The European union as a counter-terrorism actor: right path, wrong direction?

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The European union as a counter–terrorism actor: right path, wrong direction?

Marianne Wade Q1

Introduction

The challenges presented by terrorism to our governments in the past decade have led to fundamental changes in many things. The way we travel and the way we bank have, for instance, changed perceivably. Some avoid travelling to the USA—the country formerly known as "the leader of the free world"—out of a desire to avoid the need for a passport featuring biometric information or "being treated as a criminal" surrendering fingerprints at the point of entry. The more data protection aware amongst us may have changed the way we use the internet and other forms of communication technology or simply accepted the feeling that we can be watched at all times. Less obviously, a new security architecture has emerged around us and for Europeans, the EU looms large within it.[1]

Not all changes in this setting can be ascribed to terrorism; the post-Lisbon EU[2] is undoubtedly a creature very different to anything envisaged by the founding fathers of its origin European Communities -, nor do all of those perhaps associated with the threat of terrorism connect to counter-terrorism in a logical way when examined closely. Nevertheless, there is no denying that terrorism and the desire of European governments to counter it effectively, have driven changes; spear-headed impulses for change which have deeply changed some aspects of our lives and the role the EU plays in relation to them. The dynamics of reform have been so pervasive, it is almost shocking to reflect upon all that has shifted in the past ten years.

It is no coincidence that within those 10 years the EU has emerged as a security and criminal justice actor of entirely new dimensions. The Treaty of Lisbon which

[1]For more general commentary see Wuertenberger et al. [117]

[2]The Treaty of Lisbon is an international agreement between the EU member states that amends prior treaties to consolidate EU competence and restructure its bureaucracy post eastward expansion. It has introduced very significant changes to the EU's profile as a criminal justice actor providing it, e.g. with a competence to require the use of criminal law to combat fraud against its financial interests. It also includes a legal basis for the creation of a European Public Prosecutor's Office (EPPO)—See Consolidated Version of the Treaty on European Union [6] Treaty on the Functioning of the European Union [7; arts. 325 and 86]

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came into force on the 1st of December 2009 leaves us in no doubt of this. The facilitating role of the economic supra-national community which lent its organs for use by its member states in the inter-governmental third pillar has been replaced by a supra-national entity with a clear role as a criminal justice actor. Article 83 (1) of the Treaty of the Functioning of the European Union for example states:

> The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.

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These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.

On the basis of developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph. It shall act unanimously after obtaining the consent of the European Parliament.

Terrorism thus heads the list of criminal phenomena for which the post-Lisbon EU is ascribed a role in combating. This paper aims to explore the role played by the EU in this context thus far and to analyse and evaluate its impact and meaning. It finishes with a discussion of the EU's likely future role in this context as well as the deeper meaning of this for the EU and counter-terrorism in Europe.

The EU as a counter-terrorism actor

The Council of the EU's webpage explains the EU counter-terrorism strategy in the following terms:

> "The EU's strategy is comprehensive, covering a wide range of measures. These aim at increasing co-operation in fields ranging from intelligence sharing to law enforcement and the control of financial assets in order to make it easier to find, detain and bring to justice terror suspects. Furthermore, the criminal law of the 27 Member States is being aligned so that terrorism is prosecuted and punished in the same manner throughout the EU."[3]

In pursuit of this strategy, the member states of the EU have used its legislative mechanisms and institutional structures (to which they have also added significantly) during the past decade to change substantive and procedural law across the Union as well as to enhance the institutional competence of criminal justice systems throughout Europe. In so doing, they have also transformed the EU into a powerful counter-terrorism force.

[3] See http://www.consilium.europa.eu/policies/fight-against-terrorism/eu-strategy?lang=en and Saul [104].

Substantive criminal law

This area of activity is particularly significant not only because it sees the EU taking on the role (and in relation thus to the Council of Europe in particular, taking over) traditionally played by international organisations.[4] Whilst there is no surprise in discovering the EU aiming for the harmonisation of laws, ten years ago this was revolutionary in relation to criminal justice related matters. Indeed due to the sensitivity of such action, it was not harmonisation which was strived for in these matters but approximation. Nevertheless given that 9 of the 15 EU member states (as they were in 2001) featured criminal law systems devoid of any offence of terrorism and the nature of EU legislative instruments[5] as more effectively binding than commitments made under international law, their willingness to proceed upon the road taken must be viewed as extraordinary.

Since the Framework Decision of 2002 on Combating Terrorism the EU has been the member states' forum of choice to provide a definition of terrorism and to ensure the criminalisation of public provocation to commit a terrorist offence, recruitment and training for terrorism, the provision of instructions (also via the internet) to make or use explosives, firearms, noxious or hazardous substances for the purposes of committing a terrorist act [16, 31]. In specialist legislation the EU framework has been utilised to ensure attacks on information systems are subject to criminal penalties [24].

The impact of these EU measures must be regarded as very significant indeed. As the EU expanded in 2004 to encompass a further 12 member states (and indeed expands by a further one—Croatia—this year), the reach of this understanding of terrorism as a distinct offence and the need to accommodate it within criminal codes expanded. This perspective became mandatory to any system wishing to adjoin to the EU's economic power. The substantive definitions agreed upon, the predicate offences required and their definition radically challenged new member states' criminal justice systems forcing fundamental changes or at least radical exceptions. All to deal with a problem they did not regard themselves as having but attached great value by the EU *acquis* they were required to accept, adopt and implement.[6]

It should further not be overlooked that such measures were not uncontroversial in relation to the legal orders of the older member states either. Thus especially the creation of a public provocation offence required careful drafting to ensure compliance with domestic frameworks protecting freedom of expression and of the media (see [16; article 2] [93]. Interestingly, however, this area of EU legislation was apparently marked by strong compliance and swift implementation by the member states [55, 59]. Compared to the slow progress made in relation to other criminal

[4] Thus e.g. the United Nations and the Council of Europe have a long tradition of relevant legislation aiming to achieve an approximation of law by its member states. See e.g. Council of Europe 1977 [8] and United Nations 1963 [110] as well as further specific Conventions aimed at ensuring universal criminal liability for acts associated with terrorism all available at: http://www.un.org/terrorism/instruments.shtml.

[5] The Framework Decision form used bound member states as to the goal of the legislation even if leaving them choices as to how to implement. After the *Pupino* (C-105/03) case the member states were indeed warned that such legislation had a type of binding effect even failing implementation.

[6] See e.g. Korošec and Zgaga [90] and Derenčinović [46] for examples.

justice related initiatives—such as the sorry tale of the so called PIF[7] Conventions and the 2012 reform proposal [63]) aimed at protecting the financial interests of the EU itself, this dedication and decisive action by the member states must be interpreted as strong support of the EU as a counter-terrorism actor or, at least, as a useful tool through which the member states' can exercise their strong will to operate effectively in this context. Viewed retrospectively, whatever the intentions of the member states, this activity has effectively transformed the EU in itself into a significant counter-terrorism actor; perhaps all the more astonishingly so given the deficits which characterise it. (see infra).

Procedural law

The developing role of the EU as a criminal justice actor more generally has arguably been augmented more strongly in relation to procedural mechanisms introduced. Whilst these are available in and by no means used exclusively for counter-terrorism cases, it is interesting to recognise in how far their introduction can be associated with the counter-terrorism concerns of the member states. It is by no means wrong to identify counter-terrorism as the driver of revolutionary developments at the EU level. The EU's status as an actor in the counter-terrorism field can thus be seen as a catalyst for its development as a criminal justice actor more broadly.

Most famously the European Arrest Warrant (hereinafter EAW, [17]) was pushed through in the atmosphere of urgency post 9/11. This legislative act provides for terrorism—as one of 32 named catalogue offences to which the EAW applies—to no longer be subject to a double criminality requirement should a surrender be requested of an EU member state by another. Indeed such action is no longer subject to formal extradition procedures but to the simplified surrender procedures upon the basis of mutual recognition introduced by this measure (for exploration see Keijzer and Sliedregt [87]).

