

TERRORISM AND EU LAW

David Anderson Q.C.
Independent Reviewer of Terrorism Legislation
23 FEBRUARY 2012

PUBLIC CONCERN

What do you think are the two most important issues facing [our country] at the moment?

% mentioning terrorism

	2004	2005	2006	2007	2008	2009	2011
UK	28	34	17	17	9	6	N/A
Spain	59	31	36	37	14	12	N/A
NL	12	40	19	9	6	3	N/A
DK	20	32	28	17	11	9	N/A
New MS	5	3	2	2	1	1	N/A
EU 25/27	16	14	10	7	5	4	6

Eurobarometer surveys 62, 64, 66, 68, 70, 72, 75

Options included economic situation, unemployment, state of public finances, immigration, crime

What do you think are the most important challenges to the security of your country's citizens at the moment?

Economic and financial crises 33% (UK 24%)

Terrorism 25% (UK 47%)

Poverty 24% (UK 14%)

Organised Crime 22% (UK 25%)

Corruption 18% (UK 6%)

Illegal immigration 13% (UK 23%)

Petty crime 13% (UK 9%)

Natural disasters 11% (UK 3%)

Environmental/climate 11% (UK 7%)

Eurobarometer survey, June 2011

Sample: 26,840 EU citizens in EU-27

Open/unprompted question

THE ACTUAL PROBLEM

“In quantitative terms, the risk of falling victim to a terrorist attack was 33 times smaller than dying of meningitis, 822 times than being murdered for non-political reasons and 1,833 times less likely than being killed in a car accident. Yet according to the Transatlantic Trends survey, 74% of American and 66% of European respondents (of the nine countries surveyed) thought it was ‘likely’ or ‘somewhat likely’ that they would be ‘personally affected’ by terrorism in the next ten years.”

^- Edwards and Meyer, *Introduction: Charting a Contested Transformation* (2008) 46 JCMS 1-25.

Deaths from terrorism – Great Britain

2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
0	0	0	0	52	0	1	0	0	0	0

For comparison: 1968-2001 more than 3500 people were killed as a result of the conflict in Northern Ireland, including 125 in England. Very small numbers are still killed in Northern Ireland every year, up to and including 2011.

Convictions for terrorist offences – Great Britain

2006/07	2007/08	2008/09	2009/10	2010/11
56	28	25	16	3

All convictions: c. 1.3 million p.a., of which c. 450,000 are violent offences

Terrorist incidents in EU Member States - ?

Country	RAND 1968-2009	GTD 1970-2007
Spain	1425	3169
France	1223	1127
Greece	730	840
Germany	493	1130
Italy	434	1490
UK	188 (4%)	592 (6%)
EU-21 (the rest)	576 (11%)	911 (10%)
TOTAL	5069	9259

Rand Database of Worldwide Terrorism Incidents

Global Terrorism Database

More than 90% of terrorist incidents in Europe are perpetrated by ethnically motivated terrorist groups – Oldrich Bures 2011.

CHRONOLOGY OF THE EU RESPONSE TO TERRORISM

“European responses to terrorism have generally followed major incidents and could be described, unkindly, as knee-jerk reaction to assure public opinion that governments were doing something.”

- Fraser Cameron, “Transatlantic Relations and Terrorism” in *The EU and Terrorism* (ed. David Spence, John Harper 2007), p. 133.

Pre-2001

Various cross-border law enforcement mechanisms:

- Police co-operation and information sharing: 1976 TREVI (*Terrorisme, Radicalisme, Extrémisme et Violence Internationale*) group
- Schengen Agreement 1985, Schengen Convention 1990: Schengen Information System (SIS II 2013)
- Europol Convention 1995
- Customs Information System (CIS) Convention 1995
- 2000 EU Convention on Mutual Assistance in Criminal Matters (Joint Investigating Teams; legal structure for cross-border covert investigations inc. intercepts)

Given a basis in the Treaties:

- 1993 Maastricht: Third Pillar JHA
- 1999 Amsterdam: internal security mandate in Art 29 TEU and Article 61(c) TEC

