq and Carrera (eds) (n 81).

755 R Dehousse and D Sifflet, 'Les Nouvelles Perspectives de la Coopération Schengen: le Traité de Prüm' Egmont Institute (2006) < http://www.egmontinstitute.be/papers/06/eu/Prum.pdf> accessed 15 September 2011.

756 C Walsch, 'Europeanization and Democracy: Negotiating the Prüm Treaty and the Schengen III Agreement' (2008) 5 *Politika misao* 81, 86; comment on 'pragmatic approach' 89. See also D Kietz and A Maurer, 'From Schengen to Prüm: Deeper Integration through Enhanced Cooperation or Signs of Fragmentation in the EU?' (2006) German Institute for International and Security Affairs, SWP Comments 15 <http://www.swp-berlin.org/fileadmin/contents/products/comments/Com15_06_Ktz_Mrr_Ks.pdf> accessed 15 September 2011.

tackle issues such as trust, loyal cooperation or European integration under a new light and informed, where relevant, by the changes brought about by the LT. Finally, the chapter will touch upon the implications of the Prüm Treaty for the coherence of EU CT policy and on the capacity of the EU to be perceived as a strong security provider.[757] Before examining the above and in the interests of clarity, the research will briefly contrast the Prüm Treaty and its so-called 'predecessor', the Schengen Agreement.

4.1 Prüm and Schengen: experiences and the limits of the comparison

The parallels between the Prüm and Schengen cooperation (the 1985 Schengen Agreement[758] and the subsequent 1990 Convention implementing the Schengen Agreement[759]) have been repeated and emphasised since the Prüm Treaty emerged onto the security scene.[760] They mainly relate to the participating Member States, to the subject chosen for the agreement, and to the implicit use of what scholars have called 'differentiated integration'.[761]

Firstly, the same Member States that initiated the Schengen Agreement (Belgium, Germany, France, Luxembourg and the Netherlands) joined up with Spain and Austria in order to set up the Prüm Treaty. Secondly, the Schengen Agreement signed on 14 June 1985 was established with a view to enabling the 'gradual abolition of checks at the common borders' of the participating Member States. This allowed

757 In 2006, Balzacq and others (n 161) 17 posited that 'The Treaty of Prüm undermines the EU's ability to become an efficient policy-making body in the field of security. To start with, by setting up exclusive and competitive measures that seek to address threats that affect the EU as a whole, it blurs the coherence of EU action in these fields.'

758 (n 9).

759 ibid.

760 See T Balzacq and others (n 161) Section 5. Rethinking Schengen Continuity and Transformation, Walsch (n 756) 83-86.

all Member State nationals to cross freely over internal borders as well as allowing the free circulation of goods and services.[762] In contrast, the purpose of the Prüm Treaty signed on 25 May 2005 was multi-pronged, dealing with the fight against terrorism, illegal migration and cross-border crime.[763] Lastly, both initiatives initially took place outside the EU framework. However, important differences must also be underlined in this context.

At the time the Schengen Agreement was established, the objectives pursued by it were not supported by specific Community provisions for free movement of persons, despite a general objective stated in the Single European Act for 'an area without internal frontiers.'[764] However, as Luif pointed out, the Schengen evolution 'resulted in an increasing cross-over with the new rules' of the Maastricht Treaty which established the so-called 'Justice and Home Affairs Area' (the 'third pillar'). Finally, the Amsterdam Treaty 'integrated the Schengen *acquis* into the framework of the EC and EU Treaties (through a Protocol attached to the Amsterdam Treaty).'[765]

However, the setting of the Prüm Treaty, almost twenty years after the Schengen Agreement was signed, cannot be observed through the same lens as the Schengen cooperation for several reasons. Firstly, when the Schengen Agreement was set up, the EU had not yet developed the instrument of 'enhanced cooperation'. [766] It was only the Amsterdam Treaty (1997) that introduced the possibility (revised in

761 Emmanouilidis (n 356).

762 (n 9).

763 As Walsch (n 756) 84 observes it, the history of the Treaty can be 'traced back to the security concerns Germany brought to the attention of its Schengen partners. […] Bilateral treaties were quickly completed with the Netherlands and Austria in 2003. Simultaneously, Germany launched a multilateral security initiative with the Benelux countries and France.'

764 Luif (n 752) 6.

765 ibid 7.

766 See chapter two for comments on enhanced cooperation.

2001 by the Nice Treaty) and, probably due to its relatively cumbersome rules, the mechanism was never used before the entry into force of the LT. The Member States that engaged in the Prüm Treaty thus had a clear possibility to use the rules of enhanced cooperation at least for some areas of the Treaty. However, in line with Ziller's arguments, the fact that only seven Member States took part in the initial Treaty was no coincidence.[767] This allowed those Member States to circumvent the last resort rule of Article 43A TEU, which provided that enhanced cooperation is acceptable 'when it has been established within the Council that the objectives of such cooperation cannot be attained within a reasonable period by applying the relevant provisions of the Treaties.' Furthermore, the objectives pursued by the Prüm founding countries were clearly enshrined in the EU and EC treaties touching both first pillar rules (illegal migration: Article 63(3)(b) EC) and third pillar ones (fight against terrorism and cross-border crime: Article 29 TEU). Moreover, work was under way within the Commission on the availability principle proposal (see section 3.1).[768] Finally, it should be recalled that the level of integration present among the Member States in 1985 cannot be compared with the one attained by the same Member States in 2005. As Guild and Geyer underline, 'Schengen has been anything but a smooth and easy success story. Instead the entire Schengen process has been considered anomalous and a far cry from optimal deviation from the European legal framework.'[769]

767 J Ziller, 'Le traité de Prüm -Une Vraie-Fausse Coopération Renforcée dans l'Espace de Sécurité de Liberté et de Justice' (2006) EUI Working Papers, Law No 32, 3.

768 EDPS (n 572) [13].

769 E Guild and F Geyer, 'Getting Local: Schengen, Prüm and the Dancing Procession of Echternach Three Paces Forward and Two Back for EU Police and Judicial Cooperation in Criminal Matters' (2006) Home and Justice Affairs CEPS Commentaires 3 <http://aei.pitt.edu/11629/> accessed 15 September 2011.

4.2 Security and human rights imperatives: the journey from the Prüm Treaty to the Prüm Decision

4.2.1 The passenger named 'security' on the Prüm journey

4.2.1.1 A first assessment: convergence despite dividing lines

The Prüm initiatives have translated the CT security objective through specific and general measures.[770] The Prüm Decision has, moreover, 'filtered' from the Prüm Treaty only those CT-related measures that could match the threat perceptions of all the EU Member States. Besides the provisions connected with information exchange –discussed in the previous chapter – the Prüm Decision has also retained measures termed as 'Other Forms of Cooperation', namely 'joint operations' (Article 17)[771], 'assistance in connection with mass gatherings, disasters and serious accidents' (Article 18)[772] and 'use of arms, ammunition and equipment' in relation to the two abovementioned measures (Article 19). On closer examination, the Prüm Decision has reproduced all but three provisions of the Prüm Treaty with relevance to CT: 'air marshals' (Article 17 and Article 18) as part of the Chapter 3 'Measures to prevent terrorist offences')[773] and 'measures in the event of imminent danger' (Article 25) and 'cooperation upon request' (Article 27) as part of the Chapter 5 'Others forms of cooperation'. In contrast, the EP, when consulted on the draft initiative, proposed the inclusion in the EU text of the last two provisions on grounds that it would 'ensure

770 For a discussion of the general and specific CT measures of the Prüm Treaty see J C Remotti Carbonell, 'Las Medidas Contra El Terrorismo En el Marco del Tratado de Prüm' (2007) 7 Revista de derecho constitucional europeo 181.

771 The measure has been criticised on legal certainty grounds by Remotti Carbonell ibid 184.

772 The rules have some similarities with those foreseen in Council Resolution of 29 April 2004 on security at European Council meetings and other comparable events [2004] OJ C 116/18.

773 This provision should be read in conjunction with art 18: Carrying of arms, ammunition and equipment.

more efficient police cooperation in border areas.'[774] From the three measures mentioned above, a particular consideration should be given to the use of air marshals as the key dividing line between the two Prüm initiatives in relation to CT efforts. The provision has been perceived by Balzacq and others as a 'positive response to transatlantic security demands' despite opposition from the 'Scandinavian EU Member States' and 'provid[ing], outside the EU dimension, a general agreement on transport and aviation security.'[775] Additionally, it also raised some questions of practical implementation as Bunyan, Director of Statewatch, said in evidence given before the House of Lords:

> if you have 15 Member States who are signing up to, for example, sky marshals, how can that work within the European Union? You can have sky marshals on some flights between some countries but not sky marshals on other flights. I would disagree with sky marshal anywhere as a good idea, but if you are going to have it you are getting a two-tier Europe again; it is not just two-tier decision-making, it now becomes two-tier practice.[776]

While the deployment of air marshals is to be conducted in line with the Chicago Convention of 7 December 1944 on International Civil Aviation and its annexes (in particular Annex 17 which ensures a first level of legal certainty), Article 17 of the Prüm Treaty also leaves some questions as regards the status of air marshals and the timeframes linked to their deployment. Firstly, the possibility that air marshals be also 'other suitable trained officials responsible for maintaining security on board aircraft' implies that such trained officials could be from the military, the private sector or the intelligence community.[777] Secondly, such deployment may take place only after a

774 EP Resolution of 7 June 2007 on the Prüm initiative (n 561) Amendments 43 and 44.

775 (n 161) 10.

776 HL Report on the Prüm Treaty (n 574) Examination of Witnesses [Q49].

777 Balzacq and others (n 161) 9; Remotti Carbonell (n 770) 191.

written notice given 'at least three days before' the envisaged flight and in the case of *imminent danger* 'notice must be given without any further delay, as a rule before the aircraft lands' (Article 17(4)). While this last provision has sparked comments about measures conveying the sense of a 'permanent state of emergency' – the expression 'imminent danger' not being defined – it cannot be considered alone as allowing the setting up of the 'permanent deployment of air marshals'.[778] Only its concrete implementation would support such an allegation. In this respect, it must be observed that while the national provisions implementing Article 17 can be identified, practically no information is currently available concerning the use made by the Prüm Treaty countries of this provision (eg: number of air marshals, number of accompanied flights) as in many cases such information is classified. The main rationale is to avoid undermining the effectiveness of the measure which is dependant on a certain degree of opacity. While these actions must be carefully scrutinised at national level allowing proper checks and balances in order to compensate the said opacity, it is difficult to subscribe to the 'permanent state of emergency' scenario in respect to this particular measure.