It is hard to overstate the impact of the EAW upon the EU jurisdictions or as a driver of EU status. A clear mutation of extradition/mutual legal assistance law, it marks the basis of the EU's distinctive profile in the criminal justice realm. Based upon its proclaimed success [61] the principle of mutual recognition has become established as the basis of judicial cooperation within the EU [6; art. 82(1)] but criticism highlights the need for more comprehensive development of the EU level. As such this mutation is indeed the critical step to evolution.

The history of the EAW tells of an instrument lying in wait and only able to gain political consensus and thus momentum in the charged atmosphere of late 2001. Even at that point a number of member states apparently agreed only upon condition that the EU area of freedom security and justice would also feature a swiftly introduced Framework Decision on Procedural Rights in Criminal Proceedings [54]. Notoriously upon this latter legislation we still wait. The further mutual recognition based instruments, however, are naturally applicable to counter-terrorism cases. (see e.g.

[7] Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests. OJ C 316, 27.11.1995, p. 49–57; First Protocol of 27 September 1996 (OJ C 313, 23.10.1996, p. 2) and; Convention of 26 May 1997 (OJ C 195, 25.6.1997) (corruption); Protocol of 29 November 1996 (OJ C 151, 20.5.1997, p. 2) (court interpretation); Second Protocol of 19 June 1997 (OJ C 221, 19.7.1997, p. 12) (money laundering).

the European Evidence Warrant (EEW) [30] and the European Investigation Order (EIO) [68]).

Perhaps most importantly the EAW has fostered expectation amongst practitioners and policy-makers that the EU will be utilised to provide for legislation which alleviates the problems they face in cross-border cases. This can possibly be regarded as a logical development to accompany the freedom of movement of persons provided (for by the EU and indeed particularly the border-free Schengen area [114; p. 66–67]). Nevertheless, concrete expectations—and indeed demands by NGOs and defence-lawyers for action within the EU (see e.g. ECBA [64]; FTI demands[8])—have certainly gained a far more solid and specific basis as a result of the EAW and following measures based upon mutual recognition. As such it is possible to identify the counter-terrorism context as massively accelerating the overt advent of the EU as an actor in the criminal justice realm. The nature of such procedural measures is not to make the EU itself a strong counter-terrorism actor; in fact there can be little doubt that the member states simply saw the EU as a convenient forum in which to act in creating such mechanisms. Mutual recognition procedures are precisely distinct after all in featuring no supra-national agency pushing such measures. Nevertheless they have added a European dimension to cases which utilise them. Their use has in turn highlighted the differences in domestic systems necessitating the development of a broader European dimension; one of minimum constitutional standards and not featuring the relevant checks and balances to counter-act the potential unfairness of efficiencies caused e.g. by use of the EAW. As is explored in what follows, we are some way off seeing this kind of balance in the EU criminal justice realm. Given, however, that the member states, and above all practitioners within their criminal justice systems, are certainly loath to give up the EAW as a tool, this is surely a process irreversibly underway.[9]

Beyond the criminal law

The procedures and mechanisms to which the above analysis applies are in fact restricted not only to those affecting criminal procedure in strictu sensu. Perhaps most famously the EU forum has also been used to ensure areas of law—not entirely uncontroversially expressly characterised as non-criminal—are formed to ensure a comprehensive counter-terrorist strategy. This has included a variety of activity relating e.g. to money laundering [65], civil aviation security [67], restricting the purchase of ammonium nitrate [58].

Famously and controversially EU legislation has also contradicted previous EU policy [45; p.6] to provide for the retention of email and telecommunication traffic data [66] and to provide for closer cooperation with third states (US Agreement, PNR Agreements with Australia, US, etc. SWIFT agreement on which see Pfisterer [98]).

[8] See http://www.fairtrials.net/justice-in-europe/eu-defence-rights/. Accessed 24 June 2013.

[9] It is precisely this sort of momentum which apparently concerns Eurosceptic British politicians who recognise that even measures introduced as exceptional and proven worthwhile, may cause a gravitational pull to further development. This may be regarded as natural or the more pejoratively titled "competence creep" with which the EU is often associated and indeed organs such as the European Court of Justice accused of driving [105].

Data protection concerns are still the subject of heated discussion relating to PNR agreements; the S.W.I.F.T. legislation caused rifts between the legislative organs of the EU (with the European Parliament rejecting the proposed agreement—see Pignal [99]) whilst the Data Retention Directive caused member states not usually renowned for their rebellious nature to fall foul of Commission litigation for non-compliance [62].

The EU has also (alongside the UN) been the scene of quasi-criminal measures introduced to restrict the capacities of persons and organisations associated with terrorist groupings [12, 13] and amending acts[10]as well as legal battles contradicting their legitimacy.[11] . The asset freezing mechanisms viewed by the international community and clearly also the EU member states as vital to ensuring the effective combating of terrorism were also provided for via EU legislation demonstrating the EU's status as an actor in this forum. The member states use of the EU in this context can be interpreted either as recognising that the EU provides a more reliable context for such activity and ensuring its implementation than the UN or indeed a desire to ensure the EU is not outstripped (or remains comprehensive) as an actor in this area. The unique—if extremely awkward—position of the EU as a liberty-based supra-national conglomerate was, however, highlighted in this area by the European Court of Justice's rulings in the *Kadi* [12]litigation [83, 108] This area of law in particular shows the tension between the desires member state governments may have in relation to utilising the EU as a counter-terrorist actor and the fledgling identity of the EU as an emerging criminal justice actor in the broader sense. The former would perhaps allow for more exceptional work of an intergovernmental nature (and thereby see the EU merely as another forum in which transnational treaties are forged. The latter, however, requires a more holistic, constitutionally balanced setting as is discussed infra).

Clearly the European Union has developed as a comprehensive counter-terrorism actor. This status has ramifications for its external policies and in its relationship with member states on a broad basis a few legislative examples of which have been discussed here. Interestingly in developing the current framework for criminal justice activity, the Stockholm Programme [40], emphasis was, however, placed elsewhere. Thus it is emphasised "Full use should be made of Europol, SitCen and Eurojust in the fight against terrorism."[40; p.88] Furthermore the importance of the role of the counter-terrorism coordinator is reaffirmed later in the document [40; p.85]. This highlights the importance of another feature of the EU counter-terrorism strategy: namely the institutional aspects. The shifting relationship between member states and the EU and developments of EU law can often be connected with institutional developments at the supra-national level.

[10] Also see <http://europa.eu/legislation_summaries/justice_freedom_security/fight_against_terrorism/l24402_en.htm#Amendingacts> and <http://europa.eu/legislation_summaries/justice_freedom_security/fight_against_terrorism/l33208_en.htm> for amending acts respectively.

[11] KADI and OTHER v. COUNCIL and COMMISSION (*Application no. C-402/05*), judgment of the European Court of Justice on 3 September 2008, OJ C 285/2 of 8 November 2008.

[12] Ibid

Institutionalisation

Clearly the EU's influence upon member states via agreed changes to the law must be regarded as demarking it as (at least some powerful) member states' forum of choice for counter-terrorism legislative work and has seen it advance as an actor of this kind in this policy area. It is probably uncontroversial to assert that such legislative changes impact particularly strongly upon legal systems which are different to those from which the principle ideas stemmed. It is interesting further to observe considerable impact upon legal systems of those countries which wish to join the Union. Thus we can see the Framework Decisions status as part of the *acquis* to be adopted by countries joining in the last major expansion of the EU (2004 onwards) meant very significant changes were made to the criminal law as a side effect of EU integration [46, 90]. One may well speculate that the EU's economic power will also mean this aspect of external policy is lent particular leverage via the EU potentially leading the member states to wishing to utilise the EU as a counter-terrorist actor *vis a vis* third states. This is not an aspect which can be explored here but such activity would naturally add a strong, further dimension to the EU's profile as a counter-terrorist actor [89].

A more subtle influence, which might potentially be more even-handed (though naturally more powerful member states will always be better positioned to resist influence if it is noticed and taken exception to) is imaginable via institutionalisation. It is interesting to note that whilst the member states were careful to emphasise their sovereignty and ensure the possibility to take back powers from the Union in the Treaty of Lisbon (see in particular Treaty of the European Union [6; articles 4,5 and 48(2)]), they simultaneously endowed a number of EU-level institutions with increased powers. Some of these sit within the Council and are thus inter-governmental in nature, others are, however, genuinely supra-national. In particular the status of bodies such as Europol and Eurojust are clearly shifting towards becoming EU agencies. Their enhancement can thus be seen as strengthening the EU level's hand. In what follows the nexus between this strengthening and counter-terrorism are explored.

