The EU Anti-terrorism policy in its external AFSJ dimension: democratic accountability and human rights protection in the post Lisbon Treaty era

Introduction

The EU counters terrorism in its relations with the outer world both in the context of the Area of Freedom Security and Justice (AFSJ) and the Common Foreign and Security Policy (CFSP). In these areas before the Lisbon Treaty entered into force, executive powers dominated the decision making process. The European Parliament was excluded both from the decision making process leading to conclusion of international agreements in the former third pillar and from the CFSP. The role of the Court of Justice of the European Union (CJEU) was limited in the AFSJ.[1] The Treaty change of 2009 enhanced the democratic oversight over the approval of EU international agreements and broadened the competence of the Court in the context of the CFSP. Under Art. 275 TFEU, second paragraph the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of the CFSP is subject to judicial review.[2]

The aim of this chapter is to examine how the Parliament and the Court have influenced the EU external counter terrorism policies in the light of their newly empowered status. In particular, the paper asks if they have been capable of adequately securing the protection of human rights given that the atmosphere in Europe "has turned as single-minded about the defeat of terrorism as it is in the US" after 9/11?[3]

In order to answer these questions, it is necessary to sketch out the legal framework. Section 1 maps out the legal bases justifying EU counter terrorism action in its international dimension. The description of the Treaty provisions will be complemented by a short overview of the practice to see if the EU has mainstreamed cooperation to fight terrorism in all its external relations. Section 2 focuses on the decision making process and, in particular, on the strengthening of democratic accountability in the negotiation and conclusion of international agreements designed to prevent and pursue terrorist activities and other forms of crime. The way the Parliament has exercised its new powers in practice will be illustrated. Section 3 considers whether the weakening of intergovernamentalism in the external dimension of the AFSJ has resulted in the fortification of the substantive human rights standards, taking the Parliament's fight to strengthen the right to data protection for European citizens as a test case. Shifting attention from the Parliament to the Court of Justice, section 4 explore whether the EU has been able to defend its values when implementing the United Nations Security Council (UNSC) resolutions, designed to tackle the financing of terrorism. In an area in which democratic accountability is conspicuously absent, it is contended that the Court of Justice has injected important antidotes to protect the due process rights of persons listed by the UNSC resolutions. Indeed, the Kadi line of case-law[4] on restrictive measures against individuals is

[1] The CJEU's role was even more limited in the domain of foreign affairs.

[2] Before the Lisbon Treaty the CJEU did not have the competence to examine the legality of CFSP measures. Nonetheless, in the Kadi case of 2008 the Court could examine the legality of Community measures (based Articles 60 EC, 301 EC and 308 EC Treaty) enacted to achieve the CFSP objectives of the EU Treaty. The Court was dissatisfied with the use of Community treaty provisions, such as art. 352(4) TFEU (former art. 308) to pursue CFSP objectives. See Joined Cases C-402/05 P & C-415/05 P, *Kadi* and *Al Barakaat* v. *Council and Commission*, ECLI:EU:C:2008:461, par. 197-204. The position of the Court was taken into consideration in the revision of the Lisbon Treaty which introduces Art. 275 TFEU, second paragraph.

[3] A question, along these lines, was raised by C. Warbrick, "The European Response to Terrorism in an Age of Human Rights," 5, *EJIL* 2004, p. 995.

[4] See section n. 5.

exemplary of the high degree of autonomy in providing legal safeguards in circumstances where the protection afforded in the international context are not satisfactory.

1. EU Competence and instruments to tackle terrorism in the EU external relations

Terrorism is a global threat that concerns EU security and, at the same time, that of Member States. While the latter have the primary responsibility in adopting counter terrorism measures, the EU enjoys certain powers. For example, in order to achieve a high level of (*internal*) security (Art. 67(3) TFEU), action can be taken to define minimum rules as far as criminal offences for serious forms of crimes, including terrorism (Art. 88 TFUE). In its relations with the wider world, the EU has the task of contributing to security (Art. 3 TEU) and to strengthening it (Art. 21 (2) c TEU). International terrorism is certainly a threat to the EU security and, more broadly, to that of the international community. Whenever a counter terrorism initiative has to be taken the EU may act either in the framework of the AFSJ or the CFSP.

In principle, the EU may act to achieve the objective of preventing and combating terrorism, under Art. 75 TFEU, located in the context of the AFSJ[5]. More precisely, legislative measures may be enacted to set out a framework for administrative measures with regard to capital movements and payments, such as the freezing of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-State entities. Yet, in practice, this provision, granting full legislative powers to the Parliament, has never been used by the EU. In Case C-130/10 the Court of Justice has detailed the reasons to prefer Art. 215(2) TFUE as the legal foundation of these acts, when they implement a UNSC Resolution.[6] This provision enables the EU to enact measures against natural or legal persons and groups or non-State entities to implement a CFSP decision on a joint proposal from the High Representative and the Commission. The Parliament is merely informed.[7] Despite the lack of any reference to terrorism, the Court considers that Art. 215(2) is better suited than art. 75 TFEU to justify measures directed to addressees implicated in acts of terrorism, having regard to their activities globally and to the international dimension of the threat they pose.[8] The Court has boosted the CFSP dimension of the counter terrorism and has underplayed the link between the financing of terrorism and the EU's internal security, which is implicitly made by Art. 75 read in conjunction with Art. 67 TFEU. The implication of the judgment is that Art. 75 should be used to fight home-grown terrorists, although this has not happened so far.[9] From an institutional perspective, this means that the Parliament is excluded from the decision-making process of restrictive measures.

[5] Outside the AFSJ, a further relevant provision of the TFEU, explicitly mentioning terrorism, is art. 222 TFEU. The latter is related to the internal rather than the external dimension of EU counter terrorism since it makes possible for the Union and its Member States to act jointly in a spirit of solidarity if a Member State is the object of, inter alia, a terrorist attack. The Union may act to prevent the terrorist threat in the territory of the Member States, to protect democratic institutions and the civilian population from any terrorist attack; and to assist a Member State in its territory, at the request of its political authorities, in the event of a terrorist attack. The so-called "solidarity clause" has not been implemented, yet.

[6] C-130/10, *European Parliament* v. *Council of the European Union*, ECLI:EU:C:2012:472.

[7] See European Parliament recommendation to the Council of 2 February 2012 on a consistent policy towards regimes against which the EU applies restrictive measures, when their leaders exercise their personal and commercial interests within EU borders (2011/2187(INI)).

[8] "Given that terrorism constitutes a threat to peace and international security, the object of actions undertaken by the Union in the sphere of the CFSP, and the measures taken in order to give effect to that policy in the Union's external actions, in particular, restrictive measures for the purpose of Article 215(2) TFEU, can be to combat terrorism." Case C-130/10, *Parliament v Council*, above n. 6, par. 63.

[9] P. Van Elsuwege, "The Interface between the Area of freedom, Security and Justice and the Common Foreign and Security Policy of the European Union: legal Constraints to Political Objectives," in R.H. Holzacker, P.Luif, Freedom, Security and Justice in the European Union: Internal and External Dimensions of Increased Cooperation after the Lisbon Treaty, Springer, Heidelberg/New York/Dordrecht/London, 2014, p. 132-133.

Turning to the CFSP, Article 24(1) TEU and Article 2(4) TFEU provide that the Union's competence in CFSP matters "shall cover … all questions relating to the Union's security". The only explicit mention of terrorism is made in the context of Common Security and Defence Policy (CSDP). After the Lisbon Treaty, Article 43(1) TEU confers on the Union the competence to use civilian and military means to carry out various tasks that contribute to the fight against terrorism and support third countries in combating terrorism in their territories. EU action in this field, which is addressed to unstable countries unable to counter terrorist activities, has been quite modest to date. Two CSDP missions designed to enhance the capacity of third countries to fight against terrorism have been authorised. The first is the 'EUCAP Sahel Niger' mission to support capacity building of the Nigerian security actors to fight terrorism and organised crime.[10] The second is 'EUTM Mali'[11] which purports to provide "in the South of Mali, military and training advice to the Malian Armed Forces…in order to contribute to the restoration of their military capacity with a view to enabling them to conduct military operations aiming at restoring Malian territorial integrity and reducing the threat posed by terrorist groups."[12] In Mali, the EU supports the work of the United Nations stabilisation mission MINUSMA.

As noted by Hillion, "The formulation of Article 43(1) TEU cannot be understood as mainstreaming the fight against terrorism into CSDP tasks, in the sense of obliging the EU institutions systematically to consider this aspect in setting up CSDP missions. Instead the formulation of Article 43 TEU makes it plain that this is a possibility which EU decision-makers may decide to take up, or not."[13] The use of the CSDP seems somehow exceptional. In Mali, Niger and other Sahel countries the roots of terrorism lie in the fragility of the concerned States, the insufficient operational and strategic capacities to control the territory, to ensure human security, to prevent and to respond to the various security threats, and to enforce the law (conduct investigations, trials etc.).[14] In addition, "[t]he available resources are insufficiently used to target terrorism and illegal activities."[15] Therefore, other non-military instruments in the context of the development cooperation seemed to be favoured by the EU.[16] However, after the Charlie Ebdo's terrorist attack, the announcement was made that "Counter-terrorism may be mainstreamed fully into EU foreign policy."[17] This may imply a wider use of CSDP missions with a counter terrorism purpose.

