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# Towards Supranational Governance in EU Counter-Terrorism? – The Role of the Commission and the Council Secretariat[1]

**Christian Kaunert[2]**

## Introduction

Since the events of 11 September 2001 (9/11), it has been argued by some scholars that security has become the dominant force in the European Union's Area of Freedom, Security and Justice (AFSJ). As a result, there has been an active debate on the 'securitization' of the new threats, such as refugees and migrants (Bigo 1996, 1998a, 1998b, 1998c, 2001, 2002; Guild 1999, 2002, 2003a, 2003b, 2003c, 2004, 2006; Guiraudon 2000, 2003; Huysmans 2000, 2004). In this context, 'securitization' refers to the theoretical suggestion that refugees and migrants are presented as security threats, based on the framework by the so-called 'Copenhagen School' (Buzan 1991; Buzan et al. 1998; Wćver 1993, 1995). This would lead us to hypothesise that an EU competence in security areas matters increasingly, and, given the importance of the terrorist attacks of 9/11, 03/03, and 07/07, EU competences in countering the terrorist threat, matter most significantly.

Yet, if one reviews the area of EU counter-terrorism, there are diverging opinions as to which extent EU competences matter in the fight against global terrorist threats (Reinares, 2000; Dubois, 2002; den Boer & Monar, 2002; Guild, 2008; Mitsilegas & Gilmore, 2007; Occhipinti, 2003; Deflem, 2006; Bures, 2006, 2008; Gregory, 2005; Zimmermann, 2006; Friedrichs, 2005; den Boer, Hillebrand and Nölke, 2008; Müller-Wille, 2008; Spence, 2006; Bossong, 2008; Kaunert, 2005, 2007, 2009, 2010). On the one hand, the EU has been characterised as a 'paper tiger' (Bures, 2006, p. 57) and thus an ineffective counter-terrorism actor. On the other hand, scholars point out that the EU has

[1] The author would like to acknowledge the financial support of the International Studies Association and the University of Salford.

[2] Christian Kaunert is a Lecturer at the University of Salford, Editor of the Journal of Contemporary European Research (JCER) and a member of the Executive Committee of UACES. He may be reached at: C.Kaunert@salford.ac.uk.

taken great strides towards increasing integration and encouraging co-operation between member-states since 9/11 (Zimmermann, 2006; Kaunert, 2007, 2010). Zimmermann (2006, p. 123) asserted that 'on 21 September 2001, the Union prioritised the fight against terrorism, and accelerated the development and implementation of measures deliberated on prior to the events of 9/11.' Yet, Zimmermann (2006, p. 126) makes an important caveat to all EU action in the field of counter-terrorism: '[…] the Union does not have a 'normal' government at the supranational level with all the requisite powers, competences, and hence, capabilities of regular government; it is not a federal European state.' This means, *a priori*, one would not necessarily expect EU institutions to provide significant leadership in counter-terrorism.

EU counter-terrorism policy itself has also begun to receive much scholarly attention. The *Journal of Common Market Studies* published a special issue on this topic in January 2008. The introductory article (Edwards and Meyer, 2008, p.1) suggests that the entire 'governance of the European Union has been changed through its responses to international terrorism.' However, counter-terrorism, while clearly one of the most crucial security policy fields within the EU, is also one of the most complicated areas in institutional terms and can encompass measures across all three pillars prior to the Lisbon Treaty, which entered into force on the 01 December 2009. Therefore, it is important to keep in mind the pre-Lisbon cross-pillar character of the EU counter-terrorism policy when drawing conclusions on the role of EU institutions from the following analysis, as they can only be generalised to the pillar concerned. Despite this note of caution, this article suggests that some limited generalisable arguments can be made.

In the pre-Lisbon third pillar of the EU, counter-terrorism involved a number of criminal justice instruments, of which the European Arrest Warrant (EAW) and the EU definition of terrorism are amongst the most important (Kaunert, 2007, 2010), with a particular emphasis on the European Arrest Warrant, which has been the flagship instrument of the EU. Firstly, the EAW abolishes the term extradition, and replaces it with the term 'surrender' (Douglas-Scott, 2004). The national judicial authorities will be responsible for its enforcement, thus virtually excluding political decisions by excluding the national executives from the decision-making process (Wagner, 2003a, p.707). Secondly, the legal effect of this measure is subject to the jurisdiction of the European Court of Justice (Peers, 2001) if member states sign a declaration approving of this. The Commission chose to create the arrest warrant by means of a framework decision, one of the third pillar instruments introduced by the Treaty of Amsterdam, which is binding on the member states as to the result to be achieved, leaving national authorities the choice of form and method of transposition (Peers, 2001; Wagner, 2003a, 2003b). Thirdly, the EAW abolishes the principle of double criminality for serious offences, (Douglas-Scott, 2004). Thus, an arrest warrant may not be contested on the basis that it is for an activity not

criminalised in the surrendering member states. In addition, the arrest warrant is applicable to all offences on a list, and not just terrorist offences. This applies to 32 different categories of crimes, thus, virtually all crimes apart from petty crimes. Examples of these categories of crime are: participation in a criminal organisation, terrorism, human trafficking, sexual exploitation of children and child pornography, and also corruption, fraud, money laundering, and making counterfeit money. The argument of this article is that the Commission has been instrumental in persuading EU member states to adopt the EAW, which under normal circumstances outside the 9/11 framework, would have been difficult to swallow for most member states.

