



EU Institutional and Legal Counter-terrorism Framework

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Abstract. *The 9/11 terrorist attacks in New York and Washington lifted counter-terrorism to the top of the European security agenda. The bombings in Madrid of March 2004 and in London of July 2005 proved that Europe is also a target of the new forms of international terrorism. The EU has since been trying to react to the terrorist threat with a comprehensive strategy grounded on four core objectives: prevent, protect, pursue and respond. The Union has also reshaped its institutional and legal counter-terrorist framework. The role of some EU bodies has been strengthened, while new institutional actors have been set up. The most important EU institutions in the fight against terrorism have proved to be the European Commission, Europol and Eurojust. Despite some good results achieved, lack of co-ordination and difficulties in information sharing are weaknesses that still hamper the realization of an effective intelligence and judicial co-operation. A new European common definition of terrorist offences, the introduction of the European Arrest Warrant and the use of biometrics are pioneering legal instruments in counter-terrorism. Such legal tools have enhanced the efficacy of the EU action in preventing and suppressing terrorism. On the other hand, they have raised concerns about fundamental rights and civil liberties. This paper is aimed at providing an initial evaluation of both institutional and legal aspects of the EU fight against terrorism. Whilst acknowledging the achievement of many positive results, this assessment leads also to the conclusion that the European Union has to further step up its efforts to remedy a number of inadequacies and weaknesses arising in both the institutional and legal frameworks of the EU counter-terrorism response.*

Keywords: Counter-terrorism, European Commission, Europol, Eurojust, definition of terrorism, European Arrest Warrant (EAW), Biometrics.

Introduction

The beginning of the modern era of European counter-terrorism can be located in the 1970s with the establishment in 1975 of the Terrorism, Radicalism, Extremism, and International Violence group, or TREVI group, and with the European Convention on the Suppression of Terrorism (ECST) in 1977.

The TREVI group was formed by European police officials in order to exchange information and provide mutual assistance on terrorism and related international crimes. It was initially a forum for exchanging information regarding organised crime and terrorism. It consisted of high level gatherings of Interior and Justice Ministers and top national security officials. The co-operation activities of the TREVI group were subsequently formally approved by the Ministers of Justice and Home Affairs of the then European Economic Community. The TREVI group lasted until 1992, when it was replaced by the provisions of the Maastricht Third Pillar involving immigration and asylum, policing, customs and legal co-operation.¹

Beyond TREVI, unified Europe created additional co-operative arrangements to combat terrorism, such as the Police Working Group on Terrorism and the Counter Terrorist Group. In 1993, the TREVI Group and other European institutions dealing with judicial, customs, and immigration issues were brought together in one new structure under Title VI of the Treaty of European Union.² Title VI concerned all the compensatory measures that would have to be taken once the removal of border controls between the Member States of the EU had been accomplished.³ The Maastricht Treaty also mandated the creation of the European Police Office (Europol). In 1997, a counter-terrorism preparatory group was created to formulate Europol's role in matters of counter-terrorism and Europol became operational in 1998.⁴

In spite of the increasing police co-operation through the TREVI Group and other similar organisations aimed at strengthening bilateral co-operation, it is nonetheless to underline that till the 11 September 2001 attacks in New York and Washington the European co-operation in the field of counter-terrorism remained fairly limited due to the resistance of the EU Member States to ceding to the EEC (and then to the EU) part of their sovereignty, in a delicate field such as security.⁵

¹ Peek J., *International police cooperation within justified political and judicial frameworks: Five theses on TREVI*, in J. Monar, & R. Morgan (eds), *The third pillar of the European Union*, Brussels: European Interuniversity Press, 1994, pp. 201-207.

² Treaty on European Union (TEU), Maastricht, 7 February 1992, available at: <http://eur-lex.europa.eu/en/treaties/dat/11992M/htm/11992M.html#0001000001>.

³ Benyon J., *The developing system of police cooperation in the European Union*, in McDonald W.F. (Ed.), *Crime and law enforcement in the global village*, Cincinnati, Anderson Publishing Co., 1997, pp. 103-122.

⁴ Rauchs G., and Koenig D. J., *Europol*, in Koenig D. J. and Das D. K. (eds), *International police cooperation*, New York: Lexington Books, 2001, pp. 43-62.

⁵ Wilkinson P., *International Terrorism: The Changing Threat and the EU's Response*, Institute for Security Studies *Chaillot Paper*, n. 84, October 2005 pp. 29-31.

EU Response to the Attacks of 11 September 2001

International terrorism moved to the top of the European political agenda after the plane attacks on New York and Washington. Although it was an attack aimed at America, it was perceived as an attack against the West as a whole. Consequently, all European leaders at once condemned the terrorist atrocity and promptly gave their support to the US declaring the firm intention to “stand shoulder to shoulder with America” since the fight against terrorism “is not a battle between the United States of America and terrorism, but between the free and democratic world and terrorism”.⁶ The attacks on America in 2001 and, more recently, the Madrid and London bombings in 2004 and 2005, have shown a new, different threat Europe has to face. Hence, the appearance of the new security threat of international terrorism urged the necessity of elaborating a new counter-terrorist strategy to fight a menace very different from the previous (mainly domestic) terrorism that Europe faced in the past.⁷

The attacks of September 2001 (and then in Madrid and London) showed on the international stage a new terrorism. This new form of terrorism, or “megaterrorism”,⁸ indicates a type of international terrorism, which differs from the old or domestic variant. The main features of such new terrorism are the aspiration to produce large-scale devastation, possibly through the use of weapons of mass destruction and the exploitation of religious fervour for such criminal intents. Also, new terrorists set up terrorist networks which operate worldwide. Moreover, they act through spectacular attacks preformed in an impressive “choreographed” mode.⁹

Consequently, it emerged that the Al Qaeda terrorist threat, because of its trans-national nature, can only be defeated through an equally vigorous, long-term trans-national response.

Following the 9/11 attacks the Member States of the European Union adopted a range of measures to fight terrorism. On 21 September, the European Council, during its extraordinary meeting, stated that “Terrorism is a real challenge to the world and to Europe and that the fight against terrorism will be a priority objective of the European Union”.¹⁰ This was followed by the adoption of a first comprehensive EU Action Plan to Fight Terrorism.¹¹ A detailed “Road Map” as regards the implementation of the Action Plan was drawn up in October 2004.

⁶ Blair T., *Prime Minister Tony Blair’s Statement in Response to Terrorist Attacks in the United States* – 11 September 2001, available on www.number-10.gov.uk/output/Page1596.asp.

⁷ To underline the different kind of terrorism that Europe started facing after 9/11, EU Commissioner A. Vitorino noted that “We had national terrorism, that is true, but up to 11 September we never had suicide attacks” – quoted in Szyszkowitz T., *The European Union*, in von Hippel K. (ed.), *Europe Confronts Terrorism*, Houndmills, Basingstoke [etc.], Palgrave Macmillan, 2005, p. 171.

⁸ Müller H., *Terrorism, Proliferation: a European Threat Assessment*, Institute for Security Studies, *Chaillot Papers*, n. 58, March 2003, pp. 21 ff.; available at: <http://www.iss-eu.org/chaillot/chai58e.pdf>.

⁹ Von Hippel K., *Introduction: Europe Confronts Terrorism*, in Von Hippel K. (ed.), *Europe Confronts Terrorism*, pp. 1-4.

¹⁰ Council of the European Union, *Extraordinary Council Meeting: Justice, Home Affairs and Civil Protection*, Brussels, 20 September 2001; available at: <http://ue.eu.int/uedocs/cmsUpload /12019.en1.pdf>.

