



## Evaluating an Evaluation - "The EU Counter-Terrorism Policy: Main Achievements and Future Challenges"

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### 1. Introduction

In 2005-2006 QCEA published twelve briefing papers outlining and evaluating EU responses to terrorism, and in its 2007 report "Effective Counter-Terrorism: A Critical Assessment of European Union Responses" QCEA set out a series of recommendations to policy makers. Since then, there has been a dizzying array of counter-terrorism related policy developments and initiatives within the EU. Whilst many of the recommendations in the 2007 report still apply, these developments, and responses to them, certainly merit an update. Not least because the situation relating to counter-terrorism policy has been described as ad hoc and confusing:

*"At European level, the framework is complex and subject to constant change and fine-tuning on a day by day basis, often incident driven (e.g. the body scanner case), due to the interplay of several initiatives in different areas involving many parties, both on the law enforcement side as well as, with a growing intensity, in the private sector... The first reaction to this complex, fragmented and mobile landscape is, therefore, the need for all stakeholders - policy and rule makers, civil society and citizens as individuals - to have a clear picture of the existing policies and of those which are going to be introduced."*<sup>1</sup>

<sup>1</sup> Buttarelli, Giovanni, *Counter Terrorism Policy and Data Protection*, Assistant European Data Protection Supervisor at Public Hearing on EU Counter-Terrorism by the European Economic and Social Committee, 9 February 2010. For more information on the 'body scanner case' and how controversy around this new issue continues in European policy making circles, see, for example, a Parliamentary Question from 21 September 2011, which raises some concerns, [online] accessed October 2011, available at <http://www.europarl.europa.eu/sides/getDoc.do?jsessionid=070666512F371BD400022BD734D13C0B.node2?pubRef=-//EP//TEXT+OQ+O-2011-000211+0+DOC+XML+V0//EN&language=EN>

The Commission attempted to address this need for an updated summary and evaluation of EU counter-terrorism policy in its August 2010 Communication (COM(2010)386) 'The EU Counter-Terrorism Policy: main achievements and future challenges'.<sup>2</sup>

This briefing paper will begin with a refresher on the EU's 2005 counter-terrorism strategy comprising the Prevent, Protect, Pursue, Respond framework. It will then summarise the Commission's own attempt to create a clear picture of existing and future policies. The responses to this attempted critique will be presented as a means of identifying how and why (COM(2010)386) is a deeply inadequate evaluation.

This briefing will introduce the reader to some of the current debates and concerns surrounding EU responses to terrorism, which will be followed up in briefing papers 14a and 14b by the specific law and policy developments and the main areas of concern.

## 2. A Recap of the 2005 EU Counter-Terrorism Strategy: Prevent, Protect, Pursue, Respond

The EU's 2005 strategy proposed four pillars to combat terrorism effectively: "prevent", "protect", "pursue" and "respond":

- **Prevent** - aims to combat radicalisation and recruitment of terrorists by identifying the methods, propaganda and instruments they use;
- **Protect** - aims to reduce the vulnerability of targets to attack and to limit the resulting impact of attack, by establishing collective action for border security, transport and other cross-border infrastructures;
- **Pursue** - aims to pursue terrorists across borders, while respecting human rights and international law. This means cutting off access to attack materials (arms, explosives, etc.), disrupting terrorist networks and financing, and tackling the misuse of non-profit associations;
- **Respond** - aims to ensure cooperation between Member States in mobilising to deal with and respond to an attack. The response systems to terrorist attacks will often be similar to those in place to manage natural, technological or other man-made disasters.

This framework came into being following two very serious terrorist attacks in Europe, the 2004 Madrid and 2005 London bombings. This partly explains why the 'Pursue' strand has been dominant - one of the first Action Plans to implement the strategy, of February 2006, listed 146 action points 65 of which were under the Pursue strand, with only 22 under Prevent. To read more about the 2005 strategy, its key points, and QCEA's analysis of it at the time, take a look at QCEA's 2006 briefing paper 11.<sup>3</sup>

## 3. COM(2010)386 "The EU Counter-Terrorism Policy: main achievements and future challenges"

Five years after the EU Counter-Terrorism strategy was initiated, the Commission produced a Communication taking stock of EU-level legislative and policy developments, and presenting some of the future challenges, in the fight against terrorism. The following is a summary of the document:

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<sup>2</sup> European Commission, *Communication from the Commission to the European Parliament and the Council - The EU Counter-Terrorism Policy: main achievements and future challenges*, [COM(2010)386 final]

<sup>3</sup> QCEA, *The new EU strategy, new action plan and the Future*, Briefing Paper 11, 2006, in The EU's response to the threat of terrorism series, [online] accessed July 2011, available at <http://www.qcea.org/work/human-rights/terrorism/>

<b>Prevent</b>	At the initiative of the Commission, the Framework Decision on combating terrorism was amended in 2008 to deal more specifically with prevention aspects. In force from December 2010, the amendments make it possible to prosecute and punish people who try to involve others in terrorist activity by encouraging them or by providing them with the information they need to commit attacks, such as bomb-making recipes. <sup>4</sup>
	The Commission also seeks to promote a public/private partnership approach for countering terrorist use of the internet. It has started a dialogue between law enforcement authorities and service providers in order to reduce the dissemination of illegal terrorism-related content on the internet. A European Agreement Model to facilitate public/private cooperation on the issue has been under development. <sup>5</sup>
	The Communication notes that, in the future, the most effective ways to counter radicalisation and recruitment must be identified more accurately. To this end, the Commission has supported the production of a number of studies related to its 2005 Communication on terrorist recruitment. <sup>6</sup> Furthermore, it has set up a European Network of Experts on Radicalisation (ENER) to facilitate dialogue between academics and policy makers. National policies which relate to counter radicalisation and recruitment will be assessed, to serve as a basis for updating the EU strategy; the Commission will launch a communication on this in 2011. More effective approaches must also be put in place to counter terrorist use of the internet, including further support to national law enforcement authorities. <sup>7</sup>
<b>Protect</b>	Great efforts have been made to improve border security, including the introduction of new technologies in the development of the integrated border management system and of biometric passports. Developments include the second generation Schengen Information System (SIS II) and the Visa Information System (VIS). <sup>8</sup>
	In the area of cyber security, the Framework Decision on attacks against information systems was established in 2005, and a 2009 Communication established a plan of action to deal specifically with threats to the critical information infrastructure.

