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**Publication date**

2011

**Document Version**

Final published version

**Published in**

Crime within the area of freedom, security and justice: a European public order

[Link to publication](#)

**Citation for published version (APA):**

Eckes, C. (2011). The legal framework of the European Union's counter-terrorist policies: full of good intentions? In C. Eckes, & T. Konstadinides (Eds.), *Crime within the area of freedom, security and justice: a European public order* (pp. 127-158). Cambridge University Press. <http://ssrn.com/abstract=2092789>

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## The legal framework of the European Union's counter-terrorist policies: full of good intentions?

CHRISTINA ECKES

### INTRODUCTION

Terrorism has become one of the main buzz words of our times. This has not left the European Union (EU)'s policies unaffected. Indeed, it is fair to say that counter-terrorism is one of the fastest developing policy regimes within the EU.<sup>1</sup> This might be particularly surprising given that it is somewhat controversial whether the EU should play a role in the fight against terrorism at all. Certainly the particularities of the European legal order create additional obstacles to adopting a coherent counter-terrorist policy regime.

In the last decade both the quality and the quantity of activities aimed to contain terrorism have increased tremendously within the EU. Today, the EU has developed its own counter-terrorist policies that include measures under the former Community pillar. In particular, the European Council's 'Action Plan' to fight terrorism on 21 September 2001<sup>2</sup> marks the opening of a new chapter in the EU's counter-terrorist activities. Part of this development is that the fight against terrorism has become one of

<sup>1</sup> This is not changed by the fact that multilateral counter-terrorist activity within Europe began a long time ago: see TREVI (Terrorisme, Radicalisme, Extremisme, Violence Internationale), an independent consultative forum that started dealing with terrorism as early as 1975; but see also the Schengen Agreement (although not exclusively intended to counter terrorism, it led to the establishment of the Schengen Information System (SIS), which is a comprehensive computerised repository on persons and goods considered to constitute a threat to society); see more broadly Martin Trybus and Nigel White (eds.), *European Security Law* (Oxford University Press, 2007).

<sup>2</sup> Compare documents adopted only in September and October 2001: Conclusions of JHA Council Meeting of 21 September 2001, SN 3926/6/01; Solana, Joint EU-US statement on terrorism, 20 September 2001; Conclusions and Plan of Action of the Extraordinary European Council Meeting on 21 September 2001, SN 140/01, endorsed by the European Parliament on 4 October 2001; Conclusions, General Affairs Council Meeting of 17 October 2001; and Declaration, European Council Meeting of 19 October, SN4296/2/01.

the central objectives in the creation of the Area of Freedom, Security and Justice (AFSJ).<sup>3</sup> This both reflects and shapes the EU's choice of taking a criminal law approach to fighting terrorism. The Council described the objectives of the AFSJ as: (1) extending free movement of persons, protecting fundamental rights, and promoting EU citizenship while facilitating the integration of third country nationals (freedom); (2) fighting against all forms of organised crime (security); (3) guaranteeing European citizens equal access to justice and facilitating cooperation between Member States' judicial authorities (justice).<sup>4</sup>

The aim of this chapter is twofold. Firstly, it will highlight and discuss the specific problems of justification that the EU faces when fighting terrorism. If one accepts that some form of action aimed at containing terrorism is necessary, it is widely accepted that states should take a role in this.<sup>5</sup> By contrast, a basic doubt remains whether the EU is the right actor to adopt a counter-terrorist policy regime. Secondly, this chapter will examine how the constitutional particularities of the European legal order shape the EU's counter-terrorist policies. This includes comparing the EU's counter-terrorist policies to international and national counter-terrorist policies.

The chapter is structured as follows. Part 1 first discusses the differences in the national perception of terrorism (1.1). It then maps the broad range of policy instruments used to counter terrorism within the EU and identifies some of the difficulties arising from the EU's policy choices (1.2). After this, it then moves on to examine the specific case of intelligence sharing, drawing conclusions as to what role European bodies should take (1.3). Finally, it turns to the EU courts and discusses (potential) problems of the European judiciary in protecting human rights and in shaping a uniform European understanding of the problem of terrorism (1.4). Part 2 focuses on the particularities of the EU's counter-terrorist policy regime. It examines the EU's criminal justice approach to counter-terrorism; its struggle

<sup>3</sup> 'The Hague Programme: Strengthening Freedom, Security and Justice in the European Union', Council document of 3.3.2005, OJ 2005 C 53/1. See also Communication from the Commission to the Council and the European Parliament, 'The Hague Programme: Ten priorities for the next five years. The Partnership for European renewal in the field of Freedom, Security and Justice', Brussels, 10.5.2005, COM(2005) 184 final. See also Sionaidh Douglas-Scott, 'The Rule of Law in the European Union: Putting the Security into the EU's Area of Freedom, Security and Justice' 29/2 *European Law Review* (2004), 219–42.

<sup>4</sup> Council of the European Union, 'Living in an Area of Freedom, Security and Justice', 1 January 2005.

<sup>5</sup> Compare Max Weber's definition of a state as 'a human community that (successfully) claims the monopoly of the legitimate use of physical force', e.g. in *Essays in Sociology*, (Routledge Sociology Classics, 1991) 78.

for consistency; the difficulty of reconciling the external and the internal dimension of counter-terrorist policies; and the protection of procedural and substantive rights in the complex multi-layered European legal order. Finally, sanctions against terrorist suspects are analysed as an exception to the EU's general approach to counter-terrorism.

## 1. TERRORISM AS A EUROPEAN PROBLEM

### 1.1 Terrorism seen through a national lens

Justifying European counter-terrorist policies is an uphill struggle. Most of the powers and capabilities in this field continue to remain with the Member States. The discussion is dominated by national threat perception, and much of the political discourse takes place at the national level.<sup>6</sup>

A central obstacle to a coherent European counter-terrorist policy regime is that the threat of terrorism is perceived very differently from one Member State to the next. Most Member States not only participate in the European counter-terrorist policies but have also adopted national counter-terrorist policies. All Member States have views on what should be done to address the threat of terrorism. A divide is identifiable between the West and the East of the EU and between countries that have experienced internal terrorism and those that have not.<sup>7</sup> National counter-terrorist policies differ greatly. In Germany, for example, the counter-terrorist discourse takes an international perspective. Although it enacted legislation as a response to the terror activities in the late sixties and seventies,<sup>8</sup> Germany introduced the first general law with the objective to fight international terrorism in early 2002.<sup>9</sup> Many more legal instruments have followed since.<sup>10</sup> These measures are partially adopted in order to

<sup>6</sup> Jörg Monar, 'Common Threat and Common Response? The European Union's Counter-Terrorism Strategy and its Problems' 42(3) *Government and Opposition* (2007) 292–313.

<sup>7</sup> See Clara Portela, 'The Efficacy of Sanctions of the European Union: When and Why Do They Work?' EUI Florence, unpublished PhD dissertation, 2008.

<sup>8</sup> Including the three 'Anti-Terror-Gesetze': Gesetz zur Ergänzung des ersten Gesetzes zur Reform des Strafverfahrensrechts vom 20 Dezember 1974, Bundesgesetzblatt (BGBl.) 1974 I, 3686; Gesetz zur Änderung des Strafgesetzbuches, der Strafprozessordnung und des Strafvollzugsgesetzes, der Bundesrechtsanwaltsordnung und der Strafvollzugsgesetzes vom 18 August 1976, BGBl. 1976 I, 2181; Gesetz zur Änderung der Strafprozessordnung vom 14 April 1978, BGBl. 1978 I, 497.

<sup>9</sup> Gesetz zur Bekämpfung des internationalen Terrorismus, 9 January 2002 (Terrorismusbekämpfungsgesetz), Bundesgesetzblatt (BGBl.) I 361, 3142.

<sup>10</sup> Jutta Limbach speaks of an 'unbroken line of political activism in the fight against terrorism': 'Human Rights in Times of Terror – Is Collective Security the Enemy of Individual

implement counter-terrorist policies agreed at the European level,<sup>11</sup> but they also originate in part from the national discourse. In the UK by contrast, counter-terrorist policies are developed predominantly in a national discourse. Since early 2003, the UK has developed a long-term, 'co-ordinated, multi-agency, and international approach to the disruption of terrorist activity'.<sup>12</sup> The key pieces of the legislative framework that give the UK Government the powers to combat terrorism are: the Terrorism Act 2000 (TACT), the Anti-Terrorism, Crime and Security Act 2001 (ATCSA), the Prevention of Terrorism Act 2005, the Terrorism Act 2006 and the Counter-Terrorism Act 2008. The Terrorism Act 2000 made it illegal for certain terrorist groups to operate in the UK and extended proscription to include international terrorist groups, such as al-Qaeda. The Prevention of Terrorism Act 2005 introduced control orders.<sup>13</sup> The Terrorism Act 2006 made it a criminal offence directly or indirectly to encourage the commission, preparation, or instigation of acts of terrorism or to disseminate terrorist publications. It also broadened the basis for proscribing organisations to include those that promote or encourage terrorism.<sup>14</sup> In the UK, although prosecution remains the preferred way of responding to persons involved in terrorist activity, other options for taking disruptive action have been introduced as well. These include the deportation on grounds of national security or unacceptable behaviour, control orders, freezing and seizing financial assets, and proscription of organisations. By contrast, Member States, like the Czech Republic, that have not suffered any terrorist attacks and that do not fear the radicalisation of any particular group of the population, do not perceive counter-terrorist policies as a priority – even though they do not deny the relevance of the issue.<sup>15</sup>

Freedom?' 1 *Göttingen Journal of International Law* (2009) 19. For a more provocative journalistic account see Heribert Prantl, *Der Terrorist als Gesetzgeber. Wie man mit Angst Politik macht* (Droemer Knaur, 2008). For an overview of the legislative activity in the immediate aftermath of 11 September, see 2001 the report of the Counter-Terrorist Committee S/2002/11 of 2 January 2002.

<sup>11</sup> Gesetz zur Neuregelung der Telekommunikationsüberwachung und anderer verdeckter Ermittlungsmaßnahmen sowie zur Umsetzung der Richtlinie 2006/24/EG, 21 December 2007, BGBl. I, 3198, implementing: Directive 2006/24/EC, Directive 2006/24/EC, OJ 2006 L 105/54.

<sup>12</sup> See HM Government, *Countering International Terrorism: The United Kingdom's Strategy*, July 2006, Cm 6888.

<sup>13</sup> See the case law of the House of Lords on control orders: *Secretary of State for the Home Department v. MB; Same v. AF*, decisions of 31 October 2007 [2007] UKHL 46; *Secretary of State for the Home Department v. JJ* [2007] 3 WLR 642, HL; *Secretary of State for the Home Department v. E* [2007] 3 WLR 720, HL.

