

## **The agreements of Europol with third countries: data protection and power asymmetry in counterterrorism**

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### **Abstract**

This article investigates empirically the impact of power asymmetry and interest formation in European Union's (EU) external relations with third countries in the context of the Europol data exchange and counterterrorism agreements. It focuses on three countries, namely the United States (U.S.), Turkey and Morocco, which have each a different level of counterterrorism cooperation with the EU. This article argues that the EU acts as a pragmatic actor with regard to Europol's data exchange agreements with third countries, and that the power asymmetry between the EU and the third country under question determines the extent of the EU's flexibility. If the power asymmetry favours the EU, then it insists on its data protection demands. Otherwise, the EU is more flexible towards its counterparts on data protection issues.

**Key Words:** Europol, Counter-terrorism, Data Protection Rules, United States, Turkey, Morocco, Power Asymmetry.

### **Introduction**

Since the end of the Second World War, the protection of human rights has gradually gained a prominent role, both among the EU member states and in the EU's external relations. The EU and its member states are part of a comprehensive human rights regime based on documents such as the 'Charter of the Fundamental Rights of European Union' (CFR) and the Council of Europe's 'European Convention on Human Rights'. Additionally, the EU has set the adoption of liberal democratic norms as a condition to third countries when these countries have sought to cooperate with EU. In

particular, in the issue-area of counterterrorism the protection of human rights is considered by the EU as a vital requirement for cooperation with third countries. In its functions and operation, Europol is bound by the same human rights principles and treaties as the EU.

Regarding data protection and data privacy in the EU, the right to privacy including data privacy has been elevated to the status of a fundamental human right and the EU has a detailed data protection regime (the comprehensive legislative framework model)<sup>1</sup> based on a number of international agreements, rules and regulations and regulated by data protection supervisory authorities. The protection of personal data has, therefore, a central place in Europol's mode of operation as reflected in the organisation's convention. In order for a third country to sign a data exchange agreement with Europol, it is required that this country has an adequate data protection framework.

In the aftermath of the 9/11 attacks, however, the EU and the Europol were subject to the criticism that they were not as sensitive on data protection rules as before prioritizing instead the expansion of counterterrorism cooperation with third countries.<sup>2</sup> This had the risk of the EU losing its normative reputation in global politics which has been developed in the course of many years.

Contrary to the above concerns, this article presents a more complex picture of Europol's relations with third states; Europol and the EU neither sacrifice their data protection rules completely for the sake of counterterrorism cooperation, nor do they enforce these rules to third countries consistently and in the same manner. This article shows that Europol pursues a pragmatic approach, depending each time on its bargaining power and the power asymmetry vis-à-vis the third country under question. If the power balance is in favour of the EU then the EU insists on the adoption of data protection rules by the third country as a

precondition for signing counter-terrorism cooperation agreements. If the power balance is equal or in favour of the third country then the EU pursues a more flexible approach; it insists less on this country fully adopting EU's data protection rules for the conclusion of agreements.

In the literature, scholars have examined the issues of Europol's democratic accountability and legitimacy<sup>3</sup> and Europol's effectiveness in the fight against organised crime.<sup>4</sup> Additional topics discussed in the literature include the establishment of Europol<sup>5</sup> and Europol's international actorhood in the field of counterterrorism.<sup>6</sup> The issue of whether Europol is consistent in safeguarding its data protection principles in the agreements it concludes with third countries has not, however, systematically examined. The only exception has been Pawlak's examination of the closely related question of why the EU has not met any criticism or opposition by third countries on its data protection related practices; according to Pawlak, these practices are not consistent with the EU rhetoric which portrays the Union as a normative international actor with regard to data protection.<sup>7</sup> However, his study has not touched extensively upon the determinative role of the power asymmetry between the EU and third countries and its impact on rule transfer. This article takes Pawlak's argument further in that it argues that the approach of the EU is pragmatic and intentional and that EU institutions take into consideration the power dynamics and the interdependence with other countries when they negotiate counterterrorism agreements.

In order to analyse Europol's diverse approach regarding the operational agreements with third countries, this article examines three cases through a power asymmetry framework. These cases are the relations of Europol with the U.S., Turkey and Morocco. The cooperation of the above countries with Europol intensified since the 9/11 attacks. Each country's relationship with Europol is based, however, on a different framework: transatlantic relations (loose interaction) for the U.S., EU candidate status

(membership conditionality) for Turkey and European Neighbourhood Policy (ENP) (policy conditionality) for Morocco. Regarding transatlantic relations, the U.S.-EU counterterrorism cooperation has expanded significantly and a number of agreements have been negotiated and concluded by the two partners. This relationship has been based on mutual benefits and common interests rather than being imposed by one of the partners. Concerning Turkey, Turkey's relations with the EU are under the framework of membership conditionality, which postulates, among others, the adoption of data protection rules by Turkey as one of the conditions for Turkey being a member of the EU. The reluctance of Turkey to fulfil the EU requirements can inhibit both this country's counterterrorism cooperation with the EU and Turkey's membership prospect in general. Morocco, for its part, is one of the ENP countries. While membership is not in the agenda Morocco is encouraged to adopt the EU's data protection rules through financial and technical assistance incentives. A comparison of the relations of Europol with the above three countries can provide insights on whether EU's insistence on its data protection requirements is consistent or not. In cases of inconsistency, this article will look whether there is a link between power asymmetry and the EU's diverse approach and at the conditions under which the EU abandons its hierarchical superiority on data protection.

