CeSPI

CentroStudidiPoliticaInternazionale

Working Papers
22/2005

Supranational Counter-Terrorism

A test under duress for EU principles and institutions

Edited by Ferruccio Pastore

November 2005

Via d'Aracoeli, 11 – 00186 Roma (Italia) – Tel. +39066999630 – Fax +3906 6784104 – e-mail: cespi@cespi.it - web: www.cespi.it

CONTENTS

I. EUROPE FACING HOMEGROWN JIHAD

Achievements, shortcomings, dilemmas[1]

Ferruccio Pastore (CeSPI)

There can be little disagreement over the fact that in the last couple of years Europe has become a primary target for international jihadist terrorism, after having played for some time an important role as an organisational platform. Indicators of such change are not univocal and can be controversial: if one looks at the number of attacks in 2004 (tripled worldwide compared to 2003), it is striking that almost one third took place in Irak (198 out of 655)[2]. However, if one considers the number of victims (9,321 globally in 2004, according to the American National Counterterrorist Center), Europe (Beslan included, with all its specificities) appears as the worst hit continent, as recently stressed also by EU's Counter-Terrorism Coordinator, Gijs de Vries[3].

What is new and shocking is not just that Europe has become a target, but also that both in Madrid and in London the perpetrators turned out to be seemingly well-integrated foreigners or even European citizens, and not short-term visa holders as the nineteen of 9-11. "Homegrown jihad" has become a shorthand to refer to such disquieting reality and to the complex law enforcement and political challenges that are associated to it[4]. With homegrown jihad, al-Qaeda-inspired terrorism becomes also an internal European issue, not just an external threat any more.

1. Europe's counter-terrorism half-full glass

The Europe Union is reacting to the challenge. It is not surprising that supranational response was incomparably more substantial here than in other continents under attack, Asia in the first place. But even taking Europe's institutional uniqueness into account, the glass of European counter-terrorism - less than two years since 11 March 2004 - may now be seen as half-full. In 2001, the European Union started almost from scrap. It is true that, back in the 1970s, ad hoc inter-agency and intergovernmental cooperation against different forms of subversive and independentist terrorism (including Middle Eastern groups) opened the way for what evolved into the Union's JHA policy. But terrorism as such was nearly absent from the common agenda when the World Trade Center and the Pentagon were hit. Terrorism was perceived predominantly if not exclusively as a national issue of some Member States, the legal definitions of the phenomenon were heterogeneous to the point that the very word "terrorism" was used only in seven domestic legal systems out of fifteen.

---

[1] A shorter version of this article will be published in *Europe's World*, No. 2, forthcoming. The expression "test under duress" used in the title of this Working Paper as a definition of the challenges connected with the European response to international terrorism is borrowed from J. Monar, "The European Union and the challenge of September 11, 2001: Potential and limits of a 'new actor' in the fight against international terrorism", in P. Eden and T. O'Donnell (eds.), *September 11, 2001. A Turning Point in International and Domestic Law?*, Ardsley (NY), USA, Transnational Publishers, 2005, p. 387.

[2] J. P. Stroobants, "Depuis le 11-Septembre, la menace terroriste est devenue permanente", *Le Monde*, 11-12 septembre 2005, p. 2.

[3] G. de Vries, "Working together in the fight against terrorism", in "Making Europe an area of freedom, security and justice", Special issue of Challenge Europe Online Journal, Issue 14, 17 October 2005, European Policy Centre, available on http://www.theepc.be/.

[4] Interesting reflections on the concept in O. Roy, "Britain: homegrown terror", *Le Monde Diplomatique*, August 2005, online edition, available at http://mondediplo.com/2005/08/05terror.

All this has changed: since June 2002, the European Union has a common definition of terrorism[5] (although underlying threat perceptions remain different) and on that basis a growing normative architecture has been developing. Significant institution-building took place with gradual reinforcement of counter-terrorism branches and competences within Europol, Eurojust and SitCEN, and with the appointment of an EU coordinator in March 2004, in the wake of Atocha bombings. The policy process was made more dynamic and steady through a very wide-ranging Action plan to combat terrorism (containing more than 150 measures), to be updated every six months[6]. Although difficult to assess and measure, concrete results were obtained, particularly in the form of dismantling some jihadist network and foiling a few planned attacks just through increased European cooperation. It is also important to stress that such results were obtained by reinforcing pre-existing cooperation trends and integration logics, such as the principle of mutual recognition. Temptations and suggestions of an emergency approach and of adopting pieces of extraordinary legislation were rejected, in a significant although mostly implicit affirmation of European identity (with rule of law as a keystone) compared to other approaches, be they the repressive drive prevailing in most "moderate" Arab and/or Muslim countries or the "war on terror" conducted by current US administration[7].

2. Is the half-full glass leaking?

But the same picture appears very different if we look at it from the implementation side of the policy-making cycle. From that angle, the half-full glass looks as if it were worryingly leaking. It is not just a matter of weakened political will on part of Member States' governments in the phase of transposition of framework decisions or of ratification of conventions (the comprehensive and quite advanced May 2000 Convention on mutual assistance in criminal matters, for instance, is still not in force)[8]. Major obstacles are also emerging on the judiciary side, with decisions by the Polish Supreme Court (April 2005), by the Belgian *Cour d'Arbitrage* (July 2005) and, even more resoundingly, by the German Constitutional Court (also in July 2005), more or less radically questioning the legitimacy of a tool as essential in EU strategies as the European arrest warrant[9]. In other countries, such as Italy, several police operations ended in systematic acquittals or in light sentences, due to the lack of evidence of direct involvement of the accused in terrorist activities. The controversial response of the Italian government was to enact a reform of the penal code as a matter of urgency which has significantly expanded the sphere of criminalization by introducing two new criminal offences labelled "enrolment with purposes of terrorism, even international" (art.

---

[5] Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism.

[6] The latest progress report was presented at June 2005 European Council; it is available at web page http://ue.eu.int/uedocs/cmsUpload/newWEBre01.en05.pdf. A complete overview of EU policies against terrorism is available on the Council's website http://ue.eu.int/showPage.asp?id=406&lang=en&mode=g. An in-depth overview of post-11 March developments, focused on the key issue of information exchange between law enforcement agencies is provided by House of Lords, European Union Committee, *After Madrid: the EU's response to terrorism, Report with Evidence*, 5th Report of the Session 2004-05, HL Paper 53, March 2005.

