



Analysis

Who drives EU counter-terrorism? On the legislation of the European Union

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The formal process of developing and implementing EU counter-terrorism law and policy begins with the heads of government, in the European Council, setting out strategic guidelines. Thereafter, the Commission produces proposals for laws and policies that are discussed by the Council of the EU (made up of government officials) and the Parliament. However, this formal task-sharing between the institutions of the EU does not say much about the power relations and impulses surrounding counter-terrorism policy.

As executive body of the EU the European Commission presents proposals for laws (Regulations and Directives), supervises EU agencies – in particular Europol, Eurojust, Frontex and euLisa, the Agency for Operational Management of the large-scale IT systems - assigns money to Member States from the Internal Security Fund, supports security research projects, and so on. Primary responsibility in the Commission for the former 'third pillar' of the EU (the 'Area of Freedom, Security and Justice') lies with the Directorate-General for Home Affairs (DG HOME) under commissioner Dimitris Avramopoulos, a former Greek Minister of Defence.

Avramopoulos is getting reinforcements: last summer the British Commissioner Sir Julian King was given responsibility for the new 'Security Union' role by the President of the Commission, Jean-Claude Juncker. [1] His tasks and functions relate to counter-terrorism, radicalisation, organised crime, the management of external borders and European legislation on weapons. It remains unclear to what extent the commissioners King and Avramopoulos are going to divide their responsibilities. The latter is still going to fulfil important representative functions, like the first visit of an EU Commissioner to the US Department for Homeland Security under the new President Donald Trump. [2]

[1] http://ec.europa.eu/germany/news/juncker-konsultiert-eu-parlament-zur-ernennung-von-sir-julian-king-als-kommissar-f%C3%Bcr-die_de; http://ec.europa.eu/malta/news/president-juncker-consults-european-parliament-sir-julian-king-commissioner-security-union_en

[2] Press release 08.02.2017: http://europa.eu/rapid/press-release_STATEMENT-17-249_en.htm

When it comes to progress concerning the Security Union both commissioners appear side-by-side. In April 2015 the European Commission announced the European Agenda on Security. One year later, shortly after the attacks in Brussels, a communication followed concerning counter-terrorism and 'paving the way for a genuine and effective Security Union'. [3] Like the Agenda on Migration from May 2015, the Agenda on Security and the transposition note serve to speed-up the legislative process. Since October monthly progress reports haven't been presented. [4]

What can be seen is that when it comes to counter-terrorism many topics discussed have been introduced previously as instruments of migration and border management – from the transformation of the EU border agency Frontex into a border and coast guard, to the tightening of rules in the Schengen Borders Code, up to the expansion and integration of the EU information systems such as the SIS, which were the centre of proposals that appeared late last year. Concerning this topic the Commission also introduced a group of experts (the 'High Level Expert Group on Information Systems and Interoperability') which is instructed to find possibilities for the interoperability of police databases. The Member States also sent experts to this working group.

The Council of the EU and its Counter-Terrorism Coordinator

Apart from the 'additional value' which the EU's Security Agenda is supposed to produce, the counter-terrorism agenda of the Commission is not significantly different from the measures requested by the European Council and the Justice and Home Affairs Council after the Paris attacks in January 2015. [5] The respective statements were starting signals for a new round of European legislation concerning counter-terrorism and it is clear that the governments of the Member States and their respective advisory bodies remain the driving force in that area. However, the January 2015 conclusions did not come out of the blue. A significant amount of their content had already been included in the reports of the EU Counter-Terrorism Coordinator (CTC).

