

# A DECADE OF EU COUNTER-TERRORISM AND INTELLIGENCE: A CRITICAL ASSESSMENT

## INTRODUCTION

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The Treaty on the European Union (EU) stipulates that one of the key objectives of the Union is to provide citizens with a high level of safety within an Area of Freedom, Security and Justice (AFSJ). Given the fact that the fight against terrorism is a prominent aspect of this general objective, it is remarkable that, in spite of its political relevance and decade-long history, it has only relatively recently received due attention in the academic community<sup>1</sup>. Only a handful of post-9/11 edited volumes and special issues have focused on specific aspects of the EU counterterrorism efforts<sup>2</sup> and initial monographs on the subject have only been relatively recently published by the three editors behind this special issue: Argomaniz<sup>3</sup> has produced a theoretically informed assessment of the coherence of the EU response, Bures<sup>4</sup> has examined the extent to which the EU can offer an added

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<sup>1</sup> A selection of relevant contributions would include: Monica den Boer and Jörg Monar, 'Keynote Article: 11 September and the Challenge of Global Terrorism to the EU as a Security Actor', *Journal of Common Market Studies*, 40/4 (2002), pp. 11-28; John Occhipinti, *The Politics of EU Police Cooperation: Towards a European FBI?* (Boulder, CO: Lynne Rienner, 2003); Edwin Bakker 'Differences in Terrorist Threat Perceptions in Europe', in Dieter Mahncke and Jörg Monar (eds.) *International Terrorism. A European Response to a Global Threat?* (Brussels: P.I.E Peter Lang, 2006); Daniel Keohane *The EU and counter-terrorism* (London: CER, 2005); Doron Zimmermann, D., 'The European Union and Post-9/11 Counterterrorism: A Reappraisal', *Studies in Conflict and Terrorism*, 29/1, (2006), pp. 123-145; Oldrich Bures, 'EU Counterterrorism: A Paper Tiger?', *Terrorism and Political Violence*, 18/1 (2006), pp. 57-78; David Spence (ed.), *The European Union and Terrorism* (London: John Harper, 2007); Björn Müller-Wille, 'The Effect of International Terrorism on EU Intelligence Co-Operation', *Journal of Common Market Studies*, 46/1 (2008), pp. 49-73; Raphael Bossong, 'The Action Plan on Combating Terrorism: A Flawed Instrument of EU Security Governance', *Journal of Common Market Studies*, 46/1 (2008), pp. 27-48; Javier Argomaniz, 'Post-9/11 Institutionalisation of European Union Counterterrorism: Emergence, Acceleration and Inertia', *European Security*, 18/2 (2009), pp. 151-172; Christian Kaunert, 'The External Dimension of EU Counterterrorism Relations: Competences, Interests, and Institutions', *Terrorism and Political Violence*, 22/1 (2010), pp. 41-61; Sarah Léonard, 'The Use and Effectiveness of Migration Controls as a Counterterrorism Instrument in the European Union', *Central European Journal of International and Security Studies*, 4/1 (2010), pp. 32-50.

<sup>2</sup> See: Cyrille Fijnaut, Jan Wouters and Frederick Naert (eds.) *Legal Instruments in the Fight Against International Terrorism: a Transatlantic Dialogue* (Leiden: Nijhoff, 2004); Dieter Mahncke and Jörg Monar (eds.) *International Terrorism: A European Response to a Global Threat?* (Brussels: PIE Peter Lang, 2006); David Spence (ed.) *The European Union and Terrorism* (London: John Harper Publishing, 2007); Geoffrey Edwards and Christoph O. Meyer, 'Introduction: Charting a Contested Transformation', *Journal of Common Market Studies*, 46/1 (2008), pp. 1-25; Laura C. Ferreira-Pereira and Bruno Oliveira Martins, 'The external dimension of the European Union's counter-terrorism: an introduction to empirical and theoretical developments', *European Security*, iFirst article (2012), pp. 1-15.

<sup>3</sup> Javier Argomaniz, *The EU and Counter-Terrorism. Politics, polity and policies after 9/11* (Abingdon: Routledge, 2011).

<sup>4</sup> Oldrich Bures, *EU Counterterrorism Policy: a Paper Tiger?* (Farnham: Ashgate, 2011)

value in the fight against terrorism in Europe and Kaunert<sup>5</sup> has studied how counter-terrorism has been a driver in the process of construction of the EU's AFSJ.

Given these substantive efforts, this special issue suggests that an analysis of the successes and failures of the EU's involvement in this field is imperative and we believe this is a particularly pertinent moment to take stock of progress. The goal of this special issue is therefore to look back at the past decade and answer the question of whether, when it comes to the measures taken to combat terrorism following the 9/11 attacks, the EU has lived up to the promise made in its founding treaties.

The editors believe that adopting this long term perspective contributes to our understanding of the subject by permitting the individual contributors to this special issue to reveal general trends and to draw upon their accumulated expertise in order to produce a thorough assessment of the outcomes of the EU efforts to combat terrorism since 9/11. In order to ensure unity of purpose, an editorial meeting was held in November 2011 in the context of an International Workshop at the University of St Andrews that was generously funded by the Centre for the Study of Terrorism and Political Violence (CSTPV). The result of those fruitful exchanges is this special issue: a volume that presents the views of leading experts casting a critical eye over the EU performance, recognising achievements but also being suitably critical when realities did not match the European rhetoric.