778 Balzacq and others (n 161) 10.

4.2.1.2 A second assessment – a difficult but confirmed settling in the EU security architecture

From the above comments, several questions arise: (a) has the Prüm Treaty allowed the establishment of competing models of security? (b) did it create – as suggested by Balzacq and others – a 'hierarchy within the EU', that is 'some Member States can decide to create a new structure that will apply to all'? [779] Finally, (c) it is worth revisiting the question: has the Prüm Treaty undermined the coherence of EU CT policy?

(a) It must firstly be pointed out that, during the 'legal transfer' of provisions from the Prüm Treaty to the Prüm Decision, only three measures were registered as not responding to the CT security concerns of all twenty-seven Member States with a perceived strong opposition especially in relation to the use of air marshals. In concrete terms, it could thus be argued that the Prüm Treaty has not departed – content-wise – from the mainstream approach to countering terrorism within the EU. Procedurally speaking, the Prüm Treaty addressed the concerns of some Member States as regards security, concerns they considered the EU mechanisms were not able to address on time. From the perspective of the year 2011, where the Prüm Decision is a key measure in terms of information exchange referred to also by the Stockholm Programme and in relation to the Information Exchange Model [780] and where the measures stemming from the Prüm Treaty are hardly mentioned in the EU arena, it can be considered that, despite initial concerns as to the evolution of the Prüm model,

779 Balzacq and others (n 161) 1.

no competing internal security model has really emerged. This is also due to the fact that, only three months after the entry into force of the Prüm Treaty, fifteen Member States adopted an initiative for a Council Decision that included the most important third pillar provisions. Several reasons could have underpinned the decision of the Member States to support the inclusion in EU law of such an instrument: the Member States' awareness of the potential benefits of the Prüm Treaty which took a more moderate approach in respect of the implementation of the principle of availability, the avoidance of a Europe of multiple speeds as regards security concerns and the wish not to be left behind. However, none of these reasons can account for the final decision of the Member States. Only a mix of these elements, in a context of rational choice analysis,[781] can explain their decision. The Prüm Treaty has shown that EU objectives (ie to counter terrorism) and schemes (ie the principle of availability) can also be firstly translated at intergovernmental level and by small groups acting as 'laboratories'. It can be accepted that a number of Member States can have, in relation to the same objective (ie the fight against terrorism) and according to their legal and political cultures, different methods in order to attain that objective, and that they should be entitled to engage in cooperation with those Member States that share their views. However, this should still be done as far as possible within the EU framework and without undermining the EU project.

(b) With respect to the question of an hierarchy within the EU among Prüm Treaty Member States and the rest, while it is true that after signing the intergovernmental Prüm Treaty the same Member States have pushed forward in order for the vast majority of its provisions to become EU law, the ultimate decision

780 (n 54) section 4.2.2.

781 Wallace and Wallace (n 156) 57.

was in the hands of all twenty-seven Member States. Formally, they had a choice and could have imposed their veto had the Treaty raised fundamental problems for their legal systems. Furthermore, and taking into consideration the 'degree of Europeanisation', it has been also argued that 'the signatories do not value the EU as the primary unit for the production of security'.[782] Taking this comment in a different light, it could also be argued that the Prüm experience has shown that there was still a deficit in building the EU as the corner stone for the delivery of transnational security, not necessarily because the Member States did not trust their counterparts, but possibly because they opposed the lengthy EU procedures. However, it must be pointed out that what the Member States missed when assessing the EU framework is that, despite its drawbacks, it offered guarantees in terms of policy formation, democratic legitimacy and judicial oversight that were not provided by the intergovernmental framework. One could argue that the last two elements – democratic legitimacy and judicial scrutiny – have been finally secured by the process of the Prüm Decision. However, the aspect of adequate policy formation has not been addressed by the Prüm regime.

(c) Additionally, the coherence of the EU CT policy could have been seriously endangered if several intergovernmental cooperations, such as the Prüm Treaty, had emerged in the aftermath of the signature of the Treaty. At such a moment, we could have reasonably concluded that the EU was at great risk of facing multiple security regimes with possible risks of incoherencies and overlapping measures. In the current context, however, the coherence of the EU CT policy, while eroded *prima facie*, has been secured by the integration of the Prüm Treaty into the EU framework.

782 (n 161) 3.

Nevertheless, coherence should not be treated as equal with the proportionality of the measure in an EU context, an aspect dealt with in the previous chapter of this thesis.

From the above, several conclusions can be drawn. The Treaty has highlighted a series of inadequacies and shortcomings in the EU framework that the Prüm countries wished to circumvent. Secondly, the Treaty might be a dangerous example of how intergovernmental cooperation can receive the integration 'logo' and be re-baptised as EU law. Thirdly, as suggested by Kietz and Maurer, the Treaty entailed the EU institutions facing a '*fait accompli*' (despite the fact that the Council and the Commission were informed about the Prüm proceedings).[783] The Prüm Treaty and its questionable entry into EU security law thus reflect the struggles that the EU has to face from inside in order to position itself as the first stop for cooperation among Member States when delivering security in a globalised environment. On a positive note, it is also argued that, despite difficult beginnings, the Prüm Decision sits comfortably today as a key measure in the EU security apparatus due to the important political support given to the measure and to a strong emphasis on its implementation. It remains to be observed what the positioning of the Prüm regime might be with respect to the human rights imperative of the CT fight.

4.2.2 The passenger named 'human rights' on the Prüm journey

Two types of considerations can be developed under this heading and they refer to the substance of the Prüm Treaty and Prüm Decision as regards (a) human rights

783 (n 756) 3.

provisions[784] and (b) the adoption process of the two instruments as part of the democratic legitimacy appraisal.

(a) Unlike the differences observed in 'security measures' between the Prüm Treaty and the Prüm Decision, the human rights safeguards provided for in the Prüm Treaty and subsequently in the Prüm Decision are almost identical. Nonetheless, one can note some some differences with respect to data protection provisions. It maintains the 'responsibility for legal checks on the supply or receipt of personal data' only with the independent data protection authorities (Article 39(5)), while the Prüm Decision allows an alternative 'with the independent data protection authorities or, as appropriate, the judicial authorities of the respective Member State' (Article 30(5)). Additionally, under Article 40 on 'Rights of the data subjects and damages', the Prüm Treaty prescribes that 'information shall be supplied in compliance with national law to the data subject […] at the *request of the competent body under national law*'.[785] In contrast, the Prüm Decision has enshrined that the request should emanate from 'the data subject' (Article 31(1)), a situation criticised by data protection experts (as indicated in the previous chapter). Both the Prüm Treaty and the Prüm Decision take a modest approach, relying on the standards of the CoE 108 and its 2001 Additional Protocol. However, this approach is not specific to the Prüm regime but has also been preferred by other EU instruments in the field as indicated in chapter three. Furthermore, both the Prüm Treaty and the Prüm Decision have disregarded the leitmotif requirement of data protection experts and academics that no additional information exchange mechanisms be set up before the adoption of an all-

784 Note that specific comments in relation to the substantive provisions of the Prüm Decision and their impact on the protection of human rights have been provided in chapter three.

785 (emphasis added).

encompassing framework for the protection of personal data in the third pillar. In this context and considering that a more thorough consideration of the privacy and data protection implications of the Prüm logic – under both formats –[786] could have been adopted, both initiatives can be seen as 'grey laws'.

(b) With respect to the adoption process, it must be observed that both instruments exhibit deficiencies examined against the democratic legitimacy standard as laid down in the first chapter of this thesis and extensively developed in the second chapter. Previous research in relation to the Prüm Treaty has already pointed out the fact that 'negotiations and agreements were almost exclusively in the domain of national bureaucracy experts' and 'the role of national parliaments was frequently neglected […]. Parliamentarians could exercise little or no influence on the contents of the treaty'.[787] Walsch, drawing on the findings of Kietz and Maurer, has nevertheless listed different practices in the national parliaments with respect to the Prüm Treaty ranging from a simple formality to an actual veto power.[788]

Under the EU framework, the democratic legitimacy of the Prüm Decision has also been limited as, under the consultation procedure, the Council – treaty bound to consult the EP – is not bound by the EP's position and can dismiss it. It has nevertheless the merit of allowing a public debate on provisions, which could have an impact not only on the security of EU citizens but also on their right to privacy. The EP held a hearing on the Prüm Treaty in 2006 during which academics warned about the dangers of reverting to intergovernmental settings while the EU was fully

786 See Germany's and Austria's efforts in relation to the confirmation that the Prüm Treaty provided a high level of data protection in Walsch referring to Kietz and Maurer (n 756) 86.

787 Walsch (n 756) 86-87.

equipped to deal with such security requests.[789] In supporting the adoption of a framework decision instead of a simple Council decision, the EP followed the position of other scholars and data protection authorities such as the EDPS. They considered that the substance of the text submitted for its analysis – access rights to automated DNA files, automated dactyloscopic identification systems and vehicle registration data, and data protection provisions – required an approximation of relevant national rules. In support of its position, the EP Legal Affairs Committee recalled the reasoning of the Advocate General Ruiz-Jarabo Colomer, in his Opinion of 12 September 2006 in *Advocaten voor de Wereld VZW v Leden van de Ministerraad*. He took the view that the Framework Decision on the EAW was a harmonising provision on the grounds that[790]

> [a]rrest warrants are well established under the criminal procedure laws of the Member State and, in certain circumstances, subject to specified conditions, the Framework Decision affords them cross-border effect, an objective which requires approximation of the relevant national rules.[791]

This approach also reflects the belief that a deeper level of EU integration and harmonisation is required where important aspects such as exchange of DNA profiles or fingerprint data are at stake, thus alleviating problems stemming from divergent national practices.