Following a special meeting in the wake of the Madrid bombings, Article 14 of the Council Declaration on Combating Terrorism of the 25th March 2004 provided for a **Counter-Terrorism Co-ordinator** [19] to work within the Council (upon appointment by the High Representative) to "co-ordinate the work of the Council in combating terrorism and… maintain an overview of all the instruments at the Union's disposal" as well as to "closely monitor the implementation of the EU Action Plan on Combating Terrorism and to secure the visibility of the Union's policies in the fight against terrorism." [19; art. 14]. Whilst no co-ordinating role was directly assigned to this office, it is clear that the member states wished to create a high-level overview of their respective policies [25]. The first Co-ordinator Gijs de Vries resigned in 2007 apparently due to frustration at the member states' security agencies lacking the will to co-operate [80]. Nevertheless this office continues to work actively under the auspices of Giles de Kerhove with the office reconfirmed by the Stockholm Programme and now defined as 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,

fostering better communication between the EU and third Countries and ensure that the Union plays an active role in the fight against terrorism." (). The discussion paper emphasised the need for improvements relating to travel safety, cyber-terrorism response and the combating of discrimination against and the social marginalisation of Muslims [39]. Clearly the counter-terrorism coordinator has taken on a broad role on the member states behalf.

A further, informal form of institutionalisation is to be found at the Council in the guise of the **Situation Centre, known as SitCen**. This is an informal organisation of inter-governmental character situated within the Council. The 'new' Sitcen, which became operational in 2005, was distinct from its predecessor because its activities were no longer limited to the material falling within the ambit of the former "2nd pillar" (common foreign affairs and the European defence area). This expansion is particularly relevant because it related directly to areas belonging to the now defunct 3rd pillar; the criminal justice relevant part of Union work.

SitCen is concerned with intelligence and is a contact centre for the member states' and third states' intelligence services. It is to be found within the Council Secretariat and is composed of analysts from member states' external and internal security services. Their task is to assess any terrorist threat developing within the European Union or externally As it is an informal entity, very little information can be gleaned about it. It would appear, however, to have grown from an agency of 3 assistants and 2 administrators in 2001 which hosted a modest number of delegated agents in years prior to that to having a staff of 110 in 2010 [100] with Ikka Salmi appointed its Director in 2011.[13] This body's existence alone and its increased status bears witness to the changed expectations placed upon the EU governance level in the counter-terrorism context even if maintained in an informal context.

Although such informal developments are doubtlessly important and demonstrate the EU's significance, they arguable signal it merely as a forum within which the member states choose to operate. The power exercised remains within the sovereign power of the member states albeit in a context in which this is expressed in common with other states. The EU has, however, also been the stage of significant formal and supranational institutionalisation. Thus in 2009 the European Police Office, Europol became the Law Enforcement Agency of the EU.

Europol is one of the older institutions within the Justice and Home Affairs (JHA) policy area formed upon the initiative of the member states, initially as the European Drug Office (first created by Ministerial agreement in June 1993 [96; p.536]) before being created by the Europol Convention of 1995 which came into force on the 1st October 1998. It was funded as an inter-governmental project, i.e. directly by the member states and was thus an example of inter-governmental JHA work in the Maastricht period. Europol began work on 1st of July 1999. In June 2007 the Presidency confirmed the JHA Council decision to reform the Europol Convention [36]. This followed a detailed discussion process which is in part still ongoing, after which the JHA Council of the time endorsed the Commission's proposal and replaced the Europol Convention by a Council Decision in 2009. With this Europol became incorporated into the legal framework of the EU meaning that it is now financed from

[13] His CV available at: http://www.europarl.europa.eu/meetdocs/2009_2014/documents/sede/dv/sede041011cvsalmi_/sede041011cvsalmi_en.pdf

the general budget and staff fall under EC Staff Regulations and the Protocol on the Privileges and Immunities of the European Communities. In other words Europol became an EU agency. As such it is still currently undergoing a very significant transformation process.

Initially the Convention stated "Europol shall initially act to prevent and combat unlawful drug trafficking, trafficking in nuclear and radioactive substances, illegal immigrant smuggling, trade in human beings and motor vehicle crime." The Council always, however, retained the power to lend Europol competence over any further serious international crimes by unanimous decision and this power was used to lend Europol competence for terrorism as soon as it took up its work. The 2009 Decision witnessed Europol's mandate expanded to cover all forms of serious cross-border crimes,[14] i.e. the restriction to organised crime and terrorism fell away. Nevertheless the importance of counter-terrorism and Europol's work in this context must be emphasised. Because, amongst other things, Europol has been able to demonstrate its added value in the counter-terrorism field—for which its work was clearly seen as vital—its powers have steadily expanded. Thus e.g. the 2009 Decision also tackled changes necessary to ensure Europol databases are inter-operable with member states' national, the Schengen or visa information systems.

The Europol Decision delineates competences in a similar, vein to the previous Convention whilst making additions to it. Article 3 states Europol's objective as:

> "to support and strengthen action by the competent authorities of the Member States and their mutual cooperation in preventing and combating organised crime, terrorism and other forms of serious crime affecting two or more Member States."

Europol's powers are essentially determined by the tasks the organisation is given by article 5 (1) of the Europol Decision. Europol's major tasks lie in handling information its role being to:

a) to collect, store, process, analyse and exchange information and intelligence;
b) to notify the competent authorities of the Member States without delay via the national units referred to in Article 8 of information concerning them and of any connections identified between criminal offences;
c) to aid investigations in the Member States by forwarding all relevant information to the national units;
d) to ask the competent authorities of the Member States concerned to initiate, conduct or coordinate investigations and to suggest the setting up of joint investigation teams in specific cases;
e) to provide intelligence and analytical support to Member States in connection with major international events;
f) to prepare threat assessments, strategic analyses and general situation reports relating to its objective, including organised crime threat assessments.

If one compares article 5 of the Decision to the formerly decisive article 3 of the Convention,[15] it seems clear that Europol is acknowledged by the Decision as an

[14] The meaning corresponding to those described in Art. 2(2) of the EAW Framework Decision. [17]
[15] Article 3(1) point 6 Europol convention, added by Council Act of 28 November 2002 [14]

institution with a clear knowledge advantage over the Member States and much specific expertise. The sensitivity of the Member States in wishing to ensure their own policing authorities retain "real" or frontline policing powers is clearly expressed in the provisions concerning Europol participation in joint investigation teams[16] and requests for the initiation of investigations (article 7). In relation to the latter, the duties of the Member States to afford requests "due consideration" and to inform Europol and indeed, usually, to justify to Europol if the request is not followed, demonstrate the desire that Europol carry significant clout whilst clearly acknowledging the primacy of Member State decisions.

The steady evolution of Europol's influence on the initiation of investigations can, however, also be regarded as indicative of growing power. Europol's remit and expertise in the counter-terrorism context has been key in securing this influence and acceptance of it. Thus one can track e.g. the Council Act of 28 November 2002 [14] adding article 3 b to the Europol Convention giving Europol the right to request that MS initiate investigations and obliging MS to inform Europol where a decision is made not to follow the request (unless this presents a danger to national security or would endanger a current investigation). The Decision has strengthened this aspect of Europol's work by introducing requests to initiate investigations as a core task backed up by Member States' obligations to respond to such requests. Though Europol's position is clearly subservient, it doubtlessly grew stronger post 9/11.

The priorities of Europol's analysis work can change every year. These have traditionally included counter terrorism, with this often, as in 2005, being the priority first mentioned [71; p. 5]. Whilst the determination of priorities drawing upon the Organised Crime Threat Assessment tool since 2006 has ensured organised criminal groups have also gained priority [72; p.6], the annual review (which replaced the report in 2009) continues to emphasise this work area as bearing the highest importance. In 2010 terrorism remained the first work priority set by the Council [74; p.7]. Organised crime and terrorism remain high on the Europol agenda with the annual threat assessments (for terrorism the so-called TE-SAT) published in these areas attracting much attention.

