



## **The EU as a Regional Actor: Terrorism**

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## Abstract

The EU enacts its security policy on different levels and through various frameworks and structures of cooperation. One of these levels is the regional dimension (i.e. within the Union) where the EU acts as a regional security actor. This paper puts forward an analysis of the regional dimension of the EU's anti-terrorism policy by assessing (i) the institutional dimension underpinning this issue, (ii) the EU's policy output in the field of anti-terrorism, and (iii) an evaluation of the Union's institutional and output dimension; this 'check-up' of EU policy through the assessment of its coherence, the current levels of accountability, and the legitimacy of EU action enables a reflection on the merits of EU policy in the security field.

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# The EU as a Regional Actor : Terrorism<sup>1</sup>

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## Introduction

Since the 9/11 attacks, the UN-sanctioned intervention of Afghanistan and the US-led intervention in Iraq, the countries of especially Western Europe have moved up the ‘terrorist value chain’ (Zimmerman 2006: 139) to become ‘core target[s]’ (Bruguière 2005) as the terrorist bombings of public transports in Madrid on 11 March 2004 and London 7 July 2005 testify. International terrorism is consistently rated highly as one of the most pressing security threats across Europe among national publics (GMFUS 2008: 9) and security experts alike (Kirchner & Sperling 2002; Mauer 2006). Both individual Member States and the EU as a whole have reacted strongly and in differing ways to this perceived threat.

This paper provides first an overview of the development of the EU counter-terrorism policy and an analysis of its institutional dimension. Second, an overview is given of the Union’s policy output and legal instruments in the anti-terrorism field at EU level. Third, an evaluation is made of the Union’s policy coherence, the checks and balances on its output as well as its legitimacy in the field of counter-terrorism.

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<sup>1</sup> An earlier version of this paper was presented at an EU-GRASP workshop in July 2009 hosted by UNU-CRIS.

## Institutional Dimension of Terrorism

Terrorism has been on the EC/EU's agenda since the 1970s (Szyszkowitz 2005; Bures 2006). Initial cooperation between EC Member States in terms of coordination of foreign policy took place, in the 70s, in the intergovernmental framework afforded by the European Political Cooperation (EPC). Later, in response to the terrorism acts of the early 70s and in particular the 1972 Munich hostage crisis during the Olympics, another body called TREVI<sup>2</sup> was set up in 1975 comprising interior and justice ministers as well as police chiefs. The TREVI group had its own telex system for circulation among interior ministries, police forces and security services. This system was separate from the EPC, foreign ministries, the EC and the Commission (Edwards & Meyer 2008: 8-9). TREVI did not fall within EC competences and institutions and possessed no legal base, permanent structures, legislative procedures nor budget. Nevertheless TREVI can be seen as one of the first steps towards real information exchange and occasional cross-border coordination of measures it allowed for (Monar 2007a: 292; Edwards & Meyer 2008: 9). TREVI can as such be seen as the predecessor of the later cooperation in the area of Justice and Home Affairs (JHA). The EPC was eventually superseded by the Common Foreign and Security Policy (CFSP) with the introduction of the Maastricht Treaty.

The prospect of enlarging the European Union to new democracies in Central and Eastern Europe (having at that time a rather awkward appreciation of the requirements of rule of law, order, democratic policing, civil liberty and fundamental rights), coupled with deepening EU integration, compelled the EU to reassess its potential role in strengthening its external frontier and realising and sustaining an *Area of Freedom, Security and Justice* (AFSJ) for its inhabitants, as instigated by the Treaty of Amsterdam. The realisation of the AFSJ was given further impetus by the Tampere European Council of October 1999 (European Council 1999: point 59) (Lodge 2002: 44; Edwards & Meyer 2008: 9).

The level of cooperation in the fight against terrorism was further spurred on by the September 11 2001 terrorist attacks in the US which provided the Member States with both an opportunity and a need – for the sake of the Union's credibility – for a more substantial common response to the 'new' terrorist threat. This was further compounded when terrorist struck within the Union in 2004 in Madrid and in 2005 in London (Monar 2007a: 293).

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<sup>2</sup> The acronym TREVI stands for Terrorisme, Radicalisme, Extrémisme et Violence International

### *Division of Competences in the Field of Terrorism*

A variety of the objectives in the AFSJ are influenced both by internally-defined goals, such as establishing internal freedom of movement for persons, and also from external challenges, such as terrorism (Cremona 2008: 4). The free movement of persons is a virtue within the Union, yet it calls for compensatory measures in order to ensure public security. The EU has therefore from the outset explicitly linked terrorism to an EU-context with questions of asylum and migration. Cooperation on JHA matters took place within the framework of TREVI, whereas the Schengen Agreement calls for careful checks on persons who enter or leave the Schengen zone. The Maastricht Treaty lists asylum, immigration and police cooperation as areas of common interest and speaks of police cooperation for the purposes of preventing and combating terrorism, including necessary aspects of customs cooperation, in connection with the organisation of a Union-wide system for exchanging information within the European Police Office (Europol). The Treaty of Amsterdam spoke for the first time about the AFSJ, within which free movement of persons, immigration policy as well as combating terrorism play a central role.

The legal basis of the AFSJ is to be found in the first and third pillar, while also having some links with the second pillar. We limit the discussion here to the first pillar. Since the Treaty of Amsterdam, the policy on asylum, migration and judicial cooperation in civil matters has been transferred from the third to the first pillar and was inserted into Title IV TEC (Eeckhout 2004: 132). One could argue to include these provisions when discussing the division of competences in the field of terrorism. However, as this transferral effectively separated the provisions within JHA that touched upon police and judicial cooperation in criminal matters from those on asylum, migration and judicial cooperation in civil matters, the transferred provisions to Title IV TEC only touch upon matters related to terrorism in a remote way. The core provisions are therefore to be found in Title VI TEU. These provisions are, as such, the main focus when discussing the division of competences.

Some powers in the EC Treaty are, however, worth noting. These powers relate to the free movement of capital, economic sanctions and the internal market. Article 58(1)(b) TEC provides Member States with the right to lay down restrictions on the free movement of capital on the grounds of public security. Article 60(1) TEC defines the Council's power to take economic sanctions in the sphere of capital movements and payments in the cases envisaged by Article 301

TEC.<sup>3</sup> In urgent cases Member States may take such measures themselves, provided that the Commission and the other Member States are informed.<sup>4</sup> Another example is the power to take measures for the approximation of laws related to the internal market, for example to protect the stability and effective functioning of the internal market against “dirty money” on the basis of Article 95 TEC (see also paragraph 2 *infra*).

Since the establishment of the European Union, Title VI TEU is directed towards preventing and combating crime, organised or otherwise.<sup>5</sup> The TEU further mentions preventing and combating racism and xenophobia as a means – without prejudice to the powers of the Community – of achieving the Union’s objective of “providing citizens with a high level of safety within an area of freedom, security and justice”.<sup>6</sup> Article 42 TEU provides that action in areas referred to in Article 29 TEU may be brought within the scope of Title IV of the EC Treaty. When this is done, the Council is to determine the relevant voting conditions.<sup>7</sup> In accordance with Title VI TEU, in particular Article 29 second paragraph thereof, the Union may act in various ways in order to prevent and combat crime, organised or otherwise, in particular terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud.

Title VI TEU provides for closer cooperation between police forces, customs authorities and other competent authorities in the Member States, both directly and through Europol (Lenaerts et al. 2005: 329). Common action in the field of police cooperation include measures related to (a) operational cooperation between national law enforcement services in relation to the prevention, detection and investigation of criminal offences; (b) collection, storage, processing, analysis and exchange of relevant information; (c) cooperation and joint initiatives in training, the exchange of liaison officers, secondments, the use of equipment and forensic research; and (d) the common evaluation of particular investigative techniques in relation to the detection of serious forms of organised crime.<sup>8</sup>

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<sup>3</sup> Art. 301 TEC enables the adoption of common positions or joint actions according to the provisions of the TEU relating to the CFSP, for actions by the Community to interrupt or to reduce, in part or completely, economic relations with one or more third countries.

<sup>4</sup> Art. 60(2) TEC.

<sup>5</sup> Art. 29 2<sup>nd</sup> para TEU.

<sup>6</sup> Art. 29 1<sup>st</sup> para TEU.

<sup>7</sup> Art. 42 TEU states that the Council is to adopt such decisions by a unanimous vote on the initiative of the Commission or a Member State, after consulting the European Parliament, and is to recommend the Member States to adopt it in accordance with their respective constitutional requirements.

<sup>8</sup> Art. 30(1) TEU.



The Council also promotes cooperation through Europol.<sup>9</sup> Europol is intended to improve the effectiveness and cooperation of the competent authorities in the Member States in preventing and combating serious forms of international crime where there are factual indications or reasonable grounds for believing that an organised criminal structure is involved and two or more Member States are affected in such a way as to require a common approach by the Member States owing to the scale, significance and consequences of the offences concerned. Europol is in particular concerned with terrorism, unlawful drug trafficking, illegal money laundering activities, trafficking in nuclear and radioactive substances, illegal immigrant smuggling, trade in human beings and motor vehicle crime.

The Treaty of Amsterdam conferred treaty-making powers onto the Union through provisions within Title VI TEU.<sup>10</sup> The first pillar dimension of the AFSJ has, however, no such provision nor external competences specific to the AFSJ (Monar 2004: 396). ECJ case-law on external relations states that the treaty-making powers must therefore be implied.<sup>11</sup> An example of such implied power would be the power to adopt measures in the field of judicial cooperation in civil matters having cross-border implications,<sup>12</sup> which implies the power to enter into an international agreement on the jurisdiction and enforcement of judgments (the Lugano Convention) (Cremona 2008: 6; Eeckhout 2004: 135; Monar 2004: 396, 398). However, when the external AFSJ has as its objective to pursue other (EU and EC) external policy objectives, existing legal bases and instruments from both the TEU and the TEC can be used, thereby limiting the need for implied powers derived from Title IV TEC (Cremona 2008: 6). As such an AFSJ dimension can, for example, form part of the CFSP, development cooperation policy, association relationships or trade policy. Examples include the counter-terrorism clause in the Cotonou Convention between the EU and

<sup>9</sup> Art. 30(2) TEU. Europol was established by the Convention of 26 July 1995 on the establishment of a European Police Office (Europol Convention), OJ C 316 of 27 November 1995.

