



The EU's Fight against International Terrorism Security Problems, Insecure Solutions

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Introduction

The investigations on the London attacks of 7 July 2005 have yet to clarify the intricate storyline of the bombings. Yet, the European Union has already set about tightening up its fight against international terrorism through policies that, unfortunately, compound the difficulty of addressing the challenge. The problems arise partly because the policies put forward do not match the diagnosis nor do they fully comply with the principles of legitimacy, proportionality and efficiency. In addition, it is unclear how these Community measures will minimise the lack of trust among member states, which has put the brakes on the implementation of instruments adopted after the Madrid attacks. This relates to the vexed question of the extent to which intergovernmental initiatives such as the Prüm Treaty are compatible with a credible EU policy in the area of terrorism.¹

This Policy Brief proceeds in two sections: First, we critically examine the main EU measures and legislative initiatives intending to fight what has been qualified as 'terrorism' following the Declaration on the EU Response to the London Bombings, as adopted by the Council on Wednesday, 13 July 2005. Second, we investigate how, if the freedom and justice dimensions are not set at the centre of EU policies developing an Area of Freedom, Security and Justice, human rights and civil liberties can be endangered and finally lost to the exceptional security demands.

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¹ The Treaty of Prüm (Schengen III), increasing cross-border cooperation in the fight against terrorism, organized crime and illegal immigration, is an intergovernmental initiative signed on 27 May 2005 in Prüm (Germany) (retrieved from www.mir.es).

The EU's response to the London events

The logic behind the EU's answers to terrorism is now well known. It always serves two purposes, the first of which is psychological and the second being more operational. The psychological part of the European Security Strategy is a reassuring action, the aim of which is to reinvigorate and strengthen the bonds among member states. It is one of the EU's roles to promote solidarity and empathy among the member states in such difficult circumstances. In this light, the Council meeting on 13 July 2005 following the London bombings was vital. Indeed, by bringing together the interior and justice ministries of the member states, it has reasserted the importance of a collective strategy against the terrorist threat.

The EU operational answer, on the other hand, is geared to defensive and proactive political actions. It is often encapsulated in a set of legislative initiatives. The extraordinary meeting of the Council falls within this scope. It intended to speed up transnational cooperation through a package of security measures that are part of the EU Plan of Action on Combating Terrorism. The Council has declared "its immediate priority to build on the existing strong EU framework for pursuing and investigating terrorists across borders, in order to impede terrorists' planning, disrupt supporting networks, cut off any funding and bringing terrorists to justice".²

It is important, however, to bear in mind that many of the legislative tools and initiatives included in the Council Declaration that came out of the extraordinary meeting are neither new nor innovative in character. Indeed, some of the 'sticks' thereby highlighted had already been included in the European security agenda before the attacks on 11 September in New York and on 11 March in Madrid. They were furthermore integrated in and promoted by the Declaration on

² Council Declaration on the EU Response to the London Bombings, Extraordinary Council Meeting, Justice and Home Affairs, Council of the European Union, 11116/05, Brussels, 13 July 2005.

Combating Terrorism of 25 March 2004. These initiatives are, for instance, commitments to: combat terrorism financing, improve information-sharing between security and law enforcement agencies, intensify the exchange of police and judicial information, protect citizens and infrastructures (with the use of new technologies, e.g. biometrics and databases), and manage and reduce the consequences of acts of political violence.

In addition to the much-debated proposal on the retention and storage of telecommunications data,³ the Council would like to agree on the following items by December 2005: the European Evidence Warrant; the exchange of information between law enforcement authorities; the exchange of information concerning terrorist offences; a code of conduct to prevent the misuse of charities by terrorists; and, a strategy to address factors that contribute to the radicalisation and recruitment of terrorist activists among ‘home-grown’ groups.

The problem, however, is that a substantial portion of these policies are open to discussion. Further, there seems to be a lack of relevance. Indeed, the order of priorities is not consistent with the diagnosis established after the London bombings. Although the investigations are far from being completed, the first clues are leaning towards home-grown groups of radical individuals. Given this finding, one might have thought that the Council meeting would firmly address the driving reasons behind radicalisation. Yet, in fact, when it comes to measures proposed to prevent “people turning to terrorism”,⁴ the EU strategy remains somewhat truncated. Instead, most of the measures advocate the “roll-out of biometric identifiers”,⁵ information-sharing, the re-introduction of internal border checks, the reinforcing of external border controls, the retention of telecommunications data, the expeditious implementation of the European Evidence Warrant and the like.⁶ We are not claiming that these measures are wholly useless. Rather we think that they do not tackle the root factors leading to violence nor do they address the many ways in which activists are

recruited. Furthermore, the Council Declaration, as with former EU strategies seeking to tackle ‘international terrorism’, creates more problems and individual insecurity, than it solves.⁷ Taking the argument further, we analyse how and why this is the case, then we suggest ways to circumvent the problem.