Furthermore, inhibiting the funding for terrorist groups is of particular importance in the fight against international terrorism (Gilmore, 2003); primarily dealt with pre-Lisbon first and second pillar instruments in the EU. The Commission has the exclusive right to initiate proposals on terrorist financing with regards to first pillar provisions. The article suggests that it used this power and successfully persuaded the Council of Ministers and the European Parliament to approve its proposed laws. In addition, together with fifteen 'old' EU Member States, it is also a member of the FATF itself. Legislative measures with terrorist financing implications include the 'Protocol to the Convention on Mutual Assistance in Criminal Matters', as well as the so-called 'second anti-money laundering Directive', and the 2005 'third anti-money laundering Directive' which repealed the previous two directives. In addition, it also integrated a number of associated measures aimed at implementing the FATF requirements: (1) Regulation (EC) No 1889/2005 on the control of cash entering or leaving the Community (which implements SR IX on cash couriers); (2) Regulation (EC) No 1781/2006 on information on the payer accompanying transfers of funds ; and (3) Directive 2007/64/EC on payment services (PSD) in the internal market, which provides the legal foundation for the creation of an EU-wide single market for payments.

On the other hand, the Council Secretariat was vital in facilitating the transposition of the binding resolutions of the UNSC at the EU level. To this purpose the Council Secretariat exerts an important role within the intergovernmental setting of the Council of Ministers, to be precise in the Common Foreign and Security Policy (CFSP) context of the second pillar. One of the cornerstones in the fight against terrorist financing is the regime of targeted financial sanctions foreseen by UNSC resolutions. Following the precedent of the UNSC Resolution 1267 concerning Al-Qaeda, Osama Bin Laden and the Taliban and Associated Individuals and Entities, the EU has adopted and implemented an ad hoc set of rules to transpose UNSC Resolution 1373 in the context of the second pillar. Since the adoption in 1999 of Resolution 1267, the EU has already been applying certain sanctions on Al Qaeda and Taliban suspects in accordance with the list drawn up by the UN 'Al-Qaeda and Taliban Sanctions Committee.' Yet, after 9/11 the implementation of Resolution 1373, whose most

important component is the 'freezing of assets' provision, required imposing freezing measures against whatever terrorist group, not only against Al-Qaeda and the Taliban.

The article suggests that, despite the central place EU Member States continue to have in the in the policy-making process, EU supranational actors, in particular the European Commission and the Council Secretariat[3] (Christiansen, 2002; Kaunert, 2005, 2007, 2009, 2010; Stetter, 2007), have exerted a considerable influence in shaping the current design of the EU counter-terrorism policy. Thus, the article engages with the arguments made by intergovernmentalists that the supranational institutions are 'late, redundant, futile and even counterproductive' (Moravcsik, 1999a, p.270). This article argues that the Commission and the Council Secretariat played a very active and significant role – the role of a supranational policy entrepreneur. Admittedly, counter-terrorism is a policy sector in which the European institutions have rarely taken the lead, nor consistently been active. Yet, increasingly this view has become challenged (Kaunert, 2007, 2009, 2010). The argument of this article is to suggest that this signifies a step towards increased supranational governance in EU counter-terrorism policy.

The article will proceed in four stages. The first section will provide a brief outline of the debate on the political role of the European Commission and Council Secretariat as a supranational policy entrepreneur, and the precise framework used for this analysis. The second section will analyse the normative environment which EU decision-makers have been operating in since the 9/11 attacks. The third section will demonstrate the empirical findings within the case study of the EAW. The fourth section will examine the extent to which the Commission and the Council Secretariat have been instrumental for the EU counter-terrorist financing regime. Finally, the article will conclude that the European Commission and the Council Secretariat have been significant in the process of European integration in 'high politics', which has implications on how scholars of the European Union need to conceptualise the powers of this supranational institution.

## The European Institutions as a Supranational Policy Entrepreneur (SPE)?

The debate on supranational policy entrepreneurship falls within the dispute between intergovernmentalists (Hoffman, 1966; Moravcsik, 1993),

[3] The Council Secretariat is here assumed to be a supranational institutional actor following the interpretation given by Christiansen (2002, p.35) according to which 'in spite of the official nomenclature, the Council Secretariat is clearly an institution, possessing a formal structure with a set of internal rules and administrative practices which regulate the work of a body of permanent staff. And it is located at the European level, possessing a high degree of institutional autonomy and may therefore be regarded as supranational.'

supranationalists (Haas, 1958; Stone Sweet and Sandholtz, 1997; Stone Sweet et al., 2001), and institutionalists 'somewhere in between' (Pollack, 1997, 2003; Tallberg, 2002, 2003, 2006, 2008; Beach, 2004, 2005; Kaunert, 2005, 2007, 2009, 2010) concerning the role of supranational institutions in the process of European integration.

