

# Chapter Eleven

## The European Union as a Collective Actor in the Fight against Post-9/11 Terrorism: Progress and Problems of a Primarily Cooperative Approach

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### Introduction

Protecting the security of their citizens is one of the core functions and reasons of being of the modern nation state. In a system like the European Union (EU), where the constituent member states retain full national sovereignty over matters of internal security, the role of EU common institutions in this critical domain is far from obvious. When terrorism first afflicted the European Community member states in the 1970s they responded in 1975 by setting up a loose intergovernmental cooperation framework outside of the partly supranational legal and institutional framework of the European Communities (EC) of the time. This so-called TREVI<sup>1</sup> framework remained outside of the EC treaty framework; had no legal base, permanent structures, legislative powers or budget. Nevertheless TREVI was seen at the time as quite successful in that it allowed for information exchange and occasional cross-border coordination of measures. In 1993, as a result of the *Maastricht Treaty* (the *Treaty on European Union* or TEU),<sup>2</sup> TREVI was incorporated into the EU as part of the provision on Justice and Home Affairs (JHA) cooperation in the context of the new third pillar, Title VI of the TEU. Inclusion of TREVI in the third pillar brought cooperation against terrorism for the first time within the ambit of the EU Treaties and institutions. Yet the absence of any defined objectives and of any external action competence, the inadequate legal instruments provided for by the *Maastricht Treaty*, and institutional provisions that retained much of the intergovernmental nature of

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<sup>1</sup> TREVI stood officially for *Terrorisme, Radicalisme, Extrémisme et Violence Internationale*, but its real background seems to have been a word game linked to the Dutch Minister Fontein (in Dutch, 'fountain') who chaired the meeting that established TREVI and a dinner the ministers had close to the Trevi Fountain in Rome.

<sup>2</sup> *Treaty on European Union*, opened for signature 7 February 1992, OJ C 191, (entered into force 1 November 1993) (*Maastricht Treaty*, hereinafter cited as TEU).

the previous TREVI cooperation made the third pillar an only marginally more effective framework for anti-terrorism cooperation.

The situation changed substantially with the reforms introduced by the *Treaty of Amsterdam*<sup>3</sup> in 1999. Under the overarching fundamental treaty objective of maintaining and developing the Union as an 'area of freedom, security and justice'<sup>4</sup> ('AFSJ') the EU was for the first time vested with an explicit internal security mandate: Article 29 TEU establishes the objective of providing citizens with a 'high level of safety' within the AFSJ and Article 61(e) of the *Treaty Establishing the European Community* (TEC)<sup>5</sup> links police and judicial cooperation in criminal matters to the aim of 'a high level of security by preventing and combating crime within the European Union'. Related to the new objectives were a number of other important reforms such as:

- the introduction of more appropriate legal instruments for the third pillar;<sup>6</sup>
- the incorporation of the until then 'exiled' Schengen system<sup>7</sup> with its considerable array of law enforcement cooperation mechanisms;
- the 'communitarisation', that is, transfer into the more supranational part of the Treaties, of part of the JHA areas in the context of a new Title IV TEC (which includes border controls as one area of obvious relevance to the fight against terrorism); and
- the creation of an external treaty-making competence of the EU/EC in the JHA domain.<sup>8</sup>

To these reforms one has to add a changed political context at the end of the 1990s. While still asserting their full sovereignty in matters of internal security, member states were at least willing to fill the notion of the AFSJ with some substance through a deepening of their cooperation on a broad range of internal

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<sup>3</sup> *Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts*, opened for signature 2 October 1997, OJ C 340, (entered into force 1 May 1999) (*Treaty of Amsterdam*).

<sup>4</sup> TEU, above n 2, art 2.

<sup>5</sup> Originally the *Treaty Establishing the European Economic Community*, renamed by the TEU to *Treaty Establishing the European Community*, opened for signature 25 March 1957, 298 UNTS 11 (entered into force 1 January 1958) (hereinafter cited as TEC), consolidated version published OJ C 321E.

<sup>6</sup> Framework Decisions and Decisions were added as legislative instruments of the Council, in order to provide alternatives to the cumbersome Conventions subject to national ratification procedures.

<sup>7</sup> Established in 1985 outside of the EC framework by initially only five EC member states through the Schengen Agreement, which provided for the abolition of controls on persons at internal borders and hence forced the countries involved to adopt a whole range of 'compensatory measures' to offset potential internal security risks stemming from this step.

<sup>8</sup> TEU art 38 in conjunction with art 24 for the matters of the remaining third pillar (police and judicial cooperation in criminal matters). In the domains of internal Community competence the Community enjoys in accordance with the doctrine of parallelism between the internal and the external competences developed by the European Court of Justice (ECJ) an implied power to act externally as far as such action is necessary for achieving objectives under the TEC. As a result the Community has gained 'automatically' external action capabilities in the JHA areas communitarised as a result of the 1999 reforms.

security-related matters. This political will is demonstrated by the Conclusions of the Tampere European Council of October 1999 with, *inter alia*, their emphasis on developing judicial cooperation in criminal matters and the decision to establish the cross-border prosecution unit Eurojust.

When the attacks of 11 September 2001 (9/11) brutally inaugurated a new phase of terrorism, the EU was therefore in a better position than ever before to develop a common response to the challenge. Since then the Madrid attacks of March 2004 and the London attacks of July 2005 (as well as foiled major attacks in several member states) have brought this threat much closer to home. The question is therefore how, and how well, the EU has used its improved potential to emerge as an actor in the fight against terrorism. This chapter will try to provide an answer to this question and to bring out both the progress and the problems connected with the Union's role in this sensitive field.

## **The European Union's Response: an Evolving Threat Definition and Multidimensional Action**

### **The Evolution of the Threat Definition: 'Internalisation' and Differentiation**

Whatever means the potential victim — be it a state, a company or even a group of individuals — has at its disposal to counter any threat, the first thing it must do is actually define and identify the nature of that threat. The EU is obviously no exception to this requirement. If one looks at the host of declarations adopted by the EU institutions since 9/11 one can discern a quite substantial evolution of threat definition post-9/11. Three phases can be distinguished.

In the immediate aftermath of the 9/11 attacks, EU statements were focused on the threat posed to the United States (US) as part of a more general global threat to 'open' and 'democratic' societies.<sup>9</sup> While cross-border intelligence and law enforcement cooperation was immediately stepped up in order to identify and dismantle terrorist networks in the EU, such networks were treated as part of a global threat posed to Western societies by Al Qa'ida. In that sense, EU terrorist networks were seen as posing an 'external' threat. This 'global' definition also prevailed in the first more substantial legislative act in the fight against terrorism, the *Framework Decision on Combating Terrorism* of 13 June 2002. The Decision started with a strongly worded preamble that identified terrorism as 'one of the most serious violations' of the 'universal values' (human dignity, liberty, equality, solidarity, respect for human rights and fundamental freedoms) and 'principles' (rule of law and democracy) on which the EU is founded. Terrorism was also referred to as a global threat to democracy, human rights and economic and

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<sup>9</sup> See the Conclusions of the extraordinary European Council meeting of 21 September 2001, which also defined terrorism, rather philosophically, as 'a challenge to the conscience of every human being' (EU Council Document No SN 140/01).

social development in line with the *La Gomera Declaration* that the European Council adopted in 1995.<sup>10</sup> The main emphasis in this first common EU post-9/11 terrorist threat definition was clearly on a broad and rather undifferentiated threat of a global nature to the political, constitutional and socio-economic foundations of the EU and its member states. This emphasis was also reflected in the common definition of terrorist acts as this included the aim of terrorists seriously to destabilise or destroy 'the fundamental political, constitutional, economic and social structures of a country'.<sup>11</sup>

The rather undifferentiated global threat definition showed its limitations in the light of the growing evidence of the terrorist potential within some of the member states when logistical bases and cells in the United Kingdom (UK), Italy, Germany, Spain and Belgium were uncovered during 2002 and 2003. The adoption of the *European Security Strategy*<sup>12</sup> in 2003 formally marked the passage to a new phase with a more 'internalised' and differentiated threat perception. The *Security Strategy* not only identifies terrorism as the first of the 'key threats' the Union was facing in the security domain but also describes it as a threat having both an internal and an external dimension. The *Security Strategy* emphasises that terrorism not only endangers lives and causes huge costs but that it also 'seeks to undermine the openness and tolerance of our societies'. Although maintaining the global nature of the threat, there is recognition also of an internal threat with a significant risk of 'home grown' terrorism. The *Security Strategy* also links terrorism with other international threats, in particular, the proliferation of weapons of mass destruction, 'state failure' (a concept not further defined in the EU texts) and organised crime, seeing terrorism as part of a differentiated set of interrelated internal and external security threats rather than an individual and isolated one.