<sup>10</sup> Art. 38 TEU and Art. 24 TEU. In addition, Art. 37 TEU provides that Member States are to defend the common positions they adopt on the AFSJ within international organisations and conferences; the Presidency will represent the Union. These provisions were used, for example, as the legal basis for the agreement between the EU and the USA on extradition and mutual legal assistance in criminal matters. Council Decision 2003/516/EC of 6 June 2003 concerning the conclusion of the Agreements between the European Union and the United States of America on extradition and mutual legal assistance, OJ L 181 of 19 July 2003.

<sup>11</sup> See *inter alia* ECJ, Case 22/70 *Commission v Council (ERTA)* [1971] ECR 263 and ECJ, Joined cases 3, 4 and 6/76 *Kramer* [1976] ECR 1279. See further ECJ, Case C-405/92 *Mondiet* [1993] ECR I-6133. See also Art. 3(2) TFEU, OJ C 115/51 of 9 May 2008; ECJ, Opinion 1/03 [2006] ECR I-1145, para. 122, referring to *ERTA*, *supra*, para. 31; ECJ, Opinion 1/94 [1994] ECR I-5267, paras. 95-96; ECJ, Case C-467/98 *Commission v Denmark* [2002] ECR I-9519, paras. 83-84. See further paras. 114-121 of the *Lugano* Opinion. The Court in this regard also pointed out that, in all the areas corresponding to the objectives of the EC Treaty, Article 10 TEC requires Member States to facilitate the achievement of the Community's tasks and to abstain from any measure which could jeopardise the attainment of the objectives of the Treaty; See Opinion 1/03, para. 119 and *Commission v Ireland*, *supra* note 16, para. 174; Opinion 1/03, *supra*, para. 133; Opinion 1/03 para 126, referring to ECJ, Opinion 2/91 [1993] ECR I-01061, para.25; See Opinion 2/91, *supra*, paras. 25-26; Opinion 1/94, *supra*, para. 95; ECJ, Opinion 1/76 [1977] ECR 741, para. 4.

<sup>12</sup> Art. 65 TEC.

developing countries in Africa, the Caribbean, and the Pacific,<sup>13</sup> and the provisions on JHA in the Stabilisation and Association Agreements (SAAs) with the Western Balkan States (Monar 2004: 412).<sup>14</sup>

Judging from the above provisions there appears to be no single general 'external AFSJ competence', either expressed or implied. Rather, there are numerous expressed competences (such as trade, development, association, CFSP) that may be used to pursue AFSJ objectives, with the possibility of implying external powers based on specific internal AFSJ powers and secondary legislation. The external competence in the AFSJ as such entails the possibility of using specific powers to achieve specific objectives (such as combating terrorism) (Cremona 2008: 7; Eeckhout 2004: 131-2). However, the case for external competence needs always to be made.<sup>15</sup>

The EU's response to the terrorist attacks of 9/11, Madrid and London did not involve a substantial strengthening of the EU's Situation Centre (SitCen). Europol was not transformed into a European FBI, nor was the SitCen transformed into a European Intelligence Agency, in spite of the Belgian call for a European Intelligence centre and the Austrian discussion paper proposing a European Intelligence Agency (European Voice 2004; Austrian Representation to the EU 2004; Edwards & Meyer 2008: 9). Whilst Europol saw the re-establishment of Joint Investigative Teams and was given new reporting duties for terrorist activity, and SitCen assumed an increased role in assessing terrorist-related intelligence, this was with small numbers of new staff and no explicit legal mandate. Furthermore, both Europol and SitCen are dependent on intelligence coming from Member States, which is not always forthcoming. As such, vital competences and resources remained at the national level in spite of a considerable body of legislation, which is discussed *infra* in paragraph 2.

### ***Decision-Making Methods***

Provisions on the AFSJ are found both in Title IV TEC and Title VI TEU as explained *supra*. In addition CFSP powers may be used to achieve AFSJ aims. The external AFSJ has therefore at its disposal a wide variety of types of instruments: EC Regulations, Directives, and Decisions; third pillar common positions, decisions and framework decisions; CFSP joint actions and common

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<sup>13</sup> Council Decision 2005/599/EC: Council Decision of 21 June 2005 concerning the signing, on behalf of the European Community, of the Agreement amending the Partnership Agreement between the members of the African, Caribbean and Pacific Group of States on the one part, and the European Community and its Member States on the other part. Signed in Cotonou on 23 June 2000, OJ L 209 of 11 August 2005, p. 27.

<sup>14</sup> See for example Title VII of the EU-Croatia SAA on Justice and Home Affairs, which includes provisions on money laundering, illicit drugs and criminal matters.

<sup>15</sup> See *supra* note 11.

positions; and international agreements concluded by either (or both) the EC and the EU (Cremona 2008: 10). For the reasons explained *supra* there are only a few EC Treaty provisions relevant to combating terrorism. However, as these are limited in number, only the provisions within Title VI TEU, on which most decisions are based, will be discussed.

The provisions in Title VI TEU enable the Council, acting unanimously on the initiative of any Member State or the Commission, to adopt common positions,<sup>16</sup> framework decisions,<sup>17</sup> decisions for any other purpose consistent with the objectives of Title VI TEU,<sup>18</sup> and to establish conventions<sup>19</sup>. Where the Council is required to act by a qualified majority, the votes of its members shall be weighted as laid down in Article 205(2) of the EC Treaty,<sup>20</sup> and for their adoption acts of the Council require at least 232 votes in favour cast by at least two thirds of the members. If a decision is to be adopted by qualified majority, a member of the Council may request verification that the Member States constituting the qualified majority represent at least 62% of the total population of the Union. The decision is not adopted if that condition is not met.<sup>21</sup> Procedural questions are dealt with by qualified majority of the Council members.<sup>22</sup>

Article 36(2) TEU states that “the Commission shall be fully associated with the work in the areas referred to in this title”. Assessing the degree of Commission involvement based on the notion of “associated” is, however, difficult given the vague meaning of the word “associated”. For measures adopted on the basis of Articles 34(2)(b), (c) and (d), the Council consults the EP before any measures are adopted. The Parliament gives its opinion within a time limit set down by the Council, which is not less than three months. If such an opinion is not provided within the time limit, the Council may act.<sup>23</sup> It is further the duty of the Presidency and the Commission to regularly inform the EP of discussions in the areas covered by this title. The Parliament is furthermore allowed to

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<sup>16</sup> Art. 34(2)(a) TEU speaks of common positions defining the approach of the Union to a particular matter.

<sup>17</sup> Art. 34(2)(b) TEU speaks of framework decisions for the purpose of approximation of laws and regulations of the Member States. Framework decisions are binding upon the Member States as to the result to be achieved but leave to the national authorities the choice of form and methods. They do not entail direct effect.

<sup>18</sup> Art. 34(2)(c) TEU states that such decisions exclude any approximation of the laws and regulations of the Member States. These decisions are binding and do not entail direct effect; the Council acts by a qualified majority and adopts measures necessary to implement such decisions at the level of the Union.

<sup>19</sup> Art. 34(2)(d) TEU speaks of conventions which the Council shall recommend to the Member States for adoption in accordance with their respective constitutional requirements. Member States begin procedures applicable within a time limit set by the Council. Unless they provide otherwise, conventions shall, once adopted by half of the Member States, enter into force for those Member States. Measures implementing conventions are adopted within the Council by a majority of two thirds of the Contracting Parties.

<sup>20</sup> See Art. 205(2) TEC for an overview of the way in which the votes are weighted.

<sup>21</sup> Art. 34(3) TEU.

<sup>22</sup> Art. 34(4) TEU.

<sup>23</sup> Art. 39(1) TEU.

ask questions of the Council or make recommendations to it. Moreover, each year the Parliament holds a debate on the progress made in the areas referred to in this title.<sup>24</sup>

Member States that intend to establish enhanced cooperation (pursuant to Article 40 TEU) in the AFSJ address a request to the Commission, which may submit a proposal to the Council to that effect. In the event of the Commission not submitting a proposal, it informs the Member States concerned of the reason for not doing so. Those Member States may then submit an initiative to the Council designed to obtain authorisation for the enhanced cooperation concerned.<sup>25</sup> This authorisation is granted in compliance with Articles 43 to 45 TEU, with the Council acting by a qualified majority, on a proposal from the Commission or on the initiative of at least eight Member States, and after consulting the EP. The votes of the members of the Council again proceed according to Article 205(2) TEC.<sup>26</sup> A member of the Council may request that the matter be referred to the European Council, where after it has been raised there, the Council may act in accordance with Article 40a(1) TEU.

Any Member State which wishes to participate in enhanced cooperation in accordance with Article 40(a) TEU needs to notify its intention to the Council and to the Commission, which gives an opinion to the Council within three months of the date of receipt of that notification, possibly accompanied by a recommendation for such specific arrangements as it may deem necessary for the Member State to become a party to the cooperation in question. The Council then takes a decision within four months of the date of receipt of that notification. This decision is deemed to be taken unless the Council decides to hold it in abeyance; for which the Council will then state the reason for that decision and sets a deadline for re-examining it.<sup>27</sup>

Article 42 TEU states that the Council may, upon acting unanimously on the initiative of the Commission or a Member State, and after consulting the EP, decide that action in the areas referred to in Article 29 TEU shall fall under Title IV TEC, and at the same time determine the relevant voting conditions relating to it. The Council then recommends adopting the decision in accordance with their respective constitutional requirements.

From the above description of the applicable decision-making methods, it is clear that nearly all decisions taken in major topics of Title VI TEU take place according to unanimity in the Council. It is

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<sup>24</sup> Arts. 39(2) and 39(3) TEU.

<sup>25</sup> Art. 40a(1) TEU.

<sup>26</sup> Art. 40a(2) TEU.

<sup>27</sup> Art. 40(b) TEU. See also Art. 44(1) TEU on the conditions for voting concerning Article 40(b) TEU.

this requirement of unanimity that can make decision-making a long and cumbersome process to arrive at a common agreed or position. Furthermore provisions constituting legal bases for action in the field of counter-terrorism both fall within the 2<sup>nd</sup> and 3<sup>rd</sup> pillar, thereby indicating that the level of cross-pillarisation occurring is likely to be high.

### *Impact of the Treaty of Lisbon*

The Treaty of Lisbon would establish more explicit objectives for the AFSJ than those in the current Treaties. These objectives include a ‘high level of security’, with express references to solidarity between Member States, fairness towards third country nationals, access to justice and respect for fundamental rights.<sup>28</sup> However, there are multiple objectives all directed at aspects of the ‘internal’ area, and with no explicit external dimension. The Lisbon Treaty would also retain and even emphasise the way in which the AFSJ may be used in order to achieve the Union’s overall external objectives (Cremona 2008: 4-5).