Post 9/11

- European Arrest Warrant) Both tabled 19 September 2001
- Framework Decision on Terrorism) and very quickly passed
- Action Plan on Combating Terrorism
- Eurojust 2001 (Council Decisions 2002/187/JHA; 2009/426/JHA)

Post Madrid 2004

- SitCen (intelligence reports)
- EU Counter-Terrorism Co-ordinator
- Revised Action Plan: terrorism financing, critical infrastructure protection, response management

Post London 2005

- New CT strategy based on UK CONTEST model
- Emphasis on PREVENT: incitement, radicalisation, recruitment, Islamophobia

- PNR agreement with USA; aviation security; ports security; data retention
- European Border Agency (Frontex)

Multilateral action

- **Treaty of Prüm 2005** (“*Schengen III*”): 7 Schengen States, subsequently joined by more, provided for further measures concerning sharing of DNA, fingerprints and vehicle registration data, joint operations involving use of arms
- Some elements have been adopted in EU legal framework: Council Decisions 2008/615-617/JHA

Post-Lisbon

- Existing 3rd pillar legislation remains until replaced by Regulations, Directives and Decisions
- European Parliament will be involved in most new measures
- But provisions re ***policing in other Member States*** will be subject to special legislative procedure TFEU Arts 87(3), 89: Council acts unanimously after consulting Parliament.
- Court of Justice has jurisdiction over new measures and will have jurisdiction over pre-Lisbon measures **from 1 December 2014**, subject to possible UK opt-out by **1 June 2014** from all pre-2010 PJCCM acts, including European Arrest Warrant, with the possibility of subsequent specific opt-ins: Protocol 36, Art 10. See Bar Council’s Brussels News 103, 21 February 2012.

THE TREATY FRAMEWORK

EU TREATIES

Article 73 TFEU: intelligence agencies for the Member States

Judicial Co-operation in Criminal Matters

Article 82 TFEU

1. **Judicial cooperation in criminal matters** in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States ..
2. [Directives may establish minimum rules for admissibility of evidence, rights of individuals in criminal procedure, rights of victims of crime &c.]
3. [Emergency brake / enhanced cooperation]

Article 83 TFEU (ex Art 31 TEU)

1. The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, **establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension** resulting from the nature or impact of such offences or from a special need to combat them on a common basis.

These areas of crime are the following: **terrorism** ...

[Emergency brake / enhanced cooperation]

Article 84 TFEU

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish measures to **promote and support the action of Member States in the field of crime prevention**, excluding any harmonisation of the laws and regulations of Member States.

Article 85 TFEU

Eurojust's mission shall be to support and strengthen coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime affecting two or more Member States ...

Article 86 TFEU

The Council .. may establish a **European Public Prosecutor's Office** from Eurojust

[enhanced cooperation]

Police Co-operation: Articles 87-89 TFEU

Article 87 TFEU

1. The Union shall establish **police cooperation** involving all the Member States' competent authorities, including police, customs and other specialised law enforcement services in relation to the prevention, detection and investigation of criminal offences.
2. [Ordinary legislative procedure to govern measures concerning the **collection, storage, analysis and exchange of relevant information**, support for the training of staff and cooperation on the exchange of **staff**, on **equipment** and on **research** into crime detection; and common **investigative techniques** in relation to the detection of serious forms of organised crime.]
3. [Special legislative procedure (unanimity) to establish measures concerning **operational cooperation** – provision for enhanced cooperation]

Article 88 TFEU

1. **Europol's** mission shall be to support and strengthen action by the Member States' police authorities and other law enforcement services and their mutual cooperation in preventing and combating .. **terrorism** ..
2. [Tasks may include **collection, storage, analysis and exchange of information** and **coordination, organisation and implementation of investigative and operational action carried out jointly** with the Member States' competent authorities or in the context of joint investigative teams, where appropriate in liaison with Eurojust.]

Article 89 TFEU

The Council, acting in accordance with a special legislative procedure, shall lay down the conditions and limitations under which the competent authorities of the Member States referred to in Articles 82 and 87 may **operate in the territory of another Member State in liaison and in agreement with the authorities of that State**. The Council shall act unanimously after consulting the European Parliament.