The third, and current, phase started after the London attacks of July 2005 brought to the fore the full scale of home grown terrorism. This third phase found its full expression when the European Council, partly in response to the London attacks of July 2005, adopted the *EU Counter-Terrorism Strategy* on 15-16 December 2005.<sup>13</sup> The *Counter-Terrorism Strategy* broadly reaffirms the earlier threat assessment, but places an even stronger emphasis on the threat posed by 'home grown' terrorism through radicalisation and terrorist recruitment within the EU<sup>14</sup> — an obvious reaction to the background of the Madrid and London attacks. The *Strategy* adds a further element to the common definition that deals more specifically with the EU's particular vulnerability to terrorist

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<sup>10</sup> [2002] OJ L 164/3, [1]-[2].

<sup>11</sup> *Ibid*, art 1.

<sup>12</sup> Council of the European Union, *A Secure Europe in a Better World. European Security Strategy* (Paris: Institute for Security Studies, 2003).

<sup>13</sup> EU Council Document No 14469/4/05 REV 4 of 30 November 2005.

<sup>14</sup> *Ibid* [6]-[12].

activities. After re-emphasising the threat posed by terrorism to the EU's security, values and rights and freedoms, the text continues:

The European Union is an area of increasing openness, in which the internal and external aspects of security are intimately linked. It is an area of increasing interdependence, allowing for free movement of people, ideas, technology and resources. This is an environment which terrorists abuse to pursue their objectives.<sup>15</sup>

This addition provides a new element to the threat definition as the threat is presented as being, at least partially, due to the Union's specific 'openness': terrorists may abuse the free movement of people across borders and the freedoms of the Internal Market. Accordingly, the threat is even more 'internalised' and more justification is provided — as the *Strategy* emphasises in the same paragraph — for 'concerted and collective European action'. Finally, a further distinctive feature of this most recent stage of the EU's threat definition is its diversification: The *Counter-Terrorism Strategy* no longer focuses almost exclusively on Al Qa'ida as did some of the earlier texts; it refers to Al Qa'ida only once, and even then only as an example.<sup>16</sup> The *European Union Strategy for Combating Radicalisation and Recruitment to Terrorism* of November 2005, which is an integral part of the *Counter-Terrorism Strategy*, defines the terrorism perpetrated by Al Qa'ida '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 going to focus on this main threat.<sup>17</sup>

It is important to note that a considerable effort has also been made to avoid anything in the official definition of the threat that could make Islam or the Muslim world appear as the 'threat' or 'enemy'. While Europol's TE-SAT Report liberally uses the term 'Islamist terrorism' and 'Islamist terrorist propaganda',<sup>18</sup> the EU's *Counter-Terrorism Strategy* consistently employs very neutral language. The term 'Islam' appears only once and then only for the purpose of rejecting the claim of 'a clash between the West and Islam'.<sup>19</sup> Equally, in the *Strategy for Combating Radicalization and Recruitment to Terrorism*, two entire paragraphs are dedicated to the need to avoid linking Islam to terrorism and, in close cooperation with Muslim communities, to reject distorted views of Islam.<sup>20</sup>

Compared with the initial focus on a largely 'external' global threat posed by Al Qa'ida the common EU threat definition has clearly evolved to encompass

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<sup>15</sup> Ibid [2].

<sup>16</sup> Ibid [6] ('terrorist groups such as Al Qa'ida').

<sup>17</sup> EU Council Document No 14781/1/05 of 24 November 2005, [3].

<sup>18</sup> Europol, *EU Terrorism Situation and Trend Report (TESAT) 2007* (The Hague: Europol, 2007) 10, 18-26.

<sup>19</sup> EU Council Document No 14469/4/05 REV 4 of 30 November 2005, [10].

<sup>20</sup> EU Council Document No 14781/1/05 of 24 November 2005, [10]-[11].

the concept of an 'internal' threat. It also reveals an appreciation of post-9/11 terrorism as a more differentiated and complex phenomenon, both inside and outside of the EU, than the activities of Al Qa'ida. As far as the new emphasis on the particular vulnerability of the EU is concerned, there is little doubt that terrorists can potentially benefit from the 'openness' of the EU's internal borders and the provisions on free movement.<sup>21</sup> A further positive element is that the threat definition clearly tries to avoid any simplified or simplistic identification of the post-9/11 terrorist threat with Islamist activities and the Muslim world.

## The Terrorist Threat as a Multidimensional Law Enforcement Challenge

The growing 'internalisation' of the threat definition in line with the realisation of a potential for internal radicalisation and recruitment has enhanced the perception of the post-9/11 terrorist threat as primarily a law enforcement challenge. In contrast to the US concept of the 'war on terror', for the EU the fight against terrorism has in fact remained a challenge to be met primarily by the use of law enforcement instruments. The reasons for that are partly historical and partly systemic.

Historically, one has to remember that several of today's member states, especially the United Kingdom, Germany, Italy and Spain, have had to tackle serious terrorist threats since the 1970s. Although the countries concerned responded to the terrorist challenge with a range of measures that had serious implications for civil liberties, they did so primarily by adapting and toughening law enforcement instruments. Wherever significant suspensions of civil liberties and the use of military force was resorted to — such as by the British government in Northern Ireland — this was generally seen as a response *in extremis* and of doubtful effectiveness. In several member states, such as Germany, Italy and, more recently, France,<sup>22</sup> the experiences with a strong law enforcement response to the challenge of terrorism were on the whole regarded as positive, with terrorist threats eventually receding again or at least being contained. The European experience with a law enforcement-focused approach has therefore been not only a long one but also, at least in some cases, an effective one. It has also received some qualified endorsement through the case law of the European Court of Human Rights, which has more or less systematically accepted the right of European countries to criminalise violent political behaviour.<sup>23</sup> Although there has also been a growing perception in Europe that the post-9/11 terrorism

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<sup>21</sup> The flight of Osman Hussain, one of the suspected July 2005 London terrorists, from London to Rome might otherwise have been more difficult.

<sup>22</sup> France suffered a series of major attacks in 1985-86 (by Hizballah-linked terrorists) and 1995 (by Algerian terrorists).

<sup>23</sup> C Warbrick, 'The European Response to Terrorism in an Age of Human Rights' (2004) 15 *European Journal of International Law* 989.

challenge is qualitatively different from the more 'traditional' forms of earlier decades,<sup>24</sup> many policy-makers in Europe continue to be influenced by their experiences with 'old' terrorism and the relative successes achieved by a law enforcement centred approach.<sup>25</sup>

There is also a 'systemic' disposition of the EU towards a law enforcement response. Terrorism is mentioned in the Treaties only once, as one of the forms of crime that should be targeted 'in particular' in the context of the internal security mandate of Article 29 TEU (focusing on police and judicial cooperation in criminal matters). The security mandate of the Common Foreign and Security Policy (CFSP) to 'strengthen the security of the Union in all ways'<sup>26</sup> may be broad enough to include international action against security threats posed by global terrorism within the remit of the CFSP and the European Security and Defence Policy (ESDP) elements it comprises, and the latter include tasks of rescue, peacekeeping, crisis management and peacemaking (the so-called 'Petersberg tasks'), which could obviously be of relevance to the fight against terrorism. Yet there is no explicit mention of the fight against terrorism as an objective of the CFSP, nor have any of the CFSP Petersberg tasks been linked to combating terrorist activity. Indeed, it seems far from certain that the EU could claim any legal competence to engage in a military operation abroad in order to prevent a terrorist attack on the EU, let alone to retaliate militarily against any such attack. Even if such a legal competence to act does exist, it seems highly improbable that, given the serious doubts in many EU capitals about both the legality and the effectiveness of military interventions abroad, the necessary unanimity in the Council for using ESDP instruments could be achieved. This contrasts rather strikingly with the US strategic culture and capability, which relies heavily on the use of 'hard power'<sup>27</sup> and must be counted among the contributory factors to the EU's reliance on a law enforcement approach.