The Lisbon Treaty does not seek to transform the external AFSJ into an autonomous external policy. The focus is rather on using external powers to achieve (internal) AFSJ objectives and on integrating an AFSJ dimension into other external policies. As with the current Treaties, external action may also be taken within the framework of the AFSJ (including the conclusion of an international agreement) which supports other external policy objectives. Furthermore, the general objectives for external action which the Lisbon Treaty introduces are also intended to shape the external dimension of the AFSJ as they are to be pursued not only in the Union’s specifically external policies (such as the CFSP, trade and development) but also in the implementation of “the external aspects of its other policies”. In sum, there appears to be greater scope for developing wider objectives for the external AFSJ, or at least to take wider objectives into account. Essentially, however, it still concerns implied external powers (Cremona 2008: 7-8).

With respect to the level of cross-pillarisation, the Lisbon Treaty will help to improve policy coherence. The provisions relating to AFSJ external action will still be found in several different places, yet there will no longer be special decision-making rules for the third pillar as it is integrated into the TFEU. As a result, boundary issues between the first and third pillar that make it difficult to allocate an international agreement to the correct legal base (and pillar) are likely to disappear. However, they are likely to remain as far as the AFSJ/CFSP boundary is concerned, as the Treaty of Lisbon maintains “specific rules and procedures” for the CFSP as well as a revised version

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<sup>28</sup> Art. 67 TFEU, OJ C 115/73 of 9 May 2008.

of Article 47 TEU (Cremona 2008: 18). Other changes include that in the TFEU it is clearly stated that EU action will not affect the responsibility of Member State governments for preserving national security.<sup>29</sup> Another is that a standing committee will be created within the Council in order to promote operational cooperation between Member States' internal security authorities.<sup>30</sup>

In terms of decision-making, the most significant change under the Treaty of Lisbon is that decision-making by qualified majority will become the norm, with only a limited number of exceptions. The most important exceptions are measures taken by the EU concerning passports, identity cards, residence permits and other documents that go beyond the powers conferred by the EU Treaties, but which are necessary to fulfil the citizens' right to move and reside freely within the Union;<sup>31</sup> measures concerning family law; the establishment of a European Public Prosecutor's Office (EPPO), as well as any subsequent decision to extend the EPPO's powers; measures concerning operational cooperation between Member States law enforcement authorities, and legislation setting down the conditions and limits under which law enforcement and judicial authorities may operate in the territory of another Member State (Brunsdon 2007: 32).

The EP will have co-decision powers in most areas of JHA. In a limited number of other areas, despite lacking co-decision powers, it will still need to give its consent before an initiative can be taken. These include the procedure to create the EPPO, and subsequent initiatives to extend its powers. Situations where the Parliament is only consulted include measures concerning law enforcement authorities and legislation setting down the conditions and limits under which law enforcement and judicial authorities may operate in other Member States. In the current situation, consultation applies to all measures concerning police and judicial cooperation in criminal matters (Brunsdon 2007: 32).

Another change is the extension of the right of initiative of the Member States in the areas of police and judicial cooperation in criminal matters. Under the new arrangements, legislative acts in these specific areas of JHA policy can now be proposed not only by the Commission but also on the initiative of a quarter of the Member States.<sup>32</sup>

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<sup>29</sup> Art. 73 TFEU, OJ C 115/74 of 9 May 2008.

<sup>30</sup> Art. 71 TFEU, OJ C 115/74 of 9 May 2008.

<sup>31</sup> Art. 77(3) TFEU, OJ C 115/76 of 9 May 2008.

<sup>32</sup> Art. 76b TFEU, OJ C 115/75 of 9 May 2008.

Two new Articles<sup>33</sup> warrant special attention as they allow a Member State to block the adoption of a legislative proposal if it believes the proposal would affect fundamental aspects of its criminal justice system. Resolving the matter would then be the task of the European Council. Also, new elements are added to the “opt-out” arrangements for the UK and Ireland. The Lisbon Treaty will enable the UK and Ireland to choose not to participate in a legislative initiative to amend or update a JHA measure to which they already participate at EU level. Should they choose not to do so, the other Member States would be able to decide through qualified majority whether or not the non-participation of either the UK or Ireland would make the amended version of the measure “inoperable” (Brundsen 2007: 33). If the other Member States decide that this is the case, they could force the non-participating country to withdraw from the whole measure, and not just the planned amendments.<sup>34</sup> The UK’s existing “opt-in” for JHA measures<sup>35</sup> will be extended by the Lisbon Treaty to cover the areas of police and judicial cooperation, and judicial cooperation in criminal matters.<sup>36</sup> The Irish government intended to take part in the same way as the British, with one important difference. The revision of the JHA protocol will make it clear that Ireland’s power to choose when it wishes to “opt-in” to measures will not extend to legislation proposed under Article 75 TFEU (i.e. measures to freeze terrorist assets). It has to participate in the adoption and implementation of such measures on the same basis as other Member States (Brundsen 2007: 33).

The “opt-out” rule relating to the position of Denmark in Justice and Home Affairs policy will also be altered by the Lisbon Treaty. The existing Danish “opt-out” will be extended to cover the areas of police and judicial cooperation in criminal matters. Moreover, a whole new annex is added to the Treaty. Denmark has, however, the freedom to decide whether it wants to give up its full “opt-out” and have the same power to “opt-out” as the British and the Irish. Denmark can decide upon this in the future at a time when it so desires. Should it decide to give it up, it has to do so in accordance with its constitutional requirements (Brundsen 2007: 33).

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<sup>33</sup> Articles 82(1) TFEU (OJ C 115/79 of 9 May 2008) on the establishment of minimum rules to facilitate mutual recognition of judgments and judicial decisions and 83(3) TFEU (OJ C 115/81 of 9 May 2008) on the definition of criminal offences and sanctions in the areas of particularly serious crime with a border dimension.

<sup>34</sup> Protocol 11 of The Lisbon Treaty.

<sup>35</sup> This “opt-in” currently covers the areas of JHA decision-making at the EU level of borders, asylum, immigration, and judicial cooperation in civil matters. The “opt-in” works on the basis that the UK is not automatically expected to join in with the adoption and implementation of measures, but can do so whenever it wishes.

<sup>36</sup> This has been agreed at the June 2007 European Council.

## EU Counter-Terrorism Policy Objectives, Output and Legal Instruments

### Key Legislative Measures

The EU's history in combating terrorism dates back as far as the 1970s as was described *supra*. The development of the Treaties has contributed to the Union being able to undertake common positions and adopt a whole range of instruments designed to combat terrorism.<sup>37</sup> Other examples of specific measures include operational cooperation between national law enforcement services;<sup>38</sup> information exchange;<sup>39</sup> and measures on particular investigative techniques in relation to the

<sup>37</sup> Measures taken to prevent terrorist acts include, *but are not limited to*: Council Decision of 12 February 2007 establishing, for the period 2007 to 2013, as part of the general programme "Security and Safeguarding Liberties", the specific programme "Prevention, Preparedness and Consequence Management of Terrorism and other Security Related Risks", OJ L 58 of 24 February 2007; Regulation (EC) No 1781/2006 of the European Parliament and of the Council dated 15 November 2006 on information on the payer accompanying transfers of funds, OJ L 345 of 8 December 2006; Council Common Position 2009/67/CFSP of 27 January 2009 updating Common Position 2001/931/CFSP on the application of specific measures to combat terrorism and repealing Common Position 2008/586/CFSP, OJ L 23/37 of 27 January 2009 (this is the most recent amendment to the original act that was adopted on 27 September 2001); Council Decision 2008/616/JHA of 23 June 2008 on the implementation of Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime, OJ L 210/12 of 6 August 2008; Commission Regulation (EC) 781/2005 of 25 May 2005 amending Regulation 622/2003/EC laying down measures for the implementation of the common basic standards on aviation security, OJ L 143 of 7 June 2005; Council Framework Decision 2005/222/JHA of 24 February 2005 on attacks against information systems, OJ L 69/67 of 16 March 2005; Commission Regulation (EURATOM) 302/2005 of 8.2.2005 on the application of EURATOM safeguards, OJ L 54/1 of 28 February 2005; Council Regulation (EC) No 2252/2004 of 13 December 2004 on standards for security features and biometrics in passports and travel documents issued by Member States, OJ L 385 of 29 December 2004; Commission Regulation (EC) 1138/2004 of 21 June 2004 establishing a common definition of critical parts of security restricted areas at airports, OJ L 221/6 of 22 June 2004; Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190 of 18 July 2002; Council Common Position 2002/402/CFSP of 27 May 2002 concerning restrictive measures against Usama bin Laden, members of the Al-Qaida organisation and the Taliban and other individuals, groups, undertakings, and entities associated with them and repealing Common Positions 96/746/CFSP, 1999/727/CFSP, 2001/154/CFSP and 2001/777/CFSP, OJ L 139/4 of 29 May 2002; Council Regulation (EC) No 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, OJ L 370 of 28 December 2001; Council Common Position 2001/930/CFSP of 27 December 2001 on combating terrorism, OJ L 344/90 of 28 December 2001; Council Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing and confiscation of instrumentalities and the proceeds of crime, OJ L 182 of 5 July 2001; Council Recommendation 98/C 189/02 of 28 May 1998 on the provision of forgery detection equipment at ports of entry to the European Union, OJ C 189 of 17 June 1998; Council Recommendation 99/C 140/01 of 29 April 1999 on the provision for the detection of false or falsified documents in the visa departments of representations abroad and in the offices of domestic authorities dealing with the issue or extension of visas, OJ C 140 of 20 May 1999; Decision No 2119/98/CE of the European Parliament and of the Council of 24 September 1998 setting up a network for the epidemiological surveillance and control of communicable diseases in the Community, OJ L 268 of 3 October 1998. Measures taken aimed at responding to terrorist acts include *inter alia* Council Decision 2007/779/EC, Euratom: Council Decision of 8 November 2007 establishing a Community Civil Protection Mechanism (recast), OJ L 314 of 1 December 2007; Council Decision 2007/162/EC, Euratom of 5 March 2007 establishing a Civil Protection Financial Instrument, OJ L 71 of 10 March 2007;

<sup>38</sup> See Council Framework Decision 2002/465/JHA of 13 June 2002 on joint investigation teams, OJ L 162 of 20 June 2002; and Council Decision 2002/956/JHA of 28 November 2002 setting up a European Network for the Protection of Public Figures, OJ L 333 of 10 December 2002; Council Decision 2002/630/JHA of 22 July 2002 establishing a framework programme on police and judicial cooperation in criminal matters (AGIS), OJ L 203 of 1 August 2002.