The Europol Decision brings together in one legal basis many developments which had occurred upon ad hoc legal bases. For example, previously Europol staff can become members of Joint Investigation Teams (JITs) on the basis set out in a special protocol [14] (which also provided a power to initiate investigations by requesting the relevant member state do so); the creation of one singular, legal basis providing for such activity is surely to be taken as a consolidated expression of confidence in Europol. Although the Decision is, as stated above, at pains to reserve certain roles for Member States' criminal justice practitioners, it is interesting to note that this decision emphasises this constellation in which Europol staff can become operative. As members of an investigation team working according to the rules of the country in which the JIT operates (see article 6(1)). The Decision was drafted in an environment of the Justice and Home Affairs Council of Luxemburg encouraging MS to "invite Europol to participate in JIT whenever possible and useful" [28] and with both Europol and Eurojust making concerted efforts to ensure JITs are used more frequently as well as the Commission dedicating significant funds to them. Given

[16] See article 6, this is particularly true in relation to the use of coercive powers which Europol staff "shall not … take part in."

Europol's specialist nature and superior access to information (the processing of which constitutes a hugely important proportion of police work), one might also note that the power to suggest the opening of investigations to national criminal justice system institutions arguably comes close to operational powers. During reform discussions former Director Rätzel for example was careful to emphasise Europol's role as to facilitate exchange rather than to seek operational powers[69; Ratzel's Speech] but only time will tell what profile Europol will adopt. Whilst the MS's will was clearly to ensure central decisions are still made by their authorities, the Europol Decision provides for an EU policing agency with the right to be heard and whose request can only be refused for good reason.

It must be noted to that the new Decision is fundamental in its **expansion of Europol's mandate**. The previous tie in of initial Europol work to terrorism or organised crime has been removed [36; Art. 4]. Clearly this will ease Europol's ability to assist the member states in the investigation of cross-border crimes more generally. Article 13 (1) of the Decision also appears to fall in the same vein relieving the member states of the Convention's requirement (article 7(1)) that the member state authorities must have a specific enquiry in order to access the full range of Europol information sources. Clearly the work Europol carried out also in the counter-terrorism context has led to the creation of expertise pushing the member states both to relinquish a certain degree of authority to Europol as well as to acknowledge the desirability of access to their work products. Counter-terrorism has thus also created push and pull factors to integration in this very concrete manner. It is interesting to note that this steady increase of the Europol remit runs in parallel to discussions in which supra-nationalisation is condemned as infringing too far upon member states' sovereignty (and a clear emphasis of deference to the member states' national authorities expressed in key legislative instruments such as article 88 (3) TFEU). Counter-terrorism can thus be viewed as a context factually and practically pushing integration even as member states hesitate over it in theory.

That the Council went to significant lengths to ensure Europol relevant legislation was passed prior to the Lisbon Treaty coming into force adds something to our consideration of this agency. One can only speculate whether the passing of these acts the day before the latter occurred was to ensure the sensitive work Europol performs—also in the counter-terrorism context—was kept out of the controversy anticipated under the Lisbon regime (and indeed now made all too prominent reality by the UK opt-out discussion—see Spencer [106]). On the day the new Decision was passed, so was legislation introducing the rules governing confidentiality of Europol information [35] for analysis work files [34] and laying out rules for the exchange of information with partners including the exchange of personal data and classified information [32]. The latter regulated the means to draw up agreements with EU bodies an third parties, providing a procedure for this, regulating any receipt of information taking place before an agreement is reached and setting out the conditions for the onward transmission of information to EU agencies and third parties [33]. This final power has proved of particular importance in the counter-terrorism context with the Director of Europol using exceptional powers to pass relevant data to the US. This is important not only because of the political trust and power ultimately placed in Europol by the member states in relation to data and this politically sensitive area [see 32; article 14] but also because of the external

impression therewith created. Of course partners such as the US will prefer the "one-stop shop" arrangement of data-exchange with Europol rather than 27 plus member states. This precedent, though utterly exceptional and explained merely by the specific-nature and political high-profile of counter-terrorism in transatlantic relations of the last decade, will likely bear further external consequences, pushing the EU's status as an external facing criminal justice agent. The impact of work in the high-profile counter-terrorism area in undeniably significant for institutional development.

There can be no denying that the member states' desire to ensure all Europol-relevant legislation was finalised on the day before the Treaty of Lisbon came into force also emphasises a desire to ensure this area retains an intergovernmental nature for as long as possible. The effect of this timing was to ensure the role played by the European Parliament in the legislative process was the pre-Lisbon minimum and that Europol's work is exempt from European Court of Justice scrutiny for a 5 year transition period (ending 1st December 2014). The Europol Decision and e.g. the data reporting duties placed on the member states by it (article 7) doubtlessly places obligations upon the latter for which time was required for appropriate adjustment, nevertheless the effort made to avoid this additional accountability is remarkable. In the longer term, however, with these reforms, the member states committed themselves to a, albeit slowed, path to supra-nationalisation which cannot but be regarded as highly marked by their desire to ensure effective work at this level in the counter-terrorism context.

In terms of the assignment of the ultimately controversial operational powers, Europol agents clearly ordinarily remain without these. Article 88 of the TFEU does, however, provide for the novel possibility that Europol carry out operational action jointly with MS authorities or in the context of joint investigative teams (article 88(2)b of the TFEU). The scope of this contribution means this activity cannot be explored here but it is regarded as significant, particularly given the very significant growth in the use of JITs since Europol and Eurojust established a programme to promote them and house specialist units supporting member states in all aspects of establishing them. Where Europol (or indeed Eurojust) contribute to the financing of such teams, the participation of one of their agents (staff respectively) becomes mandatory [48, 53] and whilst these are ad hoc, inter-governmental measures, the factually important role played by supra-national bodies is significant. Again in this context the member states' desire to work together closely in the counter-terrorism context must be seen as driving factual integration and with it a very gradual establishment of expertise at the European level facilitating a seismic shift in power.

Like Europol ***Eurojust***—the "judicial cooperation unit of the EU" – has featured terrorism as a priority crime area since its creation. The importance of this link is perhaps not as key possibly because Eurojust as service and support body for judicial institutions when investigating and prosecuting crimes has no preventive remit [78, 81]. It is, however, perhaps more obviously on the member states' radar with this "body of the Union" established as that "from" which a European Public Prosecutor's Office shall grow by article 86 of the Treaty of the Functioning of the Union. In as far as one regards the counter—terrorism priorities of the member states as behind the introduction of mutual recognition based instruments, however, one may in turn

recognise these as facilitating an increase in Eurojust's influence. It is this organ prosecutors across Europe turn to when an EAW or a request for evidence (of the kind which will certainly be covered by the EIO) does not meet the required response.[17] Interestingly therefore even the introduction of special mechanisms, like mutual recognition, in core designed to avoid supranational institutionalisation, may be seen as driving precisely this in the longer term.

Terrorism forms a focal point of work at Eurojust with the current College President, Michèle Coninsx, an expert for this area and the organisation regularly contributing to Europol's TE-Sat [52; p.27]. However, terrorism cases form only a relatively small proportion of the cases handled by this body, dwarfed recently e.g. by the number of references in drug smuggling and fraud cases [52; p.59 and 78]. Between 2004 and 2008 the number of cases (and the relative caseload proportion) was not surprisingly significantly higher [73; p.23]. This work, however, does not mark Eurojust's existence in the same way it has Europol's . This is certainly likely to be not only because such cases are fewer and because such prosecutions are likely lent extremely high priority at domestic level in any case but also because Eurojust does not perform a strategic informational role in the way in which Europol has established itself.

Being the body the proposed Constitution (article III-274) intended and which the Lisbon Treaty (article 86) demarked a European public prosecutor (EPP) to grow "from", Eurojust is, however, clearly the EU's foremost prosecution related body[18] and the seed from which a supra-national agency is most likely to grown. It was formed in 2002 by Council Decision on the 28th of February [15], as a co-ordinating instance only, however, taking over from Pro-Eurojust [10]. Its website introduces the organisation as "the European Union's Judicial Co-operation Unit." It was referred to in the same way by article 29 TEC (as amended by the Treaty of Nice) which stated its position as one means to ensure "closer cooperation between judicial and other competent authorities of the Member States" and thereby contribute to the achievement of an area of freedom, security and justice; a statement now paraphrased by article 85 TFEU.