Limitations of EU policies against ‘terrorism’

The security strategy revitalised by the Council Declaration on the EU Response to the London Bombings of 13 July 2005 hardly passes the tests of legitimacy, proportionality and effectiveness. It also shows the existence of a lack of mutual confidence and a high level of mistrust among EU counterparts regarding cooperation on security and justice.

1. The test of legitimacy and the rule of law

Few would disagree that this package does not fully comply with Art. 8 of the European Convention of Human Rights and Fundamental Freedoms,⁸ the right to privacy and data protection as guaranteed by the Council Directive 95/46 on the protection of individuals with regard to the processing of personal data⁹ and ‘liberty’ in general.

Protection of the individual and liberty should be at the heart of any security measure being developed. Legal and judicial remedies for the individuals affected or potentially subject to these measures should also be put in place as a priority. The lack of political agreement within the Council of Ministers on the proposal for a framework decision on certain procedural rights of ‘suspected terrorists’ in criminal proceedings throughout the EU reveals member states’ hesitation towards having ‘more Europe’ in the freedom dimension.¹⁰

⁷ D. Bigo & S. Carrera, “From New York to Madrid: Technology as the Ultra-Solution to the Permanent State of Fear and Emergency in the EU”, Commentary, CEPS, Brussels, April 2004.

⁸ Art. 8 of the European Convention of Human Rights and Fundamental Freedoms states that “1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

⁹ European Council Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, *Official Journal* L 281, 23 December 1995, pp. 0031-50.

¹⁰ Proposal for a Framework Decision on certain procedural rights in criminal proceedings through the European Union, COM(2004) 328 final, 28 April 2004.

³ Draft Framework Decision 2004/8958 of 28 April 2004 on the retention of data processed and stored in connection with the provision of publicly available electronic communications services or data on public communications networks for the purpose of prevention, investigation, detection and prosecution of crime and criminal offences including terrorism, Council of the European Union, Brussels.

⁴ See the Council Declaration on the EU Response to the London Bombings, op. cit. point 4.

⁵ *Ibid.*, point 6.

⁶ J. Apap & S. Carrera, “Maintaining Security Within Borders: Toward a Permanent State of Emergency in the EU?”, *Alternatives: Global, Local, Political*, Vol. 29, No. 4, October 2004, pp. 399-416.

The main risk is that the principle of legitimacy and the rule of law are endangered by the very legal framework under which measures crafted to 'fight terrorism' are being adopted – the EU third pillar.¹¹ Indeed, any cooperation in these fields continues to be carried out on a purely intergovernmental basis, falling outside the Community method.¹² This has the negative consequence of preventing a direct and transparent involvement of the European Parliament and the European Court of Justice. Yet the European Parliament should be openly included in the decision-making procedures to guarantee the *democratic accountability* of the legal instruments being adopted and implemented. The role of the European Court of Justice should be strengthened to ensure *judicial review* and the protection of the rule of law. Indeed, the involvement of the judiciary is of utmost importance if we want to protect our democratic values and the individual.

2. The test of proportionality

It is held that any security instrument adopted should be assessed through the lens of the principle of proportionality. This principle is grounded upon two assumptions. First, the European Community acts only when it is necessary or 'required' to do so in order to achieve a certain end. This entails the idea of a balanced relationship between means and ends. Second, and more importantly, it requires that the measures adopted are the least restrictive to freedom. In this light, are the security measures proposed compatible with this general principle of EC law?

The answer may take the following form: Some of the legal acts proposed by the British government and the special Council meeting have been put into question by the European Parliament, civil society, NGOs and academia because of serious concerns as regards their compliance with the principle of proportionality and the human rights dimension (as provided by international and European human rights commitments). For instance, the proposal on the retention and storage of telecommunications data was cast out by the European Parliament on 18 April 2005. This initiative had previously been presented on 28 April 2004 by France, Ireland, Sweden and the UK.¹³

The main reasons the European Parliament justified its rejection of the proposal were:

- the choice of legal basis, being Art. 31 of the Treaty on European Union, which deals with "common action on judicial cooperation in criminal matters" and which would fall within the rubric of 'justice' under The Hague Programme agreed in November 2004. The proposal consists of various measures that come under both the third and the first pillars of the Union. Notably, the establishment of an obligation for service providers to retain data, the definition of data and the retention period fall within the first pillar/Community law;
- inappropriateness in view of the principle of proportionality. As the Parliament's report puts it, "the ends do not justify the means, as the measures are neither appropriate nor necessary and are unreasonably harsh towards those concerned", and that "given the volume of data to be retained, particularly internet data, it is unlikely that an appropriate analysis of the data will be at all possible";¹⁴ and
- incompatibility with Art. 8 of the European Convention of Human Rights, which guarantees the right of respect for private life against interference by a public authority.

