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The European Union and the fight to counter terrorism

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Abstract :

The deadly attacks of Paris (January and November 2015) and of Copenhagen (February 2015), as well as those foiled in Belgium, (January 2015) have highlighted the reality and extent of the jihadist terrorist threat across Europe. They also pose the question of Europe's response to this threat with great acuity [1].

The measures provided for in the treaties do not diminish the Member States' exercise of responsibility in maintaining public order and the protection of internal security (article 72 TFEU [2]). But the Union must also work to ensure a high level of security, particularly via measures involving coordination and cooperation between police and judicial authorities (article 67 TFEU). And so the question of European "added-value" is raised in a battle that is first and foremost the responsibility of the Member States themselves.

Terrorism is a permanent, diffuse threat for the European Union. Between 2009 and 2013 1,010 attacks – aborted, foiled or successful – were identified in the Member States. They led to the deaths of 38 people. According to the European Police Office, Europol, in 2013 152 terrorist attacks occurred in five Member States, most being in France (63), Spain (33) and the UK (35). Since 2011, there has been a constant increase in arrests on the grounds of religiously motivated terrorism.

Religious radicalisation played a clear role in at least two attacks in 2013 in the UK and in France [3]. Several cases have highlighted the threat that has come from self-radicalised, self-organised and self-financed individuals. The threat linked to religious radicalisation sadly became a reality in 2015 with the attacks in Paris (7th January and 13th November) and in Copenhagen, as well as in the foiled attacks in Belgium.

The European Union is also confronted with the phenomenon of fighters leaving Europe to undertake a holy war (jihad) in various places, particularly in Syria. It is believed that between 3,500 and 5,000 Union citizens have left their country to become foreign fighters since the start of the war and violence in Syria, Iraq and Libya. They can pose a serious threat to security on their return to Europe. In August 2014 the European Council identified the seriousness of this

threat. As stated in the joint declaration by participants in the European and international meeting organised on 11th January in Paris, the Union is facing a multifaceted terrorist threat that is making a direct challenge to its values. On 14th November after the terrorist attacks in Paris that led to the deaths of 129 people and 352 injured, the heads of State and government of the EU Member States and the leaders of the European institutions deemed in a joint declaration that this was an attack "against all of us. We shall face this threat together with all the means necessary and unflinching resolve."

1. THE PROGRESSIVE ACCEPTANCE OF THE VALUE OF A EUROPEAN RESPONSE

In the 1970's already Europe faced a terrorist threat from the far left. Terrorism was at the origin of the first type of cooperation in terms of justice and internal affairs under the TREVI network [4]. This intergovernmental cooperation was a precursor to the third pillar – which was intergovernmental itself – via the Maastricht treaty alongside the first and second Community pillars devoted to the common foreign and security policy (CFSP) [5].

The attacks of 11th September 2001 in the USA, planned in part in Europe, were a powerful factor accelerating the adoption of an action plan on 21st September by an extraordinary European Council.

1. This text was first published in the review "Questions internationales" as part of a thematic file on "Nouveaux espaces du jihadisme. Menaces et réactions" No75, La documentation française, September-October 2015. Our thanks go to La Documentation française for its kind permission to publish this text.

2. TFEU: treaty on the functioning of the European Union.

3. Murder of a British soldier on 22nd May 2013 in Woolwich, London, a knife attack against a French soldier on 25th May 2013, at La Défense in Paris.

4. Acronym for "Terrorisme, radicalisme, extrémisme, violence internationale", the TREVI network was put together on 1st July 1975 in an informal manner. It brought together the Home Affairs and Justice Ministers of nine Member States of the European Economic Community (EEC) as well as those of the associated States.

5. See Guillaume Renaudineau, « L'Union européenne face au terrorisme », Questions internationales, n°8, July-August 2004, p.58-63.

6. In September 2007, Gilles de Kerchove was appointed to this post.

7. Framework Decision 2002/475/JAI of the Council of 13th June 2002 regarding the fight to counter terrorism, modified under the framework decision 2008/919/JAI of 28th November 2008 which led to three new terrorism related offences i.e. "public provocation to commit a terrorist offence", "recruitment for terrorist purposes" and "training for terrorist purposes."

8. Framework Decision 2002/584/JAI of the Council of 13th June 2002 regarding the European Arrest Warrant and surrender procedures between Member States.

9. It was thanks to the European arrest warrant that the murderer of four people in the Jewish Museum in Belgium in 2014 was delivered by the French justice to the Belgian authorities in under six weeks.

10. European Parliament and Council Directive regarding the prevention of the use of the financial system to launder capital and of the financing of terrorism and the European Parliament and Council regulation on information on the transfer of monies. This "4th anti-laundering package" was approved by the Council for Economic and Financial Affairs (ECOFIN) on 27th January 2015.