<sup>14</sup> See the case of Case T-228/02 *Organisation des Modjahedines du peuple d'Iran v. Council and UK (OMPI I)* [2006] ECR II-4665.

<sup>15</sup> Pavel Zeman, 'Less Affected? The Perspective of the Czech Republic', ERA, *Anti-Terrorismus-Recht und Rechtsprechung im Bereich des Europäischen Strafrechts*, Trier, 7 November 2008.

Furthermore, even if the new form of decentralised international terrorism – mainly connected to the phenomenon al-Qaeda – has been the primary focus of the EU's counter-terrorist policy regime, Member States face different forms of terrorism to different degrees. In Spain for example, the perception of terrorism has shifted from being a regional/national problem to being an international problem. The attacks in Madrid in March 2003 and the following political discussion exemplify this. In the confusion immediately following the attacks, politicians were quick to blame regional Basque activists for a crime committed by international Islamist terrorists. Additionally, even though (illegal) immigration has increasingly been framed as a security problem more broadly,<sup>16</sup> the link between terrorism and illegal immigration is perceived very differently in Member States that do not have 'external borders' compared with those that do.<sup>17</sup> Finally, Member States have organised the national institutions that take part in the fight against terrorism according to their distinct judicial and institutional cultures. Some of these differences are closely interlinked with highly sensitive historical events and cultural identity, such as the division between internal security (police, in the broad sense) and external security (military) agencies in Germany and the UK. These structural and institutional choices are so deeply entrenched and run so close to the national understanding of security, that they are not easily changed for a broader European approach to counter-terrorist policy.

These differences in the national experience and perception of terrorism, as well as differences in national security culture, lead to distinct views on the necessity to take action and on the scope of that action. Under the presidency of Spain in 1995 the Madrid European Council stated in its conclusions that terrorism was one of the priority objectives of cooperation in justice and home affairs.<sup>18</sup> It was not by chance that one of the European countries that has been most affected by political violence emphasised the importance of the fight against terrorism at this early point in time. Similarly, the composition of the Joint Situation Centre (SitCen)<sup>19</sup> is a result of the differing national interests in counter-terrorist policies. Despite the fact that SitCen is directly attached to the Office of the High

<sup>16</sup> Ariane Chebel D'Appollonia and Simon Reich, 'The Securitization of Immigration – Multiple Countries, Multiple Dimensions', in Ariane Chebel D'Appollonia and Simon Reich (eds.), *Immigration, Integration, and Security: America and Europe in Comparative Perspective* (University of Pittsburgh Press, 2008) 1 ff.

<sup>17</sup> See e.g. Francisco Javier Moreno Fuentes, 'Dissonance between Discourse and Practice in EU Border Control Enforcement', *ibid.*, 254 ff.

<sup>18</sup> Available at, [www.europarl.europa.eu/summits/mad1\\_en.htm](http://www.europarl.europa.eu/summits/mad1_en.htm).

<sup>19</sup> See below for more detail on the function of SitCen.

Representative and forms an integral part of the General Secretariat of the Council,<sup>20</sup> it consists of representatives of the foreign and domestic intelligence services of some but not all Member States.<sup>21</sup>

## 1.2 Law and policy – one European strategy to contain terrorism?

Against these odds the EU has made a strong appearance as a security actor in the area of counter-terrorism. At the Treaty level, in European policy-making, and in the EU's international actions, the fight against terrorism has become an important consideration.

Since the Treaty of Maastricht, counter-terrorism policy forms part of the objectives of justice and home affairs in what was at the time the third pillar of the EU temple.<sup>22</sup> Old Article 29 TEU continued to list the fight against terrorism as one of the primary objectives of police and judicial cooperation in criminal matters (PJCC). Under the Lisbon Treaty the containment of terrorism takes an ever more prominent place. It is integrated within a great range of policies: Articles 43 (common security and defence policy), 75 (AFSJ), 83 (minimum rules for criminal measures), 88 (Europol's mission) TEU (post-Lisbon) and Article 222 (solidarity clause) TFEU.

In the wake of the attacks on New York, Washington DC and Philadelphia on 11 September 2001, the European Council adopted the first action plan to fight against terrorism. This action plan has been updated several times since and remains a key document in the EU's counter-terrorist policies.<sup>23</sup> The most well-known legal instruments are two framework decisions adopted on 13 June 2002: one on combating terrorism and one concerning the European Arrest Warrant (EAW).<sup>24</sup> The former defined a common concept of terrorist offences which all the Member States must include in their legal system and

<sup>20</sup> Johnny Engell-Hansen, Head of the Operations Unit in the EU SitCen since 2004, in his answer to question 92 in the House of Lords, European Union Committee – Sixth Report of Session 2008–2009: Civil Protection and Crisis Management in the European Union, 3 March 2009.

<sup>21</sup> Both foreign and domestic: UK, France, Spain, Italy, Germany and Finland; only foreign: the Netherlands, Sweden, Slovenia, Poland and Hungary. See Annegret Bendiek, 'EU Strategy on Counter Terrorism – Steps towards a Coherent Network Policy', SWP Research Paper No. 12 (2006).

<sup>22</sup> Article K.1 (9) TEU.

<sup>23</sup> See for the latest developments, [http://ec.europa.eu/justice\\_home/fsj/terrorism/fsj\\_terrorism\\_intro\\_en.htm](http://ec.europa.eu/justice_home/fsj/terrorism/fsj_terrorism_intro_en.htm).

<sup>24</sup> Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism OJ 2002 L 164/3; see also: Council Framework Decision 2008/919/JHA of 28 November 2008

which is applicable across the EU's counter-terrorist policies. It also set the minimum level of penal sanctions for terrorist offences (to prevent terrorists being able to find refuge in a more lenient Member State). The EAW framework decision aims to facilitate extradition procedures. It introduces a considerable reduction of political discretion on the part of the Member States.<sup>25</sup> Even though extradition continues to take place on the basis of arrest warrants issued by the competent national authorities, the framework decision creates common rules that eliminate administrative obstacles. The instrument was hailed by the Commission as one of the successes of EU anti-terrorism policy,<sup>26</sup> whilst academic voices were predominantly critical.<sup>27</sup> Terrorism is one of the 32 crimes for which extradition was facilitated; and since terrorist acts are inherently political crimes, extraditing someone charged with a terrorist act requires a particularly high level of trust in the legal system of the country requesting extradition.<sup>28</sup>

However, the EU's attempts to contain terrorism go much further than these two well-known framework decisions. In December 2003, the 'European Security Strategy' identified terrorism as the first of five key threats to European interests.<sup>29</sup> It placed an emphasis on external security, rather than on the impact of terrorism within the EU. Two years later in 2005, the EU put into place a separate and fairly comprehensive

amending Framework Decision 2002/475/JHA on combating terrorism, OJ L 330/21–23; Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ 2002 L 190/1; for more detail see Chapter 7 by Theodore Konstadinides in this volume.

<sup>25</sup> Report from the Commission based on Article 34 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, Brussels, 23 February 2005, COM(2005) 63 final.

<sup>26</sup> MEMO/07/98, Brussels, 12 March 2007, available at <http://europa.eu/rapid/>.

<sup>27</sup> R. Blekxtoon and W. van Ballegooij (eds.), *Handbook on the European Arrest Warrant* (T.M.C. Asser Press, 2004), calling the EAW collateral, perhaps unavoidable damage from 9/11; J. Wouters and F. Naert, 'Of Arrest Warrants, Terrorist Offences and Extradition Deals: An Appraisal of the EU's Main Criminal Law Measures against Terrorism after 11 September' 41 *Common Market Law Review* (2004) 909 ff.

<sup>28</sup> Including where the outcome would be different if its own criminal law were applied: see comments of the ECJ at Joined Cases C-187/01 and C-385/01 *Criminal Proceedings against Hüseyin Gözütok and Klaus Brügge* [2003] ECR I-1345; Case C-436/04 *Van Esbroeck* [2006] ECR I-2333; Case C-150/05 *van Straaten* [2006] ECR I-9327; Case C-467/04 *Gasparini and others* [2006] ECR I-9199.

<sup>29</sup> Council of the European Union, A Secure Europe In A Better World – The European Security Strategy, [www.consilium.europa.eu/showPage.asp?id=266&lang=en&mode=g](http://www.consilium.europa.eu/showPage.asp?id=266&lang=en&mode=g). See also K. Becher, 'Has-been, Wannabe, or Leader: Europe's Role in the World after the 2003 European Security Strategy' 13(4) *European Security* (2003) 345–9.

‘Counter-Terrorism Strategy’, supported by an ‘Action Plan’.<sup>30</sup> The Strategy defines four headings for EU action: Prevent (radicalisation and recruitment); Protect (citizens and infrastructure); Pursue (terrorists across borders); and Respond (to the consequences of terrorist attacks).<sup>31</sup>

In 2007, the Commission adopted a package containing a series of proposals fleshing out the EU’s legal framework to counter terrorism. In particular, the Commission proposed measures to: criminalise terrorist training, recruitment and public provocation to commit terrorist offences;<sup>32</sup> prevent the use of explosives by terrorists;<sup>33</sup> and make use of airline passenger information in law-enforcement investigations.<sup>34</sup>

Other recent tools in the fight against terrorism deal with criminal law more generally, yet also aim to contain terrorism.<sup>35</sup> Examples include the Council Framework Decision on the execution of orders freezing property or evidence of 22 July 2003,<sup>36</sup> and more famously, the so-called ‘third money laundering Directive’ of 26 October 2005,<sup>37</sup> both (also) targeting ‘illegal money’ used for terrorist attacks. Furthermore, the money laundering Directive is a good example of *Community* activity (ex-first pillar) relating to terrorism that leads to controversy, not only because of its impact on fundamental rights but also because it goes beyond (traditional) Community competences into the area of crime prevention and prosecution.<sup>38</sup> Another recent example would be

<sup>30</sup> Conclusions and Plan of Action, 21 September 2001 (n. 2 above).

<sup>31</sup> Presidency and CT Co-ordinator, ‘The European Union Counter-Terrorism Strategy’, Brussels, 30 November 2005, 14469/4/05 REV 4.

<sup>32</sup> IP/07/1649, Fight Against Terrorism: stepping up Europe’s capability to protect citizens against the threat of terrorism; COM(2007) 649 final, Communication from the Commission to the European Parliament and the Council – Stepping up the fight against terrorism; COM(2007) 650 final, Proposal for a Council Framework Decision amending Framework Decision 2002/475/JHA on combating terrorism.

<sup>33</sup> COM(2007) 651 final, Communication from the Commission to the European Parliament and the Council on enhancing the security of explosives.