Solidarity Clause – Art 222 TFEU

1. The Union and its Member States shall **act jointly in a spirit of solidarity** if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster. The Union shall **mobilise all the instruments at its disposal, including the military resources made available by the Member States**, to:
 - (a) - **prevent the terrorist threat** in the territory of the Member States;
 - **protect** democratic institutions and the civilian population from any terrorist attack;
 - **assist a Member State in its territory**, at the request of its political authorities, in the event of a terrorist attack; ...

...

DEFINITION, JURISDICTION, TERRORIST OFFENCES

Council Framework Decision on combating terrorism 2002/475/JHA

Definition of terrorism (Article 1 – supplemented by CECPT 2005¹ Art 1)

	UK Terrorism Act 2000 section 1	Council Framework Decision Art 1
Nature of action used or threatened	Serious violence; serious damage; endangers life; serious risk to public health or safety; designed seriously to interfere with or disrupt an electronic system	Attacks on a person's life or physical integrity; kidnapping/hostage taking; extensive destruction likely to endanger human life or result in major economic loss; release of dangerous substances; etc.
Aim	designed to <i>influence any government</i> or international organisation, or to <i>intimidate the public</i> or a section of the public	<i>Seriously intimidating a population</i> ; or <i>unduly compelling a Govt</i> /intl orgn to perform or abstain from performing an act; or <i>seriously destabilising or destroying the fundamental structures</i> of a country / intl orgn.
Underlying Cause	"the use or threat is made for the purpose of advancing a <i>political, religious, racial or ideological cause</i> "	N/A

Second Evaluation Report COM(2007)681final says UK, D, I, P failed properly to implement.

Mandatory jurisdiction (Article 9 – cf CECPT 2005 Art 14)

- Offence committed in whole or in part in ***national territory***
- Offender is a ***national or resident***
- Offence committed for the ***benefit of a legal person*** resident in national territory
- Offence committed against ***institutions or people of that Member State or EU***

Council Framework Decision amending the above, 2008/919/JHA

Mandatory offences (based on CECPT 2005 Arts 5-7):

- ***Directing / participating*** in terrorist group [TA 2000 ss 11-13, 56]
- Public ***provocation*** to commit a terrorist offence" (distribution of a message to the public with the intent to incite a terrorist offence) [TA 2006 s1]
- ***Recruitment*** for terrorism [TA 2000 s54]
- ***Training*** for terrorism [TA 2006 ss 6,8]

¹ Council of Europe Convention on the Prevention of Terrorism

- *Aiding, abetting , inciting, attempting*

POLICY FRAMEWORK

EU ACTION PLAN ON COMBATING TERRORISM (updated version 15 November 2010)

CONTEST (UK STRATEGY) 2006,2009,2011	EU ACTION PLAN (as of 2010)
Pursue (detect/investigate/disrupt/prosecute)	Pursue
Prevent (counter-radicalisation)	Prevent
Protect (CNI, crowded places, borders, security)	Protect
Prepare (resilience, response to attacks)	Respond

Commission Communication: The EU Counter-Terrorism Policy: main achievements and future challenges COM(2010)386 final

CO-OPERATION WITH UNITED STATES OF AMERICA

Twice yearly meetings on law enforcement, judicial co-operation, intelligence, diplomatic, financial, security matters relevant to combating terrorism

- EU-US Mutual Legal Assistance Agreement) Approved for use by Council
- EU-US extradition agreement) Decision 2009/820/CFSP
- EU-US Agreement on Security of Classified Information 2007
- EU-US Agreement on TFTP (terrorist finance tracking provisions) 2010

EU COUNTER-TERRORISM BODIES

SitCen

Frontex (Council Regulation (EC) 2007/2004, as amended by Regulation 863/2007):

Europol (Article 88 TFEU; Council Decision 2009/371/JHA)

Eurojust (Articles 85 TFEU; Decisions /2002 and/2008)

EU Counter-Terrorism Co-ordinator

TERRORIST FINANCING

How expensive is terrorism?