This article has developed four factors through which the asymmetrical relations between two sides are measured and, thus, the power dynamics between the Europol and third countries are revealed. In brief, the attitude of Europol is shaped by interest calculations (the enhancement of EU's and Europol's counterterrorism institutions and structure), common threat perceptions with its counterparts, the reputational benefits to Europol from the cooperation with third countries, and the political environment that facilitates or impedes the conclusion of an agreement. In each country case the influence of the above factors is examined showing the link between these four factors and power asymmetry.

Applying these factors into three countries that have a different level of counterterrorism cooperation with the EU can provide more insights on the issue of whether the EU approach is pragmatic or not. The empirical evidence for this article is drawn from official EU documents and elite interviews conducted with senior officials from the EU and the countries being investigated.

This article starts with a brief historical background on Europol's cooperation with third countries. The subsequent section presents the conceptual framework employed in this article, which is based on the concept of power asymmetry and interest formation. The main body of the article analyses the conditions under which Europol has negotiated the agreements with United States, Turkey and Morocco. The conclusion evaluates the role of power asymmetry in Europol's agreements and relations with third countries and provides some policy prescriptions for EU's political actors are facing a dilemma between liberty and security.

### **Counterterrorism cooperation of Europol with third countries and data protection rules**

The first steps of establishing a European criminal intelligence and law enforcement agency date back to 1991, when German Chancellor Helmut Kohl suggested the creation of such an agency.<sup>8</sup> His proposal came to life in 1992 with the Treaty on European Union (TEU) which postulated explicitly the creation of a European Police Office. Subsequently, the Europol Drugs Unit (the predecessor of Europol) emerged in January 1994.<sup>9</sup> Europol emerged out of this unit in 1995 when the EU's member states signed the Europol Convention (1995) which came finally into operation in 1998.<sup>10</sup>

Since the establishment of Europol, senior Europol officials emphasized in every occasion that cooperation with third countries was necessary for the fight against transnational crime. In line with this view, the Council of the

EU adopted in 1997 an action plan against organised crime;<sup>11</sup> among the plan's recommendations was the enhancement of Europol's ability to liaise with third countries and international organisations with the creation of suitable legal instruments. Additionally, in December 1997 the Justice and Home Affairs Council adopted three reports related to the exchange of police and criminal intelligence between Europol and third countries.<sup>12</sup> These reports dealt with issues like the posting of liaison officers and the transmission of personal data from Europol to a third country.

Initially, counter-terrorism was beyond Europol's mandate, given, among others, the lack of a political agreement among Europeans on the definition of terrorism.<sup>13</sup> However, this situation started gradually to change through the efforts of the Spanish government, which has suffered from ETA's (*Euskadi Ta Askatasuna*) terrorist activities. In 1998, the Council of the EU agreed to add terrorism into Europol's mandate.<sup>14</sup> Finally, the Council of the EU authorised in 2000 Europol's Director to start negotiations with non-EU states and with international bodies and organisations for the conclusion of cooperation agreements.<sup>15</sup>

Europol's cooperation with third countries is based on two types of agreements, namely strategic agreements and operational agreements. The former aims to facilitate Europol's cooperation with third countries through the sharing of best practices and technical expertise and the establishment of liaison points; it does not include, however, the sharing of personal data. It is also a preliminary agreement in the sense that it can open the way for the conclusion of an operational agreement. The latter, allows the exchange of both personal and technical data between Europol and the law enforcement agencies of third countries.<sup>16</sup> According to the rules of Europol, before the start of negotiations with a third country the data protection system of this country should be assessed according to the European standards.<sup>17</sup> If a third country has adopted EU's data protection rules, then the member countries can exchange

information with this country through the Europol channels. However, in the absence of compliance with EU's data protection regulations third countries cannot benefit from Europol's intelligence.<sup>18</sup>

As of August 2015, Europol has concluded operational agreements with thirteen countries (Albania, Australia, Canada, Colombia, Macedonia, Iceland, Montenegro, Norway, Serbia, Switzerland, Liechtenstein, Monaco, and the U.S.) and strategic agreements with five countries (Bosnia-Herzegovina, Moldova, Russian Federation, Turkey, and Ukraine). A quick look at these agreements gives a mixed picture regarding the inclusion of data protection rules; in other words, EU's and Europol's data protection requirements have not been fulfilled in the same way across the agreements. This lack of consistency is linked with the power of the EU vis-à-vis each country; EU is more effective in exporting its norms into countries that are not as powerful as the EU rather than into countries which have equal or more power than the EU.