[7] A useful overview of global policy developments in the field of counter-terrorism, with a particular focus on their impact on human rights, is provided by the "E-Bulletin on Counter-Terrorism & Human Rights", produced by the International Commission of Jurists, see No. 6, June 2005, at http://www.icj.org/IMG/pdf/ICJBulletinjune05.pdf.

[8] For a critical overview of a "far from satisfactory" situation, particularly on the side of legislative implementation at national level, in the context of a broader assessment of progress in the wider JHA field, see J. Monar, "Justice and Home Affairs", in *Journal of Common Market Studie*s, Annual Review, Vol. 43, 2005, pp. 131-146.

[9] The 18 July 2005 *Bundesverfassungsgericht*'s ruling in the Darkazanli case (2 BvR 2236/04) has been widely covered by all main European media (see for instance "Germany sets free suspected al-Qaeda financier", *Financial Times*, 19 July 2005). Information on the Polish case (27 April 2005, P1/05) can be found on http://www.statewatch.org/news/2005/apr/poland.pdf.
More details on the Belgian case are available at http://www.libertysecurity.org/article370.html (see also http://www.libertysecurity.org/IMG/rtf/European_Arrest_Warrant_En.rtf).

270-quarter of the Penal Code) and "training for activities with purposes of terrorism, even international" (art. 270-quinquies)[10].

Such dialectic between executive powers and independent judiciaries may be perceived by some as an annoying hindrance, but it is integral with the foundations of European polities. Furthermore, it is by no means demonstrated that judicial review necessarily turns into an obstacle to counter-terrorism. This was clearly shown, for example, by the historical decision by which the EU Court of First Instance, on 21 September 2005, declined to review the EU rules on asset freezing that were adopted soon after 9-11 on the basis of a UN Security Council resolution. The principle that the Security Council decisions to freeze one person's assets is not subject to judicial review was accepted by EU judges, on the basis of the (indeed questionable) argument that "the right of access to the courts is not absolute. In this instance, it is curtailed by the immunity from jurisdiction enjoyed by the Security Council"[11].

A real, structural obstacle to law enforcement, both in general and against international terrorism in particular, is instead represented by the reform paralysis that has struck Europe after the negative results of the French and Dutch referenda. The abolition by the constitutional treaty of what is left of the "third pillar" (after the 'communitarization' of immigration and asylum policies), although accompanied by a set of important derogations to the Community method in the internal security field, would produce sizeable benefits. These would be measurable both in terms of a more efficient legislative process and of a reinforcement of implementation mechanisms. As shown in greater details by Valsamis Mitsilegas in the second part of this Working Paper, increased democracy, transparency and accountability would also strengthen EU legitimacy in this field, thus consolidating popular support[12]. All these important benefits were frozen by millions of "non" and "nee" largely and paradoxically inspired by vague security concerns. It is even more paradoxical that popular dissent and hostility toward further integration are not preventing the French and Dutch governments (plus the Austrian, Belgian, German, Luxembourg and Spanish ones) to go ahead alone with pure intergovernmental means, such as the Prüm Treaty (better known as 'Schengen III'), signed without much publicity in the small German town on 27 May 2005.

3. Two fundamental strategic dilemmas

What I have been describing so far – a picture of European glasses being promisingly filled and then worryingly leaking – is unfortunately a well-known story. Implementation weaknesses, institutional standstills, judiciary brakes are making the road of European integration bumpy in all fields, not just counter-terrorism. As awkward and annoying as this may be, it certainly belongs to (current) European physiology. All this can nevertheless be overcome by clear, strong and

---

[10] Governmental law-decree (decreto legge) of 27 July 2005, No. 144 (*Gazzetta Ufficiale*, No. 173 of the same day), converted into Law No. 155 of 31 July 2005. On recent developments of Italian anti-terrorism legislation, see P. L. Vigna, "Il coordinamento delle indagini giudiziarie sui delitti di terrorismo", in *Italianieuropei*, 4/2005, settembre-ottobre, pp. 197-205. For brief analyses, see also http://www.statewatch.org/news/2005/aug/05italy-terror-laws.htm and http://www.alcei.org/index.php/archives/103.

[11] Court of First Instance of the European Communities, Press Release No. 79/05, Judgments of the Court of First Instance in Case T-306/01 and Case T-315/01, Luxembourg, 21 September 2005.

[12] For an overview of the innovations introduced in the JHA field by the Constitution, compared with the more adavanced solutions previously proposed by the Convention on the future of Europe, see E. Paciotti, "Quadro generale della costruzione dello spazio di libertà, sicurezza e giustizia", in G. Amato and E. Paciotti, eds., *Verso l'Europa dei diritti. Lo Spazio europeo di libertà, sicurezza e giustizia*, Il Mulino, Bologna, 2005, pp. 13-33. See also E. Guild and S. Carrera, *No Constitutional Treaty? Implications for the Area of Freedom, Security and Justice*, CEPS Working Document No. 231, October 2005, Centre for European Policy Studies, available at www.ceps.be, and E. Guild, "Crime and the EU's Constitutional Future in an Area of Freedom, Security and Justice", in *European Law Journal*, Vol. 10, No. 2, March 2004, pp. 218-234.

convergent political will. But this is precisely what seems to be weakening and cracking at European level since some time.

On 7 September 2005, two months after London had been hit in one of its most essential and symbolical infrastructures, UK's Home Secretary Charles Clarke addressed the European Parliament with strong words: "European Union States may have to accept an erosion of some civil liberties if their citizens are to be protected from organised crime and terrorism". With a concession to populist tones, he added that "the human right to travel on the underground on a Thursday morning without being blown up is also an important right"[13]. Those words were accompanied by a vigorous diplomatic action aimed at upgrading the common European response to terrorism. The key priorities to that objective were listed in a paper presented by the British Presidency at the JHA Council of 12 October[14]. Such efforts to shape the EU agenda are complementary to a domestic approach hinged upon a new Terrorism Bill whose draft was published on 15 September[15].

The enhanced response strategy developed by the Blair government during the summer 2005 stirred acute controversy, at both the internal and European levels[16]. The supranational debate revolves round two fundamental and deeply divisive questions, which represent indeed two crucial strategic dilemmas for the future of European policies against terrorism:

A) *How much should the sphere of police control for preventive and investigative purposes be expanded?* The response depends here on the fate of measures aimed for instance at allowing or imposing a more generalised and prolonged retention of telecommunications traffic data[17], a more systematic inclusion of biometrics in identification documents, a more capillary use of closed circuits TVs in public places. In the second part of this Working Paper, Valsamis Mitsilegas makes a critical overview of EU measures in this field and he illustrates how these contribute to a broad trend towards the establishment of what he defines a "security continuum".

