



Europe and its homeland security

A fundamental objective of the European Union (EU) is to offer EU-citizens an area of freedom, security and justice in which internal borders have vanished. To realize this ambition, EU member states have sought to strengthen judicial and policing cooperation with regard to external border controls, asylum, immigration and the prevention and combating of crime and terrorism. Though initial steps in this area have been taken over the last decades, renewed momentum for matters of Justice and Home Affairs (JHA) came with the recent terrorist attacks on western soil. As a consequence, internal security is nowadays at the top of western governments' agendas. Within the policy area of JHA, counter-terrorism strategies - including intelligence cooperation - has gained relatively great prominence at a moment that Bush's "Global War on Terror" has set a permissive context for more radical policy measures.

However, though consensus exists on the importance of judicial and police cooperation, this still forms a delicate discussion for EU integration and transatlantic agreements. Questions such as "which instruments are the most effective in combating crime and terrorism?" and "what balance to strike between effective law enforcement, data protection and human rights?" generate diverse and debatable answers, both between the EU and the US, and between EU member states as well. As a consequence, the focus at the EU level has been mainly on practical issues related to data sharing, the establishment of European Arrest Warrant (EAW) and restricting financing opportunities for terrorist groups. However, developments at the institutional level point to increased real integration in this policy area as well, a development that is likely to be accelerated with ratification of the Lisbon Treaty. This brief examines the development of EU integration regarding judicial and policing cooperation in general, singles out EU counter-terrorism measures in particular and focuses on the challenges this policy areas poses to transatlantic cooperation.

The Path to a European Area of Freedom, Security and Justice

European cooperation on issues of Justice and Home Affairs existed before the advent of the EU in the 1990s. General instruments regarding mutual legal assistance and extradition developed first of all in the broader context of the Council of Europe (CoE), complemented by some regional arrangements amongst, for example, the Benelux countries and amongst the Nordic countries. The basis for European judicial and police cooperation can be found in several conventions agreed upon by the 46 members of the CoE. The most important of these conventions are listed here:

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- *The 1957 European Convention on Extradition* is ratified by all CoE members, plus Israel, replacing hundreds of bilateral agreements on the subject. It has proved to be of value: in the mid-1990s the annual number of extraditions within Europe was between 750 and 1000, in principle all carried out under this Convention. Nevertheless, the Convention has several weaknesses and does not apply to political, military or fiscal offenses, nor to offenses committed outside the territory of the requesting state. The EU agreed upon a further reaching convention amongst its member states in 1996 and enhanced it in 2004 with the European Arrest Warrant.
- *The 1959 European Convention on Mutual Assistance in Criminal Matters* is, for the EU, supplemented in 1990 by the Schengen Convention and regional agreements in the Benelux and the Nordics. The Convention still forms the basis for mutual assistance within Europe regarding witnesses and documents and has few clauses that allow for refusal of assistance.
- *The 1977 Convention on Suppression of Terrorism*: In this convention several offenses that are to be considered of a non political nature have been concretely spelled out, such as unlawful seizure of aircraft, taking of hostages, commitment of offenses involving bombs, grenades, rockets, etc. By depoliticizing such crimes offenders were made eligible for extradition. However, many rights to refusal were granted. In the wake of the 9/11 attacks a revision was drafted, aimed at removing these refusal rights. This *Protocol Amending the European Convention on Terrorism* was adopted in May 2003 (ratified in January 2008 by 19 members, but not into force yet). On May 16, 2005 a *Convention on the Prevention of Terrorism* was adopted, criminalizing the incitement to and recruitment of terrorists. For the six member states that already ratified, this convention has now entered into force.
- *The 1990 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime* was supplemented and adopted in May 2005 with the extension “*and the financing of terrorism*”. It deals with property of illicit origin used for criminal matters, monitoring banking operations and gathering and disseminating financial intelligence. However, by January 2008 not enough member states had yet ratified this convention in order to let it enter into force.