¹¹ *EU Action Plan on Combating Terrorism*, last update is available at: <http://register.consilium.europa.eu/pdf/en/06/st05/st05771-re01.en06.pdf>.

A further important legal instrument to respond to the threat of terrorism was the Council Framework Decision on Terrorism. It was agreed upon at the Justice and Home Affairs Council of 6 and 7 December 2001 and aimed at improving legal harmonisation of Member States' legislations.¹²

In the wake of the terrorist attacks in Madrid in March 2004, the Justice and Home Affairs Ministers drew up an ambitious Declaration on Combating Terrorism, which was adopted by the European Council on 25 March 2004.¹³ The European Council endorsed the revised EU Action Plan on Combating Terrorism on 18 June 2004. The EU Action Plan identifies a series of measures such as joint investigation teams of police and magistrates from throughout the EU, routine exchange of information about terrorism among the Member States, a specialist anti-terrorist team within Europol and a co-operation agreement between Europol and the relevant US authorities. The Action Plan establishes high level Strategic Objectives for the EU action in preventing and combating terrorism. These include:

- To deepen the international consensus and enhance international efforts to combat terrorism (supporting the role of the UN, especially the work of the Terrorism Prevention Branch of the United Nations Office of Drugs and Crime);
- To reduce the access of terrorists to financial and other economic sources;
- To maximise capacity within EU bodies and Member States to detect, investigate and prosecute terrorists and prevent terrorist attacks;
- To protect the security of international transport and ensure effective systems of border control;
- Enhance the capability of the European Union and of Member States to deal with the consequences of terrorist attacks;
- Address the factors which contribute to support for, and recruitment into, terrorism (identifying factors which contribute to recruitment to terrorism and exploring extreme religious and political beliefs which support terrorism);
- Target actions under EU external relations towards priority Third Countries where counter-terrorist capacity or commitment to combat terrorism needs to be enhanced (including the provisions of effective counter-terrorist clauses in agreements with Third Countries).

In the aftermath of the London bombing in July 2005, an extraordinary meeting of the Ministers of Interior of Member States decided on the implementation of a series of measures already adopted as matter of urgency: the European Arrest Warrant; the strengthening of Schengen and visa information systems; biometric details on passports; combating terrorism financing; prevention of recruitment and radicalisation; greater controls on trade, storage and transport of explosives.¹⁴

¹² Council Framework Decisions on Combating Terrorism of 13 June 2002, available at: http://www.eur-lex.europa.eu/pri/en/oj/dat/2002/l_164/l_16420020622en00030007.pdf.

¹³ Council of the European Union, *Declaration on Combating Terrorism*, Brussels, 25 March 2004; available at: <http://ue.eu.int/uedocs/cmsUpload/DECL-25.3.pdf>.

¹⁴ Council of the European Union, *Extraordinary Council Meeting, Justice and Home Affairs*, Brussels, 13 July 2005; available at: http://ue.eu.int/ueDocs/cms_Data/docs/pressdata/en/jha/85703.pdf.

In December 2005 the Justice and Home Affairs Ministers approved a new European Union Counter-Terrorism Strategy,¹⁵ which aims at covering four strands of work: *Protect, Prevent, Pursue, and Respond*. Across these four categories, the strategy seeks to link strands from different policy areas and emphasise close interaction of measures at the Member State, the European and the international level. The first objective is to *prevent* people turning to terrorism by tackling the factors or root causes which can lead to radicalisation and recruitment, in Europe and internationally. The second objective of the EU Strategy is to *protect* citizens and infrastructure and to reduce Europe's vulnerability to attacks, including through improved security of borders, transport and critical infrastructure. The third objective of the Counter-Terrorism Strategy is to *pursue* and investigate terrorists across EU internal borders and globally; to impede planning, travel, and communications; to disrupt support networks; to cut off funding and access to attack materials, and to bring terrorists to justice. The fourth objective of the EU Counter-Terrorism Strategy is to prepare Member States, in the spirit of solidarity, to manage and minimise the consequences of a terrorist attack, by improving capabilities to deal with the aftermath, the coordination of the *response*, and the needs of victims.

The EU Counter-terrorism Strategy is not only a set of almost 200 counter-terrorism measures, grouped around the above-mentioned four key concepts, but it is also an attempt to set out the EU policy in the fight against terrorism in a comprehensive and consistent fashion, which is comprehensible also for the general public.¹⁶

At the operational level, the most important achievements in the EU fight against terrorism after 9/11 have been the strengthening of the role of Europol, the establishment of Eurojust and of the External Borders Agency (FRONTEX), and the appointment of an EU Counter-terrorism Co-ordinator. Among legal instruments, beyond the Framework Decision on Combating Terrorism of 13 June 2002, the most relevant have been the introduction in 2004 of the European Arrest Warrant, replacing the previous national extradition tools and, most recently, the European Evidence Warrant, creating a standard form warrant for obtaining objects, and documents in cross-border cases.¹⁷

¹⁵ Council of the European Union, *EU Counter-terrorism Strategy*, 2697th Council Meeting, Brussels 1-2 December 2005, doc. 14390/05 (Presse 296), available at <http://www.consilium.europa.eu/uedocs/cmsUpload/JHA,1-2.12.05.pdf>.

¹⁶ Den Boer M., *The EU Counterterrorism Wave: Window of Opportunity or Profound Policy Transformation?* in Van Leuween M. (ed.), *Confronting Terrorism. European Experiences, Threat Perceptions and Policies*, 2003, p. 189.

¹⁷ For a complete overview of the history of EU counter-terrorism policy see, *inter alia*: EU Council Secretariat, *The European Union and the Fight Against terrorism*, fact sheet, 9 March 2007, Brussels, available at: <http://www.eurunion.org/partner/euusterror/CounterTerrorFactsheetCoun030907.doc>; Koenig D. J. and Das D. K. (eds.), *International police cooperation*, New York, Lexington Books, 2001; De Cesari P., *The European Union*, in Nesi G. (ed.) *International Cooperation in Counter-Terrorism: the United Nations and Regional Organizations in the Fight against Terrorism*, Ashgate, 2006, pp. 207-229.

EU Institutional Counter-terrorism Framework

The most relevant institutions in EU counter-terrorism are the European Commission, Europol and Eurojust. In fact these three institutions play a major role at a legislative level (the Commission) and at the operational level (Europol and Eurojust), these two latter having as top priority in their mandate the fight against terrorism.

A number of other institutions are also part of the institutional architecture of EU counter-terrorism. The *European Counter-Terrorism Co-ordinator*, the *European Agency for the Management of Operational Cooperation at the External Borders* (FRONTEX) and the *European Joint Situation Centre* (SitCen) are also important stakeholders. Nonetheless, either they have been so recently instituted (the Coordinator), or they have little competences on counter-terrorism (FRONTEX), or there is little availability of data and a very thin relevant body of literature data (SitCen). Consequently, it is not possible to carry out a comprehensive analysis of these institutions' achievements.

The **European Commission** (EC) plays an active role in a large number of fields related to counter-terrorism policy. Primarily, the EC is the main actor in proposing new legislative tools in the areas of the Third Pillar. These proposals are the ground for the EU legislation on counter-terrorism (i.e.: the EC proposals for the Framework Decision defining the crime of terrorism and the European Arrest Warrant).