<sup>34</sup> COM(2007) 654 final, Proposal for a Council Framework Decision on the use of passenger name records (PNR) for law-enforcement purposes; see also: Joined Cases C-317/04 and C-318/04 *European Parliament v. Council of the European Union (Passenger Name Record case)* [2006] ECR I-4721 and the discussion below at 1.4.

<sup>35</sup> This is of course also true for the above mentioned EAW framework decision.

<sup>36</sup> Council Framework Decision 2003/577/JHA, OJ 2003 L 196/45.

<sup>37</sup> *Ibid.*, and Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, OJ L 309/15, 25.11.2005. For more detail see Chapter 3 by Ester Herlin-Karnell in this volume.

<sup>38</sup> See for the Data Retention Directive, Case C-301/06 *Ireland v. Parliament and Council (Data Retention Directive)* [2009] ECR I-593 (confirming that Article 95 EC was the

the Data Retention Directive.<sup>39</sup> This instrument harmonises the rules on how long telecom operators and internet providers must retain data.

European criminal law-making is increasing both in quality and in quantity. This is a trend that continues. In December 2008, the Framework Decision on the European Evidence Warrant (EEW) was adopted.<sup>40</sup> The EEW facilitates and accelerates the exchange of objects, documents and data that are obtained pursuant to national law, such as production orders or search and seizure orders. It also covers information already contained in police or judicial records, such as records of criminal conviction. Yet, less than a year after the adoption of the EEW (and before the deadline for its transposition), the Commission launched a green paper asking for comments on a new approach going beyond its scope.<sup>41</sup> The new regime would also cover evidence that does not already exist, such as statements from suspects or witnesses or information obtained in real time, such as interception of communications or the monitoring of bank accounts, and evidence that is not directly available without further investigation or examination, such as the analyses of existing objects, documents or data, or obtaining bodily material, such as DNA samples or fingerprints. Furthermore, numerous bodies with broader (criminal law) objectives contribute to the fight against terrorism, such as the European Border Agency (Frontex)<sup>42</sup> and the European Police Office (Europol).<sup>43</sup>

appropriate legal basis) and the constitutional complaint against the national implementation measure pending before the German Constitutional Court, Data Retention decision, judgement of 2 march 2010, 1 BvR 256/08, 1BvR 263/08, 1BvR 586/08; see also Cian Murphy, 'National Courts – Romanian Constitutional Court's Decision No. 1258 of 8 October 2009' 47 *Common Market Law Review* (2010) 933–41.

<sup>39</sup> Directive 2006/24/EC: the Directive was adopted in view of 'the Declaration on Combating Terrorism adopted by the European Council on 25 March 2004 ...[b]ecause retention of data has proved to be such a necessary and effective investigative tool for law enforcement in several Member States, and in particular concerning serious matters such as organised crime and terrorism' (Recitals 8–9).

<sup>40</sup> Council Framework Decision 2008/978/JHA on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, 18 December 2008, OJ 2008 L 350/72.

<sup>41</sup> Green paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility, 11 November 2009, COM(2009) 624 final.

<sup>42</sup> Council Regulation 2007/2004, of 26 October 2004, establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ 2004 L 349/1. The six tasks of Frontex were to coordinate operational cooperation, train national border guards, do risk analyses, develop research, assist Member States with technical and operational facilities, and organise joint return operations.

<sup>43</sup> See the reference to Europol in Conclusions and Plan of Action, 21 September 2001 (n. 2 above): 'Member States will share with Europol, systematically and without delay,

Finally, since the adoption of the Hague Programme in 2005, the fight against terrorism has also become one of the central objectives in the creation of the Area of Freedom, Security and Justice.<sup>44</sup> The European Council took stock of the developments of the AFSJ since the Tampere summit and specifically declared security a common problem that should be solved on the basis of the principle of solidarity. The terrorist attacks on 11 September 2001 and in Madrid on 11 March 2004 had given security a new urgency since the 1999 Tampere summit.

### 1.3 Intelligence cooperation outside the EU legal framework – a defensible choice

Gathering relevant information and access to sometimes secret information lies at the heart of any successful counter-terrorist regime. A fair share of intelligence cooperation takes place in decentralised networks outside the European legal framework. National actors remain the key players in this, and the EU merely takes a supportive role.<sup>45</sup> Yet, a number of players are involved at the EU level both in intelligence gathering and intelligence sharing, namely, the Counter Terrorist Group (CTG), the Joint Situation Centre (SitCen) and Europol.

Specifically in the fight against terrorism the CTG, established in 2001, has the role of bringing together the heads of national intelligence services.<sup>46</sup> It is focused on supporting operational measures. By contrast, the SitCen, established in 1999, undertakes situation monitoring twenty-four hours a day, seven days a week. Its aim is to support EU policy-making. As a consequence, SitCen deals with more general information compared to bodies supporting law enforcement. It is assisted by national experts who work side-by-side with Council officials. This way, SitCen benefits from exchanges of information with Member States including with diplomatic,

all useful data regarding terrorism. A specialist anti-terrorist team will be set up within Europol as soon as possible and will cooperate closely with its US counterparts'. Europol and the United States of America have since concluded two agreements on the exchange of personal data (available at: [www.europol.europa.eu](http://www.europol.europa.eu)), which have raised many concerns of data protection.

<sup>44</sup> See the references at n. 3 above.

<sup>45</sup> Björn Müller-Wille, 'The Effect of International Terrorism on EU Intelligence Co-operation' 46 *Journal of Common Market Studies* (2008) 49–73.

<sup>46</sup> The CTG is an information network created in 2001 with the aim of extending and deepening intelligence exchange between European security and intelligence services. It does not directly depend on EU structures, although its chairmanship rotates with the Council Presidency. It comprises all 27 Member States plus Norway and Switzerland.

intelligence and security services.<sup>47</sup> Moreover, SitCen has a specific counter-terrorism cell, however, unlike Europol and the CTG, not all Member States are members of SitCen.

The EU counter-terrorism coordinator has no managerial or hierarchical relationship with SitCen, yet is its key interlocutor in the area of counter-terrorism. Whenever there is a significant event with a possible terrorism aspect, SitCen instantly alerts the EU counter-terrorism coordinator and keeps him informed throughout the crisis. The counter-terrorism action plan and all the other counter-terrorist policy papers serve as the guiding framework for the assessments that the EU SitCen writes in this area.<sup>48</sup>

Europol's main focus lies on assisting national units to exchange information, predominantly in ongoing law-enforcement operations.<sup>49</sup> Europol only has competences to gather information from open sources, yet intelligence aimed at identifying terrorists (in contrast to intelligence contributing to policy decisions) would regularly require the use of secret sources.<sup>50</sup>

Not only limited trust in the confidential treatment of the information shared,<sup>51</sup> but also Europol's limited responsibilities, are reasons why the centralised form of intelligence cooperation envisaged by the Europol founders has not got off the ground.<sup>52</sup> The conclusion is that certain types of activities that are part of the overall counter-terrorist agenda of the EU should better remain the cooperation of national agencies rather than a centralised European responsibility. This is particularly true for law enforcement rather than policy-making. Fine-tuned cooperation at the European level appears more promising so long as core state powers

<sup>47</sup> Johnny Engell-Hansen, Head of the Operations Unit in the EU SitCen since 2004, in his answer to question 92 in the House of Lords, European Union Committee – Sixth Report of Session 2008–2009: Civil Protection and Crisis Management in the European Union, 3 March 2009.

<sup>48</sup> *Ibid.*

<sup>49</sup> See Europol Convention, available at [www.europol.europa.eu/](http://www.europol.europa.eu/) and in particular recital 6, Articles 3(1) (1) (task to facilitate information sharing between national units), 3a (participate in joint investigation teams), 4(4) (4) (request for information/intelligence). However, particularly in the area of child pornography, Europol has also taken part in gathering information.

<sup>50</sup> Müller-Wille, 'The Effect of International Terrorism on EU Intelligence Co-operation', 60.

<sup>51</sup> The Commission suggested general provisions on cooperation between Member States and exchange of information for Framework Decision 2002/475/JHA on combating terrorism. These provisions have not been included in the final Framework Decision (n. 24 above).

<sup>52</sup> Müller-Wille, 'The Effect of International Terrorism on EU Intelligence Co-operation', 55 ff.

remain at the national level. The EU has to strike the difficult balance. It must justify why coordination and cooperation in the area of counter-terrorist policies is effective, given that terrorist activity does not stop at borders. At the same time, it must address national sovereignty concerns by ensuring that the exercise of core state powers that usually entail far-reaching fundamental rights restrictions, remain a national responsibility.

#### 1.4 The role of the European Court of Justice

Despite the fact that neither the fight against terrorism, nor the maintenance of international peace and security fall within the primary objectives of the EU,<sup>53</sup> an increasing number of cases before the EU courts relate to the threat posed by terrorism and most of them have arisen under the Community pillar.

To start with the statistics, in the five years between 1 January 1999 and 31 December 2004 the ECJ and the CFI gave eight judgments and orders referring to the phenomenon of terrorism.<sup>54</sup> In the same period, Advocate-Generals referred to terrorism on four occasions.<sup>55</sup> By contrast, in the following four and a half years between 1 January 2005 and 31 July 2009 the EU courts referred to terrorism in 43 rulings.<sup>56</sup> One explanation

<sup>53</sup> Compare old-Articles 2 and 3 EC; this was conceded by the CFI in Case T-306/01 *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission* [2005] ECR II-3533, para. 139.

<sup>54</sup> T-338/02 Order 2004-06-07 *Segi and others v. Council*; C-252/01 Judgment 2003-10-16 *Commission v. Belgium*; T-47/03 R Order 2003-05-15 *Sison v. Council and Commission*; C-167/99 Judgment 2003-04-10 *Parliament v. SERS and Ville de Strasbourg*; C-475/98 Judgment 2002-11-05 *Commission v. Austria*; T-306/01 R Order 2002-05-07 *Aden and others v. Council and Commission*; C-378/97 Judgment 1999-09-21 *Wijsenbeek*; C-235/92 P Judgment 1999-07-08 *Montecatini v. Commission*.

<sup>55</sup> C-167/99 Opinion 2002-09-26 *Parliament v. SERS and Ville de Strasbourg*; C-187/01 Opinion 2002-09-19 *Gözütok*; C-54/99 Opinion 1999-10-21 *Eglise de scientologie and Scientology*; C-439/97 Opinion 1999-05-20 *Sandoz*.