Taking these building blocks, the heads of state and governments of the European Union have sought to strengthen cooperation by harmonizing more procedures and decreasing the number of possible exemptions. The idea of justice and home affair matters being explicitly discussed and mainly decided at an EU level was already recognized in the Maastricht Treaty (1993). With the Amsterdam Treaty (1998) EU member states decided to maintain and develop Europe as an “Area of Freedom, Security and Justice” (AFSJ). In Tampere (Finland) some few months later, a first related work program was adopted during an exclusive JHA-summit. In 2004, a second program was adopted in The Hague, following up on the Tampere conclusions and setting a strategy for implementation

covering the period 2005-2010. A detailed Action Plan accompanies the Hague program and forms the frame of reference for Commission and Council.

At the level of implementation, it was soon acknowledged that crucial progress was limited because of institutional constraints as well as sometimes by a lack of political consensus. With the 2004 enlargement these shortcomings were further aggravated, as with only 15 members it already turned out to be difficult to reach unanimous agreement at the European level for the adoption of certain measures relating to sovereignty-sensitive policies. The second, and latest, annual report addressing the implementation of the Hague program was adopted on July 3, 2007 and offers a mixed picture: it shows wide variation between the progress at EU level adoption and the national level implementation, the latter showing reluctance and as a consequence considerable delays. It is nonetheless believed that – if nothing goes wrong in the ratification process – the 2007 Lisbon Treaty will lift some important barriers in this policy area: decision-making will be facilitated, the European Parliament will get a bigger leverage and competences of the European Court of Justice will be extended.

EU Police Coordination and Cooperation

Open borders bring more freedoms to all individuals, including to those individuals active in criminal networks. Increased opportunities for those networks have also increased the necessity for international police cooperation. To meet this need, the EU has set up several coordinating bodies. At the operational level, the establishment of Europol has by far been the most important step forward in EU law enforcement cooperation. Europol, based in The Hague, started in 1994 as a tiny Europol Drugs Unit, but from 2002, its mandate has been extended to deal with all forms of serious international crime, including illegal immigration networks, money laundering and the smuggle of radioactive and nuclear materials. Additionally, it has an important role in the dissemination of criminal intelligence. Europol is funded by the member states (shares are agreed upon according to country GNP) and in 2007 its budget reached 70.5 million euro. Using the Europol computer system (CETS), Europol integrates, analyzes and indexes criminal records and other relevant data, although these activities are regulated by a strict framework to stay in line with European human rights and data protection rules. Given that international organized crime does not recognize European borders either, Europol also has in place several bilateral operational and strategic agreements with other states and international organizations.

Besides Europol, a network of national top-level police chiefs has been established, and at the level of training, a European Police College (CEPOL) located in Bramshill (UK) was inaugurated in 2000. Its scope is to strengthen knowledge of international instruments, to provide appropriate training and to encourage cooperation with other police training institutes.

EU Judicial Coordination and Cooperation

EU level-activities in the field of criminal justice are focused on: approximation of legislation, the development of instruments based on the mutual recognition principle, improvement of judicial cooperation mechanisms, and the development of relationships with third countries. At the 1999 Tampere Summit, mutual recognition was agreed to become the cornerstone of judicial cooperation both in civil and criminal matters. This means that once a judicial decision has been made in one member state, this decision shall be recognized and executed in other member states as if it was a national decision. Since this mutual recognition can only be based on mutual trust, the Commission issued a Green Paper on procedural safeguards for suspects and defendants in criminal proceedings throughout the European Union. The principle has been of great importance with regard to the adoption of the Framework decision of June 2002, agreeing the European arrest warrant and surrender procedures, as well as on the Framework decision of July 22, 2003 regarding the execution of orders to freeze property or evidence.

The European Arrest Warrant (EAW) came into force in 2004 and made former extradition procedures between member states obsolete. The EAW tackles, among other things, the problem encountered with reluctance of member states where it concerns extraditions of “nationals”. Now, evoking EAW, all are considered EU-citizens, meaning that member states can no longer refuse to surrender own citizens who have committed a serious crime, or who are suspected of having committed such a crime in another EU country, on the ground that they are nationals. In practice, this means faster and simpler surrender procedures and no more political involvement. As a safeguard, the EAW can not be used for individuals committing minor crimes that carry a sentence of less than a year in prison.