Yet the focus on law enforcement by the EU does not limit internal police and judicial cooperation measures. As indicated above the internal and external nature of the terrorist challenge is a core element of the EU threat definition, so that the response must necessarily be both an internal and an external one. Because of the complex and multifaceted nature of the identified challenge, the response must also be a multidimensional one involving, as the *European Union Security Strategy* of 2003 emphasised, a 'mixture' of means beyond policing and enhanced judicial cooperation.<sup>28</sup>

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<sup>24</sup> T Delpech, *International Terrorism and Europe* (2002), Chaillot Paper No 56, Paris: Institute for Security Studies.

<sup>25</sup> J Stevenson, 'How Europe and America Defend Themselves' (2003) 82 *Foreign Affairs* 75.

<sup>26</sup> TEU art 11(1).

<sup>27</sup> W Rees, *Transatlantic-Counter Terrorism Cooperation: The New Imperative* (Abingdon/New York: Routledge, 2006) 69-73.

<sup>28</sup> *A Secure Europe in a Better World*, above n 12.

This multidimensional approach forms the basis of the *Counter-Terrorism Strategy* of December 2005. It defines the strategic objectives of EU action in countering the terrorist threat. These objectives and the main measures to be taken are regrouped under the four headings of 'PREVENT' (radicalisation and recruitment), 'PROTECT' (citizens and infrastructure), 'PURSUE' (terrorists across borders) and 'RESPOND' (to the consequences of terrorist attacks). The *Counter-Terrorism Strategy* has the merit of providing a broad structure for the variety of EU measures, a list of priorities and a justifying narrative. Yet in terms of the substance of the action planned or taken, the key document remains the *EU Action Plan* against terrorism, which has been frequently revised and added to since September 2001.<sup>29</sup> Together the *Counter-Terrorism Strategy* and the *Action Plan*, which currently comprises well over 200 individual measures, allow us to identify four key elements of the EU's response to post-9/11 terrorism which will be dealt with in turn.

## The Combination of Legislative and Operational Measures

The EU has adopted a considerable number of legislative instruments to enhance cross-border law enforcement capabilities within the EU. The most important of these has been the already mentioned *Framework Decision on Combating Terrorism* of 13 June 2002.<sup>30</sup> This provides not only for a common minimum definition of terrorist acts, focused on a specific intent to commit such an act and its actual or potential consequences for a country or an international organisation, but also for common minimum/maximum custodial penalties for directing (15 years) or participating in (eight years) a terrorist group. The common definition contains some vague and subjective elements,<sup>31</sup> it does not regulate all aspects of the definition of terrorist acts as an offence, and its minimum/maximum penalty levels leave wide margins of discretion to the member states. Nevertheless, the common definition is substantial enough to provide a common platform for the comprehensive criminalisation and prosecution of terrorist offences throughout the Union.<sup>32</sup> This platform is all the more important as several member states did not have specific provisions on terrorism as a criminal act in their criminal legislation or codes before the adoption of the *Framework Decision*. It is also worth noting that in its list of proscribed acts, the *Framework Decision* goes beyond the conventional *acquis* of the United Nations.<sup>33</sup>

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<sup>29</sup> Latest version: *Revised EU Action Plan on Terrorism*, EU Council Document No 7233/07 of 9 March 2007.

<sup>30</sup> [2002] OJ L 164.

<sup>31</sup> See E Symeonidou-Kastanidou, 'Defining Terrorism' (2004) 12 *European Journal of Crime, Criminal Law and Criminal Justice* 14.

<sup>32</sup> See E Dumitriu, 'The E.U.'s Definition of Terrorism: The Council Framework Decision on Combating Terrorism' (2004) 5 *German Law Journal* 585.

<sup>33</sup> See S Peers, 'EU Responses to Terrorism' (2003) 51 *International and Comparative Law Quarterly* 227.

Much legislative activity has been focused on the financing of terrorism. In addition to measures freezing funds and property of certain presumed terrorists and terrorist groupings on the basis of Council Regulation (EC) 881/2002,<sup>34</sup> there are other major instruments such as the *Council Framework Decision on the Execution of Orders Freezing Property or Evidence* of 22 July 2003,<sup>35</sup> the *Council Framework Decision on the Confiscation of Crime-Related Proceeds, Instrumentalities and Property* of 24 February 2005,<sup>36</sup> and the *Directive on the Prevention of the use of the Financial System for the Purpose of Money Laundering and Terrorist Financing* (the so-called 'Third Money Laundering Directive') of 26 October 2005.<sup>37</sup>

Although not solely directed at terrorists, the adoption of the *Framework Decision on the European Arrest Warrant* of 13 June 2002<sup>38</sup> was much accelerated because of anti-terrorism objectives, thereby generating one of the most advanced cross-border law enforcement instruments of the Union.<sup>39</sup> The European Arrest Warrant, which provides for the arrest and transfer of wanted persons by the police and judicial authorities of one member state on demand from the authorities of another member state, can also be regarded as an instrument of cross-border operational cooperation between national authorities in the fight against terrorism.

As a further counter-terrorism measure, the Commission introduced in 2003 a proposal for a *Framework Decision on a European Evidence Warrant*, on which political agreement was reached in the Council in June 2007.<sup>40</sup> Similarly to the European Arrest Warrant, the Evidence Warrant constitutes an application of the principle of mutual recognition to a judicial decision in the form of a European Warrant, in this case for the purpose of obtaining from the authorities of other member state's objects, documents and data for use in proceedings in criminal matters. The adoption on 15 March 2006 of *Directive 2006/24/EC on the Retention of Telecommunication Data*<sup>41</sup> was also motivated, at least in part, by counter-terrorism objectives. The Directive obliges telecommunication service providers to retain personal data such as the calling number, name and address of the subscriber and the identity of a user of an Internet Protocol address for a period of between six months and two years to ensure their availability for

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<sup>34</sup> [2002] OJ L 139.

<sup>35</sup> [2003] OJ L 196.

<sup>36</sup> [2005] OJ L 68.

<sup>37</sup> [2005] OJ L 309.

<sup>38</sup> [2002] OJ L 190.

<sup>39</sup> For a comprehensive analysis see R Blekxtoon and W van Ballegoij (eds), *Handbook on the European Arrest Warrant* (The Hague: TMC Asser Press, 2005); J Spencer, 'The European Arrest Warrant' (2005) 6 *The Cambridge Yearbook of European Legal Studies* 201.

<sup>40</sup> Provisional text: EU Council Document No 9913/07 of 25 May 2007. This text is still subject to national parliamentary scrutiny.

<sup>41</sup> [2006] OJ L 105.

the purpose of the investigation, detection and prosecution of terrorism and other serious crimes.

In parallel to these legislative counter-terrorism measures in relation to criminal law, financial and data-retention issues, the EU has placed right from the beginning an emphasis on enhancing the operational interaction between the national law enforcement and criminal justice systems of member states. A host of measures have been taken or are under negotiation to increase multinational investigations and the supply of information to Europol; to enhance the common threat analysis capacity through Europol and the Situation Centre (SitCen) in the Council; and to improve the exchange of relevant data — such as crime registry data on convictions and lost and stolen passports. Key instruments adopted for primarily operational purposes include the *Framework Decision on Joint Investigation Teams* of 13 June 2002,<sup>42</sup> the *Council Decision on the Implementation of Specific Measures for Police and Judicial Cooperation to Combat Terrorism* of 19 December 2002,<sup>43</sup> the *Council Decision on the Exchange of Information and Cooperation Concerning Terrorist Offences* of 20 September 2005,<sup>44</sup> the *Council Decision on the Exchange of Information Extracted from the Criminal Record* of 21 November 2005<sup>45</sup> and the *Framework Decision on Simplifying Exchange of Information and Intelligence Between Law Enforcement Agencies* of 18 December 2006.

