



## Statewatch “Scoreboard” on post-Madrid counter-terrorism plans

### Summary

1. The tragedy in Madrid on 11 March 2004 requires a response from the EU to review and reinforce counter-terrorist measures. An analysis of the 57 proposals on the table at the EU Summit on 25-26 March in Brussels shows that 30 of these are relevant to this need.

2. However, the analysis also shows that 27 of the proposals have little or nothing to do with tackling terrorism - they deal with crime in general and surveillance.

3. A number of the proposals would introduce the wholesale surveillance of everyone in Europe and could potentially be used for social and political control:

a) through logging all telecommunications (e-mails, phone-calls, mobile-calls, faxes and internet usage;

b) tracking all air travel in and out and within the EU (effectively an EU version of the USA’s controversial PNR, CAPPs II and US-VISIT plans);

c) the fingerprinting of nearly everyone in the EU by the introduction of biometric passports and ID cards for citizens and the same for resident third country nationals.

4. The dreadful loss of life and injuries in Madrid requires a response that will unite the people of Europe rather than divide them.

If in defending democracy measures are introduced that fundamentally undermine civil liberties and peoples’ right to privacy, it has to be asked what are we defending?

Tony Bunyan, Statewatch editor, comments:

*“Under the guise of tackling terrorism the EU is planning to bring in a swathe of measures to do with crime and the surveillance of the whole population. After the dreadful loss of life and injuries in Madrid we need a response that unites Europe rather than divides it”*

## Commentary

The EU summit on 25-26 March 2004 will agree upon a set of counter-terrorism measures following the appalling events in Madrid on 11 March. On the basis of a European Commission Action Plan on terrorism (MEMO/04/66, dated 18 March 2004) and the latest draft of an EU Declaration on combating terrorism prepared for the summit (7468/4/04 REV 4, 22 March 2004) there are at least 57 specific measures on the table. This report, the *Statewatch* "scoreboard" on post-Madrid counter-terrorism plans, is a systematic review of the justification, content and legitimacy of these measures (the concept of a "scoreboard" is borrowed from the European Commission's bi-annual "scoreboard on the development of the Area of security, freedom and justice").

We have grouped the proposals in five categories and given each measure one or two scores out of 5. The first score is a measure of the relevance of the proposals to countering terrorism. This scoring system reflects our serious concern that time and resources spent on issues not sufficiently related to terrorism are time and resources that could be better spent making the EU more secure from terrorism if the action were more focussed. A high score demonstrates proposals relevant and limited to counter-terrorism, implying legitimacy. Those proposals that are "severable" - allowing the EU Council to go ahead and adopt special rules to deal with the terrorist threat without applying those rules (at least for now or in the same way) to other crimes - get a medium score. Measures entirely unrelated to terrorism score "0".

The second score is a measure of our concern that data protection, human rights law, and frameworks for regulation and accountability are being ignored by EU governments. We have given a score only where the terrorism relevance is high to reflect our concern for civil liberties and the desirability of the measures in their current or suggested form (a low score here demonstrates serious concern).

Thus, a measure with two high scores, may be deemed both proportionate and consistent with standards for the protection of human rights and civil liberties.

A full list of the measures is provided after this summary of our concerns. The 34pp *Statewatch* scoreboard, providing detailed analysis of each proposal, is on: <http://www.statewatch.org/news/2004/mar/swscoreboard.pdf>

### Proposals not limited to combating terrorism

Of the 57 proposals under consideration that we were able to identify, almost half bear little or no relation tackling terrorist attacks like the those in Spain - 27/57 score 2 or lower out of 5 on our relevance scale. Rather, these proposals concern existing EU mechanisms or initiatives on general matters relating to police, judicial cooperation or immigration control. It is

hard to avoid the conclusion that the EU plans on the table are trying to exploit the recent tragedy to push through controversial and unwarranted measures.

The plans also call on the member states to expedite agreement on a number of complex measures on the implementation of the principle of “mutual recognition” in EU judicial cooperation on matters. None are limited to terrorism and are only theoretically relevant if one member state *refuses* to cooperate with another. Given the unequivocal commitment from all member states to cooperate fully in the investigation and prosecution of terrorist offences, the premise that these measures must be swiftly agreed to counter-terrorism is misguided. It is also unacceptable in the light of the hurried and flawed agreement on the European Arrest Warrant and the absence of harmonised procedural safeguards for suspects and defendants as promised in the EU’s mutual recognition programme. The harmonisation of EU criminal law is a delicate and complex process that must not be rushed on the basis of a false pretext.