Although "counterterrorism" is not yet a clearly defined area in its broadest and fullest sense, it already spans across a number of other policy areas across all of the EU's former three pillars. Thus, right from the start, the consensus was to adopt a broadly sectoral approach for this interim evaluation, independently examining policy outputs from some of the main components of the European Union's multifaceted fight against terrorism. These include the exchange of information between police and intelligence agencies, the protection of critical infrastructure, the development of external action, the production of counter-terrorism legislation, the control of European borders and the fight against terrorist recruitment and financing. As a general rule, all articles in this special issue have attempted to determine the extent to which the EU has put in practice its own policy plans since 9/11, all articles discuss the political and institutional factors behind successes and failures, and, when needed, present lessons learned and forward-looking recommendations. To complement these efforts, several contributions have also followed a thematic approach to matters such as the evolving importance of institutional actors for EU counter-terrorism, the impact of these policies on national systems and the centrality accorded to intelligence efforts in the European response. Thus, although the conceptual approaches have varied between the contributing experts, the general goal has remained to provide an indication of how EU counterterrorism relates back to the changing nature of the phenomenon of terrorism.

What this special issue has not attempted to achieve, however, is an evaluation of the *effectiveness* of these policies. Although the editors have raised this issue at the editorial meeting, it soon became obvious that quantifying effectiveness of counter-terrorism strategies is not only beyond the reach of this project but perhaps also of the field of terrorism research. There have been few attempts at providing evaluations of counter-terrorism interventions at the national level and even fewer methodologically ambitious ones<sup>6</sup>. This can be explained, amongst other factors, by the absence of

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<sup>5</sup>Christian Kaunert, *European Internal Security: Towards Supranational Governance in the Area of Freedom, Security and Justice?* (Manchester: Manchester University Press, 2010)

<sup>6</sup> See: Richard J. Chasdi, *Counterterror Offensives for the Ghost War World: The Rudiments of Counterterrorism Policy* (Plymouth: Lexington Books, 2010); Cynthia Lum and Leslie W. Kennedy (eds.) *Evidence-based Counter-terrorism Policy* (Heidelberg: Springer, 2012); Gary La Free, Laura Dugan and Raven Korte, 'The Impact of British Counter-terrorist Strategies on Political Violence in Northern Ireland: Comparing

sufficient evidence to measure impact due to the unavailability of sensitive data, as well as by the lack of consensus on how ‘effectiveness’ should be gauged.<sup>7</sup> This is due to the methodological difficulties of finding the right proxy indicators that would complement the few available, yet inherently limited quantifiable criteria (such as the number of arrests, requests for assistance, or amounts of frozen terrorist money) that do not shed much light on the actual effects of counterterrorism measures on specific cultures, groups and individuals – as virtually all contributions in this special issue confirm, even the most “efficient” counterterrorism measures increasing the overall security may be problematic due to their impact on other important values such as liberty and justice. An additional and EU-specific obstacle is the multilevel system of governance involving national, sub-national and supranational actors, which complicates attempts of tracing back the origin of specific outcomes to certain policies and/or actors.

The high density of factors affecting the incidence of terrorist violence and the difficulty in isolating the short and long term impact of individual variables has clear implications for counter-terrorism, both at the domestic and international level. It undermines the capacity that national and supranational actors have in other public policy arenas to deliver evidence-based policies that are sustained by meaningful cost-effectiveness analyses and whose overall impact and implications can be measured in a thorough and credible manner. In other words, not having clear indicators of the extent to which a counter-terror initiative works -or does not- towards a specific goal affects whether counter-terror actors allocate their resources in a sensible manner. The repercussions deriving from these limitations are evident in ‘real-life’ counter-terrorism: from existing scepticism on the value of European governments’ counter-radicalisation efforts<sup>8</sup> to the debates on whether the effect of the targeted killing of jihadists by US drone campaigns are more than counterbalanced by their impact on anti-American feelings in the region and the increase in domestic opposition due to their corrosive effect on human rights and international and US law<sup>9</sup>.

Finally, it is also important to note that with the exception of the EU’s Counterterrorism Coordinator, none of the EU agencies and institutions discussed in this volume has a counterterrorism-only mandate. Similarly, many of the legal instruments utilized in the fight against terrorism are general anti-crime measures. Thus, following Mark Rhinard, Arjen Boin, and Magnus Ekengren, we believe that it is important to keep in mind that there are actually three levels of abstraction of EU’s counterterrorism capacities:

1. Capacities explicitly engineered toward the fight against terrorism;
2. Capacities directed toward managing complex threats and natural disasters in general;
3. Capacities found in EU institutions that may help national agencies, of any type, respond to adverse events.<sup>10</sup>

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Deterrence and Backlash models’, *Criminology*, 47/1 (2009), pp. 17-45; Gary La Free et al., *Modeling the Effectiveness of Counter-Terrorism Strategies in Indonesia, the Philippines and Thailand*, (University of Maryland: START Research Report, 2011).

