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Appendix A: EU competencies

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Annex 1

The Cost of Non-Europe in the Fight against Terrorism

Research paper
by RAND Europe

Abstract

Recent terrorist attacks, including those in Belgium, France, Germany, Spain and the UK, highlight the devastating individual and societal impacts of terrorism. Given the global nature of the threat, actions to prevent terrorism, to protect the public, to pursue terrorists and to respond to attacks must be based on European and international cooperation if they are to be effective. This study, prepared by RAND Europe for the European Added Value Unit of the Directorate-General for Parliamentary Research Services, describes the state of play regarding the actions taken at the EU level to support the fight against terrorism. It examines the economic and individual impacts of terrorism, and provides new estimates of the costs of attacks across EU member states. It also examines the costs of measures to counter terrorism, and in particular their impacts on fundamental rights. The study identifies and assesses gaps and barriers in European cooperation and action in the fight against terrorism, and suggests potential options for action at the EU level that could address them.

AUTHOR

This report has been written by researchers from RAND Europe, a not-for-profit research organisation that helps to improve policy and decision making through research and analysis, at the request of the European Added Value Unit of the Directorate for Impact Assessment and European Added Value, within the Directorate-General for Parliamentary Research Services (DG EPRS) of the General Secretariat of the European Parliament.

The parts of the text covering European competency were written by Christina Eckes, Professor of European law at the Amsterdam Centre for European Law and Governance at the University of Amsterdam.

This study benefited from the expert advice of Dr Maria O'Neill, Senior Lecturer in the Division of Law at the Dundee Business School, Abertay University.

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Table of contents

Abbreviations	v
Executive summary	vii
Chapter 1: Introduction.....	1
I - The terrorist threat to the EU	1
II - The EU's response to the terrorist threat.....	2
III - Objectives and research questions	4
IV - Scope.....	5
V - Study methods and limitations	5
VI - Structure.....	7
Chapter 2: The impacts of terrorism and corresponding counter-terrorism measures.....	8
I - The impacts of terrorism.....	9
II - The impact of counter-terrorism measures.....	13
III - Quantitative assessment of the impacts of terrorism in the EU	16
Chapter 3: Description and qualitative assessment of gaps and barriers relating to fundamental rights, oversight and the policy-making process.....	25
I - State of play	25
II - Description of gaps and barriers	28
III - Assessment of gaps and barriers	30
Chapter 4: Gaps and barriers in relation to operational cooperation.....	31
I - Counter-radicalisation measures.....	32
II - Systems and databases for information sharing	36
III - Practices of information sharing between member states	46
IV - Cooperation tools and mutual recognition instruments	49
V - Support and capabilities of Europol and Eurojust	53
VI - Action against terrorism financing.....	60
VII - Chapter summary, key findings and synthesis of gaps	69
Chapter 5: Policy options.....	71
I - Fundamental rights, oversight and the policy process.....	72
II - Improving operational cooperation: countering radicalisation	75
III - Improving operational cooperation: information sharing	78

Appendix A: EU competencies

Prepared by Christina Eckes, Professor of European Law at the Amsterdam Centre for European Law and Governance at the University of Amsterdam

As a general rule, under the principle of conferral (Article 5(1) TEU) the Union can only act within its competences and when it does not have competence, the member states do (Article 4(1) TEU). In the present context Article 4(2) TEU is relevant: the Union ‘shall respect’ the member states’ ‘essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each member state.’ Specifically with regard to internal security, Article 72 TFEU sets out that ‘[the Title on the Area of Freedom Security and Justice] shall not affect the exercise of the responsibilities incumbent upon member states with regard to the maintenance of law and order and the safeguarding of internal security.’ These provisions confirm that the use of coercive measures in order to enforce measures adopted under the Area of Freedom, Security and Justice is a reserved competence of the member states, in particular as regards arrest, detention and the use of force (Peers 2011, 27). The principle of sincere cooperation may even oblige member states to take enforcement measures that the Union cannot.⁸⁶ However, other more specific and express limitations of Union competence on security issues in the Treaties confirm that Article 72 TFEU should not be read as excluding specific Union actions in the absence of such a specific limitation.⁸⁷ Article 73 further expresses that member states may organise cooperation on matters of national security amongst themselves. This provision only preserves a *parallel* competence of the member states. It does not exclude cooperation measures adopted by the Union regarding national security.⁸⁸

The rest of this appendix sets out the Union’s competences to legislate, conclude international agreements, adopt frameworks for member state cooperation, and set up common capabilities and systems that support the member states in their efforts as well as the institutional capacities to oversee the Union counter-terrorism strategy.

The Treaties vest the Union with a number of **legislative competences** that allow it to adopt specific legal acts that either specifically address counter-terrorism or may at least also serve the fight against terrorism. Firstly, pursuant to **Article 83(1) TFEU**, the EU is competent to adopt directives defining criminal offences and sanctions in the areas of particularly serious crimes, including terrorism and organised crime. An example is the Directive on combating terrorism,⁸⁹ which replaces the existing Council Framework Decision 2002/475/JHA with regard to those member states bound by this Directive.

Secondly, **Articles 75 TFEU and 215(2) TFEU** are two specific legal bases that allow the Union to adopt restrictive measures (counter-terrorist sanctions). For the past 15 years, the Union has been adopting both autonomous counter-terrorist sanctions and transposing UN freezing measures (Eckes 2009).⁹⁰ Until now all EU sanctions, whether autonomous or giving effect to UN Security Council Resolutions, have been based on Article 215 TFEU and its predecessor.⁹¹ Article 75 TFEU has thus never been used as a legal basis for the adoption of counter-terrorist sanctions. In 2010, Parliament challenged the choice of Article 215 TFEU for EU sanctions giving effect to UN Security Council Resolutions.⁹² It argued that the correct legal basis would have been Article 75 TFEU, which provides

⁸⁶ C-186/98, *Criminal proceedings against Maria Amélia Nunes, Evangelina de Matos*.