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788 Walsch (n 756) 87. See also Ziller (n 767) 8 for a discussion about Article 48, 'executive agreements' –implying waiver of ratification- and regression in comparison with EU working methods (public debates).

789 See EP, LIBE Committee Hearings <http://www.europarl.europa.eu/hearings/20060622/libe/programme_en.pdf> accessed 15 September 2011.

790 Opinion in Case C-303/05 [2007] ECR I-3633. [49].

791 Report of 24 May 2007 on the initiative by the Kingdom of Belgium, the Republic of Bulgaria, the Federal Republic of Germany, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Slovenia, the Slovak Republic, the Italian Republic, the Republic of Finland, the Portuguese Republic, Romania and the Kingdom of Sweden on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime A6-207/2007.

The already weak consultation procedure has been further weakened by the establishment in the case of the Prüm process of a new and parallel adoption procedure that was taking place at Council level. The Member States had in fact to 'give' or 'withhold' their consent to this text (the so-called 'take it or leave it' approach[792]), considering that the intention was to keep the Prüm Treaty text – for coherence reasons – with the minimum number of amendments possible, given that several Member States were already implementing and applying its provisions (with a view to avoiding additional burdens). The fact that the initiative was supported by such a large number of Member States leads to the conclusion that there was an important willingness to support such a far-reaching mechanism. However, this could also be seen through the lens of a need for conformity with the mainstream approach. This could be related to the comment by the House of Lords, which rightly observed that '[w]hat is remarkable is how little any of the other Member States appear to have questioned what they are being asked to agree.'[793]

While there were clear democratic legitimacy deficits in both Prüm initiatives, the new landscape of the LT offers premises for enhancing legitimacy through the new powers granted to the EP. In this context, it must be recalled that the EP has already been called to give its consent under Article 218 TFEU on a Prüm-related measure, namely the Agreement between the EU and Iceland and Norway on the application of certain provisions of Council Decision 2008/615/JHA and Council

792 See also in this sense the comments of the EDPS that 'the other Member States are denied a real say in the choice of rules. They can only choose between participating and not participating.' (n 572) [16] Also, the position of Lord Avebury expressed during the Joint Parliamentary Meeting European Parliament -National Parliaments (2-3 October 2006) is extremely clear on this subject: 'What is peculiar about the G6 Group and the Prüm Group, which gave birth to the Prüm Convention, is that they seek to pre-empt EU decision-making processes, by making arrangements of their own, and offering them to other Member States on a take-it-or-leave-it basis.' Statewatch, 'Intervention -Lord Avebury' <http://www.statewatch.org/news/2006/oct/eric-avebury-heiligendamm1.pdf> accessed 15 September 2011.

793 (n 574) [2].

Decision 2008/616/JHA. It has given a positive reply to this.[794] Moreover, any amendment to the Prüm Decision will be subject to the co-decision procedure thus allowing a deeper scrutiny of the EP.

It therefore follows that, despite beginnings marked by limited transparency and public debate, the Prüm Decision is bound to go back in the parliamentary arena either as a point on its implementation at the latest in 2012 or as a file whose amendment requires the co-decision procedure. Moreover, the end of the transitional period will also lift the limitations imposed on the Commission or the CJEU, leading thus to a more compliant human rights regime in respect of the Prüm Decision.

4.3. Prüm – turning concerns into strengths and reasoning *in abstracto*

At the beginning of this chapter, we touched upon some aspects perceived, in the aftermath of the signing of the Prüm Treaty, to be in conflict with the EU construction either in its spirit or in its letter. Among these elements the research retains the following: (a) 'breach [of the] letter [and of the] spirit, of Article 10 of the EC Treaty', (b) 'dismantl[ment of] trust among the Member States' and (c) the perception of the Prüm Treaty as 'detrimental to EU integration'. We therefore set out to examine them under a new perspective informed also by the changes brought about by the LT. This section will conclude with a general appraisal of the Prüm regime as regards the delivery of human rights and security imperatives and from the perspective of the year 2011.

794 EP legislative resolution of 6 July 2010 on the draft Council Decision on the conclusion of the Agreement between the European Union and

(a) In relation to the breach of the obligation of loyal cooperation, it is worth inquiring in a hypothetical manner from the angle of the LT provisions (Article 4(3) TEU as amended by the LT) in order to observe whether their application would have yielded different results had the LT been in force in 2005, all other aspects being equal. In 2007, Balzacq, drawing on comments made by Lang, observed that Article 10 EC established positive as well as negative obligations for the Member States and that these obligations extend to all treaty provisions (EU and EC) requiring Member States to pursue 'the completion of the internal market and the area of freedom, security and justice […] within the treaties' and not to 'interfere with the operation of Community institutions'.[795] Also, the Court seemed to apply by analogy loyal cooperation to the third pillar, based on the very general provision of Article 1 TEU calling for the establishment of an 'ever closer union'.[796]

Prüm touched on three areas (terrorism, illegal migration and cross-border crime) central to the EU action and in relation to which specific legislation was either already in place in the EU or was at the level of policy reflection. Moreover, many of the third pillar elements of the Treaty had already been discussed between the Member States. While for some areas (such as air marshals or measures in the event of imminent danger – 'hot pursuit' across borders by law enforcement agents – Articles 17 and 25 respectively), there was no clear consensus among the twenty-seven Member States, in others the Commission was analysing paths in order to put forward concrete proposals at EU level (eg the availability principle proposal).

Iceland and Norway on the application of certain provisions of Council Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime and Council Decision 2008/616/JHA on the implementation of Decision 2008/615/JHA and the Annex thereto P7_TA(2010)0250.

795 (n 161) 3.

796 V Mitsilegas, 'Constitutional Principles of the European Community and European Criminal Law' (2007) 8 EJLR 301, 310.

Nevertheless, it should be pointed out that the Treaty in its Article 47 enshrined that its rules

> shall apply only in so far as they are compatible with European Union law. Should the European Union in future introduce arrangements affecting the scope of this Convention, European Union law shall take precedence in applying the relevant provisions of this Convention.

At the time, the House of Lords held that for 'seven Member States to enter into an agreement including first pillar matters falling squarely within EC competence may have breached the letter, and certainly breached the spirit, of Article 10 of the EC Treaty.'[797] While the LT renders the loyal cooperation obligation generally applicable, the substance and weight of the obligation remain practically the same as in the previous treaty. Nevertheless, it can be argued that having regard to the spirit of the LT the obligation not only to abstain from action than could hamper EU's objectives, but more importantly the positive obligation to 'facilitate the achievement of the Union's tasks' is reinforced (Article 4(3) third subparagraph). In contrast, and as discussed at length in the second chapter, the new provisions on enhanced cooperation in the LT lay the premises for better addressing at the same time issues of democratic legitimacy and effectiveness within a EU.[798] Making a predicament as to the future of these provisions – in combination with the emergency brake – or of Prüm-like initiatives would lead the reader on a known path, namely that of the possible occurrence of a Europe of multiple speeds. [799] Instead, it is worth pointing out that six years after the signature of the Treaty, no other Prüm-like initiative has emerged on the European security scene and that, almost two years after the entry into force of the

797 (n 574) [22].

798 F Tekin and W Wessels, 'Flexibility within the Lisbon Treaty. Trademark or Empty Promise?' Eipascope 2008/1, < http://www.eipa.eu/files/repository/eipascope/20080509184449_SCOPE2008-1-5_TekinandWessels.pdf> accessed 15 September 2011, 27; Walsch (n 756).

799 Walsch (n 756) 90.

LT, the only two enhanced cooperations that have been put forward are in the in the area of the law applicable to divorce and legal separation and the creation of unitary patent protection.[800] At the same time, the threat to the coherence of EU action can also come from within, which entails careful scrutiny of the EU CT measures already adopted or at the stage of legislative proposals. While the Prüm Treaty has been depicted as a 'Trojan Horse', attention must be paid to possible 'in-house Trojan Horses' that would also weaken the EU's stand in the CT field.[801]

(b) Subsequently, the question of trust among the Member States has also been highly debated in relation to the Prüm developments, especially coined in a negative manner as eroding the said trust. However, 'trust' is a highly volatile term in this particular situation as it is not a legal concept as such but rather a political and moral notion, which can take different forms according to the particular context in which it is used.[802] The role played by the concept of 'trust' within the Prüm Treaty is also used flexibly among scholars, being replaced sometimes by concepts of efficiency and effectiveness or connected with concerns about the coherence of the EU action in the AFSJ.[803] Moreover, it seems that the Prüm Treaty countries have themselves invoked a form of trust among the EU Member States allowing them to reintegrate the EU

800 EP, Legislative Observatory, 'Enhanced cooperation in the area of the law applicable to divorce and legal separation. Implementing rules. Council Regulation' <http://www.europarl.europa.eu/oeil/file.jsp?id=5849082&noticeType=null&language=en> accessed 20 October 2011; EP, Legislative Observatory, 'Enhanced cooperation in the area of the creation of unitary patent protection: implementation' <http://www.europarl.europa.eu/oeil/file.jsp?id=5909652> accessed 20 October 2011.

801 See The Lost Marketing Ploy, <http://thelostmarketingploy.blogspot.com/2011/03/are-mccanns-working-for-nazis.html?zx=c6d6c176bbd320e6> accessed 20 June 2011.

802 As Radaelli (n 73) in his analysis of Europeanisation points out drawing on Sartori, '[c]oncepts that are not well defined lead to confusion and elusive language. Concepts that do not specify the level of analysis generate mistakes in terms of the 'ladder of abstraction', that is, they obfuscate the relations between genus and species. Concepts without negation are universals: they point to everything, 'conceptions without specified termination or boundaries' (Sartori 1970: 1042).'