<sup>56</sup> T-332/08 and T-246/08 Judgments 2009-07-09 *Melli Bank v. Council*; T-318/01 Judgment 2009-06-11 *Othman v. Council and Commission*; T-157/07 Order 2009-03-03 *People's Mojahedin Organization of Iran v. Council*; C-301/06 Judgment 2009-02-10 *Ireland v. Parliament and Council*; C-549/07 Judgment 2008-12-22 *Wallentin-Hermann*; T-284/08 Judgment 2008-12-04 *People's Mojahedin Organization of Iran v. Council*; T-256/07 Judgment 2008-10-23 *People's Mojahedin Organization of Iran v. Council*; C-415/05 P and C-402/05 P Judgment 2008-09-03 *Kadi v. Council and Commission*; C-296/08 PPU Judgment 2008-08-12 *Santesteban Goicoechea*; C-164/07 Judgment 2008-06-05 *Wood*; T-229/02 Judgment 2008-04-03 *PKK v. Council*; T-236/06 Order 2008-04-03 *Landtag Schleswig-Holstein v. Commission*; T-253/04 Judgment 2008-04-03 *Kongra-Gel and others v. Council*; T-256/07 Order 2008-02-14 *People's Mojahedin Organization of*

for this increase is the development of the EU's own comprehensive counter-terrorist policies regime.

The most well-known and far-reaching example is probably the EU's practice of listing and sanctioning private individuals as terrorist suspects.<sup>57</sup> Indeed, of the 43 mentioned rulings between 2005 and July 2009 21 concerned counter-terrorist sanctions against private individuals.<sup>58</sup>

*Iran v. Council*; C-403/05 Judgment 2007-10-23 *Parliament v. Commission*; C-117/06 Judgment 2007-10-11 *Möllendorf and Möllendorf-Niehuus*; T-327/03 Judgment 2007-07-11 *Al-Aqsa v. Council*; T-47/03 Judgment 2007-07-11 *Sison v. Council*; C-305/05 Judgment 2007-06-26 *Ordre des barreaux francophones et germanophones and others*; C-303/05 Judgment 2007-05-03 *Advocaten voor de Wereld*; C-354/04 P Judgment 2007-02-27 *Gestoras Pro Amnistía and others v. Council*; C-355/04 P Judgment 2007-02-27 *Segi and others v. Council*; C-266/05 P Judgment 2007-02-01 *Sison v. Council*; C-229/05 P Judgment 2007-01-18 *PKK and KNK v. Council*; T-228/02 Judgment 2006-12-12 *Organisation des Modjahedines du peuple d'Iran v. Council*; C-452/04 Judgment 2006-10-03 *Fidium Finanz*; T-253/02 Judgment 2006-07-12 *Ayadi v. Council*; T-49/04 Judgment 2006-07-12 *Hassan v. Council and Commission*; C-318/04 and C-317/04 Judgment 2006-05-30 *Parliament v. Council*; C-459/03 Judgment 2006-05-30 *Commission v. Ireland*; C-514/03 Judgment 2006-01-26 *Commission v. Spain*; T-299/04 Order 2005-11-18 *Selmani v. Council and Commission*; T-306/01 Judgment 2005-09-21 *Yusuf and Al Barakaat International Foundation v. Council and Commission*; T-315/01 Judgment 2005-09-21 *Kadi v. Council and Commission*; T-405/03, T-150/03 and T-110/03 Judgment 2005-04-26 *Sison v. Council*; C-336/03 Judgment 2005-03-10 *easyCar*; T-206/02 Order 2005-02-15 *KNK v. Council*; T-229/02 Order 2005-02-15 *PKK and KNK v. Council* (not counting orders of interpretation and those concerning purely procedural issues).

<sup>57</sup> See: Christina Eckes, *EU Counter-Terrorist Policies and Fundamental Rights – The Case of Individual Sanctions* (Oxford University Press, 2009).

<sup>58</sup> These numbers refer to cases published in the European Court Reports. Six cases decided by the ECJ: Case C-117/06 *Gerda Möllendorf and Christiane Möllendorf-Niehuus* [2007] ECR I-8361; Cases C-402/05 P and C-415/05 P *Kadi and al Barakaat Foundation* 2008 [ECR] I-6351; Case C-266/05 P *Sison v. Council* [2007] ECR I-1233; Case C-229/05 P, *PKK and KNK v Council* [2007] ECR I-439; Case C-355/04 P *Segi v. Council*, [2007] ECR I-1657 Case C-354/04 P *Gestoras Pro Amnistía and others v. Council* [2007] ECR I-1579. 15 decided by the CFI: Case T-284/08 *People's Mojahedin Organization of Iran v. Council (OMPI III)* [2008] ECR II-3487; Case T-256/07 *People's Mojahedin Organization of Iran v Council (OMPI II)* [2008] ECR II-3019; appeal pending: Case C-576/08 P *People's Mojahedin Organization of Iran*; Case T-49/04 *Hassan v. Council and Commission* [2006] ECR II-52; appealed: C-399/06 P *Hassan v. Council and Commission*, OJ 2006 C 294/30; Case T-327/03 *al-Aqsa v. Council* [2007] ECR II-79 (summ pub.); Joined Cases T-110/03, T-150/03 and T-405/03 *Jose Maria Sison v. Council* [2005] ECR II-1429; Case T-47/03 *Jose Maria Sison v. Council and Commission* [2007] ECR II-73 (summ pub.), see also the preliminary ruling, Case T-47/03 R *Jose Maria Sison v. Council and Commission* [2003] ECR II-2047; Case T-253/02 *Chafiq Ayadi v. Council* [2006] ECR II-2139; appealed: C-403/06 P, *Ayadi v. Council* OJ 2006 C 294/32; Case T-229/02 *Kurdistan Workers' Party, Kurdistan National Congress v. Council (PKK)* [2005] ECR II-539; Case T-228/02 *Organisation des Modjahedines du peuple d'Iran v. Council and UK (OMPI I)* [2006] ECR II-4665; Case T-318/01 *Omar Mohammed Othman v. Council and Commission*, judgment of 11 June 2009,

These 21 cases directly addressed the legality of an EU counter-terrorist policy. In many ways, they are illustrative (some would argue extreme) examples of the difficulties that the EU courts face when having to rule on counter-terrorist measures. The greatest problem faced is the lack of relevant information. Member States are decisively unwilling to share the necessary information on why someone is considered a terrorist suspect, not only with the applicants but also with the EU courts. This makes it impossible for the courts to rule on the merits and provide effective judicial protection.<sup>59</sup> In individual sanction cases, both the CFI<sup>60</sup> and the ECJ<sup>61</sup> have ruled that the applicants have not been placed in a position to make good use of their right of action before the Court and that the Court itself was not in a position to adequately carry out its review of the lawfulness of the decision. Furthermore, in the listing and sanctioning procedure national and European bodies cooperate in a way that makes it difficult to ensure effective procedural protection.<sup>62</sup> The right to a fair hearing is split between the national level, where the substantive information is gathered and the European level, where – without challenging the substantive decision of the competent national authority – the Council takes a discretionary decision to sanction someone. This limits the scope of the hearing at the European level to the question of whether a national decision exists. Hence, the hearing does not cover the reasons that led to the substantive decision. This artificial limitation does not seem justified given the fact that European bodies have attached far-reaching legal consequences to

nyr; Case T-315/01 *Yassin Abdullah Kadi v. Council and Commission* [2005] ECR II-3649; Case T-306/01 *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission* [2005] ECR II-3533, see also the preliminary ruling: Case T-306/01 *R Aden and others v. Council and Commission* [2002] ECR II-2387; not published in the ECR: Case T-299/04 *Selmani v. Council and Commission*, order of 18 November 2005; Case T-333/02 *Gestoras Pro Amnistía and Others v. Council*, upheld in: Case C-354/04 *P Gestoras Pro-Amistía*, [2007] ECR I-1579; further cases pending: Case T-85/09 *Kadi v. Commission*, action brought on 26 February 2009, OJ 2009 C 90/37; Case T-45/09 *al Barakaat v. Commission*; Case T-138/06 *Nasuf v. Council*, pending (application of 15 July 2006, OJ 2006 C 165/30); Case T-137/06 *Abdrabbah v. Council*, pending (application of 15 July 2006, OJ 2006 C 165/30); Case T-136/06 *Sanabel Relief Agency v. Council*, pending (application of 15 July 2006, OJ 2006 C 165/30); Case T-135/06 *al-Faqih v. Council*, pending (application of 15 July 2006, OJ 2006 C 165/29). Individual sanctions differ in several ways from other European counter-terrorist policies and will be subject to more detailed examination below.

<sup>59</sup> Eckes, *EU Counter-Terrorist Policies* 391 ff.

<sup>60</sup> Case T-47/03 *Jose Maria Sison v. Council and Commission* [2007] ECR II-73 (summ.pub.), paras. 219–225; Case T-228/02, *OMPI* (n. 4 above), para. 172.

<sup>61</sup> Cases C-402/05 P and C-415/05 P *Kadi and al Barakaat* (n. 58 above).

<sup>62</sup> Eckes, *EU Counter-Terrorist Policies*, 308 ff.

that national decision. Finally, the cases concerning individual sanctions demonstrate how international law obligations of the Member States and/or the EU could lead to a reduction of fundamental rights protection within the European legal order.<sup>63</sup>

Besides the cases arising directly in the context of the EU's counter-terrorist policies, the EU courts are also increasingly called upon to take terrorism into consideration when ruling on other EU policies. One example is the Community's visa, asylum and immigration policy. In a recent case the ECJ was asked to decide whether there existed 'a serious and individual threat to the life or person'<sup>64</sup> in the course of an application for temporary residence. This required the applicants to adduce evidence that they were specifically targeted by reason of factors particular to their personal circumstances.<sup>65</sup> The applicants in this case sought to avoid extradition to Iraq. They relied in particular on their personal circumstances, namely that a family member had been killed through a terrorist act of the militia and that they had received a letter threatening to kill them as collaborators. The ECJ ruled that subsidiary protection was not dependent on factors particular to the applicants' personal circumstances, but that 'the degree of indiscriminate violence' could reach 'such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country ... would, solely on account of his presence on the territory of threat country or region, face a real risk of being subject to that threat'.<sup>66</sup> Hence, the ECJ ruled in essence that a threat that could be serious enough to justify certain asylum rights under EU law, despite being general (not particularly focused on the applicants).

The circumstances differ so significantly from case to case that it is very difficult to compare the case law of the ECJ to cases concerning security issues decided by national courts. Yet, if one dared to speculate about where tensions could arise from differing interpretations, one issue might be the assessment of the security situation in third countries, and the type of proof necessary to make a security threat in a third country legally relevant for the applicant's position. The ECJ took a comprehensive

<sup>63</sup> Case T-306/01 *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission* [2005] ECR II-3533; Case T-315/01 *Yassin Abdullah Kadi v. Council and Commission* [2005] ECR II-3649; see also the discussion at Christina Eckes, 'Judicial Review of European Anti-Terrorism Measures: The *Yusuf* and *Kadi* Judgments of the Court of First Instance' 14 *European Law Journal* (2008) 74–92.