<sup>7</sup>See: Cynthia Lum, Leslie W. Kennedy, and Alison Sherley, ‘Are counter-terrorism strategies effective? The results of the Campbell systematic review on counter-terrorism evaluation research’, *Journal of Experimental Criminology*, 2 (2006), pp. 489-516; Peter S. Probst, *Measuring success in counterterrorism: Problems and pitfalls*, in Paul B. Kantor et al (Eds.) *Intelligence and Security Informatics* (Berlin: Springer-Verlag, 2005), pp. 316-321.

<sup>8</sup>Anthony Richards, ‘the problem with ‘radicalization’: the remit of ‘Prevent’ and the need to refocus on terrorism in the UK’, *International Affairs*, 86/4 (2010), pp. 143-152.

<sup>9</sup>Ken Dilanian (2012) In legal battle against drone strikes, she's on the front lines, *LA Times*, 9 October.,

<sup>10</sup>Mark Rhinard, Arjen Boin, and Magnus Ekengren, ‘Managing Terrorism: Institutional Capacities and Counter-Terrorism Policy in the EU’, in David Spence (ed.) *The European Union and Terrorism* (London: John Harper Publishing, 2007), pp. 88-104.

This further complicates all scholarly attempts to evaluate the effectiveness of EU policies in the area of counterterrorism: “It is hard to predict how the EU can and will employ the tools explicitly designed for counterterrorism purposes, it is impossible to foresee if and how the Union will employ its generic tools that were originally designed for other purposes.”<sup>11</sup>

Taking all of the aforementioned caveats and reservations into account, we decided that rather than to focus just on *effectiveness*, which the contributors to this special issue address in those areas where the aforementioned problems could be reasonably tackled (e.g. in the fight against terrorist financing, where at least some relevant data is publicly available), our primary criterion of progress is *presence*: the materialisation and development of EU policies and their translation into national systems and the establishment of institutional actors with the necessary powers and resources to fulfil the objectives laid out in the official EU strategy documents. In other words, the objective is to look at the existence of policies at the EU level and then, when possible, to reach a conclusion based on available evidence on whether these initiatives have had -or had the future potential to- make a difference on the ground.

The distinction between presence and effectiveness is clear when seen in the context of the process of bureaucratic development that has occurred in this area. Clearly, there has been a dramatic growth in the past decade on the number of EU bodies engaged in counter-terrorism at different levels. Individual contributions have richly illustrated this point. For instance, Occhipinti has outlined Europol’s growing competencies and resources in the post-9/11 environment and their working relationship with Eurojust and Frontex. Bures has examined the role of committees such as the EU Clearing House in channelling the EU’s fight against terrorism financing. Argomaniz has listed a long list of bureaucratic actors (i.e. ENISA, CIWIN, AVSEC, MARSEC and others) that are working on protecting critical infrastructures from man-made attacks. Bakker has examined the work of the European Network of Experts on Radicalisation (ENER) when critically analysing the EU’s approach. Kaunert, Leonard and McKenzie have concentrated on the European Parliament’s role whereas Monar has referred to the work of the EU Counter-terror Coordinator and closely examined the myriad of Council committees working on the external dimension of the threat. In parallel, den Boer has looked at Siten/Intcen when producing a fine-grained analysis of the transparency and accountability challenges associated with the sharing of intelligence at the European level.

This is of course far from a complete list. So clearly the EU has succeeded –mainly, but by no means only- through this process of bureaucratic development to achieve recognition and visibility. Yet we take great pains to separate in our argument prominence from impact and sustain the point that the mushrooming of relevant actors at the European level should not be assumed uncritically as having in principle a direct and substantial contribution to a stronger counter-terror response in practice.

Overall, we believe that by following this approach the special issue offers a more nuanced view of the EU counterterrorism policy than those currently presented by its enthusiastic supporters and its unyielding critics.

### **The post-9/11 significance of the EU as a counter-terrorism actor**

The consensus view in this volume is that the European Union has accomplished a surprising amount in the past ten years. From a position of almost total irrelevance, and, as a reaction to the terrorist attacks in New York, Madrid and London, the Union has become increasingly active in the field of counter-terrorism. Using a set of policy programmes, strategy documents and list of priorities as

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<sup>11</sup>Ibid., 99.

foundations, the European Union has aimed to coordinate member states' policies, to harmonise national legislation and even to support some operational work conducted by national authorities.