The activity of the Commission in counter-terrorism is subjected to many criticisms. As to the role the EC plays in the legislative initiative, it is maintained that the Commission lacks in coherence as well as in a consistent political guide. Furthermore, it seems that an overlapping of the roles in the area of Justice and Home Affairs does not allow the EC to act efficiently.¹⁸ A possible response to these criticisms would come from the modifications to the Justice and Home Affairs area included in the proposed European Constitutional Treaty,¹⁹ if it enters into force. In fact, this Treaty would design a new institutional scenery, rationalising the roles of different EU bodies involved in the Third Pillar areas. Furthermore, the Commission would be enabled to play its traditional role of "guardian of the treaty" also in matters concerning Justice and Home Affairs. This means that the EC would have the power to take a Member State to the Court of Justice if the State does not implement EU legislation or is late in the implementation process. Most importantly, in the decision-making process, unanimity would no longer be a requirement for the adoption of legislation concerning matters of the Third Pillar. Thus, qualified majority voting would render the legislative process much swifter and more efficient.²⁰

¹⁸ Nunes de Almeida J., Head of Directorate D1 of the Directorate General of the European Commission: Fight against Terrorism, *The European Commission in the Fight against Terrorism*, in ICLN (International Criminal Law Network, The Hague) and EULEC (European Institute for Freedom, Security and Justice, Brussels), joint co-operation, *European Co-operation Against Terrorism*, Wolf Legal Publishers, Nijmegen, 2004, p 38-39.

¹⁹ The text of the *Treaty Establishing a European Constitution* (Rome, 29 October 2004) is available at: <http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2004:310:SOM:EN:HTML>.

²⁰ Nunes de Almeida J., *The European Commission in the Fight against Terrorism*, *op. cit.*, pp.38-39.

The European Police Office, **Europol**, was established by the Maastricht Treaty in 1992. It is an international police organisation whose objective is promoting co-operation among law enforcement authorities of the EU Member States in the fight against serious organised crime, including terrorism.²¹

Europol's specific areas of criminal investigation include the illicit trafficking in drugs, vehicles, and human beings, including child pornography; forgery of money; money-laundering; and terrorism. Priority is given to crimes against persons, financial crimes, and cyber crimes, when an organized criminal structure is involved and when the criminal activity involves two or more member states of the EU.

In fact, the reference to the offence of terrorism was not initially included in the first drafts of the Europol Convention (although it was included in article K.1.9 of the Maastricht Treaty). The addition of combating terrorism among Europol tasks is primarily due to the insistence of Spain. The Spanish government convincingly remarked that, given Europol's nature as an organisation combating international organised crime, coping with terrorism is in the core essence of Europol's mandate.²²

The main task in Europol's mandate is the collection and exchange of intelligence information with national agencies, which can then translate this information into operational actions. It plays the role of "intelligence gatherer" within what is called "intelligence-led law enforcement" at the European level.²³

The instruments of Europol in the fight against terrorism (identified since 2003 as Europol's main priority) are essentially the Counter-Terrorism Unit and, more recently, the Counter Terrorism Task Force (established as a response to the attacks of 11 September 2001) that collects and analyses data on suspected terrorists, recorded in an Analytical Work File (AWF), a record of information on international terrorists provided by Member States. In addition, Europol's mandate includes the collection of other forms of data, such as legislation on counter-terrorism, and a glossary of terrorist groups. Alongside the establishment of the Counter-Terrorism Task Force, Europol created a number of functionally specialized programs. Among these, a Counter-Terrorism Program was set up in order better to co-ordinate all Europol activities against terrorism, including information gathering and threat assessments. In its crucial task of co-ordination, Europol also sustains operational investigations by EU police and joint investigation teams.²⁴

²¹ According to the Europol Convention (art. 2.1), the objectives of Europol are "preventing and combating terrorism, unlawful drug trafficking and other serious forms of international crime where there are factual indications that an organised structure is involved". Europol Convention, 26 July 1995, available at: http://www.europol.europa.eu/legal/Europol_Convention_Consolidated_version.pdf.

²² Bunyan T., *The Europol Convention*, Statewatch 1995, p. 5; available at: <http://www.statewatch.org/docbin/europol-pamphlet-1995.pdf>.

²³ Nunes de Almeida J., *The European Commission in the Fight against Terrorism*, *op. cit.*, p. 41.

²⁴ See Schalken, T. and Pronk M., *On joint investigation teams, Europol and supervision of their joint actions*, in *European Journal of Crime, Criminal Law and Criminal Justice*, n. 10, 2002, pp. 70 ff..

Europol also issues an Annual Terrorism Situation and Trend Report (TE-SAT)²⁵. Furthermore, in the aftermath of the attacks on 11 September 2001, the Europol Operational Centre was established, with the task of providing a 24-hour service for the exchange of information.²⁶

Europol, especially through its Counter-Terrorism Task Force, has certainly achieved some good results in its counter-terrorist activities. Among these, most remarkable are the production of threat assessments with regard to terrorist groups and cells in EU Members States and a constantly updated overview of counter-terrorism measures and legislation in Europe.

However, “the impact of Europol’s strategies, including counter-terrorism operations, in terms of criminal investigations and arrests is at present difficult to estimate, not only because of the relatively recent establishment of Europol and its Counter-Terrorism Task Force, but also because Europol is very protective of the organization’s assistance in investigative activities”.²⁷ Sensitivity and confidentiality of information concerning criminal investigations and a certain degree of reluctance to make available such information make it difficult to assess the work of Europol in counter-terrorism. In 2005, an EU effectiveness study of European EU counter-terrorism policies was published, but no information from Europol was mentioned in the report.²⁸

From the little data provided it emerges that the Member States have been progressively using more of the services of Europol in their investigative activities.²⁹ It is equally worth remarking that Europol has played an active role in some significant investigations, large-scale police operations have been supported by Europol, and a large number of national investigations use terrorism analysis carried out by Europol.³⁰

²⁵ Last updated report in 2007: *EU Terrorism Situation and Trend Report TE-SAT 2007*; available at: http://www.europol.europa.eu/publications/EU_Terrorism_Situation_and_Trend_Report_TE-SAT/TE-SAT2007.pdf.

²⁶ For a more in-depth analysis of the organisation and activities of Europol see: Deflem M., *Policing World Society: Historical Foundations of International Police Cooperation*. Oxford; New York: Oxford University Press, 2002; Lavranos, N., *Europol and the fight against terrorism*, in *European Foreign Affairs Review*, 8(2), 2003, 259-275; Rauchs G., and Koenig D. J., *Europol*, in Koenig D. J. and Das D. K. (eds), *International police cooperation*, New York: Lexington Books, 2001, pp. 43-62.

²⁷ Deflem M., *Europol and the policing of international terrorism: Counter-terrorism in a global perspective*, in *Justice Quarterly*, vol. 23 n. 3, September 2006, p. 344; also available at: <http://www.cas.sc.edu/socy/faculty/deflem/zeuroterror.htm>.

²⁸ Council of the European Union, *EU counter-terrorism clauses: Assessment*, Brussels, May 11, 2005. Available at: <http://www.statewatch.org/news/2005/may/eu-terr-clauses.pdf>.

²⁹ Europol, *Annual Report (2006)*; available at: http://www.europol.europa.eu/publications/Annual_Reports/EuropolAnnualReport2006.pdf; and Europol, *EU Terrorism Situation and Trend Report TE-SAT 2007*; available at: http://www.europol.europa.eu/publications/EU_Terrorism_Situation_and_Trend_Report_TESAT/TE-SAT2007.pdf.

³⁰ Council of the European Union, *EU Plan of Action on Combating Terrorism - Update*. Brussels, May 23, 2005; available: <http://www.statewatch.org/news/2005/may/eu-terr-action-plan-may05.pdf>.