Eurojust's objective is defined more closely in article 3 of the Eurojust Decision as being to "stimulate and improve the coordination" "in the context of investigations and prosecutions, concerning two or more Member States of criminal behaviour referred to in Article 4." These are: crimes and offences for which Europol is always competent to act under article 4(1) of the Europol Decision and the relevant annex [36; II.B.1] as well as auxiliary offences thereto. Eurojust's caseload has more than tripled between 2002 and 2006 [49; p.24] with a surge of cases swelling its work volume to over 1000 cases in 2007.[19] This number has continued to grow steadily reaching 1424 cases in 2010 [51; p.76].

Eurojust can act through its National Members to request various actions from the competent authorities in member states e.g. to investigate, prosecute or to form a joint

[17] Thus Eurojust dealt with 259 cases concerning the execution of EAWs in 2012. See [52; p.8]
[18] Indeed it has already been declared the forbearer of a European prosecutor—see Dieckmann [47; p.620].
[19] Eurojust1000 new cases so far this year. [50]as well as the analysis showing a 42 % increase in cases for Jan-mid June 2007 as compared to the same period in 2006, see *Kennedy* [88]

investigation team, to ensure MS authorities inform each other about investigations and prosecutions, to assist MS authorities to achieve "the best possible coordination", (with college agreement) to assist investigations and prosecutions, forward requests for judicial assistance, etc. [15; Art. 6]. Article 7 empowers Eurojust to similar activities acting as a College.

In a parallel development to Europol, fairly recent reform of Eurojust is likely to place this body in an informationally and practically more powerful position as the 2009 Eurojust Decision requires the member states to provide certain information to Eurojust (they have always been empowered by article 13 to exchange any relevant data with Eurojust but this article's wording was changed from "may" to "shall"); with the following set out as cases in which information exchange shall take place: where a JIT is formed [15; Art.13(5)], where cases involve at least three MS in which requests for judicial cooperation have been transmitted to at least two MS [15; Art. 13(6)] as well as other problematical cases, e.g. involving conflict of jurisdiction [15; Art. 13(7)]. This provision is viewed as key by many national members as it results in member states duty to provide Eurojust with any information on criminal investigations necessary for its work. Furthermore, member states are required by article 8 to provide Eurojust with their reason for a refusal to comply with a request. Again this may be seen as a subtle factual change to power-relations within the Union.

A significant change as to Eurojust's position as *the* European Judicial Co-operation unit may further be perceived in relation to powers assigned to it *vis a vis* third states. Article 27a provides that the College may post liaison magistrates to third countries in order to facilitate judicial cooperation and, where the MS concerned agree (although currently it is the role of liaison magistrates at Eurojust—from Croatia, Norway and the USA—which is prominent—see Eurojust [52;p.36]), Eurojust may coordinate the execution of requests for judicial cooperation issued by a third State, where these requests form part of the same investigation and require execution in at least two MS [15; Art. 27(b)]. Again the external-facing impact of this organ, may be of key significance for its further development.

The particularly terrorism-related point is that Eurojust—like other EU agencies involved in criminal justice, is in a state of continued development. The agency has been strengthened firstly by the Treaty of Lisbon and then again by a new Eurojust Decision in 2009. Whilst (post-Lisbon) article 85 TFEU continues to emphasise to Eurojust's central mission as supporting and strengthening coordination and cooperation between national investigating and prosecuting authorities, article 85(1)(a)–(c) TFEU also provides potential for Eurojust to initiate criminal investigations as well as authority to resolve conflicts of jurisdiction and thus for significant novelty.[20] The wording of article 85 is fairly loose, however, leaving flexibility for the Council and European Parliament as to how they legislate for the structure and activities of Eurojust. In formulating the Treaty the member states did clearly express a standpoint that they do not wish Eurojust to become a supranational body with operational powers within an area defined as a common territory. Any such development is

[20] See e.g. Hamdorf [79;p.74]

reserved for the future European Public Prosecutor's Office (EPPO) as provided for in article 86 TFEU (see infra)[111; p.182].

The potential terrorism has as a(t least a co-) driver for change could, however, be perceived for example in 2007 the Commission issued a Communication on the role of Eurojust and the European Judicial Network in the fight against organised crime and terrorism in the European Union .[21] It is interesting to see the way in which European criminal justice dialogue is cased in terms of these crime types. In this Communication, the importance of Eurojust's role was emphasised and in particular the need to consider aligning National Member's powers and terms of appointment to ensure the body's working as efficiently as possible in the fight against these types of crime highlighted. A number of these suggestions were realised with the 2009 Decision with those put aside likely to mark discussion in the near future[111; p.183]Above all, the potential for supra-nationalisation through article 86 should any terrorism-related need be felt is clearly given. Para. 4. Of article 86 TFEU provides:

> The European Council may, at the same time or subsequently, adopt a decision amending paragraph 1 in order to extend the powers of the European Public Prosecutor's Office to include serious crime having a cross-border dimension and amending accordingly paragraph 2 as regards the perpetrators of, and accomplices in, serious crimes affecting more than one Member State. The European Council shall act unanimously after obtaining the consent of the European Parliament and after consulting the Commission.

Terrorism is thus very clearly a crime which may be assigned into the remit of an EPPO. This topic can be regarded as intimately linked with political pressures felt by the member states. Thus at times during the past decade, commentators have held a counter-terrorism EPPO for the form most likely to be formed and one might well speculate that such a likelihood would return should the misfortune of a major terrorist attack occur on Union territory. There can be no clearer indicator of counter-terrorist policy as driving EU integration and, in this case, overcoming fundamental hurdles due to the pressure member states then perceive themselves to be under. It should be noted that the EAW was pushed through against the concerns of member states who felt it must be accompanied by balancing legislation on suspects' rights (and indeed who agreed the EAW legislation conditionally upon this being passed immediately afterwards). That was undoubtedly a watershed in European criminal law; one which 9/11 facilitated.

It must be noted at this point that terrorism is distinctly not a topic in this context at the moment. The Commission is currently taking great care to ensure the EPPO debate is linked solely to the protection of the EU's financial interests [112; p. 445] and not to the expansive possibilities of article 4. Should the political situation present itself, there is, however, no doubt that terrorism could be a driver and the increasing profile and experience of Eurojust likely to be extremely relevant.

[21] COM(2007) 644 final [56] also incorporating a number of the suggestions made in Council document 13079/07 [27] e.g. the full implementation of the Eurojust decision, uniform powers, binding character for Eurojust's requests and the relationship with the EJN.

The scope of this article does not lend itself to exploring the full extent of terrorism related institutionalisation within the EU. With the main examples highlighted above, the nexus can, however be clearly drawn and this aspect of the growing role played by the EU level highlighted. There are plenty of further examples which one may regard as driven also by the need to cooperate in counter-terrorism cases (or, for the more cynically minded, which one may view as couched in these terms to make them more palatable). Even the more informally driven European Judicial Network (formally established by a Joint Action of the 29th June 1998 [9]) stated its aim to facilitate effective judicial co-operation within the Union in general as well as for specific forms of serious crime such as organised crime, corruption, drug trafficking or terrorism [9;Art.2(1)]. Indeed, even OLAF—the Anti-Fraud Office of the European Commission, has, on occasion emphasised the potential for a counter-terrorist aspect of its work; such is the currency of this topic.

The most important point to acknowledge, however, is the way in which operational benefit is clearly seen to be gained via Europeanisation of this work. The topic may have political currency but it is clear also that practitioners bring terrorism-related work to the European institutions and regard these as providing them with added value in turn. Undeniably the importance and high-profile of counter-terrorism cases in the last two decades can be seen to have driven European integration at an institutional level also making the EU a counter-terrorism actor of high practical importance. Seen in historical perspective, this is, of course, anything but surprising. Already in the 1970's the TREVI groupings [95; p.13 et seq] were utilising the EU predecessor structures to discuss operational aspects of counter-terrorism work and indeed, terrorism is arguably THE transnational crime [5] to which considerable energy is devoted. Nevertheless, there can be no denying that the institutional aspects of the EU's counter-terrorism profile make this a particularly remarkable development.