This article suggests a framework of supranational policy entrepreneurs (SPE), which is often referred to by the academic literature that discusses the role of institutions in European integration (Moravcsik, 1999a; Pollack, 2003; Beach, 2004, 2005; Stone Sweet and Sandholtz, 1997; Stone Sweet et al., 2001). The concept of a political entrepreneur is grounded in the works of Kingdon within the context of US politics. Kingdon (1984, p. 173) suggests an evolutionary policy-making model starting with the identification of a problem (first stream), which is then followed by a search for alternative solutions (second stream) and a decision among these alternatives (third stream). On some occasions, a 'policy window' opens for the adoption of certain policies. Policy entrepreneurs, '*advocates [...] willing to invest their resources – time, reputation, money'* (ibid, p. 188), stand at this window in order to propose, lobby for and sell a policy proposal. Kaunert (2007, 2009) has further extended this framework to constructivist insights of norm construction and norm entrepreneurship, widely discussed in the international relations literature (Finnemore, 1996a, 1996b; Finnemore and Sikkink, 1998).

Why is this important? At the political bargaining stage (the politics stream), where decisions amongst different alternatives are taken, the EU is dominated by member states' preferences and interests, especially by the Council of Ministers in the third pillar decision-making process. In principle, this would indicate the benefits of a liberal intergovernmental analysis for the policy area. In this view, European integration can best be explained as a series of rational choices made by national leaders and dominated by national interests (Moravcsik 1998, 1999a, 1999b). Thus, EU integration occurs due to: (1) a change in interests within the member states; or (2) the result of a grand political bargain. International institutions are merely there to bolster the credibility of interstate commitments (Moravcsik, 1998, p.18) by ensuring that member states keep their promises and thus dare to agree to a mutually favourable solution without the fear of 'free-riders.'

But where do member states' national interests and preferences come from? Moravcsik (1998) assumes national interests to be exogenous of the EU process. The interests of the member states are stable before they come to the bargaining table. However, it does not seem reasonable to assert that preferences are exogenous. The EU has created a system whereby member states continuously interact at different levels. The claim that this would not change preferences over time appears doubtful. Even within the context of the international system with less social interaction amongst states, Katzenstein (1996) has demonstrated convincingly how norms and values shape national

interests. Constructivist literature clearly showed how these norms change over time (Finnemore, 1996a, 1996b; Finnemore and Sikkink, 1998).

Yet, if national interests and preferences are shaped by different norms and values, as argued in this article, this implies that a fourth stream – the norm stream – is underlying the three other streams. Norms consequently influence the definition of political problems, the search for policy alternatives, and finally the national preferences in the politics stream where decisions are taken. How can norms be constructed and how can they be observed? Firstly, actors provide reasons for action. The SPE constantly pushes for his reasons for action to become accepted as a norm, albeit in competition with other actors. This is the first stage of norm creation in the norm life cycle as described by Finnemore and Sikkink (1998), and is followed by the norm socialisation stage. Eventually, a norm becomes the dominant norm. Consequently, SPEs are important in the social construction and reconstruction of norms that steer the political movement of the other streams.

Kaunert (2007, 2009) suggests the ways in which political entrepreneurs can achieve this:

1. First mover advantage: SPEs need to come in faster with their proposals than their rivals.
2. Persuasion strategy: as mentioned above, in order to achieve acceptance, other actors need to be convinced by the reasons for the action proposed.
3. Alliances: it is vital for the SPE to form initial alliances with other powerful actors to create a bandwagon effect, whereby more actors will join the 'winning team.'

This article will move from the argument that 'institutions matter' (Beach, 2004, 2005; Bailer, 2004; Elgström and Jönsson, 2000, 2005; Tallberg, 2002, 2003, 2006, 2008; Lewis, 2005, 2008). Specifically, it will apply the useful model elaborated by Kingdon (1984) as further developed by Kaunert (2007, 2009) and it also will take into account Lewis' insights on norms (2005, 2008). In the following section, the role of the Commission and the Council Secretariat in the policy-making process of EU counter-terrorism are analysed in detail.

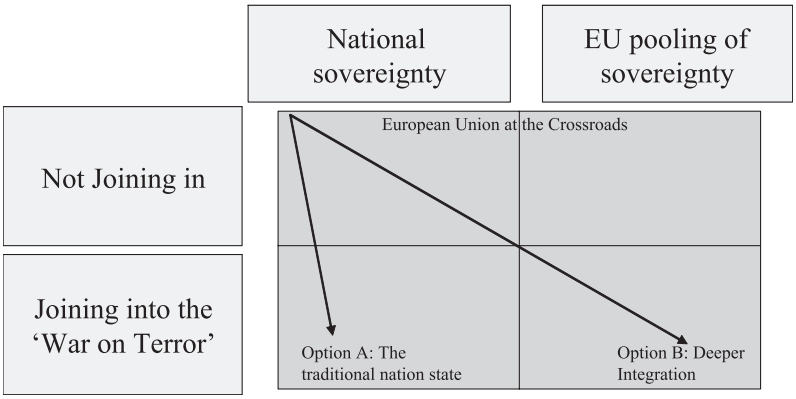
## Evaluating the Normative Environment after 9/11: The Commission in Action

This section argues that the Commission managed to play the significant role of an SPE because it constructed its formal proposals on EU counter-terrorism within the context of the emerging policy norm of the 'war on terror.' The proposals, which in its initial state would have been difficult to swallow for most member states in the mere context of 'fight against crime' even after the Tampere Council Summit 1999, were politically constructed to become an important instrument in the 'war on terror.' In this way, the norm to participate

in the war on terror (via EU mechanisms) was used strategically to convince the majority of member states of the political merits of increased EU counter-terrorism cooperation. Thus, the Commission (and the Council Secretariat in EU-CTF) managed to play the role of an SPE and persuaded member states to promote European integration in EU counter-terrorism.