The most recent step concerns progress with the so-called 'principle of availability', aimed at granting law enforcement officers access to all relevant law enforcement information available anywhere in the EU. In 2005, seven member states went ahead with the implementation of this principle by signing the so-called Prüm Convention.<sup>46</sup> On 12 June, the JHA Council reached political agreement on a Draft Decision in relation to the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime, which incorporates many aspects of the original Prüm Convention into the EU.<sup>47</sup> It establishes, inter alia, the conditions and procedures for the automated transfer of DNA profiles, dactyloscopic data and certain national vehicle registration data as well as the conditions for the supply of information on terrorist suspects, even if not requested, in order to prevent terrorist offences. It also seeks to improve cross-border police cooperation through various measures, including joint operations.

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<sup>42</sup> Its provisions are now part of the *Convention on Mutual Assistance in Criminal Matters* which entered into force on 23 August 2005 ([2000] OJ C 197).

<sup>43</sup> [2003] OJ L 16.

<sup>44</sup> [2005] OJ L 253.

<sup>45</sup> [2005] OJ L 322.

<sup>46</sup> Text: EU Council Doc No 10900/05 of 7 July 2007. For a critical assessment see, T Balzaq, D Bigo, S Carerra and E Guild, *Security and the Two-Level Game: The Treaty of Prüm, the EU and the Management of Threats* (CEPS Working Paper No 234, Centre for European Policy Studies, Brussels, 2006).

<sup>47</sup> EU Council Document No 10232/07 of 5 June 2007.

All these measures are aimed at reducing obstacles to cross-border movements of law enforcement officers and/or law enforcement intelligence for operational purposes. Legislative mutual recognition and law enforcement instruments have therefore been complemented by action aimed at enhancing operational capabilities, although no operational powers have been transferred to EU structures as such (see below). This corresponds not only to the internal security dimension of the EU's common threat definition, but also to the realisation that a variety of instruments are needed and that the EU is particularly vulnerable because of the abolition of controls at internal borders.

## The Combination of Internal and External Measures

In parallel with the above developments, the Union has made extensive use of its external relations instruments to pursue counter-terrorism objectives. There has in fact been a 'mainstreaming' of the fight against terrorism in EU external relations.

Two elements should be distinguished here. One is the fact that the EU has, to a significant extent, developed its external action in the domain of law enforcement cooperation with third countries — the most notable example being cooperation with the US. This has not only led to the conclusion of two agreements of Europol with the US government on data-exchange<sup>48</sup> and two EU-US agreements on extradition and mutual legal assistance,<sup>49</sup> but also to the exchange of liaison officers and invitations to US officials to participate in relevant EU Council working party meetings.<sup>50</sup> This development should be regarded as quite significant, as EU external relations in the third pillar domain were rather poorly developed before the 9/11 attacks pushed them much higher up on the EU's agenda. While US interests and pressures have had only a limited impact on internal EU approaches to the post 9/11 threat, they certainly greatly contributed to this 'externalisation' of the EU's anti-terrorism action, pushing the EU in certain cases — such as the EU-US agreement on the processing and transfer of Passenger Name Records (PNR) data<sup>51</sup> — to a rather controversial extension of its external counter-terrorism measures. Specific forms of EU anti-terrorism cooperation, though at a much less intensive level, have since also

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<sup>48</sup> Agreement between the US and the European Police Force (Europol), 6 December 2001, <<http://www.europol.eu.int/legal/agreements/Agreements/16268-2.pdf>> allowing for the exchange of strategic data, and Supplemental Agreement between the Europol Police Office and the United States of America on the Exchange of Personal Data and Related Information, 20 December 2002, <<http://www.europol.eu.int/legal/agreements/Agreements/16268-1.pdf>> allowing for the exchange of personal data.

<sup>49</sup> EU Council Doc No 9153/03 of 3 June 2003.

<sup>50</sup> On the various aspects of EU cooperation with the US in the internal security field after the 9/11 attacks see Rees, above n 27.

<sup>51</sup> The agreement was originally signed in May 2004, then annulled in May 2006 by the ECJ on application by the European Parliament eventually to be put provisionally into force pending ratification in October 2006. Text of the agreement: EU Council Do No 13216/06 of 11 October 2006.

been developed with other major international partners, such as the Russian Federation.<sup>52</sup>

The second element of the mainstreaming process has been a significant 'cross-pillarisation' of anti-terrorism objectives that have spread to external relations in the second pillar (common foreign and security policy ('CFSP') and its military ancillary, the European Security and Defence Policy (ESDP)) and external economic relations (common commercial policy). Examples in CFSP include the systematic use of 'political dialogues' with third countries (such as China and India) or with groups of third countries (such as EUROMED, the Asian countries in the Asia-Europe-Meetings (ASEM) and the countries of the Gulf Cooperation Council). A further example is the very active role taken by the EU at the UN (such as EU participation in the UN Counter-Terrorism Executive Directorate (CTED) assessment missions to Morocco, Kenya, Albania, Macedonia and Tanzania in 2005).<sup>53</sup> Examples in the first pillar context are the use of economic and financial aid and trade instruments of the EC to shore up the international coalition against terrorism and to support moderate reformers in countries with a high terrorist recruitment potential. Pakistan, for instance, has been granted preferential trade quotas in recognition of its contribution to the fight against terrorism.<sup>54</sup>

Since September 2001, the EU has also been systematically negotiating the insertion of clauses on cooperation against terrorism and terrorist financing into trade and cooperation agreements. Other examples are the technical assistance measures provided to Algeria and Morocco for upgrading maritime, air and border security in the fight against terrorism and the support for upgrading Morocco's counter-terrorism capabilities in fields like the combat against radicalisation in prisons.<sup>55</sup> The EU is also contributing to the anti-terrorism programs of the Jakarta Centre for Law Enforcement — and similar support for the African Union Counter-Terrorism Centre in Algiers is currently under negotiation.<sup>56</sup> Overall this quite comprehensive use of external instruments across the different pillars in parallel with internal measures reflects the link between the internal and external side of the EU's threat definition.

## The Combination of Repressive and Preventative Measures

Most of the above-mentioned internal legislative and operational measures are essentially aimed at improving law enforcement and are in that sense repressive in nature. More recently, especially since the Madrid and London terrorist attacks

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<sup>52</sup> EU Council Doc No 7233/07 of 9 March 2007, 38.

<sup>53</sup> For these other examples: EU Council Doc No 10043/06 of 31 May 2006, 28-32.

<sup>54</sup> See O Brown, *EU Trade Policy and Conflict* (Winnipeg: International Institute for Sustainable Development, 2005) 7.

<sup>55</sup> EU Council Doc No 7233/07 of 9 March 2007, 5-6, 16, 29.