### **Disproportionate surveillance powers**

The proposals on the surveillance of telecommunications through the mandatory retention of all traffic data, on the surveillance of movement through the construction of files on air passengers and on the use of biometrics in travel documents would place the majority of people in the EU under surveillance. It will also mean most people have to give their fingerprints for inclusion in one of several potentially linked EU databases. This will be of marginal use in preventing the terrorist attacks we are told are inevitable. The fact that Spain has compulsory national identity cards made no difference on 11 March.

No-one is disputing the need for targeted and sustained surveillance of certain individuals or groups. These proposals would instead give intrusive powers to a range of law enforcement agencies for “general” purposes. Moreover, as the drafters of the EU plans clearly recognise, as long as they cooperate effectively EU police forces and judicial authorities have today sufficient powers to place known and suspected “al-Qaeda” terrorists anywhere in the EU under systematic and sustained surveillance.

The wholesale and mandatory surveillance that is proposed is entirely incompatible with the “balance” sought by the rule of law and Article 8 of the European Convention of Human Rights to respect the individual right to privacy on the one hand and the legitimate need for state agencies to conduct intrusive surveillance *in specified and sanctioned circumstances* on the other.

The Irish Justice Minister has called these concerns “naïve”, suggesting that it is a “false dichotomy” to claim these measures will undermine civil liberties. In doing so, the Irish presidency is seeking to create its own false dichotomy by suggesting the only alternatives are “surveillance on everyone” or “surveillance on no-one”.

## **The EU is exceeding its mandate**

Taken together, the EU “Homeland Security” and surveillance proposals exceed the degree of intrusion deemed proportionate in the “war on terror” by any single EU member-state and, for that matter, the United States. Endorsement of these proposals would therefore see the EU exceeding its mandate and powers.

Human intelligence is the key to effective counter-terrorism. It is not produced by surveillance of the entire population, electronic fishing expeditions or a misguided belief in the superiority of technology. The EU should concentrate its efforts on the crucial task of removing the cultural and political barriers to European police and intelligence cooperation and the effective implementation of existing measures in solidarity with the Spanish people.

In exceeding its mandate in such an authoritarian manner and disregarding fundamental rights, the EU risks alienating the population of Europe and undermining the important role of improving security for all.

## **Solidarity clause and “operational cooperation”**

The implementation of the solidarity clause in the draft EU constitutional treaty genuinely reflects the people of Europe’s solidarity with the people of Spain. The victims and the authorities should be afforded every assistance in coping with the atrocities and apprehending the perpetrators.

We are concerned, however, that the solidarity clause may be used to bring in to early effect Article 162 of the draft EU constitutional treaty. This would create the permanent committee in the EU to oversee *all* operational matters relating to EU “internal security” policy. “Internal security” is a much wider remit than justice and home affairs as it includes not just policing, immigration and judicial cooperation but extends to customs, the role of the military inside the EU and the maintenance of public order.

There are already questions as to whether the proposed degree of regulation and accountability of this body is sufficient and it should not be created in advance of the provisions on the draft treaty to improve democratic control and judicial supervision.

The EU has already agreed upon a host of operational bodies, databases and cooperation mechanisms, none of which are limited in scope to terrorism. Any objective assessment suggests that as long as they are used effectively national police forces and judicial authorities, assisted by EU bodies, have today sufficient powers to undertake joint actions to improve security and investigate, arrest and prosecute suspected terrorists anywhere in the EU. Justice and home affairs policy has been about developing such measures for more than a decade - the two and a half years since 11 September has already seen them reviewed at length and extended where necessary.

## **Qualified majority voting on EU terrorist lists**

The procedure for deciding who is to be included on the “terrorist lists” is arbitrary and unaccountable. This has allowed the EU to criminalise certain groups and individuals on ideological and political grounds rather than any objective security threat to the EU.

It is unacceptable that these lists are agreed by “written procedure” and on occasions without debate (they have simply been faxed round to the fifteen foreign ministries and adopted if there are no objections). There is thus a complete lack of political accountability over how the list is drafted, the grounds for inclusion, which officials in which member states are proposing amendments and why and the extent of consultations, if any. The failure to require as much as a preliminary investigation demonstrating a connection to terrorism before individuals or organisations can be included on the list or have their assets frozen and the failure to provide adequate mechanisms for appeal or judicial review is a spectacular breach of the fundamental rights of those affected.