B) The second strategic dilemma is: how should we deal with the 'grey area' of persons considered at risk of being recruited for terrorist activities and of potential suspects? Here the main issues concern the opportunity/acceptability of criminalising so-called "hate speech"[18], banning extremist

---

[13] For an overview of the mixed reactions of MEPs, see T. Küchler, "Britain calls for change to European Convention on Human Rights", in *euobserver.com*, 8 September 2005.

[14] United Kingdom Presidency of the European Union, *Liberty and Security. Striking the Right Balance*, paper presented at the JHA Council, 12 October 2005.

[15] For an early critique of the Draft Bill, see JUSTICE, *Draft Terrorism Bill. Preliminary Briefing*, September 2005, available at www.justice.org. For a critical assessment of the underlying policy, see *A briefing document on the government anti-terrorism proposals. A joint analysis form UK's leading civil society organisations*. http://www.statewatch.org/news/2005/sep/protectourrightsbriefing.pdf , August 2005. The latter document was issued by a consortium of civil rights organisations called Protect Our Rights.

[16] The proposed Terrorism Bill suffered a serious setback on 9 November 2005 when, with a majority of 322 votes to 291 (with 49 Labour backbenchers), the House of Commons voted against the government proposal to allow police to detain terror suspects for up to 90 days without charging them. A compromise was later reached to extend the administrative detention time limit to 28 days, from the current 14 days. In spite of the reduction, this remains nevertheless a much higher limit than in most other EU legal systems.

[17] The issue with the development of ever wider systems to control (especially, but not only cross-border) flows of persons, information and capitals is not just one of privacy and rights, but also one of costs. The case was powerfully made against the cost-effectiveness of current strategies to combat the financing of terrorism by a recent leader of The Economist: "The best of a regulation is that its constraints work cost-effectively against the problem it was introduced to solve. Alas, on that simple measure the elaborate efforts by Western politicians, with George Bush and Tony Blair to the fore, to curb terrorism by stopping the flows of money that sustain it, must be judged a failure. Complex and unwieldy regulations have been imposed, but are not working, indeed arguably were always misguided. They should be scrapped and resources concentrated more productively elsewhere" ("The lost trail. Efforts to combat the financing of terrorism are costly and ineffective", *The Economist*, 22 October 2005, p. 15).

[18] See L. Fekete, " 'Speech crime' and deportation", in *Essays for civil liberties and democracy in Europe*, European Civil Liberties Network, October 2005, www.ecln.org.

Muslim organisations, deporting suspects that could not be proven guilty even to countries with very poor human rights records[19].

What is at stake, with such proposals, is much more than the future of European counter-terrorism. The debate on such proposed measures brings to the surface deeply embedded cultural differences among Europeans, concerning the role of the State and the dignity of the individual.

Several options are legitimate and possible[20]. More "targeted" and more "diffuse" prevention strategies can coexist in the European space. But if the perception were to prevail that a war is waged against "Islamic extremism" (or "radicalism", to use the terminology of the European Commission) with the weapons of criminal law instead than through dialogue and education, Europe would have lost[21].

[19] At the 12 October JHA Council the UK Presidency briefed Member States on the UK and the Netherlands "positions regarding the possibility for the European Court of Human Rights of revisiting an earlier Court decision in the 1996 Chahal case" (Council of the European Union, Press Release, 12645/05 (Presse 247), Provisional version, p. 19). The Chahal case (*Chahal v United Kingdom*, Application No. 22414/93, European Court of Human Rights, Judgment of 15 November 1996, 23 EHRR 413, available at www.echr.coe.int) is a key precedent in European human rights jurisprudence by which the Strasbourg-based Court derived from article 3 of the European Convention on Human Rights (prohibition of "torture" and "inhuman or degrading treatment or punishment") clear limits to the power of a State to deport a foreigner. The issue is being discussed at European level also due to an Italian initiative aimed at developing a common European approach to the expulsion of suspects of terrorism (See Council of the European Union, *'New ideas' on Counter-Terrorism from the July JHA Council: Next Steps*, doc. 11910/05, Brussels, 2 September 2005, point 16).

[20] A specific reflection on possible measures for the prevention of "violent radicalisation" was started by the European Commission its Communication on "Terrorism recruitment: addressing the factors contributing to violent radicalisation" (COM(2005) 313 final, 21 September 2005). On that basis, an EU Strategy on Radicalisation and Recruitment will be worked out and presented to the December 2005 European Council. The use of the rather vague sociological definition of "violent radicalisation" for normative purposes was criticised by the EU Network of Indipendent Experts on Fundamental Rights set up by the Commission upon request of the European Parliament in a thoughtful and detailed Opinion (No. 3-2005, *The requirements of fundamental rights in the framework of the measures of prevention of violent radicalisation and recruitment of potential terrorists*, 23 August 2005).

[21] Useful information is contained in a recent report by the European Monitoring Centre on Racism and Xenophobia, *The Impact of 7 July 2005 London Bomb Attacks on Muslim Communities in the EU*, November 2005, available at web page http://eumc.eu.int/eumc/material/pub/London/London-Bomb-attacks.pdf.

II. OPERATIONAL CO-OPERATION AND COUNTER-TERRORISM IN THE EU

Legal and Institutional Issues

Valsamis Mitsilegas (Department of Law, Queen Mary University of London)

1. Operational co-operation, counter-terrorism and the Hague Programme

In 2004, the ambitious five-year action plan to transform the European Union into a true 'area of freedom security and justice' adopted in Tampere would lapse. EU Member States therefore had to resit at the negotiating table and discuss how to follow up the groundbreaking Tampere conclusions. Two factors weighted heavily in these discussions: the adoption by the Intergovernmental Conference (IGC) of the Treaty establishing a Constitution for Europe (EU Constitutional Treaty, or for some, the European Constitution); and the major and continuous emphasis placed by EU Member States and institutions on the need to combat terrorism, need highlighted in particular by recent terrorist attacks in New York and Madrid.