“Europol’s main problem is the imperfect flow of information from national intelligence services”.³¹ In fact, Europol can be able to fulfil the tasks in its mandate only if the relevant authorities in the Member States provide it with the necessary information. Nonetheless, in practice Member States are too frequently reluctant to share intelligence with Europol, to the detriment of an efficient European police co-operation. As a result, the European Police Office has a limited capacity for fulfilling its tasks due to the difficulties encountered in collecting and sharing information with relevant national authorities. These latter often make available too little information, showing a modest trust in Europol, while trust should be a key element of European co-operation.

Remarkably, this lack of co-operation does not seem to surface exclusively at the EU level, in the relations between Member States and Europol, since this shortcoming regrettably emerges also at the bilateral level among Member States. For instance, after the Madrid bombings, Spanish police officials refused to share information with the French authorities on the types of explosives that had been used in the attacks.³² Similarly, after a Moroccan citizen who used to live in Hamburg, Germany, was arrested by Italian authorities in April 2003 because of his association with a Milan-based Al-Qaeda cell, it turned out that the man had already been questioned by German police just few weeks after the 9/11 attacks. Information about the suspect, however, had not been shared among Europe’s police.³³ As a result, it appears that often Europol cannot be blamed for the inefficiency of co-ordination and co-operation among EU Member State agencies, as these latter appear to hinder the development of an effective European law enforcement co-operation.

The attitude of Member States of being reluctant to share information and intelligence is the first root of inefficiency in the EU co-operation in law enforcement. The reason for this attitude can ultimately be identified as mistrust, since “intelligence collectors are concerned about the security of their sources and their methods of collecting information. They fear that if these are uncovered access to future information will be jeopardised”.³⁴

Eurojust is a permanent network of national judicial authorities of the EU Member States. It was established in 2002 with a Decision of the Council of the European Union.³⁵ In establishing this new body, the Council also set its core objectives:

³¹ Dittrich M., *Facing the Global Terrorist Threat*, *op. cit.*, p. 32.

³² Kupchinsky, R., *Intelligence and police coordination in the EU*. RFE/RL Report *Organized Crime and Terrorism Watch*, Vol. 4 N. 11, April 2004. Available at:
<http://www.rferl.org/reports/corruptionwatch/2004/04/11-210404.asp>.

³³ The New York Times, *As Europe hunts for terrorists, the hunted press advantages*, 22 March 2004.

³⁴ Hojbjerg J. H., Deputy Director of Europol, Building Trust and Developing More Efficient Sharing of Intelligence in Response to and Prevention of Terrorist Attacks. The Europol Perspective, in ICLN (International Criminal Law Network, The Hague) and EULEC (European Institute for Freedom, Security and Justice, Brussels), joint co-operation, *European Co-operation Against Terrorism*, Wolf Legal Publishers, Nijmegen, 2004, p. 53.

³⁵ Council of the European Union, Council Decision of 28 February 2002, *Setting up Eurojust with a View to Reinforcing the Fight against Serious Crime*, available at:
http://eurojust.europa.eu/official_documents/Eurojust_Decision/1_06320020306en00010013.pdf.

- To improve co-operation between national authorities in the investigation and prosecution of serious crime, particularly when it is organized, involving two or more Member States;
- To stimulate and improve co-ordination of investigations and prosecutions in Member States, taking into account any request emanating from a competent national authority and any information provided by any body competent by virtue of provisions adopted within the framework of the treaties; and
- To provide expertise to Member States and the Council (through the formulation of recommendations for changes of law to improve the legal framework in the fight against organised cross-border crime).

Each Member State appoints at Eurojust a representative or “National Member” (usually a judge or prosecutor). In fact, Eurojust can be described as a team of senior lawyers, magistrates, prosecutors, judges and other legal experts seconded from every EU country.³⁶

Being a permanent network of judicial authorities, Eurojust has a key role to play in the European counter-terrorist action. After the attacks of 11 September 2001, among many counter-terrorism measures taken by the EU, the Council Decision of 19 December 2002 *on the implementation of specific measures for police and judicial co-operation to combat terrorism*³⁷ redefined the tasks of Eurojust in the EU fight against terrorism.³⁸ Following article 3 of the Council Decision, each Member State should designate a *National Correspondent for terrorism*. In accordance with its national law, each Member State shall ensure that this National Correspondent has access to all relevant information concerning and resulting from criminal proceedings conducted under the responsibility of its judicial authorities.

The tasks of Eurojust in the field of counter-terrorism, according to the Council Decision, can be divided into the following stages:

1. Organisation of National Correspondents at national level (and access to information).
2. Transmission of information.
3. Eurojust’s methods of processing the information; and

³⁶ For an analysis of Eurojust’s tasks and activities see, *inter alia*: Kennedy M., Faletti F., Knut K., *Eurojust*, speech at the AIPP Conference, Paris, 31 August 2006; available at: http://www.iap.nl.com/speeches_11th_annual_conf_2006/speech_eurojust_members_case_presentation.pdf.

³⁷ Council Decision of 19 December 2002 *on the implementation of specific measures for police and judicial co-operation to combat terrorism in accordance with article 4 of the Common Position 2001/931/CSFP*, available at: http://eur-lex.europa.eu/LexUriServ/site/en/oj/2003/l_016/l_01620030122en00680070.pdf.

³⁸ On the role of Eurojust in the fight against terrorism: Kennedy M. (Eurojust President), *Eurojust and the Fight against Terrorism*, in *European Cooperation against Terrorism: The Peace Palace, The Hague, 13 October 2004: Conference Proceedings*, Nijmegen: Wolf Legal Publishers, 2004, pp. 59-64; Coninx M. (Belgian Member of the College of Eurojust), *Eurojust and EU Judicial Cooperation in the Fight against Terrorism*, in *Legal Instruments in the Fight against International Terrorism: a Transatlantic Dialogue*, Leiden (etc.), Nijhoff, 2004, pp. 181-186; Dittrich M., *Facing the Global Terrorist Threat: a European Response*, *op. cit.*, pp. 34-35.

4. Assistance and feedback from Eurojust to Member States.

Since the execution of most of the tasks according to the Council Decision is regrettably still at a preparatory stage, so far there has not been much exchange between National Correspondents and National Members. Furthermore, a number of obstacles are encountered in the course of practical realisation of these tasks.³⁹

As to the first stage, *organization of National Correspondents at a national level*, all Member States have designated a National Correspondent, most of whom are prosecutors. Difficulties arise when it comes to the matter of access to, and collection of, all relevant information according to the Council Decision. Currently, such information is not accessible for all National Correspondents. There are several obstacles that hamper access to relevant information. The first is a lack of legal provisions for access and collection in some Member States (i.e.: Ireland, Italy, Latvia and Slovakia, have no legal provisions that can ensure that the National Correspondents will be provided with relevant information). Therefore, National Correspondents in these countries are not allowed to forward information to Eurojust, unless there is a specific *request* in a criminal case from one Member State to another country. Hence, a legal basis for access to information should be established in each Member State.

Secondly, there are also several restrictions on access in practice:

1. National Correspondents are usually dependent on operational authorities for information. If these authorities are not aware of the fact that the National Correspondent has to be informed, the Correspondent will not receive information. In several Member States there are no arrangements about who will take the initiative to inform the other;
2. Investigating judges may constitute a problem in some Member States. Because of the *secrecy of investigation*, these judges are fully independent, and they are free to decide not to communicate relevant information to the National Correspondent.

In order to avoid such restrictions, national authorities and National Members should make practical arrangements guaranteeing that National Correspondents can have access and can collect relevant information. One highly desirable possibility would be to appoint a central prosecutorial authority for terrorism, as is already the case in some Member States. When no central prosecutorial authority for terrorism exists, different prosecutors will be supervising ongoing investigations. Thus, the information will be gathered at various prosecution offices and not be centrally collected in a co-ordinated manner.