<sup>4</sup> Summarised from Europa, *MEMO/10/350 EU Counter-terrorism strategy: main achievements*, Press Release, Brussels, 20 July 2010, [online] accessed July 2011, available at

<http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/10/350>

<sup>5</sup> *ibid.*

<sup>6</sup> Summarised from European Commission, *Communication from the Commission to the European Parliament and the Council concerning terrorist recruitment: addressing the factors contributing to violent radicalisation*, [COM (2005) 313], 2005, [online] accessed July 2011, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0313:FIN:EN:PDF>

<sup>7</sup> Information taken from *Europa Summary of COM(2010) 386*, [online] accessed July 2011, available at [http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/fight\\_against\\_terrorism/j10041\\_en.htm](http://europa.eu/legislation_summaries/justice_freedom_security/fight_against_terrorism/j10041_en.htm)

<sup>8</sup> For more information, see *Europa Summary of 'Second generation Schengen Information System (SIS II) - former 1st pillar regulation'* [online] accessed July 2011, available at

[http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/free\\_movement\\_of\\_persons\\_asylum\\_immigration/I1454\\_4\\_en.htm](http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/I1454_4_en.htm), and *Europa Summary of VIS Regulation*, [online] accessed July 2011, available at [http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/free\\_movement\\_of\\_persons\\_asylum\\_immigration/I1451\\_7\\_en.htm](http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/I1451_7_en.htm)

	<p>The Commission has also developed an EU Action Plan for Enhancing the Security of Explosives which was approved by Council in April 2008. The implementation of the 50 concrete actions to minimise the risk of terrorist attacks with explosives is under way, and involves Europol and Member State authorities.</p>
	<p>The Directive on European Critical Infrastructures (ECI) (adopted at the end of 2008) focuses on the procedure for identifying and designating ECI and includes a definition of European Critical Infrastructure.</p>
	<p>The security research programme (as part of the Seventh Framework Programme for Research and Technological Development) has been established to support the development of security and counter-terrorism policies and technologies.<sup>9</sup></p>
	<p>Future work must concentrate on improving transport security through the use of new technologies and on developing industrial security policy with a focus on standardising and certifying security solutions. Efforts should also be made to ensure the effectiveness of security research policy, in particular by strengthening links between public sector users and the research community as well as technology providers and the industry.<sup>10</sup></p>
<p><b>Pursue</b></p>	<p>Several instruments enhancing the gathering and exchange of information between police and judicial authorities of the Member States have been agreed. These include the Data Retention Directive, the integration of the Prüm framework (for the exchange of DNA, Fingerprint, and vehicle data) into EU legislation and the Framework Decision on simplifying the exchange of information and intelligence between law enforcement authorities.</p>
	<p>The European Arrest Warrant has facilitated the transfer of persons suspected of serious crimes, including acts of terrorism, between the Member States. The first phase of the European Evidence Warrant, which makes it easier to obtain evidence in another Member State, was also adopted.</p>
	<p>The functioning of Europol was enhanced by way of its new legal framework, with improvements made to its cooperation with Eurojust.<sup>11</sup> New rules have been established to tackle terrorist financing, in particular the third Anti-Money Laundering Directive. Regulation on controls of cash entering or leaving the EU has also been adopted,<sup>12</sup> and there are also non-legislative measures to counter terrorist financing, such as the voluntary guidelines to address non-profit organisations' vulnerability to abuse for terrorist financing purposes.</p>

<sup>9</sup> For more information, see *Europa Summary of 'Seventh Framework Programme (2007 to 2013)'* [online] accessed July 2011, available at [http://europa.eu/legislation\\_summaries/energy/european\\_energy\\_policy/i23022\\_en.htm](http://europa.eu/legislation_summaries/energy/european_energy_policy/i23022_en.htm)

<sup>10</sup> Details of this, and the previous five points, taken from *Europa Summary of COM(2010)386*, *ibid*.

<sup>11</sup> For more information, see *Europa Summary of 'Decision establishing Eurojust'* [online] accessed July 2011, available at [http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/fight\\_against\\_terrorism/I33188\\_en.htm](http://europa.eu/legislation_summaries/justice_freedom_security/fight_against_terrorism/I33188_en.htm)

<sup>12</sup> For more information, see *Europa Summary of 'Money laundering: prevention through customs cooperation'* [online] accessed July 2011, available at [http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/fight\\_against\\_organised\\_crime/I25069\\_en.htm](http://europa.eu/legislation_summaries/justice_freedom_security/fight_against_organised_crime/I25069_en.htm)