With these two considerations in mind, the European Council adopted during the Dutch EU Presidency, in November 2004, another five-year blueprint to follow up Tampere: the so-called Hague Programme on 'strengthening freedom, security and justice in the EU'.[22] The introduction to the Hague Programme places emphasis on both the fact that it 'reflects the ambitions expressed in the Treaty establishing a Constitution for Europe' and the need to address security considerations: it is asserted that

> 'the security of the European Union and its Member States has acquired a new urgency, especially in the light of the terrorist attacks in the United States on 11 September 2001 and in Madrid on 11 March 2004. *The citizens of Europe rightly expect the European Union,* while guaranteeing respect for fundamental freedoms and rights, *to take a more effective, joint approach to cross-border problems such as illegal immigration, trafficking and smuggling of human beings, terrorism and organised crime, as well as the prevention thereof*'.'[23]

Security considerations thus take priority and are evoked, along with citizens' concerns, in an attempt to boost the legitimacy of EU action to combat organised crime and terrorism. Citizens' concerns are stressed in further sections, where it is stated that the programme 'seeks to respond to the challenge and the expectations of our citizens' and is based on a 'pragmatic approach' building on the Tampere '*acquis'* and emphasising evaluation and implementation of existing measures.[24] This emphasis on 'pragmatism' has led to criticism of the Hague Programme for its lack of vision and the absence (especially in comparison with Tampere) of significant ideas and initiatives for legislative action.[25]

It comes therefore as no surprise that the main novelty in this 'pragmatic' programme has been the emphasis on 'operational' measures. These measures aim in particular at boosting operational co-operation between national law enforcement (and to some extent intelligence) agencies, enhancing the exchange of personal data and strategic information between these agencies and their EU

---

[22] Council document 14292/04.
[23] Ibid., p.2. My emphasis.
[24] Ibid., p. 13.
[25] See the evidence in House of Lords European Union Committee, *The Hague Programme: a five year agenda for EU justice and home affairs,* 10th Report, session 2004-05, HL Paper 84.

counterparts, and developing European Union databases. This emphasis on operational co-operation reflects the feeling that there are deficiencies in Member States' and the EU capability to confront security – and in particular terrorist – threats stemming in particular from obstacles to co-operation and communication and the lack of trust. The Hague Programme and the subsequent Action Plan to implement it[26] attempt to remedy these shortcomings by both building on existing EU initiatives and calling for the tabling of new measures at EU level.

Following these developments, new measures have recently been proposed by the Commission. This is combined with the prioritisation and acceleration of work on existing dossiers in the Council, but also with initiatives that Member States take outside the EU framework (such as co-operation with other Member States on a bilateral level, and co-operation in the auspices of G5). These complex, multilayered developments on operational co-operation raise a number of issues concerning not only the impact of operational co-operation on human rights and civil liberties in the EU, but also issues of democratic control and accountability and decision-making in the EU. These issues are going to be examined in detail, along with an analysis of the main developments on operational co-operation and counter-terrorism in the EU post-Hague.

2. Intensifying co-operation between national police authorities

The key element in this process is the facilitation of exchange of information between national authorities on the basis of the *'principle of availability'*. According to the Hague Programme, this means that 'throughout the Union, a law enforcement officer in one Member State who needs information in order to perform his duties can obtain this from another Member State and that the law enforcement agency in the other Member State which holds this information will make it available for the stated purpose, taking into account the requirement for ongoing investigations in that State'.[27] The importance of the principle of availability is also mentioned in the specific context of counter-terrorism co-operation, but following criticisms by intelligence services in Member States, the Hague Programme calls for particular consideration to be given to the special circumstances that apply to the working methods of security services (including sources of information, methods of information collection and confidentiality).[28]

The Hague Programme calls for the principle of availability to be applied from 1 January 2008 and sets out some conditions for its application. In order to meet the Hague deadlines, the Commission has recently tabled a proposal for a third pillar legal instrument in the field.[29] The general principle of availability is established in Article 6 of the draft, according to which Member States must ensure that 'information shall be provided to *equivalent* competent authorities of other Member States and Europol […] *in so far as these authorities need* this information to fulfil their lawful tasks for the prevention, detection or investigation of criminal offences'.[30] Measures determining 'equivalence' will be adopted by a 'Comitology' committee.[31] Exchange will take place on the basis of request forms (included as annex to the proposal) and may include requests for information such

---

[26] *Council and Commission Action Plan implementing the Hague Programme on strengthening freedom, security and justice in the European Union*, Council document 9778/2/05 REV2. See also the earlier Commission Communication *The Hague Programme: Ten priorities for the next five years*, COM (2005) 184 final.
[27] Point 2.1, p. 27.
[28] Point 2.2, p. 29.
[29] *Proposal for a Council Framework Decision non the exchange of information under the principle of availability*, COM (2005) 490 final, 12 October 2005.
[30] My emphasis.
[31] Article 5(2) and 19.

as DNA profiles. The proposal does contain a number of safeguards such as purpose limitation and grounds for refusal, including the protection of fundamental rights.[32]

The principle of availability, based on a maximal version of mutual recognition, is far-reaching:

- It calls for the provision of information to 'equivalent' authorities of other Member States almost exclusively on a 'need to know basis'.
- Exchange of information takes place on the basis of standard, pro-forma documents, becoming thus quasi-automated.
- No questions as to the purpose and use of this information by the requesting authority are asked (although the proposal currently includes a ground for refusal on human rights grounds).
- Requesting police authorities cannot ask for information to be obtained –with or without coercive measures – by the requested authority solely for the purposes of co-operation – but information already lawfully collected by the requested authority by coercive measures may be provided [33](even though these measures may not be lawful in the requesting State – something that would potentially infringe national constitutional provisions through the 'back door').
- Europol is also included as a beneficiary, notwithstanding the fact that the draft Framework Decision on data protection (which is being proposed to complement the availability proposal) does not apply to it[34]
- Authorities that can benefit from the principle of availability will be defined by a 'comitology' Committee[35], and not by the ordinary EU legislative procedure (currently in the third pillar)- this bypasses parliamentary scrutiny both at EU and national level and shields the issue of 'availability' from public debate.

These are all issues with far-reaching implications for both the protection of human rights but also for the legitimacy of EU action in the field. The extent to which they will be addressed in negotiations in the Council remains to be seen.