11. See Philippe Delivet, "Schengen, thirty years on: results, realities, challenges", European Issue, No361 Robert Schuman Foundation, Paris, 15th June 2015.

12. Regulation (CE) No 562/2006 15th March 2006, establishing a Community code regarding border control of persons crossing EU external borders (the so-called "Schengen Borders Code").

13. The Eurodac system enables EU Member States to participate in the identification of asylum seekers and people caught crossing an external Union border illegally.

14. Regulation (EU) No603/2013 European Parliament and Council 26th June 2013.

15. Decision 2008/615/JAI of the Council 23rd June 2008 regarding deepening cross-border cooperation notably in view of countering terrorism and cross-border crime.

16. European Parliament and Council Directive 2006/24/CE dated 15th March 2006 regarding the retention of data generated or processed under electronic communication service provision accessible to the public or public communication networks and modifying Directive 2002/58/CE.

The European Union and the fight to counter terrorism

Europe was then severely hit itself in Madrid in 2004 and London in 2005. Following the terrorist attacks in Madrid on 11th March 2004 the European Council decided to create the post of Counter-terrorism Coordinator [6]. In December 2005, the Council adopted the EU's strategy to counter terrorism. This strategy was based on four main points: prevention, protection, tracking and response. The strategy acknowledged the importance of cooperation with third countries and international institutions in these four areas. On this basis a series of legislative and operational initiatives were taken.

2. A SERIES OF MEASURES MARKING EFFECTIVE EUROPEAN MOBILISATION

The European Union drew up a common definition of terrorism in 2002 [7]. This went together with standard penalties. It was a major step forward. Previously only five Member States (France, Germany, UK, Spain and Italy) had specific legislation on terrorism.

2.1. More effective procedures

The European Arrest Warrant was introduced in 2002 [8]. It has been operational in the Member States since 1st January 2007. Under the old extradition procedure, the process often lasted more than a year. Now the average is about 16 days for the surrender of a consenting wanted person to a third State and about 48 days without consent. This procedure has proven extremely effective in terms of terrorism [9].

The Union has taken a series of initiatives to counter the financing of terrorism. A strategy was adopted in 2004 and revised in 2008. The new "anti-laundering package" ensures the total traceability of the transfer of monies, in and out of the Union [10]. The latter also concluded an agreement with the USA for a *Terrorism Finance Tracking Programme*, (TFTP) which entered into force in August 2010.

The suppression of border controls within the Schengen Area has to go together with "compensatory measures", notably focusing on common rules regarding border crossing and the checking of people on the external borders [11]. The "Schengen Borders Code" that resulted from the regulation of 15th March

2006 [12], retains the principle of no checks on internal borders. However in certain instances, particularly in the event of a serious threat to public order or internal security, as the one resulting from a terrorist attack, the temporary re-introduction of internal border controls is possible for a limited length of time.

Operational since 1995 the Schengen Information System (SIS) enables the competent authorities (police, gendarmes, customs officers, judicial authorities) the real time reception of information introduced into the system by one of the Member States thanks to an automated query procedure. The SIS now has new features such as biometric data – finger prints and photographs – or new types of descriptions – regarding aircraft, vessels, containers and stolen means of payment. With the use of new technologies a "smart borders" project could help to strengthen border verification procedures of foreigners travelling into the Union. This is due to be the focus of a new European Commission proposal at the end of 2015.

2.2. Stepping up police cooperation

Police cooperation has moved forward. The European Police Office, Europol, has set in place tools which provide Member States' enforcement authorities with information on criminal phenomena. The fight to counter terrorism is this European agency's permanent priority. The enforcement authorities and Europol can now access the asylum seeker database, Eurodac [13], in virtue of the fight to counter terrorism and other serious criminal offences [14]. The Prüm Treaty of 27th May 2005, which was integrated into the treaties in 2008, allows enforcement authorities access to databases containing DNA, fingerprint and car licence plate information. The conditions of access on security grounds to the visa information system (VIS) were established in 2008 [15]. In December 2001 the Council established a list of people, groups and entities involved in terrorist acts, who were the focus of restrictive measures. In 2006 the conditions for the retention of data regarding electronic communication traffic were defined [16].

At the same time the European Union took steps designed to guarantee the safety of explosives

and to strengthen the protection of vital infrastructures (roads, railways, electricity grids and power stations). Moreover an action plan in terms of NRBC (nuclear, radiological, biological, and chemical) was adopted in 2009.