<sup>56</sup> EU Council Doc No 9666/07 of 21 May 2007, 12.

demonstrated the 'home grown' dimension of the terrorist threat, the EU has moved towards complementing its repressive measures by enhancing its preventative measures. The principal result so far is the adoption in November 2005 of the already mentioned *European Union Strategy for Combating Radicalisation and Recruitment to Terrorism*.<sup>57</sup> This Strategy is focused on disrupting the activities of networks and individuals that draw people into terrorism — through, inter alia, an increased monitoring of the internet (involving Europol), coordination of national measures against terrorist incitement as well as action programs both to encourage engagement with moderate Muslim organisations and to enhance language and other training for foreign Imams in Europe. The Strategy is marked by a strong emphasis on improving long-term integration and the dialogue with Muslim communities and religious authorities.<sup>58</sup> Measures implementing the 2005 Strategy include:

- the creation of an expert group on violent radicalisation;
- a (classified) report on recruitment to terrorism in the EU (and the adoption of a coordinated long-term strategy based upon it);
- a report by the EU Monitoring Centre on Racism and Xenophobia in Vienna<sup>59</sup> on the impact of the London terrorist attacks on Muslim communities in the EU;
- the establishment of a high-level group on minorities;
- the organisation of special journalist training programs; and
- a substantial investment in research on radicalisation phenomena.<sup>60</sup>

Further measures with a particular focus on the 'Islamist' side of the threat include common monitoring and evaluation mechanisms of Islamist websites; encouraging Muslim communities not to rely on foreign Imams; and research on inter-faith dialogues in the 6<sup>th</sup> and 7<sup>th</sup> Research Framework Programs of the EU.<sup>61</sup> External prevention measures have included the provision of training for police forces to reduce radicalisation potential in the Balkans; support for the build-up of an interfaith dialogue in Indonesia and the Mediterranean; and EU assistance to Algeria and Morocco on the identification of radicalisation patterns and preventative measures.<sup>62</sup> This greater effort to understand and address the roots of 'home grown' terrorism reflects both the strong internal side of the EU's threat definition and an appreciation of the complexity of the causes of terrorism.

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<sup>57</sup> EU Council Doc No 14781/1/05 of 24 November 2005.

<sup>58</sup> Ibid, in particular [11], [13], [15].

<sup>59</sup> Since 1 March 2007 the EU Agency for Fundamental Rights.

<sup>60</sup> European Commission Memo/06/269 of 6 July 2006: Commission activities in the fight against terrorism, and part 1 of EU Council Doc No 7233/07 of 9 March 2007.

<sup>61</sup> EU Council Docs No 9666/07 of 21 May 2007, 4; No 10043/06 of 31 May 2006, 4; and No 7233/07 of 9 March 2007, 7.

<sup>62</sup> For these and other examples, see part 1 of EU Council Doc No 7233/07 of 9 March 2007.

## The Strengthening of European Union Institutional Capacity

Since 9/11 the mandate and actual role of the European police organisation Europol and of the cross-border prosecution unit Eurojust have been strengthened several times in terms of both their analysis functions and the support they receive for cross-border investigations and prosecutions.<sup>63</sup> The information flow from national authorities to these agencies has also been enhanced. Both institutions play a significant role in counter-terrorism both by providing cross-border assessments of anti-terrorism cases and by bringing national authorities together to work more effectively on such cases.<sup>64</sup> In addition, the tasks of some existing structures, such as the SitCen in the Council and the Police Chiefs Task Force (PCTF), have been redefined or reoriented to allow for a new focus on terrorism. The SitCen, for example, has been enabled to receive and process information from national intelligence services. The PCTF, although a non-permanent body with ill-defined powers, has been effectively mandated to play a role in the implementation of a common crime intelligence model and the identification and transfer of best counter-terrorism practices in local policing.<sup>65</sup> Newly created institutional structures, such as the European Police College (CEPOL) and the new EU external border management agency FRONTEX have also been immediately assigned tasks in the fight against terrorism.<sup>66</sup> The European Commission has undertaken a partial reorganisation to enhance its administrative capacity in the anti-terrorism field<sup>67</sup> and has reallocated funding instruments for research into terrorist issues.<sup>68</sup>

All this is clearly aimed at equipping the Union with a minimum of common response capacity, in addition to coordinated national capacities, to the defined common terrorist threat. Last but not least, with the creation of the Office of the EU's *Anti-Terrorism Coordinator*, a completely new senior office with a small supporting staff has been set up in the General Secretariat of Council in 2003 to monitor the implementation of the EU *Action Plan* and help coordinating EU and national counter-terrorism efforts.

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<sup>63</sup> Of particular importance has been the entry into force on 18 April 2007 of the third amending protocol to the Europol Convention (opened for signature 27 November 2003, OJ C 2). This increases the capacity of Europol to support the member states in the fight against terrorism and other forms of serious cross-border crime. As a result of the Protocol, Europol officers can now make information from ongoing Europol analysis files directly available to the joint investigation team. It has also become possible for Europol to receive directly and process relevant information from the joint investigation team. In addition, Europol has also been given the possibility to request individual member states to institute criminal investigations.

<sup>64</sup> See the elucidating examples in the latest Eurojust Annual Report, Eurojust, *Annual Report 2006*, Eurojust, The Hague 2007, 31-4, 43-4.

<sup>65</sup> EU Council Doc No 7233/07 of 9 March 2007, 21.

<sup>66</sup> A typical example is the inclusion of terrorism in the risk analysis function of FRONTEX as regards the EU's external borders (EU Council Doc No 10043/06 of 31 May 2006, point 2.5.8).

<sup>67</sup> Reformed unit D/1 in the Directorate General Justice Freedom and Security.

<sup>68</sup> See European Commission Press Release No IP/05/1031 of 2 August 2005. Much more substantial funding allocations to the fight against terrorism have been allocated for the financial period 2007-2013.

## The Limitations of and Problems with the European Union's Response

### A Response Based on Cooperation Rather than Integration

With its broad range of measures in each of the contexts discussed above — legal and operational, internal and external, repressive, preventative and institutional — the EU's response to the post-9/11 terrorist threat appears substantially in line with its current threat definition. Further, that response is also quite substantial by the EU's own standards. For an actor like the EU, which has to struggle with particular obstacles of legal and institutional complexity, such as the pillar structure, and has to bring together 27 member states that remain fully sovereign in most matters of counter-terrorism, the agreement on such a comprehensive common response action plan is surely no minor achievement. Yet the very nature of the EU response given imposes certain limitations on the Union's capacities as an actor in the anti-terrorism field. This response has so far been based largely on cooperation between, rather than integration<sup>69</sup> of, the national systems.

The member states have so far clearly preferred to use instruments that are aimed at facilitating and supporting cooperation and coordination between their national counter-terrorism structures and capabilities. They have not transferred any competences to the EU in the field of anti-terrorism, and have abstained from creating any legal framework and structures at EU level that could form a basis for a legal and structural integration of their capabilities. This tendency is clearly shown in the legislative field by a preference for only minimal(ist) harmonisation of national criminal law (an example is the agreement on only minimum maximum penalties for terrorist offenders in the *Framework Decision on Combating Terrorism*) as well as mutual recognition (a key example is the *European Arrest Warrant*) instead of comprehensive harmonisation of relevant criminal law. In the operational field, the same tendency can be discerned. There is, for example, a persistent refusal to transfer any operational powers to the EU law enforcement agencies such as Europol, which in spite of its now nearly 600 staff must still content itself with supporting information exchange and analysis functions. Even the EU's Anti-terrorism 'Coordinator' office — which is currently in limbo as its first office-holder decided at the beginning of 2007 not to seek a renewal of his appointment<sup>70</sup> — has no actual powers to coordinate, but rather the office can simply monitor how the member states implement common measures and suggest improvements.

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<sup>69</sup> The term of 'integration' is used here — along the lines of the definition of economic integration developed in B Balassa, 'Towards a Theory of Economic Integration' (1961) 14(1) *Kyklos* 1, 1-17 — with the very basic meaning of a process leading to the creation of single new system through the merging of several separately existing ones as opposed to 'cooperation' as a process where these systems interact but remain essentially separate.

<sup>70</sup> L Kubosova, 'EU in No Hurry to Appoint a New Anti-Terror Chief', *EU Observer*, 9 July 2007.