3. Developing EU databases and enhancing their 'interoperability'

One of the main priorities in this context is the development of the 'second generation' Schengen Information System (SIS II). Post-Amsterdam, the Schengen Convention and the Schengen acquis form part of Community and Union law, and measures developing this acquis (Schengen-building measures) are adopted by the Community/Union (according to the appropriate pillar). This rather complex legal situation (which would be simplified had the EU Constitutional Treaty – which would abolish pillars – not been frozen) is replicated in the development of SIS II. The Commission has been presenting a series of documents with this aim, the latest being three documents (two first pillar Regulations and one third pillar Decision) tabled in May 2005.[36]

---

[32] Articles 7 and 14(1) respectively.
[33] Article 2(2).
[34] *Proposal for a Council Framework Decision on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters*, COM (2005) 475 final, 4 October 2005. Admittedly the Europol Convention contains its own data protection rules, but it is unclear how these rules will apply when Europol exchanges persona data with national police authorities under the principle of availability.
[35] I.e. a Committee consisting of national civil servants and chaired by the Commission.
[36] *Proposal for a Council Decision on the establishment, operation and use of the second generation Schengen Information System*, COM (2005) 230; *Proposal for a Regulation on the establishment, operation and use of the second generation Schengen Information System*, COM (2005) 236; and *Proposal for a Regulation regarding the access to SIS II by the services of Member States responsible for issuing vehicle registration certificates*, COM (2005) 237.

Major aims of developing the 'second generation' SIS, apart from technical improvements, are to broaden the categories of data included in the database and the categories of national authorities having access to Schengen data. Counter-terrorism considerations have played a significant part in attempts at this extension. Indeed, in 2004, the Council adopted a first pillar Regulation and a third pillar Decision concerning the introduction 'of some new functions for the Schengen Information System, including in the fight against terrorism'.[37] The Regulation extends access to SIS data to national judicial authorities and access to immigration data to authorities responsible for issuing visas and residence permits and examining visa applications. The Decision extends access to 'criminal law' SIS data to Europol and Eurojust.

The widening of access to the Schengen databases have led to concerns that the nature of the Schengen Information System is being changed, with the system being transformed from an alerts mechanism accessed for specific immigration control or law enforcement purposes on a hit/no hit basis, to a general law enforcement database. These concerns are exacerbated by the broad wording of the draft Regulation and Decision regarding the purpose of SIS II- Article 1 of both documents states that this purpose is 'to enable competent authorities of the Member States to exchange information for the purpose of controls on persons and objects' and contribute to 'maintaining a high level of security within an area without internal border controls between Member States'. This wording has been criticised by both the European Data Protection Supervisor and the Schengen Joint Supervisory Authority in their Opinions on the proposals developing SIS II for being too broad and too imprecise. The European Data Protection Supervisor notes that this goes beyond Article 102 of the Schengen Convention, which ensures strict purpose limitation for the use of information in the system.[38]

Another issue of concern for the European Data Protection Supervisor involves proposals to enable the interlinking of alerts in SIS II. The Supervisor reminds us that the introduction of links between alerts is 'a very typical feature of a police investigative tool' and goes on to state at length the challenges that this move may pose on civil liberties:

> 'interlinking of alerts can have a major impact on the rights of the person concerned, since the person is no longer 'assessed' on the basis of data relating only to him/her, but on the basis of his/her possible association with other persons. Individuals whose data are linked to those of criminals or wanted persons are likely to be treated with more suspicion than others. Interlinking of alerts furthermore represents an extension of the investigative powers of the SIS because it will make possible the registration of alleged gangs or networks (eg data on illegal immigrants and data on traffickers)'.[39]

Interlinking of alerts may thus lead to a detailed profiling of individuals and the change in the nature of the SIS, it being transformed into a major investigative tool. This development, along with broadening the purpose of SIS and extending access to the database to a number of authorities, may lead to the collapse of the current distinction between SIS 'immigration' and 'police' data. This may cause legal headaches (in the light of the UK and Ireland authorities having access to the police data of the SIS but not to immigration data in the light of their Schengen 'opt-out' vis-à-vis immigration and border controls). It may also have significant repercussions for civil liberties and issues of equality and discrimination since it would explicitly link the issues of immigration and crime/terrorism and allow them to be dealt together as security issues. This appears to be a clear manifestation of the concept of the '(in)security continuum' in the EU (whereby immigration issues are linked with the fight against crime and terrorism), which was introduced by academics in response to the development of EU JHA policies in the 1990s.[40]

---

[37] Regulation 871/2004, OJ L162, 30 April 2004, p.29; Decision 2005/211/JHA, OJ L68, 15 March 2005, p.44.
[38] pp. 7-8. See www.edps.eu.int; see also the Statewatch website.
[39] Ibid., pp.12-13.
[40] See in particular Didier Bigo, *Polices en Reseaux – l'experience europeenne*, Presses Sciences Po, Paris, 1996.

Similar issues arise regarding the establishment of another important EU database, the Visa Information System (VIS). The Council adopted in June 2004 a Decision forming the legal basis for the establishment of VIS[41] and negotiations began to define its purpose and functions and formulate rules on access and exchange of data. For that purpose, the Commission has recently tabled a draft Regulation aiming to take further VIS by defining its aims and rules on data access and exchange.[42] The proposal has been the outcome of extensive consultation and the Commission have tried hard to counterbalance the choice of a very invasive form of intervention (biometric data in the VIS) with clearly delimiting access to VIS and including in the text detailed provisions on data protection and proportionality. However, the logic of the security continuum can still be discerned in Article 1(2)(a) of the proposal stating that one of the purposes of VIS is 'to prevent threats to internal security of any of the Member States'. The conclusions of the JHA Council of 24 February 2005 raise concerns that the standards set out by the Commission will be dismantled by Member States in negotiations – the Council calls for access to the VIS to be given to national authorities responsible for 'internal security', when exercising their powers in investigating, preventing and detecting criminal offences, including terrorist acts or threats. The Council invited the Commission to present a separate, third pillar proposal to this end. As I have noted elsewhere, this not only reinforces the 'security continuum' approach, but would effectively sideline the European Parliament, which will co-decide with the Council on the first pillar VIS Regulation but will only be consulted in the third pillar instrument.[43]

Privacy, data protection and equality concerns become more acute in the light of the recent emphasis on the need to ensure 'interoperability' between EU databases. Following the example of the EU Declaration on combating terrorism produced after Madrid, the Hague Programme calls for maximising interoperability of EU information systems 'in tackling illegal immigration and improving border controls' on the one hand, and 'reciprocal access to or interoperability of national databases' for security purposes, or 'direct (on-line) access, including for Europol, to existing central EU databases such as the SIS.[44] This could create a situation where databases including different categories of data and established for different purposes are 'interoperable' and thus easily accessed by a wide range of authorities. However, as the European Data Protection Supervisor has noted, 'interoperability should never lead to a situation where an authority, not entitled to access or use certain data, can obtain this access via another information system'.[45]