In 1998 a European judicial network (EJN) was established, consisting of national legal authorities providing for consultation and information points at courts or prosecution offices. Next to this decentralized network, a central, broader coordinating institution was created at the Tampere Summit and ratified in the 2001 Nice Treaty. This new institution, named Eurojust, has opened offices in The Hague and brings together (often) seconded senior magistrates, prosecutors, judges and other legal experts in order to have an overall view on relevant judicial issues in Europe as well as specific crime patterns. The Eurojust team can give instant legal advice and assistance in cross-border cases, or for example help with the EU’s anti-fraud organization, OLAF. Eurojust can give recommendations for investigations, but does not have the authority to start or carry out investigations itself.

Counter-terrorism in the EU

Although terrorism is often treated as a separate subject, the same set of general instruments is used as to combat other criminal offenses. Counter-terrorism is singled out in this text, but is seen as just one element of the JHA issues in the broader sense, which are highly articulated in the current political context.

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The 1999 Tampere conclusions dealt mainly with organized crime at large, thus building up instruments which have a similar value in the fight against terrorism. But it must be remembered that the EU is not new to terrorism. At the end of the nineteenth century many countries were plagued by anarchist inspired terrorist attacks and in the 1970s radical left-wing (and in reaction right-wing) terrorist groups such as the German *Rote Armee Fraktion*, the Italian *Brigate Rosse* and the French *Action Directe* kept entire populations in anxiety. After three decades of relative quiet, the West again faces attacks on its soil: the 9/11 attacks in New York and Washington (DC), the March 2004 attacks in Madrid, those of July 2005 in London, attacks on European targets in Turkey, several discovered terrorist plans, and attacks on individuals such as the assassination of film maker Theo van Gogh in the Netherlands by adherents of violent Wahhabism, a form of Muslim conservatism. Terrorism thus gained renewed momentum, and an awareness of the more sophisticated techniques modern terrorist groups were able and willing to use arose. Despite its history and due to a lack of necessity in the last decades, in September 2001, Europe did not have anything resembling a fully functional common counter-terrorism strategy. In the 1970s some minor steps were taken to bring about European cooperation between law enforcement authorities, but in general this remained at the level of informal consultations in the so-called TREVI-meetings, in which heads of intelligence services came together. From the mid-1990s consultation took place also in COTER, a meeting set up in the context of CFSP.

Immediately after the 2001 US attacks member states adopted an Action Plan and a roadmap, describing detailed measures in order to come to a coherent counter-terrorism (CT) strategy. Europol was strengthened and obtained a specific CT task force, Eurojust was established, the European Arrest Warrant came into being, a common concept of terrorist offences was defined, sentences were to be harmonized and more intelligence sharing was to take place in the EU Situation Centre. By the end of 2006, the European Commission had judged two-thirds of the Action Plan as translated into political decisions. After the 2004 attacks in Madrid, proposals went as far as that of the Belgian PM Guy Verhofstadt, arguing for a “European CIA”. However, this proposal was vehemently opposed by France and Germany. What did happen after the Madrid bombings was the creation of a new EU job: that of EU Counter-Terrorism Coordinator (CTC) with the task of coordinating work in the Council and the Commission and monitoring the implementation of the Action Plan. Unfortunately, quarreling caused by strong national mindsets made the first CTC, Gijs de Vries, step down in March 2007, leaving the EU without a coordinator for more than half a year. Recently, this task has been carried on by Gilles de Kerchove.