The EU has also concluded a number of bilateral international agreements to fight serious international crime and terrorism relying on the provisions of judicial cooperation in criminal matters. Art. 82(1)d and 87(2)a TFEU were used in the latest version of the so-called "PNR agreements"[18] with Australia, Canada and US, involving the transfer of passenger booking data by air carries to custom authorities of the concerned third countries. A first wave of Treaties were finalised in 2004

[10] Decision n. 2012/392/CFSP of 16 July 2012 on the European Union CSDP mission in Niger (EUCAP Sahel Niger), OJ 2012, L 187/48.
[11] Council Decision n. 2013/34/CFSP of 17 January 2013 on a European Union military mission to contribute to the training of the Malian Armed Forces (EUTM Mali), OJ 2013, L 14/19.
[12] Art. 1.
[13] C. Hillion, "Fighting Terrorism through the Common Foreign and Security Policy", in I. Govaere, S. Poli, *EU Management of global Emergencies-Legal Framework for Combating threats and Crises*, 2014, Brill Nijhoff, Leiden, Boston, p. 77.
[14] See Strategy for Security and Development in the Sahel, http://www.eeas.europa.eu/africa/docs/sahel_strategy_en.pdf, (last accessed on 3rd February 2015), p. 3.
[15] Ibidem.
[16] See *infra*.
[17] Foreign Affairs Council meeting, document n. 6044/15, 9 February 2015, p. 7.
[18] These agreements are based on the processing and transfer of data held by private entities to border and custom authorities of third countries.

(with US) [19] and 2006 (with Canada),[20] in the framework of the first pillar, after the Commission found that the transfer of passengers information to third countries' authorities ensured adequate personal data protection. However, the 2004 PNR was successfully challenged by the Parliament before the Court;[21] one of the grounds was that its legal basis, lying in the first pillar, was inappropriate.[22] Unfortunately, it was a pyrrhic victory for the Parliament. The implication of the ruling was that the agreement had to be re-negotiated in the framework of the third pillar in which there were no standards as far as data protection was concerned.[23] In 2006 an interim agreement was concluded and was followed by a second one in in 2007. In addition, the text "clearly and consistently steer[ed] away from all European basic data protection principles."[24] As hinted above, in the post Lisbon era, the first generation of agreements were then replaced by new ones with Australia (2012),[25] US (2012)[26] and Canada (2014).[27] The content of these Treaties reflects a higher standard of data protection, as we shall see later.[28]

Beyond the PNR agreement, a second example of a treaty with the US, which is based on the provisions of the AFSJ, is that on the Terrorist Finance Tracking Programme ("TFTP").[29] The legal foundations of the Council decision are art. 87(2)a and 88(2) TFEU, in conjunction with art. 218(5) TFEU. The TFTP is aimed at collecting information on financial transactions in order to cut the financing of terrorist activities. The TFTP is the first EU Treaty that was rejected by the Parliament, shortly after the entry into force of Lisbon Treaty.[30] As with the PNR agreements, these negotiations were fraught with data protection concerns. So, although cooperation with the US, Australia and Canada on terrorism is intense and advanced,[31] it has certainly not been plain-sailing.

[19] 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 US Department of Homeland Security, Bureau of Customs and Border Protection, OJ 2004, L 183/83.

[20] See Agreement between Canada and the European Community on the transfer and processing of Passenger Name Record data, OJ 2006, L 82/15. By contrast with the EU-US PNR Treaty of 2004, this agreement was not challenged before the Court since it did not raise data protection concerns. V. Mitsilegas, *EU criminal law*, Hart publishing, Oxford and Portland, Oregon, 2009, p. 304.

[21] See C-317/04 e 318/04, *Parliament* v. *Council*, ECLI:EU:C:2006:346.

[22] The background of this challenge was that the Parliament found the US data protection standards inadequate to the European ones.

[23] The only existing instrument on data protection was 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. This piece of legislation did not apply to activities falling outside the scope of Community law. The first act addressing data protection standards in the context of cooperation in criminal matters was the framework decision 2008/977 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, OJ 2008, L 350/60.

[24] For a full account of these concerns see V. Papakonstantinou, P. De Hert, "The PNR Agreement and transatlantic anti-terrorism Co-operation: no firm human Rights Framework on either Side of the Atlantic", 46 *CMLRev* 2009, p. 913.

[25] See 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, OJ 2012, L 186/4.

[26] See the Agreement between the United States of America and the European Union on the use and transfer of passenger name records to the United States Department of Homeland Security, published in OJ 2012, L 215/5.

[27] See the Agreement between Canada and the European Union on the transfer and processing of Passenger Name Record data signed on 25th June 2014. The agreement is not yet in force, pending an opinion of the CJEU on the compatibility of the envisaged agreement with the Treaty, under art. 218(11). See section 2.

[28] See section 2.

[29] 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, OJ 2010, L 8/11.

[30] See *infra*.

[31] This is witnessed by the number of international agreements and by the quality of the cooperation (legally binding agreement v. mere joint political declarations). The scope of the cooperation is also broad; it includes exchange of information in the context of police cooperation. The US was the first third country to sign a cooperation agreement with

Cooperation on combating terrorism is not framed in legally binding terms with other key-international actors, such as Japan (2001),[32] India (2010),[33] Pakistan (2012)[34] and Russia (2014).[35] Indeed, most of these initiatives have been criticised at practitioner level since they have failed to yield concrete results.[36] The EU-Japan declaration is a particularly loose form of co-operation, merely *encouraging* cooperation in multilateral fora; early finalisation of the UN Comprehensive Convention against International terrorism; and a commitment to assist post Afghanistan. Other declarations are more detailed in describing the spectrum of the cooperation.[37] In addition, the possibility to upgrade the cooperation into full international agreements, including exchange of information (Russia) or mutual legal assistance and extradition (India), is left open but there is no time line for this objective to be achieved.

As a result of the European Council's call to incorporate the fight against terrorism into all aspects of the Union's external relations (June 2002), the EU has indeed mainstreamed cooperation on counter terrorism in the framework of single external policies (such as the enlargement and European Neighbourhood and development cooperation policies). After 2004, the EU envisage counter

Europol in December 2001. Australia and Canada have also signed with similar agreements with Europol in 2007 and 2005. Further agreements concluded in the framework of the third pillar provisions of the EU Treaty before the Lisbon Treaty are the Agreement on mutual legal assistance between the European Union and the United States of America (OJ 2003, L 181/34) and the Agreement on extradition between the European Union and the United States of America (OJ 2003, L 181/27). Both agreements supplement existing bilateral agreements (art. 3). The former Treaty, inter alia, lays down the terms of the cooperation in case a request concerns counter terrorism. Under art. 4(4)b, the Member States must as a minimum cooperate with the US "in the identification of accounts associated with terrorist activity and the laundering of proceeds generated from a comprehensive range of serious criminal activities, punishable under the laws of both the requesting and requested States."

[32] See EU-Japan Joint declaration, 8 December 2001.

[33] See EU-India Joint declaration on international terrorism, 10 December 2010.

[34] See EU-Pakistan strategic dialogue, 5 June 2012.

[35] See Joint EU-Russia statement on combatting terrorism, 28 January 2014.

[36] J. Argomaniz, *The EU and Counter-Terrorism: Politics, Polity and Policies After 9/11*, Routeldge, Boston, 2011, p. 94.

[37] For example, in the Declaration with Russia emphasis is placed on the strengthening of the cooperation in countering terrorist financing activities, as well as legal cooperation, in particular in extradition and legal assistance on criminal cases, including identification, arrest, confiscation and return of property acquired through terrorist activities. In the declaration with India the parties envisage to coordinate efforts against terrorists and terrorist groups so as to deny them safe haven and freedom of travel in accordance with international law. They also encourage more efficient controls on issuance of identity and travel documents to prevent movement of terrorist and terrorist groups across national borders.

terrorism cooperation in all bilateral agreements with candidate countries[38] as well as in the action plans with neighbouring countries[39] and other third countries[40] or groups of States.[41]

Cooperation in the area of counter terrorism is also included in the association agreements with Eastern European countries such as Georgia, Moldova and Ukraine. The cooperation envisaged with Georgia is the most far reaching one. The EU extends its internal acquis on the criminalisation of terrorist offences to the Party concerned.[42] This country agrees to cooperate in the framework of the UN and the Council of Europe in order to exchange information on terrorist groups (with due respect to privacy and data protection). Further exchanges concern best practices in addressing and countering radicalization and recruitment and as regards the protection of human rights in the fight against terrorism, in particular in relation to criminal justice proceedings.[43] Turning to the association agreement with Ukraine, this act envisages the cooperation between the Parties on counter terrorism action but, by contrast with that of Georgia, it does not cover the cooperation on the best practices in relation to terrorism and human rights.[44] It should be noted that in none of these three agreements the cooperation on counter terrorism is considered an essential element of the agreements.[45] Therefore, a breach of the clause may not lead to the suspension of the agreement.