In this respect the ambitions and number of EU policy framework documents in the post-9/11 EU environment look impressive on paper. Already in November 2001, the European Council adopted an Action Plan on Combating Terrorism and an EU Counterterrorism Strategy was agreed in December 2005, following the terrorist attacks in Madrid and London. The general Strategy was soon complemented by others on radicalisation and recruitment into terrorism and terrorist financing. In December 2003, the European Council also adopted a European Security Strategy, where terrorism heads the list of threats facing the Member States and which proclaims that concerted European action against terrorism is 'indispensable', a call that was renewed in its 2008 update. Terrorism is also a key element in the 2010 Internal Security Strategy. It is no surprise that in a 2010 European Commission stocktaking exercise on EU measures specifically aimed at fighting terrorism, a conservative estimate would put the number of initiatives spanning across all of the EU's former three pillars to more than 80.<sup>12</sup>

The above successes have been trumpeted by EU institutions themselves. According to Max-Peter Ratzel, the former Director of Europol: 'The abortive London attacks of August 2006 ... showed that the concerted EU actions and counterterrorist policies proved to be effective when put to the test. This is some most recent success of EU counterterrorism efforts but a number of other terrorist cells have been dismantled throughout the EU and terrorist plans foiled as a direct result of the concerted EU actions and counterterrorism policies.'<sup>13</sup> The first EU Counterterrorism Coordinator Gijs de Vries has gone as far as to claim that the fight against terrorism is changing 'the role and functioning of the European Union' as it adopts an increasingly operational character in this area.<sup>14</sup> All this would simply be unthinkable before 9/11 when the EU was a rather negligible actor in this area.<sup>15</sup>

The contributions in this special issue offer a number of explanations for the emergence of the EU as an increasingly visible and important counterterrorism player over the last decade. To begin with, many contributors attribute much of the drive for the EU's growing involvement in counterterrorism to the shocks produced by the major terrorist attacks in New York, Madrid and London. These attacks led to a change in the existing European perception of terrorism and of the instruments that the EU Member States should put in place to fight this security threat. Under this perspective, the political shock that these terrorist attacks represented led to strong public pressure for European leaders members to 'do something', and since the threat was publicly framed as transnational, national governments rapidly agreed of the need for coordinated European action.

More specifically, Bakker notes in his contribution how the formulation of EU policies that aim to counter radicalisation and recruitment have been *incident driven*, a direct -and sometimes inconsistent- reaction to the bombings in Madrid and London, and we affirm that this observation can be firmly generalised to the entire of the European counter-terror response. Furthermore, as Monar

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<sup>12</sup> European Commission (2010) Commission Staff Working Paper: tacking stock of EU Counter-Terrorism Measures, COM(2010)386 final, 20 July 2010.

<sup>13</sup> Max-Peter Ratzel, 'Europol in the Combat of International Terrorism', in HuseyinDurmazet *al.* (eds) *Understanding and Responding to Terrorism* (Amsterdam: IOS Press, 2007), p. 12.

<sup>14</sup> Gijs De Vries, *The European Union and the Fight Against Terrorism*, Presentation of the EU Counter-Terrorism Co-Ordinator at the Seminar of the Centre for European Reform (19.01.2006). Available at <http://www.consilium.europa.eu/uedocs/cmsUpload/060119CenterEuropeanReform.pdf>.

<sup>15</sup> FernandoReinares (ed.) *European democracies against terrorism: governmental policies and intergovernmental cooperation* (Aldershot: Dartmouth, 2000); Peter Chalk (ed.) *West European Terrorism and Counterterrorism. The Evolving Dynamic* (Basingstoke: Palgrave Macmillan, 1996).

points out in his contribution, the transformation of the initial external crisis (the 9/11 attacks in the US) into sustained European action has undoubtedly been facilitated by internal and EU-specific *enabling factors* that have paved the way for the emergence of EU *actorness* in the fight against terrorism: the Lisbon treaty reforms that have empowered the Union in terms of competences and instruments (i.e. to sign agreements on terrorism with other third countries), the development of internal institutional and legal capabilities (such as Europol, Eurojust, the Counter-Terror Coordination and others) and the emergence of a threat perception generating sufficient political will for common action. Although there are diverging views amongst the contributors about whether this threat perception is truly *European*, due to the fact that only some European countries have suffered from sustained terrorist campaigns within their borders, there is a general agreement on the view that, at least in the EU discourse, terrorism has been internalised as a '*European threat*'. This has allowed the EU to present a common discourse that has sustained political consensus and, to a degree, unity of action, despite this action being often concocted by only a small group of countries within the Union. In sum, as Monar observed, 'threat perceptions and international collective action needs after the 9/11 attacks have presented the EU with an 'opportunity' to assume new roles and responsibilities in a field in which it had before legally none and practically hardly any'.

Other contributors to this special issue have highlighted that some internal enabling factors are a by-product of the single market. Occhipinti, for example, shows how the freedom of movement by citizens and capital greatly facilitated the setting up of cross-border terrorist operations whilst allowing these networks to take advantage of differences in national antiterrorism laws and capabilities and existing gaps in international police and judicial cooperation. As a result, these developments have encouraged calls for increased national coordination and for the establishment of EU flanking measures.

A number of contributions also revealed that encouragement for a more proactive EU role in counterterrorism has come from external actors. Bures for instance shows how the smart sanctions and the anti-money laundering approaches to counter terrorist financing adopted by the Union were in fact standards originally drafted by other international bodies such as the FATF. Likewise, Argomaniz has stressed the importance of the ICAO and IMO guidelines for the EU transport security policies. Finally, the importance of external pressure by the United States on the EU and the extent and ambition of the transatlantic security relationship has merited much attention in Monar's and Kaunert, Leonard and Mackenzie's papers.