The main reasons for this preference for cooperation rather than integration in the anti-terrorism domain are not difficult to identify. Security, both internal and external, is a very sensitive issue from the point of view of national sovereignty, as well as being highly topical in domestic politics. Accordingly, national governments are wary of subjecting themselves and their national anti-terrorist capabilities to supranational decision-making, more extensive common legal rules and European operational command structures. Another factor is the absence of a real common (ie, largely identical) threat perception of the member states behind their common threat definition.<sup>71</sup> The terrorist threat assessments of EU governments are in fact still largely national assessments. Although a considerable effort has been made at the EU level to improve the 'common' analysis of terrorist threats, especially through the reports drawn up by Europol and the assessments provided by the SitCen, member states continue to assess these threats primarily from a national perspective. They are seen as threats to national structures, within national boundaries that require a specific national response. An example is the UK's counter-terrorism strategy of July 2006.<sup>72</sup> The sections of the strategy document dealing with threat assessment do not contain any reference to a European dimension of the terrorist threat. Rather what is referred to is essentially a threat to British institutions and territory.<sup>73</sup> The prevalence of national threat assessments has also, to some extent, been identified as a problem by Europol. In the TESAT report published in May 2006, Europol pointed out that the 'assessment of the threat level' posed by fundamentalist jihadist terrorism 'varies depending on the Member States, some of which still consider that they are under no direct threat'.<sup>74</sup> Inevitably, therefore, the national sense of urgency, national priority definitions and national resources committed to anti-terrorism measures vary considerably from one member state to another, reducing the willingness to engage in a more 'integrated' response.

As a result the EU has, five years after the 9/11 attacks, still no harmonised legal framework and no operational capabilities of its own as regards the fight against terrorism. While a harmonised legal framework and strong central operational agencies are no guarantee of maximum efficiency in the fight against terrorism, as the US example has shown, it is also clear that there is a price to be paid for not making any effort to integrate the national legal systems and structures. Their continuing difference and autonomy not only means that a huge continuous coordination effort is needed — the proliferation of agencies, working parties

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<sup>71</sup> See on this point J Monar, 'Common Threat and Common Response? The European Union's Counter-Terrorism Strategy and Its Problems' (2007) 42(3) *Government and Opposition* 292.

<sup>72</sup> HM Government, *Countering International Terrorism: The United Kingdom's Strategy: July 2006*, HMSO, London, 2006.

<sup>73</sup> *Ibid* [3]-[4], [25]-[40].

<sup>74</sup> Europol, *Terrorist Activity in the European Union: Terrorism Situation and Trend Report (TESAT) 2004-2005* (The Hague: Europol, 2006) 19.

and expert groups is a testimony to that — but also that frequent friction and the partial failure of common efforts are inevitable. One example in this respect is the judgments rendered by the constitutional courts of Germany, Finland, Poland and Cyprus in 2005 and 2006 with respect to the compatibility of national provisions transposing the *Framework Decision on the European Arrest Warrant*. At least in the case of the judgment of the German *Bundesverfassungsgericht*,<sup>75</sup> the decision signalled a marked ‘constitutional distrust’ in the systems of the other member states that might not in all procedural aspects be similar to German standards and, as a result, also of a certain measure of distrust in the principle of mutual recognition as long as procedural standards are not harmonised, ideally in line with the German standards.<sup>76</sup> Another example is provided by Europol’s continuing difficulties in obtaining the information it needs from national authorities<sup>77</sup> — which are often not as cooperative as they should be.

## The Implementation Deficit

Linked to the ‘costs’ of an essentially cooperative rather than integrative approach are the problems of implementation of EU anti-terrorism measures. The member states are much better at agreeing on comprehensive packages of measures than at implementing them in an effective manner. The half-yearly progress reports on the implementation of the *Counter-Terrorism Strategy* and the *Action Plan* abound with examples of agreed measures not being implemented on time or being only partially implemented.<sup>78</sup> Part of the implementation problems are due to the requirement of unanimity in the Council. The hugely delayed *Framework Decision on the European Evidence Warrant* (originally planned for 2004, still not adopted at the beginning of 2008) and the *Framework Decision on the organisation and content of the exchange of information extracted from criminal records between Member States on the content of the exchange of information from criminal records* (proposed by the Commission as early as 2005, but so far only the object of a ‘general approach’ agreed on in the Council) are just two of many examples where planned EU measures of obvious relevance for the fight against terrorism have not been implemented on time.

The latest progress report describes the process of decision-making in relation to implementation in the Council as ‘slow and uncertain’.<sup>79</sup> This is a rather

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<sup>75</sup> Judgment of 18 July 2005, BVerfG, 2 BvR 2236/04.

<sup>76</sup> For an analysis see F Geyer, ‘The European Arrest Warrant in Germany: Constitutional Mistrust Towards the Concept of Mutual Trust’ in E Guild (ed), *Constitutional Challenges to the European Arrest Warrant* (Nijmegen: Wolf Publishers, 2006) 101.

<sup>77</sup> On Europol’s information problems see the summary of the Chairman of the Council’s art 36 Committee of the High Level Conference on the Future of Europol of 23/24 February 2006 (Council Doc No 7868/06 of 29 March 2006).

<sup>78</sup> These reports were formerly provided by the Anti-terrorism Coordinator, Gijs de Vries, and since his departure in March 2007 by unit DG H 2 of the General Secretariat of the Council.

<sup>79</sup> EU Council Doc No 9666/07 of 21 May 2007, 3.

carefully worded characterisation for a situation that is marked by a serious gap between the often rapidly agreed upon declaratory common objectives and the actual political will of the member states to quickly and effectively achieve them. Yet it would be wrong to reduce this problem to one of voting requirements in the Council. It has also to do with the aforementioned absence of either a real common threat perception or of its corollary: a common sense of urgency. In addition, officials in the Council working parties are often much more inflexible on details than their ministers in the JHA Council on political programming and there is undoubted complexity in compromise-building in the (over-)extended EU of 27.

The gap between declared objectives and actual implementation appears even wider if one looks at legislative implementation at the national level. By May 2007, the 2002 *Framework Decision on Combating Terrorism*, arguably the most important legislative measure of EU action in the field, had still not been fully implemented by five member states. As at the same date, the May 2000 Convention on mutual legal assistance, essential for effective judicial cooperation, had still not been fully implemented by seven member states and the *Framework Decision on the execution of orders freezing property or evidence* of 22 July 2003 had not been implemented at all by 14 member states. These deficits were in spite of repeated deadlines set by the Council.<sup>80</sup> Part of the problem is that the Commission cannot put much pressure on non-fulfilling member states because of its limited powers in the domain of the third pillar. Of particular importance in this context is the absence of 'normal' treaty infringement procedures as enshrined in Articles 226 to 228 TEC, the possibilities of infringement actions against member states under Article 35(7) TEU being very limited.<sup>81</sup> Yet the core of the problem is that when it comes to implementation in the anti-terrorism domain, the EU still has to struggle with 27 largely autonomous and different systems with their own political priorities, domestic politics, institutional structures and parliamentary procedures. The absence of a tight implementation discipline can also affect the operational side of the measures to be implemented, as Europol's aforementioned problems in obtaining all relevant information from national police authorities demonstrate.

## The Legitimacy Deficit and Fundamental Rights Protection Issues

The last few years have again shown, at a global level, that anti-terrorism measures, especially in the spheres of policing and criminal justice, are among

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<sup>80</sup> On these and other missed implementation deadlines see Council Doc No 9666/07 ADD 1 REV 2 of 4 June 2007.

<sup>81</sup> The European Commission placed a major emphasis on the absence of effective infringement procedures before the ECJ under Title VI TEU in its major June 2006 initiative to use the art 42 TEU 'passerelle' procedure for a 'communitarisation' of police and judicial cooperation in criminal matters. See COM (2006) 331 of 28 June 2006, 12.

the most invasive forms of action states are willing to use against individuals, with a corresponding negative impact on civil liberties and human rights. The absence of any law enforcement powers or of a criminal justice system at the EU level 'protects' the Union in a certain sense against the risk of infringing, via its own institutions and agencies, civil liberties and human rights. Yet the EU is an increasingly important provider of framework legislation on cross-border anti-terrorism matters, whose definition (or non-definition) of standards of protection can have an impact on how individuals are treated in cross-border police operations and judicial proceedings. The EU has been setting up more and more data-exchange and analysis instruments and procedures that also deal with personal data, and it serves, mainly on the basis of EC competences, as a framework for the implementation of UN Security Council Resolutions regarding financial sanctions against suspected terrorists. There is also a risk that major anti-terrorism objectives are agreed upon by the member states in the Council (in the form of program documents or even framework legislation), which can thereafter be used for sanctioning more controversial restrictive measures at the national level. National governments can use the argument of an existing broad European consensus to push through more invasive measures at the domestic level, and there have indeed been serious questions about the real need for some of the invasive measures agreed upon in the Council.<sup>82</sup> It would therefore seem all the more important that decisions in the counter-terrorism field are vested with the necessary legitimacy. Yet this legitimacy cannot be taken as a given as long as the European Parliament has no co-decision powers on relevant legislation on police and judicial cooperation in criminal matters.<sup>83</sup> National parliaments cannot really compensate for the absence of democratic control and scrutiny at the European level as they are not in a position to control the collective element of decision-making in the Council and are more often than not presented with a *fait accompli* by their national governments as regards the outcome of negotiations on anti-terrorism measures.