Put simply, social and legal norms up until the Tampere Council Summit had evolved on two axes (Kaunert, 2005): (1) whether the EU should be legislating at all in the Area of Freedom Security and Justice (AFSJ); where the normative debate had been structured between those wishing to preserve national sovereignty and those wishing to pool sovereignty at the EU level, and (2) what the aims and purposes of such a legislation are. This article suggests that regarding EU counter-terrorism matters, it is precisely this second dimension that was at the heart of the debate.

*Figure 1: September 11 – The EU at a normative crossroads*




The Tampere European Council Summit 1999 marked one of the most critical junctures in the history of the Area of Freedom, Security and Justice (AFSJ) (Occhipinti, 2003). While the Commission is not widely credited to have set the political agenda, it appears to have pushed important elements of its agenda into the Tampere conclusions (Occhipinti, p. 82), such as the use of a 'scoreboard' system (interview CON3, 2004) to monitor a timetable of progress towards each of the goals and objectives. This scoreboard was then used throughout the five year programme as an instrument to exert pressure on member states if progress was lagging behind. However, the Commission also strategically used the openness of the Tampere conclusion on counter-terrorism matters in order to push for much more significant proposals than member states initially asked for.

The adoption of the principle of mutual recognition of judiciary decisions is often seen as the major advance for European integration in criminal justice

matters. Wagner (2003b) claims that this principle may play a role 'similar to the 1979 Cassis de Dijon judgment of the European Court of Justice […] which paved the way for the internal market.' In fact, according to Wagner (2003a) the Spanish government and the Commission both worked successfully on establishing this principle at the EU level, which had already been included in a series of Spanish bilateral treaties with Italy, France, the United Kingdom, and Belgium. This could be an indicator for Commission influence already at this early stage in the member state preference formation.

September 11, 2001, had a significant impact on the norms of decision-makers in Europe. In simple terms, there were four general choices of direction available to the EU. The first option for EU member states may well have been to not join the 'war on terror' and continue to operate as before, adhering to the traditional principle of national sovereignty. This is represented by the first quadrant in the matrix. However, given the still positive state of transatlantic relations between Europe and America, this would have necessitated a clear rupture in relations. Hence, it was always unlikely to occur. The second option for EU member states would have been to build a counterweight against America's war and therefore not join in. Yet, in order to realise being a counterweight to the USA, the EU would have had to integrate more politically. For the same reason as the first option, this was also unlikely to happen.

This means that the norm to join the 'war on terror', which emerged after September 11, 2001, would make it difficult not to support the United States. The only realistic options at this point in time were Option A and Option B. Option A represents what nation states in Europe have traditionally practised for a very long time. This implies supporting the United States, while at the same time maintaining national sovereignty in the AFSJ. A good example here would be the provision of intelligence to the United States government without any change of structures in intelligence relations. Option B represents the new option for European nation states. It implies full support to the United States and its 'war on terror', while restructuring the foundations of internal security relations in the EU. In essence, as argued in this article, the latter option was the one that was pursued by the European Commission and approved by the Council.

The political norm that the international community needed to join the war against terrorism emerged with the attacks on the US on 11 September 2001. A close examination of the war discourse shows how the norm emerged, and ultimately made it difficult to do anything other than join it. This demonstrates the fact that, ultimately, the EU had to support the USA – even if more in appearance than substance. In fact, the appearance of support would increase peer pressure for EU member states to adopt EU counter-terrorism policy in the end.

The platform for the emerging norm to join the 'war on terrorism' was first established with Bush's 'act of war speech' (BBC News, 12.09.01). In this, he declared: 'The deliberate and deadly attacks, which were carried out yesterday

against our country, were more than acts of terror. They were acts of war.' [...] 'This enemy attacked not just our people but all freedom-loving people everywhere in the world.' [...] 'We will rally the world.' [...] 'This will be a monumental struggle of good versus evil, but good will prevail.' One should note the significant pressure for countries to adopt the norm to fight the 'war on terror.' Bush defined appropriate action in terms of fighting in the 'war against terrorism', and made an even stronger case by distinguishing between 'good and evil.' Later, Bush (BBC News, 12.09.01) enforced this emerging norm by stating that 'you are either for us or against us.' Thus, the political pressure is such that the appropriate course of action became defined in its support of the US.

In speaking to the European Parliament, the Commissioner responsible for the Area of Freedom, Security and Justice (formerly better known as Justice and Home Affairs), Antonio Vitorino, remarked (FT, 06.12.01): 'Terrorist acts are committed by international groups with bases in several countries, exploiting loopholes in the law created by the geographical limits on investigators and often enjoying substantial financial and logistical resources. Terrorists take advantage of differences in legal treatment between States, in particular where the offence is not treated as such by national law, and that is where we have to begin.' Vitorino made the link that was established earlier very clear. In order to combat terrorism, these measures were vital (ibid). Therefore, in Vitorino's view, anyone opposing these measures behaved out of line, inappropriately, and effectively supported terrorism indirectly by not closing the legal loopholes. The Commission moved extremely fast to make this link.