2.3. Judicial Cooperation

Judicial cooperation has developed via Eurojust (*European Union Judicial Cooperation Unit*), created in 2002. Eurojust now deals with terrorist issues. 41 Eurojust coordination meetings took place from 2006 to 2014. Joint investigation teams and the judicial network in criminal matters are also extremely useful tools regarding terrorism. The European convention for mutual judicial assistance dated 29th May 2000 set the principle of direct relations between the judicial authorities of the Member States without the need for centralised intermediary authorities. ECRIS (*European Criminal Records Information System*) enables the connection of criminal records thereby facilitating the exchange of information between Member States regarding convictions [17].

The European Union has adopted measures designed to ensure transport safety. The European Aviation Safety Agency (EASA) has been operational since September 2003. Common standards have been established notably regarding the training of crews and luggage checking.

2.4. The external, political dimension of prevention

The external dimension plays a vital role in the fight to counter terrorism. The Union has concluded cooperation clauses and agreements with third countries. It is also undertaking projects to aid and strengthen capabilities with strategic countries. Cooperation with the USA is of major importance in this context. The European Union has concluded cooperation agreements with the latter in various areas: the financing of terrorism, transport, borders, mutual judicial aid and extradition. Cooperation on the part of the American authorities with the agencies Europol and Eurojust has also grown. An agreement was reached regarding the transfer of passenger data (PNR data – Passenger name record).

Other PNR agreements have been made with Canada and Australia. France has also been busy beyond its borders, via external operations (Opex) to counter the terrorist threat. And this raises the issue of the EU's collective support and response [18].

The prevention of radicalisation and violent extremism is another important line of action. In 2011 the European Commission established the radicalisation awareness raising network which involves players who work in the social, and healthcare domains, in victims' associations or which represent local authorities, diaspora, local police forces and prison authorities. This network enables an exchange of good practice and develops action oriented towards those – for example in prisons and on campuses – who might have leanings towards extremist or violent excesses.

3. EUROPEAN ACTION STILL WANTING

However European mobilisation has suffered due to several weaknesses. First of all the organisation into pillars which prevailed until the Lisbon Treaty in 2007, impeded the acceptance of a global approach which is necessary however. The Council's unanimity rule, which governed the second and third pillars was also an obstacle to effective cooperation in the fight to counter terrorism. Legal instruments (conventions, framework decisions ...) in the third pillar were also ill adapted. The limited role of the Court of Justice was another impediment to good legal certainty.

In addition to this European action has not been operational enough. Police and judicial cooperation via Europol and Eurojust has not used the potential of these agencies to the full. Although Europol has accomplished a significant support mission with the Member States to facilitate the exchange of information, its operational role has been limited, with low participation in joint investigation teams. In the case of terrorism investigative services have often tended to privilege direct contact with their counterparts in other Member States. Eurojust like Europol are not systematically receivers of information regarding ongoing procedures and convictions delivered in the Member States in terrorist cases.

Finally the fight to counter terrorism at European level has entailed the quest for a difficult

17. It enabled for example the exchange of information on the two brothers involved in the attack against the newspaper Charlie Hebdo.

18. In principle the Common Security and Defence Policy (CSDP) integrates the fight to counter terrorism including via the support provided to third countries within their territory.

balance between repression and the respect of the principles of the rule of law. The agreement with the USA regarding the transfer of air passenger data (PNR) was criticised because of its excessively weak guarantees concerning data protection. Comparable criticism was made about the USA's use of personal data from the EU held by the company SWIFT (financial information exchange system) in the fight to counter terrorism [19]. The directive of 15th March, which provided for the retention of telephone data by operators, was finally invalidated by the European Court of Justice [20]. Allegations regarding the transfer and illegal detention of prisoners by the CIA in European countries were also the cause of lively polemic [21].

4. THE URGENT NEED FOR GREATER OPERATIONAL RESPONSE

4.1. A global approach

Given the now permanent, diffuse terrorist threat the declaration of 11th January 2015 retained the principle of action that will continue to be part of a global approach. The declaration of the members of the European Council of 12th February 2015 defined three priorities: to guarantee citizens' safety via the improved use of existing tools, to prevent radicalisation and to protect the Union's values, to cooperate with the Union's partners at international level. The "European Agenda on Security 2015-2020" presented by the European Commission on 28th April 2015 also places the fight to counter terrorism and radicalisation at the heart of the new strategy. Parliaments are also being mobilised on this. A meeting on the fight to counter terrorism with the representatives of the assemblies of various European States took place on 30th March at the French Senate on the initiative of its President Gérard Larcher and Jean Bizet, Chairman of the European Affairs Committee. A joint declaration recalling the fundamental principles and priority actions to be taken regarding the fight to counter terrorism at European level was adopted.

The European Union will have to improve the integration into the definition of terrorism the phenomenon of nationals who leave to fight abroad. It might be based on resolution 2178 dated 24th

September 2014 of the UN Security Council regarding "foreign fighters" which defines them as having the intention to "commit, organise or prepare terrorist acts, or to take part in, to provide or receive training for terrorist purposes notably in the event of armed conflict [...]". The European legal framework must also be adapted to facilitate the monitoring, accusation and prosecution of these "foreign fighters".