Effective judicial control of anti-terrorism measures, especially with regard to the protection of fundamental rights, is surely another crucial condition for their

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<sup>82</sup> Some examples are given — from a very critical perspective — in the 'Statewatch Scoreboard on Post-Madrid Counter-Terrorism Plans' (March 2004). <<http://www.statewatch.org/news/2004/mar/swscoreboard.pdf#search=%22Statewatch%20EU%20action%20plan%20terrorism%22>>.

<sup>83</sup> The Parliament needs only to be consulted on such legislation — which gives it no power of amendment or rejection — and the ECJ's jurisdiction is limited by several member states not accepting preliminary rulings in this domain and by a more extensive public security exemption (TEU art 35). See, on this issue, European Parliament Policy Unit, 'Citizens' Rights and Constitutional Affairs: The fight against terrorism: How to improve effectiveness with due regard for fundamental rights', note prepared for the Joint Parliamentary Meeting between the European Parliament and the National Parliaments on 2/3 October 2006 in Brussels (EP Doc No NT\630666EN.doc).

legitimacy in any system firmly based on the principle of the rule of law.<sup>84</sup> The Union currently fulfils this condition at best partially. The current treaty provisions still impose important limitations on the role of the European Court of Justice (ECJ) in terms of fundamental rights protection. On issues of police and judicial cooperation in criminal matters under Title VI TEU, the Court may by virtue of Article 35(2) TEU receive requests for preliminary ruling only from the jurisdictions of member states that have made a declaration to that effect.<sup>85</sup> Unlike the situation under the TEC, these requests cannot concern the interpretation of primary law but only Framework Decisions, Decisions and Conventions. Other acts of the Council such as 'common positions' are excluded. As regards annulment proceedings, pursuant to Art 35(6) TEU these can only be introduced by a member state or the Commission, not by individuals. All these are serious limitations; particularly in light of the important role preliminary rulings have played in the development of fundamental rights protection under the TEC and the importance of annulment in cases of EU anti-terrorism measures directed against individuals. A further restriction is the absence of any possible action for damages under Title VI TEU.

In a number of cases, the Court has given a restrictive interpretation of these limitations, affirming its general judicial control functions on the basis of rule of law and legal coherence considerations. After an earlier general affirmation by the ECJ in Case C-170/96<sup>86</sup> of its right to interpret the third pillar provisions with implications for the EC framework, even if such a competence was not explicitly provided for by the Treaties, the Court of First Instance (CFI) even went a step further in asserting its judicial control powers in Case T-228/02 *Modjahedines*.<sup>87</sup> This case, coming after a range of cases dealing with challenges to the placing of suspected individuals and entities on the so-called 'terrorist lists' for the purpose of financial and other property sanctions (see below), concerned the financial sanctions adopted by the Council against the alleged terrorist organisation *Modjahedines du peuple d'Iran* on the basis of EC Regulation 2580/2001.<sup>88</sup> That EC Regulation, in turn, implemented a common position adopted on the basis of Articles 15 TEU (CFSP) and 34 TEU (AFSJ)<sup>89</sup> which was the initial EU decision to freeze funds. While stating that scrutiny of the common

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<sup>84</sup> This point is also emphasised in E Guild and S Carrera, 'No Constitutional Treaty? Implications for the Area of Freedom, Security and Justice' (CEPS Working Document No 231, Centre for European Policy Studies, Brussels, 2005) 4.

<sup>85</sup> According to information provided by the General Secretariat of the Council, only 15 of the 27 member states had made a declaration to that effect on 30 June 2007.

<sup>86</sup> Case C-170/96, *Commission v Council* [1998] ECR I-2763.

<sup>87</sup> Case T-228/02, *Modjahedines* [2006] ECR II-4665.

<sup>88</sup> 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 344/70 of 28 December 2001.

<sup>89</sup> *Council Common Position 2001/931/CFSP on the application of specific measures to combat terrorism*, [2001] OJ L 344/93.

position was, in principle, outside its jurisdiction, the Court nevertheless asserted that it had jurisdiction to hear an action for annulment ‘to the extent that, in support of such an action, the applicant alleges an infringement of the Community’s competences’.<sup>90</sup> As a result the Court felt in a position to annul the EC Decision to implement the second and third pillar measures and freeze the Modjahedines’ assets on the grounds that it did not contain a sufficient statement of reasons and did not observe the right to a fair hearing.<sup>91</sup>

With its judgment in the *Modjahedines Case*, the CFI not only reaffirmed the Court’s power to review any third pillar measures with regard to their implications for the first pillar domain, but also its general role in safeguarding the application of the rule of law across the pillar divide. The rule of law approach to ‘bridge’ that divide has been further developed in two recent judgments of the ECJ in appeal proceedings against dismissal orders issued by the CFI — Cases C-354/04 P *Gestoras pro Amnesia* and C-355/04 P *Segi*. Those dismissal orders had declared inadmissible actions for damages by two groups that had been the object of financial sanctions decisions as alleged terrorist groups by virtue of an EU common position.<sup>92</sup> While recognising that the provisions under Title VI TEU did not provide for any action for damages, and recommending a corresponding reform of the EU legal framework,<sup>93</sup> the Court held that because pursuant to Article 6 TEU, the Union is based on the rule of law and the respect of fundamental rights: ‘the institutions are subject to review of the conformity of their acts with the treaties and the general principles of law, just like the Member States when they implement the law of the Union’.<sup>94</sup> The Court thereby affirmed that all measures adopted by EU institutions that directly affect individual rights, independently from the pillar under which they are adopted, can be made subject to judicial review by the ECJ under the preliminary rulings procedure. The Court extended this position to include Title VI TEU ‘common positions’<sup>95</sup> although these are not listed in Article 35(1) TEU as acts on which a preliminary ruling can be requested.

While the Court has clearly affirmed its own judicial control function of anti-terrorism measures on the grounds of rule of law principles, it has until now not given much content to that protection. It is true that in the aforementioned *Modjahedines Case*, the CFI annulled the EC Decision to freeze the Modjahedines’ assets on grounds of not containing a sufficient statement of reasons and non-observation of the right to a fair hearing. Yet the annulment only concerned an EC implementing decision, and not the common positions on

<sup>90</sup> Case T-228/02, *Modjahedines* [2006] ECR II-4665, [56].

<sup>91</sup> *Ibid* [173].

<sup>92</sup> Cases C-354/04 P, *Gestoras pro Amnesia* [2007] ECR I-1579 and C-355/04 P, *Segi* [2007] ECR I-1657.

<sup>93</sup> *Ibid* [50].

<sup>94</sup> *Ibid* [51].