In conclusion, the norms changed demonstrably in the few weeks after 11 September 2001, and the Commission acted as an SPE in this process. It played the role of a strategic 'first mover' in order to shape the debate in a way that placed the EU at the centre of Europe's 'war on terror.' It also assessed very well politically how the norm environment would produce political pressure on member states to act. Consequently, the European Commission and its Commissioner Vitorino proposed action which clearly demonstrated its support for the United States and its 'war on terror' (interviews COM10, COM25 and CON7).

## The Commission and the European Arrest Warrant

In the case of the European Arrest Warrant, the Commission followed this normative change in the political environment up politically with a very timely proposal. This proposal for the policy had already been under preparation for about two years before it was launched. Vitorino initially intended to launch it under the Spanish Presidency in the first half of 2002 due to Spain's strong support of the issue in order to solve its own problems with the ETA terrorists. Yet, with the emerging norm of the 'war on terror', it became apparent that fast action was required. Ministers in the AFSJ would be under intense pressure

to behave appropriately and settle their differences. Vitorino remarked: 'If we do not get agreement, and it should be a substantial agreement to cope with the global threat, it will be difficult to explain to the public why we failed.' (FT, 06.12.01)

Therefore, the Commission's strategy was for the arrest warrant to be presented as an anti-terrorist measure and to be amalgamated with other such measures, such as the Framework Decision on the Definition on Terrorism. During research interviews, this strategy could be triangulated from the information provided by the interviewees, as follows: Firstly, officials in the Commission (COM10, COM14, COM20, and COM25) confirmed the political decision to bring the proposal of the EAW forward, as indicated above. Officials in the Directorate-General JHA under Sir Adrian Fortescue had to work at full speed over the weekend before the proposal for it to be approved by the College of Commissioners on 19 September 2001 (Occhipinti, 2003, p. 149; also confirmed by interviews COM10 & COM25). The timing was crucial in order to construct the EU response to the 'war on terror.'

Secondly, the official who drafted the proposal (interview COM20) confirmed the fact that there had been work on it for almost two years, which included bilateral meetings with the different member states, with national lawyers, academics and NGOs. Nonetheless, all these meetings made it very clear that the different national views were very, very far apart. These disagreements covered the most basic features of the EAW, including the maintenance of the principle of double criminality, the preservation of some political interference and even the choice of the legal instrument. All national representatives (interviews PR1 to PR24) had serious misgivings about the drafts of the EAW. This number is far larger than was commonly suggested by the reporting media, who mainly pointed to Italy. However, it seems clear that France, Ireland, the UK, Luxembourg, and even the Presidency at the time - Belgium - had severe political problems with significant parts of the draft. In the end, the Commission made the political decision to have a completely new extradition system and to convince member states through constructing the EAW into the 'war on terror.'

Thirdly, Commission officials accepted the fact that the speed of the negotiations was 'revolutionary' (interview COM10 in particular, but also COM20). This is perceived to have been in connection with the political mood of ministers, who desperately wanted to demonstrate action (COM10), and were persuaded by the Commission that the EAW had to be part of an anti-terrorist package. Subsequently, the Extraordinary (Emergency) European Council held in Brussels on 20/21 September set in motion a series of nine measures proposed by the Commission, of which the most notable items were the EAW and the definition of terrorism. The displayed the sense of action that national ministers wanted. At the same time, it managed to blur the boundaries between the different contents – terrorism and crime more generally. The drafters of the

EAW (interviews COM20 & COM12) accepted this fact. 'The European Arrest Warrant is not a specific instrument to fight terrorism, but to fight crime' (ibid).

The European Arrest Warrant (EAW) was politically adopted by the Laeken Council summit on 14-15 December 2001, with the formal legal adoption in June 2002 under the Spanish presidency. The first post 09/11-opportunity for Justice and Home Affairs (JHA) ministers to start negotiations on the ambitious anti-terrorist agenda in the Council was during its regularly scheduled session of 27-28 September 2001 in Brussels. It was of vital importance for the Commission to ensure the support of the six months rotating Presidency of the Council for the European arrest warrant. In particular, there is one specific reason why the Commission needed to persuade the Belgian Presidency. Not only are Presidencies important in their gate-keeping and drafting roles, but the Belgians were known to be opposed to the European Arrest Warrant (EAW) before it was proposed by the Commission. This is a fact that was not only confirmed by the Belgian delegation, but also reiterated by other national delegations (interviews PR1, PR3, PR5 and PR8), the Commission (interviews COM10 & COM20), and, in particular, staff of the Council Secretariat (interviews CON3 & CON7). The Belgian Justice Ministry was particularly opposed to the EAW (interview CON7), and this fact was known to the European Commission before the negotiations. This was one of the reasons why the Commission initially wanted to propose the EAW under the Spanish presidency six months later (interview COM12). In these circumstances, it was a strategic gamble on the fact that it would manage to persuade Belgium in order to achieve greater EU integration in the area of criminal justice.