At the same time, this special issue confirms that most of the Union's contribution to the fight against terrorism has been conducted within the borders of Europe. In fact, most experts have been generally rather sceptical about the EU's external efforts. Despite the fact that EU-US collaboration in counterterrorism has been seen as very substantial, sometimes even controversially so; in most other respects results have been considered modest due to the reluctance by member states, and even third countries targeted for support to engage with European institutions on these matters.<sup>16</sup> In his up-to-date survey of this external dimension, however, Monar offers a more nuanced view by providing compelling evidence that the use of external relations instruments, such as political dialogues, counter-terrorism clauses, capacity building, economic assistance and others, has been a substantial part of the EU's response to the post-9/11 terrorist challenges. In the process, the Union has been successful in

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<sup>16</sup>See: Daniel Keohane (2008) 'The Absent Friend: EU Foreign Policy and Counter-Terrorism', *Journal of Common Market Studies*, 46/1 (2008), pp. 125-146; Hugo Brady, *Intelligence, emergencies and foreign policy: The EU's role in counter-terrorism* (London: CER, 2009); Rick Coolsaet, 'EU counterterrorism strategy: value added or chimera?', *International Affairs*, 86/4 (2010), pp. 857-873; WynRees, *Transatlantic-Counter Terrorism Cooperation. The new imperative* (Abingdon: Routledge, 2006)

achieving external *actorness* across three dimensions: ‘opportunity’, ‘presence’ and ‘capability’. In other words, the EU has become increasingly accepted as a potential counter-terror partner on its own right by third-countries.

Several contributions have also offered more theoretical insights and explanations for the growing role of the EU in counterterrorism. Occhipinti’s contribution, for example, puts special emphasis on the importance of institutional factors, especially in the field of police cooperation. Updating his seminal 2003 model on the supranationalisation of Justice and Home Affairs, and drawing on Kaunert’s work, he stresses the Commission’s influence as an *interest shaper*, a policy entrepreneur that has succeeded in weakening member states’ attachment to national sovereignty as the dominant norm for their relations with the EU in the AFSJ and, more specifically, counter-terrorism. Thus, the Commission has skilfully used the opening of windows of opportunity to push through legislation such as the European Arrest Warrant, which in reducing the average extradition period of serious crime suspects from more than 9 months to 45 days<sup>17</sup>, is perhaps the EU’s flagship Counter-terror measure in the past decade.

Furthermore, Occhipinti has argued for the need to focus on other crucial institutional dynamics. He follows Argomaniz in highlighting the importance of *path dependency*. Argomaniz has contended that prior decisions made in the 1999 Tampere Council have constrained institutional actors’ reaction to 9/11, and only following the Madrid and London attacks the Union has devised a more tailored approach to the threat. In parallel, Occhipinti convincingly argues that path dependency also helps to explain the transformation of Europol into a full-fledged European agency and stronger competencies for the Commission, EP, and the Court of Justice in the European fight against terrorism.

In sum, it can therefore be argued that a combination of political and institutional factors explains the more visible position that the EU holds in comparison to its pre-9/11 self. As some contributors, and more specifically den Boer in the conclusion have noted, there is now a tapestry of legal instruments and institutional bodies with competencies in fighting terrorism at the European level and there is little doubt that these developments have significant ramifications, especially for the democratic oversight of the European counter-terrorism efforts. Arguably the most important issue in this regard is the oversight of EU counter-terrorism intelligence exchange which is hampered by a rather considerable list of challenges. Den Boer’s comprehensive account details amongst others the networked character of the intelligence, the duplication that comes from parallel bilateral exchange processes, the increasing implication of barely regulated private actors and the growing exchange of data with third countries with lower protection standards.

If we turn the spotlight on the democratic accountability of the institutional actors, on the one hand Occhipinti has remarked the post-Lisbon *de jure* increases of parliamentary oversight over Europol, which now affords both the European Parliament (EP) and national parliaments new authority over the agency. On the other hand, den Boer laments that lightly anchored agencies (SitCen/IntCen) or European-scale intelligence networks (PWGOT, Berne) have little or no accountability at all and, in addition to this, voids and gaps still exist when it concerns the specific responsibilities of these agencies, as in Europol’s work within the terrorist Financing Tracking Programme (TFTP).

Using precisely TFTP as one of their case studies, Kaunert, Leonard and MacKenzie have illustrated the turnaround in the European Parliament’s fortune in its quest for greater democratic accountability for EU counter-terrorism. Arguably, the pre-Lisbon period saw the EP mostly limited to making

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<sup>17</sup> European Commission (2005) Commission evaluation report: the European arrest warrant has broadly achieved its objectives, Memo/05/58, 23 February 2005

exasperated (and often ignored) calls through its LIBE Committee for a counter-terrorism response that was more respectful of European citizens' civil liberties and privacy rights. The introduction of co-decision in the AFSJ due to the Lisbon Treaty has finally transformed the European Parliament (EP) from a 'critical but impotent actor in European Union counter-terrorism' into a key player in the European decision-making process. This is one of the most significant developments in the field in the last decade, yet a slight shadow of a doubt remains on the EP capacity, or inclination, to take up the mantle for European citizens' rights. The reason, the authors contend, is that its increased institutional power has forced the EP to recognise the need of becoming a responsible partner to the Council and behaving in a more co-operative manner. The need to engage in compromises such as that of the EU-US SWIFT Agreement may detract from the EP's reputation as an upholder of civil liberties.