Independent of the Parliament's report and several criticisms questioning this particular initiative, the above-mentioned extraordinary Council Meeting of 13 July 2005 has reintroduced it into the policy agenda. Even worse, this and other security initiatives inserted in the Council's Declaration on the EU Response to the London Bombings are currently under scrutiny at the national level. This is the case in the UK, where the House of Lords EU Select Committee has expressed its concerns to the government that as they stand these measures are theoretically dangerous to adopt. These developments are disturbing. They lead to the impression that contested acts are being introduced through the back door during critical times, without consideration for due legislative process, national-level

detection and prosecution of crime and criminal offences including terrorism.

¹⁴ See European Parliament, Draft Legislative Resolution on the initiative by the French Republic, Ireland, the Kingdom of Sweden and the United Kingdom for Draft Framework Decision 8958/2004 of 28 April 2004 on the retention of data processed and stored in connection with the provision of publicly available electronic communications services or data on public communications networks for the purpose of prevention, investigation, detection and prosecution of crime and criminal offences including terrorism, 8958/2004 – C6-0198/2004 – 2004/0813(CNS), 18.4.2005.

¹¹ Title VI of the Treaty on European Union, Provisions on Police and Judicial Cooperation in Criminal Matters, Arts. 29-43.

¹² See T. Balzacq & S. Carrera, *Migration, Borders and Asylum: Trends and Vulnerabilities in EU Policy*, CEPS, Brussels, July 2005.

¹³ Draft Framework Decision 8958/2004 of 28 April 2004 on the retention of data processed and stored in connection with the provision of publicly available electronic communications services or data on public communications networks for the purpose of prevention, investigation,

scrutiny procedures and irregardless of whether they address – proportionally and effectively – the challenge posed.

3. The test of effectiveness

Scepticism persists over whether these legal instruments are effective in curbing threats of political violence. Moreover, the political struggle taking place in order to ensure that the intergovernmental method of cooperation reigns over policies on security undermines the efficacy and effectiveness of the acts themselves. As we have seen above, the EU's third pillar has three weaknesses: 1) it is based on the unanimity rule; 2) it excludes the European Parliament and the European Court of Justice; and 3) it introduces a lack of transparency in the decision-making process. The efficiency and overall usefulness of the operational setting is, as a consequence, sapped.

A good example showing the predominance of the intergovernmental method of cooperation in the fight against terrorism and organised crime is the Treaty of Prüm or Schengen III, signed between seven EU member states (Spain, France, Germany, Belgium, The Netherlands, Austria and Luxembourg) on 27 May 2005. This Treaty aims at reinforcing transnational cooperation against organised crime, terrorism and illegal immigration while setting aside the European Community framework. The Treaty of Prüm thus proposes to cement the interchange of information between the law enforcement and security agencies of the signatories. It widens the power of these security agencies (through the creation of national contact points being appointed in accordance with national law) to have direct and automatic access to DNA and fingerprint data in another participating member state in order to prevent 'terrorist attacks'.

This Treaty is not the only intergovernmental plan being discussed. On 6 March 2004, members of the G5 (France, Germany, Italy, Spain and the UK) agreed that they will set up a network for exchanging information on individuals linked to terrorist activities. The database will contain information on fingerprints, DNA and false identity details.¹⁵

The picture that emerges is one of dispersed policies in the field of terrorism, and consequently 'less Europe'. The danger is to turn the EU into a shadow body that legitimises instruments ratified by certain of its members, on different occasions, within different settings. The communitarisation of this cooperation (bringing it under the Community method) and the use of the co-decision procedure (Art. 251 EC Treaty)

would alleviate these weaknesses. It would also ensure the parliamentary and judicial accountability of the policy steps taken.

4. The test of mutual confidence

EU cooperation in security and justice dimensions is a case in point of the mistrust that endures among law enforcement and security agencies, as well as the judicial authorities in the EU. This is mainly ascribable to the different legal and historical traditions, visions and philosophies of each of the member states of the EU project. Trust is essential for maintaining stable relationships, and it is particularly vital for effective cooperation in the field of justice and home affairs. The establishment of a high level of trust is closely intertwined with the progressive establishment of an Area of Freedom, Security and Justice.