	<p>There has been an overview of information management in the area of freedom, security and justice, considering the various new legal instruments for exchanging information, with various legislative proposals expected.<sup>13</sup> It will be necessary to determine the right way to establish a European policy for the use of passenger name record (PNR) data to combat terrorism and organised crime. There is the need to establish a methodology based on common parameters for threat assessments at EU level in order to ensure that counter-terrorism policy is adequately supported by evidence.<sup>14</sup></p>
<b>Respond</b>	<p>The EU Civil Protection Mechanism is the main instrument for responding to terrorist attacks.<sup>15</sup> Additional EU-level mechanisms include the Crisis Coordination Arrangements (CCA) and the ARGUS system, which aim at coordinating responses to crises. Europol also supports coordinated responses to terrorist incidents through its information exchange mechanisms.</p>
	<p>The EU action plan on chemical, biological, radiological and nuclear security was adopted in 2009, with a view to better preparing and responding to incidents in which terrorists would obtain such materials.<sup>16</sup> The Commission also provides support to victims of terrorist attacks, including financial support - € 5 million has been made available over the last 5 years.<sup>17</sup></p>
	<p>The EU civil protection policy has been under evaluation to better prepare for the follow-up actions. An assessment of ways to reinforce coordination and cooperation to facilitate consular protection during crises is also underway. Furthermore, it is essential that the EU rapid response capacity be further developed on the basis of existing instruments.<sup>18</sup> The arrangements to make the solidarity clause, which was introduced in the Treaty on the Functioning of the European Union (Article 222), operational will need to be established quickly.<sup>19</sup></p>

The Communication also considers horizontal issues, which include:

- **respect for fundamental rights**<sup>20</sup> - the tools used to fight terrorism must comply with the Charter of Fundamental Rights;
- **cooperation with external partners** - cooperation should be further developed through international organisations, such as the United Nations, and with non-EU countries, particularly the United States;

<sup>13</sup> For more information, see European Commission, *Communication from the Commission to the European Parliament and the Council of 20 July 2010 - Overview of information management in the area of freedom, security and justice*, [COM(2010) 385 final], [online] accessed July 2011, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52010DC0385:EN:NOT>

<sup>14</sup> Information taken from Europa Summary of COM(2010)386, *ibid*.

<sup>15</sup> For more information, see *Europa Summary of 'Civil Protection Mechanism'* [online] accessed July 2011, available at [http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/fight\\_against\\_terrorism/128003\\_en.htm](http://europa.eu/legislation_summaries/justice_freedom_security/fight_against_terrorism/128003_en.htm)

<sup>16</sup> For more information, see *Europa Summary of 'EU action plan on chemical, biological, radiological and nuclear security'* [online] accessed July 2011, available at [http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/fight\\_against\\_terrorism/j10030\\_en.htm](http://europa.eu/legislation_summaries/justice_freedom_security/fight_against_terrorism/j10030_en.htm)

<sup>17</sup> Information from MEMO/10/350, *ibid*.

<sup>18</sup> Europa Summary of COM(2010)386, *ibid*.

<sup>19</sup> COM(2010)386, *ibid*.

<sup>20</sup> For more information, see *Europa Summary of 'Charter of Fundamental Rights'* [online] accessed July 2011, available at [http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/citizenship\\_of\\_the\\_union/133501\\_en.htm](http://europa.eu/legislation_summaries/justice_freedom_security/citizenship_of_the_union/133501_en.htm)

- **funding** - the multiannual financial frameworks (currently the Security and Safeguarding Liberties Programme) provide funding for counter-terrorism; the feasibility of creating an Internal Security Fund will be examined in future.<sup>21</sup>

#### 4. Responses to COM(2010)386

The Commission's Communication was supposed to serve the purpose of a critical policy evaluation. It falls far short of that goal. COM(2010)386 largely highlights only (what the Commission sees as) its successes, and raises few of the contentious and difficult issues that have been raised relating to the plethora of terrorism-related policy developments at EU and Member State level. The European Parliament has been very vocal in its criticisms relating to this lack of oversight and evaluation. The responses to the communication of the European Economic and Social Committee (EESC), the EU Parliamentary Committee on Civil Liberties, Justice and Home Affairs (LIBE Committee) and European Data Protection Supervisor (EDPS) are explored below.

##### 4.1 LIBE Committee

Since the Lisbon Treaty entered into force, the European Parliament has more influence in EU counter-terrorism policy. They have used this opportunity to make some pretty loud noises. The Parliamentary Rapporteur on counter-terrorism policy and Vice Chair of the LIBE Committee, Dutch MEP Sophia in 't Veld, has been vocal in calling for a thorough evaluation of counter-terrorism policy and its costs - both financial and in terms of civil liberties - and has criticised the fact that the ad hoc collection of policies have too often been based on emotion rather than evidence.

At a LIBE hearing on COM(2010)386 in April 2011,<sup>22</sup> the Committee considered the results of ten years of EU counter-terrorism policies, focusing on the questions of whether we are any safer, and the impact of counter-terrorism policy on the rule of law and human rights.

##### Q. Are We Safer?

**(a) Director of Internal Security of the European Commission Directorate General for Home Affairs, Reinhard Priebe**, noted that security and safety are subjective notions, and suggested that the more pertinent question is whether we are more competent to tackle an ever evolving threat.

**(b) Director of Europol, Rob Wainwright**, noted that whilst, for example, drug trafficking has literally millions of victims and effects, with a comparatively tiny number of victims of terrorism, the indirect effects of terrorism are much bigger in terms of fear and the feeling of insecurity.