- 9/11: \$400,000-\$500,000 (9/11 Report)
- IED in Iraq: \$100

How useful are smart sanctions?

- Pioneered in late 1990s, e.g. by UNSCR 1267/1999 sanctions against Taliban
- Perceived as the key after 9/11 – an expensive attack financed by wealthy foreigners
- Waning enthusiasm in recent years:
 - o *“Trying to starve the terrorists of money is like trying to catch one kind of fish by draining the ocean”* – National Commission on Terrorist Attacks upon the United States, 9/11 Report, para 12.3
 - o *“Financing may become decreasingly relevant to efforts to contain the threat”* – Richard Barrett, co-ordinator since 1004 of UN 1267 Monitoring Team, (2009) Case Western Reserve Journal of International Law 7, 11.
 - o *“TFAFA 2010 is an ancillary rather than a central part of the fight against terrorism.”* – First Report of the Independent Reviewer on the operation of TFAFA &c 2010, Dec 2011, <http://terrorism-legislation-reviewer.independent.gov.uk>

Sums frozen in the UK (source: Treasury quarterly report on operation of the UK’s Counter-Terrorist Asset-Freezing Scheme, Oct – Dec 2011)

31 December 2011	TFAFA 2010 (domestic)	Reg 2580/2001 (impl UNSCR 1373)	UNSCR 1989/2011 (ex UNSCR 1267)
Assets frozen	£33,000	£11,000	£72,000
Number A/Cs frozen	70	10	39
Designations	42	51	343

EU measures implementing FATF (G7) Recommendations

- **Cash couriers** – Regulation 1889/2005: customs authorities to restrict cash movements over €10000
- **Wire transfers** – Regulation 1781/2006: make complete information available on transfers over €150 / 1000.
- **Use of non-profit organisations for terrorism** – Commission Communication on the prevention of and fight against terrorism financing through enhanced national

level coordination and greater transparency of the non-profit sector COM (2005) 620 final

Reg 2580/2001: The EU's implementation of UNSCR 1373 sanctions

- 26 individuals and 25 entities on the list
- An eclectic collection

EU challenges to discretionary EU listing under UNSCR 1373

- Case T-228/02 *OMPI I* [2006] ECR II-4665: CFI upheld right to a hearing, to reasons and to effective judicial protection.
- 2007 Council improved procedures and gave statement of reasons to each group or person on the list.
- Next wave of cases: terrorist conviction is a good reason for listing, but several listings annulled.
 - o Case T-341/07 *Sison* [2009] ECR II-3625; 23 November 2011.
 - o (Case T-256/07 *OMPI II* [2008] ECR II-3019).
 - o Case T-284/08 *PMOI III* [2008] ECR II-3487, appealed by France as ...
 - o ... Case C-27/09P: appeal dismissed by Grand Chamber, 21 December 2011
 - o Opinion of Sharpston AG of 14 July 2011 (*obiter*):
 - “*Serious consideration should now be given to **amending the rules of the General Court** so as to make provision for the production of evidence that is truly confidential for consideration by that Court in a way that is compatible with its character without doing unacceptable violence to the rights of the other party or parties to the action.*” §186
 - “*The Council should make available a non-confidential summary of the evidence to the party concerned, thereby giving that party an indication of the reasons on which it intends to base its decision. I regard the availability of a non-confidential summary as an irreducible minimum guarantee in a Union governed by the rule of law. In its absence, it is impossible for the rights of the defence to be safeguarded.*” §216
 - “*There may be a tendency on the part of Member States and their security services to **over-classify information** so that what ought to be truly in the public domain becomes classified as secret. Equally,*

- Following *A v UK*, the provision of “*sufficient information .. to enable him to give effective instructions to the special advocate*” is “***an irreducible minimum requirement***”.
- Contrast *R(Bhutta) v HM Treasury* [2011] EWHC 1789 (Admin); *Tariq v Home Office* [2011] UKSC 35, [2011] 3 WLR 322 (duty of effective protection under Race Directive, Employment Equality Directive); Green Paper, *Justice and Security Cm 8194* (October 2011), 2.39-2.46.
- *ZZ v SSHD* [2011] EWCA Civ 440 referred (as Case C-300/11)

“Does the principle of effective judicial protection require that a judicial body considering an appeal from a decision to exclude a EU citizen from a member state on grounds of public policy and public security under chapter VI of Directive 2004/38 ensure that the EU citizen concerned is informed of the essence of the grounds against him, notwithstanding the interests of state security?”