In the end, how did the Commission persuade Belgium? Firstly, it exploited a split between the (then) Belgian Prime Minister, Guy Verhofstadt, and his own Justice Minister, Marc Verwilghen (interview CON7). During the preparations of the Council agenda, the instructions of the Justice Ministry that were given to their staff were aimed to slow down progress in order to prevent the adoption of the EAW. In order to solve this potential problem, Vitorino personally intervened at the Prime Minister level (interview CON7). In this struggle, the Prime Minister was convinced of the necessity to incorporate the EAW into the anti-terrorist agenda in order to advance to the EU's role in the 'war on terror.' It was only this direct intervention by the Belgian Prime Minister within his own national delegation that changed the negotiating stance of the Presidency. During the course of the negotiations, both the Belgian Presidency and the Council Secretariat greatly supported the Commission in its effort to persuade the other reluctant member states to adopt the European arrest warrant. This was the essential first stepping stone to success for the Commission as a supranational policy entrepreneur.

As part of the strategy to persuade the big member states, the Commission lobbied the United States. The Director-General of the Commission, Fortescue (European Voice, 27.09.01), had been part of an EU delegation meeting with Colin Powell, the US Secretary of State, in Washington the week after the

events of September 11. As a result of the terror attacks, Fortescue mentioned the fact that the EU and the US could be drawn together by co-operating. Moreover, a letter (ibid) was sent to Washington asking President Bush how the EU could assist America. Bush's reply in the form of a five-page letter angered several member states, but it gave the Commission another reason to press for the smooth adoption of its own proposals. Bush provided a long list of 47 demands covering judicial and diplomatic co-operation and other issues (BBC News, 22.10.01). Extradition processes from the EU to America should also be streamlined, the letter requested. Most importantly, the letter asked the Union to ease extradition procedures internally. Again, welcome support for the Commission's cause. Leonello Gabrici, the Commission's Justice and Home Affairs spokesman, argued that 'the things that we are doing against terrorism... will simplify life for the Europeans and make it easier for us to co-operate with the United States' (BBC News, 22.10.01).

The final part of the Commission strategy involved persuading reluctant member states, especially Italy. This was achieved through a re-enforcement of the norm to join the 'war on terrorism' and by putting considerable peer pressure on Italy from within the Council and the European Council (The Times, 07.12.01). Italy was the last member state opposed to the European Arrest Warrant at that time. However, the Commission and its allies amongst the member states, especially Belgium, were quick to apply peer pressure on Berlusconi. Commissioner Vitorino declared that 'we cannot be held hostage to Council unanimity' and indicated that the 'Council might try to proceed without Italy by using the option of enhanced co-operation to allow the 14 member states to go ahead' (Occhipinti, 2003, p.171). Marc Verwilghen - the Belgian Justice Minister who initially opposed the EAW - warned Italy that the Laeken meeting on December 14-15 would be 'very difficult' for Silvio Berlusconi and that his behaviour was 'incomprehensible.' The German Interior Minister Otto Schily also complained that 'the Italian position is completely unacceptable' (ibid).

In the end, the pressure applied on Berlusconi paid off, and Italy abandoned its opposition (Irish Times, 12.12.01). Italy's official reversal of policy came during a visit to Rome on 11 December 2001 by Verhofstadt, the (then) leader of the Presidency. However, this section showed how the Commission and its ally – the Belgian Presidency – were able to organise pressure by hinting exclusion and by applying it in order to push for the Commission's proposal for the European Arrest Warrant. This is the reason why the European Arrest Warrant provides an excellent example of the Commission as an effective SPE.

## Counter-Terrorism Financing and the Commission and the Council Secretariat

This section argues that the Commission and the Council Secretariat managed to play the significant role of SPEs in dimensions of the first and the

second pre-Lisbon pillar as well. The Council Secretariat and Commission have been demonstrably significant in designing and implementing international standards for fighting terrorist financing in the most coordinated and effective way. The Council Secretariat constructed its influence predominantly within the intergovernmental context of implementing UN resolutions through the Council of Ministers, whereas the Commission played a significant role regarding supranational cooperation in relation to FATF recommendations.

Yet, the implementation of these international standards, framed in the context of the UN and the FATF, necessitates clear pooling of national sovereignty at the EU level. Surprisingly, EU Member States, despite their traditional reluctance to hand over powers to European institutions in areas as deeply entrenched in national sovereignty as counter-terrorism, recognised that a collective implementation at EU level can add value in dealing with that demand more effectively (interview CON5). Furthermore, two additional factors added to this perception of a European added value. On the one hand, some national governments, some which were not previously familiar with terrorism, lacked the original primary legislation necessary to adopt some of the instruments to implement the provisions (ibid). On the other hand, the EU had consistently been committed in the past to aligning itself to FATF and UN decisions, as well as implementing both UNSC resolutions and FATF recommendations into EU legislation. Both of these reasons contributed to the EU as a whole seeking to be 'an exemplary implementer' (Eling, 2006).

Thus, the Commission and the Council Secretariat both managed to play the role of an SPE and persuaded member states to promote European integration in countering terrorism financing matters. The use of the term 'persuasion' here is applied slightly differently to both EU institutions. While the Commission had to persuade Member States of the merits of the policy, the Council Secretariat acted more as a facilitator, given that UN resolution 1373 is binding in international law. However, despite this, Members States were persuaded to use the framework of the European Union in order to fulfil their international legal obligations, which they could have done at the national level only if they so wished. EU commitment in the field was subsequently reinforced by the shock of the terrorist attacks in Madrid on 11 March 2004. The 'solidarity' Declaration on Combating Terrorism of 29 March 2004, agreed upon by the European Heads of State and Government (European Council 2004), again strongly emphasised the need 'to reduce the access of terrorists to financial and other economic resources' and 'to address the factors contributing to the support for and recruitment into terrorism.'