**(c) Parliamentary Rapporteur on Counter-Terrorism, Sophia in t'Veld** agreed that we probably cannot say whether we are safer now than ten years ago. However, she strongly criticised claims that this or that measure is very important for counter-terrorism, because

<sup>21</sup> Information taken from Europa Summary of COM(2010)386, *ibid*. An Internal Security Fund has now been proposed by the Commission in the Communication on the next Multi-annual Financial Framework. See [COM(2011) 500], 29 June 2011, [online] accessed July 2011, available at [http://europa.eu/press\\_room/pdf/a\\_budget\\_for\\_europe\\_2020\\_en.pdf](http://europa.eu/press_room/pdf/a_budget_for_europe_2020_en.pdf)

<sup>22</sup> Details on the LIBE hearing can be found [online] accessed July 2011, available at <http://www.europarl.europa.eu/activities/committees/eventsCom.do?page=1&product=CHE&language=EN&body=LIBE> under '19-04-2011: Hearing on EU Counter-Terrorism: Main achievements and future challenges'



unless there is clear evidence for such claims, they are merely assumptions that lead people to herald the success of one particular measure! In t’Veld also noted that:

- The EU has passed so much legislation in the last decade that there is a clear need for analysis and a “much stronger reflex of self-criticism and evaluation”.
- Public perception is very important when it comes to countering terrorism and taking action to restore public confidence, but we must distinguish between this, which is a political need, and the responsibility of law-makers, which requires more reticence and reflection over what drives us to action.
- The Parliament has, time and time again, called for evidence of the efficacy, impacts and implementation of counter-terrorism policy, because policy should be made not on the basis of emotion, but on evidence.
- It is also important that we consider to what extent are our own actions - for example, wars against Muslim countries - Iraq, Afghanistan, Libya, - or partisan policies, have led to terrorist actions.
- The line between law enforcement and intelligence activities has become increasingly blurred, and there has been substantial mission creep. Many counter-terrorism measures have subsequently been used for totally different purposes, and vice versa. There is a need for purpose-limitation pinned to specific pieces of legislation.

**(d) UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Professor Martin Scheinin,** reiterated the concerns about mission creep. He also noted that acts of terrorism can unite societies so that exceptional powers are easily granted for investigative purposes, which then become extended to preventative purposes.

Q. What are the impacts of counter-terrorism policy on the rule of law and human rights?

**(a) The International Centre for Counter-Terrorism’s Dr Beatrice De Graaf** made the point that evaluating counter-terrorism is not done in a value-free vacuum. It is a political and ideological question, and so there cannot be an assessment of objective effectiveness. She went on to argue that there are a series of epistemological difficulties in evaluating counter-terrorism, from defining terrorism itself, to ascertaining what governments actually want; *to prevent attacks; to disrupt networks; a more secure society; a more open democratic society?* Depending on what are seen as the root causes of terrorism, reactions could be anything from trying to address socio-economic root causes to implementing more oppressive measures.

Because the effectiveness of measures cannot be assessed, De Graaf argued that we should look instead to assess performance. How something performs is largely determined by our perception of it, and De Graaf described the research that she has done into the unintended consequences of counter-terrorism measures, with respect to what these perceptions do. In particular, she examined the effects of the kind of government discourse which puts counter- terrorism high on the agenda, presenting it as an urgent threat.

### **High visibility of counter-terrorism correlates with a high incidence of terrorism**

Where counter-terrorism is given this kind of high visibility - what De Graaf calls 'high performativity' - this can include:

- the presentation of terrorism as an imminent risk or direct vulnerability;
- invoking an urgent threat to the common good which therefore needs direct action against it;
- a national security issue;
- emphasising that there is no shared cultural identity or possible overlap with the terrorist groups;
- large-scale anti-terrorism measures;

De Graaf found a positive correlation with the incidence of terrorism.

When counter-terrorism strategies with a high level of performativity have been implemented, and had a high potential to get the public on board, it was only afterwards that the number of attacks rose. Furthermore, it was only after this performativity decreased that the number of incidents decreased.

Whilst this decrease in the number of terrorist attacks could be the delayed result of counter-terrorism measures, research has also pointed to the fact that a high level of urgency, mobilization and visibility has gone hand in hand with continuing radicalization of new recruits and increased incidence of attacks.

With regard to explanations for this phenomenon, De Graaf offered several theories:

- I. Action repression theory** - the end of a cycle of violence is ascribed to a decrease in the public and political relevance attached to terrorism and counter-terrorism. In certain cases, terrorists abandon violent courses of action when they notice that they no longer draw public and political attention, for example, due to a lack of recruits, etc. On the other hand, more attention, harsher law enforcement measures and the kind of simplified solutions to which law enforcement agencies always tend in a high stress environment, provide terrorists with their aspired injustice framework. Intrusive, broadly preventative and aggressive counter-terrorism measures induce alienation and radicalization in marginalized and ethnic communities/ minorities. When feeling weak and oppressed, it pushes some to lash out.
- II. Normalizing the state of exception** - highly visible security measures enhance perceived insecurity rather than generating more security. Undermining the rule of law with "emergency" measures, continually presenting society with new measures, like data mining, data transfer, even simple calls for public vigilance, can, in turn, rebound against the efforts of counter-terrorism itself.

Contrary to common assumption, De Graaf's study suggests that reserved language and punctual crime prevention, rather than enhancing huge discretionary powers and invoking the state of exception, are more effective counter-terrorism strategies. Prioritizing security can lead to public perceived insecurity and loss of trust. De Graaf called on the European Parliament to evaluate (or call for the evaluation of) not only the technical and financial aspects of the EU's prevent, protect, pursue and respond programme, but also to investigate the effects of performativity. Focusing on the prevent strand, not by focusing on control and security but rather on social inclusion and equality, could be just the tool to counterbalance



false security thinking and bring about more lasting social peace and human freedom than security measures could ever provide.