4. 'Deepening' the collection of personal data: biometrics

Another hotly debated issue at EU- and global- level is the inclusion of biometric identifiers in identity documents and databases. Biometric identifiers are perceived to be an indispensable tool to fight terrorism. In the EU this was reflected after Madrid

in the Declaration on combating terrorism, but also earlier: in June 2003, in Thessaloniki, the European Council called for a coherent EU approach on biometrics, 'which would result in harmonised solutions for documents for third country nationals, EU citizens' passports and information systems (VIS and SIS II)' and invited the Commission to present relevant proposals.[46]

---

[41] Council Decision of 8 June 2004 establishing the Visa Information System (VIS), OJ L 213, 15.6.2004, p.5.
[42] *Proposal for a Regulation of the European Parliament and of the Council concerning the VIS and the exchange of data between Member States on short-stay visas*, COM (2004) 835 final, Brussels 28.12.2004.
[43] V. Mitsilegas, 'Controle des étrangers, des passagers, des citoyens: Surveillance et anti-terrorisme', in *Cultures et Conflits,* no 58, summer 2005.
[44] Point 1.7.2, p.25 and 2.1, p.28 respectively.
[45] *Op. cit.*, p.23.
[46] See the Explanatory Memorandum in the *Commission proposal for a Regulation amending the uniform format for visas*, COM (2003) 558 final, Brussels, 24 September 2003.

The Hague Programme maintained the momentum for the inclusion of biometrics by stating more clearly the link between movement, migration and terrorism – the first part of paragraph 1.7.2, provides another example of the 'security continuum' EU approach:

> 'The management of migration flows, including the fight against illegal immigration should be strengthened by establishing *a continuum of security measures* that effectively links visa application procedures and entry and exit procedures at external border crossings. Such measures are also of importance for the prevention and control of crime, in particular terrorism. In order to achieve this, a coherent approach and harmonised solutions in the EU on biometric identifiers and data are necessary.' [47]

Political pressure towards the insertion of biometrics into identity documents has led to the adoption, in December 2004, of a Regulation introducing biometric identifiers (in the form of facial images and fingerprints) in EU passports.[48] The legal basis of the Regulation is Article 62(2)(a) TEC. The Regulation was finally adopted notwithstanding serious objections regarding the appropriateness of the legal basis and the existence of EC competence to adopt binding legislation on the content of identity documents. Existing EU measures take the form of non-legally binding Resolutions; Article 62(2)(a) refers to controls of the external border of the EU and not to the content of EU travel documents; and Article 18(3) TEC explicitly states that Community action to facilitate the exercise of citizenship rights does not apply to provisions on passports, identity cards, residence permits or any such document.[49] In spite of these legality concerns, and concerns on the proportionality of the measure,[50] negotiations on the measure went ahead and a second biometric identifier – fingerprints – was added. In spite of the reactions by the Article 29 Working Party[51], the Regulation was adopted swiftly thereafter in December 2004 – perhaps to pre-empt a greater say of the initially critical European Parliament, which would become a co-legislator with a right to veto on the biometrics proposal from 1 January 2005 .[52]

Notwithstanding on-going doubts as to their value and efficiency, biometrics seem to be here to stay. It remains to be seen how the access and use of these highly sensitive, and invasive to human personality and dignity, categories of personal data will be regulated[53] and how the protection of human rights will be ensured. In debating these issues, it would be useful to keep in mind the broader point raised by the Article 29 Working Party, which raised the concern that the widespread use of biometric data may desensitise the general public to the effect that such use may have on everyday life and warned against the use of biometric identifiers which may leave physical traces (such as fingerprints) or that can be memorised.[54]

---

[47] My emphasis.

[48] *Council Regulation (EC) No 2252/2004 of 13 December 2004 on standards for security features and biometrics in passports and travel documents issued by Member States*, OJ L 385, 29.12.2004, p.1.

[49] See Mitsilegas, *op. cit.*

[50] On both concerns, see the detailed analysis by Statewatch, prepared by Steve Peers, *The Legality of the Regulation on EU Citizens' Passports*, 26 November 2004, in www.statewatch.org

[51] Letter of 30 November 2004 by Peter Schaar, chairman of the Working Party, to Josep Borrell Fontelles, chairman of the European Parliament. The Working Party expressed its reservations as to the use of 'biometric features such as fingerprints allowing 'one to many' identification and tracing of individuals'. The WP called for the respect of the fundamental right of privacy and of transparency and noted that 'due to the relevance of the measure to all our citizens the Article 29 WP considers it appropriate that public opinion should be widely sought on this matter to demonstrate that the decision-making process is based on a proper and comprehensive assessment'.

[52] The need for the swift adoption of the proposal has also been justified on the grounds that the US would abandon its visa-waiver programme with its members in the EU which had not introduced biometrics in their passports by a certain date.

[53] Especially in the light of calls for more extended access to databases and interoperability.

[54] Article 29 Working Party, Working document on biometrics, adopted on 1 August 2003, doc. 12168/02/EN WP 80.

5. The proliferation of EU structures

There exist now a number of bodies and agencies dealing with operational co-operation in JHA matters and counter-terrorism in the EU. Europol and Eurojust are the most obvious references, both third pillar agencies established by and regulated extensively by EU law. Other structures, however, are less formal. The post of the EU Counter-terrorism Co-ordinator was established by the European Council after Madrid. He reports to Javier Solana but the post has no clear legal basis in EU law, nor is there, quite some time after the establishment of the post, a clear description of his mandate.[55] The Police Chiefs' Task Force, working within Council structures, has also been called to assist on counter-terrorism, as has SitCen, a second pillar intelligence centre also reporting to Mr Solana.[56] The recently established European Borders Agency is also called to co-operate. We thus have a combination of first, second and third pillar bodies and structures, some founded on legal rules, some more informal. The work of all these agencies raises important issues of democratic control and scrutiny as well as accountability, but this is especially the case with the informal structures: who checks the exercise of their powers, especially if these are coercive and/or involve the exchange of personal data?