Soft law and institutionalisation

Reflecting the status of the EU as a comprehensive counter-terrorism actor is the member states use of this forum for solutions beyond the law. Thus the last ten years bear witness to the EU simply as a venue in which the member states make agreements and declarations; plans for action without any binding legal force but—presumably—with efficient impact.

Thus the EU not only features a common 4 pronged counter-terrorism strategy since 2005 (prevent, protect, pursue, respond—see [22, 26]) but also features measures such as the "EU Action Plan for the Enhancement of the Security of Explosives" [57] leading to the European Bomb Data System at Europol as well as current projects such as an EU-wide early warning system [60] being developed to include threats and information on missing explosives, etc. Broad arrangement has and is being made (e.g. by Council Decision 2005/671/JHA [22]) for cooperation (for matters ranging from access to DNA databases, in relation to large-scale events and prevention [29]), information and data-exchange and the pooling of operational expertise. As article 75 TFEU demonstrates mechanisms to continue the development of freezing of funds via administrative measures are likely to be a field of future action.

Just as this softer law can be seen to complete the web in which specific criminal justice legislation operates, so informal contact opportunities surround formal institutionalisation. Thus for example the Police Chiefs Operational Task Force was to be found in this context. Established in spring 2000 based upon a decision set out in the Conclusions from Tampere, this Task Force has never been placed on any EU legal basis but met regularly apparently discussing joint operations and making recommendations relating to Council policy [97; p.926–927]. In 2004 a decision was made that Task Force decisions relating to operational matters were to be made within the Europol framework—again emphasising Europol's operational influence, although the Task Force continued to meet within the Council framework when strategic matters were being discussed [21]. Documentation of meetings was not made public. Since the establishment of the COSI committee, the Chief of Police Officers Task Force has been amalgamated into this structure. The need for distinct, operational police discussions is, however, reportedly still felt so it is possible that further developments will follow in the future.

In this context, attention can also be drawn to the above mentioned Joint Investigation Teams (JITs). These may in fact be seen as a potential alternative to European institutionalisation of trans-national investigatory matters. They are legislated for in articles 13 to 16 of the 2000 Convention on Mutual Assistance in Criminal Matters which came into force on the August 23rd 2005 (due to slow ratification progress they were also provided for in the interim by Council Framework Decision of 13 June 2002 on joint investigation teams [18] which lapsed with that entry into force). These provide that two or more member states may make agreements to set up JITs for a specific purpose and a limited time period where complicated actions with links to other states or coordinated, concerted action is necessary (article 13 (1)). The actions of the team and procedures used are determined by the laws of the country in which it was set up [11; Art. 14]. MSs not participating in the set-up agreement can second agents to a JIT [11; Art 13(4), (5) & (6)]. Members of JITs who are not nationals of the country in which they are operating are to be treated as such "with respect of offences committed against or by them." [11; art. 15] Members of Europol, Eurojust and OLAF can also be seconded to JITs. The initiative to provide for JITs stems from the Council of Tampere in which the MSs called for JITs to be set up without delay to combat the trafficking with drugs, human beings and terrorism.

In parallel to the mutual recognition instruments, however, even this development can be related to stronger EU level institutionalisation and thus, at least in the long run, supra-nationalisation. Thus since 2007 the inclusion of Europol staff wherever possible is encouraged [11]. Furthermore, the increased use of JITs is to be connected with European institutions. By 2007 approximately 30 JITs mainly used for terrorism and drug cases had reportedly been or were in action [88]. The 2012 Eurojust Annual Report mentions no terrorism related JIT- [52; p.34], nor does the Europol Annual Review 2011 [75; p. 28–29]. They are thus far from an instrument to be related to counter-terrorism although one may note the timing of increased momentum in developing them. They were apparently not being used as often as they might be in the past, reportedly due to the complexity [101, 102, 116] and expense of setting them up. Thus a Network was set

up[22] to provide at least one expert contact point to provide assistance in each MS and as seen supra Europol and Eurojust took on key roles encouraging their use. Indeed these organs undertook a joint initiative to promote their use and have produced a guide to Member States legislation on JITs [48, 53]. In recent years efforts to ensure JITs are used more frequently have redoubled with Europol and Eurojust taking a far more pro-active stance in this context.

JITs are now a prominent feature on both Europol and Eurojust websites with funding also being made available to assist MS in establishing these.[23] A further facilitating step was the publication of a Eurojust and Europol JIT Manual [37] in September 2009 which provides comprehensive information on the legal basis and pre-conditions for setting up a JIT, as well as advice as to when JITs can be sensibly utilised.

This perspective perhaps provides insight into how a number of mechanisms, whether key criminal law or procedural mechanism, institutionalisation or a softer law/quasi-institutionalisation context contributes to the EU's development as a more holistic counter-terrorism actor of great significance. In what follows the broader impact of this development is examined and analysed.

The state of counter-terrorism

The defining feature of counter-terrorism policy is that it sees governments facing an exceptional situation. Low probability, high-risk incidents programmed to create terror amongst the population are bound to place governments and security forces under great pressure to prevent terrorist attacks.

Facing this pressure in the past decades, governments have regularly resorted to exceptional measures. The British situation is often used to illustrate such a point. It should be noted that the UK has a long tradition of exceptionalism in reaction to the IRA terrorist threat of the last century [77; p.1331 et seq.]. Much attention has been paid to the regime for preventive detention: evolving first from the detention without trial scheme for foreign, non-deportable (regulated by Anti-Terrorism, Crime and Security Act 2001 [1; s. 23]) scheme struck down by the House of Lords in 2005,[24] to control orders and now to the TPIMS[25] The actual (up to 28 days [schedule 8 of the 2000 TA (amended by section 23 of 2006 TA and Code H of PACE), now amended by the Protection of Freedoms Act and reduced to 14 days]) and proposed detention without charge schemes (with 90 days discussed [84; p.8])., 42 debated before Parliament [103] as well as the shoot-to-kill policy operated by British police, have been equally headline-grabbing [91, 92].

In fact, counter-terrorism policy has left the criminal law fundamentally changed with offences such as those provided for by sections 57 and 58 of the Terrorist Act

[22] See Council Document 11037/05 [23] and http://www.europol.europa.eu/index.asp?page=content_jit&item=jit_role_national_experts.
[23] See "JIT Funding Project" website, at http://www.eurojust.europa.eu/jit_funding.htm, . Also *de Moor* [42; p.95] and Eurojust [52; p.35 et seq]
[24] A and others v Secretary of State for the Home Department [2004] UKHL 56
[25] See Hunt, A. (This volume)

2000 (criminalising possession for terrorist purposes[26] and the collection (as well as possession) of information likely to be useful to terrorists[27] respectively) as well as section 5 of the 2006 Terrorist Act (which criminalises any conduct undertaken to realise an intention to commit acts of terrorism or to assist the commission of such acts[28]) casting the net of criminalisation very wide. Section 38b of the 2000 Terrorism Act adds effective reverse burdens of proof to this mixture imposing criminal liability on anyone who has information which they know or believe might be of "material assistance" in preventing an act of terrorism or "securing the apprehension, prosecution or conviction of another person" (within the UK) who was involved in "the commission, preparation or instigation of an act of terrorism"[29] and do not report this to the police and provide them with the relevant information. Considering the UK approach to counter-terrorism is also explicitly not limited to the criminal law but considered a category of its own which also utilises the criminal law, such fundamental changes to the criminal law are of particular significance.

It is not only the UK, however, in which exceptionalist tendencies are to be seen. The Government of the Federal Republic of Germany has also been found legally

[26] **Section 57** reads: Possession for terrorist purposes.(1)A person commits an offence if he possesses an article in circumstances which give rise to a reasonable suspicion that his possession is for a purpose connected with the commission, preparation or instigation of an act of terrorism.

(2)It is a defence for a person charged with an offence under this section to prove that his possession of the article was not for a purpose connected with the commission, preparation or instigation of an act of terrorism.

(3)In proceedings for an offence under this section, if it is proved that an article—

(a)was on any premises at the same time as the accused, or

(b)was on premises of which the accused was the occupier or which he habitually used otherwise than as a member of the public,

the court may assume that the accused possessed the article, unless he proves that he did not know of its presence on the premises or that he had no control over it.