Parliamentary Rapporteur Sophia in t'Veld heralded de Graaf's research as the truths we do not want to hear. For ten years, in t'Veld argued, we have been telling ourselves how extremely urgent and necessary all of these measures are, but in fact, by putting it so high on the agenda and making it so visible, we not only provide terrorists with a justification and framework, making terrorism sexy and terrorists to feel powerful, but we have also created a state of panic. In t'Veld gave the example of one man screaming in a crowded square in Amsterdam, for no other reason than mental ill-health, and of panic spreading. In this instance, 65 people were seriously injured, the crowd instantly thinking it was a terrorist attack as opposed to what it actually was - absolutely nothing. We have driven ourselves 'crazy', and yet raising this issue has become taboo, with everyone bound to adopt this discourse about an imminent threat, everywhere, all the time.

**(b) Vrije Universiteit Brussel (V.U.B.)'s Professor Paul De Hert** gave examples of how the new capacities of innovative technologies have sometimes led to human rights issues being overlooked, as well as the issues of proportionality and function creep, and how the Courts have responded by drawing 'red lines'. For example;

- I. **The UK Terrorism Act** granted the London Metropolitan police the power to stop and search any person in a given geographical area. However, the UK courts set a precedent by ruling that the act was 'too wide and too open to a discriminatory use of powers against minorities'.<sup>23</sup> In short, they ruled that the act was unlawful.
- II. **The European Court of Human Rights (ECHR)** ruled against the British Parliament who passed legislation allowing a UK database to be kept containing information on groups of innocent people, for example, youths. They ruled that it was a violation of the right to privacy simply because it was disproportional.
- III. **The German Courts** ruled that the planned use, by the police, of a database of foreigners in the fight against crime/terrorism was unacceptable. Crime is not dependent on nationality, and police cannot use a database of foreigners if they are not using a database of Germans: it is discriminatory. This has added to the legal basis for preventing function creep, i.e. existing instruments being used for purposes different to those originally intended.

De Hert argued that there has been a trend towards preventive policing using technology as support. Law makers are responding to this with both adaptive and non-adaptive strategies. Non-adaptive strategies are the more emotional ones, designed to show the people that "We are in control", without actually assessing if they work. Yet, non-adaptive strategies, such as giving powers to the London police to stop and search anyone, do not pass the bar when put under scrutiny of the rule of law *i.e.* they cannot pass the test of the European courts. Law cannot be arbitrary or vague; it must be proportional and explicit. Where it is not, it is being ruled unlawful.

As a point of caution, one MEP expressed the concern that whilst judges ruling against new laws which are unacceptable from a human rights perspective is welcome, it is nonetheless unwise to have a system that relies solely on the personal courage of judges. Of course we must put our faith in the legal system, but judges are also human beings, who come under pressure from governments, urged not to prosecute, to stay off certain cases, as the Wikileaks scandals of the last few years have demonstrated. We need much stronger legal

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<sup>23</sup> De Hert, Paul, speaking at *LIBE Committee Hearing on EU Counter-Terrorism: Main achievements and future challenges*, 19 April 2011, *ibid.*

and political safeguards than relying on the incorruptibility of those who sit in our Courts of Law.

## 4.2 European Economic and Social Committee (EESC)

The EESC made clear in its response to COM(2010)386 that counter-terrorism policy should be brought in line with actual trends in terrorism, with the emphasis placed firmly on prevention, understood in its broad sense as a process whereby the societal, political and economic causes of terrorism are dealt with directly.<sup>24</sup>

The EESC emphasised the effects of the economic crisis, in weakening the links of solidarity between people, groups and political institutions, triggering mistrust and intolerance towards minority communities, and pushing them into a defensive position. They identified a consequent growing danger of radicalisation, both religiously and ideologically motivated. EU counter-terrorism policy, especially relating to combating radicalisation and recruitment to terrorism, continues to seriously neglect practical measures to curb inequalities and discrimination. For example, the most recent (January 2011) counter-terrorism action plan<sup>25</sup> 'does not include any actions in the area of targeting inequality and discrimination wherever it may be found in the EU and promoting long-term integration wherever necessary'.<sup>26</sup>

The EESC argue that the prevention strand should be reviewed. Although the focus on prevention is to be welcomed, it is still not properly tackling the causes of terrorism:

*"many lapses into terrorism may be explained as the end result of processes of alienation, radicalisation and recruitment fed by broad inequalities between groups in an area, exclusion and discrimination (social, political or economic)"<sup>27</sup>*

Dialogue aimed at identifying political responses to the development of terrorism should examine political, institutional, social and economic relations at Member State level and aim to effectively pacify historically rooted tensions. Within the prevention area, a new dimension should be added further upstream, involving the development of cooperation and the timely resolution of tensions, and incorporating wider EU and national policies, including youth, culture, education and political and civic participation.

The EESC recommend that qualitative and quantitative information on the dynamics of terrorism should shape counter-terrorism policies. The number of failed, foiled or completed terrorist attacks fell by half in 2009 compared to 2007. What is more, despite the fact that religiously motivated terrorism, namely Islamist terrorism, is publically perceived to be the most common and dangerous type of terrorism, it is actually the rarest. Of the total 294 failed, foiled or successfully executed terrorist attacks that occurred in EU Member States in 2009, their affiliation and number were:

<sup>24</sup> For more information, see European Economic and Social Committee, *Opinion of the Section for Employment, Social Affairs and Citizenship on the Communication from the Commission to the European Parliament and the Council - The EU Counter-Terrorism Policy: main achievements and future challenges COM(2010) 386 final*. EESC SOC/388, Brussels, 31 March 2011, [online] accessed October 2011, available at <http://www.europarl.europa.eu/document/activities/cont/201104/20110407ATT17200/20110407ATT17200EN.pdf>