With regard to the second stage, *transmission of information* from National Correspondents to National Members at Eurojust, it emerges that Member States interpret the tasks of the Council Decision according to their national systems. In accordance to the Council Decision, information concerning and resulting from criminal procedures pertaining to terrorism and conducted under the responsibility of judicial authorities should be forwarded. This has resulted in many differences in stage, kind and means of transmission of information to Eurojust, because of the 27 different

³⁹ EUROJUST, *Eurojust's Tasks in the Area of Preventing and Combating Terrorism, Gaps between Formal Decisions and Actual Practice*, unpublished document, 2005.

national systems of Member States.⁴⁰ In order to find a solution to this problem, National Correspondents and National Members should make clear arrangements about what information is to be transmitted and at what stage. Furthermore, provisions concerning the means by which the usually high sensitive information will be communicated to Eurojust are needed.

The recent Council Decision of 20 September 2005 on “the exchange of information and co-operation concerning terrorist offences”⁴¹ tried to respond to the above-mentioned need for greater exchange of information at all stages of criminal proceedings in the area of counter-terrorism. In fact, this Decision requires a more extended exchange of information during investigations and prosecutions concerning terrorist offences (as set out in Article 1 to 3 of the 2002 Framework Decision on combating terrorism). According to the provisions of this Decision, Member States have now the obligation to make sure that “information (...) concerning prosecutions or convictions for terrorist offences which affect or may affect two or more Member States (...) is transmitted to Eurojust and to Europol” (article 2) and made “available as soon as possible to the authorities of other interested Member States, taking account of the need not to jeopardise” (article 6). The rapidity and effectiveness of the process of implementation of this Decision by Member States will make it possible to assess whether the mentioned problems in the exchange of information have been overcome.

Once the information is transmitted to Eurojust, it should be very clear exactly what Eurojust should do with this information, i.e., during the third stage of its tasks, ways of *processing the information*. A clear policy on this matter has not yet been established. Therefore, in actual practice it is difficult to decide how the information should be processed, in order to give feedback and assistance to the national authorities. Of course, information received by Eurojust needs to be stored and analysed. Currently, Eurojust has no secured connection with the Member States, and does not have the technical or personnel resources to analyse large amounts of information. A closer co-operation with Europol, which is in possession of a secured system and a group of analysts, would be a possible solution.

Finally, as to the fourth point, *assistance and feedback*, what Eurojust is requested to do with collected information should be clarified.

To fulfil its main task, co-ordination of cases of serious cross-border crime and to improve the effectiveness of activities to prevent and combat terrorism, Eurojust should be able to know exactly how it should help ongoing investigations and what kind of feedback is expected. In fact, too often it is not yet clear whether Member States need co-ordination or advice. Eurojust should be a ‘*centre of expertise*’.⁴² It should have a complete overview of ongoing terrorism investigations and prosecutions, in order to give assistance and feedback to national authorities.

⁴⁰ *Ibidem*.

⁴¹ Council Decision of 20 September 2005 on the exchange of information and co-operation concerning terrorist offences, available at:

http://eur-lex.europa.eu/LexUriServ/site/en/oj/2005/l_253/l_25320050929en00220024.pdf.

⁴² EUROJUST, *Eurojust's Tasks in the Area of Preventing and Combating Terrorism*, *op. cit.*.

EU Counter-terrorism Legal Framework

As a response to the attacks of 11 September 2001, and again after the attacks in Madrid and London, the EU has created extensive legislation to help the national and European institutions better combat international terrorism within a coherent legal framework. The objects of analysis here will be the most innovative and controversial tools, namely the definition of the offence terrorism provided by the Council Decision of 13 June 2002, the European Arrest Warrant, and the use of biometrics as a counter-terrorism tool.

Several problems come into consideration with regard to the **definition of terrorism** in international law and, consequently, in European law, as a regional instrument to combat terrorism. These include a major concern with the exact legal definition of the phenomenon and of the offence of terrorism. Secondly, there arises the question of how largely the definition of the offence of terrorism should be extended. In other words, this latter is a question of identifying which behaviours have to be covered by the legal definition of terrorism, such that its perpetrators can consequently be pursued as terrorists.⁴³

The difficulty of identifying a shared definition of terrorism is reflected also in the history of European counter-terrorism. EU political documents and legislation in the past referred to terrorism without providing a (juridical) definition of the offence. After 11 September 2001, the need for a shared definition became vital⁴⁴ and the Framework Decision on Combating Terrorism of 13 June 2002 bridged this gap, introducing a comprehensive and harmonised definition of terrorism into EU legislation. This decision finally established minimum criteria describing the constituent elements of the offence of terrorism.⁴⁵

The Decision defines terrorism, differentiating it from common or ordinary crimes, focusing on the intent pursued by the criminal act. The originality of the definition is inherent in the fact that the ultimate political goal constitutes the basic criteria for distinguishing a terrorist offence from other offences. In fact, both national “common law” and “continental” systems define the incrimination of terrorism (and other offences) regardless of its aim and focusing instead on the (prohibited) acts.⁴⁶ Article 1 of the Framework Decision defines terrorist offences as “offences under national law, which, given their nature and context, may seriously damage a country or an international organization where committed with the aim of: (1) *seriously intimidating a*

⁴³ For a discussion on the definition of terrorism in international law, especially with regard to the UN response tackling this question, see Shaw M., *International Law*, fifth edition, Cambridge University Press, 2003, pp. 1048-1053, and Cassese A., *Terrorism is also Disrupting Some Crucial Legal Categories of International Law*, in *American Journal of International Law*, n. 95, 2001, pp. 993 ff..

⁴⁴ As is remarked in the *Framework Decision on Combating Terrorism* of 13 June 2002, Preamble (6): “The definition of terrorist offences should be approximate in all Member States, including those offences relating to terrorist groups”; Council of the European Union, Council Framework Decisions on Combating Terrorism of 13 June 2002, available at: http://www.eur-lex.europa.eu/pri/en/oj/dat/2002/l_164/l_16420020622en00030007.pdf.

⁴⁵ Den Boer M., *9/11 and the Europeanisation of anti-terrorism policy: A critical assessment*. Notre Europe, Policy Papers No. 6, 2003, p. 5.

⁴⁶ Saul B., *International Terrorism as a European Crime: the Policy Rationale for Criminalization*, in *European Journal of Crime, Criminal Law and Criminal Justice*, n. 11, 2003, p. 323.

population, or (2) unduly compelling a Government or international organization to perform or abstain from performing any act, or (3) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or international organization.”

Alongside this set of terrorist offences, the Decision also defines three other categories of offences. Firstly, article 2 defines *offences relating to a terrorist group*, emphasizing the necessity of punishing whoever participates in a terrorist group (by supporting, funding, or contributing to the activities of the group). Article 3 describes *offences linked to terrorist activities*, namely acts preparatory to terrorist acts, such as extortion or forgery of documents. Finally, article 4 calls upon Member States to take measures also against further activities, such as *incitating, aiding and abetting*, and *attempting* terrorist offences.⁴⁷

Scholars have pointed out that the language used for such definitions appears “somewhat complex and uncertain”⁴⁸ and leaves room for opposite interpretations of the same fact. For instance, it seems that the riots in Paris and other French cities in November 2005 entailed all the constituent elements of the definition of terrorism provided by the Framework Decision. Indeed, there certainly was intimidation of the population, the government was compelled to act, and social, political and constitutional structures were endangered. Nonetheless those events were “not perceived as terrorism either in France or abroad”.⁴⁹ This example illustrates all the difficulties to contextualise a multifaceted phenomenon as terrorism in a legal definition.