<sup>39</sup> Measures taken to enhance the exchange of information include, *but are not limited to*: Council Decision 2007/551/CFSP/JHA of 23 July 2007 on the signing, on behalf of the European Union, of an Agreement between the European Union and the United States of America on the processing and transfer of Passenger Name Record (PNR) data by air carriers to the United States Department of Homeland Security (DHS) (2007 PNR Agreement), OJ L 204 of 4 August 2007; Council Recommendation 2007/562/EC of 12 June 2007 concerning sharing of information on terrorist



detection of serious forms of organised crime.<sup>40</sup> Also, measures have been taken in the context of Europol that have centred on terrorism.<sup>41</sup>

### *Terrorist Attacks as Catalysts for Policy Development*

Several terrorist events have served as catalysts for the development of EU counter-terrorism instruments. The EU policy that has originated from them is discussed further below through linking the policy output to the occurrence of the specific terroristic act that spurred the development of policy.

One such key-event were the 11 September 2001 terrorist attacks in the US. 9/11 prompted the EU to provide a statement on the events and a strategy to combat terrorism and prevent such acts from happening on European soil. On 14 September 2001 the EU issued a joint declaration affirming the intention of the EU-15 to develop a CFSP to enable the EU to speak with a single voice; facilitate the operationalisation “as soon as possible” of the ESDP; accelerate the creation of a common legal area; and promote international action to create a sustainable counter-terrorist network at the international level which would leave no hiding place for the perpetrators, trainers and harbourers

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kidnappings, OJ L 214 of 17 August 2007; Council Decision 2007/274/JHA of 23 April 2007 concerning the conclusion of the Agreement between the European Union and the Government of the United States of America on the security of classified information, OJ L 115 of 3 May 2007; Council Decision 2005/876/JHA of 21 November 2005 on the exchange of information extracted from the criminal record, OJ L 322 of 9 December 2005; Council Decision 2005/211/JHA of 24 February 2005 concerning the introduction of some new functions for the Schengen Information System, in particular in the fight against terrorism. OJ L 68 of 15 March 2005; Council Decision 2005/671/JHA of 20 September 2005 on the exchange of information and cooperation concerning terrorist offences OJ L 253/22 of 29 September 2005; Council Common Position 2005/69/JHA of 24 January 2005 on exchanging certain data with Interpol, OJ L 27 of 29 January 2005; Council Directive 2004/82/EC of 29 April 2004 on the obligation of carriers to communicate passenger data, OJ L 261/24 of 6 August 2004; Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), OJ L 201 of 31 July 2002; Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime, OJ L 63 of 6 March 2002; Council Decision 2000/261/JHA of 27 March 2000 on the improved exchange of information to combat counterfeit travel documents, OJ L 81 of 1 April 2000; Council Decision 2000/642/JHA concerning arrangements for cooperation between financial intelligence units of the Member States in respect of exchanging information, OJ L 271 of 24 October 2000; Council Decision 2001/886/JHA on the development of the second generation Schengen Information System (SIS II), OJ L 328 of 13 November 2001; and Council Decision 2002/348/JHA of 25 April 2002 concerning security in connection with football matches with an international dimension, OJ L 121 of 8 May 2002.

<sup>40</sup> See for example Council Decision 2007/126/JHA of 12 February 2007 establishing for the period 2007 to 2013, as part of the General Programme on Fundamental Rights and Justice, the Specific Programme ‘Criminal Justice’, OJ L 58/13 of 24 February 2007.

<sup>41</sup> Examples of measures taken by Europol include, *but are not limited to*: Council Decision 2005/681/JHA of 20 September 2005 establishing the European Police College (CEPOL) and repealing Decision 2000/820/JHA, OJ L 256 of 1 October 2005; Council Decision 2005/511/JHA of 12 July 2005 on protecting the euro against counterfeiting by designating Europol as the Central Office for combating euro counterfeiting, OJ L 185 of 16 July 2005; Council Decision of 17 October 2000 establishing a secretariat for the joint supervisory data-protection bodies set up by the Convention on the Establishment of a European Police Office (Europol Convention), the Convention on the Use of Information Technology for Customs Purposes and the Convention implementing the Schengen Agreement on the gradual abolition of checks at the common borders (Schengen Convention, OJ L 271 of 24 October 2000; Council Act of 28 February 2002 amending the Council Act of 12 March 1999 adopting the rules governing the transmission of personal data by Europol to third States and third bodies, OJ C 58/12 of 5 March 2002;

of terrorists. The text stated that those who bear responsibility for aiding, supporting and harbouring the perpetrators, operators and commissioners of these acts will have to answer for them.<sup>42</sup>

The Parliament and the Council sought ways to resolve their technical differences over the plan aimed at strengthening the fight against money laundering and extended European intervention to all offences of organised crime, including bio-terrorism (Lodge 2002: 54). The extraordinary European Council meeting of 21 September 2001 defines terrorism as an assault on open, democratic, tolerant and multicultural societies and as a challenge to the conscience of every human being. In the conclusions the EU calls for enhancing police and judicial cooperation (related to the European Arrest Warrant and an adoption of a common definition of terrorism), the development of international legal instruments (implementation of all existing conventions against terrorism), putting an end to the funding of terrorism, the strengthening of air security, and the coordination of EU global action against terrorism (European Council 2001a: 2-3). The Action Plan is, however, characterised by a short and general nature. It therefore did little more than give a green light to the further development of various initiatives that had already been put on the agenda in the immediate aftermath of 9/11. The grouping of individual measures under the above-mentioned objectives did serve, however, to reduce some of the ambiguity that surrounded the overall shape and aims of the EU's renewed counter-terrorism effort (Bossong 2008: 35). An important step towards more specialised policy-making was the extraordinary JHA Council of 20 September 2001 (Council of the European Union 2001a) that made significant progress on the Arrest Warrant and the framework decision on terrorism (Bossong 2008: 35-6).

In addition to these two measures, the extraordinary JHA Council also dealt with a wide range of other proposals and issues including, but not limited to, the increasing of the anti-terrorist competences of Europol and the European Union's Judicial Cooperation Unit (pro-Eurojust, later named Eurojust), the strengthening of police and intelligence cooperation and data-sharing, the setting up of joint investigation teams, and ensuring the national ratification of a number of legal conventions (Council of the European Union 2001a: 2-12). Cooperation with the US was strengthened in the area of counter-terrorism through the Commission advocating, together with the US, for countries to support the Convention against Transnational Organized Crime and eleven

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<sup>42</sup> Joint Declaration by the Heads of State and Government of the European Union, the President of the European Parliament, the President of the European Commission, and the High Representative for the Common Foreign and Security Policy, 14 September 2001. Available at: [http://www.eu-un.europa.eu/articles/fr/article\\_46\\_fr.htm](http://www.eu-un.europa.eu/articles/fr/article_46_fr.htm) [Accessed 10 May 2009].

other UN anti-terrorism conventions with a view to heightening international action against terrorism and ensuring coherence in the range of instruments at the disposal of the international community (Lodge 2002: 56).

Furthermore, the JHA Council was also instructed by the extraordinary European Council to accelerate the implementation of the entire Tampere agenda that was scheduled to be reviewed by the end of 2001 (European Council 2001a: para. 7). In response to this, by 21 September 2001 the European Council adopted the Action Plan to Combat Terrorism, and on 26 September 2001 the 'Anti-terrorism Roadmap' had been drawn up by the Council Secretariat to structure the work of the JHA Council (European Council 2001b).<sup>43</sup> This Roadmap, like the Action Plan, represents an ideal-type strategy listing targets, actors, deadlines as well as achievements in relation to a specific, if broad objective. As such, the Roadmap soon came to merge with, or even replace, the original Action Plan by the European Council (Bossong 2008: 37). The Belgian Presidency at that time quickly extended the JHA Anti-Terrorism Roadmap to include the work of the Transport, Economic and Financial Affairs (ECOFIN) and General Affairs Council (Council of the European Union 2001c). The Presidency's Roadmap stretched explicitly across all pillars of the EU. It also set tight deadlines for almost all proposals and measures. As comprehensive as the Presidency's Roadmap was, it created a very busy agenda and an expectations/capabilities gap (cf Hill 1993; Bossong 2008: 38).

On 27 December 2001, the Council adopted Common Position 2001/931/CFSP<sup>44</sup> which sets out the definition of a terrorist act and provides for an Annex with a first list of persons, groups and entities involved in terrorist acts. Pursuant to this Common Position, the Community was authorised to order the freezing of funds and other financial assets or economic resources of persons, groups and entities listed in the Annex. The Common Position requires the list to be reviewed at regular intervals and at least once every six months to ensure that there are grounds for keeping the individuals and organisations on the list. This list has been amended regularly with the most recent version in force being Common Position 2009/67/CFSP (see *supra*). The list now comprises 59 persons and 47 groups and entities (Guild 2008: 179).

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<sup>43</sup> The original Action Plan to Combat Terrorism was revised in 2004 and re-aligned in pursuit of seven major objectives: to reinforce international efforts to combat terrorism; to reduce terrorists' access to financial and economic resources; to increase the capacity of the European institutions and Member States to investigate and prosecute; to protect the security of international transport **and set** up effective systems of border controls; to strengthen the coordination between the Member States and thus the European Union's capacity to prevent and deal with the consequences of a terrorist attack; to identify the factors that contribute to the recruitment of terrorists; to encourage third countries to engage more effectively in combating terrorism. Available at: [http://ue.eu.int/uedocs/cmsUpload/EU\\_PlanOfAction10586.pdf](http://ue.eu.int/uedocs/cmsUpload/EU_PlanOfAction10586.pdf) [Accessed 11 June 2009].

<sup>44</sup> Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism, OJ L 344/93 of 28 December 2001, Art. 2.