<sup>25</sup> Council of the European Union, *EU Action Plan on combating terrorism*, 17 January 2011, [online] accessed July 2011, available at <http://register.consilium.europa.eu/pdf/en/10/st15/st15893-re01.en10.pdf>

<sup>26</sup> EESC Opinion SOC/388, *ibid.*, p. 6

<sup>27</sup> European Economic and Social Committee, *Opinion on the Prevention of terrorism and violent radicalization*, SOC/301Brussels, 22 April 2008, p. 8, [online] accessed July 2011, available at <http://www.uni-mannheim.de/edz/doku/wsa/2008/ces-2008-0769-en.pdf>

- separatist attacks (257)
- left-wing or anarchist attacks (40)
- right-wing attacks (4)
- "single issue" attacks (2)
- Islamist terrorism (1).<sup>28</sup>

Terrorism is multi-faceted and multi-issue: one-size-fits-all policies are inappropriate, costly and ineffective. 'Counter-terrorism policies must tailor their response to terrorism depending on the arena, motivation, type and causes'.<sup>29</sup> Given that the vast majority of terrorist acts carried out in the EU derive from historical, separatist issues, the EESC also suggests that the Committee of the Regions, which brings together local and regional representatives, should be more closely involved in the European debate. The principle of proportionality must also be brought into play, so that the response is proportionate in terms of effort and cost to the scale of these different types of threat.

In view of the profound differences between the public perception of terrorism and the reality, the EESC urges governments and EU institutions to play their part in educating people on its causes, scale and effects. There are serious 'risks of incorrect and incomplete information about terrorism, as well as the danger of turning the terrorist threat into a pretext for social exclusion, intolerance and discrimination. As the aim of terrorism is to spread fear, overstating terrorist threats could serve the interests of those who might carry out such actions'.<sup>30</sup> To this end, there is an important role for civil society to be involved in constructing a communication, cooperation and solidarity model to precede actual prevention (the phase when individuals are already prepared to undertake terrorist actions). This reflects the EESC (and QCEA's) belief that the most effective way of combating terrorism is to tackle the causes rather than the effects. Specific instruments and programmes, like mediation and education, also have an important role, in which civil society could be involved.

In order to boost the credibility of counter-terrorism policy and to drive home the importance of respect for fundamental rights, the EESC recommends that the Commission should accede to the European Parliament's request, set out in the 2007 resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners, for an evaluation of counter-terrorism legislation at Member State level and of other procedures which could open the door to such actions.

The Commission's commitment to respect for fundamental rights is welcomed, but the EESC requests the same commitment from national governments, and that this respect should not be not limited to devising and drawing up instruments, but should also encompass their implementation. The legal basis of the European system for the protection of human rights should be reflected more clearly in the Commission's communications and actions. The EESC also emphasis a need for more vigorous promotion of counter-terrorism models based on democratic standards and procedures, especially in third countries where counter-terrorism policy may affect the quality of, and infringe upon, democracy and respect for fundamental rights.

The weight of expenditure on each strand of the strategy (prevent, protect, pursue, respond) must be rebalanced and the political commitment to prevention must be flanked by appropriate budgetary resources.

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<sup>28</sup> 2010 Europol terrorism situation and trend report (TE-SAT), [online] accessed July 2011, available at [http://www.europol.europa.eu/publications/EU\\_Terrorism\\_Situation\\_and\\_Trend\\_Report\\_TE-SAT/Tesat2010.pdf](http://www.europol.europa.eu/publications/EU_Terrorism_Situation_and_Trend_Report_TE-SAT/Tesat2010.pdf)

<sup>29</sup> EESC Opinion SOC/388, *ibid.*, p. 4

<sup>30</sup> *ibid.*, p. 4

## 4.3 European Data Protection Supervisor (EDPS)

'Surveillance information technologies and personal data processing are the building blocks of a large part of the EU counter-terrorism strategy.'<sup>31</sup> It is for this reason, the EDPS argues, that the counter-terrorism strategy must be accompanied, at every stage of its development, by a concrete and robust policy on fundamental rights, which:

- is **ex ante** (minimum interference principle as default rule, principles of strict necessity and proportionality, data quality and transparency, privacy by design, tools to evaluate impact, impact assessment of different policy options in order to select the least privacy-intrusive),
- has a **clear legal basis** and is not based on general or vague rules, with effective judicial remedy, liability and adequate compensation ensured,
- is **ex post** ("the periodic, comprehensive and objective (i.e. showing also the weakness of the systems) evaluation of the effectiveness of the legislative and organisational measures introduced via an independent and multidisciplinary panel"), and;
- has **effective controls**.<sup>32</sup>

The EDPS has expressed concern about the 'preventive' use of personal data, because it is more likely to lead to discrimination:

*"The preventive analysis of information would entail the collection and processing of personal data relating to broad categories of individuals (for example, all passengers, all internet users) irrespective of any specific suspicion about them.*

*"The analysis of these data – especially if coupled with data-mining techniques – may result in innocent people being flagged as suspects only because their profile (age, sex, religion, etc.) and/or patterns (for example, in travelling, in using internet, etc) match those of people connected with terrorism or suspected to be connected.*

*"Therefore, especially in this context, an unlawful or inaccurate use of (sometimes sensitive) personal information, coupled with broad coercive powers of law enforcement authorities, may lead to discrimination and stigmatization of specific persons and/or groups of people. In this perspective, ensuring a high level of data protection is also a means of contributing to fighting racism, xenophobia and discrimination, which, according to the Communication, 'can also contribute to preventing radicalisation and recruitment into terrorism'."<sup>33</sup>*

The EDPS specifically expressed concern over proposals which result in the general collection of personal data of all citizens, rather than only suspects, as well as recommending further concrete improvements in:

- **the use of restrictive, asset-freezing, measures towards specific countries and suspected terrorists (i.e. terrorist lists):** the case law of the European Court of Justice has repeatedly and consistently confirmed that respect for fundamental rights is crucial in the fight against terrorism, not only to ensure citizens' rights are upheld, but to ensure the lawfulness of the measures taken. Improvements are needed with regard to the right of information and of access, as well as with the

<sup>31</sup> Buttarelli, 2010, *ibid*.