Despite these criticisms, it is remarkable that for the first time in the history of European Counter-terrorism (and of international law), the Framework Decision of 2002 has provided Member States and EU institutions with a common (although to some extent vague) definition of the offence of terrorism. Such a definition will probably be refined in future legislation, but it constitutes a legal basis for upcoming legislation and gives political and judicial authorities dealing with terrorism the essential guidelines for a common understanding of the constituent elements of terrorism as a criminal offence.

The **European Arrest Warrant** (EAW) has probably been the most important piece of legislation in the EU fight against terrorism after the attacks in New York and Washington in 2001 and the most innovative legislative tool in the areas of the Third Pillar. Already in October 1999, at the Tampere Summit of the European Council, Spain and the UK worked at promoting an agreement among European Heads of State, according to which extradition “should be abolished among Member States as far as persons are concerned who are fleeing from justice after having

⁴⁷ Troosters R., *The European Union Framework Decision of 13th June 2002 on Combating Terrorism*, in ICLN (International Criminal Law Network, The Hague) and EULEC (European Institute for Freedom, Security and Justice, Brussels), joint co-operation, *European Co-operation Against Terrorism*, Wolf Legal Publishers, Nijmegen, 2004, pp. 68-72.

⁴⁸ Guillaume G., *Terrorisme et Droit International*, Lecture at the British Institute for International and Comparative Law (BIICL), London, 13 November 2003, published in the *International and Comparative Law Quarterly*, Vol. 53, n. 3, 2004, p. 537.

⁴⁹ Saul B., *Defining Terrorism in International Law*, Vaughan Lowe, ed., Oxford University Press, 2006, pp. 164-166.

been finally sentenced, and replaced by a simple transfer of such persons".⁵⁰ A political agreement was reached in December 2001 and the Framework Decision was finally adopted on 13 June 2002.⁵¹ It came into force on 1 January 2004, replacing the previous extradition procedures among Member States.⁵² The objective of the EAW is to improve judicial co-operation in the EU creating a simplified system of surrender of sentenced and suspected persons for the purposes of execution or prosecution of criminal sentences, removing the delay of bilateral extradition procedures. The EAW is based on the trust of every Member State in the legal system of each other Member State and on the mutual recognition of national courts' decisions. Hence, the European Council referred to the EAW as a cornerstone of EU judicial co-operation, in regard to the realization of a more efficient area of freedom, security and justice in the European Union.⁵³

At the practical and operational level, the implications of the introduction of the EAW are very significant. Indeed, a national judicial authority can issue a request for the arrest and the return (namely, a European Arrest Warrant) valid throughout the EU for a person accused of a serious criminal offence (punished with a penalty of at least 10 years imprisonment)⁵⁴ or for a person sentenced to at least 4 months imprisonment.⁵⁵ Consequently, the requested person has to be arrested and surrendered without delay to the requesting Member State.⁵⁶

For the offences listed in the Framework Decision, The EAW has not abolished the "dual criminality principle" (or "double criminality"), according to which, traditionally, extradition can be denied if the offence in question is not a criminal offence in the executing country.⁵⁷ Despite criticism, especially from the UK, Member States decided to retain the validity of the dual criminality principle.⁵⁸ Hence, the objection to the extradition that a conduct might be considered a

⁵⁰ Article 35 and 37 of the *Presidency Conclusions to the Tampere European Council, 15 and 16 October 1999*; available at: http://www.europarl.europa.eu/summits/tam_en.htm.

⁵¹ Council of the European Union, *Framework Decision on the European arrest warrant and the surrender procedures between Member States* of 13 June 2002, available at: http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/1_190/1_19020020718en00010018.pdf.

⁵² The last Member State to implement the Common Decision on the EAW was Italy in July 2005.

⁵³ Framework Decision on the European Arrest Warrant, Preamble (6).

⁵⁴ Article 2 of the Framework Decision on the EAW lists 32 categories of criminal offences for which a EAW can be issued, including, *inter alia*, terrorism, trafficking in human beings, sexual exploitation of children and child pornography, and fraud.

⁵⁵ Framework Decision on the European Arrest Warrant, article 1.

⁵⁶ Nonetheless, article 3 and 4 of the Framework Decision define some exceptions in which the surrender can be denied. The most relevant grounds for non-execution of an EAW are: 1. The offence is covered by an amnesty in the executing State; 2. The person has already been tried in respect of the same acts (*ne bis in idem* principle); 3. The person is a minor or has not reached the age for criminal responsibility in the requested State.

⁵⁷ Blekxtoon R., *The European Arrest Warrant*, in ICLN (International Criminal Law Network, The Hague) and EULEC (European Institute for Freedom, Security and Justice, Brussels), joint co-operation, *European Co-operation Against Terrorism*, Wolf Legal Publishers, Nijmegen, 2004, esp. p. 78.

⁵⁸ House of Commons, European Standing Committee B, *European Arrest Warrant and Surrender Procedures between Member States*, 10 December 2001, available at: <http://www.publications.parliament.uk/pa/cm200102/cmstand/eurob/st011210/11210s01.htm>.

crime in one country but be legal in a different Member State has not been ruled out, and a co-operation system based on the mutual recognition of the conduct of the suspected or sentenced person as unlawful and criminal has been established.⁵⁹

Since the Member States have the general obligation to execute the EAW and surrender the person, they can no longer refuse to surrender their own nationals. All EU citizens are held responsible not only before national judicial authorities, but before courts in all Member States. As a result, an EU country will not have the right to base a denial of surrender on the fact that the alleged person is its national.

As to the effectiveness of the EAW, the European Commission has repeatedly stated that the introduction of the EAW has been a success. A first report evaluating the implementation and the impact of the Framework Decision on the EAW was released by the European Commission on 23 February 2005. The Commission underlined that, although with some delay, all Member States implemented the Framework Decision and that from the available data (2,603 warrants issued) the EAW seemed to have acquired a widespread use among national judicial authorities. Most importantly, the average time taken to execute a warrant was estimated to have reduced from more than 9 months to 43 days.⁶⁰ In a second more recent report, the Commission highlighted how the use of the EAW by Member States had increased year by year, making easier the surrender of persons between national judicial authorities in a much more shorter time than in the previous conventional system of extradition. In 2005 alone about 6,900 EWA were issued, showing that the number of requests of the EAW has risen sharply. The same trend seems to continue in 2006. Furthermore, conflicts of national laws that impeded a complete application of the Framework Decision seem to have been overcome in the years 2005-2006 by the adoption of new national legislative measures, leading to a full implementation of the provisions on the EAW.⁶¹

Criticisms of the common EAW have been particularly strong. In fact, the introduction of the EAW seemed to render it easier for the United States to obtain the extradition of a suspect, and potentially use the death penalty against him, which all European states oppose. A partial solution to this controversial matter has been provided by the Council Framework Decision: "No person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to death penalty, torture or inhuman or degrading treatment or punishment", Preamble (13). Nonetheless, there remains a certain ambiguity since this provision seems to be more a declaration of principle rather than an obligation on Member States. More importantly, the

⁵⁹ See European Commission, Justice and Home Affairs Directorate, *European Arrest Warrant Replaces Extradition between EU Member States*; available at:

http://ec.europa.eu/justice_home/fsj/criminal/extradition/fsj_criminal_extradition_en.htm.