The EU also assists third countries in strengthening their capacity to fight terrorism. Providing assistance is a way to implement the Union's strategy to "increase its involvement in the efforts of the international community to prevent and stabilise regional conflicts and promote good governance and the rule of law."[46] The Instrument for Stability, established by Regulation (EC) No 1717/2006,

[38] The parties' cooperation concerns the financing of terrorism and money laundering. In these areas, the EU encourages the partners to adopt the standards of the Financial Action Task Force. In addition, the parties agree to implement UNSC 1373 (2001) and to exchange information on terrorist groups. See art. 82 and 87 of the of the EU stabilization and association agreement with Montenegro, OJ 2010, L 108/3. The content of these provisions is replicated in other agreements of this kind.

[39] In this context, cooperation on terrorism and broad forms of crime is a common feature in all ENP Action Plans and this cooperation has been progressively framed in legally binding terms. Cooperation in these areas feature in all association agreements concluded with Southern neighbours and negotiated after 2005.

[40] Such as Tajikistan and Iraq. For more detailed analysis of counter terrorism clauses, see C. Matera, The development of an external dimension of the EU counter-terrorism policy: a framework for an analysis" in C. Matera, E. Erlin-Karnell, *The external dimension of the EU counter terrorism policy*, *CLEER Working papers* n. 2014/2, p. 22. The EU has also included counter terrorism clauses in the EU framework agreement with the Republic of Korea (Council Decision of 10 May 2010 on the signing, on behalf of the European Union, and provisional application of the Framework Agreement between the European Union and its Member States, on the one part, and the Republic of Korea, on the other part (2013/40/EU), OJ 2013, L 20/2). Article 7 refers to the Parties' cooperation in the prevention and suppression of terrorist acts in the context of the UN and to share and exchange practices and information, including in the area of protection of human rights in the fight against terrorism.

[41] See art. 16 of the Agreement establishing an Association between the European Union and its Member States, on the one hand, and Central America (2012), OJ 2012, L 346/3. This is the first bi-regional agreement signed after the entry into force of the Lisbon Treaty.

[42] Georgia is required to ensure the criminalisation of terrorist offences, in line with the definition contained in the Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism. See art. 20 of the association agreement between the EU and the European Atomic Energy Community and its Member States, of the one part, and Georgia, of the other part, OJ 2014, L 261/13.

[43] This form of cooperation is also envisaged in the association agreement between the EU and the European Atomic Energy Community and its Member States, of the one part, and Moldova of the other part (art. 19), OJ 2014, L 260/4.

[44] Association agreement between the EU and its Member States of the one part, and Ukraine, of the other part, OJ 2014, L 161/3.

[45] Respect for the democratic principles, human rights and fundamental freedoms and countering the proliferation of weapons of mass destruction are considered to be essential elements of these agreements (see art. 2 of the association agreement with Moldova).

[46] See the European Council Declaration on combating terrorism, 25 March 2004.

revised in 2014,[47] is "the only instrument specifically designed to address pure counter-terrorism (civilian) needs, including at national and regional levels."[48] It sets out to assist developing countries[49] in addressing global and trans-regional threats to peace, international security and stability, such as terrorism, organised crime all forms of illegal trafficking, as well as emerging threats such as cyber crime by strengthening the capacity of law enforcement and judicial and civil authorities involved in the fighting this sources of threats (art. 5 (2) a). Assistance is given to individual countries or countries of the same region or regional international organizations.[50] Supporting measures which are prioritized include "the development and strengthening of counter-terrorism legislation, the implementation and practice of financial law, of customs law and of immigration law, the development of law-enforcement procedures which are aligned with the highest international standards and which comply with international law, the strengthening of democratic control and institutional oversight mechanisms, and the prevention of violent radicalism."[51] Unlike the 2006 Regulation, the new one dedicates a self standing provision (Art. 10) to "human rights," thus showing a special attention toward this issue in its external counter terrorism strategy. The Commission shall develop operational guidance to ensure that human rights[52] are taken into consideration in the design and implementation of the supporting measures to counter terrorism. This Institution undertakes to carefully monitor that the mentioned measures are implemented in line with human rights obligations.[53] However, nowhere in the Regulation the consequences of a failure to comply with the Commission's guidelines are spelled out. For example, it is not specified whether the breach of human rights counter terrorism action of assisted countries could lead to a suspension of the financial assistance.

It should be noted that the cooperation on counter terrorism is a "principled one." The Commission emphasizes that when developing cooperation with third countries on counter terrorism the EU demands respect of "human rights law, international humanitarian and refugee law, free and fair judicial proceedings as well as the protection of personal and private data. In its human rights dialogues with third countries, the EU already raises violations of human rights committed under the guise of counter terrorism activities."[54] Probably, the EU acts through quiet diplomacy since there do not seem to be any situations in which counter terrorism action of a third country, disrespecting human rights, was publicly brought to the attention of the international community by the EU executives.[55]

[47] Regulation (EU) 230/2014 of the European Parliament and of the Council of 11 March 2014 establishing an instrument contributing to stability and peace, OJ 2014, L77/1.
[48] European Commission, Addressing conflict prevention, peace-building and security issues under external cooperation instruments-Guidance note, p. 14. Counter terrorism assistance is excluded under both the European Development Fund and the Development Cooperation Instrument. Ibidem, p. 13.
[49] The Regulation is based on art. 209 and 212 TFEU. The use of the latter implies that countries other than developing countries are entitled to benefit from EU financial support.
[50] Art. 5(3) a.
[51] Art. 5(3) c.
[52] In particular as regards the prevention of torture and other cruel, inhuman or degrading treatment and respect for due process, including the presumption of innocence, the right to a fair trial and rights of defence (Art. 10(2)).
[53] Art. 10(3).
[54] Joint Communication to the European Parliament and the Council-Human Rights and democracy at the heart of the EU external action-Toward a more effective approach, COM (2011) 886 final, 12 December 2011, p. 13.
[55] By contrast, the Parliament has raised the human rights concerns of the US practices in countering terrorism on more than one occasion. In its view, "the EU must consistently raise with strategic partners all examples of non-compliant counter-terrorism measures and seek accountability for violations both within and outside the EU." See European Parliament resolution of 18 April 2012 on the Annual Report on Human Rights in the World and the European Union's policy on the matter, including implications for the EU's strategic human rights policy (2011/2185(INI)), par. 152). For example, the Parliament has urged President Obama to honour its promise to close the Guantánamo Bay detention facility and has emphasised that normal criminal trials under civilian jurisdiction are the best way to resolve the status of

While the EU Charter applies to all EU measures countering terrorism, including international agreements, by contrast, it does not apply to counter terrorism action taken at national level. Indeed, the EU competence in this field has constitutional limits. Under Article 4(2) of the TEU, "the Union shall respect the equality of Member States (...) as well as their national identities (...) It shall respect their essential state functions, including (...) safeguarding national security. In addition, under Art. 72 TFUE, maintenance of law and order and the safeguarding of internal security remains Member States' prerogatives. Although the Court of Justice has widely interpreted Art. 51 (2) in the Fransson case,[56] it would be very difficult for the Court to demand that Member States respect the Charter when acting to protect the national security from a terrorist threat. Indeed, such an action would lie outside the scope of EU law. This means that where Member States, in the name of national security, carry out counter terrorism activities which breach human right standards, the EU's safeguards are not applicable, *qua* EU law. However, it should be noted there is tension at EU level as to the scope of national security, as we shall see in the next section.

2. The strengthening of democratic oversight and problems of secrecy

Before the Lisbon Treaty the EU cooperation with third countries in the area of criminal and police cooperation was based on third pillar provisions of the Treaty (i.e. Art. 38 TEU). This meant that the Parliament was not even consulted when international agreements in this area were concluded. In a resolution of 2007 the European Parliament complained about the lack of democratic accountability in the external dimension of the AFSJ and advocated a number of changes to be introduced. The first request concerned the consultation of the Parliament in respect of "third pillar" agreements, especially those affecting the fundamental rights of Union citizens and the main aspects of judicial and police cooperation with third countries or international organisations. The second recommendation was to keep the Parliament regularly informed of the negotiations on agreements dealing with the AFSJ and to make sure that Parliament's views were duly taken into consideration.[57] The Lisbon Treaty and an inter-institutional agreement between the Parliament and the Commission of 2010[58] have partially addressed the democratic deficit.