<sup>32</sup> Summarised from *ibid*.

<sup>33</sup> European Data Protection Supervisor, *Opinion of the European Data Protection Supervisor on the Communication from the Commission to the European Parliament and the Council – 'The EU Counter-Terrorism Policy: main achievements and future challenges'*, (2011/C 56/02), Official Journal of the European Union

safeguards available to listed individuals. Under data protection law (Article 8 of the Charter of Fundamental Rights), citizens have a right to have access to their own personal data and to have them rectified, e.g. when they are incorrect or out of date. These rights may be subject to limitations only to the extent these limitations are necessary, foreseeable and laid down by law;<sup>34</sup>

- **international cooperation:** adequate safeguards must be ensured when personal data are processed in the context of international cooperation, and the development and implementation of data protection principles by third countries and international organizations should be promoted;
- **privacy by design:** data protection expertise must be fed into security research at a very early stage, so as to guide policy options and to ensure that privacy is embedded to the fullest possible extent in new security-oriented technologies.<sup>35</sup>

The EDPS has also stressed that there is a clear need for 'consistency between all the policies and initiatives in the area of home affairs and internal security, instead of the present fragmented framework'.<sup>36</sup> COM(2010)386 covers numerous earlier initiatives including terrorist lists, data retention, biometrics, Passenger Name Record agreements and the TFTP/SWIFT agreement on the exchange of financial data (see Briefing Paper 14b for further discussion of some of these initiatives). The EDPS warns that many of these measures have been taken as a fast response to terrorist incidents, without a thorough consideration of duplications or overlaps with existing instruments. The principles of necessity, of purpose limitation, of proportionality and of data quality<sup>37</sup> should always be applied in new policy instruments. Any exceptions - deviations from these principles - must have a clear legal basis.

#### 4.4 Amnesty International

Whilst Amnesty welcomed the specific references to, and somewhat more systematic attempt to include, human rights in COM(2010)386, they suggest that the human rights analysis is still ad hoc and weak, with gaps regarding the impacts of EU and Member State actions in counter-terrorism.<sup>38</sup> The lack of reference made to international and European legal frameworks is startling. Amnesty has condemned the weak and non-binding language relating to, for example, non-stigmatisation and discrimination; there should be explicit reference to the legal right to non-discrimination, an area in which the EU has a strong legal basis. Likewise, there is no mention of the prohibition of torture or the right to freedom of expression. Furthermore, the criminal law framework is outdated, referencing only national court rulings but failing to include European Court of Human Rights (ECHR) or European Court of Justice rulings, which are more relevant than ever in a post-Lisbon EU (see Briefing Paper 14a, Section 3, for more details on the Lisbon Treaty).

Amnesty also cited concern over the de facto acceptance by the EU of Spain's 'incommunicado' system, where someone suspected of terrorism can be held for thirteen days without access to a lawyer or informing the suspect's family, and the UK's control order

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<sup>34</sup> EDPS, *ibid.* 'Kadi II' case refers to... Briefing paper 14 will go into more detail on this matter.

<sup>35</sup> EDPS, *EU Counter-Terrorism policy: EDPS calls for a systematic and consistent approach to avoid unnecessary restrictions to privacy*, Europa Press Release, Brussels, Wednesday 24 November 2010

<sup>36</sup> *ibid.*

<sup>37</sup> "For example, concerning the so called 'terrorists' list' data quality should be ensured by taking into account relevant developments in the police and security investigation on which listings are based and by carrying out regular reviews of the lists and listed persons should be provided with adequate information and with the right to have access to personal data concerning them (in order to ask, if the case, for the rectification of the information)" - *ibid.*

<sup>38</sup> This summary of Amnesty's response to COM(2010)38 is based on the presentation given by Natacha Kazatchkine, Senior Executive Officer Legal Affairs/Human Rights at Amnesty International EU Office, at the Public Hearing on EU Counter-Terrorism by the European Economic and Social Committee, 9 February 2010.

regime. There is a need for more robust action from the European Commission to ban such regimes at EU level.

COM(2010)386 mentions the closure of Guantanamo Bay as progress, but fails to recognise the need for follow up; ensuring that it is closed and that there is an end to administrative detention elsewhere. Other outstanding issues include ending the practice of diplomatic assurances and the EU's response to evidence of Member States colluding in extraordinary rendition of individuals to places where torture may take place, e.g. Sweden rendering persons to Egypt on behalf of the CIA. Indeed, the European Parliament's 2007 resolution on the alleged complicity of Member States in CIA rendition, which called for a complete and independent review of counter-terrorism legislation that could breach human rights, and how this could be avoided, still needs to be carried out. (See Briefing Paper 14b, Section 5, for more detail on these issues).