Accordingly, in December 2005 the EU adopted a counter-terrorism strategy, with the strategic commitment “to combat terrorism globally while respecting human rights, and make Europe safer, allowing its citizens to live in an area of freedom, security and justice”. This strategy articulates that the primary responsibility for combating terrorism lies with the member states, but sees a role for the EU in strengthening national

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capabilities, facilitating European cooperation, developing collective capabilities and promoting international partnership. The aims of the strategy are fourfold:

- *Prevent*: address the root causes leading to radicalization and recruitment: monitor suspicious behavior in schools, religious places, prisons and on the internet; whilst promoting education; and developing an inter-cultural dialogue and a non- emotive lexicon.
- *Protect*: reduce the vulnerability to attack: securing passports through the implementation of biometrics; establish the Visa Information System (VIS) and the Second Schengen Information System (SISII); develop risk analysis of the external border through Frontex and implement common standards on civil aviation, port and maritime security.
- *Pursue*: disrupt terrorist networks and bring terrorists to justice: impede their planning, travel, and communications; cut off the supply of both financial finding and operational materials; further develop mutual recognition of judicial decisions.
- *Respond*: manage and minimize the consequences of terrorist attacks: set up EU crisis coordination arrangements; revise legislation on the community mechanism for civil protection; improve coordination with international organizations; share best practices and develop approaches for the assistance to victims of terrorism and their families.

Dilemmas of JHA Cooperation within the EU

Sovereignty-sensitive matters of national security form a complex area for policy integration. Large sums of money are involved, views on which instruments can best be used to combat crime and terrorism diverge, and measures that might secure one member state could put another at risk. Also, ceding sovereignty in this field touches upon questions of political identity, currently a highly debated issue. Next to these more political difficulties, many practical flaws are to be overcome to make cooperation truly successful. The current structure of the EU is one of these flaws. Former European Commission President Jacques Delors characterized the EU as an “unidentified political object”. As a result of EU complexity and its differentiated levels of decision-making, it has often been unclear which procedural context applied. In many flanking policies of JHA-matters, such as those for civil aviation and information security, national governments have ceded sovereignty to the EU-level. In policy areas related to the Common Foreign and Security Policy (CFSP), national governments retain the last word. The “EU third pillar” matters of Justice and Home Affairs (renamed Justice, Liberty and Security) offer the most relevant legal framework. Here the current tendency is that decision-making in ever more pieces of this pillar is shifted from the national level to the EU-level. Above all, cooperation and integration in this policy area can be judged as functional to perceptions of the security environment. Putting terrorism as a number one

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threat has made national governments accelerate and enhance cooperation and integration in a number of important areas.

The EU in the International Context of Combating Crime and Terrorism

As border-crossing international crime does not stop at the European border, the EU needs partnerships with third countries. Since 9/11, EU agreements with third countries have almost automatically included clauses on counter-terrorism, anti-money laundering and other law enforcement instruments. In December 2005, the European Council adopted “A Strategy for the External Dimension of JHA: Global Freedom, Security and Justice”. It aims at addressing those problems often considered to have roots outside of the European Union, such as the trafficking of women (estimated by Europol at 100,000 women a year), drugs smuggling, youth radicalization processes and other features of terrorism. It also calls for better management of migration flows. Within international cooperation, much credit is given to UN Security Council Resolutions and UN Conventions and Protocols relating to terrorism. As a byproduct of the approach adopted by the EU, an ever tighter relationship between the EU and the UN is taking shape as the EU cooperates with the UN Counter-Terrorism Committee, the Counter-Terrorism Executive Directorate, the 1267 Sanctions Committee and other UN bodies. Other key partners for the EU are the CoE, the OSCE, regional organizations such as ASEM and the countries included in the European Neighborhood Policy. External CT-assistance is given by the EU in relevant areas as defined by the UN. The financial burden for this assistance has been translated in approximately 400 million euro, with almost 80 different countries benefiting. The EU and Russia have made agreements on counter-terrorism through the common spaces of “external security” and of “freedom, security and justice”.