The position of the CTC was introduced by the European Council after the attack in Madrid in 2004 and was first carried out by the former Dutch Minister of the Interior, Gijs de Vries. In 2007 his successor Gilles de Kerchove took over, who was previously Director of the Directorate-General for Justice and Home Affairs in the Council of the EU. The role is still held by de Kerchove and the CTC is still amenable to the Council's General Secretariat. He acts as guardian of counter-terrorism and keeps an eye on all instruments that are at the Union's disposal. [6]

The CTC reports back to the Council and gives detailed policy recommendations for priority areas of action every six months, and on other occasions when it is deemed necessary. De Kerchove thereby functions as a political, strategic, and operational guide. In his recommendations he constantly calls for more competences and capacities. For example, Europol: if the police of the Member States call for an increase in data transfer to Europol, it requires an expansion of the information systems. Thereupon, the Council and the

[3] COM(2015) 185 (28.4.2015), COM(2016) 230 (20.4.2016)

[4] COM(2016) 670 (12.10.2016); COM(2016) 732 (16.11.2016); COM(2016) 831 (21.12.2016); COM(2017) 41 (25.1.2017)

[5] Council's Riga Joint Statement (29./30.1.2015) – Council doc. 5855/15 (02.02.2015); Council Declaration 56/15 (12.02.2015), Council Conclusion (Press Statement 848/15) 20.11.2015; Council Conclusion Euco 28/15 (18.12.2015)

[6] Council doc. 7906/04 (29.03.2004)

Commission include these proposals in new regulations or other measures. In the subsequent CTC report progress is evaluated and Member States are called upon to undertake the necessary efforts.

The Council's working parties

The EU's Justice and Home Affairs Council – made up of the Member States' relevant ministers – meets every three months. On occasion they meet informally. The actual work on measures and legal acts concerning justice and home affairs takes place within different Council working parties:

- The Working Party on Information Exchange and Data Protection (DAPIX) deals with legislation on existing and new databases in the area of policing and criminal justice. Together with Europol they are responsible for the implementation of the EU's information management strategy. The party is also responsible for the compliance with regulations on the protection of personal data.
- The Working Party for Schengen Matters meets in four different constellations: SIS SIRENE discusses the Schengen Information System (SIS), SIS TECH deals with technical questions like the upgrade of the old SIS to the new version SIS II, the subsection Schengen acquis coordinates legislative affairs, SCHEVAL is concerned with matters of evaluation of SIS.
- The Law Enforcement Working Party (LEWP) is responsible for operational matters of cross-border police work. Its aim is the increased cooperation between the authorities of the Member States when it comes to technical aspects, cooperation against cross-border criminal phenomena, major events and legislative action. The LEWP cooperates with the European Police College (CEPOL, based in Budapest) and Europol.
- The Working Party on Substantive Criminal Law (DROIPEN) is concerned with the standardisation of national regulations and works on new criminal law regulations. Recently the group worked on the new Directive on Combating Terrorism which was adopted in February 2017.
- The Working Party on Terrorism (TWP) is responsible for counter-terrorism matters, including the exchange of data, prevention of radicalisation, the development of reliable criminal proceedings in Member States, and the evaluation of terror threats via police and secret services of the Member States. They also deal with Europol's situation reports and increasingly with reports of the EU Intelligence Analysis Centre (INTCEN), which receives information from the secret services of the Member States and is part of the European External Action Service. The TWP follows the former TREVI work group and cooperates with the CTC and Europol. The group meets every three months.
- The Working Party on Terrorism (International Aspects) (COTER) is part of the General Affairs and External Relations Council. It deals with risk analysis and cooperation with third countries. For example, it oversees dialogues and measures in countries like Tunisia or Libya on the topic of terrorism. In various political fields the party cooperates with the TWP and both parties meet every six months. Unlike the TWP, the agendas and protocols of the COTER are not publicly available.
- The Coordinating Committee in the area of police and judicial cooperation in criminal

matters (CATS) works on a strategic overview over the Council working parties on police and judicial cooperation. CATS is made up of Directors and Director-Generals of national ministries for justice and home affairs. CATS is the apex of legislative bodies of the Council and is linked to the Permanent Representatives Committee.