Another substantial legislative act in the fight against terrorism was the 13 June 2002 Framework Decision on combating terrorism.<sup>45</sup> This Framework Decision possessed a common definition of a post 9/11 terrorist threat, which emphasised the threat to the political, constitutional and socio-economic foundations of the EU and its Member States and included the aim of terrorists to seriously destabilise or destroy the fundamental political, constitution, economic and social structures of a country.<sup>46</sup>

The formal achievement of a common definition on terrorism as a security threat came with the adoption of the European Security Strategy by the European Council on 12 December 2003.<sup>47</sup> The Strategy lists terrorism as the first of the “key-threats” facing the Union in the domain of security, and it also describes it as a threat having both an internal and an external dimension. The Strategy emphasises that terrorism not only endangers lives and causes huge costs but also that it seeks to “undermine the openness and tolerance of our societies”. Terrorism movements are increasingly well-sourced and “willing to use unlimited violence to cause massive casualties”. The recent wave of terrorism is seen to be “linked to violent religious extremism and having complex causes, including the pressures of modernisation, cultural, social and political crises, and the alienation of young people living in foreign societies”. The phenomenon is also seen as being “part of our own society”. The Strategy then goes on to remark that “Europe is both a target and a base for such terrorism”.<sup>48</sup> This assertion was made prior to the Madrid bombings of March 2004 and the London attacks of July 2005 (Monar 2007a: 295-6). The Strategy then links terrorism to other threats such as the proliferation of weapons of mass destruction, state failure and organised crime, the tackling of which, in the eyes of the Council, requires a mixture of intelligence, police, judicial, military and other means.<sup>49</sup>

The March 2004 bombings in Madrid made the reference in the European Security Strategy to “home-grown” terrorism a reality. Directly after the attacks, the Commission produced an Action Paper in response to the terrorist attacks in Madrid on 18 March 2004 in which it *inter alia* emphasised that the Union has already put in place a series of legislative measures to combat terrorism, but implementation of these measures is often slow, poor and inadequate. The

<sup>45</sup> Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism, OJ L 164 of 22 June 2002. The most recent version is Council Framework Decision 2008/919/JHA of 28 November 2008 on combating terrorism, amending Framework Decision 2002/475/JHA on combating terrorism, OJ L 330/21 of 9 December 2008.

<sup>46</sup> *Ibid.* 2002, paragraphs 1,2 and Art.1. Art. 1(a) further provides an encompassing list of offences that are deemed to be terrorist offences. See also Monar, 2007, p. 294

<sup>47</sup> Council of the European Union, *A Secure Europe in a Better World, European Security Strategy*, Brussels, Council of the European Union, 12 December 2003.

<sup>48</sup> *Ibid.*, p. 3.

<sup>49</sup> *Ibid.*, pp. 3, 4 and 7.

Commission went on to state that this is unacceptable and called for action to turn political agreements into legal reality (European Commission 2004b: 2). Shortly after, the European Council released a declaration on combating terrorism in which it again re-iterated that acts of terrorism are attacks against the values on which the Union is founded. It recalled the European Security Strategy, and stated that a full implementation of measures to combat terrorism is a matter of urgency. In the light of the attacks, the European Council called for the development of a long-term EU strategy to address all the factors which contribute to terrorism. In addition, the European Council called for work to be rapidly pursued to develop the contribution of the ESDP to the fight against terrorism, on the basis of actions taken since the Seville European Council, and urged all Member States to fully implement existing legislative instruments (European Commission 2004a). Also, in this declaration the European Council agreed to the establishment of the position of a Counter-Terrorism Coordinator who would coordinate the work of the Council in combating terrorism, maintain an overview of all the instruments at the Union's disposal and report regularly to the Council on the follow-up of Council decisions (European Commission 2004a: 13).<sup>50</sup>

In addition, the declaration contained a so-called "solidarity declaration" that was intended to enhance the political legitimacy and cohesiveness of the EU's counter-terrorism effort by closely involving the European Council (European Commission 2004a: 18). Another element of importance in the declaration is the reorganisation of the EU Action Plan to Combat Terrorism around seven strategic objectives (European Commission 2004a: 14).<sup>51</sup> Doing so situated the EU's fight against terrorism in a wider perspective (Bossong 2008: 41). The European Commission continued to build on both the European Security Strategy and the seven strategic objectives through its March 2004 SEC document regarding the European Security Strategy – Fight Against Terrorism that distinguishes ten areas with priorities for future action (European Commission 2004a).<sup>52</sup>

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<sup>50</sup> The first EU Counter-Terrorism Coordinator was Mr. Gijs de Vries. He was succeeded by Mr. Gilles de Kerckhove on 19 September 2007.

<sup>51</sup> Annex 1 lists as objectives: (i) to deepen the international consensus and enhance international efforts to combat terrorism; (ii) to reduce the access of terrorists to financial and other economic resources; (iii) to maximise capacity within EU bodies and Member States to detect, investigate and prosecute terrorists and prevent terrorist attacks; (iv) to protect the security of international transport and ensure effective systems of border control; (v) to enhance the capability of the European Union and of Member States to deal with the consequences of a terrorist attack; (vi) to address the factors which contribute to support for, and recruitment into, terrorism; and (vii) to target actions under EU external relations towards priority Third Countries where counter-terrorist capacity or commitment to combating terrorism needs to be enhanced.

<sup>52</sup> The measures centre on the following areas: (i) JHA; (ii) the fight against terrorism financing; (iii) customs; (iv) health security; (v) transport and energy security; (vi) use of passenger data; (vii) civil protection; (viii) research and technological development; (ix) external action; and (x) safeguarding individual rights and freedoms and combating racism.

A third key-event that was the immediate reason for the further development and strengthening of EU counter-terrorism policy was the 7 July 2005 London terrorist attacks. On 13 July 2005, the Council convened for an Extraordinary Council Meeting of JHA. During this meeting the Council adopted a declaration condemning the terrorist attacks in London. Again the Council re-iterated that the attacks constituted an affront to the universal values on which the EU is based and strengthened its commitment to combating terrorism and upholding the fundamental principles of freedom, security and justice. In the declaration, the Council also stated that, together with the Commission and the Parliament, it would accelerate the implementation of the EU Action Plan on Combating Terrorism and other existing commitments. It also urged Member States to implement the recommendations that arose from the peer evaluation process in order to improve national counter-terrorism arrangements and capabilities (Council of the European Union 2005a: 6-7). The Council further stated that the fight against terrorism was a worldwide agenda and emphasised the crucial role of the United Nations. It concluded by stating that a reinforced Action Plan would be presented to the December European Council (Council of the European Union 2005a: 9). It is this particular event that led to the development of the European Counter-Terrorism Strategy.

### *The European Union Counter-Terrorism Strategy*

The Strategy (Council of the European Union 2005c: 3)<sup>53</sup> defines the strategic objectives of EU action and the main measures under the four strands of work: (i) prevent (aimed towards radicalisation and recruitment) (Council of the European Union 2005b); (ii) protect (citizens and infrastructure);<sup>54</sup> (iii) pursue (terrorists across borders);<sup>55</sup> and (iv) respond (to the consequences of terrorist attacks).<sup>56</sup> The basis for the Counter-Terrorism Strategy forms the EU Action Plan on Combating Terrorism. The Strategy states that Member States have the primary responsibility for combating terrorism, yet the interdependence of border security, transport and other cross-border infrastructures require effective EU collective action. The Strategy explains that the EU can add value by (i) strengthening national capabilities, (ii) facilitating European integration, (iii) developing collective capability, and (iv) promoting international partnership. The Counter-Terrorism Strategy places a particular emphasis on “home-grown” terrorism through radicalisation

<sup>53</sup> See also Monar (2007b: 273). The most recent version of this Strategy dates from 19 November 2008 (Council of the European Union 2008e).

<sup>54</sup> Examples include *inter alia* European Commission (2006b; 2006a; 2004c).

<sup>55</sup> Examples include *inter alia* Council Decision 2005/876/JHA of 21 November 2005 on the exchange of information extracted from the criminal record, OJ L 322 of 9 December 2005; Council Framework Decision 2002/584/JHA *supra* note 37.

<sup>56</sup> Examples include *inter alia* Council Decision 2007/779/EC, Euratom, *supra* note 37; Council Decision 2007/162/EC, Euratom, *supra* note 37.

and terrorist recruitment (Council of the European Union 2005c: 7-9). A new feature that was put forward in this document is the explicit link between the internal and external aspects of security, as it names the EU as an area of increasing openness and interdependence allowing for free movement of people, ideas, technology and resources; an environment which terrorists abuse to pursue their objectives (Council of the European Union 2005c: 6).

The strong focus on Al-Qaeda has diminished and it is only mentioned as an example for the European Union Strategy for Combating Radicalisation and Recruitment to Terrorism, which forms an integral part of the Counter-Terrorism Strategy. The Strategy for Combating Radicalisation and Recruitment defines terrorism perpetrated by Al-Qaeda “and extremists inspired” by it as the main terrorist threat to the Union. “Although other types of terrorism continue to pose a serious threat to EU citizens, the Union’s response is focussing on this main threat” (Council of the European Union 2005b: 2). In this context it should be noted that a considerable effort has been made on part of the EU to avoid anything in its Counter-Terrorism Strategy that could make Islam or the Muslim world appear as the “threat” or “enemy”. Similarly, in the Strategy for Combating Radicalisation and Recruitment to Terrorism two entire paragraphs are dedicated to the need to avoid linking Islam to terrorism and to reject distorted views of Islam in close cooperation with Muslim communities (Monar 2007a: 297-8).

Late 2007, the Commission tabled a new “terrorism package” of proposals that were aimed at improving the EU’s capabilities in the fight against terrorism. The Issues dealt with are the criminalisation of terrorist training (European Commission 2007a), recruitment and public provocation to commit terrorist offences (European Commission 2007a), the prevention of the use of explosives by terrorists (European Commission 2007b) and the use of airline passenger information in law enforcement investigations (European Commission 2007c). The proposal for amending the Council Framework Decision on combating terrorism was adopted by the Council on 28 November 2008<sup>57</sup> and lists public provocation to commit terrorist offences, recruitment for terrorism and training for terrorism as intentional crimes as well as the aiding or abetting, inciting and attempting of the aforementioned offences.<sup>58</sup> The proposal on the prevention of the use of explosives by terrorists identifies a number of chemical compounds or elements that can be converted into an explosive compound through a chemical reaction or a series of reactions. It further calls *inter alia* for the improvement of the exchange of timely information,<sup>59</sup> increased

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<sup>57</sup> Council Framework Decision 2008/919/JHA, *supra* note 50.

<sup>58</sup> *Ibid.*, Arts. 2(a)(b)(c) and 4.

<sup>59</sup> The proposal speaks of an Early Warning System and a European Bomb Data System.

explosives related research (i.e. improved detection techniques); improving the regulation and control of explosive precursors available on the market; improving the security of explosives facilities, the security vetting of personnel and the improving of transport of explosives; reducing supply and quality of information on making illicit explosives; improving explosive detection;<sup>60</sup> improving preparedness and response through information exchange, threat assessments and the development of specific preparedness and response measures for terrorist threats using explosives. The aim of the Commission proposal on Passenger Name Records (PNR) is to increase security in the form of reducing the risk of terrorist attacks, serious crimes and transnational crimes occurring on the territory of the EU (European Commission 2007c: 6). The Council discussed the use of PNR for law enforcement purposes and agreed to discuss the proposal further with a view to gradually identifying the essential features that the European PNR system should satisfy, in particular relating to the operational use of data, privacy protection, and the technical arrangements (Council of the European Union 2008d: 16).