<sup>64</sup> Article 15(c) of Directive 2004/83.

<sup>65</sup> Case C-465/07 *Meki Elgafaji, Noor Elgafaji v. Staatssecretaris van Justitie*, [2009] ECR I-921.

<sup>66</sup> Case C-465/07 *Meki Elgafaji, Noor Elgafaji*, para. 43.

approach, willing to take into account the security situation in an entire country, irrespective of the applicants' particular circumstances. This appears to be very different from the House of Lords' approach in the *Torture Evidence Case*,<sup>67</sup> in which it demanded specific evidence that information had been gathered through torture for it to be inadmissible in court. The House of Lords ruled that 'evidence which has or may have been procured by torture inflicted, in order to obtain evidence, by officials of a third state without the complicity of the British authorities'<sup>68</sup> was not admissible before the Special Immigration Appeals Commission. Yet, the standard of proof necessary to demonstrate that evidence had been obtained through torture was found to be very high. The majority required that evidence be excluded if it "is established" to have been made under torture'.<sup>69</sup> The majority did not accept the fact that evidence that had been gathered in a country that is known for applying torture was sufficient to exclude it from the proceedings. Hence, it did not accept a general threat of torture, but required specific proof that the particular statement was obtained through torture. It goes too far to speculate how the ECJ would have ruled on the case before the House of Lords, and vice versa. It can only be noted that differences in the perception of what is a sufficiently concrete threat, results in very different legal consequences that have far-reaching fundamental rights implications.

Another area that has given rise to legal challenges concerning issues relating to terrorism, is police and judicial cooperation in criminal matters. Particularly well-known are the cases concerning the above-mentioned Framework Decision on the European Arrest Warrant (EAW).<sup>70</sup> Challenges against the national implementation of the EAW Framework

<sup>67</sup> *A and others v. Secretary of State for the Home Department* [2005] UKHL 71 (*Torture Evidence case*). On this case see Sangeeta Shah, 'The UK's Anti-Terror Legislation and the House of Lords: The Battle Continues' 6(2) *Human Rights Law Review* (2006) 416–34; Helen Fenwick, 'The Reaction of Great Britain's Legal Order to September 11, 2001', in Bernd Rill (ed.), *Terrorismus und Recht – Der wehrhafte Rechtsstaat* (Hanns Seidel Stiftung, 2003) 57 ff; Brice Dickson, 'Law versus Terrorism: Can Law Win?' 1 *European Human Rights Law Review* 11 ff. This case was decided shortly after the attacks on London in July 2005.

<sup>68</sup> *Torture Evidence case*, para. 1 per Lord Bingham of Cornhill. The House held unanimously, in a panel of seven, that torture evidence was not admissible. On the standard of proof the panel was divided four to three.

<sup>69</sup> *Torture Evidence case*, paras. 120–21.

<sup>70</sup> Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States 2002 OJ L190/1; see above, but for a more detailed analysis see [Chapter 7](#) by Theodore Konstadinides in this volume.

Decision were brought in the Czech Republic, Cyprus, Germany and Poland. The German Constitutional Court,<sup>71</sup> the Polish Constitutional Tribunal<sup>72</sup> and the Supreme Court of Cyprus<sup>73</sup> ruled that the respective national instruments implementing the EAW Decision were unconstitutional, inter alia, for breaching the prohibition to extradite nationals. The Czech Constitutional Court, by contrast, confirmed the validity of the implementation of the EAW Decision in the Czech Republic.<sup>74</sup> These judgments, according to the opinion of Advocate-General Colomer in the *Advocaten voor de Wereld* case, triggered 'a far-reaching debate concerning the risk of incompatibility between the constitutions of the Member States and European Union law'.<sup>75</sup> Even though national courts did not directly address the legality of the EAW framework decision itself, which was then confirmed by the ECJ,<sup>76</sup> there is an obvious potential for conflicting interpretations, including on what is necessary and permissible in order to attempt to contain terrorism.

The ECJ has also been asked to rule on measures giving effect to international efforts to contain terrorism. Besides the example of individual sanctions, the *Passenger Name Record* case comes to mind.<sup>77</sup> In this case, the ECJ annulled a Commission decision and a Council decision that paved the way to the conclusion of an agreement between the US and the EU on the transfer of personal data that concerned public security, criminal law and the fight against terrorism. The Court held that both Community instruments were based on wrong legal bases. In essence, the ruling can be seen as a case where the ECJ found that the Community instruments encroached upon police and judicial cooperation in criminal matters (at the time the third pillar of the EU) where these counter-terrorist measures should have been adopted.<sup>78</sup> As a consequence, the ECJ limited the competences of the European institutions (which used to have further-reaching competences under the first than under the third pillar) to deal with these security issues.

In another case, concerning terrorism even more directly, the ECJ ruled on the lawfulness of the Commission's decision seeking to enhance the

<sup>71</sup> German Constitutional Court, Decision 2 BvR 2236/04 of 18 July 2005.

<sup>72</sup> Polish Constitutional Tribunal, Decision P 1/05 of 27 April 2005.

<sup>73</sup> Supreme Court of Cyprus, Decision 294/2005 of 7 November 2005.

<sup>74</sup> Czech Constitutional Court, Decision 66/04 of 3 May 2006.

<sup>75</sup> Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-3633. <sup>76</sup> *Ibid.*

<sup>77</sup> Joined Cases C-317/04 and C-318/04 *Passenger Name Record* case.

<sup>78</sup> This appears to be the interpretation of Deirdre Curtin, *Executive Power of the European Union – Law, Practices, and the Living Constitution* (Oxford University Press, 2009) 182.

security in the Republic of the Philippines in accordance with Security Council Resolution 1373.<sup>79</sup> Resolution 1373 contains a general call on all UN Member States to combat terrorism and international crime. However, the regulation on which basis the Commission adopted its decision did not expressly mention the fight against terrorism, but identified development cooperation as its essential aim. The ECJ struck down the Commission's decision for falling outside the framework of development cooperation. Until the entering into force of the Lisbon Treaty (and hence when this judgment was given), the choice of whether an instrument was adopted as a Community measure or as a third pillar instrument had implications not only for the horizontal competence division within the EU, but also for the vertical competence division between the EU institutions and the Member States. Hence, the ECJ's decision on the correct legal basis determined the role of the EU institutions and of the Member States in the fight against terrorism, including on the international stage.

All of these cases (though some more indirectly than others) require the ECJ to consider terrorism as a legally relevant fact. At the same time, the legality of counter-terrorist measures has been subject to decisions in the highest national courts in a number of Member States.<sup>80</sup> The greatest number of these decisions concern national counter-terrorist policies that do not have a direct link with European law, but are based on national competence. However, it has become fashionable to speak of a dialogue between national courts and the EU courts, and the ECJ's position will not be (and cannot be) disregarded by national courts (even when ruling essentially on national policies).<sup>81</sup> Yet this does not mean that national courts would be willing to accept the ECJ's lead on hard questions of what is permissible (and what is not) when states aim to contain terrorism. At the same time, conflicting interpretations will have more far-reaching fundamental rights implications in an area as sensitive as counter-terrorism. By

<sup>79</sup> Case C-403/05 *EP v. Commission* [2007] ECR I-9045.

<sup>80</sup> House of Lords, *R (Al-Jedda) v. Secretary of State for Defence (Justice and another intervening)* [2007] UKHL 58; [2008] 1 AC 332; House of Lords, *R (Al-Skeini) v. Secretary of State for Defence (The Redress Trust intervening)* [2007] UKHL 26; [2008] 1 AC 153; House of Lords, *Secretary of State for the Home Department v. MB; Same v. AF*, decisions of 31 October 2007 [2007] UKHL 46; House of Lords, *Secretary of State for the Home Department v. JJ* [2007] 3 WLR 642, HL; House of Lords, *Secretary of State for the Home Department v. E* [2007] 3 WLR 720, HL; House of Lords, *A (FC) and others; X (FC) and others v. Secretary of State for the Home Department (Belmarsh detainees case)*, judgment of 16 December 2004 [2004] UKHL 56, [2005] 2 AC 68, [2005] 2 WLR 87, [2005] HRLR 1; House of Lords, *A and Others v. Secretary of State for the Home Department (Torture Evidence case)* [2005] UKHL 71.

<sup>81</sup> Even though this is what the UK Supreme Court largely did in *HM Treasury v. Ahmed* [2010] UKSC 2.

contrast, national courts might leave it to the ECJ to determine the EU's and Community's competences in the area of counter-terrorism, even if this will as a consequence determine national competences.

The question of how far human rights can lawfully be limited by counter-terrorist policies has become one of the most pressing issues of our time. Many courts have displayed a tendency to defer to the necessity assessment of policy makers. The European Court of Human Rights (ECtHR) in Strasbourg for example, affords the executives of the Contracting Parties a large margin of appreciation in determining what constitutes a national emergency.<sup>82</sup> The House of Lords followed the ECtHR's deferring position on this issue. However, neither traditionally in other fields of Community law, nor in the specific area of counter-terrorist policies does the ECJ defer to the executives of its Member States. The role of the ECJ in establishing the European Union as we know it today can hardly be overrated. The Court has traditionally accelerated Europeanisation with a high-speed negative integration agenda, and even if it appears that the ECJ has chosen to act more carefully in the area of counter-terrorism, there is nonetheless considerable potential for tension between the ECJ and national courts.

Particularly in the area of counter-terrorism a 'dialogue' develops between the political branches of government and the courts.<sup>83</sup> This dialogue is of course not confined to any particular legal system. The EU courts and national courts can, and have, entered into a dialogue with each other and with the political institutions at both levels. Multilevel regulation more generally broadens rather than reduces dialogic relationships. The actors at one level are often required to respond and justify their deviations from certain standards to actors at other levels. In the area of counter-terrorism, a dialogue takes place not only between the European and the national level, but also between the EU and other actors at the international level. On the one hand, this might contribute to justifying and potentially revising a particular policy. On the other hand, it might also imply that, influenced by the delicate division of powers between the different actors at different levels, the EU courts might be more hesitant about protecting individuals than they should be.

<sup>82</sup> ECtHR, *Lawless v Ireland* (No. 3), Application No 332/57, judgment of 1 July 1961.

<sup>83</sup> See also Baroness Hale, 'Human Rights in the Age of Terrorism: The Democratic Dialogue in Action' (39) *Georgetown Journal of International Law* (2008) 383 ff; Kent Roach, 'Judicial Review of the State's Anti-Terrorism Activities: The Post 9/11 Experience and Normative Justifications for Judicial Review' *Indian Journal of International Law* (2009), *forthcoming*.