See also *SS v SSHD* [2011] EWCA Civ 1547 – no reference.

EU challenges to mandatory EU listing under UNSCR 1267

- Joined Cases C-402/05P and C-415/05P *Kadi I* [2008] ECR I-6351

“The Court concludes that ***the Community courts must ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights*** forming an integral part of the general principles of Community law, ***including review of Community measures*** which, like the contested regulation, are ***designed to give effect to resolutions adopted by the Security Council.***”

Failure to communicate any evidence to the persons or groups concerned meant that their rights to be heard, and to effective judicial protection, had been breached.

- Case T-85/09 *Kadi II*, 30 September 2010:

“*The applicant’s rights of defence have been ‘observed’ only in the most formal and superficial sense ... the procedure followed by the Commission, in response to the applicant’s request, did not grant him even the most minimal access to the evidence against him ... the few pieces of information and the imprecise allegations in the summary of reasons appear clearly insufficient to enable the applicant to launch an effective challenge to the allegations against him.*” §§172, 174.

- On appeal as Joined Cases C-584/10P, 593/10P and C-595/10P.

Legal base issues

- Legal base challenges dismissed in *Kadi I*.
- Post-Lisbon position tested in Case C-130/10 *Parliament v Council*, concerning the amendment of Reg 881/2002 giving effect to UNSCR 1267.
- Opinion of Bot AG of 31 Jan 2012:
 - o Art 215 correct for action implementing a CFSP decision.
 - o Art 75 appropriate for other terrorist asset-freezing measures (EU-US PNR).
 - o Rejected distinction based on 'internal', 'external' or 'international' terrorists.

UK AND SCHENGEN

- **Scope of UK's Schengen opt-out** was the subject of three Grand Chamber cases:
 - o Case C-77/05 *UK v Council* [2007] ECR I-11459
 - o Case C-137/05 *UK v Council* [2007] ECR I-11593
 - o Case C-482/08 *UK v Council* [2010] ECR [26 Oct]

UK opted into police co-operation elements of Schengen, as well as other aspects (legal obligations of carriers to communicate passenger data: Council Directive 2004/82/EC) but not into elements concerning border checks and visa policy. It wanted direct access to:

- o An expert body tasked with improving operational cooperation between Member States in external border management (Case C-77/05)
- o Rules on security features and biometrics in passports (C-137/05)
- o Visa Information System, for police purposes (C-482/08).

Held: the primary purpose of the each was to manage EU visa policy. The prevention of threats to internal security was a secondary purpose. No automatic access granted.

SURVEILLANCE AND DATA PROTECTION

PASSENGER NAME RECORDS

- US Aviation and Transportation Security Act 2001 obliged European airlines operating in the US to disclose PNR data
- Data Protection Directive prohibited this
- 2004: Adequacy Decision 2004/535, followed by **First EU-US PNR Agreement** under Articles 95 (internal market) and 300(2) EC (Council Decision 2004/496/EC)
- First Agreement annulled on legal basis grounds: Joined Cases C-317/04 and C-318/04 *Parliament v Council* [2006] ECR I-4721.
- **Second EU-US PNR Agreement** 2007/551/CFSP/JHA, applied provisionally since then.
- Similar (though more moderate) agreements with Australia, Canada.
- **Third EU-US PNR Agreement:** proposal for a Council Decision on the conclusion of the Agreement between the USA and the EU on the use and transfer of Passenger Name Records to the US Department of Homeland Security, 23 November 2011

48th Report of House of Commons European Scrutiny Committee, 2010-2012, December 2012.