Under art. 218(6)(v) TFEU, the Parliament has to express its consent to all agreements that concern matters subject to the ordinary legislative procedure or to a procedure where its consent is required. In addition, under Art. 218(10) TFEU the Parliament must be kept fully informed during all stages of the negotiation and conclusion of the agreement. The interinstitutional agreement mentioned above includes the obligation of the latter to forward the former with all relevant information that it provides to the Council. In addition, the Commission is bound to take due account of Parliament's comments.[59] It should be noted that informal cooperation between the EU and third countries is not subject to the requirements of Art. 218(10) and of the inter-institutional agreements and therefore is not well received by the Parliament.[60]

Guantánamo detainees. See European Parliament resolution of 23 May 2013 on Guantánamo: hunger strike by prisoners (2013/2654(RSP)), P7_TA(2013)0231, par. 9.

[56] C-617/10 *Åklagaren v. Hans Åkerberg Fransson*, ECLI:EU:C:2013:105.

[57] Parliament Resolution of 21 June 2007 on an area of freedom, security and justice: Strategy on the external dimension, Action plan implementing the Hague Programme (2006/2111(INI), OJ 2008, C 146/354, points 1 and 2.

[58] Framework agreement on relations between the European Parliament and the European Commission OJ [2010], L 304/47.

[59] Annex III, points 3 and 5. For additional comments on the scope of the Parliament's rights see C. Eckes, "How the European Parliament's Participation in International Relations Affects the Deep Tissue of the EU's Power Structures," *Jean Monnet working paper*, 12/14, p. 6-7.

[60] European Parliament resolution of 11 November 2010 on the global approach to transfers of passenger name record (PNR) data to third countries, and on the recommendations from the Commission to the Council to authorise the opening

Not only the letter of legal process but also practise confirms the prominent role of the Parliament. In December 2009, the Parliament rejected the EU-US agreement with the US on the TFTP[61] on data protection grounds,[62] using for the first time its power of consent. This is notable because the negotiations took place just prior to the entry into force of Lisbon on 1 Dec 2009 and therefore technically EP consent was not required. The Commission was forced to re-negotiate the agreement. In July 2010, finally, the Parliament, approved the text on account of the strengthened level of data protection.

The TFTP saga also led to an important and welcome ruling that narrowly construed the scope of one of the exceptions to the principle of access to documents and, more broadly, reinforced the principle of transparency in EU external relations. A member of the Parliament had asked the Council to have access to the opinion of the Council legal service on the choice of the legal basis of the envisaged agreement. Only partial access was authorised by the Council. The latter's decision was challenged before the General Court (GC) by Ms In'tVeld. The protection of the EU public interest as regards the EU's international relations was the exception invoked by the defendant as the ground to refuse full access to this document. The GC,[63] which partially upheld the action, considered that the Council had not established the risk of a threat to the public interest in the field of international relations concerning the undisclosed parts of the document relating to the legal basis. On appeal, the CJEU[64] confirmed this interpretation. The information on the choice of the legal basis provided in the Council document was unlikely to undermine the negotiating position of the EU and more broadly, EU international relations.

The European Parliament does not have the power to initiate the suspension or termination of an international agreement under art. 218 TFEU. In October 2013 the Parliament exerted pressure on the Commission to suspend the TFTP as a result of the disclosure of the US mass surveillance programmes in June 2013.[65] Yet, since the Commission was convinced by the US that there was not a breach of the agreement, the request to suspend was rejected and the Parliament did not have any legal means by which to oppose the assessment of the Commission.

After the rejection of the TFTP in 2009, the Parliament has kept a watchful eye on the negotiation process of agreements designed to prevent terrorism and other forms of crime. This has meant that the Commission and the Council have had to compromise with the Parliament on the content of several bilateral agreements. Such a power cannot be directly inferred from the right to be

of negotiations between the European Union and Australia, Canada and the US. Para. 9 states that "bilateral memorandums of understanding between Member States and the USA, alongside negotiations between the EU and the USA, are contrary to the principle of loyal cooperation between the EU institutions; urges the Council to provide further information and legal clarity on the situation regarding the legal base and competence of bilateral memorandums of understanding between Member States and the USA concerning information exchanges related to PNR data, OJ 2012, C 74/E/8.

[61] This agreement was made necessary by the fact that in 2010 the provider of financial data to US authorities implemented a new messaging architecture, consisting of two processing zones – one zone in the US and the other in the European Union. Previously, this company had stored all relevant financial messages on two identical servers, located in Europe and the US. In order to ensure the continuity of the TFTP, the US had to conclude an international agreement with the European Union. COM (2013) 843 final, p. 2.

[62] See *infra.*

[63] T-529/09 *In'tVeld* v. *Council*, ECLI:EU: T:2012:215. The GC only partially annulled the Council's decision refusing access to information.

[64] C-350/12 *Council* v. *In't Veld*, ECLI:EU:C:2014:2039.

[65] Parliament resolution of 23 October 2013 on the suspension of the TFTP agreement as a result of US National Security Agency surveillance (P7_TA(2013)0449).

immediately informed in all the stages leading to the conclusion of an international agreement, provided for by Art. 218(10) TFEU.[66]

As hinted at above the conclusion of PNR agreements is exemplary of the Parliament's major role in shaping EU relations with third countries. The cooperation with the US has played a crucial role in influencing the EU strategies to counter terrorism. Before the Lisbon Treaty, the EU has been quite uncritical in adopting the US techniques incorporated in the legislation adopted between 2001 and 2002, as a reaction to 9/11. In May 2010 the Parliament postponed its vote on the request for consent on the existing PNR agreements with the US and Australia. It demanded that the existing PNR agreements with Canada, Australia and US to be re-negotiated (5 May 2010).

The approval of the PNR agreements was fraught with difficulties because of the Parliament's concerns over European citizens' insufficient guarantees of data protection. Amongst all agreements with the transatlantic partners and Australia, that with the US met the strongest opposition by the Parliament. Special points of concern were the excessively long data retention periods, the use of the most privacy-intrusive transmission methods of travelers data to non EU-recipient,[67] the possibility of data mining and flaws in the redress provisions with respect to European citizens.[68] As a result, the negotiation of the text of the agreement was prolonged in order to assuage Parliament's concerns. In 2010, as a result of this institution's pressure, the Commission for the first time laid down a set of general criteria which would form the basis of future negotiations on PNR agreements with third countries.[69]

Shortly after the Parliament decision to postpone the vote on the PNR agreement, the Commission recommended to the Council to authorise the opening of negotiations for an umbrella agreement between the EU and the USA on protection of personal data when transferred and processed for the purpose of preventing, investigating, detecting or prosecuting criminal offences, including terrorism, in the framework of police cooperation and judicial cooperation in criminal matters.[70] It is clear that the Parliament's work was central to this decision being taken and indeed the Parliament remains active in trying to bring this agreement to fruition some five years later.[71]

The Parliament finally approved the PNR with the US and, although a few Member States were not thoroughly convinced of the terms of the agreements, the latter finally entered into force in 2012.

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[66] H. Hijmans, A. Scirocco, "Shortcomings in EU data protection in the third and second pillars. Can the Lisbon Treaty be expected to help?" 46 *Common Market Law Review*, 2009, p. 1522.

[67] Internet based communication of data can be made through different methods. The "push system" is the method that encroaches less on the right to data protection and is the one favoured by the EU institutions when agreements providing exchange of information between EU flight companies and the competent border authorities of third countries are concerned. Under this system, the communication of information is initiated by the publisher or central server (data controller) and therefore it can be seen as deliberate transfer of data. In the pull system the transmission of the information is initiated by the recipient (the third country interested in the receiving the data). European Data Protection Supervisor, "The transfer of personal data to third countries and international organizations by the EU, 14 July 2014, p. 7 published online https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Supervision/Papers/14-07-14_transfer_third_countries_EN.pdf (last accessed 2 May 2015).

[68] See section n. 3.

[69] COM (2010) 492 Communication from the Commission on the global approach to transfers of Passenger Name Record (PNR) data to third countries, 22/09/2010, p. 3.

[70] The European Council had invited the Commission to propose a recommendation for the negotiation of a data protection and, where necessary, data sharing agreement for law enforcement purposes with the US in the Stockholm programme "An Open and secure Europe serving and protecting citizens", 2010, point 2.5.

[71] http://www.statewatch.org/news/2015/mar/eu-usa-dp-meps-prel.pdf.

Although in no case has the Parliament prevented the conclusion of an international agreement with the US and other transatlantic partners, this institution has influenced the content of the agreements and has used all instruments at its disposal when the final texts did not satisfy legal safeguards on data protection.[72] In November 2014, the Parliament has also sought an advisory opinion from the CJEU on the EU-PNR agreement with Canada.[73] The critical opinion of the European Data Protection supervisor on the necessity and proportionality of the PNR schemes[74] as well as the CJEU's annulment of the data retention Directive[75] were undoubtedly influencing factors here.