Transatlantic Prospects: “Global War on Terror” vs. “The Fight against Terrorism”

Close cooperation with the US regarding counter-terrorism is – inevitably – top of the EU's agenda. Terrorist attacks have made security the most visible challenge for both the US and Europe. However, few in Europe endorse the idea of a Global War on Terror (GWOT) as articulated by George W. Bush. Recent terrorist attacks have not had the same impact in Europe as in the US. In Europe – a continent more familiar with terrorism than the US – the 2004 Madrid and the 2005 London attacks brought about changes in policies, but not as radically as those like the US Patriot Act. Europeans tend to be against fighting terrorism with primarily military means and try to strike a different balance between law enforcement, data protection and human rights. Instead of a “Global War on Terror”, Europe “fights against terrorism” and most European governments neither subscribe to the words “axis of evil” and “either with or against us” nor to the concept of pre-emptive warfare, even with an acceptance of the doctrine of humanitarian intervention.

Tellingly, the European Commissioner responsible for Justice, Freedom and Security is simultaneously responsible for Fundamental Rights. Though scandals such as the agreements on rendition flights over parts of Europe have put this rhetoric in a more

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realist perspective, the EU is still likely to stage itself as having a credible and more humane alternative to the GWOT, taking into account the long term political sides of the terrorist threat. This alternative is developing slowly, but is arguably rooted in (relatively) more thought-through governmental decisions.

Europeans feel strengthened in their views due to the Autumn 2006 National Intelligence Estimate Report, which concluded that the GWOT had not at all made the West a safer place. Through European eyes, the war in Iraq has, in particular, brought about an upsurge in public order problems within the EU, which has led to irritation with American stances. Problems regarding timely exchange of vital intelligence blemish transatlantic relations in this field as well.

Despite the differences in view, in practice there is close cooperation between the EU and the US, which has been enhanced in recent years and is still improving. In June 2003, the US and the EU signed a mutual legal assistance and extradition agreement (MLAT). This facilitates and speeds up extraditions. It includes a clause making extradition refutable if there is chance that the death penalty might result. Also, both the EU and the US have held seminars to increase bilateral knowledge of law enforcement structures and institutions. The US is having contacts with the new Police College, OLAF, and Frontex, the new EU border agency based in Warsaw.

Of even more importance are the structural, high-level consultations between the US and the EU. Before 9/11 a Justice Dialogue already existed, but has now obtained a central position within the spectrum of transatlantic relations. The Justice Dialogue has been held four times a year, since 2002 on a ministerial level, and is judged as very productive. It offers quite an informal setting for the discussion of sensitive topics such as measures designed to secure mainly US borders, for example the Passenger Name Reports (PNR) and the Container Security Initiative (CSI). PNR in particular brings problems for European airlines, as US requirements collide in principle with the terms of the EU's Data Privacy Directive. Passport data is another sensitive issue. US requirements established in 2002 to include biometric features such as fingerprints and iris scans put both EU officials and US officials in a difficult position, leading in practice to close cooperation. Besides the Justice Dialogue, the EU and the US saw the need for another institution to cope with EU-US sensitivities in the field. The result has been a policy Dialogue on Borders and Transport Security (PDBTS), created in early 2004. As can be suspected by the name, this forum occupies itself with border and transport issues. Although very new, the PDBTS has established a positive reputation, and it could be argued that these difficult issues in the latest years have actually formed a successful area of EU-US cooperation.

Summary

In recent years, the EU has increased its profile in counter-terrorism substantially. Spurred by the US and in the wake of several terrorist attacks on European soil, member states have become aware of the need for a supranational approach to address matters of

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combating crime and terrorism. As this new threat perception coincides with a tendency of opening up borders and granting people, capital, goods and services total freedom of movement, judicial and police cooperation is needed. Despite the sensitivities of the issues and many challenges remaining, the EU has been able to institutionalize justice and home affair matters at the EU-level and to increase integration of several security policies. Europe is now building on the creation of a coherent toolbox of policies, though the responsibility for implementation of the approved “European Union Counter-Terrorism Strategy” remains at the level of the member states. Transatlantic cooperation has accelerated as well, but is covered in divergent views on which approach should be taken to tackle the security dilemma. In sum, the current context has made both EU-internal and EU-US cooperation flourish, but differences in individual perceptions of – and experience with – terrorism cause that cooperation in this field to remain uneven, non-optimal and mainly reactive.

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