### **Power asymmetry, interest formation and the conditions for a change in asymmetry**

Power has been traditionally one of the main concepts through which scholars have tried to examine the relations among states and between states and international organisations. From the perspective of stronger actors it can be defined as "the ability of an actor to get others to do something".<sup>19</sup> From the perspective of weaker actors power is "the ability to overcome the resistance of others".<sup>20</sup> The equilibrium between the ability of a stronger player to impose its preferences and the ability of a weaker player to resist such an imposition determines the nature of the power relations between the two actors under question.

Equally important to the concept of power is the concept of interdependence. According to Keohane and Nye, interdependence emerges when there are intensive cross-border transactions between two

or more actors, such as flows of money, goods, persons, and information, creating certain gains and losses for both parties. The actors which have a preponderance of resources and which are less dependent on international cooperation can influence more easily the actors which are more dependent on cooperation.<sup>21</sup> In relations based on interdependence, the powerful actors may cause or trigger an interest formation process in the weaker actors which have a greater need to initiate or sustain the cooperation; in this way, weaker actors may abandon their previous legislative and institutional priorities.<sup>22</sup> In such situations of asymmetric interdependence the actors which are more dependent on the cooperation with third states tend to compromise and to give concessions to these third states in order to secure the benefits gained from international cooperation.<sup>23</sup>

Additionally, in the international relations literature power is often conceptualised as having two dimensions, namely "hard" power and "soft" power. Hard power is based on using coercive tactics for influencing other countries. On the contrary, soft power is based on persuasion tactics, social interactions and the promotion of norms and values for shaping the behaviour of other actors.<sup>24</sup> The type of power that an actor favours the most depend on this actor's "strategic culture" which is shaped by historical experiences, strategic preferences, beliefs, values, and geographical necessities.<sup>25</sup>

Concerning the external relations of the EU, it is one of the strongest political and economic actors in the world. The EU uses an external governance strategy to diffuse its rules and policies into third countries, including the countries without an EU membership perspective.<sup>26</sup> Through the external governance of the area of justice and home affairs the EU transfers its internal security policies to third countries in order to enhance these countries' law enforcement capabilities.<sup>27</sup> To influence the internal security policies of third states, the EU relies on a soft power

approach. It uses its political and trade power and the “tools” of the accession negotiations and the provision of technical assistance and aid opportunities.<sup>28</sup> If a country is dependent on the opportunities provided by the EU, it is then in the interest of that country to maintain cooperation with the EU and this country may adopt the EU rules if the benefits of rule adoption exceed the internal political costs. This dependence increases the EU’s leverage over these countries and the EU benefits from this asymmetric interdependence in that it is used as a bargaining chip in order to ensure domestic security policy change and adaptation in third countries.

The EU is not always the dominant actor in its relations with third countries. Depending on the circumstances, there might be cases where the EU is politically and economically dependent on other states. In such cases, there is asymmetry of power between the EU and these countries and the EU cannot always fully impose its rules on them. In other words, in these cases it is often in the interest of both sides to make compromises.<sup>29</sup> Therefore, the EU’s normative requirements regarding these countries are not always met or they are fulfilled only after a bargaining process.

Given the above, this article sets four conditions that shape the interest calculations of the EU and the power hierarchy between the EU and third countries regarding the data exchange agreements. If one of these conditions is met, then EU relinquishes its imposing role and it is less persistent on the adoption of data protection rules. Otherwise, the EU adopts a stance based on hierarchical superiority and requires from the third country under question to adopt EU’s data protection norms.

1. If the agreement with the third country enhances EU’s and Europol’s policies and institutional structures and benefits Europeans’ interests

2. If there is a common terrorist threat between the EU and the third country, the EU is as much concerned with this threat as its counterpart and signing an agreement with this country is considered as a solution for eradicating the threat.
3. If signing an agreement with the third country enhances the good reputation of the EU institutions.
4. If the political environment within the EU is suitable for a compromise regarding the conclusion of an agreement with the third country.

