



EUROPEAN PARLIAMENT

2009 - 2014

Committee on Civil Liberties, Justice and Home Affairs

19.1.2011

WORKING DOCUMENT 2

The EU Counter-Terrorism Policy: main achievements and future challenges

Committee on Civil Liberties, Justice and Home Affairs

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I. Democratic scrutiny and accountability

Accountability and responsibility are essential factors of democratic legitimacy of counter-terrorism policies. Mistakes, unlawful actions, and violations of international law and human rights must be investigated and corrected, and justice must be done. That is part of the very values we are trying to defend against the enemies of democracy. If we fail to recognize wrongdoing, we destroy our own moral authority.

Recommendation 6: The European Commission must carry out a study to establish if counter-terrorism policies are subject to effective democratic scrutiny, including at least the following issues:

- For each measure it must be established if either national parliaments or the European Parliament had full rights and means of scrutiny, such as access to information, sufficient time for a thorough procedure, and rights to modify the proposals; the evaluation must include an overview of the legal basis used for each policy measure;
- All existing measures to be subjected to a retrospective proportionality test;¹
- Provide an overview of classification of documents, and trends in the use of classification, numbers and trends in access granted or denied to documents relating to counter-terrorism policies, as well as the documents made available to Parliament, to be consulted in a secure room;
- An overview of the use made of external consultants and (independent) expertise, in areas such as (international) law, data protection and civil liberties, security in the context of European counter-terrorism policies;
- An overview of the instruments for democratic scrutiny of cross border cooperation of intelligence agencies, and more specifically of SitCen, the Watch-Keeping Capability, the Crisis Room, the Council's Clearing House, and COSI;
- An overview of measures adopted by third countries with extraterritorial effect in the EU, such as the US Foreign Intelligence Surveillance Act (FISA), which are not subject to scrutiny by any parliament in the EU;
- An overview of measures agreed in international governmental and non-governmental bodies (United Nations, ICAO, IATA), and existing instruments for democratic scrutiny;
- An overview of non legislative EU (funded) activities, such as research programmes, and how they are subject to democratic scrutiny.

Recommendation 7: unlawful action, violations of international law and human rights must be investigated and rectified

- The EU and EU Member States must fully clarify their role in the CIA programme of renditions and black sites, in line with the recommendations of the European Parliament and the Council of Europe; The EU and EU Member States must clarify if

¹ European Court of Human Rights, *S. and Marper v. United Kingdom*, 8 December 2008, §95, 101-103, 125.

judicial inquiries into issues relating to Guantanamo and to renditions have been cancelled at the request of third countries;

- The EU must help the US in finding appropriate solutions for the closing of Guantanamo and ensuring the inmates get a fair trial;
- The EU and its Member States must modify the procedures regarding the terrorist lists, and make sure they are fully in line with all relevant court rulings;¹
- The Commission and the Council must start an investigation into possible collection of personal data for law enforcement purposes without adequate legal base, or by applying irregular or even illegal procedures.

II. Civil liberties and legal protection

- The independent panel must include in its evaluation a full overview of the accumulated impact of counter-terrorism measures on civil liberties, including policies of the Member States and measures of third countries with a direct impact within the EU;
- The independent panel to evaluate if current instruments for assessment of the impact on privacy and civil liberties are adequate.

III. Monitoring and profiling

Mass surveillance has become a key feature of counter-terrorism policies. Large scale collection of personal data, detection and identification technologies, tracking and tracing, data mining and profiling, risk assessment and behavioral analysis are all used for the purpose prevention of terrorism. The effectiveness and success rates of these instruments for the prevention of terrorism are dubious. Amooore and De Goede compare this to the 1% doctrine: "*screening of transactions data is the war on terror's banal face of the preemptive strike*".² Data mining and profiling techniques bear the risk of shifting the burden of proof to the citizen. Furthermore, it is unclear to what degree these techniques contribute to the *prevention* of terrorism (as opposed to investigating and prosecution, or indeed for crimes other than terrorism). These techniques may certainly be useful, but no technology is foolproof. In addition, in many cases it would seem that all required information on the planning of attacks was available, but the sharing of information between agencies and countries, and the risk assessment is inadequate. It would seem that we rely more and more on technology, sometimes ascribe almost magical powers to it, at the expense of Human Intelligence, which may be a more useful instrument in certain situations.

Recommendation 8:

¹ See *inter alia* *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission*, Joined Cases C-402/05 P and C-415/05 P.

² Louise Amooore and Marieke de Goede, "Transactions after 9/11: the banal face of the pre-emptive strike," *Transactions of the Institute of British Geographers* 33 (2008) 2, pp. 173-185. Available at: <http://dare.uva.nl/document/126608>

- Improve the use of data: collection of data only on the basis of well defined law enforcement needs, strict limitation of the amount of data to be collected, drastic improvement of the sharing and processing of data;
- Conduct a compulsory proportionality test for each proposal involving large scale collection of personal data, detection and identification technologies, tracking and tracing, data mining and profiling, risk assessment and behavioural analysis or similar techniques;
- Prevent function creep by strict purpose limitation;
- The EDPS and FRA to report annually on profiling, data mining, detection and identification techniques used in Europe for counter-terrorism purposes (and possible other purposes) ;
- The Counter-Terrorism Coordinator to draw up a report on the use of Human Intelligence in European counter-terrorism policies.

General recommendations for future counter-terrorism policies:

- The future counter-terrorism strategy must be coherent, and based on the outcome of the evaluation to be carried out by independent experts, and on the autonomous security needs of the European Union;
- The Commission must put forward a *Communication on Ethics in European Counter-Terrorism Policies*;
- Any new counter-terrorism measure must be preceded by a full impact assessment of costs and impact on civil liberties, including a compulsory proportionality test;
- The Commission must put forward proposals for strengthening the protection of civil liberties, transparency, and democratic scrutiny in the context of counter-terrorism policies, such as improving access to documents by creating a EU Freedom of Information Act, and by strengthening the Fundamental Rights Agency, the EDPS and WP29;
- The Commission must put forward proposals for a legislative framework for data protection in the context of the CFSP on the basis of Article 39 TFEU.