## Evaluation of the Institutional and Output Dimensions

### *Coherence*

The European Security Strategy (Council of the European Union 2003) of 12 December 2003 calls for a more coherent CFSP and ESDP through bringing together the different instruments and capabilities at the Union's disposal, emphasising that the EU is stronger when it acts together. It further states that better coordination between external action and Justice and Home Affairs policies is crucial both in the fight against terrorism and organised crime as well as for building and sustaining an effective and balanced partnership with the US (Council of the European Union 2003).

In its May 2005 Communication on the Hague Programme (European Commission 2005a: para. 10(2)), the Commission sets itself the goal of creating a coherent overall approach to combatting terrorism (European Commission 2005a: Annex, para. 3.2). It calls for increased coherence in the cooperation between the competent national authorities in the field of information exchange relevant to the investigation of terrorist activities.<sup>61</sup> In order to attain a more coherent EU strategy

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<sup>60</sup> The proposal speaks *inter alia* of developing minimum detection standards, improved information exchange and certification schemes.

<sup>61</sup> See also, European Commission (2005c: para. 5.1). Here the Commission states that a more efficient use of current data systems can be achieved through more coherence as regards input of data categories. In its 20 October 2004 Communication on the Prevention of and the Fight against Terrorist Financing, the Commission (2004c) calls for the



toward third countries and international organisations, the Commission called for the completion of the Programme on mutual recognition of decisions in civil and commercial matters. It further emphasised the importance of enforcing judicial decisions and the mutual recognition of public and private documents, and the need for the adoption of a Common Frame of Reference (CFR) in order to improve the coherence and quality of EU legislation and replace traditional mutual assistance with new instruments based on mutual recognition. The Commission stresses the key role of Eurojust and calls for it to be supported and its potentialities to be fully exploited (European Commission 2005a: para. 10(9)).

A more efficient use of current systems can first and foremost be achieved by an enhanced use of the possibilities that exist: better quality control of data in-input, more coherence as regards input of data categories, and improved user-friendliness. In this respect, wider and more direct consultation of Member States and exchange of best practices would be useful. Although this consultation should be achieved primarily in existing working groups and committees, regular user conferences could help. This additional consultation could identify where there is need for improvement and results could then be fed into the legislative process and/or daily practice.

In its October 2005 Communication on a strategy for the external dimension of the Area of Freedom, Security and Justice, the Commission names the successful establishment of the internal area of freedom, justice and security as the purpose of this strategy, to be achieved by creating a secure external environment and advancing the EU's external relations objectives through the promotion of the rule of law, democratic values, and sound institutions (European Commission 2005b: 11). In order to attain greater effectiveness and coherence in the external dimension of AFSJ, coordination between the geographic Council working groups could be improved with an important coordinating role for COREPER in this regard. Also, improved coordination is required to ensure coherence at EU level between different policies and instruments. Furthermore, the Commission calls for itself to enact its full role in international organisations in greater coordination with the Member States in order to stimulate the development of new tools. It furthermore calls for itself to strengthen its support of regional cooperation on AFSJ issues by supporting existing bodies such as the African Union, and for greater efforts in areas where regional cooperation is weak, such as the Middle East or Eastern Europe (European Commission 2005b: 11-12).

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ensuring of robust data protection and a coherent legal framework at the level of the Union based on common standards regarding the processing of personal data.

In terms of the EU's ability to respond to terrorist attacks, the EU Counter-Terrorism Strategy emphasises that, in the event of an incident with cross-border effects, there will be a need for a rapid sharing of operational and policy information, media coordination, and mutual operational support, drawing on all available means, including military resources. It is in this context that the Commission calls for the development of EU crisis coordination arrangements, supported by the necessary operational procedures, asserting that this will help ensure the coherence of the EU response in the advent of a terrorist attack (Council of the European Union 2005c: 15).

### *Accountability*

Under Title VI TEU, the Parliament is kept informed of discussions in the areas covered by this title by the Commission and the Presidency; it's allowed to ask questions to the Council or make recommendations to it; and each year it holds a debate on the progress made in the areas referred to in Title VI TEU. Parliamentary consultation under Title VI TEU takes place when measures are taken on the basis of Articles 34(2)(b),(c),(d), and 40 TEU.<sup>62</sup>

In its Resolution on the proposal for a Council Decision on Cross-border cooperation to combat terrorism and cross-border crime, the Parliament (2008b) proposes numerous amendments to the German initiative. The Parliament called *inter alia* for a clarification of the definition in Article 2 of "personal data" and the "non-coding part of DNA", and suggested an alternative formulation (European Parliament 2008b: amendment 6 & 11) whilst calling for additional clarification of the powers the officers and other officials of the seconding Member State(s) may exercise during the operation (European Parliament 2008b: amendment 20). The adopted Council Decision 2008/615/JHA reflects the Parliament's suggested amendment on "personal data", yet no correction was made to the "non-coding part of DNA".<sup>63</sup> The additional clarification suggested by the Parliament was not followed through by the Council.

In its Resolution on the proposal for a Council Decision amending Framework Decision 2002/475/JHA on combating terrorism, the Parliament (2008b) proposed various amendments. Several are highlighted here. The Parliament proposed a series of amendments on the provocation of persons to commit terrorist-linked offences, favouring the word *incitement* over provocation (European Parliament 2008b: amendment 2, 3, 4 and 9). Neither one of these amendments was

<sup>62</sup> See *supra* paragraph on 'Decision-Making Methods' on the nature of Articles 34(2)(b),(c), (d), and 40 TEU.

<sup>63</sup> See Council Decision 2008/615/JHA, *supra* note 37, Art. 2(2).

followed through by the Council in the most recent update of this Framework Decision.<sup>64</sup> The Parliament called on Member States to ratify the Council of Europe Convention on the Prevention of Terrorism of 16 May 2005 and wanted to include such a call in the Council Decision (European Parliament 2008b). Also, it included references to the Charter of Fundamental Rights and the European Convention for the Protection of Human Rights when it came to the criminalisation measures being implemented (European Parliament 2008b: amendment 10). Neither one of these recommendations were followed through by the Council.

As explained in paragraph 1.2, the Parliament holds a debate on the progress made in the areas referred to in Title VI TEU each year. The progress report on the year 2007 (European Parliament 2008c) stated that the Hague Programme is seriously behind schedule. The Parliament further noted a lack of mutual trust and solidarity among Member States, especially as regards policies on legal and illegal immigration and police and judicial cooperation in criminal matters, a lack of transposition of measures in these areas and concern over inadequate standards for the protection of transatlantic transfers of data (European Parliament 2008c: point E and Art. 2). The progress report on the year 2008 (European Parliament 2009) points out the persistent legal weakness and complexity of the EU decision-making process, notably in areas such as police and judicial cooperation in criminal matters which, according to the Parliament, lacks an appropriate democratic and judicial control at EU level (European Parliament 2009: point B). Furthermore, it once again stresses the delays in the implementation of the Hague Programme, the lack of timely and correct transposition of Community legislation, calls once more for improving the standards of data protection, and notes a refusal by the Council to consult Parliament regularly in the case of international agreements dealing with police and judicial cooperation in criminal matters. This refusal is, according to the Parliament, contrary to the principle of loyal cooperation and the democratic accountability of the EU (European Parliament 2009: points B, C(3) (a) and (j)).

## *Legitimacy*

### **Input Legitimacy**

What can be seen from the above analysis of accountability is that the Treaties provide for involvement of the EP in many ways. The adoption of measures in the AFSJ, particularly in relation to terrorism, are, however, often adopted on the basis of provisions within Title VI TEU on police and judicial cooperation in criminal matters for which the Parliament is at most consulted. The

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<sup>64</sup> See Council Framework Decision 2008/919/JHA *supra* note 45, para. 7, 10 and 11.

amendments proposed by the Parliament and the annual progress reports show also a lack of follow up by the Council and the Commission. The *input* legitimacy is therefore deemed to be insufficient in terms of the accountability arrangements present.

In the 66<sup>th</sup> Eurobarometer of December 2006, terrorism is mentioned by 15% of the respondents as being one of the two most important issues facing their country. This number declined to 12% in the 67<sup>th</sup> Eurobarometer of June 2007.<sup>65</sup> Terrorism is further seen as an area where the EU can play a vital role along with national governments. In December 2006, 79% of the respondents thought that decisions on combating terrorism should be made jointly within the EU. This percentage was only to rise to 81% in June 2007 (Eurobarometer 2007a: 13).<sup>66</sup> In December 2007, the percentage of respondents who claimed terrorism was one of the two most important issues facing their country dropped further to 10% (Eurobarometer 2007b: 22).<sup>67</sup> The percentage of respondents who would like to see the fight against terrorism dealt with at EU level remained at 81% (Eurobarometer 2007b: 29).<sup>68</sup> In December 2008, the percentage of respondents who labelled terrorism as one of the two most important issues facing their country dropped even further and was halved in comparison with a year before, to 5% (Eurobarometer 2008: 21).<sup>69</sup> On an individual level, only 2% of the respondents claimed that terrorism was one of the most important issues facing them personally (Eurobarometer 2008: 27).<sup>70</sup> In terms of the decision-making level at which terrorism policy should be made, the percentage of respondents claiming this should be decided at EU level declined somewhat to 79% in comparison with the year before (Eurobarometer 2008: 50).<sup>71</sup> The 70<sup>th</sup> Eurobarometer further added two questions, asking respondents what currently *is* the main objective of the building of Europe and what *should* be the main objective of the building of Europe. 8% of the respondents claimed that currently the fight against global threats (such as terrorism) is the Union's main objective, whereas 9% indicated that this should be the Union's main objective (Eurobarometer 2008: 27).<sup>72</sup>

<sup>65</sup> For both the December 2006 and the June 2007 result see Eurobarometer (2007a: 11). Response to question: "The two most important issues facing (our country) at the moment".

<sup>66</sup> Response to question: "Decisions should be made jointly within the European Union for...".

<sup>67</sup> Response to question: "Was sind Ihrer Meinung nach die beiden wichtigsten Probleme, denen (UNSER LAND) derzeit gegenübersteht?".