### **Transatlantic relations and the U.S.-Europol counterterrorism agreement**

The transatlantic security cooperation has a long history since during the Cold War the U.S. protected Western Europe in the face of Soviet aggression. After the collapse of the Soviet Union, an increased emphasis was placed by both Americans and Europeans on the emerging threats of organised crime, drug trafficking, and illegal immigration. Regarding the threat of transnational terrorism in the pre-9/11 period, the absence of any spectacular terrorist attacks within the territory of the EU or the U.S. meant that this threat was not considered a top priority by either actor. This lack of political prioritisation was reflected in the fact that the EU-U.S. counterterrorism cooperation did not expand significantly in the period before the 9/11 attacks.<sup>30</sup> After the 9/11 attacks countering transnational terrorism moved at the top of the political and security agenda of both the U.S. and the EU.

When the Bush administration declared a global war on terror in 2001, it also asked from its allies to choose their side and to either support the U.S. or stand by with terrorists.<sup>31</sup> As a key partner of the U.S., the EU was asked to support the US-led global war on terror. The 9/11 attacks gave the opportunity to the U.S. authorities to pressure both the EU member states and the EU institutions.<sup>32</sup> One of the US requirements was

allowing the U.S. Federal Bureau of Investigation (FBI) to access the data bases of Europol.

In response to the U.S. calls, the EU was very keen to show its solidarity with the U.S.<sup>33</sup> In the extraordinary Justice and Home Affairs Council meeting of September 20, 2001 the Director of Europol was invited to “take all the measures necessary (...) [in order] to establish informal cooperation with the United States, pending the conclusion of a formal agreement”.<sup>34</sup> Additionally, the Council called for Europol’s Director to finalise the strategic agreement with the U.S. by November and to open negotiations for a formal personal data agreement.

In this respect, the first agreement regarding the posting of liaison officers and the exchange of strategic and technical data (excluding the sharing of personal data) was signed in 6 December 2001. It was followed by a supplemental agreement in 20 December 2002, which encompasses the exchange of personal data;<sup>35</sup> Europol was authorised to share personal data with its US counterparts including the names, addresses, and criminal records of terrorist suspects.<sup>36</sup>

The main point of friction in the Europol-U.S. negotiations for a personal data exchange agreement was the issue of data protection.<sup>37</sup> The way personal data was protected among European countries was different from the system that was in place in the U.S. The protection of personal data had a central place in Europol’s mode of operation as reflected in the organisation’s convention.<sup>38</sup> In this respect, the EU had a detailed data protection regime (the comprehensive legislative framework model) based on a number of international agreements, rules and regulations, and on data protection supervisory authorities. Furthermore, the Europeans were sceptical about giving much flexibility to law enforcement agencies regarding the storage and process of personal records concerned about the risk of potential abuse.<sup>39</sup>

The U.S. system, on the other hand, was based on sector-specific laws, the self-regulation of private sector and technologies that enhanced personal privacy.<sup>40</sup> Contrary to the Europeans, the U.S. authorities see the law enforcement agencies as a strong partner of the U.S. justice system and in case of data protection abuses from the law enforcement institutions the U.S. system relies on the judiciary for the correction of misconducts .<sup>41</sup>

Despite these major differences between the two parties, in the negotiations that ensued, Europeans made a number of concessions to the Americans on the data protection issues of data retention, purpose limitation, data accuracy, and data protection adequacy. According to Europol's rules, before the start of negotiations, the data protection system of the U.S. should have been assessed according to European standards.<sup>42</sup> In practice, this never happened.<sup>43</sup> Regarding the purpose limitation principle, the data that was requested and subsequently transferred should only be used for the purpose for which the request was submitted. In the Europol-U.S. agreement however the allowed use of the shared data was broadened.<sup>44</sup> Concerning data retention, Europol Convention stated that the organisation could not store data for more than three years and Europol's Supervisory Body highlighted that this time limit should be applicable to the data transferred to the U.S. too. The final text of the Europol-U.S. agreement did not include however any time-limitation to the storage of data, in accordance with the U.S. preferences on this topic.<sup>45</sup> Finally, there was no mentioning in the agreement about the deletion of incorrect data and about the number and status of the U.S. law enforcement agencies that would have access to the Europol information.<sup>46</sup>

The above concessions of the EU and Europol mean that the EU was not in a position of hierarchical superiority which could allow Europeans to

impose their data protection rules. In this sense, there was a situation of asymmetrical interdependence against the EU which led Europeans to compromise.

The first reason for this compromise was that in the wake of the 9/11 attacks where the U.S. had a superior and global role in the fight against terrorism Europe was left with no other choice than to cooperate with the U.S.<sup>47</sup> In the context of the post-9/11 U.S. superiority, the EU authorities found a window of opportunity which allowed them to institutionalise their counterterrorism policies and Europol was central in this effort.<sup>48</sup> The security officials of the EU used the U.S. demands for enhanced transatlantic cooperation as an excuse for increasing the role and status of the Europol within the EU's security machinery.<sup>49</sup> This agreement was an opportunity for Europol to improve its intelligence network both internally and externally, given that many member states were reluctant to share critical information with Europol due to mistrust;<sup>50</sup> the Europol-U.S. agreement, however, paved the way for Europol to become a central body in EU's intelligence, counterterrorism and law enforcement apparatus.