The proposal to allow amendments to this list by qualified majority voting in the EU Council would exacerbate these problems and further politicise rather than rationalise the decision-making process.

## **An unbalanced and undemocratic plan**

The second scoring system we have used, where measures are limited or powers restricted to terrorism, highlights serious concerns in two thirds of the proposals over compliance with EU human rights or data protection law or frameworks for regulation and accountability (18 out of the 27 measures scored two or less out of five).

Development of the EU’s counter-terrorism policy, like all its decision-making, should be open and democratic process involving European and national parliaments and the people of Europe. Quite the opposite has been the case to date.

Agreement upon sweeping law enforcement powers at the EU level is easier than ensuring effective cooperation between national police, security and intelligence agencies in Europe.

The EU would be showing the victims of 11 March the ultimate disrespect by using the solidarity and support it claims in the name of the people of Europe to undermine civil liberties and democratic standards.

**Ben Hayes, Steve Peers and Tony Bunyan, 23 March 2004**

## The 57 measures on the table

For full analysis of proposals and explanation our scoring , see: “Statewatch scoreboard on EU counter-terrorism plans” <a href="http://www.statewatch.org/news/2004/mar/swscoreboard.pdf">http://www.statewatch.org/news/2004/mar/swscoreboard.pdf</a>	Counter-terrorism relevance	Respect for civil liberties & democratic standards
1. Appointment of an EU “security coordinator”	4	2
2. The creation of an EU intelligence agency	4	2
3. Creation of a European Registry for issued travel documents [possibly limited to lost or stolen documents]	1	
4. Agreement on Guidelines for Common Approach to the Fight Against Terrorism	5	2
5. Declaration of solidarity	5	2
6. Creation of a database of persons, groups and entities subject to restrictive measures or criminal proceedings for terrorist offences	5	2
7. The lists of terrorist Organisations to become operational and reactive on a “real time” basis	5	2
8. European information policy for law enforcement purposes	1	
9. Commission & Member States should monitor all legislative machinery so as to have it subject to “ex ante” terrorism proofing	5	1
10. EU-wide criminalisation of stolen mobile communications equipment	2	
11. Directorates General JAI and RELEX should be in charge of better internal coordination of all aspects of the institution’s activities that touch upon terrorism	5	2
12. Legislation on cross-border hot Pursuit	2	
13. European Programme for the protection of witnesses	4	3
14. Exchange of personal information (DNA, fingerprints and visa data)	4	2
15. Database of forensic material	2	
16. Enhance the efficiency and effectiveness of the EU’s mechanisms for the freezing of terrorist assets	5	2
17. Improve cooperation and exchange of information on terrorist financing	5	3
18. Legislative proposal for the creation of a network for exchange of information on terrorist financing	4	2
19. Regulation and transparency of legal entities, including charities and alternative remittance systems	4	2
20. Electronic database of all targeted persons and entities	4	0
21. Exchanges of information on convictions	5	4
22. Creation of a European Register of convictions and disqualifications	2	
23. Mandatory systems for identifying and investigating bank accounts	2	
24. Improve mechanisms for cooperation between police and security services and intelligence services between Member States	4	3
25. Revise and review action plan on terrorism	4	1
26. Strengthen role of Europol	5	3
27. Ratification of three protocols amending the Europol Convention	2	
28. Strengthen role of Task Force of EU Police Chiefs	4	1
29. Strengthen role of Eurojust (possibly including extended powers over national authorities)	4	4
30. Supply of all relevant information on terrorist cases to Europol and Eurojust	5	4
31. European Arrest Warrant	1	
32. Framework Decision on the fight against terrorism	5	3
33. Framework Decision on money laundering, the identification,	1	

tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime		
34. Framework Decision on joint investigation teams	3	
35. Framework Decision on the execution in the European Union of orders freezing property or evidence	1	
36. The 2000 EU Convention on Mutual Assistance in Criminal Matters and its 2001 Protocol	1	
37. Ensure greater security of firearms, explosives, bomb-making equipment, and the technologies used in terrorist attacks	5	
38. New functions for the Schengen Information System (SIS)	2	
39. Development of SIS II	1	
40. Development of Visa Information System	2	
41. Comprehensive and interoperable European Information Systems	0	
42. National law enforcement agencies access to SIS, VIS and Eurodac	0	
43. Draft Framework Decision on the confiscation of crime-related proceeds, instrumentalities and property	1	
44. Draft Framework Decision on attacks against information systems	1	
45. Draft Framework Decision on Mutual recognition of Confiscation Orders	1	
46. Draft Framework Decision on the European Evidence Warrant	0	
47. Draft Regulation on creation of European Border Agency	1	
48. Use of travellers' data for border and aviation security and other law enforcement purposes	1	
49. Proposals on inclusion of biometrics in all EU passports and visas	1	
50. EU-wide mandatory retention of communications	0	
51. Customs controls on cash movements at the external frontier & agreement on Draft Strategy for Customs Cooperation	1	
52. EC and MS ratification of Protocol to UN Organised Crime Convention on trafficking of illegal firearms	2	
53. Draft Council Directive on compensation for victims of crime	5	5
54. Agreement on draft UN Convention on Terrorism	5	2
55. Anti-terrorism clauses in agreements with third countries to be followed up with technical assistance; sanctions for non-cooperating countries	5	2
56. Co-operation with the United Nations Counter Terrorism Committee (CTC) and other relevant international and regional organisations	5	2
57. Cooperation with US and Partners	4	1

### List of EU proposals with little or no relevance to terrorism - primarily concerned with law enforcement and surveillance

- 3. Creation of a European Registry for issued travel documents [possibly limited to lost or stolen documents]
- 8. European information policy for law enforcement purposes
- 10. EU-wide criminalisation of stolen mobile communications equipment
- 12. Legislation on cross-border hot Pursuit
- 15. Database of forensic material
- 22. Creation of a European Register of convictions and disqualifications
- 23. Mandatory systems for identifying and investigating bank accounts
- 27. Ratification of three protocols amending the Europol Convention
- 31. European Arrest Warrant
- 33. Framework Decision on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime
- 35. Framework Decision on the execution in the European Union of orders freezing property or evidence

36. The 2000 EU Convention on Mutual Assistance in Criminal Matters and its 2001 Protocol
38. New functions for the Schengen Information System (SIS)
39. Development of SIS II
40. Development of Visa Information System
41. Comprehensive and interoperable European Information Systems
42. National law enforcement agencies access to SIS, VIS and Eurodac
43. Draft Framework Decision on the confiscation of crime-related proceeds, instrumentalities and property
44. Draft Framework Decision on attacks against information systems
45. Draft Framework Decision on Mutual recognition of Confiscation Orders
46. Draft Framework Decision on the European Evidence Warrant
47. Draft Regulation on creation of European Border Agency
48. Use of travellers' data for border and aviation security and other law enforcement purposes
49. Proposals on inclusion of biometrics in all EU passports and visas
50. EU-wide mandatory retention of communications
51. Customs controls on cash movements at the external frontier & agreement on Draft Strategy for Customs Cooperation
52. EC and MS ratification of Protocol to UN Organised Crime Convention on trafficking of illegal firearms

## **EU counter-terrorism proposals raising concerns over civil liberties and democratic stands**

1. Appointment of an EU "security coordinator"
2. The creation of an EU intelligence agency
4. Agreement on Guidelines for Common Approach to the Fight Against Terrorism
5. Declaration of solidarity
6. Creation of a database of persons, groups and entities subject to restrictive measures or criminal proceedings for terrorist offences
7. The lists of terrorist Organisations to become operational and reactive on a "real time" basis
9. Commission & Member States should monitor all legislative machinery so as to have it subject to "ex ante" terrorism proofing
11. Directorates General JAI and RELEX should be in charge of better internal coordination of all aspects of the institution's activities that touch upon terrorism
14. Exchange of personal information (DNA, fingerprints and visa data)
16. Enhance the efficiency and effectiveness of the EU's mechanisms for the freezing of terrorist assets
18. Legislative proposal for the creation of a network for exchange of information on terrorist financing
19. Regulation and transparency of legal entities, including charities and alternative remittance systems
25. Revise and review action plan on terrorism
28. Strengthen role of Task Force of EU Police Chiefs
54. Agreement on draft UN Convention on Terrorism
55. Anti-terrorism clauses in agreements with third countries to be followed up with technical assistance; sanctions for non-cooperating countries
56. Co-operation with the United Nations Counter Terrorism Committee (CTC) and other relevant international and regional organisations
57. Cooperation with US and Partners