803 See Balzacq and others (n 161) and Guild and Geyer (n 769) for a critical approach to the Treaty and Brady, Dehousse and Sifflet for a rather positive stance on the Prüm Treaty in Walsch's review of academic positions on the Prüm Treaty (n 756) 88. On the concept of mutual trust see D Flore, 'La Notion de Confiance Mutuelle: l'"Alpha" et l'"Omega" d'une Justice Pénale Européenne' in G De Kerchove and A Weyemberg (eds), *La Confiance Mutuelle dans l'Espace Pénal Européen/Mutual Trust in the European Criminal Area* (Institut d'Etudes Européennes 2005) 19.

landscape after a certain period of time while at the same time indirectly mistrusting the EU legal framework's ability to provide an adequate format for their initial cooperation.[804]

Moving beyond the issues surrounding the levels of trust present among the Member States in the beginning of the Prüm cooperation, it is posited that we can currently see a positive form of trust developing among the EU Member States as a result of the implementation work undertaken for the Prüm Decision. More particularly, this is the case with the assistance provided by Member States that are already operational – termed 'supporting partners' – to those Member States that are not yet operational with a view to:

> - organising the technical support,
> - helping the respective [Member State] to meet the technical requirements,
> - carrying out the pilot run,
> - providing at least one expert to lead and/or participate in evaluation visits.[805]

(c) Finally, the Prüm Treaty has been seen as 'detrimental to EU integration' by 'produc[ing] a political rift in the construction of the EU area of freedom, security and justice' and by 'the fracturing of the legal framework of EU objectives and their pursuit through agreements that elude the EU'.[806] Taking into consideration the division proposed by Emmanouilidis as regards the concept of 'differentiated

804 Article 1(4) of the Prüm Treaty allowed for the most bizarre legal reasoning to unfold. As drafted, it can reasonably be inferred that, irrespective of the assessment of the implementation (e.g. modest results and human rights concerns), the initiative for a corresponding EU instrument had to be submitted.

805 Council Document 6077/8/11 REV 8, 'Implementation of the provisions on information exchange of the 'Prüm Decisions'. See document also for a detailed presentation of the state of play as regards implementation.

806 Balzacq and others (n 161) 2.

integration'[807] (more specifically, the forms consisting of 'creation of a supranational EU' (option 1) and 'intergovernmental cooperation outside the EU' (option 2), as well as Radealli's take on Europeanisation[808]), it is worth also considering another strand through which the Prüm regime and the integration process can be observed, namely through the pendulum metaphor described in chapter one and proposed by Wallace (to be further developed in chapter five).

The setting up of the Prüm Treaty can be perceived as a first swing of the weight (bob) from the national arena to a micro-transnational one. The subsequent moves of the bob between the national and the transnational one equal a period of indecision as to the outcome of the Treaty beyond the micro-transnational arena emphasised above. Finally, the bob has moved decisively into the transnational sphere of the EU in the format of the Prüm Decision. This view catches both options 1 – new supranational EU – and 3 – intergovernmental cooperation outside the EU – as termed by Emmanouilidis, and accounts for the difficulties of designing an EU policy in a field fundamentally marked by entrenchment in national positions, preference for 'clubs' of Member States and a tendency towards secrecy.

The above analyses attempt to provide a fresh look at the Prüm Treaty and the Prüm Decision, informed by strong and often critical positions from academia as regards the process of crafting EU law as well as the substance of the above initiatives. Reviewing the sub-questions raised at the beginning of this chapter, several comments can further inform the debate around the Prüm regime. The Prüm Treaty has had an impact on the EU CT agenda and has actually fulfilled – at least

807 (n 356).

808 (n 73).

from the perspective of the efforts deployed and of the political support given to the measure – the prophecy of being a '[pioneer] in establishing the highest possible standard of cooperation, especially by means of improved exchange of information'.[809] Moreover, it has also changed the CT agenda in relation to the pursuit of the legislative proposal concerning the principle of availability. If the security approach adopted by the Treaty taken *in abstracto* follows to a great extent the lines of the EU approach, the way the treaty has been introduced into EU law still raises criticism for the lack of democratic legitimacy and the 'pre-made' security vision that an intergovernmental treaty has succeeded in imposing onto the EU framework. The Treaty has pushed forward a piece of EU legislation constructed to add another layer of control and surveillance over individuals in the EU. It has done so without any clear and thorough evidence for its necessity or assessment of its real efficiency, apart from the extremely limited, though successful, results as regards its implementation (only three months) and the general requirements of the Hague Programme concerning the development of the exchange of information under the principle of availability. Additionally, precision as to the concrete input of the Prüm Decision to the CT fight will only be possible in 2012 after the release of the results of the implementation of the decision. Moreover, the Prüm process, while today perceived as a successful EU outcome stemming from intergovernmental cooperation, is nevertheless a 'grey' process. This means that the risks and benefits are intertwined, not only as regards the substantive aspects of the measure but also in relation to the procedural steps linking the Prüm Treaty to the Prüm Decision. Qualifying the process as 'grey' raises questions about the simultaneous fulfilment of the human rights and security imperatives in both the Prüm Treaty and the Prüm Decision.

809 (n 560) 3.

It follows that, while it is difficult to conclude that the Prüm approach has been counter-productive for EU CT policy, it is nonetheless justifiable to say that Prüm can be perceived as a symptom of a still 'troubled' EU when it comes to security and issues of supremacy (In this vein, EU internal security governance has been identified by Gruszczak as being 'a complex multi-level differentiated set of organizational, institutional and normative patterns and modes of "arranging things."'[810]). Prüm has proved that, while pursuing the EU security track, some Member States felt that the EU framework, even if equipped to deal with specific security requests, was too cumbersome or inappropriate for dealing with *their* specific security demands. This means that additional efforts in 'security marketing' are needed from the EU side in defining itself as the first 'check point' when Member States wish to engage in cooperation falling within the AFSJ remits, especially in relation to the CT fight. In defence of the EU model, it should be pointed out that no such attempt has been engaged in since the signing of the Prüm Treaty in 2005. Moreover, and paradoxically, the Prüm Decision is perceived today as a core measure within the EU information exchange, which leads to the conclusion that the EU has been ultimately successful in 'recuperating' and 'rebranding' this intergovernmental initiative.

However, such a precedent could have important negative repercussions if repeated with other instruments. Not only would it undermine the EU's credibility as a security provider and norm setter, but it would consider acceptable for some Member States, acting outside the EU framework, to impose the EU agenda. Prüm as a hybrid security initiative, intergovernmental by beginnings with integration

810 Gruszczak (n 100) 101.

aspiration, a ‘cooperation with centrifugal effect’ (the Prüm Treaty) which was ‘quickly, though only partially, transformed into centripetal action’ (the Prüm Decision)[811] should be perceived as a ‘grey phase’ in EU law-making. Such course should be avoided. This is especially important in the setting provided for by the LT, which ensures greater flexibility within the EU framework, an adequate level of democratic legitimacy and an obligation to take into account the impact on human rights from the beginning of the legislative process. At the same time, Prüm is at the crossroads of the frailties and potentialities of the AFSJ and of the CT policy in particular. The current challenge is to move the cursor in the field of potentialities by thoroughly examining the human rights impact as well as the effectiveness of the Prüm Decision and assessing whether Prüm has actually complied with the last part of its title, ie ‘particularly in combating terrorism and cross-border crime’. Rising to this challenge will be crucial for a successful EU CT policy that responds simultaneously to human rights and security concerns.

811 ibid 92.

CHAPTER V: EU CT POLICY – FINAL REMARKS AND THE WAY FORWARD

This thesis has striven to answer the research question of whether, and how, the imperatives of adequate protection of human rights and security are addressed within the EU CT policy. To achieve this, it has focused on the benefits for the CT legal framework brought about by the LT and on three instruments considered valuable in the fight against terrorism. The findings resulting from the different analyses undertaken in this research have provided insights on the trends of this EU policy, on the likely impact they have or could have on an individual and on the way EU CT law is being conceived, shaped and promoted. In this chapter, these trends and effects upon the individual, together with reflections on the way forward for the EU CT policy, are developed. Finally, the limits of the study as well as possible research stemming from the current one are laid out.

5.1 Working in a new legal landscape – benefits, challenges and unanswered questions

As was observed in the second chapter, the entry into force of the LT has strengthened the legitimacy and accountability of EU CT policy, the mechanisms pertaining to the rule of law[812] and has improved its checks and balances. It has also introduced provisions that enhance the effectiveness of the policy. However, some limitations are prolonged from previous treaties (Article 276 TFEU replacing Article 35(5) TEU). Moreover, advancements are coupled with newly introduced limitations (Articles

812 Under the new legal framework, the vast majority of CT measures are now enforced by a triple shield (on a medium to long term perspective): the requirements of the EUCFR, the quasi-complete control of the CJEU over such measures, and the external control of the ECtHR.

215(2) and 75 TFEU, Article 263 fifth paragraph TFEU). In addition, the LT also raises challenges for the EU institutions as regards the implementation of a series of CT-related mechanisms and procedures.

By means of example, the way in which the Commission will decide to implement Article 75 TFEU will be of paramount importance. This will allow for the establishment of a framework of administrative measures with regards to the freezing of assets to prevent and combat terrorism. Such a framework will not only need to devise effective measures in relation to the freezing of assets, but also provide substantial safeguards for persons subject to such measures in light of the 2008 and 2010 Kadi judgements.[813] The Commission Communication on the ISS has already indicated that the Commission will give consideration to such a framework based on Article 75 TFEU in 2011.[814] However, nothing has been said as to the relationship between Article 215 TFEU as *lex generalis* and Article 75 TFEU as *lex specialis*, and the split between EU autonomous and UN blacklists. The Court ruling on the *Parliament v Council* case as regards restrictive measures could indicate a possible way forward in this sense.[815]

Again at the level of challenges we can include the setting up of precise forms of evaluation and scrutiny for Eurojust and Europol (Articles 85 and 88 TFEU) and the arrangements pertaining to the evaluation of AFSJ CT-related measures by the Member States in collaboration with the Commission (Article 70 TFEU). In relation to the evaluation of the EU CT policy, the report by MEP Sophie in't Veld, the EP's

813 (n 138); Case T-85/09 *Kadi v Commission* [2009] OJ C 90/37 [171].