A second reason for Europol's flexible stance was the fact that Europol saw an opportunity for benefiting from U.S. intelligence which could prevent future attacks at European soil.<sup>51</sup> When the Al Qaeda declared its intention to target Western countries, along with the U.S. the EU countries were also included in the terrorist organisation's list.<sup>52</sup> In this sense, there was a common threat, that of Al Qaeda, that united the U.S. and the EU, and Europeans were as concerned about this threat as the Americans.

The third reason behind Europol's stance was that Europol officials wanted to enhance the status and the prestige of the European organisation through an agreement with the U.S. which emerged after the 9/11

attacks as a dominant counterterrorism actor.<sup>53</sup> Such an agreement would confirm globally the status of Europol as an important pan-European law enforcement institution. This was even more important if the frequent criticisms about the progress of Europol and EU's third pillar are taken into account. In this sense, the dependency of Europol on the recognition by the U.S. led the EU to be less persistent on data protection issues in the negotiations with the Americans.

The fourth factor that played a role in Europol's stance was the fact that when the Europol-U.S. agreement was concluded Europol was not accountable to the European Parliament<sup>54</sup> and the European Court of Justice had a limited role on reviewing the actions of Europol.<sup>55</sup> In other words, there was a suitable political environment for Europol to sign a data exchange agreement with the U.S. without consulting the European Parliament which has been critical of the EU-U.S. counterterrorism cooperation and without the risk of ECJ's judicial review.

In view of the four factors mentioned above, Europol faced a situation of interdependence with the U.S. in the field of counterterrorism and therefore the EU made a number of compromises on the issue of data protection for its own interest. This retrenchment from EU's normative values could create a negative precedent on the effort of the EU and Europol to export their norms to third countries which could accuse Europeans of double standards. In other words, when Europol insists on a third country adopting EU's data protection rules this country could invoke the example of the Europol-U.S. agreement in order to undermine EU's arguments on data protection. This could affect, for instance, the relations between Europol and Turkey which are analysed in the next section.

### **The membership conditionality and the Turkey-Europol agreement**

Since the EU-Turkey relations were enhanced in 1987, when Turkey applied for a full membership, the fight against terrorism has always been

a tense topic between the two parties due to Turkey's hard-line counterterrorism policies towards domestic terrorist organisations such as the Kurdistan Workers Party (PKK). The EU institutions, such as the European Parliament, the European Council and the Commission, have frequently urged Turkey to transfer into the country's counter-terrorism policies and implement in practice EU's human rights-related norms and legislation.<sup>56</sup>

In 1999, the PKK leader Abdullah Ocalan was captured and the PKK declared a ceasefire and withdrew its militants to Northern Iraq and this development brought also a change in the EU-Turkey relations on counterterrorism matters. In the same year the EU also provided a strong membership prospect to Turkey, which triggered a number of human rights-related and EU-originating reforms in Turkey. In particular, during these years, Turkey adopted nine harmonisation packages that encompassed a number of reforms related to improving the human rights conditions in Turkey's counter-terrorism policy.<sup>57</sup>

Regarding the relations of Europol with Turkey, in 2000 the Council of the EU authorised Europol to sign an agreement with Turkey and a strategic agreement was signed between the Turkish National Police and Europol in 2004.<sup>58</sup> In these four years Turkey has investigated the pros and cons of an agreement with Europol.<sup>59</sup> The scope of this agreement was limited and it included the exchange of technical expertise and strategic information, training and internship programmes, the sharing of best practices, and mutual consultation of the two parties. The sharing of personal data was excluded from this agreement.

The negotiation and conclusion of an operational agreement that would allow the exchange of personal data would depend on whether Turkey would adopt EU's data protection rules.<sup>60</sup> Indeed, the EU authorities such as EU's counterterrorism coordinator have emphasized that the

incorporation of EU's data protection rules into the domestic level of Turkey is a central condition for the exchange of personal data between Europol and Turkey.<sup>61</sup> In particular, an important hurdle for Turkey's cooperation with Europol is that Turkey has not yet ratified the Council of Europe's "Convention of the for the Protection of Individuals with regard to Automatic Processing of Personal Data" which was signed by Turkey in 1981. In order to enhance its counterterrorism cooperation with the Europol, Turkey has amended its constitution in a way that the protection of personal data is explicitly postulated. Furthermore, following this amendment, in June 2012, a draft law on the protection of personal data was also submitted to the parliament for consideration. Despite the above developments, there was no great progress in the adoption of the EU data protection norms by Turkey. According to senior officials from Turkish national police, the adoption of rules for the protection of personal data limits the capacity of the law enforcement agencies in Turkey to access personal data while conducting counterterrorism investigations and this is the main reason why the adoption process is slow.<sup>62</sup>

In the face of Turkey's reluctant stance regarding data protection, the EU and Europol have shown that they are not willing to compromise on data protection issues. This stance is in contrast with the stance that EU and Europol had towards the US demands and approach as seen previously. The explanation of this inconsistency lay in the level of interdependence between Turkey and the EU and the fact that the EU is less dependent on Turkey than the vice versa. This creates a power asymmetry between Turkey and the EU and therefore the latter is less flexible and can more easily impose its data protection rules to the former.