[27] **Section 58 reads**: Collection of information.

(1)A person commits an offence if—

(a)he collects or makes a record of information of a kind likely to be useful to a person committing or preparing an act of terrorism, or

(b)he possesses a document or record containing information of that kind.

(2)In this section "record" includes a photographic or electronic record.

(3)It is a defence for a person charged with an offence under this section to prove that he had a reasonable excuse for his action or possession.

(4)A person guilty of an offence under this section shall be liable—

(a)on conviction on indictment, to imprisonment for a term not exceeding 10 years, to a fine or to both, or

(b)on summary conviction, to imprisonment for a term not exceeding six months, to a fine not exceeding the statutory maximum or to both.

[28] **Section 5** reads:

Preparation of terrorist acts(1)A person commits an offence if, with the intention of—

(a)committing acts of terrorism, or

(b)assisting another to commit such acts,

he engages in any conduct in preparation for giving effect to his intention.

(2)It is irrelevant for the purposes of subsection (1) whether the intention and preparations relate to one or more particular acts of terrorism, acts of terrorism of a particular description or acts of terrorism generally.

(3)A person guilty of an offence under this section shall be liable, on conviction on indictment, to imprisonment for life.

[29] Section 38B (1)(a)&(b)

pushing and hotly debating the boundaries of its constitutions. Thus preventive detention is demonstrated by Mueller[30] as a contentious issue in relation to which previously sacrosanct standards have been broken. The Federal Constitutional Court was required to revisit the meaning of human dignity, perhaps the central concept of the post-World War 2 German constitution in relation to the so called *Luftsicherheitsgesetz* (for details *see* [2] and [3, 4]). This case saw a successful challenge to legislation permitting the deliberate shooting down of a hijacked aircraft being steered by terrorists to ends paralleling the events of 9/11. According to the Constitutional Court the Constitution as it stands will not tolerate the utilisation of any single life as a means to an end even to save a greater number of lives.[31] In the German context an act of Government and Parliament to attempt to legalise such action was a heavily criticised step well beyond the acceptable [82].

Intervention by the Federal Constitutional Court was also required in relation to the highly controversial "online-searches."[32] These involve the installation of Trojans by law enforcement on private computers to enable the remote and clandestine search of that computer. Use of this measure is restricted to grave and international terrorism-related threats of the highest order and is intended above all for the purposes of prevention. Transfer of any evidence found to a prosecution agency may only occur to support the prosecution of a crime punishable by a minimum of 5 years. A strong data protection regime involving on-going oversight by the BKA (Federal Police Office) data protection supervisor and two further public servants (one qualified to hold judicial office) to immediately inspect any data collected in order to determine whether it pertains to the core area of private life was created. Should they deem this kind of data to have been collected, it must be deleted immediately. Should a search be deemed capable only of collecting data of this kind it must cease forthwith [113].

Counter-terrorism is clearly to be associated with well-established, democratic states introducing exceptional measures often considered beyond the boundaries of the constitutionally acceptable particularly to serve the purposes of prevention.

Given that it is precisely the members of these executives which populate the highest organ of the EU, one cannot be surprised that this entity is in turn marked by the same spirit in the counter-terrorist context. As is clearly to be recognised from the above account, the EU has always been and become a repressive counter-terrorist forum/actor, serving broader criminalisation, facilitation of more efficient intelligence gathering and exchange, investigation and indeed prosecution. It has been ascribed an intelligence related role and a role supportive of prevention within an international network of solidarity. Given the high priority afforded to such issues by those populating the Council as first ministers of their member states or indeed the respective ministers of the interior, this is predictable and indeed correct. One could well argue the member states governments as being neglectful in their duty to protect their citizens were they not utilising the EU in this way. The problem is that this contexts highlights what the European Union is not.

[30] Müller, T. (2013) Preventive Detention as a Counter-Terrorism Instrument in Germany, *Crime, Law and Social Change* (*this volume*).
[31] Judgment of the First Senate, 5th February 2006–1 BvR 357/05 -
[32] Judgment of the First Senate, 27th February 2008–1 BvR 370/07 −/− 1 BvR 595/07 -

The counter-terrorism context is littered with statements reminding of the broader European constitutionalised criminal law tradition. Thus the Stockholm Programme for example states:

> "Respect for the Rule of Law, fundamental rights and freedoms is one of the bases for the Union's overall counter-terrorism work. Measures in the fight against terrorism must be undertaken within the framework of full respect for fundamental rights and freedoms so that they do not give rise to challenge. Moreover, all the parties concerned should avoid stigmatising any particular group of people, and should develop intercultural dialogue in order to promote mutual awareness and understanding.
>
> The Union must ensure that all tools are deployed in the fight against terrorism while fully respecting fundamental rights and freedoms. The European Council reaffirms its counter-terrorism strategy consisting of four strands of work—prevent, pursue, protect and respond—and calls for a reinforcement of the prevention strand."[40; p.84]

Nevertheless it is important to remember that all of the above described developments run in parallel to the failed attempts develop a general declaration of procedural rights in criminal proceedings [54] and the now slowly progressing Roadmap rights development [38]as well as to constitutionalise the Union [109].

What the EU doesn't have

Within the context of individual member states, counter-terrorist policies have been subject, as highlighted for the UK and Germany, to political debate of the most intensive nature. More often than not further to challenge before the courts, often as a constitutional issue of the highest order. Such kick-back has, however, mostly been absent from the EU level up to this point.

This is, of course, entirely in keeping with the EU as the entity it is. The rejection of the Constitutional Treaty clearly illustrated that it is not a constitutional entity and as such correctly devoid of any court structure dedicated to upholding the sanctity of any such higher legal principle. Its much criticised lack of democratic legitimacy (fundamentally for lack of a demos, see e.g. [115]) also accounts for the pre-Lisbon lack of any political debate.

Post-Lisbon the scenario is somewhat different. The European Parliament is changing given its role as co-legislator. It has indeed already demonstrated its potential power in relation to counter-terrorism relevant policy via its opposition in the SWIFT data exchange agreement [99]. National Parliaments have also been ascribed a role in overseeing EU policy meaning that we can expect some of the controversy to be found in national contexts reflected in post-Lisbon EU policy in the future. The inclusion of the European Charter into Union law via the Lisbon Treaty[33] and indeed the planned accession of the EU to the European Convention for the Protection of Human Rights and Fundamental Freedoms should lead to a different

[33] See http://www.europarl.europa.eu/charter/default_en.htm, and TEU [6; Art.6]

and justiciable rights discourse within the Union but this is currently embryonic. An assertion which cannot be mirrored vis counter-terrorist activity at the European level.

Although not a constitutional court, the European Court of Justice stance in Kadi[34] is demonstrative of that court's willingness and ability to step into such a role as necessary. As it gains jurisdiction over all legislation passed in the former third pillar at the end of 2014 [See Article 10 of Protocol No 36 on transitional provisions as well as [41]], this means the lack of a forum for such discourse in case law is likely to be rectified.

The fundamental problem is one of imbalance. As has been shown, the EU has advanced to a sophisticated counter-terrorism actor and there are many grounds to believe this is rightly so. The atmosphere of exceptionalism has, however, meant that this development is associated with a number of negative, in part highly controversial, side-effects. Specific to the counter-terrorism context these are the data retention directive, passenger name record and swift privacy-related controversy discussed above. The broader discourse surrounding criminal justice at the EU level is also marked by controversy and fundamental criticism of this context, however. Above all the European level has been subject to continual criticism in the last years because of the almost purely repressive nature of the policies it facilitates. The efficiency of these stands in stark contrast to the lack of rights protection afforded to those who become subject to them.