Approved by Council 13 December 2011 (minimal consultation with HC European Scrutiny Committee). Commission Legal Service expressed serious reservations.

Proposed EU Directive on PNR

- Published February 2011 COM(2011) 32 final: Proposal for Directive on the use of PNR data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime.

TERRORIST FINANCE TRACKING PROGRAMMES (SWIFT)

- US law enforcement agencies issued subpoenas to SWIFT to access data held on its European servers (and on mirror servers in US).
- Agreement signed in 2010 (under Arts 87, 88, 215) after power struggle between Council and Parliament and a request for legal service opinion T-529/09.

DATA RETENTION DIRECTIVE 2006/24

- Member States must compel telecoms companies to retain for 6 mths to 2 years traffic and location data (**NB not content of communications**), including for internet connection and email, for all their customers
- Case C-301/06 *Ireland* (supported by Slovakia) *v Council* [2009] ECR I-593, challenge to 1st pillar (Art 95 EC internal market) vires failed, distinguishing the EU-US PNR case.
- Implementing legislation criticised in German (35,000 applicants), Belgian, Czech and Romanian constitutional courts
- *Digital Rights Ireland*: decision to refer made by Irish High Court in 2010, challenging Directive on fundamental rights grounds - ?

DATA PROTECTION WITHIN THE EU

Inconsistency of approach

- Frontex (old Pillar 1) is subject to Directive 95/46, the guarantees in Council Regulation 45/2001, and control by the European Data Protection Secretariat.
- Old Pillars 2 (CFSP) and 3 (PJCCM - law enforcement) are not: each is specifically excluded from Directive 95/46.
- Even within PJCCM, no consistency. Framework Decision 2008/977 JHA on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters:
 - o applies to Council Framework Decision 2009/315/JHA on the exchange of criminal record information but
 - o Europol, Eurojust, SIS and CIS are excluded.
- Even Europol and Eurojust operate to different rules from each other, different again from Frontex.
- The Prüm Decision 2008/615/JHA relies on *local* data protection laws.

EUROPEAN ARREST AND EVIDENCE WARRANTS

European Arrest Warrant (Framework Decision 2002/584/JHA; 2009/299/JHA)

- Extradition - long history of small steps:
 - o Council of Europe Convention on Extradition 1957
 - o Council of Europe Convention on the Suppression of Terrorism 1977 (CECST), which required certain offences (defined by nature of the action e.g. kidnapping, use of bomb, not by aim or underlying cause) not to be considered political for purposes of resisting extradition between contracting States
 - o Convention relating to Extradition between Member States of the EU (1995)
- Political impetus for European Arrest Warrant provided by 9/11. Radical:
 - o Provides for **surrender** (not extradition), including of State's own nationals. Poland, France, Cyprus, Slovenia, Portugal had to amend their constitutions to deal with this.
 - o Abolishes **dual criminality** for 32 serious offences, including terrorism.
 - o Limited **grounds for refusal** or for requiring **guarantees** from issuing State
- Charter compatibility? See e.g. *Pisarek v Poland* [2010] EWHC 877 (Admin); *Targosinski v Poland* [2011] EWHC 312 Admin (Toulson LJ): clear and cogent evidence that Polish prison conditions breached Article 3 might have justified refusal of warrant.

European Evidence Warrant (Council Framework Decision 2008/978/JHA)

- Supplements EU Convention on Mutual Assistance in Criminal Matters (2000)
- Request can be made for objects, documents and data: but not for the interviewing of witnesses or suspects, DNA, surveillance, or evidence requiring analysis.
- Implementation date January 2011

Selective bibliography:

Europol TE-SAT trend reports

- C. Eckes – EU Counter-Terrorist Policies and Fundamental Rights (Oxford, 2009): The Case of Individual Sanctions
- O. Bures – EU Counterterrorism Policy (Ashgate, 2011)
- M. O’Neill – The Evolving EU Counter-Terrorism Legal Framework (Routledge 2012)
- C. Murphy – EU Counter-Terrorism Law (Hart, 2012, forthcoming)

D.A.Q.C.