In particular, the first factor that has shaped the power asymmetry between Turkey and the EU is Turkey's candidate status; as mentioned previously, the EU membership has been a strategic goal for Turkey in terms of both the economic and the political benefits that the membership

entails. The “gatekeeper” role of the EU has increased Europeans’ power and the EU can as a result set the adoption of data protection rules by Turkey as a prerequisite for concluding a Europol-Turkey agreement. In this sense, Turkey’s longstanding counterterrorism experience and its enthusiasm for cooperating with the EU countries is not perceived as an opportunity by the EU and the member states to improve their own counterterrorism capacity. Turkey’s candidate status gives a negative impression that the EU does not have much to learn from Turkey and Turkey’s demands for closer cooperation were not enough to stimulate and bring together EU’s political actors for a common compromise. Therefore the EU does not take any initiative to mobilise member states and EU institutions to take action in line with Turkey’s demands.

A second factor that has increased the power asymmetry between the EU and Turkey is that the PKK has not been a major threat to EU countries, if compared with to Al Qaeda network which was involved in the London and Madrid bombings of 2004 and 2005 respectively. On the contrary, there is even the risk for Europol and the EU that enhanced cooperation with Turkey can mobilise the PKK networks against EU states; for example when the PKK leader Abdullah Ocalan was captured in 1999 there were several violent protests in European countries.<sup>63</sup> Additionally, the strong links of the PKK networks and the Kurdish diaspora with members of the European Parliament meant that if a Turkey-Europol agreement was signed these networks would try to bring the issue of human rights and data protection in Turkey into the agenda of the Parliament and the ECJ.<sup>64</sup> In order to avoid negative ECJ rulings, the EU authorities were reluctant to sign a data exchange agreement with Turkey.

As a caveat to the above argument, in recent years, the recruitment of European foreign fighters to the Islamic State (IS) through the Turkish-Syrian borders and the possibility of these fighters to return to their home countries and to be involved in terrorist attacks in the EU is expected to

change the existing asymmetrical situation in favour of Turkey; the EU may, as a result, compromise on some data protection issues. According to the International Centre for the Study of Radicalisation and Political Violence (ISCR), by 2015 the estimated number of foreign fighters joining the IS from EU countries has reached to almost 4000.<sup>65</sup> The IS atrocities towards EU citizens, including several beheadings and the terrorist attack against the Charlie Hebdo cartoonists in France, necessitates the cooperation of Europeans with Turkey in order to stop radicalised European citizens from traveling to Iraq and Syria. The Europol Chief Rob Wainwright has also highlighted the need for the EU and Europol to cooperate with third countries establishing, for example, a database of foreign fighters.<sup>66</sup> In order to facilitate the exchange of personal data with Turkey through the conclusion of an operational agreement and prevent the increasing IS threat for the EU both the EU institutions and member states may therefore ease their data protection requirements. But this may affect future negotiations only in the medium to long term.

A third factor is that, if compared to the U.S. case, cooperation with Turkey does not add much in terms of the international status and prestige for Europol. While cooperation with the U.S. enhanced the international recognition and actorness of Europol, cooperation with Turkey, which has not been a trendsetter country in global counterterrorism, cannot bring similar benefits. For this reason Europol has been less flexible with Turkey and less willing to accept concessions on data protection issues.

Finally, since 2009 and the coming into force of the Lisbon treaty, Europol has become an EU agency, which implies that the European Court of Justice has acquired jurisdiction over the whole area of justice and home Affairs, including Europol; Europol's agreements with third countries are therefore under the legal scrutiny of the ECJ<sup>67</sup> and Europol has less autonomy compared to the pre-Lisbon treaty period when the agreements

with the U.S. were signed.<sup>68</sup> In other words, the political environment is not favourable for Europol and this factor reduces the ability of Europol to be more flexible and make compromises on the issue of data protection in its negotiations with Turkey.