<sup>95</sup> *Ibid* [54].

which it was based. In its ruling, the CFI emphasised that the non-observation of the above-mentioned legal guarantees provided a ground of annulment only because the UN Security Council Resolution 1373(2001)<sup>96</sup> at the origin of the common position had in fact left discretion to the Council as regards the individualisation of the sanctions concerned. As a result, the Council was bound to observe all applicable legal guarantees under EC law.<sup>97</sup> The Court explicitly recognised in this context the 'broad discretion' of the Council in deciding on the imposition of the sanctions. It declared that 'the Community Courts may not, in particular, substitute their assessment of the evidence, facts and circumstances justifying the adoption of such measures for that of the Council', so that its judicial review role would need to be limited to the respect of procedural rules and the exclusion of a manifest error of judgement or abuse of power.<sup>98</sup> This is not the only instance of the Court showing reluctance to review the substantive grounds of the Council for imposing sanctions on individuals in the fight against terrorism. In two of the earlier 'terrorist lists' cases — Case T-306/01 *Yusuf* and T-315/01 *Kadi*<sup>99</sup> — the CFI had even refused to enter into the merits of the case by adopting the position that the UN Security Council Resolutions at the origin of the sanctions imposed enjoyed supremacy over EC/EU law, a reasoning that has attracted vigorous criticisms.<sup>100</sup> In the two subsequent 'terrorist lists' cases — Case T-253/02 *Ayadi*<sup>101</sup> and Case T-49/04 *Hassan*<sup>102</sup> — the CFI also rejected the applications for annulment against the sanctions. This time it did so essentially on the grounds of the responsibility of the member states to ensure in the given case adequate protection of the rights of the individuals within their jurisdiction, including the rights of those individuals to seek a 'de-listing' of their names by the UN Sanctions Committee. The existence of this responsibility was strongly affirmed by the Court.

As far as the protection of personal data in the context of anti-terrorism measures is concerned, the Court has so far avoided any substantive decision. In its 2004 application for annulment of the controversial EU-US agreement on the processing and transfer of PNR data, the European Parliament had sought the termination of the agreement because of both its concerns about adequate protection of personal data and the aim to assert its co-decision rights. In its judgment of 30 May 2006, the ECJ in fact annulled the Council decision to conclude the

<sup>96</sup> UN SC Res 1373 (2001) of 28 September 2001.

<sup>97</sup> Case T-228/02, *Modjahedines* [2006] ECR II-4665, [107].

<sup>98</sup> *Ibid* [159].

<sup>99</sup> Case T-306/01 *Yusuf* [2005] ECR, II-3533 and T-315/01 *Kadi* [2005] ECR, II-3649.

<sup>100</sup> See, inter alia, D Simon and F Mariatte, 'Le Tribunal de première instance des Communautés: Professeur de droit international' (2005) *Europe* 12, 6-12; H Labayle, 'Architecte ou Spectatrice, la Cour de Justice de l'Union dans l'espace de Liberté, Sécurité et Justice, à Paraître' (2006) *Revue trimestrielle de Droit Européen* 1, 38-45.

<sup>101</sup> Case T-253/02 *Ayadi v Council* [2006] ECR II-2139, under appeal.

<sup>102</sup> Case T-49/04 *Hassan v Council* [2006] ECR II-52, under appeal.

agreement, but did so only on the grounds that the first pillar legal basis (art 95 TEC) of the agreement was inappropriate. The ECJ did not enter into the substance of the data protection arguments put forward by the Parliament.<sup>103</sup> In this case, as well as in a range of the ‘terrorist lists’ cases, the Court therefore showed a considerable degree of ‘judicial restraint’. While the principle of judicial review of Council measures in the fight against terrorism has certainly been affirmed by the Court in recent years, the content and extent of this review currently appears relatively thin.

Finally, it should also be mentioned that the Council has not been in any hurry to adopt legislation aimed at counterbalancing the growth of repressive measures in the form of texts ensuring an EU-wide protection of the rights of individuals caught by those measures. The *Framework Decision on procedural rights in judicial proceedings*, proposed by the Commission in April 2004<sup>104</sup> and originally due to be adopted at the end of 2005, is still on the Council’s negotiating table. This seems all the more regrettable from a fundamental rights protection point of view as the judicial rights provided for by the *EU Charter of Fundamental Rights* continue, along with the Charter, not to have any binding status.

## Conclusion

At the outset I raised the question of how, and how well, the EU has used its improved potential after the *Treaty of Amsterdam* to emerge as an actor in the fight against terrorism. There can be no doubt that the Union has indeed emerged as an actor in its own right in this field, both at an internal and at an international level. Today the fight against terrorism is no longer, as it was a decade ago, within the exclusive domain of the member states. Those states may still have a largely national perception of terrorist threats and of their domestic priorities in responding to them, but when it comes to cooperating across borders, and the post-9/11 challenge is essentially a cross-border challenge, then the EU is now the uncontested primary framework for doing so: even for pursuing common approaches towards third countries.

When it comes to assessing the way in which the EU’s potential has been realised so far, the obvious overall conclusion is that its role in the ‘war on terror’ has evolved through cooperation rather than through integration. Member states continue to be highly protective of national sovereignty and their position as primary providers of internal security. They do not necessarily share either a perception of threat or a corresponding sense of urgency in matters of counter-terrorism. As a result, they want to maintain a significant degree of autonomy and to limit as far as possible any necessity to adapt their national legislation, structures and capabilities to common objectives and requirements.

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<sup>103</sup> Joined Cases C-317/04 and C-318/04, *European Parliament v Council* [2006] ECR I-4721.

<sup>104</sup> COM(2004) 328 of 28 April 2004.

Instruments of cooperation rather than integration, such as mutual recognition of judicial decisions, enhanced data-exchange and common structures supporting cross-border cooperation, are therefore the preferred method of proceeding. Most of the progress achieved since 9/11 is indeed due to such instruments.

The answer to the question of how well the EU has used its potential as an actor in this field must be a more nuanced one. On the one hand, it has to be said that there is no other example in the world of a group of countries agreeing on a comprehensive common strategy and action plan similar to that of the EU. As security, both in its internal and external dimension, arguably remains the area in which the European integration process has made least progress, this must be regarded as a major achievement in itself. It can also not be denied that the EU has managed to arrive at a reasonably specific common threat definition that avoids any simplistic reductions to an 'Islamic threat', and a response that is sufficiently multidimensional to address the different aspects — internal and external, legislative and operational, repressive and preventative as well as institutional — of this threat. There is today a common platform of legislation, operational mechanisms and institutional structures that, whatever its limitations, nevertheless provides clear added value as far as the interaction between the national systems in the fight against terrorism is concerned.

Yet the almost purely cooperative approach has major limitations. These include the absence of real common operational capabilities, a continuing significant diversity of national legislation and structures (which create friction and require a huge coordination effort) and serious problems regarding the effective implementation of objectives and measures agreed upon at the EU level. The preference for cooperation rather than integration also contributes to the legitimacy deficit of the Union in the anti-terrorism domain: the restrictions imposed on the roles of both the European Parliament and the Court of Justice reflect the reluctance of at least some member states to subject themselves in the sensitive internal security domain to 'supranational' parliamentary control and judicial review procedures. This justifies some concern over the level of protection of the rights of individuals in relation to EU anti-terrorism measures. Although the ECJ has strongly asserted its right to judicially review such measures, it has on substantive issues followed a line of judicial restraint. Such restraint corresponds all too well to the political climate. Member states want to exclude as far as possible any judicial interference with their preferred form of cooperation that continues to be based very much on the principles of sovereignty and territoriality.

The EU as a system may have many deficits in terms of effectiveness and legitimacy. Nevertheless it is definitely more dynamic than most national systems. The agreement reached at the June 2007 European Council on a framework for

the new Reform Treaty,<sup>105</sup> planned to be negotiated in Autumn 2007 and to enter into force in 2009, also offers some development perspectives for the EU's role in the anti-terrorism domain. Various predicted reforms, including the abolition of the pillar structure, enhanced competences in the criminal justice field (especially as regards criminal procedure) and an extended use of qualified majority voting could strengthen the EU's effectiveness as an actor in the sphere of counter-terrorism. The anticipated removal of most of the restrictions on the role of the ECJ, the extension of the European Parliament's co-decision rights to most of the current Title VI TEU matters as well as the legal codification of the *Charter of Fundamental Rights* could further strengthen its legitimacy. If all these reforms are implemented, the Union will remain a collective actor in the fight against terrorism — but it will be a stronger and more legitimate one.

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<sup>105</sup> See EU Council Document No 11177/07 of 23 June 2007 (Presidency Conclusions), Annex I: *Draft IGC Mandate*.