<sup>68</sup> Response to question: "Sagen Sie mir bitte für jeden der folgenden Bereiche, ob er Ihrer Meinung nach von der (NATIONALITÄT) Regierung oder gemeinsam innerhalb der Europäischen Union entschieden werden sollte."

<sup>69</sup> Response to question: "What do you think are the two most important issues facing (OUR COUNTRY) at the moment?".

<sup>70</sup> Response to question: "And personally, what are the two most important issues you are facing at the moment?".

<sup>71</sup> Response to question: "For each of the following areas, do you think that decisions should be made by the (NATIONALITY) Government, or made jointly within the European Union?".

<sup>72</sup> Response to questions: "In your opinion, at the current time, what is the main objective of the building of Europe?" and "What should be the main objective of the building of Europe?".

What can be seen from the public opinion analysis through Eurobarometer is that terrorism is one of the recurring themes on the European public agenda. Shortly after the 9/11 attacks as much as 86% of the Europeans said that they personally feared terrorism (Eurobarometer 2002: i). This percentage has since dropped considerably. Other events also had an impact: in the wake of the July 2005 London terrorist attacks the percentage rose somewhat to 14% compared to 10% a few months earlier (Eurobarometer 2005: 8).<sup>73</sup> The most recent Eurobarometer of December 2008 shows that currently this percentage stands at 5% (Eurobarometer 2008: 21).<sup>74</sup>

What this analysis of public opinion reveals is that there is a clear mandate for combating terrorism with support for decision-making at EU level being consistently high. However, the amount of public support has, since 11 September 2001, been in serious decline. Judging from the Eurobarometer results, it seems therefore that the level of public support is very much dependent upon the level of emergency in which the Union finds itself. Currently it seems that the general public prefers to shift its attention to issues such as economic growth, employment and social affairs, and public health.

## Output Legitimacy

In terms of the Union's *output* legitimacy in combating terrorism, a closer look is given to the 6-monthly progress reports issued by the EU Counter-terrorism Coordinator. In the second annual review of the implementation of the Strategy for Combating Radicalisation and Recruitment (Council of the European Union 2007a: 2), the Coordinator stresses that implementation of the strategy has been uneven, noting that in some areas new initiatives were launched,<sup>75</sup> whilst in

<sup>73</sup> Response to question: "The two most important issues facing (OUR COUNTRY) at the moment".

<sup>74</sup> Response to question: "What do you think are the two most important issues facing (OUR COUNTRY) at the moment?".

<sup>75</sup> Examples include, *inter alia*, Directive 2007/65/EC of 11 December 2007 of the European Parliament and of the Council amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ L 332/27 of 18 December 2007, this Directive extends the prohibition of incitement to hatred to all audiovisual media services, including on-demand services; the development of a multi-pronged exercise of counter-terrorism technical assistance to Morocco and Algeria; A UK proposal aimed at establishing a network of mainstream voices to counter extremist networks and German proposals aimed at the promotion of dialogue among mainstream Muslims; a Commission co-hosted meeting attended by 20 leading representatives of the Christian, Jewish and Islamic faiths in Europe on the theme "Building a Europe Based on Human Dignity"; further intercultural dialogue initiatives through the Euro-Mediterranean partnership, the Anna Lindh Euro-Mediterranean Foundation, the organisation of the first meeting of the Euro-Mediterranean Youth Parliament under the German Presidency, the Asia-Europe Meeting and the Asia-Europe Youth Interfaith Dialogue, and cooperation with the Organisation of the Islamic Conference and the support of the Alliance of Civilisations initiative; the continued encouragement of partners to ratify and implement the 16 UN Conventions and Protocols pertaining to the fight against terrorism and to carry out provisions of the UN's Global Counter-Terrorism Strategy; educational cooperation through the Tempus programme directed at Eastern Europe, Central Asia, the Western Balkans and the Mediterranean region and the Erasmus Mundus programme for students and scholars from third countries allowing them to participate in Erasmus Mundus master courses in the EU; the promotion of active citizenship, solidarity and mutual understanding among youth in third countries through the Youth in Action and the Euro-Med Youth programmes; the

others (such as EU cooperation with regard to the prevention of radicalisation at educational institutions, training for religious leaders, and community policing) cooperation remained limited to the exchange of information on a limited scale (Council of the European Union 2007a: 2) .

In the Discussion paper on the implementation of the EU Counter-terrorism strategy of 23 March 2007 (Council of the European Union 2007b), the Coordinator remarks that the multiplication and growing importance of files in the areas of information sharing require enhanced coordination as there are more and more links and sometimes overlaps between projects, not being properly identified in the current Council structures. Further the Coordinator notes an unsatisfactory transmission of information to Europol by some Member States pursuant to Council Decision 2005/671/JHA.<sup>76</sup> With regard to Eurojust, the document notes that necessary procedures at national level for ensuring systematic transmission should be established as such procedures exist only in a few Member States. It further calls for the provision of technical means by Eurojust so that this transmission can be carried out in a structured way; a clear definition by Eurojust of the practical purposes of using the mass of information resulting from systemic transmission; and for the establishment of structural links between Eurojust and Europol so that Europol can benefit fully from its own capacity in criminal analysis (Council of the European Union 2007b: 4-5). The Coordinator goes on to state that concerns have been voiced in the area of information sharing with third countries with respect to the US data protection regime and particularly over the use that is made of personal data obtained from European citizens. The ongoing exercise, in the context of the EU-US High Level Contact Group on Data Protection and Data Sharing, to draft common data protection principles on the adequacy of these principles is said to be potentially helpful as it is important that all Member States take the same position with regard to data protection issues, including the question of adequacy of the US data protection regime (Council of the European Union 2007b: 6).

In terms of transnational cooperation with respect to special investigation methods, the legal framework is said to be either too complicated (in particular the interception of telecommunications) or largely insufficient to solve the problems resulting from differences between national laws and practices. The document therefore calls for a continuation of earlier work done by the German Presidency on undercover activities and extending this to other special

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organisation of several expert meetings on radicalisation and recruitment under the German Presidency; the setting up by the Commission of a group of academic experts on violent radicalisation to inform its policies in this area.

<sup>76</sup> Council Decision 2005/671/JHA of 20 September 2005 on the exchange of information and cooperation concerning terrorist offences, OJ L 253/22 of 29 September 2005

investigation methods (Council of the European Union 2007b: 7). As regards technical assistance to third countries, the process has not been able to provide the full leverage for maximising global EU counter-terrorism assistance to third countries. The major obstacles are the limited financial resources available at EU level for purely counter-terrorism external relations and the availability of experts to carry out assessment missions and specific objects (Council of the European Union 2007b: 10). The document also makes a link between security and development asserting that as the European Security Strategy recognises that security is a precondition for development, terrorism should be included in the ongoing debate on security and development. In this context, reflections should be made on the specific relation between terrorism and development and ways to ensure complementarity and coherence of policies and actions in these fields should be explored (Council of the European Union 2007b: 11). In terms of internal Council work on terrorism, the Coordinator asserts that for reasons to do with the composition of the Council working parties on preventing and fighting terrorism,<sup>77</sup> several factors of combating terrorism are not satisfactorily covered by these preparatory bodies. On topics such as the updating of the strategy on terrorist financing, the drawing up of an action plan to increase the security of explosives, the drawing up of conclusions on Chemical, Biological, Radiological and Nuclear (CBRN) and bio-preparedness and the protection of critical infrastructures, the Presidency had, in many cases, to set up “friends of the Presidency” groups to coordinate the efforts of several of the working parties (Council of the European Union 2007b: 11-12). Finally, when it comes to the implementation of EU instruments at national level, some progress has been made though this still remains one of the main challenges (Council of the European Union 2007b: 12-13).<sup>78</sup>

The 28 November 2007 progress report on the implementation of the Strategy and Action Plan to Combat Terrorism (Council of the European Union 2007c) highlights once more that considerable deficiencies remain in the sharing of information at national level. Despite a general trend among the Member States in favour of a “multi-agency” approach, those deficiencies constitute one of the

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<sup>77</sup> These working parties are the Working Party on Terrorism (TWG), for internal aspects, the Working Party on Terrorism (International Aspects) (COTER) for external aspects and the CP 931 Working Party for the designation of organizations and individuals involved in terrorist acts.

<sup>78</sup> At 23 November 2007 the situation was called *particularly alarming* for several legal instruments. The most recently updated document titled of the Council of the European Union (2008f) states *inter alia* that the Framework Decision of 13 June 2002 on the European Arrest Warrant has seen implementation completed and legislation has entered into force in all EU Member States; Convention of 29 May 2000 on mutual assistance in criminal matters and its protocol of 2001 has almost seen implementation completed in all EU Member States; Framework Decision of 22 July 2003 on the execution of orders freezing property or evidence still awaits implementation by some Member States; Framework Decision of 24 February 2005 on attacks against information systems still awaits implementation by some Member States; Decision of 20 September 2005 on the exchange of information and cooperation concerning terrorist offences still awaits implementation by some Member States; the aforementioned 16 UN Conventions and Protocols pertaining to the fight against terrorism show diverse ratification among Member States.

main obstacles to cooperation at European level. They relate to the lack of platforms bringing together different agencies (police, customs, Financial Intelligence Units (FIUs), etc.) and to insufficient links between the agencies' databases (Council of the European Union 2007c: 3).

The progress report on the implementation of the Strategy and Action Plan to Combat Terrorism of 26 May 2008 (Council of the European Union 2008b: 3) shows that in December 2007 the Council adopted a Decision on the full application of the Schengen acquis including the connection to Schengen Information System I (SIS I) of 9 Member States which acceded to the EU in 2004.<sup>79</sup> In February 2008 the Council adopted a number of conclusions regarding the development of the second-generation Schengen Information System (SIS II) (Council of the European Union 2008a: 8-12). In April 2008, the Council reached political agreement on conferring EU status on Europol and extending its mandate to cover organised crime, terrorism and all other forms of serious cross-border crime. Consequently, Europol will find it easier to come to the assistance of Member States in cross-border criminal investigations (Council of the European Union 2008e: Art. 4(1)). Also, some progress had been made in the implementation of the Strategy in terms of prevention, due to the adoption of Council Conclusions establishing priorities to enhance EU and national level cooperation in preventing terrorism, radicalisation and recruitment as well as serious terrorist-related crime, such as trafficking in drugs, explosives and arms. The Brussels European Council of 19/20 June 2008 affirms this conclusion and stresses the importance of information exchange in this context (European Council 2008: points 13 and 14).