To sum up, in view of the above four conditions, the EU is less dependent on Turkey than vice versa and it insists on a hierarchical superiority mode of relations for now. The EU has not made any compromises with Turkey on data protection as it has done in the U.S. case. While this strict approach enhances the normative aspects of the EU, it also reveals an inconsistent stance on the part of the EU and Europol regarding the degree to which they insist on the adoption of European norms and rules by third countries. A comparison of the cases of Turkey and the U.S. shows that the EU acts in a pragmatic manner on the issue of data protection. The EU has been dependent on the U.S. and therefore it has accepted the American demands. It has not, however, made any concessions towards its EU candidate partners, such as Turkey, due to the fact that it is less dependent on them. A similar pattern of relationship is evident in the Morocco-EU/Europol relations which are analysed in the next section.

### **Political conditionality and the Morocco-Europol agreement**

The relations between the EU and the European Neighbourhood countries of the Mediterranean started in 1995 with the Barcelona Process which aimed towards the promotion and adoption of liberal democratic norms in the Mediterranean region.<sup>69</sup> When it was launched, this initiative aimed to ensure stability and security in the Mediterranean area through a Political and Security Dialogue, an Economic and Financial Partnership and a Social, Cultural and Human partnership. Regarding security issues, at that time more emphasis was placed on the issues of organised crime and illegal immigration rather than on the issue of terrorism.<sup>70</sup> In 2004 the broader European Neighbourhood Policy (ENP) was launched which

included the countries of the Barcelona Process. The ENP was modified by the EU's enlargement policy instruments.<sup>71</sup>

After the 9/11 attacks and especially after the attacks in Madrid and London the EU perceptions towards the ENP countries changed. Regarding Morocco, the involvement of Moroccan citizens to the Madrid Bombings necessitated a closer cooperation of the EU with this country on counterterrorism issues, including the conclusion of an agreement with Europol on the sharing of personal data.<sup>72</sup> At that time, however, the ENP reports mentioned that there were significant shortcomings in the capacity of Morocco to fight terrorism within the limits set by democratic and human rights norms and within the rule of law.<sup>73</sup> Therefore, an important condition that Europeans set for the conclusion of an operational agreement with Morocco was the improvement of human rights and the strengthening of the rule of law in the area of counterterrorism.

In 2005 the ENP plan for Morocco was adopted which prioritised the enhancement of judicial and police cooperation on counterterrorism matters between Morocco and member states and the negotiation of a Morocco-Europol Agreement. Such an agreement has not yet been concluded despite the efforts towards this direction that date back to 2000's.<sup>74</sup> In general, in the context of the fight against terrorism, the EU and Europol depend to a great extent on the ENP countries for terrorism-related intelligence. This dependency can potentially increase these countries' leverage in their interactions with the EU.<sup>75</sup> In practice, in the case of Morocco the need of Europol for potentially useful Moroccan intelligence did not lead the European organisation in a more compromising stance on data protection issues and Morocco has not taken advantage of this European dependency. The uncompromising stance of the EU, despite European dependency on Moroccan intelligence, was based on several reasons.

Firstly, the EU's is perceived as superior in the context of the ENP framework and there is a perceived asymmetry of interests and power between the two sides. This superiority and power asymmetry is related to the economic and normative advantages of EU member states in comparison with the ENP countries. In order for the EU to provide financial and technical rewards to Morocco it sets a number of pre-conditions, including rules and norms on the protection of personal data. If Morocco does not comply with these preconditions then the EU holds back the financial and technical benefits. At the same time, the EU does not see any reason for compromising with Morocco on data protection issues given that cooperation with Morocco is not perceived as enhancing EU's and member states' counterterrorism capacity.

A second factor is that there is no common terrorism threat between the EU and Morocco. While the EU has seen the Al Qaeda as a major threat to its own security, Morocco's threat perceptions regarding Al Qaeda has not been as high as the EU's. Therefore, if the EU is more flexible with Morocco on data protection, this is not likely to reduce the Al Qaeda threat to Europe. Additionally, such a compromise will mostly benefit Morocco rather than the EU; Europol can obtain personal data from Morocco even without an agreement in place. Morocco, however, cannot have access to Europol intelligence without firstly abiding to data protection rules and concluding a data exchange agreement. As a result of the above, the lack of a common threat among the two actors means that the EU-Morocco interaction is not a symmetrical relationship in terms of power and interests.

However, the recent expansion of the IS in Syria, Iraq and the unstable countries of the Maghreb has created risks for Morocco. According to ISCR figures, Morocco has a very high number of citizens (1500 individuals) fighting for the IS, coming third after Tunisia (1500-3000) and Saudi

Arabia (1500-2500).<sup>76</sup> The return of these fighters to Morocco and the EU is a security risk for both sides of the Mediterranean. The main concern of the EU is the prevention of radicalised individuals who may plan terrorist attacks from entering EU countries.<sup>77</sup> The above may create the impetus for the urgent negotiation of a Morocco-Europol data exchange agreement.