814 (n 101) Objective 2, Action 2, 8. At the time of the writing no legislative proposal based on art 75 TFEU has been put forward by the Commission.

815 Case C-130/10 (n 220).

Rapporteur on the 'EU Counter-Terrorism Policy: main achievements and future challenges', put forward substantive and procedural suggestions. Firstly, it requested that the examination focuses on 'whether the measures taken to prevent and combat terrorism in the EU have been evidence-based, needs driven, coherent and part of a comprehensive EU counter-terrorism strategy.' Secondly, the report states that 'in-depth and complete appraisal' should be conducted

> in line with Article 70 of the TFEU, with the Commission reporting back to a Joint Parliamentary Meeting of the European Parliament and national parliamentary committees responsible for overseeing counter-terrorism activities within six months of the study being commissioned, drawing upon reports to be requested from relevant organisations and agencies such as Europol, Eurojust, the Fundamental Rights Agency, the European Data Protection Supervisor, the Council of Europe and the United Nations.[816]

The study to which the report elliptically refers to could be read in conjunction with the title of the section, namely 'Evaluation by a panel of independent experts and mapping exercise' although no additional information is provided in relation to this panel as regards the choice of the members or by whom they would be selected. Additionally, it is open to question how this study – potentially fruitful for the evaluation – would feed the 'objective and impartial evaluation of the implementation' of AFSJ policies conducted by Member States, in collaboration with the Commission. The input to be provided by agencies such as Eurojust, Europol and FRA would also be highly relevant for a proper and comprehensive evaluation of CT policy. In this way the CT evaluation – within the remits of Article 70 TFEU and in the spirit of the LT but also beyond this article – could become an element of

816 Report of 20 July 2011 on the 'EU Counter-Terrorism Policy: main achievements and future challenges' A7-0286/2011.

enhanced effectiveness, accountability and transparency in the renewed EU CT policy under the LT.

The full potential of the LT will also depend on the willingness of the institutional actors to bring into its scope of application several CT measures adopted before its entry into force, thus ending the five-year transitional period and the inherent shortcomings of the former third pillar regime. A case in point would be the 2002 Framework Decision on combating terrorism amended in 2008 with respect to which the CTC suggested a discussion on a possible revision of above text in order to criminalise attending a terrorist training camp in the EU or abroad.[817]

Additionally, this thesis argues that, beyond the 'entrepreneurial' and key role played by the Commission,[818] the EP will also have a *strategic* role to play in the CT area under LT, and this despite the absence of such a formal role granted by the Treaty as regards the definition of the EU CT Strategy or the strategic objectives of the AFSJ. The EP is known to attentively 'question' along with other stakeholders the rationale of the CT measures, long-term and possible side-effects of CT measures and, more generally, the CT agenda, while also being a strong supporter of sound, effective and human rights-compliant CT measures. This should be informed by the vast amount of work already taking place in the framework of academia, research programmes funded by the Commission and the hearings and round tables organised by the EP, to quote only some instances.

817 Council Document 15894/1/10 REV1, 'EU Counter-Terrorism Strategy - Discussion paper' 5.

818 C Kaunert, 'The Area of Freedom, Security and Justice in the Lisbon Treaty: Commission Policy Entrepreneurship?' (2011) 19 European Security 169; C Kaunert, *European Internal Security - Towards Supranational Governance in the Area of Freedom, Security and Justice?* (Manchester University Press 2010).

As pointed out in chapter two, the EP has already used its LT consent powers (Article 218(6)(a)(v) TFEU) to block an important CT-related international agreement (the first EU–US TFTP Agreement) on the grounds that it infringed the rights to privacy and protection of personal data of individuals. Welcomed by privacy and human rights experts alike, this action has also been interpreted – or constructed – as reflecting an inter-institutional confrontation between the Commission, Council and EP. The EP's capacity to resist pressure and urgency requests has been put to the test again with respect to the second EU–US TFTP agreement, for which the EP gave its consent after it concluded that some of its key requests had been met in the new agreement. The legal strength of the above agreement is beyond the scope of this research, but it has been given as an example of the growing role of the EP in the CT field. The EP has also requested that the Commission elaborate a global approach as regards transfers of PNR data to third countries and to renegotiate the PNR agreements with a view to better addressing the criticism pertaining to lack of proportionality and legal certainty surrounding the said agreements, in particular the EU–US PNR agreement. It will be interesting to observe whether, in the case of the envisaged EU–US PNR agreement, the EP will make use of the possibility enshrined in Article 218(11) TFEU and ask for the CJEU's Opinion on the compatibility of the agreement with the Treaties. It is posited that, in this situation, the EP cannot be considered as 'delegating' its responsibilities to the CJEU but rather acting responsibly in the face of complex legal problems. Additionally, in the event that the CJEU itself will be asked to pronounce on the agreement, its position could have a legal 'spill-over' effect on the negotiations underway on the EU PNR Directive, by indicating what the standards as regards proportionality in terms of the collection of PNR data are.

It follows that the LT offers a solid basis for allowing the EU CT policy to be a viable project despite a series of shortcomings and unanswered questions, but it remains a necessary but insufficient condition.

5.2 AFSJ CT measures – the search for a matrix

As was announced in the first chapter, Wallace's pendulum metaphor has been used to observe whether and how it can be applied not only to a policy in general but to specific measures of the said policy, namely to the three CT measures analysed in the previous chapters in order to observe what can be inferred in terms of policy formation and agenda setting. Before embarking on such an analysis, some considerations are necessary as to the manner in which we conceive the pendulum in relation to EU CT decision-making processes. On closer examination, it appears that Wallace uses the pendulum model but at the same time introduces in it magnetic poles. This is due to the fact that, in its basic form, the pendulum is constituted of a 'weight (bob) suspended from a pivot' which, once displaced from its equilibrium point, 'swings with a specific period' which varies according to its length until it once again reaches its equilibrium point if no other forces intervenes (this is also known as the 'simple gravity pendulum').[819] This form of pendulum would not be able to record the constant movement between the national sphere and the transnational one in terms of policy formulation as presented by Wallace. This is why reference is made to two magnetic poles:

> Sometimes the forces of magnetism are so strong that they create a propensity to settle policy at the transnational level, while at other

819 <http://en.wikipedia.org/wiki/Pendulum> accessed 25 September 2011; MR Matthews, C F Gauld, A Stinner, *The Pendulum: Scientific, Historical, Philosophical and Educational Perspectives* (Springer 2005); G L Baker, J A Blackburn, *The Pendulum: a Case Study in Physics* (Oxford University Press 2005).

> times the country-based forces of magnetism keep policy-making located at the country level. In some instances no magnetic field is strong enough to provide a firm resting-point for policy-making and the pendulum sways uncertainly.[820]

The next paragraphs test the pendulum model and its limits.

(a) An EU offence of public provocation or how one magnetic transnational pole (CoE) can influence another magnetic transnational pole (EU)

The relative degree of coherence of national policies within Europe with respect to an offence of public provocation to commit terrorist offences led the pendulum to first swing to a transnational arena, namely to that of the CoE in the form of the CoE CPT 2005. The growing importance of terrorist propaganda determined the EU to also push for introducing an equivalent provision to that of the CoE CPT 2005 in its CT arsenal by amending the 2002 Council Framework Decision on combating terrorism. It follows that the bob rapidly moved within the general transnational arena from one magnetic pole (CoE) to another (EU). The speed with which the bob moved from the CoE to the EU realm indicates the somewhat broad consensus reached at EU level in keeping the CoE definition almost untouched. This example indicates that the pendulum metaphor can explain the policy formation of the offence of public provocation. However, the pendulum can be perceived as relying on three rather than two magnetic poles. As the transnational arena is not solely composed of the EU domain, it is argued that we can identify several magnetic poles which can have an impact on the decision-making process (a sub-division of the pendulum model) (see figure 2).

820 Wallace and Wallace (n 156) 46.

Figure 2

(b) The Prüm Decision and the Prüm Treaty, or the interplay between a strong micro-transnational magnetic pole, a powerful national arena and an EU in need of reaffirmation

As regards the Prüm Treaty and its integration into EU law, the moves of the pendulum between the different magnetic poles are as follows: the bob moves from the national arena towards a mini-transnational sphere represented by the Prüm Treaty magnetic pole. The swing of the weight back to the national level is then taken to represent the first measures of implementation. At the same time, a strong impulse from the national level makes the weight move again to the transnational sphere, but this time further than the intergovernmental treaty and into the EU magnetic field. At national level, the driving vector can be found in the strong impulse provided by Germany during its presidency and backed up by other Member States. At the same time, the EU's intention to quickly 'validate' a measure adopted at its 'outskirts' acts like a magnetic pole at transnational level. In contrast, the reluctance of the Member States to agree on the Commission proposal on the availability principle could be equated to the situation where 'no magnetic field is strong enough to provide a firm resting-point for policy-making and the pendulum sways uncertainly'.[821] As in the previous case, the pendulum model would be best served by a model resting on more than two magnetic poles (figure 3).

821 ibid.

Figure 3

(c) The EU PNR proposal – a propensity towards the EU arena

Finally, the decision-making process concerning the EU PNR proposal can also be explained from certain angles using a pendulum movement coupled with magnetic poles. It must be emphasised that, in the EU PNR proposal, there is an additional arena beyond that of the Member States and the transnational one: that of the privileged partners of the EU in the JHA field, such as the US, Canada and Australia (this thesis considers these actors to be different from what is the termed transnational arena[822]). It is difficult to place such actors at the same level as the Member States or on the curb made by the weight in its movement towards the transnational arena.

In the PNR context, the 2001 Aviation and Transportation Security Act mentioned above required that

> that airlines operating passenger flights to, from or through the United States, provide [US Customs and Border Protection Bureau (CBP)], upon request, with electronic access to PNR data contained in their reservation and departure control systems. [823]

This had an impact on the transnational field of the EU, pushing it into pursuing a PNR Agreement with the US. It follows that the settlement of a PNR policy at EU level has also been influenced by external vectors, namely the requirements of third countries such as the US, Canada and Australia. At the same time, in the PNR case we cannot account for converging policies of the Member States (a premise of the pendulum as identified by Wallace in order for the policy to settle at transnational level), but on the contrary we can identify only a limited number of countries

822 Wallace and Wallace (n 156). In the current setting the US has been perceived as the most important actor and therefore represented in figure 4.