There is also no reference to putting a stop to the use of diplomatic assurances - the unverified promise by a state official or diplomat that an individual will not be tortured or mistreated if extradited, deported or transferred to a particular country. This is not acceptable because they are not legally binding, lack any formal safeguards, and rely on the 'good faith' of a receiving country. It is at odds with the *jus cogens* norm in international law that an individual cannot be returned to a place where torture or inhuman treatment may occur, and the *non-refoulement* principle as interpreted by the European Courts under Article 3 of the European Convention on Human Rights, which absolutely prohibits torture or inhuman or degrading treatment or punishment.<sup>39</sup>

#### 4.5 The EU Counter-Terrorism Coordinator

The current EU Counter-Terrorism Coordinator (CTC) is Gilles de Kerchove, who replaced Gijs de Vries in September 2007, at the end of de Vries' three-year term. The post of CTC was created by the Council in March 2004. The CTC's function is to coordinate the work of the Council of the EU in the field of counter-terrorism, maintain an overview of all the instruments at the Union's disposal, closely monitor the implementation of the EU counter-terrorism strategy, foster better communication between the EU and third countries and ensure that the Union plays an active role in the fight against terrorism. Whilst the CTC's function, via the production of various discussion papers, summaries and reports, does serve to bring greater clarity to what the array of policies and projects within the four strands of the counter-terrorism strategy are, it is not a role designed to be critical of aspects of the policy. Thus, when it comes to commenting on COM(2010)386, the CTC has not been particularly critical, in the way that, for example, the EDPS is of the official communications.

Advisor to the CTC, Tim Jones, has stated in response to COM(2010)386 that the prevent, protect, pursue, respond strategy was originally designed to be both comprehensive and flexible, and the fact that it has not needed to be redesigned illustrates its success as a policy framework.<sup>40</sup> Mr Jones also emphasised the importance of the fact that it is a law and order framework, not a military one: terrorism must be understood to be a crime, not framed in a war paradigm. The mistake of the post 9/11 US anti-terror strategy - waging a "war on terror" - was to raise their opponents - who are criminals - to the level of warriors. This played into Al-Qaeda's hands, as they want to be perceived as God's warriors. Likewise,

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<sup>39</sup> *Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and No. 14, Rome, 4.XI.1950*, Article 3, [online] accessed September 2011, available at <http://conventions.coe.int/treaty/en/Treaties/Html/005.htm>

<sup>40</sup> This summary of the response of the Principal Advisor to the EU Counter-terrorism Coordinator to COM(2010)38 is based on the presentation given by Tim Jones at the Public Hearing on EU Counter-Terrorism by the European Economic and Social Committee, 9 February 2010.

images of detainees in Guantanamo Bay played into Al-Qaeda hands and were used as part of their “advertising” and recruitment strategy. Being tried in an ordinary court instead of held and mistreated in secret detention centres helps to deglamorise what terrorists are doing. This is why, Jones has emphasised, effective counter-terrorism and the protection of fundamental rights are reinforcing, not competing, goals. This, at least, is an extremely positive aspect of the EU’s approach to counter-terrorism – **an outright rejection of the war paradigm.**

## 5. Conclusion

For the EU to not merely talk the talk, but to walk the walk, numerous policy areas that have proved cause for concern demand genuine, independent evaluation and critique. This has been highlighted by the LIBE Committee, EDPS, EESC, various academics and human rights organisations.

In no real sense does the Commission’s evaluation of counter-terrorism meet the stringent requirements of an evaluation of a policy area, especially one that has as much impact on fundamental rights and civil liberties, social cohesion, democratic accountability and is as emotive as counter-terrorism is. QCEA supports the demands of the LIBE Committee, the EDPS, the Economic and Social Committee, Amnesty International and many other human rights organisations, for a thorough, independent and critical evaluation of all aspects of EU counter-terrorism policy.

Genuine scrutiny and accountability can only come about through greater transparency and democratic overview. Without this, the implications of the policies falling under the umbrella term ‘counter-terrorism’, create a real concern (in the words of Swiss MP Dick Marty) that ‘governments are taking advantage of the fear generated by the terrorist threat to impose arbitrary restrictions on fundamental freedoms.’<sup>41</sup>

The more serious and disturbing aspects of this picture can be summed up as follows:

*“Practices like punishment in the absence of crimes, wholesale surveillance on a massive scale, enabled by technological advances in this field, trials concerning terrorist activities in which ordinary procedures are not followed, shape one side of this equation. The other side is the substantial impunity enjoyed by agents of the state whose disproportionate, or even criminal, actions may have affected the lives of ordinary citizens, from the political level to that of an unidentified police officer during a demonstration or of a prison officer, unless there is incontrovertible evidence and sometimes even when there is.”<sup>42</sup>*

In light of the thoroughly inadequate attempt, by the European Commission, at an evaluation of the policies which comprise the EU’s response to the threat of terrorism, Briefing Papers 14a and 14b will go into more detail about specific law and policy framework developments in the last five years, analyse and critique some of the instruments and issues, and make detailed recommendations to policy-makers and practitioners.

<sup>41</sup> Marty, Dick, *Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report, Explanatory memorandum*, 7 June 2007, Council of Europe Report, Committee on Legal Affairs and Human Rights, p.5 [online] accessed August 2011, available at

[http://assembly.coe.int/CommitteeDocs/2007/EMarty\\_20070608\\_NoEmbargo.pdf](http://assembly.coe.int/CommitteeDocs/2007/EMarty_20070608_NoEmbargo.pdf)

<sup>42</sup> Maccanico, Yasha ‘The effects of security policies on rights and liberties in the European Union, and their export beyond the EU’s borders’ in *Statewatch Analysis*, May 2011 [online] accessed August 2011, available at <http://www.statewatch.org/analyses/no-128-sec-lib-eu.pdf>, p. 4