Individual cases demonstrate serious injustices resulting from this lack of balance. The case of Andrew Symeou provides a horrific example whilst that of e.g. Edmund Arapi held an equally dramatic potential [76; p.4-5]. Non-governmental organisations such as Fair Trials International and Justice therefore regularly publish to highlight the very real problems caused by this constellation [86] and particularly Fair Trials has started reform campaigns as a result.[35] Associations of defence lawyers, such as the European criminal bar association also regularly express concern [64] meaning this broader work area is one recognised, also by EU organs, as at least imbalanced.[36]

Thus, although few would seek to discredit the EU as a counter-terrorism actor, this role must be viewed as fundamentally dogged by the same shadow which hangs over all criminal justice related work. The ways in which the EU adds value to its member states counter-terrorist activities described above and by which it is therefore emerging as a more autonomous force are certainly persuasive and, via their grass-roots dependent development, in many ways to be assumed effective and legitimate. This fundamental, broader worry remains however. The European Union has its origins as a set of supra-national communities fundamentally bound to enhance the lives of citizens by ensuring peace and democratic values. The precise expectations placed upon it have revolutionised as the decades passed and are still in flux. Nevertheless it must be viewed with the deepest concerns that in this context; one which has proved constitutionally beyond challenging for the oldest of constitutionalised democracies, that precisely this indeterminate entity which draws its legitimacy from such lofty aims, has made leaps and bounds in only repressive

[34] KADI and OTHER v. COUNCIL and COMMISSION (*Application no. C-402/05*), judgment of the European Court of Justice on 3 September 2008, OJ C 285/2 of 8 November 2008.
[35] See the various facets of the Justice in Europe campaign at http://www.fairtrials.net/justice-in-europe/
[36] Thus the concentration on proportionality issues in the Commission review of the EAW [61] and the steady work on defence rights, currently more successfully in the Roadmap process [38].

directions. As it stands the EU may be viewed as a counter-terrorist actor which can sprint before we are convinced it can keep its own balance, let alone walk.

Conclusions and outlook

Regardless of how one views the European Union or which developmental direction one considers appropriate for it, there is no denying that it has fundamentally changed in the counter-terrorism context. Although it looks back upon a long history of sorts in this context, the TREVI discussions of the 1970's have little in common with the situation as it currently stands. The EU has quite simply become the Member States' forum of choice for transnational matters counter-terrorism. It is now within the EU context that they discuss defining the crime of terrorism and within which they develop innovative mechanisms and institutions, more or less formal exchange of information and intelligence as well as informal cooperation opportunities to deal with terrorism across borders. This status of the EU is to be recognised as both internal, i.e. when the member states act amongst themselves but also as an external-facing character when the member states are in negotiation with other states.

Expertise in counter-terrorism has in this way been accumulated at the centralised European level and has indeed become supra-nationalised with the specialisation of EU bodies and agencies in this context. Thus the EU itself can be seen as a counter-terrorism actor. The supra-nationalised part of this work is very significantly backed up by less formal and softer mechanisms, some of which are still explicitly inter-governmental in nature. Nevertheless The EU doubtlessly stands as a significant counter-terrorism actor assisting some member states in pursuing their policies and processes far more efficiently whilst raising the profile of this policy area significantly in others. The existence of ever more institutions, networks and mechanisms surrounding the centralised more formal EU organs, no matter how inter-governmental in nature they currently are, is likely to fuel the centrifugal shift of power and strengthen the EU's authority in this field over time.

This may be seen to demonstrate the cumulative effect of having counter-terrorism activity of some kind at the supra-national level when political momentum is added to it. Doubtlessly the shift in focus and influence of the EU is convenient for the member states and reflective of the strongly perceived, globalised and different needs they faced in this context over the past decade. As demonstrated this is not, however, only convenient for the member states. Such development also gains momentum due to the benefits for significant partners. Thus the US government has for example responded very positively to dealing only with one contact point for 29 jurisdictions. This is turn naturally creates the expectation and at least gentle pressure for this convenience to be offered more broadly. And so policy and institutional reality may develop.

Parallel to other developments, the EU's counter-terrorism activities ensure other pressures arise. The expectations and desires placed on the EU by (at least the majority of) member states mean it as an institution is in a highly dynamic state of development. Post-Lisbon, the EU is changing. Precisely how well placed the European Court of Justice or national Parliaments will be to deal with tasks such as ensuring accountability of criminal justice organs [as foreseen by e.g. article 88(2) TFEU for Europol] remains to be seen but a fundamental change is underway and

necessary. These are institutions which have been tasked with rising to the challenges presented and which have indeed mastered many reform processes before. They are the organs to which we must turn to secure individual rights as well as accountable and acceptable processes, also in the counter-terrorism context. The challenge is great because the one-sided EU has a head start. Executive measures to change the criminal law, provide for informal information and data exchange, also with 3rd countries are in place and operating. Across EU bodies and institutions—from Europol to Frontex, and the informal interfaces it offers such as SitCen, the EU is working and facilitating efforts against terrorism. Instruments and mechanisms from the European Arrest Warrant to Europol's TE-SAT threat assessment and JITs are increasingly better received and utilised, clearly demonstrating the benefits the EU as a counter-terrorism actor offers its member states. The EU has doubtlessly successfully supported member states executives in counter-terrorism policy and there is evidence of significant benefit.

The problem is that unchecked executives, so our common and diverse European history has taught us, are not always right. They serve also to undermine their own legitimacy. And thus far the EU as a counter-terrorist actor—and indeed more broadly as a criminal justice actor—has served only to magnify executive action and reach, the consequences of which are being and still to be faced. Some of the individuals badly served by the European Arrest Warrant are well known but there are likely other tales of misfortune to be told. How for example will EU citizens feel when denied entry to the US based upon data transferred to Homeland Security by Europol? This data stems from their member states, but the transfer was made by the Europol Director in the counter-terrorist context [32; Article 14] The EU was mandated to act by the member states but is also, clearly, the governance level which can be blamed. Furthermore, the effect upon citizens' positions is not backed up by processes for clarification or rectification.[37]

The broader picture is that the European Arrest Warrant and JITs may generally operate well, but defence rights limp behind and so the risk of unnecessary "collateral" damage remains high. How long will citizens accept that the Commission finds over 100 million to assign to Europol and Eurojust awarding financial support to JITs [38]whilst negotiations over access to a lawyer and legal aid falter because these are "matters for the budgets of the member states?[39][so December?? 2012 -]"

In the current position in which citizens are less concerned about terrorist attacks and perhaps more open to important campaigns such as those by FTI highlighting the injustices at least massively exacerbated by EU instruments, the question becomes whether the legitimacy of the EU is not at stake. This is only exacerbated by populist, Euro-sceptic political movements across Europe who, on a daily basis, apparently seek to discredit the EU by any means possible [106].

Can we, in this political climate, trust the executives who negotiated or supported the developing profile of the EU as a repressive actor in counter-terrorism policy to honestly admit that it was they who shaped this profile? Will the UK government

[37] Wade, M. at Making Europe Safer: Europol at the Heart of European Security Conference, The Hague, 19 June 2012 and (2013) Judicial Control: the CJEU and the Future of Eurojust, ERA Forum, in press.
[38] See http://ec.europa.eu/dgs/home-affairs/financing/fundings/projects/stories/jits_en.htm.
[39] So Sarah Ludford MEP at Defence Rights Debate at the European Parliament, 12th October 2012.

stand up in its current mode and admit that it was its predecessor who struck a nail in the coffin of the Framework Decision on Individual Rights in Criminal Proceedings as revived by the German Presidency in 2006/7 amongst other things by demanding that the presumption of innocence be explicitly excluded for terrorist suspects?

One may reasonable fear the answer to such questions is no. There is political capital to be struck from portraying the EU as an enemy of freedom.[40] In counter-terrorism terms it cannot be fairly described as having been that. Neither can it, however, be described as the beacon of freedom for its citizens. The EU bears value and valuable potential as a counter-terrorism actor. It is, however, currently one extremely vulnerable to criticism. As an institution which draws its legitimacy from the value it adds to the peaceful and democratic lives of its citizens, it is likely fundamentally to be welcomed as a counter-terrorism actor, only however, if this work is embedded in a broader, "freedom maximising"[41] context. As such the EU can perhaps currently be described as on the right path but nevertheless as having lost its way.

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[40] Even with all senior practitioners in the field, independent of their political stances warning at meetings and conferences across Britain that a UK EU criminal justice opt-out will put British citizens in greater danger [85; para. 195]

[41] In the sense developed by the freedom model of Sanders, A. Young, R. and Burton, M. (2010) Criminal Justice.

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