⁶⁰ European Commission, *Report based on article 34 of the European Council Framework Decision of 13 June 2002 on the European Arrest Warrant and Surrender Procedures among Member States*, Brussels, 23 February 2005, available at:

http://ec.europa.eu/justice_home/doc_centre/criminal/doc/com_2005_063_en.pdf.

⁶¹ European Commission, *Report based on article 34 of the European Council Framework Decision of 13 June 2002 on the European Arrest Warrant and Surrender Procedures among Member States*, Brussels, 11 July 2005, available at:

http://eur-lex.europa.eu/LexUriServ/site/en/com/2007/com2007_0407en01.pdf.

adoption of the EAW has raised many constitutional issues in several Member States, with the necessity for some countries to amend their constitutions.⁶² For instance, the German Constitutional Court declared void the German Act provisions that implemented the provisions of the framework decision on the EAW (decision of 18 July 2005), for they were assumed to be against fundamental rights and guarantees. It seems that the improvements to the efficiency of judicial co-operation, especially through simplified and quicker procedures of surrender, might reduce the basic rights of defence and the right to a fair trial guaranteed in Member States by their constitutional charters (besides being fundamental principles recognized in international law).⁶³ This might presumably lead in short to a conflict between the German Constitutional Court and the European institutions on the constitutional implications of judicial co-operation among Member States.⁶⁴

Such difficulties probably arise from the fact that the co-operation model employed for the adoption of the EAW is more similar to a system based on mutual recognition (of judicial decisions) rather than to a process of harmonisation of legislation in Member States, which has been the traditional model of juridical integration and development in the European Communities first and then in the EU.⁶⁵ Most likely, this is due to the attempt of Member States to preserve a strong control on criminal law matters and to impede the Commission's effort to build a European common criminal system grounded on shared rules envisaged by the project of the European *Corpus Juris*⁶⁶ or by the Commission Green Paper on the European Public Prosecutor.⁶⁷ As a result, the practical model of the EAW, based on the simple abolishment of legal barriers between Member States (negative integration) will narrow and reduce the necessary guarantees of the right of citizens to defence, to the detriment of the principle of due process, unless it is countervailed by specific trade-off measures (that have not been undertaken in the case of the EAW). In short, in the Framework Decision establishing the EAW, the Council has ruled out the option of traditional

⁶² House of Lords, European Union Committee, 30th Report of the 2005-2006 Session, *European Arrest Warrant – Recent Developments*, pp. 10-12; available at <http://www.publications.parliament.uk/pa/ld200506/ldselect/ldecom/156/156.pdf>.

⁶³ Centre for European Policy Study (CEPS), *The European Arrest Warrant, A Good Testing Ground for Mutual Recognition in the Enlarged EU?* available at: http://www.ceps.be/Article.php?article_id=295.

⁶⁴ Satzger H. and Pohl T., *The German Constitutional Court and the European Arrest Warrant, 'Critical Signal' from Karlsruhe*, in *Journal of International Criminal Justice*, n. 4 (4), 2006, pp. 686-701; See also Euractiv, *European Arrest Warrant ruled unconstitutional in Germany*, 19 July 2005, available at: <http://www.euractiv.com/en/security/european-arrest-warrant-ruled-unconstitutional-germany/article-142674>.

⁶⁵ Palladino G., *Il Mandato d'Arresto Europeo, tra Appiattimento e Preservazione della Tutela Personale*, in *Diritto e Diritti*, 2 August 2007, available at: <http://www.diritto.it/art.php?file=/archivio/24508.html>.

⁶⁶ About the project of a common *Corpus Juris*, see Delmas-Marty M. and Vervaele J. A. E. (eds.), *Le mise en oeuvre du Corpus Juris dans les Etats Membres*, Vol I, Antwerpen – Groingen – Oxford, 2000. The *Corpus Juris* is an academic private project endorsed and financed by the European Commission.

⁶⁷ The Green Paper on the European Public Prosecutor is available on the website of the EU Anti-Fraud Office (OLAF), at: http://ec.europa.eu/anti_fraud/green_paper/index_en.html.

harmonisation. Instead, it has preferred to follow the path of mutual recognition, based on co-existence and reciprocal trust among national judicial authorities. Hence, the system is based a sort of “*full faith and credit clause*” between national courts like in the US judicial system, but without the necessary counterweights there are in the US Bill of Rights.⁶⁸

It remains to investigate the implications of the use of biometric technology in the fight against terrorism. **Biometrics** is the most innovative technological tool among the counter-terrorist methods, but their efficacy in the fight against terrorism and the implications with regard to civil liberties are controversial.

Since the analysis of biometrics is related the EU counter-terrorism framework, we will refer to biometric technology according to the definitions provided by the Report on the Impact of Biometrics drafted by the Joint Research Centre (JRC) for the European Commission in 2005.⁶⁹ A biometric is a physical or biological feature or attribute that can be measured. Through the technology of biometrics individuals are recognised by means of some set of individual traits, such as voice, eyes, or fingerprints. Biometric identification and verification technologies selected by the European Commission are face recognition, fingerprint recognition, iris recognition and DNA as a biometric identifier. In short, biometrics can be defined as the “automatic recognition of a person using distinguishing traits”.⁷⁰

Following the attacks of 11 September 2001, the EU began to develop elements of a coherent strategy for the improvement of the security of identity documents using biometric identifiers. The European Council of Laeken (December 2001) and Seville (June 2002) decided that the Visa Information System (VIS) shall also include biometric identifiers with the aim of preventing “visa shopping”, improving the administration of the common visa policy and contributing to internal security and fighting terrorism.

In September 2003 the Commission presented proposals to introduce biometrics in visas and residence permits for third national countries.⁷¹ In November 2005 the European Council presented the Draft Conclusions of the Representatives of the Government of the Member States on common minimum security standards for Members States’ national identity cards.⁷² This

⁶⁸ Palladino G., *Il Mandato d’Arresto Europeo, op. cit.*.

⁶⁹ The European Commission’s Joint Research Centre (JRC) Report: *Biometrics at the Frontiers: Assessing the Impact on Society*, released on 30 March 2005, available at: <ftp://ftp.jrc.es/pub/EURdoc/eur21585en.pdf>.

⁷⁰ Woodward J. D., Horn C., Gatune J. and Thomas A., *Biometrics: A Look at Facial Recognition*, Rand Documented Briefing prepared for the Virginia State Crime Commission, 2003.

⁷¹ European Commission Proposal for a Council regulation amending Regulation (EC) 1683/95 laying down a uniform format for visas and amending Regulation (EC) 1030/2002 laying down a uniform format for residence permits for third-country nationals, COM (2003) 558 Final, 24 September 2003, Brussels, available on <http://www.statewatch.org/news/2003/sep/combiometrics.pdf>; See, in particular, the Explanatory Memorandum.

⁷² Council of the European Union, *Draft Conclusions of the Representatives of the Government of the Member States on common minimum security standards for Members States’ national identity cards*, 14351/2005, Brussels, 11 November 2005, available on <http://www.statewatch.org/news/2005/nov/eu-biometric-ID-Cards-Conclusions.pdf>.

document aims at giving an impetus to the development of common standards for security features and secure issuing procedures for national ID cards.