There is no question in any case of the importance of the security versus/and/or liberties question(s). The EP itself has lamented in a 2011 LIBE Committee report how 'mass surveillance has become a key feature of counter-terrorism policies' and how 'the large-scale collection of personal data, detection and identification technologies, tracking and tracing, data mining and profiling, risk assessment and behavioural analysis are all used for the purpose of preventing terrorism'.<sup>18</sup> The concern is that these policies shift the burden of proof to the citizen while their actual effectiveness for the prevention of terrorism is far from proven. It is also an open question whether some of these measures would pass a proportionality test. In agreement with this report and the work of other scholars<sup>19</sup>, the editors therefore believe that the EU legitimacy as a counter-terror actor is dependent not only on the delivery of policies that are broadly seen as effective by others but also proportional to the threat and respectful of European democratic values.

### **The light footprint of EU counter-terrorism**

It is clear from the above that the European Union is much better equipped today than it was ten years ago to provide an added value in the European fight against terrorism. This is an important finding in itself, with important ramifications for our understanding of international organisations as security actors. Yet a number of caveats should be registered regarding this verdict. For a start, as Leonard's contribution remind us, not all the initiatives included in the long list of measures that appear in the periodic iterations of the EU Counterterrorism Action Plan have made a substantial contribution to the fight against terrorism. Leonard convincingly argues that, contrary to what the inclusion of border control measures in the Protect strand of the EU 2005 Counterterrorism Strategy seems to suggest, the importance of migration policies in the fight against terrorism has not been demonstrated yet and is in fact very difficult to assess. This is a key issue since terrorism concerns have served to justify politically the strengthening of migration controls, a process that has serious negative externalities: it makes more difficult to *bona fide* visitors to travel and enter the EU, it has a harmful effect in community relations and it raises serious questions regarding data protection and privacy rights.

Leonard's paper also brings to the fore the sensitive question of whether some polices are included in the EU strategic C-T documents because they are evidence-based and policy relevant –rather than being based on assumptions- or because they fulfil the political demands of 'demonstrating' action,

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<sup>18</sup> European Parliament Committee on Civil Liberties, justice and Home Affairs (2011) Report on the EU Counter-terrorism Policy: main achievements and future challenges (2010/2311 (INI)), 20 July 2011, p. 7.

<sup>19</sup> See: Didier Bigo, and Anastassia Tsoukala (eds.), *Terror, Insecurity and Liberty* (London: Routledge, 2008); Elspeth Guild and Florian Geyer (ed.) *Security versus Justice. Police and Judicial Cooperation in the European Union* (Hampshire: Ashgate, 2008); Thierry Balzacq and Sergio Carrera, *The EU's Fight against International Terrorism - Security Problems, Insecure Solutions*, Policy Brief 80, (Brussels: CEPS, 2005)

especially in the face of political urgency. We question in this special issue the notion that all initiatives in the EU programmatic documents contribute to tackle terrorism. The examination in this volume of Border Control and Critical Infrastructure Protection policies have shown evidence of both *mission* and *function creep* and have raised questions of the extent to which the EU has deployed a focused and fully tailored approach to the threat.

Moreover although the Union has achieved certain *visibility* and *presence* in the last decade, the contributors to this volume have often reminded us that the EU still plays mostly a subsidiary role to that of the Member States. Across the counter-terror policy areas there is a running tension between the necessity to enhance cooperation and the reluctance of member states to relinquish competencies and, given the national security sensitivity of counter-terrorism, member states have generally ‘kept the EU’s role under tight control and constraints’.<sup>20</sup>

It must be noted however that this fundamental shortcoming in counter-terror cooperation is far from unique and mirrors in fact similar dysfunctions present in other internal security areas. Terrorism is nothing but a high profile example of the long running tension in EU Justice and Home Affairs between the notions of security and sovereignty. European national governments need to perform an uneasy balancing act between the growing –sometimes, urgent- demands for closer cooperation that come from the transnational character of some of these problems (i.e. organised crime, proliferation, illegal immigration) and the accompanying weariness and reluctance that characterises any initiative that leads to the delegation of more national power to Brussels. At the same time, it should always be noted that the political sensitivity and the intensity of media attention that accompanies the phenomenon of terrorism makes of course this tension both more visible and generally harder to accommodate. Furthermore, EU’s influence on the way counter-terrorism action is conducted on the ground by member states remains extremely limited. Operational action is by and large a national responsibility, not only for national sovereignty reasons but also due to the principle of subsidiarity: even if there is an understanding that the threat is transnational, most national governments agree that it would make little sense to centralise police and intelligence efforts at the European level. National authorities have very much opposed this notion and, given this, Occhipinti draws upon Fägersten’s work to show how *bureaucratic resistance* by national authorities has hampered the development of a greater operational function for Europol in intelligence exchange. Such resistance is predicated on a bureaucratic culture in intelligence organisations that privileges isolation and secrecy and the difficulty to transfer to the international authorities the ‘personal and organizational networks - built over time, through experience and via hard-won trust – [that]are the backbone of international intelligence cooperation’. These factors have served as sources of ‘friction’ that have prevented intelligence cooperation in the EU from being realised to the extent wanted by decision makers.