823 Europa, 'Airline passenger data transfers from the EU to the United States (Passenger Name Record) frequently asked questions' Press Release <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/03/53&format=HTML&aged=0&language=EN&guiLanguage=en> accessed 20 July 2011.

developing such a system and only one Member State – the UK – with considerable experience of running a PNR scheme. Despite these wide variations, however, there is an important pressure to place the PNR policy within the EU magnetic field. While the decision-making process is only engaged for this proposal, making it difficult to predict whether the pendulum will continue swinging for failure to agree on an EU policy or whether it will be drawn finally to the EU magnetic sphere, some assumptions can nevertheless be made. The building up by the EU of a PNR strategy with respect to third countries seems to oblige the EU into a mimetic exercise internally, while, as argued at length in the third chapter, this undertaking might not be justified nor necessary within the EU in the format proposed in the 2011 EU PNR proposal. The strong support shown for the proposal by the UK, which has already developed this system, combined with a compliance mode from the other Member States also indicates that the weight might shift decisively towards the EU magnetic pole. It is unclear what can be expected from the EP where there are diverse political sensitivities on PNR matters, ranging from strong criticism concerning the entire scheme, important reservations about its proportionality to support, albeit moderate and subject to adequate safeguards. Will the EP be willing to reject the entire EU PNR proposal? This seems highly unlikely, thus leading to the hypothesis that, in PNR matters, the weight will swing firmly towards the transnational arena of the EU. The EU PNR proves that, as in the previous two cases, we can account for more than two magnetic poles for policy formation (figure 4).

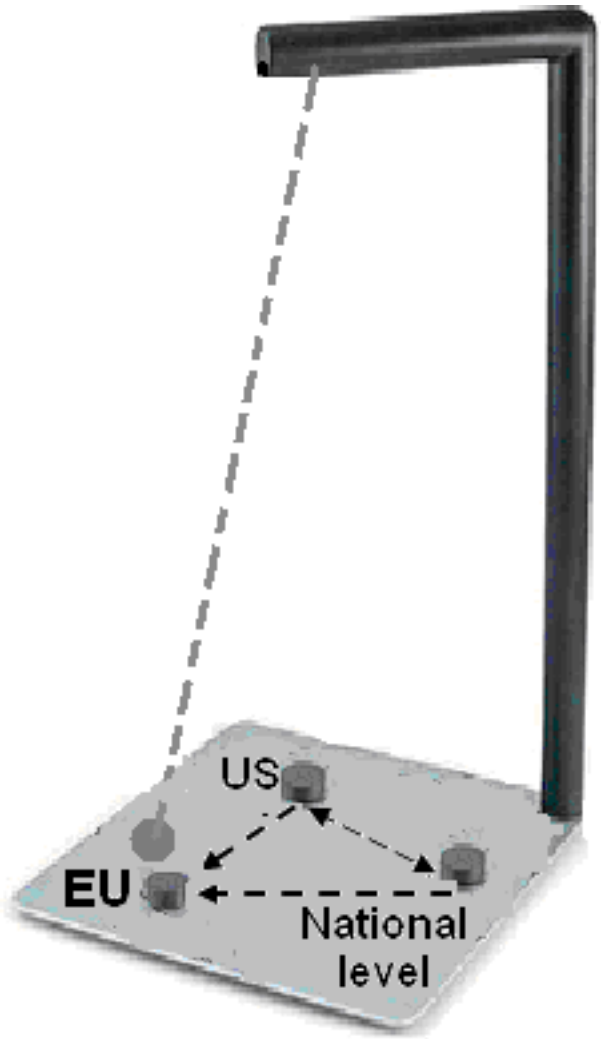

Figure 4

It follows that the pendulum model can also be applied to illuminate the formation of individual instruments within a policy, but one has to assume in this context that the bob would remain suspended at – or rather attracted to – a specific magnetic field. More broadly, it can be observed that more and more CT measures are entrenched at the EU level after prior passages of the bob through other transnational spheres or blockages in the national arena. An interesting element pertaining to prior passages through other transnational zones – difficult to account for using the pendulum model– is their capacity to 'seal' the outcome at EU level. This aspect – discussed previously in the research – will be touched upon in the next section.

Finally, this analysis has proven that the pendulum model can also be applied within the new legal setting of the LT. While the LT by its content is setting the premises for a stronger transnational EU arena in the field of CT, the new powers granted to national parliaments (ie the subsidiarity check), the powers of the CJEU and the extension of the ordinary legislative procedure to many CT measures where a very assertive EP is expected to come into play leave open the question of the swing of the weight between the national sphere and the EU one.

5.3 AFSJ CT measures – core traits and assessment: within the protective triangle of Freedom, Security and Justice or just bordering it?

Apart from exploring the impact of the LT on the legal framework for fighting terrorism, this thesis has also examined three instruments considered highly relevant to the field in question due to their ability to reveal the trends, characteristics and

logics underpinning the fight against terrorism at the EU level. In the following sections, some of these elements will be briefly reviewed.

(a) *'Borrowing'*

A first element that caught the attention of this research was connected with the models adopted by the instruments under analysis. Highlighting that the EU not only externalises its policies to neighbouring countries, Argomaniz argued that the EU is also a 'norm taker' not only in relation to international organisations such as the G8 or the UN but also in relation to 'its transatlantic 'partner', the [US]'. A key example of this is of course the PNR agreement with the EU.[824] This thesis has endeavoured to examine whether this assessment holds true for the three measures which are the subjects of this analysis. In short, the EU definition of public provocation to commit terrorist offences follows almost entirely the wording of the CoE CPT. The EU PNR proposal has been designed on a very similar logic to that of the PNR agreements and is said to be informed by the UK experience, while the Prüm Decision reproduces important parts of the Prüm Treaty.

While the importing of norms as such should not be considered *a priori* counter-productive and to automatically weaken the EU as an actor in the fight against terrorism, it must be subject to extremely careful examination. Such an examination would have to assess, on a case-by-case basis, the suitability of the measure in the EU framework, the impact of such a measure on fundamental rights and its likely effectiveness, together with the existence of alternative measures able to deliver the same results. Only when following this path can foreign models perform

824 Argomaniz (n 161) 120 followed the concept developed by Björkdahl in Björkdahl (n 161).

adequately within the EU CT law, without creating rejection, interfering with the functioning of other instruments or distorting the very foundations of the EU system.

As regards the insertion within the EU criminal law of the offence of 'public provocation to commit terrorist offences', the 2007 Commission IA has laid down a series of alternatives or complementary solutions, concluding by suggesting a similar definition to that of the CoE as the optimal way forward. This was in view of the fact that EU Member States were already implementing in their national legislation the CoE provisions. However, the internationalisation of the CoE standard in relation to the offence of public provocation to commit terrorist offences leads in practice to differences of approach, as the definitions of 'terrorism' in the two organisations are not identical. By contrast, the introduction of the Prüm Decision into EU law has not been supported by a comprehensive IA, but several arguments – detailed in chapter four – seemed to support such an approach. The 2011 EU PNR proposal follows closely the structure of the PNR agreements and of the EU PNR 2007 proposal, being informed by the work done between 2007 and 2011 and by the general approach towards PNR data transfers adopted by the Commission in 2010. It can be therefore considered, in line with Argomaniz, that the EU PNR proposal is the 'last piece in the puzzle of the internationalisation process', following the processes of 'norm advocacy and/or imposition by US authorities and norm acceptance as a result of an interactive bargaining process'.[825]

It follows then that the design of important pieces of EU CT legislation has been shaped outside the specific EU law framework. However, their design and logic do match, to some extent, the EU's approaches to the field in question. The

825 Argomaniz (n 161) 121, 130.

criminalisation of public provocation to terrorism has similarities with the criminalisation of 'incitement to hatred or violence' from the Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law.[826] The Prüm Decision has been considered a more pragmatic alternative to the Commission proposal under the availability principle. In contrast, the EU PNR proposal has been introduced following the acknowledgment that this exchange at international level was, allegedly, effective in terms of CT.

(b) *(Over?)Preventing*

In addition to being 'externally acquired' laws, the three examined measures can also be considered, in part or as a whole, as falling under the scope of preventive criminal law, which can be assessed not only through the human rights law standards, but also through the lenses of the precautionary principle or precautionary risk management.[827] Several scholars have warned of this tendency, with de Goede indicating that

> [i]t becomes clear that, with respect to a number of policies that play a key role in preemptive security practice, including criminalizing terrorist support, data retention, and asset freezing, the European Union is world leader rather than reluctant follower.[828]

What is even more worrying is that current security threats (with terrorism among the most prominent) 'contribute to a growing sense that the presumption of innocence, proof beyond reasonable doubt, and the requirement of proportionality in punishment

826 (n 407).

827 Borgers and van Sliedregt (n 376) 171; C Aradau and Rens van Munster, 'Governing Terrorism through Risk: Taking Precautions, (Un)knowing the Future' (2007) 13 EJIR 89.