Critics of biometrics worry that such a system, which is usually predicated on the idea of a large centralised reference database, will lead to an erosion of personal freedoms. Worries are that the use of biometrics will inevitably expand once widely implemented, both in the amount of data that will be collected and in the ways it will be used in everyday life. This is clearly a key issue with regard to the balance between liberty and security. Concerns with the protection of these basic rights are present also within the EU institutions. The European Parliament's Rapporteur on biometrics in visas, Ole Sorensen, remarked in 2004 that the proposals on the use of biometrics could be a step towards systematic and centralised storage of sensitive personal data, "which would be like using a sledgehammer to crack a nut".⁷³ At the same time, he observed that from a data protection point of view, such a central storage of biometric data might endanger the protection of civil rights, especially the right to privacy.⁷⁴

The impact of biometric technology upon the trust model between citizen and state is underlined also in the above-mentioned ECJ Report for the Commission. Fundamental concepts of trust seem to be challenged by the governmental aspirations to security. The risk is that "the emphasis changes to ordinary citizens being almost treated as criminal suspects"⁷⁵ and the right to privacy and anonymity is withdrawn. If in the short term citizens might agree to a certain extent on sacrificing their personal liberties for a more secure world, in the long term this sacrifice would become unpopular and lead to an erosion of trust in governments.

The worry is also that if biometrics become the common mode of identity recognition, biometric data will be linked to all other personal data. As a result, such data may consequently be shared with third parties for all kinds of other purposes, and sensitive information will be prone to abuse. It is also argued that through the introduction of biometric passports and ID cards, as well as new EU health cards and driving licences using biometric technology, and, within the foreseeable future, one single biometric chipped card integrating EU passport, ID card, driving licence and health card, we are moving towards a surveillance society.⁷⁶ Hence, a particularly strong need for effective privacy and data protection emerges. From this perspective, the Commission's Report points out that a reinforced legal framework for privacy and data protection may be needed in order to prevent biometrics from becoming a tool in the service of surveillance.

⁷³ Euractiv, 'Biometric Era' raises fears over privacy, 15 August 2004, available at: <http://www.euractiv.com/en/justice/biometric-era-raises-fears-privacy/article-111988>.

⁷⁴ *Ibidem*.

⁷⁵ EC's Joint Research Centre (JRC) Report: *Biometrics at the Frontiers*, *op. cit.*, p. 68.

⁷⁶ Bunyan T., *Unaccountable Europe: Unknown to most of its citizens, behind the closed doors of Brussels the European Union is making serious inroads on their privacy*, in *Index on Censorship*, No 3/2005, Special Issue, pp. 52-53.

The data protection directive of 1995⁷⁷ gives general protection for the use of personal data on individuals. However, there is recognition that technology is outstripping existing legislation. In order to find a solution, a European project to study the ethical implications of the increasing use of biometric technology was set up in the 2005 under the EU's Sixth Research Framework Programme. The project, called BITE (Biometric Identification Technology Ethics), aims at launching a social, legal and ethical debate over the use of biometrics involving all parties working in the field.⁷⁸

It is now possible to draw some **concluding remarks** from the analysis conducted of the EU counter-terrorism framework, especially with regard to the core question of this analysis, which concerns the main features, problems and perspectives of EU counter-terrorism policy at the institutional and legal level.

Due to the long history and collective experience of the fight against terrorism in Europe, the European legal and institutional structure in the area of Justice and Home Affairs was able to adapt quickly to the increased demand it faced in the wake of 11 September 2001. Although the Member States had to face a new threat in the form of international networks of terrorist groups, it can be recognised that many efforts have been undertaken and important steps forwards have been made by the European countries. Serious terrorist attacks in Madrid and London, as well as terrorism-related activity in some European countries, have reinforced public and political concern for security. European states and the European Union have responded by reshaping the institutional architecture in the area of Justice and Home Affairs (strengthening the role of Europol and setting up Eurojust) and by introducing innovative legislation against terrorism, such as the European Arrest Warrant.

The EU's broad approach made up of the four top priorities (prevent, protect, pursue and respond) is laudable because effective counter-terrorism policies need to go much further than law enforcement and external defence.

Whilst acknowledging the enhancement of effective co-operation between states to counter terrorism, it is also worth considering that the European Union has to step up its efforts further to remedy gaps and shortcomings arising in both the institutional and legal frameworks of EU counter-terrorism policies.

As for the institutional level, more co-ordination is utterly necessary. Specific criminal and therefore anti-terrorist measures are within the competence of the Member States only. The main role of the EU, therefore, is co-ordination. But, to be successful in this task the EU primarily needs a comprehensive and coherent institutional counter-terrorist framework within itself. Instead, the European institutional architecture of counter-terrorism consists of too many actors, with duplication of overlapping tasks and a number of institutions pursuing the same objectives. In

⁷⁷ European Parliament and Council Directive 95/46/EC of 24 October 1995 *on the protection of individuals with regard to the processing of personal data and on the free movement of such data*, available at: http://eurlex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&lg=en&type_doc=Directive&an_doc=1995&nu_doc=46.

⁷⁸ Euractiv, *Biometrics & Democracy*, 13 May 2005, available at <http://www.euractiv.com/en/justice/biometrics-democracy-archived/article-139471>.

consequence, the process of taking the necessary decisions becomes complex and cumbersome. Paradoxically, it seems that in order to co-ordinate and lead the actions of its Member states, the EU has first to reach a much higher level of co-ordination and coherence among its own institutions tackling terrorism. A disjointed and sometimes incoherent governance of counter-terrorist activities and initiatives produces inconsistencies and contradictions and therefore weakens efforts in the fight against terrorism. One possible solution would be the reinforcement of the role of the EU Counter-terrorism Coordinator. At present his powers and competences are very narrow. He has no right to propose EU legislation, nor can he call meetings of national justice or foreign ministers to set the anti-terrorism agenda. Strengthening the powers of the Coordinator, enabling him actually to pursue the statutory objective of co-ordination, would be a major step forward towards the efficiency of the EU institutional network of counter-terrorism. The aim is to build a network of security against the network of terror. Such a network of security would require the involvement of all the relevant actors in order to achieve operational co-operation in all fields of common concern. The network would bring together the EU Member States and as well as the EU's partners. The introduction of the proposed European Constitution would be a further step towards coherence in the counter-terrorist structure for it would delineate a new, clear division of roles and competences. Once ratified, the new constitutional treaty would enable the EU to fulfil its tasks more effectively. For instance, the Council of Ministers would be able to adopt legislation in the field of counter-terrorism on the basis of a qualified majority instead of unanimity, as happens today. Furthermore, the Constitution would remarkably strengthen the role of Eurojust, which, according to the provisions of the constitutional treaty would have also the right to "*initiate criminal investigations as well as proposing the initiation of prosecutions*", superseding its current almost purely advisory role.

As to the legal aspects of EU counter-terrorism, the Council Framework Decision of 13 June 2002, approximating the definition of terrorist offences, facilitates police and judicial co-operation and aligns criminal law in Member States so that terrorism is fought and prosecuted in the same manner all over Europe. Furthermore, the existence of a common framework within the EU will also facilitate closer co-operation with third countries and the implementation of international instruments related to the prevention and suppression of terrorism. Nonetheless, the wide definition of offences in anti-terrorism legislation, including offences of membership of a terrorist organization, and offences of incitement to and apology for terrorism, could result in persons engaged in legitimate political or social dissent being branded as terrorists.

The EAW has replaced the traditional system of extradition with faster and simpler surrender procedures involving only national judicial, rather than political, authorities. But, with the introduction of the EAW, concerns about fundamental rights have emerged. Since counter-terrorist measures and the protection of human rights are not conflicting goals, but complementary and mutually reinforcing, the EU should seek to fulfil its tasks in preventing and suppressing terrorism, while complying fully with fundamental rights. Similar concerns surface over biometric technology, when used for the collection of personal data for law enforcement. In both cases, adequate safeguards have still to be established to guard against the possible detriment to fundamental civil liberties.

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