There is no clear answer to this question, which becomes even more complex in cases where these agencies/structures interact and co-operate with each other. For instance, which legal framework governs the exchange of information between Europol and SitCen? What, if any, data protection rules apply to the exchange of data between the Police Chiefs' Task Force and Europol? Do 'informal' structures have access to data held by Europol or Eurojust? Are existing, and proposed EU data protection rules adequate to deal with the exchange of data between EU agencies? Which, if any, structures exist to oversee cross-pillar co-operation? Again, there are no straightforward answers on these 'operational' matters.

The Hague Programme grants greater visibility to co-operation mechanisms by calling for joint six-monthly meetings between the chairpersons of the Strategic Committee on Immigration, Frontiers and Asylum (SCIFA) and the Article 36 Committee (CATS) and representatives of the Commission, Europol, Eurojust, the European Borders Agency, the Police Chiefs' Task Force and SitCen.[57] This is viewed as a provisional step until the establishment by the Council of a Committee on Internal Security, which is envisaged in Article III-261 of the Constitutional Treaty.

The establishment of this Committee (COSI) may help streamline and render more accountable operational co-operation in JHA, in particular counter-terrorism, matters.

The Constitutional Treaty may be currently 'frozen', but the setting up of such Committee would perhaps be possible even without ratification of the Treaty. The role of such Committee was discussed in the first half of this year at the initiative of the Luxembourg EU Presidency. It was noted that the exact nature of the Committee cannot be discerned by its Constitutional legal basis, with diverging points of view emerging regarding its functions. The Luxembourg Presidency supported a vision of the Committee as not purely operational, but rather a strategic and analytical normative structure working under the authority of the Council and strengthening the tasks of its constituent bodies.[58] The debate is on-going, but if the Committee assumes such a role, there are further questions regarding its own legitimacy and accountability.

---

[55] See on this issue House of Lords European Union Committee, *After Madrid: the EU's Response to Terrorism,* session 2004-05.

[56] Ibid. According to the Hague Programme, SitCen will provide from 1 January 2005 the Council with strategic analysis of the terrorist threat based on intelligence from Member States' intelligence and security services and, where appropriate, on information provided by Europol. Point 2.2, p.29.

[57] Point 2.5, p. 34.

[58] See press release on informal JHA Council of 28 January 2005, www.eu2005.lu/en/actualites/communiques/2005/01/28f2friedensecu/index.html.

6. Enhanced co-operation within and outside the EU

In the context of EU JHA, the issue of enhanced co-operation after the inclusion of the Schengen aquis in the EU framework has arisen predominantly regarding the piecemeal participation of the UK, Ireland and Denmark in Community measures related to immigration and border controls.[59] However, recent developments seem to turn back the clock to the 1980s, when an avant-garde of EU members decided to go one step ahead on an intergovernmental basis and sign the Schengen Agreement.

The development in question is the signing, in May 2005, by seven EU Member States[60], of a Convention on the 'stepping up of cross-border co-operation, particularly in combating terrorism, cross-border crime and illegal immigration' – the Prüm Convention.[61] Like Schengen, the Prüm Convention was named after the town where it was signed. Like Schengen, it is a pioneering document, where a number of EU member states decide to push ahead on an intergovernmental basis and forge closer co-operation in home affairs matters. Novelties in the Prüm Convention include the establishment of national DNA analysis files and the automated search and comparison of DNA profiles (and fingerprinting data), the supply of personal data if circumstances 'give reason to believe that the data subjects will commit criminal offences' (Article 14), the deployment of armed air marshals, and joint police operations, including in emergency cases action in the territory of other contracting states without their prior consent. When operating in the territory of another contracting party, officers 'may wear their own national uniforms' (Article 28(1)).

These are far-reaching proposals and may have significant consequences for the protection of civil liberties and fundamental rights. And they lie outside of the Community/Union legal order. Parties in the Prüm Convention take care to avoid conflict and ensure compliance with their Community/Union obligations, by inserting Article 47(1):

> 'The provisions of this Convention shall apply only in so far as they are compatible with European Union law. Should the European Union in future introduce arrangements affecting the scope of this Convention, European Union law shall take precedence in applying the relevant provisions of this Convention. The Contracting Parties may amend or replace the provisions of this Convention in view of those new arrangements resulting from European Union law.'

However, and leaving issues of enforcement aside, the fact is that an initiative such as the Prüm Convention leaves the possibility open for action that goes beyond the EU acquis (and may or may not be compatible with it). It also acts as a motor for further integration across the EU, by setting the agenda and imposing standards that have been adopted by a group of powerful members without necessarily democratic debate or consultation regarding their formulation. These standards can be used as political leverage against non-participating countries. From the very outset, Prüm members state that participation to their group is open to all EU members, and a proposal will be tabled in three years from the entry into force of the Convention leading to its incorporation into the legal framework of the EU[62] – which will leave remaining outsiders with a fait accompli.[63]

---

[59] This piecemeal approach has arguably led to a change of the full Schengen members' stance towards at least the UK. The UK has been excluded from participation in both the European Border Agency and the biometrics Regulations on the grounds that these are Schengen-building measures. The UK has challenged their exclusion before the ECJ. On recent examples of UK non-participation and exclusion, see V. Mitsilegas, 'A Common EU Immigration and Asylum Policy: National and Institutional Constraints' in P. Shah (ed), *The Challenge of Asylum to Legal Systems*, Cavendish 2005, pp.125 et seq.

[60] Belgium, Germany, Spain, France, Luxembourg, the Netherlands and Austria.

[61] Council document 10900/05.

[62] Article 1(2) and (4).

[63] The G5 counter-terrorism initiative (France, Germany, Italy, Spain and UK), although 'softer' in legal nature, may be viewed in a similar standard-setting context. See for instance the operational conclusions of the Evian meeting of 4-5

7. The external dimension of operational co-operation

One of the main elements of the response to terrorist attacks has been the quest for co-operation on a global scale- in response to a transnational phenomenon. The European Union has been at the forefront of such co-operation, by approaching the US regarding the establishment of EU-US counter-terrorism co-operation (including matters such as extradition, mutual legal assistance and police co-operation) shortly after 9/11. At the same time, the EU has inserted JHA clauses in agreements with its neighbours and other third countries. The emphasis on the external dimension has been reiterated in the Hague Programme, whose last section calls for the development of a 'coherent external dimension' of EU JHA.[64]