828 de Goede (n 431) 162. See also Goede's comments on the precautionary principle as a 'profoundly European phenomenon' 165. See also L Amoore and M de Goede, 'Transactions after 9/11: the Banal Face of the Preemptive Strike' (2008) Transactions of the Institute of British Geographers 33, 2.

are legal luxuries ill-suited to present perils (Ignatieff 2004, but see Ashworth 2006).' [829] The risks of such an approach have also been widely examined: a reconceptualisation of the criminal justice system, a society relying on mistrust and surveillance techniques, a quasi-permanent suspicion against broad categories of individuals. The measures examined by this thesis have all been put forward in 2007 and, while they do not exhibit visible 'emergency marks', they do present signs characterised as attempts at 'fixing the future'.[830]

The offence of public provocation to terrorism formally belongs to the 'Prevention' strand of EU CT Strategy and intervenes at a very early stage of the crime chain, when it must only be proven that there is a danger that a terrorist act will be committed. The breadth of the 2002 definition of 'terrorism', coupled with an offence of incitement which has a level of legal certainty that is subject to criticism, leads to what has been referred to in literature as the 'criminalisation of uncertainty.'[831] As regards the Prüm Decision and the EU PNR proposal, the case for their potential as preventive techniques supporting a 'surveillance society' has been made in a previous chapter.[832] They could also be qualified according to Ericson's division as 'counter-law II', namely a 'surveillance assemblage'.[833] There seems to be a disconnection between the sheer amount of literature and scholarly positions on the effects of CT 'precaution-impregnated' measures on the criminal justice system and the individual and the legislation currently being enacted or implemented. While the latest multi-annual programme of the AFSJ, the Stockholm Programme, emphasises

829 Zedner (n 60) 80.

830 L Zedner, 'Fixing the Future? The Pre-emptive Turn in Criminal Justice' in S Bronnit, B McSherry and A Norrie (eds), *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law* (Hart Publishing 2009).

831 R Ericson, 'Governing through Risk and Uncertainty' (2005) 34 Economy and Society 659, 669.

832 For example, Tzanou (n 493); Akrivopoulou and Psygkas (n 493); Bunyan (n 493).

the importance of 'anticipation' and 'prevention', there has been no sustained effort to provide a normative background to such terms or to justify in detail logics such as those developed by the EU PNR proposal. With respect to this latter element, while it is obvious that profiling has a key role to play in this instrument, the Commission did not engage sufficiently in this field. More generally, it does not seem to have fully taken into consideration Harcourt's insightful comments on profiling:

> The targeting of sub-populations for purposes of policing efficiency does more than just improve efficiency. *It may shape our perception of crime and our distribution of punishment.* In the end, the decision to engage in criminal profiling is not just a matter of increased law enforcement efficiency. *It involves a political and moral decision about the type of society that we are creating. There is a normative choice that needs to be made.*'[834]

This normative discussion, which is widely supported by academia, has encountered support only in some EU institutions and bodies. The EP has examined issues of profiling[835] and has questioned, albeit on more general terms, different measures as regards their underling rationale. In the same sense, the EDPS, FRA or WP 29 have critically commented on the move towards prevention and the rise of profiling in the EU CT field.

(c) *Endangering*

The research has also revealed that all three measures have a problematic relationship with core law principles such as legal certainty, necessity and/or proportionality. The public provocation to commit terrorist offences fails to fully support the

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833 Ericson (n 119) 24, 139.

834 B E Harcourt, 'The Shaping of Chance: Actuarial Models and Criminal Profiling at the Turn of the Twenty-First Century' (2003) 70 The University of Chicago Law Review 105, 128 (emphasis added).

835 EP recommendation to the Council of 24 April 2009 on the problem of profiling, notably on the basis of ethnicity and race, in counter-terrorism, law enforcement, immigration, customs and border control P6_TA(2009)0314 [2010] OJ C 184 E/119.

proportionality principle due to the breadth of the 2002 definition of 'terrorism' and raises questions about its legal certainty. As regards the Prüm Decision, its necessity has not been substantiated for an EU of 27 while proportionality has, somewhat paradoxically, both lost and won at the same time. It has lost by not defining precisely the categories of offences, besides terrorism, and of individuals that the Decision should cover, leaving this choice to the Member States. It has won – in comparison with the Commission proposal on the principle of availability – by imposing a stricter hit/no hit regime for access to sensitive data such as DNA and dactyloscopic data, requiring that exchange of supplementary information pertaining to that individual take place using classical mutual legal assistance mechanisms.

The 2011 EU PNR proposal is better placed than its 2007 predecessor with respect to the observance of the principles of necessity, proportionality and legal certainty. Nevertheless, this is only in comparison with the 2007 text. As has been demonstrated at length in this thesis, the proposal still has important shortcomings in relation to the principles analysed above. In addition, the Prüm Decision and, more particularly, the EU PNR proposal raise the question of what forms of 'proportionality' they are supporting and promoting. This question is not new but it seems that it has never been brought to the forum and discussed in a comprehensive manner. A missed opportunity was the Data Retention Directive, termed by Mitrou a 'negation of proportionality'.[836] The PNR agreements that the EU entered into with the US, Canada and Australia and the second EU–US TFTP agreement have also further shaped a specific conception of proportionality, a conception partially advocated in the 2011 EU PNR proposal. While the battle for proportionality in the

836 L Mitrou, 'The Impact of Communications Data Retention on Fundamental Rights and Democracy – The Case of the EU Data Retention Directive' in Haggerty and Samatas (n 493) 135.

EU PNR is just engaged, due attention must be paid to 'blurred proportionality' approaches attributable to past experiences and which could have a negative impact within the debate. Judging as proportionate the collection, storage and/or analysis of the personal data of millions of individuals without a specific indication of suspicion represents a serious departure from how law enforcement action has been conceived as a rule and sets a trend for future CT legislation. It is therefore imperative that there is substantive proof of the absence of any other less intrusive measures, of the potential effectiveness of the measure itself and the inclusion of strong safeguards against abuse - should the measure be pursued.

It follows that despite workable solutions as regards human rights safeguards, the triangle of measures examined by this thesis does not inscribe itself within the AFSJ triangle at equal distance from security, justice and liberty but seems to be located closest to the security field. At the same time, this positionning can fuel insecurities due to the frailities observed in the respect of the principles of proportionality and legal certainty. Furthermore, the three measures touch rights which are core to the development of the self: freedom of expression, privacy and protection of personal data and the manner in which they are devised hold the key between lawful and unlawful restrictions and/or limitations to the exercise of these rights, as will be developed in the next section.

This thesis has also examined the quality of the three measures as 'laws of and for the future'. The research has been successful in proving, as also briefly outlined above, that these measures are 'trend laws' (*laws of the future*) as well as laws designed, under different forms, to 'regulate the future' (*laws for the future*). However, the further examination of these instruments has led the research to also

categorise them as ‘grey laws’. The manner in which this tendency of creating ‘grey laws’ could be reversed will be discussed in the subsequent section.

5.4 Public provocation, Prüm Decision and the EU PNR scheme: a triangle working for or against the individual?

The triangle of CT measures examined by this thesis has the potential under certain conditions to ‘hijack’ rights such as freedom of expression, privacy and protection of personal data. We can only hypothesise about the ‘lock’ on the exercise of rights imposed on an individual subjected to this triangle residing in a Member State whose implementation of the offence of public provocation is extremely broad, combined with large categories of people subject to DNA sampling, and finally coupled with risk assessments based on PNR data.

The UK could be considered a case in point. Firstly, under the Terrorism Act 2006 it has a broad offence of ‘encouragement of terrorism’. This act conceives that such an offence can be committed intentionally or recklessly.[837] As regards DNA samples, the UK government in order to address the failures identified by the ECtHR in the *S. and Marper v The United Kingdom* judgement[838] put forward on 11 February 2011 the Protection of Freedoms Bill which aims to provide a new ‘framework for police retention of DNA and fingerprints’.[839] The intention of the UK government as regards the above bill is to ‘adopt the protections of the Scottish model for the DNA database’, in relation to which the ECtHR has noted that ‘this position is notably

837 For the complete definition see (n 374).

838 (n 542).

consistent with the Committee of Ministers' Recommendation R(92)1 (§110)'.[840] However, at the time of writing, the Police and Criminal Evidence Act 1984 applies and under the current retention period 'DNA and fingerprints taken legally can be held indefinitely [regardless of whether the person has been convicted or not]'.[841] This has a direct impact on the size of the database and the number of individuals possibly affected.[842] The EU PNR proposal in the format proposed by the UK would allow not only the assessment of PNR data resulting from international flights but also from intra-EU flights. Moreover, the UK already has a system called e-Borders whereby the police as well the UK border agency are entitled to receive 'passenger, crew and service data from carriers in advance of all movements into and out of the United Kingdom and [there is] a duty for the border agencies to share that data among themselves.'[843] Therefore, hypothesising on the concurrent application of all the three measures analysed by this thesis in the current UK context would lead to the following considerations. Firstly, it would not be impossible that the radical comments made by a student recklessly in front of a group of his peers could be judged to be encouragement of terrorism. The student, arrested but not in the end convicted, would see his DNA sample recorded and kept in the system. By virtue of the Prüm Decision access to the reference data in the UK DNA analysis files, which would also include the students' data would be possible in order to 'conduct automated searches by comparing DNA profiles […] only in individual cases'

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839 UK Parliament, 'Protection of Freedoms Bill 2010-11' <http://services.parliament.uk/bills/2010-11/protectionoffreedoms.html> accessed 25 September 2011; Home Office, 'DNA and fingerprints' <http://www.homeoffice.gov.uk/police/powers/dna-and-fingerprints> accessed 25 September 2011.

840 (n 542) [110]. See CoE (Committee of Ministers), 'S. and Marper against the United Kingdom (Applications No. 30562/04 and 305666/04 of 04.12.08, Grand Chamber) Memorandum prepared by the Department for the execution of judgments and decisions of the European Court of Human Rights' (2011) Doc CM/Inf/DH(2011)22rev.

841 Home Office (n 839).

842 ibid.

(Article 3(1)). In addition, while boarding an international flight the student's data would be checked against pre-determined criteria and databases and stored for a considerable period of time. In this instance, the combination of far-reaching EU measures and broad national provisions questionable on grounds of legal certainty and proportionality leave an individual vulnerable as regards protection of the core rights emphasised above. Moreover, the empowering effects of such rights risk being greatly undermined by such situation.