The European Commission managed to play the significant role of an SPE in the first pillar area of implementing the FATF Special Recommendations at EU level. It persuaded EU member states to promote European cooperation in the field of countering terrorist financing, where EU engagement was so far rather limited, and thereby it contributed to shape the current design of EU-CTF

regime. Indeed, the FATF Nine Special Recommendations require the extension of the EU anti-money laundering regulatory framework in order to also include the offence of terrorist financing. Given that cooperation at the EU level during the 1990s focused more on transnational organised crime rather than on terrorism, those actors in charge with anti-money laundering tasks could broadly rely on the experience from that field.

Especially the Commission utilised its expertise and competence from dealing with money-laundering in order to initiate legislation related to terrorist financing. The Commission has the exclusive right to initiate proposals on terrorist financing with regards to first pillar provisions linked to financial crime. Consequently, it used this power and successfully persuaded the Council of Ministers and the European Parliament to approve its proposed laws. In addition, together with fifteen 'old' EU Member States, it is also a member of the FATF itself. The Directorate-General of the Commission DG Markt leads the European delegation in these negotiations. It seeks to coordinate EU Member States as much as possible negotiations start, despite their obvious jealousy to protect their national prerogatives.

Since the 2001 attacks, especially in the initial months of major political pressure for action, the Commission has been able to accelerate the adoption of some legislative measures with terrorist financing implications that were already under discussion before 9/11. Amongst these are included the 'Protocol to the Convention on Mutual Assistance in Criminal Matters'[4], which provides for the exchange of information between Member States concerning bank accounts held by any person who is subject to criminal investigations. The protocol represents a considerable improvement of cooperation in the fight against economic and financial crime. Furthermore, the Commission pushed also for the adoption of the so-called 'second anti-money laundering Directive'[5]. While controversial negotiations on the Directive had been ongoing since the summer of 1999, the Commission demonstrated particular skill in pushing this initiative through the 'window of opportunity' (den Boer, 2006) after 9/11. It used the close link between money laundering and terrorist financing in order to push the European Parliament to agree on the text already approved by the Council. The second anti-money laundering Directive was adopted at the conciliation stage in December 2001 and thereby amended the earlier 1991 Directive.

The success of this legislation has clear similarities with the Commission's policy entrepreneurship in the adoption of the European Arrest Warrant. The EAW, which in its initial state would have been difficult to swallow for most

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4 Council Act (2001/C 326/01) of 16 October 2001 establishing, in accordance with Article 34 TEU, the Protocol to the Convention on Mutual Assistance in Criminal Matters between the Member States of the EU, OJ C326, 21.11.2001.

5 Council Directive (2001/97/EC) of 4 December 2001 amending Council Directive 91/308/EEC on the prevention of the use of the financial system for the purpose of money laundering, OJ L344, 28.12.2004.

member states in the mere context of 'fight against crime' that was prevalent in the 1990s, was politically constructed to become an important instrument in the 'war on terror.' In the same way, the emerging international norm of joining in the 'war on terror' made it necessary to adopt the directive to counter-terrorist financing, even though it seemed implausible to adopt these instruments in the 'fight against money laundering'[6]. In this way, the norm to participate in the war on terror (via EU mechanisms) was used strategically to convince the majority of member states of the political merits of the second anti-money laundering directive, and it allowed the Commission to use member states' peer pressure to convince the reluctant member states to participate. Thus, the Commission managed to play the role of an SPE and persuaded member states to promote European integration in counter-terrorist financing.

This process was pushed even more strongly when, in 2004, the Commission prepared a far-reaching Communication focused on the prevention of and the fight against terrorist financing through measures to improve the exchange of information, to strengthen transparency and enhance the traceability of financial transactions. Most of the elements included in the Communication were inserted also in the 2005 'third anti-money laundering Directive'[7] which repealed the previous two directives. The 'third directive' also made the title 'terrorist financing' more explicit, and, once again, reaffirmed the EU objective to comply with FATF standards. It clearly incorporated most of the latest version of the FATF Recommendations (as revised in 2003) into Community legislation.

On the other hand, the Council Secretariat was vital in facilitating the transposition of the binding resolutions of the UNSC at the EU level. To this purpose the Council Secretariat exerts an important role within the intergovernmental setting of the Council of Ministers, to be precise in the Common Foreign and Security Policy (CFSP) context of the second pillar. One of the cornerstones in the fight against terrorist financing is the regime of targeted financial sanctions foreseen by UNSC resolutions. Following the precedent of the UNSC Resolution 1267 concerning Al-Qaeda, Osama Bin Laden and the Taliban and Associated Individuals and Entities, the EU has adopted and implemented an *ad hoc* set of rules to transpose UNSC Resolution 1373 in the context of the second pillar. Since the adoption in 1999 of Resolution 1267, the EU has already been applying certain sanctions on Al Qaeda and Taliban suspects in accordance with the list drawn up by the UN 'Al-Qaeda and Taliban Sanctions Committee.' Yet, after 9/11 the implementation of Resolution 1373, whose most important component is the 'freezing of assets' provision, required imposing

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[6] However, it needs to be remembered that, tied to the end of the cold war and the fear of organised crime, the EU was able to adopt money-laundering instruments. In fact, the EU adopted its first directive on money-laundering in 1991.