4.2. Improvement consolidation

Police and judicial cooperation can now rely on a more favourable legal framework established by the Lisbon Treaty. This has led to rationalisation that is reflected in the replacement of legal instruments specific to the former third pillar, via traditional community acts (regulations and directives) and by a strengthening of the supervisory powers of the Court of Justice. The ordinary legislative procedure – and therefore the qualified majority rule in the Council – now applies to criminal judicial cooperation. The treaty provides for the enhancement of Eurojust (article 85 TFEU) and enables the creation of a European Prosecutor's Office whose competences might be extended to the fight to counter serious cross-border crime (article 86 TFEU).

The Lisbon Treaty also set the foundation for operational police cooperation (article 87 TFEU). After a Council decision (deciding unanimously) it enables the police or customs authorities of one Member State to intervene in another Member State (article 89 TFEU). It formalises the Standing Committee on Internal Security (COSI) responsible for the strengthening of operational cooperation and coordination (article 71 TFEU). The treaty also encourages cooperation between Member States (article 73 and 74 TFEU) and provides a legal basis for measures designed to counter the financing of terrorism (article 75 TFEU). Introduced by the Lisbon Treaty (article 222 TFEU), the solidarity clause provides that the Union and its Member States will help another Member State suffering a terrorist attack.

Beyond this the Member States must make better use of the potential of Europol and Eurojust by systematically transferring to them pertinent information and by acknowledging the contribution these two agencies make to joint investigative teams. The connections between certain migratory flows and

19. European Parliament resolution dated 17th September 2009 on the international agreement planned to provide the American Finance Minister with financial messaging data to prevent and counter terrorism and the financing of terrorism; European Parliament resolution dated 23rd October on the suspension of the Terrorism Finance Tracking Programme due to monitoring undertaken by the National Security Agency (NSA).

20. The Court deemed that the directive comprised widespread interference of a particularly serious nature with fundamental rights regarding private life and the protection of personal data without this interference being limited to the strict necessary (decision dated 8th April 2014 C-293/12 and C-594/12 Digital Rights Ireland and Seitlinger e.a.).

21. In a resolution dated 11th September 2012 the European Parliament notably stressed that people suspected of terrorism must not be the focus of special procedures and recalled that everyone should be able to benefit from all of the guarantees provided for by the principle of a fair trial as defined in article 6 of the European Convention on Human Rights.

crime have to be identified. To do this Europol must work with Frontex, the European agency responsible for the management of operational cooperation on the EU's Member States' external borders.

The introduction of a European Air Passenger Name Record has been under discussion since 2011. A European system like this would be the only one able to guarantee effective coordination between national PNRs in the respect of vital guarantees for the protection of personal data. It would enable enforcement authorities to identify suspects whose means of travel are unusual and to monitor *a posteriori* itineraries, movements and contacts between individuals who are suspected of being involved in terrorist activities. After the Paris and Copenhagen attacks the Council and the European Parliament committed to stepping up their work to come to agreement before the end of 2015. The Court of Justice must also deliver an opinion on the conformity of the treaties with the draft agreement between the EU and Canada.

The phenomenon of foreign fighters makes it obligatory to have in-depth, almost systematic border controls on citizens from the member countries of the Schengen Area as they enter and leave this space. In their declaration on 12th February 2015 the members of the European Council said they wanted the existing Schengen framework to be used to the full in order to strengthen and modernise controls on the external borders. They agreed to systematic, coordinated controls of people who enjoyed the freedom of movement, based on common risk indicators. A targeted modification of the Schengen Borders Code

should also lead to permanent controls. Identification measures such as the Schengen Information System should be used more systematically to this end. The means available to the European agency Frontex should also be increased. The European Council also said it wanted to have more dialogue with third countries.

The European Union must fight to counter jihadist propaganda on the internet. To this end, private actors on the internet should be empowered and be more involved in the fight to counter terrorism. The Agenda on Security 2015-2020 has laid down several possible paths. The creation of a European Anti-Terrorist Centre would allow Europol to support the action of national enforcement authorities to counter foreign fighters, the financing of terrorism as well as violent extremist content online and the trafficking of illegal firearms. The European Union must also finalise measures designed to guarantee a common high level of information network security in the Union [22]. The Commission intends to create a centre of excellence responsible for centralising and disseminating expertise in terms of fighting radicalisation by using a network to raise awareness of radicalisation that was initially established in 2011.

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22. Draft directive by the European Parliament and Council regarding measures designed to guarantee a common high level of safety of networks and information in the Union and on the European cybersecurity strategy : open, safe, protected cyberspace (JOIN(2013) 1 final).