It follows that, while the three key measures of this thesis have the potential to support the security objective of countering terrorism and as a consequence the security of the Member States and its citizens, a series of actions – as briefly outlined below – could have a positive impact on a closer adherence to the fulfilment of the human rights protection imperative for this policy. These are: a reflection on the breadth of the 2002 EU definition of terrorism; careful scrutiny of how Member States are implementing the 2008 definition of public provocation, paying particular attention to the scope of the definition and to the requirement that the message be delivered with direct or indirect intention; a clear picture of the categories of offences and of people (eg convicted, suspected, acquitted) for which each Member State retains DNA and fingerprint data that can afterwards be exchanged for the purposes of the Prüm Decision; an evaluation of the effectiveness of the provisions enshrined in Article 16 of the Prüm Decision concerning the supply of information in order to prevent terrorist offences compared with the provisions of the 'Swedish' Framework Decision; and substantiated evidence for the necessity of PNR data in the fight against terrorism and the proportionality of such a massive collection and transfer of data and

843 Home Office, 'E-borders – Overview of legislation' <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/travel-customs/ebordersoverview> accessed 1 July 2011.

a more thorough inquiry into less alternative measures, clarifications with regards to the real time and proactive use, and the elaboration of assessments criteria combined with clear and strong safeguards.

Furthermore, the instruments examined in this thesis lead to a form of discontinued and uneven protection of human rights, while fully boosting security mechanisms whose effectiveness is yet to be fully proven. The protection is seen as discontinued and uneven because it is judged that the protection granted at EU level is still insufficient while leaving the actual *onus* of protection on the Member States. While Member States should be given sufficient flexibility in order to devise these instruments in accordance with their criminal justice systems, this does not warrant the production of EU legislation questionable on grounds of legal certainty, necessity and proportionality as this undermines the process from the start. The counter-argument would be that what this thesis has termed 'grey laws' are just a manifestation of the EU's imbricated legislative process and the result of compromises between the respective institutions. This defence cannot be accepted, however, as this would undermine the rule of law, the EU's capacity to act as a responsible CT norm and strategy creator and would admit, albeit indirectly, that 'grey laws' are an in-built element of countering terrorism.

More broadly, the manner of addressing the legal certainty and proportionality requirements must be strengthened also in the light of the EUCFR's requirements and bearing in mind the positions of European and national courts in the field. The 'Fundamental Rights Check-List' proposed by the Commission should provide support in this regard and must not become an empty and formal box but rather a real tool for further advancing a comprehensive examination of proposed measures.

Additionally, the Commission IA should engage even more thoroughly with the impact on fundamental rights of CT-related proposals. Furthermore, the proposals analysed in this research have shown how, in some instances and also due to the 'borrowing' effect addressed above, the power of the verb 'to argue' – conceived as proper and exhaustive defence of EU sensitive proposals such as those pertaining to combating terrorism – is reduced or symbolic. The challenge is to revive the core requirements of the verb 'to argue'. Several other elements are likely to better inform the EU CT policy: slowing down the pace of the adoption of CT legislation; a detailed review of the policy at the mid-term of the Stockholm Programme, critically assessing its effectiveness as well as its impact on key fundamental rights such as freedom of expression and association, privacy and data protection; and an inquiry into various forms of surveillance as reflected in different EU instruments.

5.5 Viable project or wishful thinking - the EU CT policy at the test and the need for further research

This research cannot conclude without addressing the question raised in the title of the thesis as well as providing final remarks on whether the quest to link human rights safeguards to enhanced security announced has been fulfilled. It will also attempt to provide recommendations for policy that is both effective and respects human rights. At the same time, it is important to place the research in a broader context and to see what new avenues can be pursued starting from it.

In relation to the research question and the three measures examined in this thesis, the analysis has shown that a qualified response should be made in relation to each of these measures. Firstly, a definition at the EU level of 'incitement to

terrorism' could yield a series of advantages in the coming years in countering terrorist propaganda and could be considered as partially positively responding to both security and human rights concerns. Nevertheless, the current wording of the offence leaves the door open to abuse also due to the wide coverage of the definition of 'terrorism' itself. Moreover, an important test will be how this provision is transposed and interpreted at the national level. In this context, national cases of 'indirect incitement to terrorism' should be very closely scrutinised in this respect as well. It is problematic that a key measure as regards harmonisation of criminal law in the field of CT has such conceptual shortcomings that can be only partially remedied by national legislations and interpretations by courts. A preliminary ruling of the CJEU in this area could provide additional guidance as to validity and interpretation of the provisions on incitement to terrorism.

As regards the Prüm Decision this has been assessed from a double perspective: firstly, as an information exchange mechanism with a CT objective and the relationship within this setting between the security objectives and the protection of the right to privacy and data protection and, secondly, from the angle of the security approach adopted by the Prüm Treaty and its 'migration' into EU law. On the first count, it is very difficult to support unconditionally the introduction of the Prüm Decision into EU law, although it cannot be denied that the exchange of DNA profiles and fingerprint data between all twenty-seven Member States is likely to effectively support the CT fight. It has also been established that some outstanding issues have not been addressed in the Prüm run-up for becoming an EU pioneer tool in terms of information exchange. These issues can be summarised as follows: the lack of an IA providing several policy options, weighting the pros and cons (including costs aspects), the absence of any substantive harmonisation measures with regards to the

collection of DNA profiles, the categories of individuals to be covered and the data retention periods. Under such conditions, it is not possible to deliver unequivocal approval for such a measure with regards to its proportionality and effectiveness.

Finally, the 2011 EU PNR proposal is probably the measure where proportionality and legal certainty are the most endangered and where one can, provocatively, question to what extent such a scheme under any format, while potentially effective, is also human rights compliant. Moreover, as emphasised previously, the EU PNR proposal and its surveillance implications must be read and assessed against an already charged information management environment. Additionally, the 'surveillance standards' developed under the new PNR agreements, for example as regards retention period, could play a role of acceptable threshold for the internal PNR. In this context, in order to ensure a viable nexus human rights-security and to avoid the gradual building up of individuals as 'permanent ticking bombs' there is need of a thorough and exhaustive appraisal of the mere rationale of an EU PNR combined with factual evidence before embarking on the contours of the scheme.

Furthermore, the necessity that different legal instruments for information exchange 'cover the real needs' linked to the prevention and combating of terrorist offences has been identified as a challenge for the CT policy in the Commission Communication on the Evaluation of the CT policy, something which is also to be welcomed.[844] It is, however, regrettable that the Commission did not take the opportunity to pursue this avenue of analysis in further detail. Additionally, and enlarging Rodota's reflection it is key to constantly inquire 'whether what is

844 Commission, 'The EU Counter-Terrorism Policy: main achievements and future challenges' (Communication) COM (2010) 0386 final, 9.

technically admissible is also socially and politically acceptable, ethically admissible, legally permissible.'[845] This must be done against an acknowledgment dating back to 1987 which posited that although there is a clear 'attractiveness of information technology, [f]or a democratic society, the risks are high: labeling of individuals, manipulative tendencies, magnification of errors, and strengthening of social control [which] threaten the very fabric of democracy.'[846]

Moreover, the measures examined by this thesis are likely to shape not only the contours of the EU CT policy but also be landmarks for the ambitions of the AFSJ. It is posited that, while they cannot be circumscribed in the category of 'emergency driven' measures, the importance given to prevention bordering precaution, to biometrics identifiers and to risk assessments warrants heightened scrutiny in respect of the 'message' such measures give as regards the EU's approach to countering threats. The AFSJ is supposed to rely on a triangle whereby freedom, security and justice and mutually reinforcing elements and the measures derived from this area be a model for how these three objectives are simultaneously delivered. The triangle of measures as it has been examined by this thesis currently fails to fully address this challenge on the two accounts taken into consideration. Moreover, these measures must be connected to the other CT measures of the field for a complete picture of their interactions and effects. This could be a potential area for further research, maintaining the core of these three measures and relying even more on the results of the implementation at national level of the Prüm Decision and of the offence of public provocation to commit terrorist offences.

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845 S Rodota, 'For an Electronic Citizen. Democracy and the New Technologies of Communication' <http://jorgesampaio.arquivo.presidencia.pt/pt/biblioteca/outros/confsi/rodota.html> accessed 15 September 2011.

846 S Simitis, 'Reviewing Privacy in the Information Society' (1987) 153 University of Pennsylvania Law Review 707, 746.

This study confined itself to an analysis of AFSJ CT-related measures and drew from them some characteristics that could apply to other EU CT measures, such as the autonomous or UN blacklists. It aimed to 'triangulate' key instruments of the AFSJ, namely an approximation of the criminal law tool and information management mechanisms deployed in the CT field, with an approach as regards the process of incorporation of CT measures. In addition, the thesis has examined the tensions between cooperation at EU level as opposed to intergovernmental level and whether the EU has adequately positioned itself as regards the delivery of security while protecting human rights in the CT fight. The emergence of what this thesis has termed 'grey laws' and the willingness of the institutional actors to counteract this tendency must be considered the real 'urgency' in the EU CT field. It is essential that old CT laws are 'opened up' and reviewed in order to fit more closely within the protective triangle of the AFSJ. They must not remain at its borders. New laws benefitting from the setting of the LT should be put forward only after assessing the real needs of the area with legal certainty and proportionality as core yardsticks and not merely 'legal afterthoughts'. The effect of 'discontinued protection' and 'apparently enhanced security' of the laws examined in this thesis also deserves to be explored in other CT laws and could in turn be connected to the triangle currently examined.

To conclude, a clearer perception of what the EU stands for in terms of security and its governance, combined with the current efforts to better address the links between the internal and external dimension of the CT fight, to define the EU ISS, and the improvements brought about by the LT create the basis for an optimistic outlook on EU CT cooperation. It can certainly now qualify as a viable project. Nevertheless, a more concerted and critical approach with regards to the simultaneous fulfilment of the nexus between human rights and security objectives must be

observed with respect to the construction, implementation and revision of specific EU legal instruments for CT. It is crucial to the protection of individual autonomy that rights such as freedom of expression, privacy and protection of personal data do not become casualties in the building of an EU 'security wall', as this would cripple the effectiveness and credibility of the EU's fight against terrorism. Such fundamental flaws would render it a dangerous project not merely wishful thinking. Finally, in relation to the reflection found right at the beginning of this thesis ('Having an ideal means having a mirror'), it is key that the mirror we use to look at the EU CT law is not a 'broken mirror' which does not ensure strong human rights or enhance security thus failing to be true to the rule of law leading thus to an illusory protection of individuals.

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