The Council stated that good progress had been made on a Framework Decision on enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition in respect of decisions rendered in the absence of the person (trials 'in absentia').<sup>80</sup> The progress report of 26 May 2008 further noted that the formal adoption of several pieces of legislation were delayed up to that point, either due to parliamentary reservations that still needed to be withdrawn or because procedure with the EP needed to be completed. This has now however been remedied,

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<sup>79</sup> Council Decision 2007/801/EC of 6 December 2007 on the full application of the provisions of the Schengen acquis in the Czech Republic, the Republic of Estonia, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic, OJ L 323/34 of 8 December 2007.

<sup>80</sup> This Framework Decision was eventually adopted. See: Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, OJ L 81/24 of 27 March 2009.



albeit with significant delay (Council of the European Union 2008b: 6).<sup>81</sup> In terms of addressing CBRN and bio-preparedness the Council has launched consultations by setting up a CBRN Task Force on 28 February 2008, with a view to preparing a list of measures which could be undertaken at EU level and in the Member States in order to lower the risk of terrorist acts using CBRN materials. It launched its final report on 13 January 2009 in which it proposed relevant policy measures in this area.<sup>82</sup>

The latest progress report on the implementation of the Strategy and Action Plan to Combat Terrorism of 19 November 2008 (Council of the European Union 2008f) notes that the migration from SIS I to SIS II was originally planned for September 2009, but due to technical problems this date is no longer realistic (Council of the European Union 2008f: 6; 2009a: point 4). The report further mentions the adoption of Council Conclusions on enhancing cooperation and exchanging good practice in the area of countering radicalisation and recruitment to terrorism in July 2008. The Conclusions aim to prevent radicalisation and recruitment by increasing the quality and quantity of information gathered and shared between Member States, implementing joint initiatives, sharing best practices, studying the possibility of elaborating a methodology to assess the effectiveness of counter radicalisation and recruitment measures, as well as exchanging analysis and government assessments on radicalisation and recruitment among officials with competence in these areas across the EU (Council of the European Union 2008f: 3). In addition to the work lead by Germany on the use of the internet,<sup>83</sup> the United Kingdom has undertaken to lead work to improve the communications strategy, in particular on countering the “narrative” which is used by those promoting terrorism to justify their actions. Spain is leading work on improving the training of religious leaders. The Netherlands is working on the role of local authorities in preventing radicalisation, Sweden on community policing and Denmark on the de-radicalisation of young people (Council of the European Union 2008f: 3).

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<sup>81</sup> These issues are currently resolved with the adoption of the following measures: Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member States, OJ L 93/23 of 7 April 2009; Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, OJ L 350/72 of 30 December 2008; Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings, OJ L 220/32 of 15 August 2008; Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters, OJ L 350 of 30 December 2008.

<sup>82</sup> For an overview of recommendations see European Commission (2009).

<sup>83</sup> Germany has launched an initiative entitled “Check the Web” in May 2007 which aims to strengthen cooperation among Member States in information exchange related to internet activity of terrorist networks. Meanwhile 24 Member States have opened their accounts on the information portal managed by Europol. Eight Member States have made contributions to the portal up to now.

In September 2008, EU Member States agreed on a “light” framework of cooperation with the Alliance of Civilisations, based on an exchange of letters accompanied by an action plan for the period 2008-2010. Common areas include the promotion of human rights and political reform; media and access to information: intercultural dialogue and cultural diversity, including exchanges and promotion of people-to-people contacts; immigration and integration; and the role of civil society in the prevention of polarisation and radicalisation (Council of the European Union 2008f: 5).

In June 2008, the Council reached political agreement on the proposed Directive on the identification and designation of European Critical Infrastructures and assessment of the needs to improve their protection, in particular with regard to the transport and energy sectors.<sup>84</sup> Furthermore, the report stated a need for the development of methods, including technologies, for detection of liquid explosives on an EU-wide basis at airports as swiftly as possible, and no later than 29 April 2010. If this should prove unattainable, the Commission would propose the necessary addition to the categories of items that may be prohibited (Council of the European Union 2008f: 9).

In terms of operational cooperation a Joint Customs Operation ATHENA focusing on money laundering linked to terrorism and other illicit activities took place in September 2008. 22 Member States and five third countries (Algeria, Croatia, Morocco, Norway and Tunisia) took part in the operation, as well as the European Anti-Fraud Office (OLAF), the Commission, the World Customs Organization (WCO), Europol and Interpol. Another achievement constitutes the adoption in June 2008 of Council Decision 2008/617/JHA on the improvement of cooperation between special intervention units of the Member States of the European Union in crisis situations; the adoption of Council Framework Decision 2008/919/JHA on combating terrorism; the adoption of Council Decision 2008/633/JHA concerning access to the Visa Information System (VIS) by designated authorities and Europol for the purpose of the prevention, detection and investigation of terrorist offences and of other serious criminal offences; and Council Decision 2008/615/JHA on stepping up cross-border cooperation, particularly in combating terrorism and cross-border crime.<sup>85</sup>

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<sup>84</sup> This Directive was eventually adopted. See Council Directive 2008/114/EC of 8 December 2008 on the identification and designation of European critical infrastructures and the assessment of the need to improve their protection, OJ L 345 of 23 December 2008.

<sup>85</sup> Council Decision 2008/617/JHA of 23 June 2008 on the improvement of cooperation between special intervention units of the Member States of the European Union in crisis situations, OJ L 210/73 of 6 August 2008; Council Framework Decision 2008/919/JHA *supra* note 50; Council Decision 2008/633/JHA of 23 June 2008 concerning access to the Visa

The report further notes that the Council was expected to adopt the Council Decision on extending Europol's mandate and conferring upon it the status of EU agency by November 2008. So far this has not happened. The Council did agree on a general approach to a draft Decision on the strengthening of Eurojust (Council of the European Union 2008f: 14).<sup>86</sup> Also, in July 2008 the Council endorsed a revised Strategy on Terrorist Financing (Council of the European Union 2008c) which calls for enhanced implementation of existing actions, effective implementation of legislation adopted, and in particular the implementation of the 9 Financial Action Task Force (FATF) Special Recommendations and relevant JHA-legislation (mutual legal assistance, confiscation, cooperation between FIUs and the exchange of information and cooperation concerning terrorist offences) (Council of the European Union 2008c: 12-19). The May 2009 progress report on the implementation of the revised Strategy on Terrorist Financing notes achievements in many areas, but yet again acknowledges delays in the implementation of various legislative instruments by Member States (Council of the European Union 2009b).

Adoption of legal instruments in the field of police cooperation and criminal justice have also been held up, either because parliamentary reservations still have to be withdrawn or because procedures with the EP still need to be completed. Various instruments have already been adopted, yet the Framework Decision on the organisation and content of the exchange of information extracted from criminal records between Member States remains on the agenda (Council of the European Union 2008f: 17).

In terms of international cooperation, the progress report speaks of mixed success in the cooperation and assistance programs with Morocco and Algeria in the area of counter-terrorism. Troika meetings have been convened ad hoc with these two countries in order to assess cooperation to date and exchange views on a possible future cooperation (Council of the European Union 2008f: 22). Among other initiatives aimed at third countries which are being established is a project which concerns the transfer of EU best practice to the Western Balkans and the familiarisation of these countries with the EU counter terrorism structures and practices (Council of the European Union 2008f: 23). Further work is being done on a Concept for ESDP operations countering Improvised Explosive Devices (IEDs), the setting up of a Maritime Surveillance

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Information System (VIS) by designated authorities and Europol for the purpose of the prevention, detection and investigation of terrorist offences and of other serious criminal offences, OJ L 218/129 of 13 August 2008; and Council Decision 2008/615/JHA *supra* note 37.

<sup>86</sup> Eurojust is envisaged to be strengthened through creating a common minimum basis of powers for national members; creating an emergency coordinating mechanism; improving the transmission of information to Eurojust; improving the national base of Eurojust; and strengthening judicial cooperation with third countries by enabling Eurojust to post liaison magistrates to those countries.

Networking project enhancing the maritime domain awareness off all EU-nations with seashores (Council of the European Union 2008f: 22-3).

## Conclusion

Overall, the AFSJ in itself serves to enhance coherence *in theory* by combining all the relevant policy areas within one single framework. As such, policy on combating terrorism is coherently framed on paper with, for example, immigration and asylum policies. Key to the successful establishment of the AFSJ is the efficient and effective sharing of information. It is this aspect however that seems to be running behind and serves to contribute to the aforementioned expectations/capabilities gap. The EU's crisis management response mechanisms, in particular regarding cross-border cooperation, are hampered by this lack of sufficient information sharing. In addition, the transposition of key legislative instruments from the Community to the Member State level is not progressing as rapidly as was originally envisaged, thereby not contributing to an equal adoption of measures designed for combating terrorism. This serves to hamper the development of synergy effects with other policy areas due to the incomplete implementation process of key legislative instruments.

Furthermore, when looking at individual resolutions it is noticeable that the Parliament spends a great amount of time carefully assessing each legislative proposal for which it has the competence to do so. Accordingly, detailed amendments are made to the proposals. The Parliament devotes great attention to the protection of the individual, both from Member States as well as from third countries, whereas the Member States seem predominantly concerned with the security of the Union and its citizens. This is reflected in the amendments with respect to the use of personal data, the references to the Charter of Fundamental Rights and the European Convention for the Protection of Human Rights, and the comments on the standards for the protection of transatlantic transfers of data. The proposals that are eventually adopted in the AFSJ seem to only minimally reflect the Parliament's amendments. The repetitive character of the Parliament's critique in its annual reports seems to indicate further in this direction.

Finally, the EU's *output* legitimacy with respect to its counter-terrorism policy is multi-fold. There is no lack of development of initiatives aimed at the prevention of, protection against, pursuit of and response to terrorism and terrorist perpetrators. When it comes to the sharing of information, it is evident from the above overview that some apprehension still remains within Member States, thereby hampering the effective and efficient exchange of information. Furthermore, in terms of

legal effectiveness, the reports consistently make note of delays in the implementation of legal instruments by Member States. Given that these are the only *hard* instruments available to the Union, this is cause for concern.

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## EU-GRASP

Changing Multilateralism: the EU as a Global-regional Actor in Security and Peace, or EU-GRASP in short, is an EU funded FP7 Programme. EU-GRASP aims to contribute to the analysis and articulation of the current and future role of the EU as a global actor in multilateral security governance, in a context of challenged multilateralism, where the EU aims at “effective multilateralism”. This project therefore examines the notion and practice of multilateralism in order to provide the required theoretical background for assessing the linkages between the EU’s current security activities with multi-polarism, international law, regional integration processes and the United Nations system.

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