## 2. PARTICULARITIES OF THE EUROPEAN FIGHT AGAINST TERRORISM

Particular problems are attached to fighting terrorism within the European legal order that do not have a parallel when counter-terrorist measures are adopted under national law. Examples are:

- (1) the struggle for continuity and coherence in the EU's institutional set-up;
- (2) the difficulty of combining the internal and external dimension of counter-terrorism within the complex (and divided) European legal order;
- (3) the need to avoid interference with the Member States' responsibilities in a legal order of shared external competences;
- (4) the fact that the EU takes a criminal justice approach to counter terrorism but has only limited powers to impose criminal sanctions;
- (5) the absence of a catalogue of rights and the difficulty of identifying at which level certain procedural rights should be exercised; and
- (6) the trade-off between harmonisation and cooperation.

(1) The diverging national views described above on how to contain terrorism can potentially create contradictions and inconsistencies at the European level, and the institutional landscape of the EU further increases the likelihood of inconsistencies. For instance, the leading actor in setting the Union's policy agenda, the Presidency of the Council, rotates every six months.<sup>84</sup> This change in leadership is particularly disruptive in an area in which national interests differ greatly. Further, the tasks of the Presidency not only include supervising the practical organisation of the Council but also that of the European Council.<sup>85</sup> As a result, the leadership of the Presidency is even more relevant in areas where the European Council is a key-player while the powers of the Commission and the European Parliament are more limited (this has been so far one of the differences between the Union pillars and the Community pillar).<sup>86</sup> Hence, the rotating Council Presidency increases the potential

<sup>84</sup> Article 203(2) TEC.

<sup>85</sup> Article 4(2) TEU; but see also B.Biesheuvel, E.Dell and R.Marjolin, *Report on European Institutions: Presented by the Committee of Three to the European Council* (Luxembourg: Office for Official Publications of the European Communities, 1980, available at [www.ena.lu/conclusions\\_wise\\_men\\_committee\\_dublin\\_29\\_30\\_november\\_1979-020003121.html](http://www.ena.lu/conclusions_wise_men_committee_dublin_29_30_november_1979-020003121.html)).

<sup>86</sup> See Article 18 TEU for the role of the presidency for CFSP.

for inconsistencies in the creation of the European legal framework for counter-terrorist policies.

Additionally, the division of expertise and political priorities between the different Council formations makes it more difficult to ensure a coherent approach. Acknowledging this difficulty an exceptional attempt was made to bridge the substantive divides between different policy areas involved in the fight against terrorism, money laundering and financial crime. On 17 October 2000<sup>87</sup> a joint meeting of the ECOFIN and JHA Council was organised. Yet, in principle, the different Council formations with their specific expertise and political priorities meet separately.

Another attempt to ensure greater overall coherence of the EU's piecemeal counter-terrorist regime was the creation of the post of the EU counter-terrorism coordinator.<sup>88</sup> However, he is largely considered to lack the necessary powers to have a real impact on the development of the EU's counter-terrorist policy regime.

(2) The EU's counter-terrorist policy is based on a combination of internal and external measures.<sup>89</sup> While originally the fight against terrorism was considered more of an internal than an external issue, it has increasingly become an integral part of the EU's external relations, inter alia through the EU's active involvement in the work of numerous international bodies, such as the UN Counter-Terrorism Committee, the UN office on Drugs and Crime, the organization for Security and Cooperation in Europe and the Financial Action Task Force. Further, the Area of Freedom, Security and Justice with all the importance given to the issue of security has an external dimension.<sup>90</sup> Justice and Home Affairs concerns must be integrated in the definition and implementation of other union policies and activities.<sup>91</sup> Further, JHA assistance programmes such

<sup>87</sup> 2376th Council meeting ECOFIN and Justice, Home Affairs and Civil Protection, 17 October 2000.

<sup>88</sup> Currently, Gilles de Kerchove is holding this post. The EU Counter-terrorism Coordinator is generally perceived as lacking teeth. See, for example, Doron Zimmermann, 'The European Union and post-9/11 Counterterrorism: A Reappraisal' 29 *Studies in Conflict and Terrorism* (2006) 133–4.

<sup>89</sup> See e.g. Report on the Implementation of the European Security Strategy – Providing Security in a Changing World, approved by the European Council held in Brussels on 11 and 12 December 2008 and drafted under the responsibilities of the EU High Representative Javier Solana, S407/08, 4.

<sup>90</sup> See Ramses A. Wessel, Luisa Marin and Claudio Matera, 'The External Dimension of the EU's Area of Freedom, Security and Justice', [Chapter 10](#) in this volume.

<sup>91</sup> Tampere European Council (15–16 October 1999), *Presidency Conclusions*, point 59, available at: [http://europa.eu/european-council/index\\_en.htm](http://europa.eu/european-council/index_en.htm).

as Phare,<sup>92</sup> CARDS,<sup>93</sup> TACIS,<sup>94</sup> and MEDA<sup>95</sup> include among their objectives that of fighting terrorism.

In practice, the external and internal dimensions of security policies are becoming increasingly inseparable.<sup>96</sup> Ever stronger processes of internationalisation of economic and social processes have blurred and continue to blur the distinction between internal and external policies – and not only in the area of security.<sup>97</sup> This was recognised by the European Council at the Tampere summit which was entirely devoted to developing a vision for the AFSJ. In its conclusions the European Council emphasised specifically that ‘all competences and instruments at the disposal of the Union, and in particular in external relations, must be used in an integrated and consistent way to build the area of freedom, security and justice.’

This creates institutional, procedural as well as substantive problems with regard to the (partial) separation between internal and external

<sup>92</sup> The Programme of Community aid to the countries of Central and Eastern Europe (Phare) is the main financial instrument of the pre-accession strategy for the Central and Eastern European countries (CEECs) which have applied for membership of the European Union. See for more information and references to the relevant legal acts: [http://europa.eu/legislation\\_summaries/enlargement/2004\\_and\\_2007\\_enlargement/e50004\\_en.htm](http://europa.eu/legislation_summaries/enlargement/2004_and_2007_enlargement/e50004_en.htm).

<sup>93</sup> The CARDS (Community Assistance for Reconstruction, Development and Stabilisation) programme (2000–2006) was intended to provide Community assistance to the countries of South-Eastern Europe with a view to their participation in the stabilisation and association process with the European Union. See for more information and references to the relevant legal acts: [http://europa.eu/legislation\\_summaries/enlargement/western\\_balkans/r18002\\_en.htm](http://europa.eu/legislation_summaries/enlargement/western_balkans/r18002_en.htm).

<sup>94</sup> The TACIS (Technical Assistance to the Commonwealth of Independent States) programme (2000–2006) aimed to promote the transition to a market economy and to reinforce democracy and the rule of law in the partner states in Eastern Europe and Central Asia. See for more information and references to the relevant legal acts: [http://europa.eu/legislation\\_summaries/external\\_relations/relations\\_with\\_third\\_countries/eastern\\_europe\\_and\\_central\\_asia/r17003\\_en.htm](http://europa.eu/legislation_summaries/external_relations/relations_with_third_countries/eastern_europe_and_central_asia/r17003_en.htm).

<sup>95</sup> A programme to implement the cooperation measures designed to help Mediterranean non-member countries reform their economic and social structures and mitigate the social and environmental consequences of economic development. See for more information and references to the relevant legal acts: [http://europa.eu/legislation\\_summaries/external\\_relations/relations\\_with\\_third\\_countries/mediterranean\\_partner\\_countries/r15006\\_en.htm](http://europa.eu/legislation_summaries/external_relations/relations_with_third_countries/mediterranean_partner_countries/r15006_en.htm).

<sup>96</sup> See already a decade ago (and before the attacks of 11 September 2001), V. D. Cha, ‘Globalization and the Study of International Security’ 37 *Journal of Peace Research* (2000) 391 ff, identifying the internationalisation of economic and social processes as one factor.

<sup>97</sup> Ferruccio Pastore, ‘Reconciling The Prince’s “Two Arms” – Internal-external Security Policy Coordination in the European Union’, Research Paper, Institute for Security Studies of WEU.

activities. This was certainly true under the past EU pillar structure.<sup>98</sup> Some frictions might disappear through the ‘communitarization’ of police and judicial cooperation in criminal matters. Yet, since under the Treaty of Lisbon the common foreign and security policy remains a separate field and continues to be subject to different institutional rules, the Lisbon Treaty will not solve these coherency problems.

(3) International attempts to fight terrorism entail all the problems that the EU faces when participating in international cooperation, particularly those resulting from mixity<sup>99</sup> and those resulting from the inability to speak with one voice. The ECJ has tried to counter-balance the plurality of actors and procedures that characterise the EU’s external actions by imposing a specific duty of cooperation.<sup>100</sup> This is of course also applicable in the area of counter-terrorism. Yet, it is fair to say that counter-terrorism is one area where the tension between international law obligations of the Member States and European law has become particularly obvious.<sup>101</sup>

Further, Member States can use international law to agree on measures for which no consensus can be established within the EU framework. On several occasions, what has started as international cooperation between groups of Member States, has been integrated into the European Treaties. This limits the margin of manoeuvre of those who were not originally participating. A well-known example is the Schengen Convention;<sup>102</sup> yet, even more telling in the present context is the example of the Treaty of Prüm.<sup>103</sup> The latter was signed on 27 May 2005. It entered into force on 1 November 2006. Signatory states are Belgium, Germany, Spain, France, Luxembourg, the Netherlands and Austria. Its principal purpose is to improve cross-border cooperation, particularly in combating terrorism, cross-border crime and illegal migration, particularly through exchange of information by giving reciprocal access to national databases containing: DNA profiles, fingerprints and vehicle registration data. It could be seen as an example of where a few Member States take steps which

<sup>98</sup> Stephan Stetter, *EU Foreign and Interior Policies: Cross-pillar Politics and the Social Construction of Sovereignty* (Routledge, 2007) 87, 94, 118.

<sup>99</sup> Christophe Hillion, ‘Mixity and Coherence in EU External Relations: The Significance of the “Duty of Cooperation”’, CLEER Working Papers 2009/2; Jan Klabbers, *Treaty Conflict and the European Union* (Cambridge University Press, 2009).

<sup>100</sup> *Ibid.*, 4 ff.

<sup>101</sup> See Eckes, *EU Counter-Terrorist Policies*, Chapter 5.

<sup>102</sup> 1985 Schengen Agreement and the 1990 Schengen Convention. See Eckhart Wagner, ‘The Integration of Schengen into the Framework of the European Union’ 25(2) *Legal Issues of Economic Integration* (1998) 1–60.