⁸⁷ See also Peers (2011), 28.

⁸⁸ *Ibid.*

⁸⁹ (EU) 2017/541, OJ L 88, 31.3.2017, 6–21

⁹⁰ For more recent developments see Eckes (2014; 2018, forthcoming).

⁹¹ The express competence for restrictive measures against persons rather than third states was introduced by the Lisbon Treaty, but the Union had been adopting such sanctions on the state sanctions competence before.

⁹² Case C-130/10, *Parliament v. Council*, Judgment of 19 July 2012.

for the adoption of counter-terrorist sanctions as part of the Area of Freedom, Security and Justice and pursuant to the ordinary legislative procedure. A textual analysis of the Treaties does not allow a clear delimitation between the two possible legal bases for EU counter-terrorist sanctions (Eckes 2012, 120–23). However, much speaks in favour of using Article 75 TFEU, with its stronger democratic legitimisation through the involvement of the Parliament, in particular for autonomous EU counter-terrorist sanctions.

Thirdly, the Union can adopt legislative acts that also serve the fight against terrorism based on its competences to adopt rules on the internal market (**Article 114 TFEU**, in combination with a specific legal basis in Part III of the TFEU). An example is Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing.⁹³

Fourthly, **Articles 82 and 87 TFEU** are legal bases that allow the Union to adopt legislative measures that also govern situations relevant to the fight against terrorism. **Article 82(2) TFEU** allows the Union to adopt minimum rules for judicial cooperation in criminal matters. Article 82(2) (c), for example, vests the Union with the competence to establish minimum rules concerning the rights of victims of crime, including terrorist acts. The Union has in different contexts expressed its particular concern for procedural safeguards in the context of terrorism cases.⁹⁴ The Commission further adopts Action Plans (EC 2016d), which set out its own agenda to put forward both legislative and soft measures and calls on member states to take particular action.

The EU is therefore competent to harmonise substantial criminal law, for example the definition of offenses (Article 83(1) and (2) TFEU), and procedural standards, for example procedural rights (Article 82(2) TFEU).⁹⁵

Beyond this, the EU is also competent to create a **legal framework for cooperation**, to facilitate member state cooperation. **Article 82(1) TFEU** allows the Union to adopt measures that facilitate judicial cooperation between member states, including with a view to fighting terrorism. Cornerstones of judicial cooperation are the European Arrest Warrant (EAW) and the European Investigation Order (EIO), both of which are relevant to terrorism investigations. A prominent example for an **Article 87 TFEU** measure facilitating cooperation of police authorities is the EU Passenger Name Record (PNR) Directive, which is the legal basis for systematic collection, use and retention of airline passengers' personal data, including travel dates and itineraries, contact details and payment information.⁹⁶

The EU is further competent to adopt **international agreements** pursuant to the procedure in Article 218 (6)(a)(v) TFEU in combination with the specific substantive legal bases mentioned above. This includes agreements aimed at fighting the financing of terrorism. A prime example is the EU-US agreement on access to transfer of financial data in the framework of the US Terrorist Finance Tracking Program (the 'TFTP Agreement'), which entered into force in 2010, and the Passenger Name Records agreements with the US, Canada and Australia.

Moreover, the EU is competent to set up common capabilities and systems, notably including data information systems. Core examples are SIS, VIS, EU PNR, and Eurodac. The EU must respect the existing legal frameworks for these information systems, including their specific rules on data protection, access for competent authorities, separate purpose limitation for each category of data and dedicated data retention. Within these existing legal frameworks, the EU is competent to take measures aimed to improve the effectiveness of the information systems, including their

⁹³ See also the Commission proposal to amend the existing legislation (EC 2016j).

⁹⁴ See, for example, the Commission's Green Paper on the Presumption of Innocence (EC 2006).

⁹⁵ See, for example, Directive (EU) 2016/343 of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (OJ 2016 L 65/1).

⁹⁶ The PNR Directive is based on a combined legal basis of Articles 82(1)(d) and 87(2)(a) TFEU.

interoperability. As a matter of principle, the Union is also competent to adopt legislation that makes mandatory the uploading of data into common systems.⁹⁷

The EU is further competent to provide **financial support** to member states to improve internal security, such as via the Internal Security Fund, and this support can be used to fight terrorism. Other examples of support that feature a counter-terrorism element include the Radicalisation Awareness Network, ATLAS (a network of rapid intervention forces) and Airpol (the airport police network). The EU also works together with member states and stakeholders in expert groups covering, for example, chemical, biological, radiological and nuclear threats, and precursors.

More generally, the Union is competent and required to **consider internal security matters in all policy areas**, whether or not it takes legislative actions. Examples of policies in which this particularly pertinent are transport and energy.

Finally, **EU agencies** such as Europol and Eurojust, as well as threat assessment bodies, notably IntCen (the EU Intelligence and Situation Centre, now part of the European External Action Service) have the competence and mandate to support member states in their efforts to counter terrorism, in particular by acting as hubs for information exchange and making relevant information accessible in a simple and timely manner.

⁹⁷ See, for example, the recent call of the Council on the Commission to adopt such legislation for the database of False and Authentic Documents Online (FADO) in the Conclusions of the Justice and Home Affairs Council, 27-28/03/2017.