An important source that broadens the information available to the Parliament to influence the negotiation of international agreements (outside the CFSP) is the inter-institutional agreement between the Parliament and the Council concerning the forwarding to and handling by the European Parliament of classified information held by the Council on matters other than in the area of the Common Foreign and Security Policy.[76] As a result of this, the Parliament will be able to get access to classified documents. However, this agreement has an important limitation: the documents classified by third parties cannot be disclosed.[77]

A further technique used by the Parliament to steer the negotiation of important data protection agreements is to threaten not to consent to international agreement under negotiation in domains outside the AFSJ. For example, after the revelations on mass surveillance programmes, the Parliament threatened not to give its consent to the EU-US Transatlantic Trade and Investment Partnership so long as the blanket mass surveillance activities and the interception of communications in EU institutions and diplomatic representations were not completely abandoned and an adequate solution was found for the data privacy rights of EU citizens, including administrative and judicial redress.[78] Similarly, the Parliament asked for the so-called "umbrella agreement"[79] with the US under negotiation to provide for effective and enforceable administrative and judicial remedies for all EU citizens in the US without any discrimination. The Parliament also asked the Commission not to initiate any new sectoral agreements or arrangements for the transfers of personal data for law enforcement purposes with the US as long as this framework agreement has not entered into force.

[72] By contrast the negotiation of the agreement with Australia was smooth on account of the good level of cooperation between the Parliament, Commission and Council. See C. Eckes, above n. 59 for more details on the Australian agreement, p. 14-15.

[73] The Parliament argues that there is legal uncertainty as to whether the draft agreement is compatible with the provisions of the Treaties (Article 16) and the Charter of Fundamental Rights of the European Union (Articles 7, 8 and 52(1)) as regards the right of individuals to protection of personal data. In addition, it questions the choice of legal basis, i.e. Articles 82(1)(d) and 87(2)(a) TFEU rather than the provision on data protection. See the European Parliament resolution of 25 November 2014 on seeking an opinion from the Court of Justice on the compatibility with the Treaties of the Agreement between Canada and the European Union on the transfer and processing of Passenger Name Record (PNR) data.

[74] The EDPS has always been critical of the PNR agreements with third countries. The EDPS has not seen convincing elements showing the necessity and proportionality of the massive and routine processing of data of non-suspicious passengers for law enforcement purposes. See Executive summary of the Opinion of the European Data Protection Supervisor on the proposals for Council decisions on the conclusion and the signature of the agreement between Canada and the European Union on the transfer and processing of passenger name record data, par. 3 (OJ 2014, C 24/51).

[75] Joined Cases *Digital Rights Ireland Ltd* (C-293/12) v. *Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung* (C-594/12) and *Others*, ECLI:EU:C:2014:238.

[76] OJ 2014, C 95/1.

[77] D. Curtin, "Official secrets and the negotiation of international agreements: is the EU executive unbound?," 50 *CMLRev*, 2013, p. 453.

[78] European Parliament resolution of 12 March 2014 on the US NSA surveillance programme, surveillance bodies in various Member States and their impact on EU citizens' fundamental rights and on transatlantic cooperation in Justice and Home Affairs (2013/2188(INI)), par. 74.

[79] See section 3.

Next, the Parliament has been able to halt the adoption of internal legislation that replicated the security strategy of third countries actively cooperating with the EU in counterterrorism, such as the US. This is the case of the so-called EU Passenger Name Record (PNR) system for the surveillance of air travel. There is a strong support at intergovernamental level for an EU system for collecting and processing PNR data by the EU Member States. This instrument is seen by the Counterterrorism coordinator as a valuable tool against the threat posed by terrorists travelling from and into the EU and within the EU.[80] In June 2014, revelations on the number of EU nationals, defined as "foreign fighters," who leave the EU to fight in Syria or Iraq has caused the European Council to consider the adoption of an EU-PNR scheme as an important instrument to dissuade, detect and disrupt suspicious travel and of these persons. As a result, it called the Council and the European Parliament to finalise work on the EU Passenger Name Record proposal before the end of 2014.[81] The idea of creating an in-house PNR scheme has been in discussion for quite some time. An attempt to set up an EU-PNR scheme has been made by the Commission upon request of the European Council since 2007.[82] This proposal became a proposal for a Directive after Lisbon.[83] However, its approval was halted by a negative vote of the LIBE Committee of the Parliament that questioned the necessity and proportionality of this new instrument in April 2013.[84] It is not sure, though, that the Parliament will be able to resist internal intergovernmental pressure[85] as well as the UNSC requests made to UN members with Resolution 2178 of September 2014 and finally the emotional shock of the Paris terrorist attacks of 2015. The concerned resolution calls upon the latter "to require airlines to provide advance passenger information to the appropriate national authorities in order to detect the departure from, entry into, or transit through their territory of individuals previously identified as falling within the scope of the resolution (para. 9). States should furthermore prevent the movement and travel of terrorists through effective border control and close monitoring of the issuance of identity papers and travel documents (para. 2)." A new wave of counter terrorism measures including an EU-PNR are likely to be adopted in the coming months.

A further interesting development of the Parliament's institutional practice concerns its decision to take a stand in situations in which the border between EU and national security is blurred. When the Guardian and the Washington Post revealed the existence of Prism in June 2013,[86] the Parliament

[80] Annual report on the implementation of the EU Counter-Terrorism Strategy, 2012, doc. n. 16471/1, 23 February 2012, p. 28.

[81] "The European Council Guidelines may well constitute therefore a strategic attempt to re-inject 'intergovernamentalism' or to bring back the old EU Third Pillar working habits of the JHA Council to the entire new institutional fabric of the EU AFSJ." S. Carrera and E. Guild, "The European Council's Guidelines for the Area of Freedom, Security and Justice 2020 Subverting the 'Lisbonisation' of Justice and Home Affairs?" *CEPS essays* n. 13 / 14 July 2014, p. 6.

[82] Discussions on the introduction an 'EU PNR scheme' started after the European Council of 25-26/03/2004 invited the Commission to bring forward a proposal on an EU common approach on the use of PNR data for law enforcement purposes. See Proposal for a Council framework Decision on the use of Passenger Name Record (PNR) for law enforcement purposes, COM (2007) 654, of 6/11/2007.

[83] In January 2010 the Council asked the Commission to present a proposal for an EU PNR. The European Commission put forward a new proposal for a Directive on EU-PNR on 2 February 2011.

[84] http://www.statewatch.org/news/2014/nov/ep-eu-pnr-prel.pdf.

[85] The conclusions of the European council of 30 August 2014 state: "The European Council strongly believes that determined action is required to stem the flow of foreign fighters. It calls for the accelerated implementation of the package of EU measures in support of Member States efforts, as agreed by the Council since June 2013, in particular to prevent radicalisation and extremism, share information more effectively - including with relevant third countries, dissuade, detect and disrupt suspicious travel and investigate and prosecute foreign fighters. In this context, the European Council calls on the Council and the European Parliament to finalise work on the EU Passenger Name Record proposal before the end of the year […]".

[86] This is the National Security Agency's programme enabling the mass surveillance of individuals through the direct access to the central servers of internet companies.

instructed the Committee on Civil Liberties, Justice and Home Affairs to conduct an in-depth inquiry on the mass surveillace programmes and its impact on human rights of EU citizens. The position was taken that the notion of "internal security" should be interpreted in a restrictive manner and therefore all issues related to mass surveillance programmes are not the sole competence of Member States.[87] Whereas at intergovernmental level there were no strong reactions to the 2013 revelations, the Parliament was very critical with the Member States. It called all EU Member States and "in particular, the United Kingdom, France, Germany, Sweden, the Netherlands and Poland to ensure that their current or future legislative frameworks and oversight mechanisms governing the activities of intelligence agencies are in line with the standards of the European Convention on Human Rights and European Union data protection legislation."[88]

Finally, the Parliament has harshly criticised counter terrorism practices that strictly pertain to national security. A good example is illustrated by the abduction, detention without trial, secret prisons and torture of suspected terrorists, that occurred on the EU territories of some Member States. A number of individual rights are breached by these illegal practices that concern national security. Despite art. 4(2) TEU, the Parliament has been quite vocal in stigmatising them and in criticising the Council's silence on Member States' involvement in the CIA programme.[89] It has demanded full investigations into the alleged degree of involvement of Member States[90] with the US authorities, notably the CIA. The position of the Parliament is that the mentioned practises amount to serious breaches of the principles and values on which the European Union is based and the possibility to issue a recommendation in the framework of art. 7 TEU, is threatened.

3. The evolution of data protection in the context of the EU-US cooperation

Information exchange between law enforcement authorities is one of the tools used by the EU to counter terrorism, including in relations with third countries. As the LIBE committee emphasises, "In general, the EU system on transfers of personal data to third countries is based on the principle of the continuity of protection, so as to avoid that the protection granted in the EU is lost, eroded or denied just because the data are transferred to a third country."[91]

As shown in the previous section, the Parliament consented to a new PNR agreement with the US after a long negotiating process. Does the new agreement ensure a higher level of data protection and enhanced due process rights for passengers coming from the EU?