<sup>103</sup> See Council document 10900/05, Brussels, 7 July 2005.

pre-empt negotiations already taking place within EU institutions.<sup>104</sup> The House of Lords took the position that the seven signatory states breached the EC Treaty by encroaching with their cooperation outside the Treaties upon Community competences.<sup>105</sup> The potential breach of Community competences is now a thing of the past: a little more than two years after its signing the Prüm Decision was incorporated into the European legal order.<sup>106</sup> Yet, many details were already agreed and fixed by those participating in the original Treaty. As developed above, the views of the EU Member States on what needs to be done to contain terrorism differ greatly. So do their security cultures.

(4) The EU is said to have adopted a criminal justice counter-terrorist model.<sup>107</sup> Article 83 TFEU lists terrorism together with trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime as 'particularly serious' crimes. It does not, however, single it out as a phenomenon going above and beyond other serious criminal activity. Building on judicial and police cooperation under the former third pillar, European expertise about terrorism was developed primarily within the judicial, law-enforcement and intelligence communities.<sup>108</sup> Terrorism, in contrast to most other organised crimes, pursues primarily a political objective rather than the aim of profit-making. Yet, it is believed to be closely interlinked with other criminal activities, such as illegal immigration, drug trafficking and organised crime more generally. Dealing with it as a separate problem is therefore perceived as inefficient. Further, the criminal justice model appears more palatable to the EU Member States than allowing the EU to interfere with even more politically sensitive matters of internal and external security. Moreover, the criminal justice approach reflects the convictions of a number of Member States that have

<sup>104</sup> See also [www.statewatch.org/news/2006/sep/05eu-g6.htm](http://www.statewatch.org/news/2006/sep/05eu-g6.htm).

<sup>105</sup> House of Lords, European Union Committee, 'Prüm: An Effective Weapon against Terrorism and Crime?', 18th Report of Session 2006–07, p. 12, para. 22.

<sup>106</sup> Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime (also referred to as Prüm Decision) OJ 2008 L 210/1, entered into force on 26 August 2008 (Art. 37).

<sup>107</sup> Critical: Zimmermann, 'The European Union and Post-9/11 Counterterrorism' 125 and 134; suggesting a criminal justice model: Iain Cameron, 'Respecting Human Rights and Fundamental Freedoms and EU/UN Sanctions: State of Play', October 2008, Study requested by the European Parliament's Subcommittee on Human Rights, EXPO/B/DROI/2008/34.

<sup>108</sup> EU Press Releases RAPID, of 12 March 2004, MEMO/04/59.

always taken a more integrated view on terrorism<sup>109</sup> and it is in line with the approach the international community has moved to more recently. On the one hand, the international community adopts measures such as individual sanctions that claim to be administrative and preventive rather than punitive. Hence, the intention is to fight terrorism outside of the realm of criminal law as far as procedural safeguards are concerned, but this imposes in practice human rights restrictions that can be classified as a ‘criminal charge’ within the meaning of Article 6 ECHR.<sup>110</sup> On the other hand, and this is more similar to the EU’s approach, the international community has, for instance, adopted the Convention for the Suppression of the Financing of Terrorism.<sup>111</sup> All the EU Member States have ratified and implemented the Convention, which takes a criminal law approach to terrorism. It requires states to take appropriate measures for the identification, detection and freezing or seizure of funds used for the commission of terrorist acts. It also requires states to make it a punishable offence to collect or provide funds for use in such terrorist acts.

Further, combining the civilian and military dimension of the EU’s security strategy more generally and the fight against terrorism more particularly remains problematic.<sup>112</sup> In 2009 the Presidency report on the ESDP set out that the ‘reflection on national strategies facilitating the deployment of civilian personnel for ESDP’ should be one of the foci in accordance with the agreed improvement plan.<sup>113</sup> This ties in with the above considerations on differences in security culture, in particular as regards the separation of military and civil security actors.

(5) Moreover, the EU is in a particular position when it comes to the protection of fundamental rights, including procedural rights. References to human rights are frequently included in EU counter-terrorist instruments. A prominent example is the reference in the preamble to the Framework Decision on combating terrorism, stating:

This Framework Decision respects fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and

<sup>109</sup> On the different views of selected EU Member States see Chebel d’Appollonia and Reich, *Immigration, Integration, and Security*.

<sup>110</sup> See Eckes, *EU Counter-Terrorist Policies*, Chapter 3.

<sup>111</sup> International Convention for the Suppression of the Financing of Terrorism, UN Doc A/RES/54/109 of 9 December 1999.

<sup>112</sup> Action Plan for Civilian Aspects of ESDP, Adopted by the European Council (17–18 June 2004).

<sup>113</sup> Presidency Report on ESDP as approved by the Council in Brussels on 15 June 2009, doc 10748/09, Point III a, 52 b.

Fundamental Freedoms and as they emerge from the constitutional traditions common to the Member States as principles of Community law. The Union observes the principles recognised by Article 6(2) of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union, notably Chapter VI thereof. Nothing in this Framework Decision may be interpreted as being intended to reduce or restrict fundamental rights or freedoms such as the right to strike, freedom of assembly, of association or of expression, including the right of everyone to form and to join trade unions with others for the protection of his or her interests and the related right to demonstrate.<sup>114</sup>

This complex reference to instruments that are either not legally binding on the EU (ECHR) or that were not binding at all at the time the Framework Decision was adopted (Charter of Fundamental Rights) reflects the complexity of human rights protection within the EU, given that there is no unified legally binding catalogue of rights. This results in lack of certainty and predictability.

Further, the Framework Decision on combating terrorism compels the Member States to apply rules establishing far-reaching jurisdiction, including the active personality principle (for acts committed by residents, legal persons and citizens) and the protective principle (for acts committed against the institutions or people of that Member State).<sup>115</sup> Yet, the Framework Decision does not address the question of overlapping jurisdiction where an act is planned in the jurisdiction of one Member State but was carried out or at least had effects (protective principle) in another Member State. This creates uncertainty, which is aggravated by the fact that terms such as 'residents' and 'institutions' are not further defined.<sup>116</sup>

Moreover, where the European institutions and national authorities cooperate in a so-called 'double-staged procedure', as they do for instance for the adoption of individual sanctions, the rights of defence at the European and at the national level depend on the precise division of tasks.<sup>117</sup> This adds another level of complexity. Competent national authorities take, for example, the decision that a specific person is suspected of financing terrorism, and upon that basis the Community then determines whether it lists and sanctions that person as a terrorist suspect. The EU courts have taken the position that the right to be heard must be realised 'where the actual decision is taken'. In double-staged procedures

<sup>114</sup> Preamble to the Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism OJ L 22/6/2002, 164/3.

<sup>115</sup> For more detail see Steve Peers, 'EU Responses to Terrorism' 52 *International and Comparative Law Quarterly* (2003) 232 ff.

<sup>116</sup> *Ibid.*, 234. <sup>117</sup> Eckes, *EU Counter-Terrorist Policies*, Chapter 6.

where 'the actual decision' is taken at the national level this leads to a limitation of the rights of defence at the European level. Where the decision-taking is split between the national and the Community level, a hearing can be required for parts of the decision leading to the adoption of the measure at both levels. This splitting up of the hearing has some perils:<sup>118</sup> for instance, that relevant information is lost or that the person affected cannot make their views known on all relevant aspects of the decision that adversely affects them.

By way of conclusion, even if at the end in the EU fundamental rights are overall not less well protected than in the national counter-terrorism context, it is fair to say that the complexity of the European legal order works as a detriment to legal clarity and allows national and European bodies to pass the buck.

(6) Finally, even if it is widely accepted that international terrorism is a cross-border problem that requires a solution that goes beyond the powers of any individual state this is not to say that counter-terrorist policies require a centralised approach.<sup>119</sup> Yet, a certain level of harmonisation, or at least agreement of minimum standards, is necessary for effective functioning of a counter-terrorist policy regime at the European level. The Council Framework Decision on combating terrorism of 13 June 2002,<sup>120</sup> for instance, introduces a common definition of what constitutes a terrorist act. Yet, the outlined significant cross-country differences in security concerns are necessarily mirrored in a diversity of national priorities. Member States benefit to a very different extent from prioritising the fight against terrorism, in terms of real security benefits but also in support amongst the public. This diversity is a great obstacle to harmonisation. European counter-terrorist measures that are (in some countries) badly tailored to national concerns have (in these countries) great costs in terms of reputation and credibility of the European polity. These costs increase with the intensity of the human rights restrictions and the amount of resources used.

At the same time, cooperation rather than autonomous measures tends to be less effective, particularly where it requires national justice systems that have long traditions and are at the core of the state culture to cooperate. Cooperation in the area of counter-terrorism is especially

<sup>118</sup> Hanns Peter Nehl, *Principles of Administrative Procedure in EC Law* (Hart Publishing, 1999) 71 and 84.

<sup>119</sup> Müller-Wille, 'The Effect of International Terrorism on EU Intelligence Co-operation' 69–70.

<sup>120</sup> Council Framework Decision 2002/475/JHA.

problematic for two reasons: firstly, national actors worry about damage to their sources and are fearful about the success of any criminal proceedings that may ensue, as well as the risk of exposure of possible failures; secondly, they have concerns about the differing level of fundamental rights protection in such a highly sensitive area.<sup>121</sup>

By way of conclusion, Member States' support for the EU's counter-terrorist policies depends on their assessment of the value of these policies in terms of effectiveness and human rights protection, and on how they relate to the national counter-terrorist concerns of any particular Member State.<sup>122</sup> Given the great differences, in certain areas there may be convincing reasons to choose cooperation instead of harmonisation even if this is *prima facie* less effective.

## 2.1 Counter-terrorist sanctions against private individuals – the odd one out

One corner stone of the EU's counter-terrorist policies are sanctions against private individuals suspected of supporting terrorism.<sup>123</sup> These sanctions complement the wide range of other measures adopted by the EU to fight the financing of terrorism and terrorism itself. They usually consist of freezing of funds and travel bans targeted at individuals identified on a list.

Compared to other counter-terrorist measures, sanctions against individuals are an exception in that they are based on integration rather than cooperation. The European institutions draw up autonomous lists of terrorist suspects on the basis of decisions of competent national authorities.<sup>124</sup> Moreover, even though the identification of sanctioned terrorist suspects is based on cooperation in criminal matters (and could hence be considered a form of European criminal law), the sanctions as such are imposed in separate instruments, which the Council attempts to pass off as preventive/administrative rather than criminal measures. Hence, sanctions could also be considered an exception to the general criminal justice approach that the EU takes on counter-terrorism. Additionally, there is a second type of sanction that is not based on autonomous European

<sup>121</sup> Dutch Advisory Council on International Affairs, Counterterrorism from an International and European Perspective, No. 49, September 2006, 30–1.

<sup>122</sup> For counter-terrorist policies more generally, see Monar, 'Common Threat and Common Response?'

