The Powers of the Council Concerning the Emergency of International Terrorism after the Judgment in Case C-130/10 Parlament v. Council

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1 Introduction

After September 11, 2001 and the terrorist attack on the US World Trade Centre it can justifiably be stated that international terrorism has become a global emergency.\(^1\) This has required a well-coordinated and in practical terms very effective response from the international community in the last decade at two levels, namely in the context of multilateral cooperation within the framework of the United Nations (especially in close synergy with the UN Chapter VII-based Sanctions regime) and, what is particularly relevant for the purposes of this contribution, at the level of the European Union as well.

It is widely discussed within the relevant scientific literature that the EU legal and institutional framework and the available legal tool-box for combating international terrorism were perhaps not developed sufficiently to effectively manage the globally unexpected and newly emergent situations and threats, in 2001 and 2002, caused by the new forms of international terrorism.\(^2\)

In particular the EU decision-making mechanisms, based on the former EU three-pillar structure as well as the pre-Lisbon rules on delimitation of powers of the relevant EU institutions could not provide the room for manoeuvre

* The views and opinions expressed in this contribution are strictly personal and exclusively those of the author and cannot be attributed at all to the Council or to its Legal Service. This manuscript was completed in March 2013.

1 For more detail see, for example, A. Antoniadis, R. Schütze and E. Spaventa (eds.), *The European Union and Global Emergencies*, Oxford: Hart Publishing, 2011, in particular Part II, Chapter V etc.

2 For more detail, see D. Spence (ed.), *The European Union and terrorism*, London: John Harper Publishing, 2007, in particular the introductory Part and Chapter I, pp. 1–53, or L. Benoit, *La PESC au lendemain des attentats du 11 septembre 2001*, available at: <http://generisfrance.free.fr/esgeaa/benoit0802.html> (accessed on 11 March 2013), in particular pp. 4 et seq. It should be added that the UN Sanctions regime should have also been reformed especially after 2008, see n. 3 below.
required by the EU to take all the necessary and effective restrictive measures (even so-called smart sanctions e.g. freezing of financial assets etc.) against all types of actors of international terrorism (including natural or legal persons and groups or even non-state entities, associated with international terrorist activities), while at the same time fully respecting all the requirements of fundamental rights’ protection.

A striking element of this incomplete and fragmented legal environment was, for example, the legal basis issue (e.g. the necessary reference to ex Article 308 TEC when restrictive measures against terrorist-individuals or entities with no sufficient connection to a given third country were taken etc.).

The other debated component was about the human rights protection questions relating to the administrative management of the necessary antiterrorist measures either of reactive nature, or of temporary precautionary nature, or of preventive nature in more general terms, following the emergency of international terrorist attacks or threats world-wide, taken at EU level as a rule and typically within a relatively short period of time (e.g. listing of terrorist-suspects etc).

This is exactly why, already in 2002–2003, the Convention and the 2003–2004 IGC working on the draft Treaty establishing a Constitution for Europe—and after the failed ratification of that Treaty, in 2007 the IGC working on the Lisbon Treaty, devoted particular attention to a better integrated, more consistent and coherent, and much clearer legal drafting of all the provisions dealing with restrictive measures as an EU response in combating international terrorism in the broader context of EU external action based on lessons learned from previous years’ controversies in legal practice.

The purpose of this contribution, therefore, is to give a short summary of the results of this Treaty-making process in the light of the first leading judgment of the Court of Justice of the European Union (CJEU or the Court) in December 2009 on the most important provisions of the Lisbon Treaty determining the Council’s powers with regard to the emergency of international terrorism.

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4 Except for Article 222(1)–(2) TFEU, which is dealt with in another contribution to this book as well as Article 43 TEU in connection with the EU Common Security and Defence Policy, which will not be addressed in my contribution either, although it provides that: “(EU civilian and military missions) may contribute to the fight against terrorism, including by supporting