The new EU-US agreement is considered an improvement on its predecessors from a rule of law perspective. Indeed, the main provisions and safeguards are set out largely in the text of the EU-US agreement itself and not in a non legally binding act.[92] In addition, the retention period of data in an active database is shortened; the "push" instead of the "pull" method[93] (as envisaged by the agreement

[87] European Parliament resolution of 12 March 2014 on the US NSA surveillance programme, surveillance bodies in various Member States and their impact on EU citizens' fundamental rights and on transatlantic cooperation in Justice and Home Affairs (2013/2188(INI)), par. 16.
[88] Ibidem, par. 22 (see also paras 25, 26 and 29).
[89] See the European Parliament Resolution of 11 September 2012 on alleged transportation and illegal detention of prisoners in European countries by the CIA: follow-up of the European Parliament TDIP Committee report (2012/2033(INI)), P7_TA(2012)0309.
[90] Finland, Denmark, Portugal, Italy, the United Kingdom, Germany, Spain, Ireland, Greece, Cyprus, Romania and Poland Lithuania, collaborated with the US. See Resolution of 11 September 2012, above n. 89, par. 17.
[91] LIBE committee, Electronic Mass surveillance of EU citizens, 2014, p. 83.
[92] V. Mitsilegas, *The criminalisation of migration in Europe: Challenges for human rights, and the rule of law*, Springer, Briefs in Law, Heidelberg/New York/Dordrecht/London, 2015, p. 26.
[93] See footnote n. 67

of 2004) will be used by carriers to transfer PNR data to the US Department of Home Security. A number of deficiencies remain. For example, the purpose limitation principle is stricter than in the 2007 text. It is thus possible to use "PNR for the purposes of preventing, detecting, investigating, and prosecuting not only terrorist offences and related crimes," but also "other crimes that are punishable by a sentence of imprisonment of three years or more and that are transnational in nature." In previous versions of the agreements, the "other crimes" had to be serious[94] and there was no reference to the number of years of imprisonment. The use of sensitive data (information revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, or data concerning the health or sex life of the individual) is not prohibited as such but is possible in exceptional cases and the US also maintains discretion as to whether a transfer of PNR to competent government authorities of third countries may take place or not. Let us come to judicial redress for the use of PNR data, one of the most contentious issues for the Parliament. It is possible to any individual, including EU citizens, whose personal data and personal information has been processed and used in a manner inconsistent with the Agreement to seek effective administrative and *judicial* redress (emphasis added). The problem is that it is U.S. law that defines the conditions of the exercise of these rights.

Moving on to consider the EU-US TFTP, does the agreement encompass safeguards for individuals in line with European standards? The answer of the Commission is positive: "The first joint review and the second joint review of the implementation of the EU-US TFTP Agreement by the Commission have verified that the comprehensive safeguards included in the Agreement, in particular those related to personal data protection, function properly. "The practical and to date more experienced application of the EU-US TFTP Agreement has showed that the original concerns at the time of initial analysis of an EU system have been addressed by the effective set of safeguards embedded in the Agreement."[95]

It should be recalled that the weak standards in terms of data protection were at the basis of the Parliament's substantive refusal to approve the conclusion of the agreement. However, this institution did not question the need to cooperate with the US and to use TFTP. So much that the agreement was re-negotiated and approved by the Parliament in July 2010. The text of the agreement was not much different from the one rejected in 2009. The Parliament's position was criticised for this.[96] In order to avoid a second TFTP incident, the communication channels between the Parliament and the Commission in the negotiation of international agreements were kept open in the area of counter terrorism. It is true that the data protection standards for European citizens were improved after the agreement was re-negotiated. For example, the administrative and legal redress for EU citizens in the US is possible; an independent observer appointed by the European Commission is based in Washington, DC, to oversee, along with SWIFT personnel, the extraction of SWIFT data.[97] However, eventually the Parliament was convinced of the need to consent to the agreement by economic factors rather than from its strengthened data protection standards.[98]

[94] Note the contrast with the EU-Australia agreement requiring the crime to be serious.
[95] Commission staff working document, SWD(2013)488 final, of 27/11/2013, p. 12.
[96] A. Ripoll Servent, A. Mackenzie, "The European Parliament as a 'Norm Taker'? EU-US Relations after the SWIFT Agreement," 17 *EFAR*, 2012, p. 72-73.
[97] Commission staff working document, SWD(2013)488 final, of 27/11/2013, p. 12.
[98] An element that convinced the Parliament to vote in favour of is that the failure of an agreement would have harmed European air carriers. M. Quesada Gàmez, E. Mincheva, "No data without protection? Rethinking transatlantic information exchange for law enforcement purposes" in P. J., Cardwell, *EU External Relations Law and Policy in the Post-Lisbon Era*, Springer, The Hague, 2012, p. 299.

Since December 2010 the framework agreement on personal data transferred and processed to and by competent public authorities of the EU and its Member States and the US for the purpose of preventing, investigating, detecting or prosecuting crime, including terrorism is under negotiation. Will this agreement reinforce the level of data protection standards in the information flows between the EU and the US? Such an agreement has the potential of clearly defining the legal safeguards that EU citizens enjoy when their personal data are in the hands of the US authorities. However, the way the two Parties see the agreement clash.[99] As things stand, the right of judicial redress is not guaranteed by the U.S. Privacy Act of 1974 (limiting such a right to U.S. citizens and legal permanent residents). This aspect is crucial to finalise the agreement. There were doubts as to whether the Obama Administration would agree to the EU demand, given that Congress would probably not be inclined to pass such an amendment to the Privacy Act.[100]

The stalemate in the negotiation process is likely to come to an end in favour of the EU side. Indeed, on 25 June 2014 Attorney General of the US Mr Eric Holder announced that he would take legislative action in order to provide for judicial redress for Europeans who do not live in the US. Despite this positive development, the LIBE committee expressed the view that the negotiations have not properly addressed essential data protection principles. For example, the clause of non discrimination under which a party would apply the provisions of the agreement without discrimination between its own nationals and those of the other party is criticised. Indeed, "this does not ensure that the treatment afforded to EU citizens would always comply with the minimum requirements of the Charter and EU data protection law. This principle could have the reverse effect of nullifying the protections of the agreement on the grounds that the law of a contracting party does not grant its own nationals any of the protections and safeguards set out in the agreement. This would imply that although EU citizens would be treated without discrimination, the effective protections and rights provided in the EU to their fundamental right to data protection would simply vanish when data are transferred because of the application of the principle of non-discrimination."[101]

The robustness of this agreement in terms of data protection of EU citizens could contribute to restore the trust between the EU and the US that was shaken after the Prism scandal. In 2013 the revelations of mass surveillance programmes of EU citizens by the US and some Member States has poisoned the transatlantic cooperation. Probably, had it not been for these revelations, the Commission would not have managed to convince the US negotiator to commit to change its legislation. In its turn, had it not been for the Parliament's pressure on the Commission, the latter would have not insisted on greater legal safeguard for the European citizens.

4. UN-EU cooperation on counter terrorism: constitutional challenges and the role of the CJEU

[99] There is a clash of views on the objectives of the agreement between the EU and the US side. It seems that the latter sees it as way to set in stone that the EU largely accepts U.S. data privacy standards as adequate and thus make the negotiation of future data-sharing agreements easier in the law enforcement arena. By contrast, the EU side considered the agreement as an opportunity to gain for EU citizens the right of judicial redress in the US. K. Archick, "US-EU cooperation against terrorism," *CRS Reports for congress*, 2013.

[100] "The Administration has long maintained that EU citizens may seek redress concerning U.S. government handling of personal information through agency administrative redress or judicial redress through other U.S. laws, such as the U.S. Freedom of Information Act." Ibidem, at 16.

[101] See LIBE working document on future European Union (EU) - United States of America (US) international agreement on the protection of personal data when transferred and processed for the purpose of preventing, investigating, detecting or prosecuting criminal offences, including terrorism, in the framework of police and judicial cooperation in criminal matters, 14 July 2014, p. 5.