<sup>123</sup> Elspeth Guild, 'The Uses and Abuses of Counter-Terrorism Policies in Europe: The Case of the "Terrorist Lists"' 46(1) *Journal of Common Market Studies* (2008) 173–93.

<sup>124</sup> See Common Position 2001/931/CFSP, OJ 2001, L 344/93, of 27 December 2001; EC Regulation 2580/2001, 194 OJ 2001, L 344/ 70, of 27 December 2001.

lists but on lists drawn up under the auspices of the United Nations. This second type of sanction is unrelated to national cooperation in criminal matters. Even if restrictions of fundamental rights are comparable to a criminal charge within the meaning of Article 6 ECHR, these UN-based sanctions are not classified as criminal law, but rather as related to CFSP measures within the European legal order.<sup>125</sup>

Since 2002 the EU has adopted individual sanctions, listing terrorist suspects and freezing their financial assets. The listing procedure has been harshly criticised for breaching the most fundamental procedural rights.<sup>126</sup> In one case<sup>127</sup> the EC Council's decisions to list an organisation as a terrorist suspect were annulled three times by the Court of First Instance (CFI).<sup>128</sup> Each time the Council changed the procedure slightly and then re-listed the applicant as a terrorist organisation.<sup>129</sup> Yet, the fundamental flaws remained: the relevant information that led to the listing was neither shared with the applicants nor with the EU courts. As a consequence, the organisation could not exercise its right to be heard or its right to judicial review. Additionally, on the merits of the terrorist allegation, a quasi-judicial national body ruled that it would be 'perverse' to maintain the terrorist designation for the applicant.<sup>130</sup> It ordered the national authorities to take action to delist the organization.<sup>131</sup> Yet despite the national delisting, the Council maintained the organisation's name on the terrorist list without further addressing the decision of the national body. This case is an example of how the Council (the main EU legislator consisting of representatives of the governments of the Member States) and the EU courts have engaged in a race of 'who is faster in adopting, respectively annulling, terrorist listings', while

<sup>125</sup> See on sanctions giving effect to UN Security Council Resolutions Eckes, *EU Counter-Terrorist Policies*, ch. 3 (criminal charge) and ch. 5 (judicial protection).

<sup>126</sup> See Eckes, *EU Counter-Terrorist Policies*, with more references; see also Case T-228/02 *Organisation des Modjahedines du peuple d'Iran v. Council and UK (OMPI I)* [2006] ECR II-4665, para. 173.

<sup>127</sup> The case of the Organisation des Modjahedines du peuple d'Iran or People's Mojahedin of Iran; see for background information on OMPI and its listing as a terrorist group: <http://euobserver.com/9/27472>; <http://euobserver.com/9/24393>; <http://euobserver.com/9/25123>; <http://euobserver.com/9/25521>; <http://euobserver.com/9/25917>; <http://euobserver.com/22/24165>; <http://euobserver.com/9/24028>; <http://euobserver.com/9/27316>; <http://euobserver.com/9/26315>; <http://euobserver.com/9/26990?rk=1>; <http://euobserver.com/9/27234>; <http://euobserver.com/9/25698>; <http://euobserver.com/9/23497>.

<sup>128</sup> Case T-228/02 *OMPI I* (n. 14 above); Case T-256/07 *People's Mojahedin Organization of Iran v Council (OMPI II)* (n. 58 above); Case T-284/08 *People's Mojahedin Organization of Iran v. Council (OMPI III)* (n. 58 above).

<sup>129</sup> See e.g. Council Decision 2007/445/EC of 28 June 2007, OJ 2007 L 169/58; Council Decision 2008/583/EC of 15 July 2008, OJ 2008 L 188/21.

<sup>130</sup> Case T-157/07 *OMPI II*, paras. 22 and 157. <sup>131</sup> *Ibid.*, para. 22.

they are not actually addressing the fundamental question of what are legitimate means in the fight against terrorism.

Furthermore, it is interesting to see that even though the CFI left the Council a considerable margin of discretion and explicitly stated that it did not aim to substitute the Council's decision with its own judgment, the Council defended every inch and continued to adopt sanctions against the applicant in breach of its procedural rights. The example demonstrates how the political branches and the judiciary can struggle more in practical terms than in a constitutional dialogue for the final word on what is possible and acceptable in the fight against terrorism. Hopefully, Member States and the European institutions will learn from the legal challenges in the area of individual sanctions and provide in other areas better procedural safeguards and also the necessary information to make these safeguards effective.

The criminal justice approach that the EU takes to other counter-terrorist policies is a step in the direction of providing better safeguards. Similar trends were identified in the international context. In particular, the International Convention for the Suppression of the Financing of Terrorism was considered 'the way forward in effective criminal law cooperation in this field' that would make the recourse to individual sanctions in the present form unnecessary.<sup>132</sup> Currently, however, individual sanctions and measures under the Convention are adopted in parallel. While the former start at a preventive stage and are partially thought of as preventive<sup>133</sup> or precautionary<sup>134</sup> measures, only the latter rely largely on prosecution. Yet, the distinction is more complicated. Just because the evidentiary standard for the adoption of certain measures is set lower than under criminal law does not prevent them from having punitive effects comparable to criminal charges. Further, traditional criminal law also provides the means for preventive action against crime.

<sup>132</sup> Cameron, 'Respecting Human Rights and Fundamental Freedoms and EU/UN Sanctions: State of Play' (n.107 above), 34.

<sup>133</sup> Erin Miller, 'The Use of Targeted Sanctions in the Fight against International Terrorism: What about Human Rights?', in American Society of International Law, *An Imperial Security Council? Implementing Security Council Resolutions 1373 and 1390. Proceedings of the Annual Meeting* (Washington DC: American Society of International Law, 2003) vol. 97, p. 48; see also the interpretation of the CFI at: Case T-228/02 *Organisation des Modjahedines du peuple d'Iran v. Council and UK (OMPII)* [2006] ECR II-4665, para. 130 and Case T-47/03 *Jose Maria Sison v. Council and Commission* [2007] ECR II-73 (summ. Pub.), para. 177.

<sup>134</sup> In later rulings the CFI used the term 'precautionary measures', see e.g. Case T-253/02 *Ayadi v. Council* [2006] ECR II-2139, para. 135.

## CONCLUSIONS

The EU has to some extent succeeded in Europeanising<sup>135</sup> what is usually presented either as a national or global threat. At the same time it is fair to say that ‘the EU does not play any significant operational or tactical role in the fight against terrorism’.<sup>136</sup> The EU’s fight against terrorism is more successful at the legislative and institutional than at the operational level.<sup>137</sup> Part of the problem is that the EU’s response to terrorism is based on cooperation and coordination rather than on integration. Its success depends, even after a particular instrument is agreed at the European level, on the continuous will of the Member States to take action, and the Member States are better at agreeing politically than in implementing their decisions.

Fighting terrorism at the EU level has great advantages, but it also suffers from considerable drawbacks. National agencies continue to be reluctant to share intelligence on terrorism,<sup>138</sup> even though considerable efforts have led to some progress on this issue.<sup>139</sup> Also, the coordination of counter-terrorist policies between the UN and the EU has improved, but it is not without difficulties. Some of these are due to the EU’s limited competences to maintain international peace and security and the strong interest of Member States to remain the principle international actors dealing with national security. It remains very difficult to coordinate appearances and actions of the Member States and of the EU on the international plane. The success of cooperation depends on the participation and support of all European players. At the same time, international cooperation leads automatically to a certain level of harmonisation. It creates a (legal) framework for action with which all Member States and the EU must comply.

While economic stability and growth is a priority shared by all Member States, the views on whether fighting terrorism is a pressing concern to which a high level of resources should be dedicated differ greatly. Hence,

<sup>135</sup> Monar, ‘Common Threat and Common Response?’ 293–6.

<sup>136</sup> Müller-Wille, ‘The Effect of International Terrorism on Eu Intelligence Co-operation’, 69.

<sup>137</sup> August Reinisch, ‘The Action of the European Union to Combat International Terrorism’, in Andrea Bianchi, (ed.), *Enforcing International Law Norms Against Terrorism* (Hart Publishing, 2004) 119 ff; Monar, ‘Common Threat and Common Response?’ (example of the 2002 Framework Decision on combating terrorism); Zimmermann, ‘The European Union and Post-9/11 Counterterrorism’, 130.

<sup>138</sup> See e.g. Magnus Ranstorp (Director of the Centre for the Study of Terrorism and Political Violence, St Andrews), ‘The European Terror Challenge’, available at <http://news.bbc.co.uk/2/high/europe/3563713.stm>.

<sup>139</sup> Report on the Implementation of the European Security Strategy, 2008 (n. 88 above).

making terrorism a 'European problem' is not equally in the interest of all Member States. The highest courts of the Member States are placed in a dilemma. They are obliged to apply EU law even where this undermines national constitutional guarantees. This leads to particular tensions in the area of counter-terrorist policies, because they lead to very far-reaching fundamental rights restrictions.

As a result of great national differences in the perception of terrorism and in security culture, as well as the difficulty of building enough trust among Member States to make cooperation in extremely sensitive areas possible, the conclusion has been drawn that cooperation is in some cases a better option than harmonisation or centralisation, for example in the area of gathering, sharing and analysing intelligence. This reflects the particular nature and the limited competences of the EU.<sup>140</sup> It also explains why doubts persist whether the EU should actually take a leading role in fighting terrorism. The EU adopted certain measures like data exchange with the US and Canada,<sup>141</sup> the Data Retention Directive or the Money Laundering Directive<sup>142</sup> under the former Community pillar (with better enforcement mechanisms) in order to ensure better operational success. This difference will become less relevant under the Lisbon Treaty. Also, it should be added that the Lisbon Treaty makes an attempt to address some of the legitimacy concerns. It improves fundamental rights protection in general by making the Charter of Fundamental Rights binding<sup>143</sup> and by allowing for judicial review of lists of terrorist suspects adopted with a view to imposing economic sanctions. Yet again, this does not answer the question of whether a centralised approach to a phenomenon that is given such a different priority in the different Member States is actually helpful.

<sup>140</sup> Similarly with regard to earlier counter-terrorist activities: Peter Chalk, *West European Terrorism and Counterterrorism: The Evolving Dynamic* (Palgrave Macmillan, 1996) 117.

<sup>141</sup> Council Decision 2004/496/EC of 17 May 2004 on the conclusion of an Agreement between the European Community and the United States of America on the processing and transfer of PNR data by Air Carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection, 2004 OJ L 183/83.

<sup>142</sup> Money laundering is discussed in more detail in [Chapter 3](#) of this volume by Ester Herlin-Karnell.

<sup>143</sup> With certain exceptions for the Czech Republic, Poland and the UK: see Protocol 30 and the Presidency Conclusions of the Brussels European Council of 29/30 October 2009.