Two major issues arise from attempts of the EU to co-operate with third countries: the extent to which the EU must be expected to sustain its own values and legal/human rights standards when co-operating with countries with different/lower standards; and the extent of public debate and democratic scrutiny of the development of such co-operation. These two issues have arisen prominently in the context of the co-operation between the EU and the US on counter-terrorism. Its first major legal element, the 2003 EU-US Agreements on extradition and mutual legal assistance, have been applauded by EU institutions as boosting integration (they are the first international agreements that the EU has concluded in the third pillar) and giving the EU an opportunity to speak globally with 'one voice' to a partner as powerful as the US. On the other hand, these Agreements were criticised as not being sufficiently debated (given the almost non-existent mechanisms of scrutiny for 3rd pillar international agreements) and for compromising EU-founding standards and values of human rights protection by co-operating without stringent legal conditions with a country where the death penalty is not abolished, in the era of Guantanamo Bay, and with a legal system with minimal data protection provisions.[65]

These issues were also prominently highlighted in the context of the 2004 first pillar agreement between the Community and the US regarding the transfer of Passenger Name Data (PNR) by EU airlines to US Customs. This agreement was prompted by domestic US law requiring the transfer of PNR data by all incoming airlines to the US. Although in the US this was a counter-terrorism measure, in the EU it was framed as a first pillar, internal market measure. This choice had a significant impact on the legal side of the negotiations, as the Commission took the lead and the agreement was concluded after the Commission, following a procedure in a 'comitology' committee, concluded that the US provide an adequate level of data protection. The adequacy Decision, being a comitology Decision, was adopted with minimal scrutiny and debate and the agreement was concluded in spite of the contrary view of both the Article 29 data protection working party and the European Parliament. The Parliament has launched litigation before the ECJ, arguing that it should, under the EC Treaty, have a greater say in the conclusion of the agreement, as the latter constitutes an amendment of the 1995 data protection Directive (whose amendment requires co-decision).[66]

In both cases, EU negotiators were faced with the dilemma: do I accept the 'differences' in my partners' legal system and culture or by doing so do I compromise the very founding principles of

---

July 2005, calling for the adoption of the principle of availability, the exchange of DNA and fingerprint data and exchanges of operational intelligence. From www.statewatch.org/news/2005/jul/03eu-g5-meeting.htm

[64] Point 4, p.42.

[65] For a detailed analysis, see V. Mitsilegas, 'The New EU-USA Cooperation on Extradition, Mutual Legal Assistance and the Exchange of Police Data' in *European Foreign Affairs Review*, vol. 8, no 4, winter 2003, pp.515-536. Similar issues arose regarding the Europol-USA agreement on the exchange of personal data.

[66] For details on the PNR agreement see Mitsilegas, in *Cultures et Conflits*, *op. cit*..

the organisation I represent?[67] The pro-co-operation decisions, in the name of political clout and operational efficiency, do not constitute a very encouraging precedent for the development of a coherent (also internally) external dimension of EU policy in the field.

Concerns are exacerbated by the fact that these agreements were concluded without adequate debate and scrutiny by either national parliaments or the European Parliament. In the case of the latter, this reflects the very limited space for scrutiny currently offered by the third pillar, but also by the mechanism under which the assessment of whether a third country provides an adequate level of data protection (which is central to the establishment of any form of operational co-operation) is taken behind closed doors by a comitology committee. The Commission was invited to present proposals in this context and the recent proposal for a Framework Decision on data protection in criminal matters contains a relevant section. However, this is not very encouraging, as the proposal provides that adequacy decisions will again be taken by comitology, with the European Parliament being only informed.[68]

8. Operational co-operation and counter-terrorism in the EU: the erosion of fundamental legal principles without democratic control?

Action at EU level to enhance operational co-operation in counter-terrorism and law enforcement matters has been growing rapidly. Measures range from legislative action to measures on the ground, from the establishment of principles and rules to the establishment of agencies and structures. Action is internal and external, and co-operation is cross-pillar. The effect of all this, along with the 'deepening' of surveillance by focusing on biometrics and the boosting up of databases, for the protection of fundamental rights and values such as privacy and human personality and dignity, may be considerable and detrimental. However, the development of such co-operation and its potential impact on human rights have not been properly debated in the EU or its Member States, and from that perspective the legitimacy of the operational project for the EU is questionable. Three are the main elements contributing to this democratic and legitimacy deficit:

- *the current limits of the EU institutional and constitutional structures regarding democratic control*: the third pillar envisages a very limited role for the European Parliament. Scrutiny is even more limited in third pillar international agreements. Parliament's role is even more limited when Europol and Eurojust are involved. In the first pillar co-decision is now the norm regarding the Community part of SIS, but EP involvement in international agreements is minimal, as evidenced by the EC-US PNR Agreement. The comitology process to ascertain adequacy of data protection leaves no role to either the EP or national parliaments.
- *The chosen method of integration – the emphasis on mutual recognition:* this is the case with the principle of availability. Co-operation takes place on the basis of trust in the legal systems of other Member States and information is exchanged almost automatically, without examining how this information has been obtained or how it will be used. This may have considerable constitutional implications for the Member States involved. It also serves to avoid or pre-empt EU wide scrutiny and debate on the level of co-operation desired by citizens and the standards that should underpin this. The lack of consultation and engagement with the public may however, as demonstrated by the rejection of the Constitutional Treaty in France and the Netherlands, have a boomerang effect especially when one deals with matters of that importance.

---

[67] Especially bearing in mind that the EU acquis, standards and values and adherence to them are a sine qua non prerequisite for accession to the EU and is requested in agreements between the EU and third countries- the spectre of double standards is visible here.

[68] COM (2005) 475 final, Articles 15 and 16.

- *The proliferation of agencies and informal structures and the push towards co-operation:* many of the structures created were established without debate and even without a legal basis. All these bodies are asked to co-operate, but the nature of co-operation is unclear. Cross-pillar co-operation is desirable but the legal framework of each pillar is different – as is the legal framework of specific agencies and structures. There is a danger of operational co-operation which is totally unchecked.

The Constitutional Treaty addresses various aspects of these deficits. It abolishes the pillars, thus 'normalising' third pillar issues (with the exception of Europol and Eurojust) and granting thus a meaningful say to the European Parliament. It establishes a Committee on Operational Co-operation, which could address some of the issues of control, accountability and transparency surrounding operational co-operation. And, while it emphasises mutual recognition, it also incorporates the Charter of Fundamental Rights, of paramount importance in this context as it contains provisions on both the right to privacy and the right to data protection. An explicit constitutionalisation of these rights and their interpretation by the Court of Justice and national courts, along with greater parliamentary scrutiny, may be the biggest safeguard against the erosion of fundamental legal principles.