[7] Council Directive (2005/60/EC) of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, OJ L309, 25.11.2005.

freezing measures against whatever terrorist group - and not only against Al Qaeda and Taliban.

Consequently, the EU decided to establish its own autonomous system for identifying and designating individuals and organisations under suspicion of terrorism (but not included under the 1267 sanctions regime). In order do this the Council adopted a Common Position (2001/931/CFSP) on the joint bases of Articles 15 and 34 TEU in December 2001. The Common Position lays clearly down the criteria for listing persons, groups or entities suspected of having links with terrorism and of being involved in terrorist acts, as well as defining the actions that amount to a terrorist act.

This was complemented by a Council Regulation (EC) No 2580/2001, adopted under Articles 60, 301 and 308 TEC, implementing the EC law aspects of the foreign policy aspects of the Common Position. The EC Regulation provides for the freezing of all funds, other financial assets and economic resources belonging to the persons, groups and entities listed in the Common Position and coming from outside the EU. Furthermore, all the persons, groups and entities listed in the Common Position are subject to enhanced measures taken in the field of police and judicial cooperation in criminal matters. The need to adopt a first pillar regulation alongside of a second/third pillar common position was necessitated by the fact that an asset freeze represents a hindrance to the Community provision for the free movement of capital. This would have been prohibited by EC law without this regulation. Thus, with the Common Position and the EC Regulation, the EU addressed both foreign policy and criminal law matters.

In charge of the strictly intergovernmental workings concerning the procedures of listing and de-listing of terrorist suspects is the Council Secretariat-Directorate General E for EU external affairs, which is supported by the Commission-DG External Relations. The Council Secretariat has over time been acquiring substantial functions in the intergovernmental areas of CFSP. This is equally true for some areas of police and criminal justice cooperation; EU Member States were reluctant to empowering the Commission in those sensitive fields. It is for these reasons that, since 1999, the Council Secretariat on behalf of the Council – which decided to rely on it for implementation – has taken the lead in implementing UNSC Resolution 1267 and in updating EU legislation in accordance with relevant changes to the UN 'blacklist.' This legacy has clearly influenced the post-9/11 institutional and organisational arrangements chosen for managing the implementation of Resolution 1373. In this area, the Council Secretariat plays a very significant executive role and is endowed with the delicate responsibility to assist the *ad hoc* working group created within the Council responsible for managing the EU blacklist. Thus, it can be argued that the Council Secretariat managed to play the significant role of an SPE through its influence within the intergovernmental context of the Council of Ministers; thereby facilitating the promotion of European cooperation in countering terrorist financing.

## Conclusions

In conclusion, this article demonstrated two points. Firstly, European integration is possible in areas of 'high politics', areas at the very heart of the nation state. Despite the central place EU Member States continue to have in the policy-making process, EU supranational actors, in particular the European Commission and the Council Secretariat, have played a significant role in shaping the current design of the EU counter-terrorism policy. Thus, the article refuted arguments made by intergovernmentalists that the supranational institutions are 'late, redundant, futile and even counterproductive' (Moravcsik, 1999a, p. 270).

The Commission and the Council Secretariat have been very active players – exerting the role of a supranational policy entrepreneur. On the normative level, the Commission in particular managed to contribute significantly to embedding EU countering-terrorism policy into a European policy response to the US led 'war on terror.' This significantly contributed to member states preference building. Consequently, the Commission and the Council Secretariat played the role of SPEs, as defined by Kingdon (1984) and further elaborated by Kaunert (2007).This clearly adds to the growing body of literature that suggests that European institutions can be important players in Justice and Home Affairs areas (Kaunert, 2007, 2009, 2010), as well as in other first pillar areas, such as telecommunications (Fuchs, 1994, 1995), equal opportunities (Mazey, 1995), and research (Peterson, 1995).

However, it needs to be acknowledged that there are limitations to the arguments in the article. The Commission and the Council Secretariat have acquired the capacity to act as SPEs as demonstrated by the cases in this article. This implies a (potentially) significant role in the legislative process, even in institutionally difficult terrain such as counter-terrorism. However, the thesis is limited to the legislative process. In opposition to the first pillar, in the second and third pillar, the Commission cannot take member states to the ECJ for failure to transpose legislation properly or on time as would be the case in infringement proceedings under the TEU[8]. While the Commission and the Council Secretariat can act as SPEs regarding legislative innovation, the same does not apply regarding the implementation of EU policy at the national level. Thus, despite this increase in supranational governance in EU counter-terrorism, this process is still ongoing and far from complete. Let's see where this process takes us with the ratification of the Lisbon Treaty, which entered into force on the 01 December 2009, as well as the adoption of the Stockholm Programme – the work programme for the EU in the Area of Freedom, Security and Justice for the next five years.

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[8] However, with the entry into force of the Lisbon Treaty on the 01 December 2009, the pillar structure is abolished; this will eradicate this problem to a very significant extent.

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