Under art. 21 (1) TEU the EU is bound to "promote multilateral solutions to common problems, in particular in the framework of the United Nations."[102] The threat posed to international security by entities and individuals financing terrorism is one such problem. The UNSC resolutions adopted in the aftermath of the 2001 terrorist attacks in the US are another external source of EU counter terrorism measures. The UN "has exercised a high degree of influence over the EU as far as the financing of terrorism is concerned.[103] The EU has implemented the UNSC Resolution 1267(1999) as subsequently modified which enable a Committee of the Security Council to freeze the funds and other financial resources of Usama bin Laden, the Taliban and individuals and entities associated the Al Quaeda network.[104] The EU joined multilateral efforts to prevent the financing of international terrorism, a phenomenon that threatens international peace and security[105] and adopted freezing orders against the persons or associations included on the Al-Qaida Sanction list.[106] These means were recognised by the GC as the most effective to achieve the goal of curbing financial support to terrorism.[107] The most recent (5 July 2014) organization added to the list of terrorists associated with Al-Qaida is Boko Haram and another splinter group.[108]

In addition, the EU has created its own fund-freezing regime in order to give effect to UNSC resolution n. 1373 (2001) setting out a parallel regime of sanctions to combat terrorism by all means, in particular the financing thereof.[109] Under this system, the EU has been able to freeze the funds of persons, groups or entities financing terrorism, other than persons affiliated with the Al-Qaeda network.[110]

Although the EU is bound to strengthen international security, in accordance with the purposes and principles of the United Nations Charter,[111] the Court of Justice has questioned the way these principles were interpreted by the 1267 Committee of the Security Council, without explicitly acknowledging it.[112] In a few cases, EU measures implementing UNSC belonging to both categories of sanction regimes[113] were successfully challenged before the Court and annulled.[114] It may acknowledged that the Court of Justice has never put the Member States and the EU in a state of non-

[102] Art. 21(1) TEU.
[103] S. Léonard, C. Kaunert, "Combating the Financing of Terrorism Together? The Influence of the United Nations on the European Union's Financial Sanctions Regime", in O. Costa,K. E. Jorgensen, *The Influence of International Institutions on the European Union: A Framework for Analysis*, Hampshire: Palgrave Macmillan, 2012, p. 133.
[104] As of 2011 the 1267 Committee administers the sanction regime against the Al-Qaida and associated individuals and entities; Resolution 1988 (2011) sets up a separate committee to oversee sanctions against the Taliban and any individual, group, undertaking and entity designated as or associated with the Taliban.
[105] Cases C-402/05 P and C-415/05 P, above n. 2, paragraph 363, and Cases C-539/10 P and C-550/10 P *Al-Aqsa* v *Council*, ECLI:EU:C:2012:711, par. 130.
[106] Council Common Position 2002/402/CFSP of 27 May 2002.
[107] Cases C-539/10 P and C-550/10 P *Al-Aqsa* v *Council*, ECLI:EU:C:2012:711, par. 125.
[108] See europeansanctions.com/category/Nigeria (last access, 3 February 2015).
[109] The basic rules were defined in the Common Position 2001/931/CFSP of 27 December 2001, OJ 2001, L 344/93 and by Regulation 2580/2001, OJ 2001, L 344/70.
[110] European Commission, Restrictive Measures in Force (Article 215 TFEU) 5 December 2014 available: http://eeas.europa.eu/cfsp/sanctions/docs/measures_en.pdf.
[111] Art. 21(2) c TEU.
[112] It should be noted that the Court denies that its case law contrasts with the practice of the 1267 Committee. See Judgment of 18 July 2013 in joined Cases C-584/10 P, C-593/10 P and C-595/10, P *Commission et al* v. *Yassin Abdullah Kadi* (hereafter "Kadi II"), ECLI:EU:C:2013:518, par. 299.
[113] For a list of relevant cases see C. Eckes, The Legal Framework of the European Union's Counter-Terrorist Policies: full of good Intentions?, in C. Eckes, T. Kostadinides, *Crime within the Area of Freedom, Security and Justice: a European public Order*, Cambridge University Press, Cambridge, 2011, 138-140.
[114] The most recent example is the annulment of the listing of Hamas. The Court considered that the Council decision to list was not based on an assessment of the decision of a national authority but on information derived from the press and the internet. Judgement of 17 December 2014, T-400/10 *Hamas* v. *European Commission*, ECLI:EU:T:2014:1095, par. 131.

compliance with international law.[115] However, the fact remains that the implementation of the UNSC resolutions in the EU is subject to limits that the Court has devised, as a result of the Kadi line of cases. So, while it is certain that the EU observes international law, it is less certain that the EU, through its Court, "strictly" observes it, as is required by Art. 3(5) TEU.

It should be noted that after the Lisbon Treaty, all Union acts, including those related to CFSP, must respect human rights within the limits defined at EU level. The duty to respect fundamental rights is imposed, in accordance with Article 51(1) of the Charter of Fundamental Rights of the European Union, on all the institutions and bodies of the Union, even in the context of art. 215 TFUE which provides judicial safeguards.

As a result, the strengthening of the CFSP dimension of counterterrorism has not *per se* implied that the EU was unconstrained by the Charter. Indeed, article 275 TFEU makes it clear that the Court has jurisdiction to exercise judicial control over restrictive measures adopted in the context of CFSP, in line with the Kadi jurisprudence,[116] and thus to guarantee that fundamental rights are respected in relation to these measures."[117]

Given the impact that restrictive measures have on the rights of the designated persons and of their family members, a small number of these measures were impugned by the listed persons before the Court. In a number of judgements starting from the Kadi ruling of 2008 ("Kadi I"),[118] the CJEU has made clear that the concerned EU Regulations[119] are not immune from judicial review and must comply with fundamental human rights. The judiciary was asked to strike a balance between the requirements of the fight against international terrorism, on the one hand, and due process rights (the right of defence and the right to an effective judicial protection) as well as substantive rights (the right to the protection of property). In the cases in which the challenged measure implemented a UNSC resolution targeting the Al Qaida network, the EU acts were found to breach the right to effective judicial protection, the right to defence and the right to property, which are enshrined in the EU Charter. On these grounds, the Court annulled the challenged Regulation.[120]

In the cases in which the annulment actions were related to the EU-listing system, the Court considered that the Council decision to freeze funds (or to maintain a name on the list of persons whose assets were to be frozen) did not comply with the duty to state reasons and was not sufficiently detailed.[121]

The reactions to Kadi I were sharply divided. On the one hand, the Court was praised for considering these rights as supreme EU values, trumping any other obligations stemming from the EU Treaty. As Hendry put it, "The Court of Justice of the European Union's (CJEU) decision in Kadi can be taken

[115] This is emphasised by J. Larik, "EU counter-terrorism and the 'strict observance of international law': sewing the seamless coat of compliance, in M. Avbely, F. Fontanelli, G. Martinico, *Kadi on trials*, Routledge, Boston, 2014, p. 39.
[116] See section n. 5
[117] C. Hillion, above n. 13, p. 92.
[118] Cases C-402/05 P and C-415/05 P, above n. 2.
[119] Regulation (EC) 1190/2008 of 28 November 2008 amending for the 101st time Council Regulation (EC) 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, OJ 2008, L 322/25.
[120] Persons who were in the same factual and legal situation of Mr Kadi challenged the Regulation 881/2002 successfully challenged it. See T-318/01 *Othman v. Council*, ECLI:EU:T:2009:187, Joined Cases C-399/06 P and C-403/06 P *Hassan and Ayadi v Council and Commission*, ECLI:EU:C:2009:748; T-135/06 to T-138/06 l *Faqit and others v Council*, ECLI:EU:T:2010:412.
[121] For example, see Case T-228/02 *Organisation des Modjahedines du peuple d'Iran* v *Council*, ECLI:EU:T:2008:7 'the OMPI judgment' and Case T-327/03 *Stichting Al-Aqsa* v *Council*, ECLI:EU:T:2007:211.

to represent its overt declaration to be a human rights actor in its own right.[122]" Thus, the ruling of 2008 and its progeny may be seen as paradigmatic of the autonomy of the EU legal order from the UN system. The Court is seeking to establish itself as the final arbiter and guarantor of the rights of individuals within the Union when the latter counters the threat of terrorism in cooperation with the UN. However, a number of observers have also criticised the stance taken by the Court. Indeed, it undermines the uniform application of the UNSC resolutions and eventually, such an approach weakens the authority of this body in countering terrorism.[123]

Although Mr Kadi was re-listed, the strong stand by the CJEU, as well as repeated calls by EU Member States and NGOs to adopt due process standards as well as a criminal justice approach, have influenced the UNSC's position.[124] For instance, the legal standards of the listing procedure of 1267 Committee were improved and the office of Ombudsperson was established. Between July 2010 and April 2015, the Ombudsperson examined 57 cases and most of them led to de-listing decisions.[125]

After Kadi I, the Court has continued to broadly interpret the procedural rights of the individuals listed by EU measures. In *Abdulrahim*[126] the Court annulled the GC's ruling and stated that a Libyan national who challenged his listing as a terrorist, and subsequently had been de-listed, maintained an interest in bringing proceedings under art. 263 TFEU. Indeed, the recognition of the illegality of the contested act cannot, as such, compensate for material harm or for interference with his private life; yet, it is nevertheless capable of rehabilitating him or constituting a form of reparation for the non-material harm which he has suffered by reason of that illegality. The Court sided with the individual unlawfully designated and underlined the opprobrium and suspicion that accompany the public designation of persons as being associated with a terrorist organisation.

The substantive rights of family members of a person designated as a terrorist were defended in *The Queen (on the application of M. and Others.*[127] Here, the Court narrowly defined the scope of the freezing orders. The principle of legal certainty prevents that the payment of social security or social assistance benefits (such as income support, disability living allowance, child benefit, housing benefit and council tax benefit) to a spouse of a suspected terrorist can be included in the freezing orders. Indeed, this kind of economic resource, which is available to third parties, even if closely connected to the suspected terrorist, cannot be used to finance terrorist activities.

After the ruling of 2008, Mr Kadi was re-inserted in the list of terrorist. Indeed, the Commission had complied with the Court's ruling by disclosing to the person concerned a summary of the reasons underlying his inclusion on the list of suspected terrorists at UN level. Yet, the evidence and the information at the basis of the statement of reasons were not revealed on grounds of confidentiality.