As a consequence, as several contributors have pointed out, the EU’s general role in counterterrorism has been often reduced to that of conveyor belt for best practices and knowledge sharing or a coordinator of efforts at most. Yet, as Argomaniz highlights, the extent of the European engagement and the significance of the EU’s implication in national counter-terror responses also varies depending on the particular policy sector. While it is true for the core of effective counter-terrorism work (police, judicial and intelligence operations) EU institutions can ‘only’ aspire to enhance cooperation, there are other policy areas (i.e. aviation and maritime security, terrorism financing and others) where the EU had strong pre-9/11 Community competencies derived from the Common Market. In these fields, the EU has been a preeminent actor, at times even adopting the position of a primary regulator.

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<sup>20</sup>Monar in this volume.

These are also policy areas where, as discussed by Argomaniz and Bures, the EU has had the need to engage in what is often referred to as public-private partnerships. In particular in the fight against terrorist financing, private financial institutions (FIs) have actually shouldered the bulk of the day-to-day CTF burden when it comes to monitoring the billions of daily financial transactions and reporting the suspicious ones to public authorities for further investigation. Yet here we also find private actors being very reluctant to become partners to public authorities in the security arena, motivated as they are by different logics: ‘profit rather than security maximizers’ as Bures puts it. To a large extent, this is due to the fact that ‘public authorities have provided the private sector with only vague clues for detecting costumers and/or transactions that may be linked to terrorist financing while demanding that FIs put in place elaborate and costly surveillance mechanisms and procedures’. Moreover, these demands have been in fact counterproductive because the threat of penalties has motivated private FIs to resort to the over-reporting of suspicious transactions, a practice that has placed a large burden on the public Financial Intelligence Units that have had to process large amounts of data of dubious value. Similarly, Argomaniz explains how in the transport sector private actors have been very critical with the hefty economic costs that the increasing number of security rules they have to comply with represent. In fact they have lobbied hard European institutions to prevent the passing of new rules or to promote the phasing out of existing ones.

Finally, following with Den Boer and Wiegand’s contribution, it is important to note that not all member states have been similarly affected by European legislation in this area. Those that had already in place strict antiterrorist provisions in their criminal law systems before 9/11 have been less influenced by supranational measures. Yet they find that supranational regulations in the field of criminal justice have had a ‘strong converging influence on nation states’. These ‘*bubbles of convergence*’ come from the fact that those states without a counter-terrorism legal regime (i.e. The Netherlands) or those with less developed systems (i.e. Italy and Germany) have had to ‘catch up’ with other countries, so similarities between states have grown. They caution, however, that, despite this approximation process, ‘the cultures, working procedures and priorities of the counter-terrorism organizations in the EU Member States still tend to be very different from one another’ with previous experience with terrorism and constitutional norms on the relationship between domestic and European legislation being important intervening variables in this process of convergence.

## **Future prospects**

In addition to assessing the EU’s counterterrorism performance in the first post-9/11 decade, another ambition of this special issue is to comment on potential future developments and challenges based on the trends that we have observed in the last 10 years. In this period, it has become abundantly clear that counter-terrorism as an EU policy field has depended upon the break out of major terrorist attacks to generate the impetus to move forward. This implies the question of how the EU response will develop in the future in a time when, as Eurobarometer data shows, other socio-economic concerns have supplanted this security threat in the public’s mind and the matter has moved down in the political agenda. Moreover, this change is happening in a context where the available Europol data suggests that ‘even if the threat of terrorist attacks remain ‘serious’ and ‘diverse’, there is a decreasing trend of attacks attributed to ethno-nationalist terrorist groups, a category that accounts for the vast majority of all terrorist incidents in Europe.<sup>21</sup> This tendency has been further accelerated with the

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<sup>21</sup> Europol (2011) Terrorist activity in the European Union: Situation and Trends Report (TE-SAT) <https://www.europol.europa.eu/sites/default/files/publications/te-sat2011.pdf>

2011 announcement of a permanent ceasefire by ETA, the oldest separatist terror group in Europe.<sup>22</sup> Thus, since even the EU Counterterrorism Coordinator has spoken of a ‘counter-terrorism fatigue’<sup>23</sup>, in the short term we expect the continuation of decision-making inertia, a far cry from the frenzy that met the bombings in New York, Madrid, and London.