- The Standing Committee on Operational Cooperation on Internal Security (COSI). Whereas the TWP has more of an operational role, COSI acts in a more strategic way when it comes to counter-terrorism. Its task is to evaluate the operational measures of the agencies and the Member States and to coordinate them, if necessary. This concerns prosecution, border control, and judicial cooperation. The COSI reports to the JHA Council and gives support in the event of terror attack or catastrophes. Unlike CATS, COSI also consists of members of the Commission and the European External Action Service. EU agencies can be invited as observing parties. [7]

CATS and COSI show that the distribution of tasks within the Council is not always consistent. Before the treaty of Lisbon, CATS met as the 'Article 36 Committee' (or *Comité article trente-six*), named after article 36 of the 1992 Maastricht Treaty. After 2009 it was going to be dissolved. However, because it had become "an invaluable network for senior officials" the committee continued to work on "finding solutions to interrelated problems covered by several working parties, thus allowing Coreper and Council to focus on the most contentious political issues." Its focus, however, was limited to politically important legislative proposals and initiatives.

Greater involvement of secret services

At EU level, the actual operational work on counter-terrorism is primarily taken on by Europol and Frontex (according to the border agency's new Regulation, agreed in September 2016). For this purpose Europol installed the European Counter Terrorism Centre (ECTC) a year ago. This is going to be developed into a central service provider for Member States. Following an invitation of the German Federal Criminal Police Office (*Bundeskriminalamt*, BKA) and Europol the police chiefs of the Member States, Norway and Switzerland met in Berlin in February this year to discuss its further expansion.

According to the BKA, possibilities have been found for a coordination of police cooperation concerning counter-terrorism, which is going to emanate from a central department (and through an adjustment of the existing data file landscape). [8] At issue is the installation of an Operational Steering Board consisting of the heads of the counter-terrorism departments of the national central offices. This would strategically develop and coordinate the work of the ECTC. The German Federal Ministry of the Interior did not explain the contents of the position paper until requested by parliamentarians, even though it had been coordinated with some of the Member States.

According to the paper the Police Working Group on Terrorism (PWGT, which is not an EU body) will be included in the Operational Steering Board. Further proposed measures are the installation of supranational teams, which cooperate on mutually-chosen issues and which give short-term recommendations for action and develop measures for better combating international terrorism. The Operational Steering Board could potentially lead to better

[7] A list of all preparatory bodies can be found at: <http://www.consilium.europa.eu/en/council-eu/preparatory-bodies/>

[8] Press release BKA (09.02.2017)

cooperation between the national secret services, as was the case last year with Europol and the non-EU Counter-Terrorism Group (CTG). The latter consists of the secret services of all Member States, plus Norway and Switzerland. The presidency of the group rotates parallel to the presidency of the Council of the EU. In July 2016 the CTG put into operation an intelligence-gathering platform with common databases – situated at the Dutch secret service AIVD. In a notice to COSI, the Council's General Secretariat requested closer collaboration with EU's INTCEN. [9]

Toothless parliament

Counter-terrorism measures are also discussed and initiated in informal committees of some Member States. For example the meetings of the G6 States, where the interior ministers of the six most populous Member States (Germany, Spain, Italy, the UK, France, Poland) network. Since 2007 and on the initiative of Wolfgang Schäuble, then-German Minister of the Interior, the US Department of Homeland Security has also participated. In the realm of secret services European counter-terrorism cooperation is currently augmented by the 'Paris Group', in which national intelligence coordinators of at least 15 Member States are involved. [10] The added value compared to the CTG is that external intelligence agencies are also involved (e.g. the UK's MI6). During meetings in Rome and Berlin representatives of the INTCEN, the CTG, and the counter-terrorism coordinator de Kerchove were invited. All information about the Paris Group is classified as top secret in consideration of the participating secret services.

Finally, the European Parliament is also one of the three institutions with legislative powers in the EU. Along with the Council and the Commission, the parliamentarians are involved in the ordinary legislative procedure to pass new Directives and Regulations. During the trilogue procedure proposals are discussed in all three institutions, whereby the Parliament frequently proves to be toothless.

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[9] CILIP-Blog (16.09.2016): 'EU-Terrorismusbekämpfung: Mehr Einbindung der Geheimdienste'

[10] Netzpolitik.org (15.12.2016): 'Und noch ein neuer europäischer Geheimdienstverbund: Die ‚Paris-Gruppe‘'



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