[122] J. Hendry, "Kadi in sight of autopoiesis," in M. Avbely, F. Fontanelli, G. Martinico, *Kadi on trials*, above n. 115, p. 64.

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[123] See for critical comments on Kadi I, S. Poli, M. Tzanou, "The Kadi rulings: a survey of the literature," 28 *Yearbook of European Law*, 2009, p. 533. See also Gráinne de Búrca, "The European Court of Justice and the international legal Order after Kadi," 51 *Harvard International Law Journal*, 2009, 1; K.S. Ziegler, "Strengthening the Rule of Law, but Fragmenting International Law: The Kadi Decision of the ECJ from the Perspective of Human Rights", 9 *Human Rights Law Review*, 2009, p. 288.

[124] J. Wouters, S. Duquet, "The United Nations, the European Union and Multilateral Action against Terrorism," in I. Govaere, S. Poli above n. 13, p. 390.

[125] See www.un.org/en/sc/ombudsperson/status.shtml (last access on 5 May 2015).

[126] C-239/12 P *Abdulbasit Abdulrahim* v. *Council of the European Union*, ECLI:EU:C:2014:238.

[127] In case C-340/08, *The Queen (on the application of M. and Others)* v *Her Majesty's Treasury*, ECLI:EU:C:2010:232.

This led to a new application for annulment. This time the GC upheld the action[128] but the Council, the Commission and the UK introduced an appeal.

Eventually, in October 2012 the 1267 Sanctions Committee decided to de-list Mr Kadi after considering his de-listing request and the report produced by the Ombudsperson. This development concluded his sanction saga after twelve years of legal battles. Yet, this did not deprive of interest the pending appeal before the Court. Indeed, Mr Kadi was only one of the persons whose funds were frozen.

On 18 July 2013 the Court rejected the appeal against the General Court ruling. The Court confirms the principle of full judicial review on the legality of the decision to include (or confirm the inclusion) of the name of a person on the list of terrorist. On the merit, the judicature holds that Mr Kadi did not have access to the information and evidence relied on against him and at the basis of the listing decision. Respect for the rights of the defence and the right to effective judicial protection requires that the competent Union authority discloses to the individual concerned that evidence. The statement of reasons sent by the 1267 Committee did not contain enough information. The obligation to state reasons laid down in Article 296 TFEU entails that the individual, specific and concrete reasons why the competent authorities consider that the individual concerned must be subject to restrictive measures should be disclosed to him. It is up to the EU institutions to impartially examine whether the reasons for listing are well founded. The Court lays down a sort of code of procedural conduct that the EU institutions must respect in managing the system of restrictive measures. This code dictates the rules that EU institutions should observe both before the listed person challenges the listing decision and after judicial action is introduced against that act. The assumption of the Court is that the EU institutions enjoy a certain degree of autonomy in managing the system of restrictive measures. Yet, this not the case.

The Court emphasises that an in-depth analysis on the evidence is made necessary by the lack of procedural safeguards that continues to taint the UN Sanction system generally and stresses that the unsatisfactory way in which that system works is also recognised by the ECHR. As Fontanelli put it, "All issues [in Kadi II] arise from the gulf between the duties of the EU and the UN bodies' lack of duties."[129] The conclusion of the Court is that none of the allegations presented against the appellant was such as to justify the adoption, at European Union level, of restrictive measures against him.[130]

The autonomy of the EU legal order is the principle underpinning this judgement, although that word was not even mentioned in the ruling.[131] It is contended that the position of the Court gives substance to the right of effective judicial protection of the listed person; this is all the more necessary in a situation in which, despite improvements in the listing procedure, the 1267 Committee does not respect this right. Yet, the position that the Court sets for itself as supreme guarantor of human rights in the financing of terrorism is temporary. In particular, when the listing procedure will work in such a way as to give the listed persons the possibility to defend themselves before the European Union competent authority, the Court will no longer have reasons to annul the listing decisions. Waiting for

[128] The GC had annulled Commission Regulation (EC) No 1190/2008 of 28 November 2008 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban in so far as that measure concerns Mr Kadi. See T-85/09 *Yassin Abdullah Kadi* v. *Commission*, ECLI:EU:T:2010:418

[129] F. Fontanelli, "Kadieu: connecting the dots – from Resolution 1267 to Judgment C-584/10 P: the coming of age of judicial review", in M. Avbelj, F. Fontanelli, G. Martinico, above n. 115, p. 12.

[130] Par. 163.

[131] G. Martinico, "The autonomy of EU law: a joint celebration of Kadi II and Van Gend en Loos," in M. Avbelj, F. Fontanelli, G. Martinico, above n. 115, p. 164.

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this to happen, the EU institutions are required to closely assess the evidence before them.[132] When in doubt, the decision to list should not be made. Ultimately, the Court scrutinizes whether the evidence is sufficiently detailed. The fact that the information and evidence justifying the listing is confidential is not held to be in itself sufficient to screen the measure, implementing the UN freezing decision, from judicial appraisal.

To sum up, in Kadi II, the Court forges a sort of "EU's temporary autonomy" from the UN in protecting due process human rights. The Court is willing to subject to the judicial scrutiny the restrictive measures, implementing UNSC decisions, only as long as the UN system does not assure human standards equivalent to that available at EU level.[133] This approach does not show a willingness to isolate the EU from the UN; rather, the solution of a temporary disconnection is opted for as the "necessary evil", waiting for the UN to play its part in affording greater safeguards to individuals.

6. Conclusions

In this piece a number of institutional and substantive changes were highlighted with respect to the external dimension of counter terrorism. First of all, the Parliament has substantially increased its influence on the content of EU agreements designed to counter terrorism and other forms of crime with respect to the pre-Lisbon era. As a result, the democratic accountability of the Commission and the Council in the exercise of their external powers in the AFSJ is greater than it used to be at the time the external dimension of the AFSJ was coined in the Hague Programme (2004). In addition, the Parliament has contributed to make security-oriented agreements with the US more respectful of human rights by defending the right to data protection. The "umbrella agreement" with the US under negotiation is likely to better reflect European data protection standards.[134] Certainly, human right concerns are not on top of the priorities of the Commission and the Council in the negotiation and conclusion of international agreements with powerful powers, such as the US. However, the data protection concerns rank higher in the agenda of the EU executives than in the past, when the EU lacked data protection standards in the framework of the third pillar. Perhaps, one limit of the Parliament's advocacy for human rights is that it concerns EU citizens' rights rather than to than those of third country nationals.

What contribution did the CJEU make to the external dimension of the AFSJ? One the one hand, the judicature has contributed to decrease the democratic accountability of the EU institutions when they enact freezing orders against natural or legal persons suspected of financing terrorism. This has happened as a result of its judgment in case C-130/10, locating the bulk of these measures in the CFSP context rather than in that of the AFSJ. At the same time, the judicature has seized the new opportunities offered by the Lisbon Treaty to appraise whether the EU institutions respect the rule of law in the context of the EU counter terrorism policy. The Court has made the adoption of the restrictive measures subject to its full judicial review. In addition, it has reinforced the due process rights of the listed persons, since they are not adequately protected at UN level. The CJEU has promoted a right-oriented approach to restrictive measures, *de facto* challenging the strict observance of international law principles deriving from the UN Charter. An important limit of the case-law on restrictive measures with a counter terrorism purpose is that "it remains impossible to accurately

[132] Kadi II, above n. 112, par. 137.

[133] On the equivalent protection in the Kadi line of cases, see M. Marchegiani, "Il principio di protezione equivalente nel caso Kadi," *Diritto dell'Unione europea*, 2014, p. 169.

[134] The problem is that the envisaged Treaty will not be retroactive; therefore, the various sector-related agreements are likely to be unaffected by the new rules.

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assess the level of protection of human rights that the CJEU are likely to offer once that the problems with due process are remedied."[135] Moreover, the Court's contribution to upholding the rule of law in the UN-driven counter terrorism action is limited to a few cases and is not sufficient to improve the deficiencies in terms of human right protection of the UN sanction machinery.

It is now appropriate to answer the question asked in the introduction. Is the EU credible when it states that "the war on terror" cannot justify human rights violations if one looks at the external dimension of the AFSJ? Although the EU's engagement in respecting human rights in its counter terrorism action is not as solid as it is rhetorically stated,[136] classifying the EU's attempts to give substance to this proclamation as "empty words"[137] would not do justice to the European Parliament and the CJEU's activity.

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[135] C. C. Murphy, "*EU counterterrorism Law: Pre-emption and the Rule of Law*", 2012, Hart publishing, Oxford, p. 135.
[136] "Respect for fundamental rights and the rule of law is at the heart of the EU's approach to counter terrorism […]; the Commission is dedicated to ensure that all tools that are deployed in the fight against terrorism fully respects fundamental rights." See COM (2010) 386 of 20/07/2010, point 2.5.1.
[137] Amnesty International, *The EU and human rights*, 2009, p. 4.