This piecemeal evolution can obviously be seen as rather problematic. We would like to argue, however, that the absence of major terrorist attacks should also be seen as an opportunity for the EU and its Member States to produce better thought out policies in the absence of public and political pressure. Since these policies face complex challenges and the dangers of over-reaction and unintended consequences, a more paused reflection based on in-depth analyses of the problem and the sharing of experiences and good practices could lead, we would hope, to better informed policies. Considering the controversy raised by some EU initiatives, this is certainly not a bad thing. Hence we follow Bakker in hailing the progressive move of the EU from an ‘incident driven counter-terrorism and counter-radicalisation policy to one that is based on an increasing collective body of knowledge and expertise’.

As importantly, some contributors see an opportunity here to redress the post-9/11 emphasis on security with more attention being put on the consequences of these policies for European citizens’ liberties. As Occhipinti remarks, the increased importance of fundamental rights in the Lisbon Treaty and the goals of the Stockholm Programme seem to be a step on the right direction. Moreover, the new powers that Lisbon bestows to the European Court of Justice have widened its authority to protect the individual rights of European citizens. Firstly, the Commission can now initiate infringement proceedings and bring national governments before the ECJ in the area of police and judicial cooperation in criminal matters. Secondly, when requested by national courts, measures in this area are now automatically subject to preliminary rulings of the Court.

As we have argued before, the post-Lisbon function of the EP as co-legislator and overseer will be fundamental in this regard. Here, whereas Occhipinti believes that the EP will ‘likely push for and gain greater safeguards regarding the handling of personal data and the creation of new systems and networks to store and share information about EU citizens’, Kaunert, Leonard and Mackenzie broadly agree with this prognosis, but at the same time, also highlight some obstacles for the future evolution of the EP’s as an active supporter of citizens’ privacy rights. This is an important question that remains open for the time being and would certainly merit continuous attention by scholars in the future.

Another aspect that has received significant attention from the contributors has been the importance of international organisations (UN, ICAO, IMO, FATF and others) and the United States in spurring EU action in a wide variety of areas. There are little doubts that these external actors will remain drivers for further developments in the near future and even serve to encourage further action in new areas of very recent EU activity such as cybersecurity, as Argomaniz shows. At the same time, as Bures suggests in his contribution, the EU should take advantage of the current period of relative calm to reconsider its past practise of blind implementation of those external counterterrorism standards and practices that do not necessarily reflect the nature of the contemporary terrorist threat in Europe.

Looking further in the future, most of the contributors to this special issues remain doubtful as to whether a holistic and coherent EU response to terrorism will be attainable. Argomaniz has brought

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<sup>22</sup> Luis R. Aizpeolea (2011), ETA pone fin a 43 años de terror, *El País*, 21 October.

<sup>23</sup> Council of the European Union (2009) EU Counter-Terrorism Strategy – discussion paper, 15359/1/09, 26 November 2009, p. 4

attention to the fragmented character of the EU policies on the protection of infrastructures from terrorist attacks and see these as an illustration of the broader consistency challenges that the EU faces in its response to the terrorist threat, a product amongst other factors of a complex bureaucratic structure that is made up of a multiplicity of committees, agencies and bureaucracies. Interestingly, we find on this question various predictions for the future depending on the policy sector. Thus, although Bakker sees positive steps in the anti-radicalisation field towards an approach that is more consistent and comprehensive, Monar finds that ‘institutional complexity and cross-policy coordination problems (between the external JHA dimension, the CFSP and external economic relations) continue to act as powerful constraints upon its external counter-terrorism role’. Likewise, Bures finds practical and political obstacles to the co-ordination demands that a comprehensive counter-terrorist financing approach at the EU level would require. It remains to be seen whether the EP calls for a holistic approach that would align both the external and the Internal Security Strategies and strengthen coordination mechanisms between Council JHA structures, European agencies and the European External Action Service<sup>24</sup> will make a difference in light of the scale of the challenges. Finally, Monar posits, and the editors agree, that ‘it seems clear that the EU’s future role will as well heavily depend on the further development of its internal political legal and institutional counter-terrorism framework’. At the same time, the further development of the EU AFSJ legal and institutional machinery to be applied to the fight against terrorism may not come as a reaction to terrorism itself but from other enabling internal factors. Occhipinti for instance sheds light on the *spillover-enlargement effect* and how a future expansion of the Schengen zone to Bulgaria and Romania and the enlargement into the western Balkans could exacerbate the challenges to the AFSJ from transnational crime. A ‘desire to find practical solutions to common challenges’ may bring not only the increased use of existing tools such as the Joint Investigation Teams but also the adoption of ambitious new mechanisms in the light of the new potentialities offered in key strategic documents such as the Internal Security Strategy and the Stockholm Programme.

Although this special issue cannot offer answers to all of the aforementioned puzzling questions and dilemmas, its findings clearly challenge many of the commonly expressed views concerning the EU and its role in the fight against terrorism. We therefore hope that the readers of *Intelligence and Security* will find as much food for thought in the following articles as we did in the process of their production and revision.

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<sup>24</sup> European Parliament Committee on Civil Liberties, justice and Home Affairs (2011) Report on the EU Counter-terrorism Policy: main achievements and future challenges (2010/2311 (INI)), 20 July 2011, p. 11