Regarding the actorness dimension, a relationship with Morocco has little value in terms of enhancing the global image of Europol as a dominant counterterrorism actor. Morocco has not been either as strong a counterterrorism player at the global level as the US<sup>78</sup> or at the regional level as Turkey. Therefore, the EU is not dependent on Morocco's recognition of Europol as a counterterrorism partner, which means that it is less likely that Europol and the EU will be flexible with Morocco on data protection.

Finally, the political environment in Europe has changed after the entering into force of the Lisbon treaty in 2009, making it more difficult for Europol to have a flexible approach towards Morocco on data protection issues. Though after the shock of the 9/11 attacks the political environment was more favourable for the conclusion of an agreement between Morocco and Europol, no progress has been achieved so far. In the post-Lisbon treaty period the negotiation and conclusion of an agreement with Morocco has been more risky for Europeans. If Europol concludes an agreement with Morocco before the latter has adopted EU's data protection regulations, the actions of Europol will come under scrutiny from the European Parliament and the ECJ. Therefore, the lack of a suitable political environment which would allow Europol to be more flexible means that Europeans insisted on their data protection demands.

In line with the four conditions explained above, EU and Europol have been less dependent on Morocco than vice versa and this has created a

situation of asymmetrical interdependence and power asymmetry in favour of Europeans. Similarly to its stance towards Turkey, the EU follows an uncompromising stance towards Morocco. Ultimately, the European approach towards Morocco reflects the diverse and pragmatic nature of EU's external relations which are ultimately based on calculations of interests rather than on normative concerns.

## **Conclusion**

This article has shown that the interdependence between two international actors can potentially create a situation of power asymmetry where the stronger side influences the weaker sides' interest calculations. If the weaker actor is dependent on the benefits provided by the stronger actor then it compromises and adapts its priorities in order to sustain cooperation with the stronger party. The powerful actor may, however, also compromise if it sees any opportunities for enhancing its own interests and the power asymmetry between the two sides is, as a result, diminished.

The above can be seen in Europol's relations with third countries and in Europol's data protection requirements when considering the conclusion of data sharing agreements. On the one hand, if the EU is dependent on a third country for operational cooperation then the power asymmetry between the EU and the third country diminishes and the EU adopts a more flexible approach regarding the adoption of data protection norms. On the other hand, if the EU is less dependent on a third country for operational cooperation then it is reluctant to make any compromises and it adopts a stance of hierarchical superiority over the third country. The EU's ambivalent approach on data protection rules which is shaped mostly by the power dynamics between the EU and third countries undermines, as a result, both its normative reputation and its reliability in its relations with third countries.

This ambivalence is expected to continue in the future. As noted in the Turkey and Morocco cases, the recent threat posed by the IS means that the EU political actors may be more flexible in the future in order to facilitate the exchange of data and intelligence with third countries which do not have, however, as high democratic standards and credentials as the EU. In other words, according to the model developed in the article, it is expected that the increased terrorist threat posed by the IS and the situation in Syria will change EU's interest calculations and therefore the power asymmetry between the EU and the countries which can play a role against these threats will be reduced.

In this respect, one path that the EU political actors are expected to follow in the future is to continue prioritizing the counter-terrorism cooperation with third countries and being more flexible regarding the EU's data protection regime. In other words, EU's stance of normative superiority, according to which third countries should always adopt EU's data protection norms and standards *en bloc* when cooperating with the EU, will continue being replaced by a more pragmatic EU behaviour. This pragmatism is derived from the EU realization that closer counter-terrorism cooperation with third countries (especially with those in its close vicinity) is essential for EU's security and safety. Such a conviction makes the EU actors more flexible when negotiating data protection standards.

This article supports the general argument that in its external relations the EU could be described more as a pragmatic and realist actor rather than as a normative actor and, in particular, that security concerns regarding terrorism have taken priority over the broader and normative goals of human rights promotion and data protection.<sup>79</sup> In other words,

this article complements previous research concerning whether the EU has upheld to its values and normative commitments in its internal security relations with third countries by looking at Europol's relations with three countries and by examining the reasons behind the European inconsistency and ambivalence on data protection norms.

Moving beyond Europol's relations with third countries, the conceptual model presented by this article can be applied to additional cases examining the EU inconsistency and behaviour in other fields. Further research could be done, for instance, on comparing how the EU negotiated its Passenger Name Record (PNR) agreements with the U.S., Canada, and Australia and on looking whether the EU was consistent in its data protection requirements during these negotiations.

In order to do that, the EU authorities should not only prioritize their own policies, institutions and reputation whilst signing an agreement with third countries. Furthermore, waiting until the formation of a common terrorist threat between the EU and third country should not be a precondition of signing a data exchange agreement. Finally, the EU policy makers should find ways to ease legal and political conditions to facilitate conclusion of data exchange agreements with third countries for the sake of EU security.

## Endnotes

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