The European Arrest Warrant (EAW) represents one of the first legal instruments implementing the principle of mutual recognition of decisions in criminal matters formally adopted by the Council.¹⁶ It has, however, shown the persisting lack of mutual confidence about member states' intentions and respective judicial/legal systems.¹⁷ The deep difficulties that surfaced during the implementation processes at the national level have greatly mined the efficiency and credibility of the regime. Lack of trust, or rather clear proof of mistrust seems to be a pervasive factor of the whole debate. The legal challenge brought by Germany and Poland before their respective Constitutional Courts questioning its compatibility with their constitutional legal settings also gives more strength to that argument. More worryingly, on 18 July 2005 the Federal Constitutional Court of Germany ruled the act implementing the EAW into German law as void. This judgement seriously questions, and provokes a rethink about, the very pillars of European cooperation in the Area of Freedom, Security and Justice.¹⁸

Conclusions

How possible is it to adopt robust policies against 'terrorism', while maintaining a commitment to civil liberties and human right standards? How possible is it to set up policies that do not concede arguments to

¹⁶ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, *Official Journal* L 190, 18.07.2002.

¹⁷ J. Apap & S. Carrera, *Judicial Cooperation and the European Arrest Warrant – A Good Testing Ground for Mutual Recognition in an Enlarged EU?*, Policy Brief No. 46, CEPS, Brussels, February 2004.

¹⁸ The implications of this new legal challenge are far reaching and fall beyond the scope of this Policy Brief. We intend, however, to analyse them in a forthcoming CEPS working document.

¹⁵ The G5 meeting called for more data-sharing to fight terrorism in Europe (retrieved from <http://europa.eu.int/idabc/>).

activists? These are the challenges that the EU faces today. The London attacks have made them more acute. Let us propose a way to begin framing a policy that addresses terrorism effectively.

First, the measures adopted should match the diagnosis. Biometric IDs, the exchange of DNA, EU-wide databases, the reintroduction of internal border checks, the reinforcement of external border controls¹⁹ and the European Evidence Warrant would have been of no help in preventing London events from occurring. Arguments to the contrary would be dishonest.

By contrast, a policy of *recognition (equal treatment)* and *integration (social inclusion)*, not only of *tolerance*, would have probably made a significant difference. This may prove more difficult if more rewarding than enacting new coercive rules. The EU needs, therefore, to rethink its discourse and overall approach towards groups of its citizens (and non-citizens) who are of different racial and religious backgrounds. This, we know, is complicated. Policies on integration and social inclusion are still largely the preserve of local authorities under the national level. The question then arises as to how the EU could have a real impact in these fields. Whatever forms these policies might take at national level, we believe that the EU can at least ensure their compliance with equal treatment and non-discrimination.

Further, although some may argue that the young bombers in London were all 'well-integrated', the government attempts to de-politicise these acts of violence are irresponsible. This stance only makes sense in view of a stubborn refusal by certain member states to see any link between domestic radicalisation and their international activities.²⁰ To close this window of vulnerability, the EU should therefore seek out the political message behind these attacks and consult with member states in order to uproot the threat. This is even more urgent if the bombings are carried out by those for whom religion and politics are intertwined.

Second, the policies adopted should not be disconnected from the rule of law. They should rather start from and be embedded in the rule of law. This is the precondition for their having a democratic nature and judicial accountability.

Third, the European Parliament represents EU citizens and reflects the values and principles of contemporary liberal democracies. Thus its position on any policy affecting the lives of EU citizens should be valued and indeed take precedence. This, we believe, will enhance transparency and safeguard the legitimacy of legislations agreed upon by member states.

Finally, a Community approach to terrorism should be given preference over intergovernmental actions that seem to compete with the EU level. Terrorism is already too complex a problem to tackle; matters related to it should be dealt with in a coherent institutional setting. Too many institutions and agencies along with too many initiatives will blur the policies adopted and affect their efficient implementation. The direct result is a more vulnerable EU.

Many would have us believe that the seriousness of the threat justifies 'exceptional measures' that are neither proportionate nor in compliance with human rights and civil liberties commitments. This is a perilous posture for liberal democracies. In fact, the trouble is that measures promoted by the last extraordinary Council meeting may, if not checked carefully, undermine the values that the EU considers crucial to its identity. This, without doubt, will be a serious policy failure – perhaps more serious than the terrorist threat itself because it will fundamentally vitiate the very idea of the EU as a distinctive Area of Freedom, Security and Justice.

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¹⁹ See for instance the Commission's Proposal for a Council Decision on the improvement of police cooperation between the Member States of the European Union, especially at the internal borders and amending the Convention implementing the Schengen Agreement, COM(2005) 317, 18.7.2005.

²⁰ On the UK's performance in the war on terrorism see the Briefing Paper on *Security, Terrorism and the UK*, Chatham House, Royal Institute of International Affairs, London, 18 July 2005.

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